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Rough Consensus and Running Code

A Theory of Transnational Private Law

Gralf-Peter Calliess
and
Peer Zumbansen

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of consumer-protecting services, ie 'law-consumer protection'. As such standards for the borderless character of B2C e-commerce have to have a truly transnational character, they are developed outside the traditional international law sphere on the basis of co-regulatory efforts between states, industry, and civil society actors. There can be observed a variety of efforts to establish such global minimum standards, which contribute to the future establishment of a 'transnational constitution' of cross-border consumer contract law. The thus described diffusion of the status and role of actors engaged in regulation was the reason why we decided to call the emerging regimes in this area 'transnational law regimes' on the *procedural plane* (above, chapter two).

As has been shown above in Section III on reflexive consumer protection law, a wide variety of actors are collaborating in an effort to build up a *Rough Consensus* on substantive as well as procedural global minimum standards for consumer protection in B2C e-commerce. However, the multitude of fora in which such minimum standards are discussed and promoted seems to be a serious problem, which limits the likeliness of their transformation into a *Running Code*. The most visible actors in the area of transnational consumer contract law so far have been the OECD in the international public sphere and the Global Trustmark Alliance (GTA) in the private sphere, which is backed by industry initiatives such as the GBDe as well as civil society actors such as Consumers International. Thus, transnational consumer contract law is still in the making, while the above-discussed global standards are still in the pilot phase or in the early recommendation phase. It remains to be decided if the emerged Rough Consensus on these standards will lead to a Running Code in the future. A joint effort by the OECD and the GTA in this regard might be considerably helpful.

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Transnational Corporate Governance

I. CORPORATE GOVERNANCE CODES

IN THIS CHAPTER, we shift our attention away from transnational consumer contracts in order to explore one of the most dynamic and at the same time scholarly belaboured fields in law today: transnational corporate governance. The chapter comprises two case studies, the first of which focuses on corporate governance codes and the second on executive compensation, or remuneration. Corporate governance codes are an example of the particular dynamics in the area of corporate law making, an area which displays all of the general trends we have so far identified as characteristic of emerging transnational law regimes. More specifically, as we will see, the development, practice and impact of corporate governance codes can be read as a telling illustration of the RCRC model, which we have developed in chapter two. Corporate governance codes such as those at the centre of the first case study are part of the increasingly dense matrix of *transnational corporate governance*. Their very nature—their ambiguity and their oscillation between 'hard' and 'soft' law, between state intervention and market ordering, between, in fact, law and non-law—has been keeping scholars, policy-makers, activists and stakeholders on their toes for years.

Corporate governance codes are woven into the mystic fabric of transnational law, of global governance, of the privatisation of international economic law, and of the 'transformation of the state' and the larger project of law's introspection. Corporate governance codes raise, par excellence, questions of law's identity, questions regarding its demarcation from non-law, its creation, enforcement and impact. As widespread phenomena of corporate law regulation, they embody the challenges we have addressed above—in chapter two—with regard to the notion of 'community'. Our previous discussion of transnational commercial law suggests that even if we conceived of such codes as examples of business 'self-regulation', the ensuing questions of community, legitimacy and effectiveness would still be critical. Even more poignantly than the previous example, corporate law regulation exacerbates the 'third-party effects' of contractual governance in a striking fashion. The identification

of the 'parties' at the respective ends of contractual arrangements within and around the corporation as a legal person is only the beginning of unfolding 'the theory of the business enterprise'.[1] As we lay out a definition of corporate governance below, it will become obvious that any such effort is tied into the underlying concept of the business enterprise and its regulation. Is the corporation—under law?—a contract between shareholders (investors) and managers? Is this contract complemented by or distinct from other contractual relations within the corporation? Which contractual relations define the 'purpose' of the corporation? Corporate governance codes are the ghosts in the machine. This machine is the corporation and at the same time it is the transnational creation, expansion and dissemination of rules governing the corporation. An understanding of these rules demands an understanding of the corporation. Is there a way out of this circularity?

Building on our conceptualisation of RCRC in chapter two, this chapter seeks to unfold the transnational dimension of corporate governance 'from within'. Rather than studying the perhaps 'obvious' examples of transnational corporate governance rules as they are evidenced in the OECD *Principles* and the *OECD Guidelines on Multinational Enterprises*,[2] the *UN Global Compact*[3] or the *UN Draft Norms*,[4] this chapter approaches corporate governance from the perspective of transnational *embeddedness* in order to draw out the complex correlations between different levels and spaces of norm creation that characterise corporate governance today and, in fact, make it one of the most fascinating regulatory laboratories. This approach forces us to leave aside in this inquiry, for example, the pressing questions that arise in the context of the regulation of labour rights in corporate codes of conduct.[5] We will also refrain from trying directly to contribute to the extremely rich debate as regards the correlation between the 'soft law' of guidelines and corporate codes of conduct and corporate social responsibility, a correlation that has long been central to any inquiry into the regulation of international business transactions.[6] Closely

[1] Thorstein Veblen, 1958.

[2] www.oecd.org/dataoecd/56/36/1922428.pdf; Jean du Plessis and Claus Luttermann, 2007; Gefion Schuler, 2008; Larry Catá Backer, 2009.

[3] www.unglobalcompact.org/. See George Kell, 2003; Oliver F Williams, 2004; Lynn Bennie, Patrick Bernhagen and Neil J Mitchell, 2007.

[4] UN Economic and Social Council, Norms on the responsibilities of transnational coporations and other business enterprises with regard to human rights. Published on 26 August 2003, available at: www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En; see, eg Carolin F Hillemanns, 2003; Surya Deva, 2004; David Weissbrodt and Muria Kruger, 2003, and David Weissbrodt and Muria Kruger, 2005.

[5] See Lance Compa and Tashia Hinchliffe-Darricarrère, 1995; Adelle Blackett, 2004; Harry W Arthurs, 2002; Peer Zumbansen, 2006b.

[6] See, eg Jill Murray, 1998, Thomas McInerney, 2007, Dirk Matten and Jeremy Moon, 2008, and Larry Catá Backer, 2009.

related hereto are the questions that surround the correlation between international organisations and their production of norms, principles, standards and rules.[7]

Instead, this chapter will explore the role of corporate governance codes in an increasingly mixed and decentralised production of corporate law rules and standards. The proliferation of such codes that we turn to now, as well as the ensuing study of standard-setting with regard to executive compensation, illustrate the degree to which corporate governance has long become a *transnational law regime* as defined in chapter two above.

The development of corporate governance codes (CGCs) reflects intricate, domestic and transnational, multi-level processes of norm generation and norm enforcement. Starting from mere factual evidence, the emergence of corporate governance codes in recent years has begun to fundamentally alter the legal landscape of corporate law.[8] Despite their increasingly widespread recognition as indeed an essential element of corporate law,[9] these codes continue to pose particular challenges to legal theory when compared to other, statutory approaches to law-making, as they regularly are drafted by non-state actors such as non-governmental associations, private industry institutes or corporate actors.[10] In general, corporate governance codes are relatively short collections of legal regulations already in force in a particular jurisdiction, that are accompanied by recommendations and suggestions, directed either to private corporations or, in some cases,[11] the law-maker, concerning a company's organisation, its governance rules or disclosure regime as well as its duties towards stakeholders, employees and the environment.[12] Offering a considerable range of flexibility, corporate

[7] See, eg the debate between Alston and Langille with regard to the role of the International Labour Organization and 'core labour standards', Philip Alston, 2003; Brian A Langille, 2005; Philip Alston, 2005a. For a concise reconstruction of the ILO as an international organisation, see Lawrence R Helfer, 2006.

[8] For an overview of so far existing corporate governance codes in various countries, see www.ecgi.org/codes/all_codes.php. For an interesting analysis of how the adoption of the corporate governance code has legitimated Slovenia to adapt the country's company law to international standards rather than having permitted for 'institutional learning', see Nina Cankar, Simon Deakin and Marko Simoneti, 2008.

[9] See Melvin Eisenberg, 2005, 176, 182.

[10] See, for one of the first examples, the German Corporate Governance Code, the interview with Professor Theodor Baums, who chaired the commission that preceded the commission to draft the first German Corporate Governance Code: Theodor Baums, 2001a. For a study and analysis of the work by the American Law Institute on this field, see, eg the contributions to the *Symposium: The American Law Institute's Corporate Governance Project* (1993) *Business Lawyer* 1267; for a discussion of the development in the UK, see, eg Sue Bowden, 2000, John Armour, Simon Deakin and Suzanne J Konzelmann, 2003, and Paul L Davies, 2003. See, for the case of Slovenia, Nina Cankar, Simon Deakin and Marko Simoneti, 2008.

[11] See Ulrich Noack and Dirk Zetzsche, 2005, 6–7.

[12] Christine Mallin, 2005, 19–40; Jennifer Hill, 2005, 376 (highlighting how CGC have tended to be either a response to the absence of governmental regulation or a justification of such absence); Melvin Eisenberg, 2005, 182: 'bodies of standards, principles, or rules that are

governance codes and corporate codes of conduct have become key regulatory instruments in the 'post-regulatory state'.[13] As such, they are of interest both as representative examples of larger transformative trends in post-interventionist, procedural, indirect regulation and as illustrations of far-reaching reform processes in domestic corporate law systems worldwide.[14] The names of such transformations fluctuate between characterisations as 'market-driven reform' and claims to 'universal convergence' of corporate governance systems towards shareholder value.[15] A far-reaching and yet to be fully unpacked *financialisation* of corporate law through capital market law[16] ties path-dependent trajectories of national political economies into the global evolution of markets.[17] This short-circuiting of 'embedded' trajectories of domestic reform, routine and innovation processes in corporate law and securities regulation with the treacherous disembeddedness of global financial markets constitutes the most pressing challenge to present projects of corporate governance reform.[18] The 'convergence vs divergence' debate in corporate law that spurred an almost overwhelming production of comparative assessments on the origins and prospects of different national corporate law systems has only recently begun to ebb,[19] leaving the contestants somewhat wondering where to direct their creative and sometimes polemical energies. This constellation is in many ways a particularly ambivalent one, as the topic as such no longer seems as clearly defined as it was some years ago. Among the discursive topics that appear to be pursued with increasing rigour is the correlation between corporate law and capital markets law in the face of the global financial and economic crisis[20] that has given preceding assessments of this relation a twist of considerable urgency. Other topics currently attracting

promulgated by private institutions, and that have force of some sort although they are not directly backed by state sanctions'.

[13] Colin Scott, 2004; Colin Scott, 2008a.

[14] With regard to the approach taken in the Cadbury Report, see John C Shaw, 1997; for a comparative view of Germany and the UK, see David Seidl, Paul Sanderson and John Roberts, 2009; with considerable skepticism: Nina Cankar, Simon Deakin and Marko Simoneti, 2008 (focusing on the case of Slovenia).

[15] See, on the one hand, Henry Hansmann and Reinier Kraakman, 2001, and, on the other, Cynthia A Williams, 2002, 711–14; Antoine Rebérioux, 2004, and Ronald Dore, 2008.

[16] Werner F Ebke, 2000; Klaus J Hopt, 2003; Friedrich Kübler, 2003; Luca Enriques and Matteo Gatti, 2007a.

[17] See Saskia Sassen, 2005.

[18] See, hereto, the contributions to Klaus J Hopt and Eddy Wymeersch, 2003, and to Klaus J Hopt, Eddy Wymeersch, Hideki Kanda and Harald Baum, 2005.

[19] For an excellent representation of the debate, see Joseph A McCahery, Piet Moerland, Theo Raaijmakers and Luc Renneboog, 2002, and Jeffrey N Gordon and Mark J Roe, 2004.

[20] See, eg *OECD Observer*, No 273 (June 2009): Corporate governance: Lessons from the Crisis, available at: www.oecdobserver.org/news/fullstory.php/aid/2931/Corporate_governance:_Lessons_from_the_financial_crisis.html. 'If there is one major lesson to draw from the financial crisis, it is that corporate governance matters'.

substantial attention are 'not so new' in the sense that current explorations of corporate social responsibilities and Human Rights obligations of multinational or transnational enterprises/corporations (MNEs/TNCs) hark back to historical contestations of the allegedly private nature of a purely profit-driven business enterprise.[21] The critical examination of the possible 'limits of law' vis-à-vis transnational corporate power[22] has fast extended itself into a complex web of regulatory strategies at the core of which scholars have regularly been shifting between questions of re-domesticating (or, litigating) a global corporate actor[23] and devising a regulatory and, very importantly, 'meta'-regulatory[24] (legal) framework adequate to the transnational reality of TNCs. Pursuits with regard to the latter strategy have a history of their own. Detlef Vagts noted 40 years ago: '[a]s the literature about the MNE grows exponentially, the question arises whether the legal profession should not be developing responses to it. As yet it has not: statutory or case law is virtually nonexistent and the secondary coverage is thin'.[25] Over time, such pursuits have often involved parallel or combined efforts to conceptualise corporate accountability at international law and through indirect regulation in the form of corporate codes of conduct.[26] The variety of such attempts is reflective of the 'problem' to which they seek to respond.[27] This chapter is not another attempt to address the question of regulating the transnational corporation as such. Instead, in trying to gain a better understanding for the transnational evolution of law, this chapter seeks to illuminate the connections between the transformation of corporate governance rules within domestic, embedded corporate governance systems—constituted by a historically evolved interaction and correlation between company law, labour law and capital markets law (as well as insolvency law and industrial relations)—and the evolution of rules *for*, *against* and *by* the corporation outside of the nation-state.[28] The corporation, certainly, presents the formidable case in point for the impossibility, as it were,

[21] See, eg Wolfgang G Friedmann, 1957, 164–65, 170–71; Robert Charles Clark, 1981, 569–71.

[22] Cynthia A Williams, 2002, 724; Jan Eijsbouts, 2005.

[23] Heinrich Kronstein, 1952; Raymond Vernon, 1967.

[24] Christine Parker, 2007; see on this concept already Colin Scott, 2003, and Bronwen Morgan, 2003.

[25] Detlev F Vagts, 1969, 739; see also Heinrich Kronstein, 1952, 984: 'Assuming that it is legal theory which should adjust to economic reality and not the reverse, it follows that any "divergence between corporate theory and the underlying economic facts" should be resolved in favor of the latter. Such a divergence does exist, and, despite it, corporate theory has been slow to change'.

[26] See, eg Jonathan I Charney, 1983; Beth Stephens, 2002a; David Kinley and Junko Tadaki, 2004; Sean D Murphy, 2005; Larry Catá Backer, 2006; Sarah Joseph, 2004, and the contributions to Olivier De Schutter, 2006.

[27] Wolfgang G Friedmann, 1957, 173: 'the extension of private corporate power across the confines of State sovereignty is an older as well as a more intractable problem'.

[28] Peter T Muchlinski, 1997; Jean-Philippe Robé, 1997; Peter Hermes, 1998.

for any thinking at all of an existence *outside* of the state. As a legal person it has no 'reality' outside of the legal system.[29] The unquestionable presence and impact of TNCs on the global scale today, however, echoes and further exacerbates the long-standing assertions of corporate 'power', which have always been an integral part of thinking about the corporation on the domestic level.[30] In the following, we posit that a better understanding of the evolution of transnational corporate governance can be gained from studying the way in which the evolution of domestic corporate law-making, through legislation and jurisprudence, through expert committees and corporate actors, is correlated, paralleled, shaped by and *shaping* the production of corporate law rules outside of the nation-state. As such, the examples that inform the following two case studies have to be to a certain degree detailed, even parochial in their illustration of one concrete domestic context in which the production of transnational corporate governance rules is occurring. The spotlight that is directed in the following at the case of Germany can only be justified with regard to the tremendous regulatory transformation which this country has seen in the area of corporate norm-making in the recent decade, a transformation that would not be imaginable without the evolution of transnational institutional and normative 'spaces' that are both embedded and disembedded. The promise of studying the present transformation of German corporate governance lies less in the comparative aspect of 'Rhenish'[31] or 'co-ordinated' capitalism[32] that has inspired corporate law scholars and comparative political economists for decades to contrast institutional design in countries such as the United States and the United Kingdom, on the one hand, and Germany and Japan, on the other,[33] but rather in a necessarily interdisciplinary inquiry into the evolution of norms *between* the domestic and transnational levels, an orientation we will try to capture through an elaboration of Saskia Sassen's concept of 'assemblages'. The research agenda pursued here aims at cutting through the distinct layers of comparative corporate law, economic governance, institutional analysis and regulatory theory in order to illustrate that none of these explanatory frameworks on its own can render an adequate depiction of the complex and ambivalent way in which corporate law norms continue to evolve. Perhaps this is one of the reasons why the convergence vs divergence debate had no clearly discernable outcome, no neat result, no 'winner' or 'loser'. Even if much suggests that corporate governance

[29] John Dewey, 1926.
[30] Adolf A Berle, 1954; Wolfgang G Friedmann, 1957; David Sciulli, 1999; David Millon, 1990; William T Allen, 1992; Paddy Ireland, 2002; William W Bratton, 2005b.
[31] Michel Albert, 1991.
[32] David Soskice, 1999; Sigurt Vitols, 2001.
[33] Detlev Vagts, 1966; Thomas Raiser, 1988; Mark J Roe, 1993; Klaus J Hopt, Hideki Kanda, Mark J Roe, Eddy Wymeersch and Stefan Prigge, 1998; John W Cioffi, 2000b; Ronald Dore, 1973; Peter A Hall and David Soskice, 2001b; Bob Hancké, 2009.

reform projects around the world in recent years displayed a great prominence of shareholder value orientations, and even if the 'end of history for corporate law'[34] had come, the inherent paradoxes of the corporation[35] would in the end likely trump and undermine any universalising theory. The importance of the convergence vs divergence debate today lies, on the one hand, in having provided comparative company lawyers—leaving the polemics aside—with a goldmine of important data to inform future research,[36] and on the other, in having illustrated how an analysis of formal or functional convergence[37] and legal transplants[38] or irritants[39] cannot be disentangled from a critical analysis of how such migrations of standards correlate with changes in the identity of 'legal actors' and the transformation of governing norms and of the regulatory landscape.[40]

The following section will explore the different dimensions of corporate governance codes by first providing a general introduction to the regulatory issues dealt with under the heading of *corporate governance*, before secondly studying the emergence, legal nature and the enforcement of these codes in greater detail. The latter will be addressed in two parts, one of which addresses codes as *alternative* modes of law-making, while the ensuing sub-section deals with one regulatory area in more detail, the case of executive compensation. Both case studies illustrate how corporate governance amounts to a hybrid legal regime, as identified in our RCRC model.

A. Corporate Governance

The law of corporate governance is one of the fastest developing areas in law-making in recent years, and discussions about 'good corporate governance' have for years now been surpassing the confines of academia, occupying media and public debates: '[g]ood corporate governance is a top priority in business worldwide'.[41] Alongside wide-ranging public protest against managers' self-dealing and excessive pay-packages, institutional investors have for years now been moving into the centre of corporate governance rule-making by developing investor protection standards.[42] Surely since the summer of 2002, when President Bush heralded 'Corporate Responsibility'

[34] Henry Hansmann and Reinier Kraakman, 2001; Henry Hansmann, 2006.
[35] See, eg William W Bratton, 2005b.
[36] See Klaus Jürgen Hopt, 2006; David C Donald, 2008.
[37] Ronald J Gilson, 2001.
[38] Katharina Pistor, 2003.
[39] Gunther Teubner, 2001.
[40] Upendra Baxi, 2005b; Daniela Caruso, 2006; David Schneiderman, 2006; Mauro Zamboni, 2007; David Schneiderman, 2008.
[41] Jean du Plessis and Claus Luttermann, 2007, 215.
[42] John C Coffee Jr, 1992; GP Stapeldon, 2000; Friedrich Kübler, 1994.

in the aftermath of the ENRON debacle,[43] corporate governance regulation has come to rank high on national and transnational policy agendas.[44] With other countries learning about their own skeletons in the closet,[45] the high intensity level of policy proposals, domestic and transnational law-making initiatives has been no less than astounding.[46] The worldwide academic and policy discussion of corporate governance, embedded in numerous debates in- and outside of specially empanelled expert commissions, hearings and documented by government and working group reports, symposia, articles and voluminous books, has accompanied an active production of norms on the national and the international level.[47] Issues of general, even public, concern include managers' alleged free-reined authority to dispose of corporate assets as they see fit, the steep amounts of executive compensation packages[48] and the seemingly untamed and untamable power of corporate actors.[49] These questions touch upon long-standing governance, control, legitimacy and accountability problems surrounding the large business

[43] See the ABA Presidential Task Force on Corporate Responsibility: Final Report of March 31, 2003, available at: www.abanet.org/buslaw/corporateresponsibility/final_report.pdf (visited 29 September 2009). The Task Force had been appointed in 2002; see also the *Corporate Responsibility* (CORE) Coalition, founded by Amnesty International, Christian Aid, Friends of the Earth, New Economics and Traidcraft, more available at: www.corporate-responsibility.org/.

[44] See *The Economist*, 13 July 2002: 'American capitalism takes a beating'; Margaret Blair, 2002, 2–3: 'Now, in the spring of 2002, the helium has come out of the formerly high-flying technology and information infrastructure sectors that were leading U.S. economic expansion in the 1990s, and the Enron fiasco and accounting scandals at numerous other corporations have exposed deep flaws in the system that was held up as the model for all the world to follow'.

[45] Roger Adams, 2004: 'As a result of the recent Parmalat case, European attitudes to Enron-like incidents have turned a full 180 degrees from "It can't happen here" to "It has happened—what do we do about it?"'

[46] See, for example, the speech given by SEC Commissioner (as he then was), Paul S Atkins, on 5 February 2003, on '*The Sarbanes Oxley Act: Goals, Content, and Status of Implementation*', available at: www.sec.gov/news/speech/spch020503psa.htm (visited 25 September 2009).

[47] For a selection of fruitful introductions to the over many years burgeoning corporate governance debate, see Klaus J Hopt, Hideki Kanda, Mark J Roe, Eddy Wymeersch and Stefan Prigge, 1998; Joseph A McCahery, Piet Moerland, Theo Raaijmakers and Luc Renneborg, 2002, and Klaus J Hopt, Eddy Wymeersch, Hideki Kanda and Harald Baum, 2005; see the concise overviews of the contemporary regulatory challenges within the EU by Eddy Wymeersch, 2002, and Luca Enriques and Paolo Volpin, 2007.

[48] See the scathing critique by Lucian Ayre Bebchuk and Jesse Fried, 2004; see William W Bratton, 2005a; the scope of executive compensation, its components, allocation and disclosure continues to range high on the political agenda: see, for example, *Frankfurter Allgemeine Zeitung*, 30 June 2008, noting a 20% general increase in CEO pay of German companies listed on the DAX index. On 5 August 2009, the new Law on the Adequacy of Executive Compensation (*Gesetz zur Angemessenheit der Vorstandsvergütung [VorstAG]*) entered into force, the full text is available at: www.bmj.de/files/7db813ef5ce3522d02ef3547a4c2f341/3836/gesetz_vorstandsverguetung_VorstAG.pdf (visited 25 September 2009).

[49] See Louis D Brandeis, 1934; Ralph Nader, Mark Green and Joel Seligman, 1974; Richard J Barnet and Ronald E Muller, 1974; David C Korten, 1995.

corporation.[50] The related literature is legion and continues to grow.[51] For the purpose of this chapter, we shall confine ourselves to highlighting a number of central elements in the heightened debate over corporate governance standards before focusing more closely on the specific transnational dimension of corporate governance norms and law-making.

B. Corporate Governance and Political Economy

Corporate Governance relates to the exercise of powers inside the firm: the analytical focus can, for one, be directed to the relationship between the owner (shareholder, principal) and the management (agent). Or, one may focus on the overall organisational structure of the firm. While this also includes the principal-agent ties, it encompasses the other stakeholders in the firm, including employees and creditors. The first, control-oriented approach centres on shareholders as being the prime residual claimants of the firm: therefore, the firm's organisation is governed by the overriding principle of maximising 'shareholder value'. The other, 'stakeholder'-oriented, approach considers the actors in and around the firm and its business with regard to their vested interests in the firm. It sees the firm as *embedded* in a specific legal, economic and political culture, in which it occupies a place as a societal actor. In contrast to the shareholder approach, this perspective takes into account the 'public' services rendered by a large firm in view of employment capacities and overall socio-economic spin-off.[52]

The two definitions lay at the base of the convergence vs divergence debate over different patterns of corporate organisation, which had—ironically—begun to take hold of public policy and academic debates precisely in the moment when the corporate governance world had allegedly already moved towards universal values of capitalist wealth maximation,[53] recognised by some as marking no less than the 'end of history in corporate law'.[54] To be sure, this 'end of history' triumphalism was not invented by company lawyers. When former US State Department Advisor, Francis Fukuyama, published his book on *The End of History and the Last Man*, in the aftermath of the erosion of Communist states in the 1990s, he predicted ethnic and nationalist conflicts to be the successors to the up-till-then

[50] See Adolf A Berle and Gardiner C Means, 1932; Wolfgang G Friedmann, 1957; with regard to Germany, see Detlev Vagts, 1966, and Thomas Raiser, 1988, 115, providing a brief historical outline of the regulatory development.

[51] William W Bratton, 2001; Dalia Tsuk, 2005; Dalia Tsuk Mitchell, (forthcoming).

[52] For a discussion, see William T Allen, 1992, and David Millon, 1990.

[53] See the critical assessment by William Lazonick and Mary O'Sullivan, 2002, and Jennifer Hill, 2005; see also Volkmar Gessner, Richard P Appelbaum and William F Felstiner, 2001, 4–5.

[54] Henry Hansmann and Reinier Kraakman, 2001.

Eastern bloc competition.[55] At the same time, in the shadow of the first Iraq War, the French policy-maker and administrator Michel Albert, published his study *Capitalisme contre Capitalisme*, in which he presented an outline of national capitalist organisation focusing primarily on the French and German (Rhenish, or 'Rhenanian') systems of market and state relations.[56] In what would eventually become recognised as one of the key studies on the path-dependency of institutional change and the pressures of regulatory adaptation in an era of globalisation,[57] Albert described the embeddedness of capitalist organisation within particular historically contingent circumstances, structures of government policy, statutory and social norms and institutional frameworks to emphasise the relevance of such structures for a national economy's sustainable growth and the *longevity* of these very structural conditions. He contrasted the image of the Anglo-Saxon model of market organisation, leaving great room for market incentives, self-regulation and decentralised governance, with the 'other' model of capitalism (*'L'autre capitalisme'*).[58] The latter is characterised by long-term investments in firms by banks (and other large, non-financial firms[59]) exercising extensive control rights, cross-holdings on a large scale tying in different industries ('Germany Inc')[60] and a—(so far)—strong role of corporatist collective action pertaining to wage bargaining and lobbying. Much has been written about the merits and the likely demise of these clearly distinguished systems.[61] As noted, one of the 'outcomes' of the otherwise ambivalently open-ended debate about the chances of the respective survival of the shareholder- and stakeholder-oriented models of corporate governance[62] is that the study of corporate governance models against the background of

[55] Francis Fukuyama, 1992; *ibid, Trust. The Social Virtues and the Creation of Prosperity* (1995) ch 1.

[56] Michel Albert, 1991, English trans: Capitalism Against Capitalism (1993; Paul Haviland trans).

[57] See, eg, Peter A Hall and David Soskice, 2001a, 4 fn 4 'one of the pioneering works'; Jürgen Hoffmann, 2004; Andreas Busch, 2005, 131; Alain Touraine, 2007, 19–20.

[58] Michel Albert, 1991, 117, 119.

[59] See Jeremy Edwards and Marcus Nibler, 2000, arguing that, in contrast to common opinion, the role of banks as 'insider' controllers of German firms is exaggerated and fails to recognize the strong role played by other large firms in the control of the firm. The authors argue that ownership is more important than the traditionally held assumption that banks play the most important role in German corporate governance.

[60] 'Germany Inc' is the often-used short formula for the densely structured financial and administrative network between German business enterprises and banks, see, for example, Cover Story: 'The Bell Tolls for Germany Inc.: Cosy relations between business, banks and labor are unravelling', Business Week, 15 August 2005, available at: www.businessweek.com/magazine/content/05_33/b3947011_mz001.htm; Peer Zumbansen, 2002; John W Cioffi, 2002.

[61] See, eg Gregory Jackson, 2000; Gregory Jackson, 2001; Ronald Dore, 2000; John W Cioffi, 2000b.

[62] See the excellent paper by Klaus J Hopt, 2002; further on this debate, see the contributions to Jeffrey N Gordon and Mark J Roe, 2004, and to Joseph A McCahery, Piet Moerland, Theo Raaijmakers and Luc Renneborg, 2002; Peer Zumbansen, 2004a.

history and political economy has contributed tremendously to a deeper understanding of the forces that have been shaping this area of law in recent years.[63] From this perspective, the following definition provided by John Cioffi, a legal scholar and political scientist, whose work on comparative corporate governance, the United States and Germany over recent years has significantly contributed to our understanding of the particular dynamics of institutional change of embedded capitalist systems, might best capture the forces at work within the law of corporate governance:

> Corporate governance regimes structure the allocation of power among managers, shareholders, and employees—the principal groups involved in corporate affairs. A tripartite legal structure of company (or corporate) law, securities regulation and labor relations law defines the juridical relationships among these groups and is a central feature of national political economies.[64]

In his book 'Public Law & Private Power', Cioffi uses the term 'juridical nexus' (of securities, company, and labour relations) to capture the 'regulatory framework that structurally allocates power among managers, shareholders, and employees within the corporation'.[65] This definition goes a long way in highlighting the connections between corporate governance norms and the regulatory structures in which they are embedded. By including both securities regulation and labour relations in a thus enlarged concept of corporate governance, it suggests a bridging of the gap that has long come into being between corporate law creation and adjudication but also scholarship and teaching in those fields that have regularly been living separate, 'parallel' lives. Cioffi's definition was not unknown to corporate lawyers. One of its most intimate experts, Melvin Eisenberg, offered a brilliantly concise statement of American corporate law, when he observed '[a]ny body of rules that directly or indirectly addresses the facilitation of corporate transactions or conduct, or the regulation of traditional or positional conflicts of interest, is a part of corporate law'.[66] Similarly, Robert Clark, alerted students of his landmark casebook on corporate law to make every effort to study labour law in order to have a chance to understand their current field of study.[67]

What these assessments suggest, is the need for a richer and deeper understanding of the historical circumstances, the political dynamics and the

[63] See John W Cioffi, 2000a; Colin Crouch, 2005; Wolfgang Streeck, 1997.

[64] John W Cioffi, 2006, 536.

[65] John W Cioffi, 2010, ch 2, on file with authors. Cf Jean du Plessis and Claus Luttermann, 2007, 223: 'A corporate governance model is typically influenced by several legal arrangements such as company law, securities regulation, accounting and auditing standards, insolvency law, contract law, labour law and tax law', an enumeration, however, that tends to isolate and immunise corporate governance from the specific organisational and power structuring functions that eg labour and securities law share with company law in Cioffi's definition.

[66] Melvin Eisenberg, 2005, 176.

[67] Robert C Clark, 1986, 5.

contemporary forces that shape law reform in this area in contrast to the enthusiasm about shareholder value, stock-price euphoria of recent years. The definition of the juridical nexus of corporate governance can reach beyond the already mentioned convergence-divergence dualism by prompting a more differentiated picture of alleged convergence processes. In order to unpack the notion of 'convergence', it is necessary to take a closer look at which elements of corporate law regulation have actually been undergoing change and in which form did this change occur? The juridical nexus perspective demands a careful look at the role of politics, public and private actors to appreciate the causes and prospects of corporate governance reform. As it stands, the contention regarding an allegedly universal transformation of corporate law towards shareholder value, that until very recently has been ardently voiced[68] falls short of explaining how regulatory structures in mature legal systems are in fact adapting to demands of greater investor protection, lower labour costs and more effective management control.[69] Lurking beneath contentions of universal convergence are far-reaching claims about the *limits* of corporate law with regard to the regulation of corporate organisation.[70] The celebration of universally accepted shareholder value standards over many years turned into a triumph over the state's aspiration to regulate the market.

For the longest time this debate among corporate lawyers unfolded in a parallel universe from long-standing historical and comparative studies of institutional and regulatory change, in which corporate governance was among the most actively studied regulatory fields. The 'Varieties of Capitalism' approach (VoC) focused on the framework conditions and regulatory settings of corporate governance regimes with the inclusion of complementing relational frameworks such as industrial relations, co-determination, and vocational training.[71] Central to this work has been the distinction between 'co-ordinated' and 'liberal market economies'.[72] While the former are characterised by a high level of ownership concentration, an institutionalised role of lending investors (banks) in the corporation's governance structure and the representation and participation of employees in the company's decision-making processes, the latter are characterised by stock market liquidity and the absence of employees or their representatives

[68] See, above, and reprinted as Henry Hansmann and Reinier Kraakman, 2002.

[69] Beth Ahlering and Simon Deakin, 2007.

[70] See, eg, Mark J Roe, 2002, 234: 'Lost in the current academic debate (and perhaps lost to policy makers at some international development agencies) is that corporate law does not even try to directly control the costs of basic mismanagement. Other institutions do. For these other institutions (product market competition, incentive compensation, takeovers, shareholder primacy norms, and so on), corporate law (other than for takeovers, which given the usual large premium just sets an outer limit—more about that below) is usually just a supporting prop, not the central institution'.

[71] See, eg Pepper D Culpepper, 1999.

[72] David Soskice, 1999.

from corporate boards. Recently, VoC scholars have begun to critically revisit the CME/LME distinction and to further illuminate the intricate dynamics of legal reform and institutional change within those systems the capacity of which to change had previously been portrayed with great scepticism, mostly with reference to their long-grown, historical and institutional entrenched status.[73] Greater emphasis is now being placed on the interaction of interest groups and on the struggle over particular issues, which are identified and pursued across traditional political lines, such as right and left, conservative and progressive to counter all too rigid descriptions of path-dependent political camps in the battle over law reform.[74] If nothing else, this does already show to what degree a study of contemporary changes in corporate governance depends on a clear view of the various forces at work in this area. At the same time, this research forms an important basis for our contention of emerging hybrid governance regimes, which are characterised by a particular mixture and interaction of public and private, co-ordinative and regulatory elements. In the context of the RCRC model, the recent attention given by VoC scholars to the increasingly flexible governance mixes in corporate law-making allows for a better understanding of the particular ways in which corporate governance reform has been promoted, sometimes even by otherwise unlikely political groupings,[75] but also of the new forms of intertwining formal and informal processes of law-making, as powerfully exemplified by the politics surrounding the drafting and enforcement of corporate governance codes.[76] This differentiation is especially important in a context, where attempts to 'respond' to the crisis are often synonymous with calls for 'more', 'stronger' or 'tougher' regulation. As John Braithwaite noted in a recent book, '[t]he ritual for blaming someone for failures that are system failures is ritualistic in the sense that it seeks to calm critics by giving them a fall guy to chew on instead of fixing the problem'.[77] The rise of the 'post-regulatory' state and the network society, however, illustrate the futility and inadequacy of quantitative assessments of 'more' or 'less' state (meaning government intervention) that turn out to be extremely imprecise in the face of the complexity of the domestic and transnational regulatory landscape. The recent insights by VoC scholars into the changing political economy of corporate

[73] John W Cioffi, 2006; Peter A Gourevitch, 2003, 1835–36 (highlighting the ways in which it has become necessary to focus on issues and interest group politics that may be pursued with no regard to existing party lines or traditional camp politics). Cioffi, above n 65 (forthcoming), suggests moving beyond the political coalition focus put forward in particular by Peter A Gourevitch and James Shinn, 2005, and laying greater emphasis on the constantly re-forming and re-constituting coalitions that drive reform politics.

[74] Peter A Gourevitch, 2003.

[75] Hereto, John W Cioffi, 2002; John C Coffee Jr, 1999, 667.

[76] Peer Zumbansen, 2002b.

[77] John Braithwaite, 2008, 150.

law-making have furthermore illustrated that both transfigurations and demonisations of the 'state' are unhelpful exaggerations. In addition, from a legal sociology perspective, such depictions of the role of the state are likely to miss the nature of non-hierarchical, networked creation of corporate governance norms.

C. Law-Making in Corporate Governance

The German Corporate Governance Code, on which the following section focuses, illuminates the significant characteristics of law-making processes that have been undergoing dramatic changes with regard to the *actors* involved and the *nature of the norms* generated in these processes. These developments have to be placed into the wider context of both highly pressured law reform and regulatory change. In this respect, *reform* does not only concern company law but, more generally involves national, European and international attempts to improve law-making procedures by allowing for a wider inclusion of private actors in rule-making procedures.[78] What is involved from the point of view of democratic theory, is a tension that has long been growing between a functionally reduced, rubber-stamping parliament on the one hand and a fast moving, hardly controllable administration which is in close contact and interaction with private actors, on the other.[79] At the same time, the currently widespread attempts at improving respective national laws on corporate governance and firm organisation[80] must be seen against the background of the considerable pressure to converge towards shareholder value-oriented corporate governance principles.[81]

[78] For developments on the European level, see, eg Kenneth A Armstrong, 2001, 99–100: 'The normative case for a more autonomised transnational civil society ... lies in the inclusion of a new constituency of voices, interests and expertise within élite transnational governance'; Kenneth A Armstrong, 2002, 105, qualifies the reaching out to civil society to be more than just a cure to an unsatisfactory supranational parliamentary system, but as a reflection of the EU's development of 'new forms of governance'; *cf* the other contributions in (2002) 8(1) *European Law Journal* and (2009) 15(2) *European Law Journal* edited by Imelda Maher; with particular emphasis on administrative law, see also Carol Harlow, 1999, placing the analysis of contemporary admin. law against the background of 'a global context' and a definite tilt from the interventionist to the regulatory state. The participation of civil society actors and stakeholders in general is, of course, central to the 'global administrative law' project: see, eg Benedict Kingsbury, Nico Krisch, Richard B Stewart and Jarrod Wiener, 2005; Nico Krisch, 2006.

[79] For a powerful reconstruction of the pertinent role of the administration in designing rules 'close to the ground', see the landmark assessment by James W Landis, 1938.

[80] See, the contributions in Dieter Feddersen, Peter Hommelhoff and Uwe H Schneider, 1996; Klaus J Hopt and Eddy Wymeersch, 1997; Theodor Baums, 2001b, Introduction; see, for a list of future items of work in German corporate governance, see, eg: Marcus Lutter, 2002, 85; Holger Fleischer, 2007; Brigitte Haar, 2008.

[81] See, Henry Hansmann and Reinier Kraakman, 2001; critically Douglas M Branson, 2001; Sanford M Jacoby, 2002; see, for an instructive comparison, Steven N Kaplan, 1997; Sigurt Vitols, 2001.

As already alluded to above, such efforts were for years informed by a sense of urgency with regard to getting stakeholder-oriented, closely knit, bank-financed corporate governance systems ready to 'compete' for globally available investments.[82]

These transformations, however, can no longer solely be studied within contained, embedded systems of national political economies. Instead, there is a growing awareness of the fact that the adaptations of historically evolved governance systems display a particular transnational dimension. In light of the globally intertwined business and interaction among firms created under different legal rules, corporate governance rules (as well as securities regulation) have increasingly become a competitive asset on a global 'law market',[83] a market, however, that is not only constituted by sovereign sellers with vested authority in the creation of binding legal norms, but by an amalgamation of national governments, supranational norm-setting institutions such as the OECD or the UN Global Compact as well as private parties such as multinational corporations and interest group representations. Drawing on the observation by Melvin Eisenberg of the four 'essential modules' of corporate law, which he identifies as state statutory law, state judge-made law, federal law and private ordering through soft law,[84] it becomes clear that we can no longer limit our perspectives to national processes of rule creation. Instead, rules and standards are developed and disseminated by transnational actors such as multinationals, stock exchanges (whose listing rules are of overriding importance for domestic and foreign companies), or International Organisations such as the OECD, that altogether must be seen to contribute to the evolution of the transnational law of corporate governance.[85]

This particularly global regulatory landscape has not failed to capture the imagination of scholars of comparative law,[86] regulatory theory[87] and institutional analysis.[88] So, while the economic and financial crisis that has been unfolding since 2007 has frequently been perceived as a failure of regulation and state action,[89] it can no longer be denied that reactions to the crisis—including perhaps calls for 'tougher regulation', as widely promulgated by political leaders around the world in the face of the crisis—will

[82] Theodor Baums, 2003.

[83] Erin A O'Hara and Larry E Ribstein, 2009; Erin A O'Hara and Larry E Ribstein, 2008; Jens Dammann and Henry Hansmann, 2008; Onnig H Dombalagian, 2008.

[84] Melvin Eisenberg, 2005, 176.

[85] See hereto Jennifer Hill, 2008, and Julia Black, 2008.

[86] Jennifer Hill, 2008.

[87] Julia Black and David Rouch, 2008.

[88] See, eg the recent monographical study by Andreas Busch, 2009 with case studies on the US, Germany, the UK and Switzerland.

[89] Busch, preceding note; Cioffi, 2009, above.

unfold in a tightly interwoven space of governmental collaboration and interaction[90]—both within and beyond the borders of the nation-state.[91] In the field of corporate governance the landscape is not only populated by national governments eagerly engaged in a headstrong pursuit of regulatory reform; complementing such efforts is a vast proliferation of private and mixed public/private, hybrid processes of rule-making, cutting across jurisdictional boundaries and contributing to an increasingly densely woven net of guidelines, best practices, and standards. As will become apparent from the following, the defining feature of the emerging transnational body of corporate governance norms is the intricate resurfacing of the RCRC paradox we described above, pertaining to the inseparability of substantive/procedural, co-ordinative/regulatory and authority/affectedness aspects. As was the case for our discussion of the preceding example of transnational consumer contracts, our focus in this section will not be confined to the *substantive* law governing specific forms of societal activity, which has long remained the hallmark of comparative work in the law of corporate governance;[92] rather, our attention has to turn as well to the dynamics that are unfolding between different levels and sites of rule-making from a *regulatory* perspective. From this combined perspective, the law of corporate governance becomes a prime example of a *transnational law regime*. The intricate embeddedness of regulatory innovation in locally defined governance structures on the one hand, and their integration in transnationally unfolding rule-making processes is characteristic of the current regulatory landscape in corporate governance, as the following example of the German Corporate Governance Code will illustrate. While the evolution of the Code and the legislation arguably having flown out of the Code provides a case in point of the RFC ('request for comments') procedure within our model of Rough Consensus and Running Code, it is an equally powerful denotation of the way in which private ordering maintains an intricately challenging tension with the institutional frameworks for official law-making.

(i) The German Corporate Governance Code as an Example of RCRC

A little bit of legislative history: On 21 June 2002, the German chamber of federal states (*Länder*), the Bundesrat, approved a Bill which had prior to that passed the national parliament (*Bundestag*), and which introduced a number of substantial changes to the German *Aktiengesetz* (Stock Corporation Act).[93] This particular statute had to a large degree been

[90] Howard Davies and David Green, 2008.

[91] Adrienne Héritier and Dirk Lehmkuhl, 2008; Pierre-Hugues Verdier, 2009.

[92] See the excellent study by Detlev Vagts, 1966.

[93] See the *Gesetz zur weiteren Reform des Aktien- und Bilanzrechts, zu Transparenz und Publizität (Transparenz- und Publizitätsgesetz)* [*TraPuG*] (Transparency and Disclosure Act),

contemplated and prepared under the auspices of two specially formed governmental commissions concerned with a reform of German corporate governance. The second of these commissions, the so-called 'Corporate Governance Code-Commission', had been convened with the mandate of taking up the suggestions of the first commission, central to which was the drafting of a voluntary Code of Corporate Governance Rules. Mr Gerhard Cromme, Spokesperson of the supervisory's board of German steel manufacturer ThyssenKrupp,[94] chaired this second commission and presented its work on 26 February 2002 to the Ministry of Justice.[95] Among the many interesting features of the German Corporate Governance Code, which a renowned German corporate governance scholar coined a 'novum' in the system of German legal sources,[96] is its intricate and still largely unresolved legal nature.[97] In the remainder of this first part of this chapter we will formulate a possible answer to this question in the larger context of corporate governance reform as it has been pursued on the domestic, European and transnational levels. In the second part of the chapter, we will focus on the example of executive compensation from a distinctly legal sociological perspective entitled 'transnational legal pluralism'.[98]

From the time of its publication in 2002, the German Corporate Governance Code prompted a vivid debate about its legal or, perhaps, non-legal nature, with assessments ranging from 'soft law'[99] to 'unconstitutional'.[100] That this debate has still not subsided[101] might be explained in light of the particular novelty that the arrival of the idea of a code constituted in Germany.[102] At the same time, its creation could be seen as having been a part of a worldwide surge to draft and to promulgate corporate governance codes.[103] The Code itself includes those *norms* and

adopted by the German Bundestag on 17 May 2002. See also the documentation in *Neue Zeitschrift für Gesellschaftsrecht* (*NZG*), 2002, 78–81, and the comprehensive presentation of the *TraPuG*'s main elements by Heribert Hirte, 2003.

[94] See the relevant information on the Commission at: www.corporate-governance-code.de/index-e.html.

[95] See press release at: www.corporate-governance-code.de/eng/news/presse-20020226.html.

[96] Peter Ulmer, 2002, 152; Wolfgang Seidel, 2004a, 289.

[97] Eberhard Vetter, 2008, 121: 'still not resolved satisfyingly'.

[98] See already Peer Zumbansen, 2008b, and Peer Zumbansen, 2006c.

[99] Marcus Lutter, 2001, 225; critically, Ulmer, 2002, 161.

[100] Wolfgang Seidel, 2004b.

[101] See, eg Jean du Plessis and Ingo Saenger, 2007, 31: 'serious concerns with regard to the constitutionality of the Code'. But see Jan von Hein, 2008, 424–26, arguing for a constitutional form of 'informal governmental action' (*informelles Regierungshandeln*).

[102] Axel von Werder, 2008, 15, fn 6.

[103] See, eg Axel von Werder, 2008, who situates the creation of the German Code within the larger context of a veritable 'international code movement', *ibid*, at 14. See also the list of corporate governance codes listed on the website of the European Corporate Governance Institute, available at: www.ecgi.org/codes/all_codes.php.

regulations that are mandatory corporate law rules, which are already set out in the German Stock Corporation Law. According to its Drafters, the Code's purpose in reiterating these norms here is to provide foreign investors with a transparent and simple introduction to central rules pertinent to the corporate governance rules existing in Germany.[104] Furthermore, the Code includes *recommendations*, which are expressed by the word '*sollen*' (shall) and the observation of which is to be made transparent in an annual statement made by the firm's management.[105] Lastly, the Code contains *suggestions* as to corporate conduct the observation of which is merely 'suggested' but there is no obligation to disclose whether a company has followed these suggestions.[106] The '*comply or disclose*' principle, which is endorsed in the Code with regard to 'recommendations', has been seen as an indirect enforceability anchor in the Code, whereby it could be seen to lose its genuinely voluntary character.[107] That the Code in fact attains an at least indirect mandatory character, is suggested by the enactment of Section 161 in the German Stock Corporation Act (*AktG*), whereby the legislature actually introduced the disclosure duty into codified law.[108] But, does this suffice to make the Code a piece of enforceable legislation? Others have argued that even if there was a disclosure obligation with regard to the company's compliance with the Code's recommendations, it would be wrong to perceive the Code itself as 'law'. The latter, so it was argued,[109] would only be the case if the recommendations themselves were being made obligatory, which, arguably, they are not.[110] These opposing viewpoints illustrate the underlying central difficulty: it is clear, that the Code's practical relevance is to be seen in its effect on the actual *behaviour* of firms,[111] something which appears to have continuously accrued with each

[104] German Corporate Governance Code, Foreword available at: www.corporate-governance-code.de/eng/kodex/1.html: 'This German Corporate Governance Code (the "Code") presents essential statutory regulations for the management and supervision (governance) of German listed companies and contains internationally and nationally recognized standards for good and responsible governance. The Code aims at making the German Corporate Governance system transparent and understandable. Its purpose is to promote the trust of international and national investors, customers, employees and the general public in the management and supervision of listed German stock corporations'.

[105] See the German Corporate Governance Code, Preface, 2, available at: www.corporate-governance-code.de/index-e.html.

[106] *Ibid.*

[107] Wolfgang Seidel, 2004a; Wolfgang Seidel, 2004b; Markus Heintzen, 2004.

[108] The quality and assessment of this obligatory annual 'explanation' must certainly be disputed. See, eg Martin Peltzer, 2002b, 594; Gerald Spindler, 2008, annotations 12–79, in particular 14–16; Henrik-Michael Ringleb, 2008, annotations 46–65, in particular 47 (no obligation to justify non-compliance of Kodex norms). Ringleb suggests to substitute the often 'confusing' notion of 'comply or explain' by 'comply or disclose'.

[109] Ringleb, 2008, annotations 51–65 ; Axel von Werder, 2002; Christoph H Seibt, 2002.

[110] Marcus Lutter, 2002, 86, with regard to informations and suggestions.

[111] Christoph H Seibt, 2003.

passing year.[112] Whether or not firms do comply with the code's dispositions relating, eg, to transparency and disclosure of executive compensation[113] (a part of the *Kodex* that spurred concrete legislative action leading up to the entering into force of a federal statute on the adequacy of executive compensation in August 2009[114]), the publication of the firm's reports on the Internet,[115] or the facilitating of personal exercise of shareholders' voting rights[116] will, according to the rules established by the Code, remain within the discretion of the company.[117] Again, the Code explicitly foresees that companies do not have to comply with 'recommendations'. And yet they are *obliged*—under Section 161 *AktG*—to issue an annual account of whether or not they did comply.[118] The annual monitoring of the Code's 'acceptance' has revealed consistently growing numbers of German major corporations to be observing the Code.[119]

A systematic interpretation alone of the Code's three-fold structure with *information*, *recommendations* and *suggestions*, which would aim at determining the legal nature of each of the Code's components in concert with the others and, lastly, within the general structure of the Code, does not appear to yield a clear-cut result. While the merely informative sections on the one hand and the suggestions on the other can remain outside the ambit of such a line of inquiry, the Code's recommendations invite further inspection. The mentioned disclosure obligation is in itself intriguing, if not problematic.[120] While identifying criminal sanctions against the disclosing director in the case of an incorrect declaration (Section 400 *AktG*), neither the statute nor the Code suggests how such incorrectness could be ascertained. This can be interpreted as meaning that the legislator did not wish to or did not imagine how to put in place a right monitoring system that goes beyond the registration of whether the declaration has been made at all, the failure of which is sanctioned in the *Handelsgesetzbuch* [*HGB*] (Commercial Code). What is likely, then, is that the legislator, keeping in line with the regulatory spirit of the Code itself, did in turn aim at

[112] Jürgen van Kann and Mira Eigler, 2007, 1733.

[113] Very critically, Martin Wolf, 2002, 60.

[114] See *Gesetz zur Angemessenheit der Vorstandsvergütung* [*VorstAG*]; full text at: www.bmj.de/files/7db813ef5ce3522d02ef3547a4c2f341/3836/gesetz_vorstandsverguetung_VorstAG.pdf. For an assessment, see eg Klaus-Stefan Hohenstatt, 2009, Björn Gaul and Alexandra Janz, 2009, and, from inside the responsible Ministry, Ulrich Seibert, 2009.

[115] See, eg, Section 2.3.1 of the Cromme commission's German Corporate Governance Code.

[116] German Corporate Governance Code, Section 2.3.3.

[117] German Corporate Governance Code, Section 1: Foreword, differentiating between voluntary recommendations ('shall'), suggestions ('should', 'can'), and legally compelling provisions, according to existing law.

[118] See Section 16 Transparency and Disclosure Act.

[119] Van Kann and Eigler, 2007, 1733.

[120] For a list of the extensive, even monographical literature on this provision, see Gerald Spindler, 2008, before annotation 1.

inducing an *indirect* enforcement mechanism into the law, the functionality of which, however, is unfolding entirely outside of the statutory realm. Where companies fail to correctly disclose their compliance or non-compliance, so it might be argued, the market—that is, the investors—will adequately act on this communication. Surely, such a perspective is not without problems: even if in theory the market were to react to a declaration incorrectly issued or not issued at all by devaluing the company's shares, there would still remain considerable burden of proof challenges to establish liability.[121] Rejecting as well a number of other legal grounds for liability due to the legal—non-binding—nature of the Code,[122] the effect of Section 161 would merely be the initiation of a *shaming* process, playing out on a *market for reputation*, something we have already discussed in the context of chapter three. From this perspective, however, it remains doubtful how the Stock Corporation Act, a statutory public norm, which commands a private actor, here a stock corporation, to disclose annually whether it has complied with a non-binding set of recommendations, can be compatible with an enforcement processs through shaming, which unfolds outside of the state.

But, perhaps, this perspective is inadequate to capture the particular combination of *co-ordinative/regulatory* dimensions reflected in the Code. The preceding discussion suggested that our conceptualisation of the enforcement qualities of the Corporate Governance Code is informed by our understanding of the distinction between a statutory norm of law set by the state, on the one hand, and a non-binding norm of non-law, on the other. The linkage between law and non-law as established by Section 161 leads us to further entrench this unquestioned distinction where, perhaps, we should recognise that it was an inappropriate one to begin with. Whether or not the Code is law might not be answerable with regard to its enforcement mechanism, but perhaps better with a view to its authorship. It is here, where the relevance of the above proposed RCRC model to depict such incremental ways of rule-making becomes central. We will lay this out in detail in the following sub-section.

(ii) Who Makes Company Law?

If the answer to whether or not a norm is to be recognised as law depends on the authoritative process to enact legal norms, then we have to take a closer look at the process through which the Corporate Governance Code was enacted. Under German constitutional law, the right to initiate legislative proposals lies with the government and with the *Bundestag* and the

[121] Gerald Spindler, 2008, annotation 63.
[122] Spindler, 2008, annotations 63–77.

Bundesrat, the federal parliament and the representation of the Federal states respectively.[123] This in fact is the starting observation of those scholars who are opposed to norm-making by private expert groups. These scholars characterise instances where a government seeks societal approval for envisioned legislative projects from private interest groups, as examples of an on-going and proliferating 'deparlamentarisation'.[124] Their critique is directed, in particular, against the norm-production by societal groups such as expert groups, commissions or associations the work of which is at times based on an ambivalent form of public authorisation.[125]

This scepticism, however, appears overdrawn. First of all, it has long been recognised by adminstrative and constitutional law scholars that the state is highly dependent on the expert input from societal actors in carrying out 'its' legislative and administrative functions.[126] Furthermore, it is clear that with the growing complexity of societal relations and, correspondingly, a growing demand for sophisticated and increasingly responsive governance forms that are sensitive to the networked, non-hierarchical structure of society,[127] any form of norm-production and implementation has become an extremely fragile process of risk-taking and of trial-and-error. In light of the particular governance challenges arising in contemporary, complex societies, an allegedly clear-cut distinction between public and private governance schemes, built on the image of a sovereign, knowledgable state presiding over a fragmented, market-society, fails to grasp the intricate forms of public-private governance mechanisms, of knowledge sharing and experimental politics and regulation that characterise contemporary law-making.[128] In this light, the insistence on the state keeping a safe distance from private knowledge, bears little explanatory value for our understanding of contemporary forms of governance.

The second strand of critique of corporate governance codes and the associated form of private law-making was directed against the real *effect* emanating from such codes and practices. Given the already noted, particular co-ordinative/regulatory nature of the Code, it is not surprising that it has met with criticism regarding its purportedly absent legislative basis.[129] While some scholars expressed their support of this form of installing

[123] See, Art 76 para 2 *Grundgesetz* (German Basic Law).
[124] See, Martin Wolf, 2002; Paul Kirchhof, 2001; Paul Kirchhof, 2000, 690.
[125] Kirchhof, 2001, above, arguing that parliaments, but not such private commissions are mandated to produce legal norms; see also Wolfgang Seidel, 2004b, arguing that the Code remains a public norm, which was drafted without proper law-making authority.
[126] See already Richard B Stewart, 1975; Jody Freeman, 1997.
[127] Gunther Teubner, 1987b; Karl-Heinz Ladeur, 1999; Karl-Heinz Ladeur, 2007; Karl-Heinz Ladeur, 2009.
[128] See, eg Michael Power, 1997; Michael Power, 2005; Ladeur, 2009.
[129] See Wolfgang Seidel, 2004a; Paul Kirchhof, 2004; Ulrich Noack, 2002, 620, calling the Code drafted by the Cromme-Commission, 'a peculiar set of rules' ('*ein Regelwerk von eigenartiger Gestalt*'); Martin Peltzer, 2002b, 593, highlights the fact that the the Code has

a forum in order to solicit dispersed and urgently needed expertise, feeding into concrete law-making proposals for the Federal legislature,[130] others pointed to various drawbacks of this particular form of law-making.[131] One of the main contentions concerns the alleged 'exclusion' of the parliament from the actual process of conceptualising and preparing of the legislative proposal.[132] In this respect, it has been alleged that the solicitation of experts into the open parliamentary arena would make the law's genesis more transparent and, ultimately, render it more legitimate.[133] Another critical issue concerns the fundamental question whether or not a private body of experts is or *should* in fact be entitled and authorised to draw up binding law.[134]

In this concrete case of the German Corporate Governance Code, the mandate to form a commission the task of which would be to draft the first such Corporate Governance Code, came from the Chancellor and the Ministry of Justice. At the time, it was widely debated among German legal scholars whether this would suffice to provide a legitimation for the Commission's work on the one hand, or whether this would amount to rendering both the Commission and the Code public in nature, on the other.[135] The reasons in support of the argument that they are public must seem rather exotic to non-continental readers, especially when scholars defending this view began referring to the German Eagle Seal, which is placed on the cover of the Code.[136] In turn, then, another look at the Code reveals a number of significant elements that can be taken to respond to the mentioned critique. The work of both commissions, that of 2000–01, chaired by Mr Baums, and that of 2001–02, chaired by Mr Cromme, is of interest not only because it outlines significant reform perspectives and proposals leading to concrete legislative proposals. Moreover, the commissions'

been drafted without a legislative authorisation nor democratic legitimisation; see, even more polemically, Paul Kirchhof, 2001.

[130] See, eg Theodor Baums, 2001a.

[131] See, eg Martin Wolf, 2002, 59, 60; in the same vein Paul Kirchhof, 2001, 1332, 1333, critically observing a 'deparlamentarisation' (*Entparlamentisierung*) both with regard to the EU's (ie the Council's) appropriation of law-making sectors formerly reserved by the Member States and the executive's practice on the national level of seeking consensus with market players before pushing this consensus through the parliament; see already *ibid*, ZGR 2000, 609; for a thorough discussion of private law-making, See Ferdinand Kirchhof, 1987; in the US American context, the canonical text is Louis Jaffe, 1937; see also Jody Freeman, 2000a; Jody Freeman, 2000b.

[132] See, Martin Wolf, 2002; Paul Kirchhof, 2001.

[133] *Ibid.*

[134] *Ibid.*

[135] See Seidel, *Der Deutsche Corporate Governance Kodex—eine private oder doch eine staatliche Regelung?*, above, (explicitly adopting the view that both the Commission and the Code are public in nature); likewise Markus Heintzen, 2004.

[136] See www.ixos.com/german-corporate-governance-code-en.pdf; Wolfgang Seidel, 2004a, 287.

activities mark significant examples of integrating scientific expertise into law-making procedures.[137] In fact, in view of the work actually presented by the two commissions—the first presenting its Report and the recommendation to the Ministry to initiate a Code Commission in July of 2001, and the second Commission, which in February 2002 presented the first draft of the Code—it can be well disputed if any binding law had in fact been adopted *by* these Commissions. The proposals of the first Commission were both an encompassing survey of current company law, drawn up against the background of increasing pressure to react to international capital markets' demands, and a presentation of recommended amendments to the existing law, referring to both statutory law changes and to the drafting of a Code.[138] Thus, while sometimes very concrete proposals for changes to be enacted through normal legislative procedures were included in the first Commission's report, the Commission by itself did *not* formulate norms.[139] However thin the line between the Commission's report and what the parliament later adopted in form of the Transparency and Disclosure Act, which amended the Stock Corporation Act, the report itself did not contain binding law.

To be sure, the case is more complicated with regard to the Code, which was drafted by the second Commission upon a recommendation by the preceding Commission.[140] The Code Commission did draw up a corporate governance code, the provisions of which clearly build upon and endorse the Transparency and Disclosure Act and, importantly, the already mentioned comply-or-explain rule in Section 161 of the Stock Corporation Act. It is against this concrete background of the first and second commissions, that we can now return to answer the original question about the Code's legal nature. This procedure is itself reflective of the changing forms of law-making that are characteristic of contemporary law reform processes.

As to the first strand of critique, it can easily be maintained that different forms of soliciting information by experts in order to prepare (legislative) processes of law making are not at all anything new or unheard of.[141] Quite

[137] For a discussion of the procedure and quality of this know-how integration, see Theodor Baums, 2001a.

[138] See Martin Peltzer, 2002b, 593; Ulrich Seibert, 2002, 608.

[139] For Joachim Schulze-Osterloh, 2001, 1436, it goes without saying that these norms are not 'law', which leads him to find the term 'soft law' as used by Marcus Lutter (in ZGR 2001, 225) *misleading*.

[140] This is acknowledged by both the Federal Justice Minister, Mrs Däubler-Gmelin, and the commission's Chairperson, Mr Gerhard Cromme in their statement before the press on the occasion of the the publication of the Commission's report, available at: www.corporate-governance-code.de/eng/news/presse-20020226.html.

[141] See, eg the examples given by Matthias Schmidt-Preuss, 1996, and also the reflections by Udo Di Fabio, 1996; *cf* Karl-Heinz Ladeur, 2001b, 63: '*Der Staatsapparat büßt seine Rolle in der Mediation und Aggregierung des allgemeinen Handlungswissens und eines allgemeinen Regelbestandes ein und wird selbst zum Manager fragmentierter begrenzter Interventionen auf der Grundlage spezialisierten Wissens*'. [The state apparatus relinquishes its role in mediating

to the contrary, the inclusion of private expertise into law making processes is not only common practice but, arguably, unavoidable in view of an ever proliferating and further dispersing body of societal, private knowledge[142] on which the state has always been dependent. This holds true even if this state is no longer neither the nineteenth-century interventionist state reserving the right to govern and shape the market nor the twentieth-century, modern welfare state as broker and mediator of societal conflicts and interests through different patterns of juridification.[143] The post-modern, 'Supervisory' State, as contemporary public governance is sometimes coined in political science or legal scholarship,[144] can fulfill its function only to the degree that both its information-intake procedures and regulatory instruments are suited to a fast evolving, hererarchical societal production of norms and knowledge.[145] The emerging and changing forms of 'informal' and 'procedural' political conflict resolution and public-private governance reshape the face not only of today's nation-states[146] but, clearly, also that of international politics.[147] Yet, the soliciting of expert opinions from a group of experts engaging in serious research and analysis in order to undertake a requested analysis differs

and aggregating general action knowledge to become itself a manager of fragmented, limited interventions on the basis of specialized knowledge. [Trans PZ]

[142] See, again, Karl-Heinz Ladeur, 2000b, esp 13, 19–20; Karl-Heinz Ladeur, 1999, 31–33; Karl-Heinz Ladeur, 2001b, 63, arguing that 'specialized bodies of knowledge' (*spezialisierte Wissensbestände*) can only with great difficulty be traced back to commonly shared expectations and shared knowledge; see, Peter Hommelhoff and Martin Schwab, 2001, 694, suggesting that, for example, in the allegedly fast-evolving field of accounting standards but also in many other areas of corporate or commercial law policy, neither the parliament nor the executive were capable to provide for the necessary expert knowledge, see also, *ibid*, 700; in the same vein, Havermann, 2000, 698, with regard to innovative forms of product design and distribution as well as new financial instruments.

[143] See, Gralf-Peter Calliess, 1999, 55–70, for a discussion of different connotations of contemporary 'statehood' (*Staatlichkeit*); Gunther Teubner, 1987b, 4: 'juridification describes a reality which is not merely a problem of jurists, nor a national phenomenon. *Verrechtlichung* does not only spring from the well-known Teutonic tendency towards overregulation, so the discussion of the problem is not confined to German jurisprudence. Although national divergences exist ... the phenomenon is universal, and the debate international and interdisciplinary'.

[144] See, eg Helmut Willke, 1997; Armin von Bogdandy, 1995; Peer Zumbansen, 2000b, 43, 286–94.

[145] See, eg Karl-Heinz Ladeur, 2001b; Karl-Heinz Ladeur, 2006; with regard to supranational law making: Joanne Scott and David Trubek, 2002, 3.

[146] See, Peter Hommelhoff and Martin Schwab, 2001, 698: '*Die Einbindung privater Gremien scheint gegenwärtig nicht mehr nur punktuell-vereinzelt, sondern generell zum Mittel moderner Rechtssetzungstechnik heranzuwachsen*'. [The inclusion of private bodies is no longer a punctual-singular occurrence, but has generally grown into an instrument of modern law making. PZ trans].

[147] See, eg Michael Zürn, 2001, 39; Christoph Knill and Dirk Lehmkuhl, 2002, 41. See also the EU Commission's communication of 13 June 2000, regarding standard setting in the field of corporate accounting, where the Commission explicitly plans to nominate 'highly qualified experts' for a comparative review of IAS (international accounting standards) and the EU's own directives on accounting.

fundamentally from what has long since been practised in contemporary parliamentary life: the invitation of experts to parliamentary hearings and interrogations.[148] This does indeed prompt a whole new array of questions pertaining to the issue of introducing expert knowledge into both parliamentary and bureaucratic law and decision-making processes.[149] Yet, in idealising rational debate and open deliberation on the parliamentary floor,[150] one runs the danger of overburdening parliamentary democracy, which has always been characterised by the structured chaos of public debate, the biasedness of prepared and party-line guided speeches as well as by the division between a handful of experts on the one hand and a majority of laymen with regard to specific topics on the other.[151] Only where such exclusive emphasis is laid upon parliament-based forms of law-making, can the fact that government commissions work 'outside' the parliament, paint such a negative image of 'behind closed doors' politics.[152] While this does not have to mean taking up an older Schmittian critique of parliamentary democracy—in which the correct observation pertained to the ineffectiveness of the parliamentary body to engage in productive deliberation, thereby not being able to confront the 'arcane practice of lobbying, haggling and consensus-seeking which took place behind executive doors[153]—the scepticism towards commissions is justified where it points to the parliament's exclusion from its own soliciting and hearing of experts. Indeed, there is a difference between convening a commission of experts and later presenting their findings to the parliamentary assembly and the invitation and open hearing before the congress assembly.[154]

[148] See Paul Kirchhof, 2001, 1332–33, who strongly contrasts expert commissions and prelegislative bargaining between the government and market players to expert hearings taking place before the parliamentary assembly.

[149] This is certainly not a mere national issue: see, for example, for the case of the EU, Ellen Vos, 2000, 40–41, discussing the participation of 'civil society'; see also Martin Shapiro, 2000, discussing administrative law's contribution to global cooperation and networks, and Kenneth A Armstrong, 2001, with particular reference to the EU's experimentation with 'new forms of governance' in connection with the Commission's 'White Paper on Governance'. Another example is the extremely fruitful series of expert and stakeholder consultations led by the UN Special Representative on Business & Human Rights, Professor John Ruggie, available at: see www.business-humanrights.org/SpecialRepPortal/Home.

[150] Paul Kirchhof, 2000, 681: 'Das parlamentarische Verfahren der öffentlichen Diskussion verbürgt das staatlich erreichbare Maß an Vernünftigkeit und Gemeinwohlverbindlichkeit des Gesetzesinhalts'. [The parliamentary procedure of the public discussion guarantees the degree of rationality and common welfare of the law's content that the state may attain. PZ trans].

[151] See, Martin Peltzer, 2002a, 12–13, for an instructive analogy to the impossibility of rational deliberations within a supervisory board of 20 members, providing the ground for the insertion of new members by other ways of decision making.

[152] See Paul Kirchhof, 2001, 1333, speaking of, secretive governmental conversations' (*verschwiegene Regierungsgespräche*); this notion is picked up by Peter Hommelhoff and Martin Schwab, 2001, 707.

[153] See the *locus classicus*, Carl Schmitt, 1988.

[154] See Paul Kirchhof, 2000, 689: '*Das Parlament ist sachverständig kraft Wahl, spezialisiert sich in den jeweiligen Ausschüssen, bedient sich im übrigen in Anhörungen des in Staat und Gesellschaft verfügbaren Sachverstands ... Das Demokratieprinzip baut darauf, dass der*

The task at this point then is to merge the perspectives. The rightist critique of parliamentarism in the name of a virtual, even utopian world of unimpaired and rational parliamentary discussions à la Schmitt,[155] did a lot of damage to the concept of parliamentary rule as such, but also helped to see parliamentary rule in its separation-of-powers context. In particular, this critique and its further elaborations, also from the political left,[156] can productively be taken as an occasion to take a closer look at contemporary administrative law-making processes, where a substantial sharing of law-making power with private actors is—rightly and readily being seen as normal.[157]

The second critique mounted against 'private' law-making bodies such as the two recent government commissions on corporate governance is harder to refute. The core issue appears to be whether or not privately enacted norms may be given binding effect towards third parties to the norm generation. While an intuitive answer would suggest a clear 'no', the matter at stake here does indeed escape such a straight-forward assessment. While it is commonplace in private law that contractual obligations concern foremost and only the contracting parties,[158] we have been witnessing a decisive evolutionary development in the public (constitutional) governance of private contract law to recognise the social role played by private transactions.[159] Indeed, it is not unknown to private law litigation, that contracts between two (or more) parties often unfold effects upon third parties to the contractual

Sachverständige seinen Sachverstand weitergeben kann, das Parlament für sachverständigen Rat zugänglich ist'. [The parliament is knowledgeable by election, specializing itself in its committees and otherwise serves itself the expertise which is available in state and society ... The democratic principle relies on the Expert passing on his expertise and that the parliament is receptive to expert advice. PZ trans].

[155] We may also mention one of Carl Schmitt's most influential pupils, Ernst Forsthoff: see Ernst Forsthoff, 1971, and the excellent article by Ilse Staff, 1987. See also Fritz Ossenbühl, 2000, 7–9, with explicit references to Forsthoff's diagnosis of the pressure resulting from technological progress on parliamentary law-making.

[156] See Volker Neumann, 1981.

[157] Alfred C Aman Jr, 1997, 90; Matthias Schmidt-Preuss, 1996; see also Klaus Günther, 1990; Jody Freeman, 2000b, 592–93; Martin Shapiro, 2000, 369: 'Today, elected and nonelected government officers, nongovernmental organizations, political parties, interest groups, policy entrepreneurs, "epistemic communities", and "networks" are all relevant actors in the decision-making processes that produce government action'.

[158] See, eg Hugh Collins, 1999, 23; Michael Bäuerle, 2001, 65, describing the different ordering function of private (contract) law and public (administrative) law; see also Murray Hunt, 1997, 38, recognizing both the need and the emergence of a 'modern conception of constitutionalism', which reaches beyond a strictly parliamentarian vision of law making; see also Martin Peltzer, 2002a, 11.

[159] See Murray Hunt, 1997; Hugh Collins, 1999, 46; Michael Bäuerle, 2001, 121, 123; Dieter Hart, 1987; Dieter Hart, 1984; see Hestermeyer, Report on the BGH's Jurisprudence in Private Law, in: *The Annual of German & European Law* (R Miller and P Zumbansen (eds) (Oxford/New York, Berghahn, 2004), Section C II.

agreement.[160] And yet, the here suggested connection between contractual private ordering and the setting of norms by commissions might, however, be misleading. As we have seen, it is not entirely clear, whether or not the commissions are in fact 'private' by nature. This can be doubted at least in those cases where government officials are participating in the commission's work, such as was the case in the first Commission of 2000–01.[161] While the Code Commission[162] was made up only of private actors, ie representatives of large firms or academic institutions, the Commission's personnel might also not entirely provide the answer to the question as to whether any of these commissions is furnished with the proper competence to enact binding law. More importantly, then, is the nature of the Commission's empanneling. Where the Commission is convened upon the initiative and request by the government, there is indeed considerable reason to qualify it to be more 'public' in nature than if it were upon the initiative of a commercial actor, such as a bank or another private interest group.[163]

After the preceding discussion, we are likely to still feel unsatisfied with an ultimately inconclusive attempt at answering the question regarding the Code's legal nature with regard to the constitution of the drafting Commission. The result, however, we suggest, was entirely predictable if not inevitable, given the starting premises. If anything, this discussion has begun to illustrate the inadequacy of the public/private distinction to capture what we have in chapter two referred to as the paradoxical constitution of transnational law making. In the following section, we will further explain the inadequacy of the attempt to explain the legal nature of the Code through a designation of its norms or its authors as either public *or* private.

(iii) Corporate Law-Making Between State and Society

The discussion of the rise of governance in contemporary law making reflects a wide-ranging interest, but also a high level of concern with what

[160] See, eg the jurisprudence of the *Bundesgerichtshof* (BGH–Federal Court of Justice) concerning third party effects of expert testimony contracts: BGH, JZ 2000, 725; earlier BGH, in (1979) *Neue juristische Wochenschrift* 1595; BGH, in (1982) *NJW* 2431, and BGH, in (1984) *NJW* 355; BGHZ 127, 378; BGHZ 138, 157; see also BGHZ 133, 168; for a discussion of this jurisprudence, see Basil Markesinis and Hannes Unberath, 2002, 265–88; Peer Zumbansen, 2000a; see already Friedrich Kessler, 1973 and the contributions to David Campbell, Hugh Collins and John Wightman, 2003.

[161] See, again, the Report of the (First) Government Commission Corporate Governance, chaired by Professor Theodor Baums, section B.

[162] See Martin Wolf, 2002, note 3; see the list of members of the (Second) Government Commission Corporate Governance, chaired by Dr Gerhard Cromme, available at: www.corporate-governance-code.de/eng/mitglieder/index.html; see the Code at: www.corporate-governance-code.de/eng/download/CorGov_Endfassung_E.pdf.

[163] Latter examples include the code commissions for the Deutsche Bank, the 'Berliner Initiativkreis' and the 'Frankfurt Commission', all mentioned in Martin Peltzer, 2002a, 11.

is being perceived as a 'privatisation of law'.[164] As Colin Scott recently noted, 'recognition of private legislation reflects both a desire to better understand the diffuse nature of capacities underpinning regulatory and wider governance practices and a concern respecting the legitimacy of such non-governmental rule making'.[165] This combination of 'desire' and 'concern' originates from a persisting association of law and its creation with the public, state sphere, while informal and private ordering remains relegated to the private, market realm. Throughout our discussion up to this point and in particular in our first case study on consumer protection, we have been arguing against this dualistic distinction, which we hold to be inadequate to grasp the ways in which both hybrid and private forms of norm generation can produce norms with regulatory functions.

(iv) The Reform of German Corporate Governance: The Intricacies of Rough Consensus and Running Code

The example of the German Corporate Governance Code illustrates our model of *Rough Consensus and Running Code* in the following way. The German government, facing immense domestic and international pressure to reform its corporate law regime so as to make German companies more attractive for global investors, was aware of the reform obstacles existing in the contemporary German political economy. At the same time, the government was well aware of the potential of societal ('market') self-regulation, as was declared by the Ministry of Justice on the occasion of being presented with the Commission's Corporate Governance Code in February 2002. Furthermore, the German government was hardly taking a revolutionary step when inviting a Commission to draft this instrument. Even if the legislative project of drafting a national civil code in the latter part of the nineteenth century was of course in many ways different to the drafting of the Corporate Governance Code in 2002, the Schröder government's initiation of the Commission, which was markedly referred to as a 'Government Commission', also bears some important resemblances to its historical forerunner. In both instances, the government drew on private expert knowledge in preparing a comprehensive legislative instrument, the regulatory impact of which was perceived as being so large that its delegation to a commission of experts promised to channel otherwise conflicting and perhaps irresolvable positions through a discursive, outcome-oriented process. Certainly, the government's initiation of this norm-generation process remained ambivalent at best with regard to the legal nature of the Code growing out of the commission's work. The striking characteristic of

[164] See the survey by Johannes Köndgen, 2006.
[165] Colin Scott, 2008b, 254.

both the process of the Code's drafting and of the Code itself remains, it seems, its *hybrid* nature between a non-binding, voluntary, 'private' regulatory instrument, on the one hand, and a document linked to a statutory disclosure obligation by a federal law, on the other. Yet, neither dimension adequately depicts the dynamics that shape the emergence of the idea of a Code, the evolution of its drafting, the intriguingly open-ended nature of the discussion around the legal nature of both the norms of the Code and of the Code itself. Instead, the discussion has made it far too clear that the repeated attempts to solve this mystery—by effectively avoiding the question 'public' or 'private' through designating the Code as *hybrid* and by referring to its norms as 'soft law'—achieve just that, namely to avoid the underlying conundrum of how to integrate such governance processes into a much-needed new legal theoretical methodology and doctrine. To us, the example of the German Corporate Governance Code is intriguing because its coming into being is reflective of its embeddedness both in a complex, historically evolved political economy that was historically sceptical with regard to private law-making and market ordering[166] and in a fast-evolving transnational regulatory landscape in which public and private actors—as 'norm entrepreneurs'—not only compete in striving to make 'better rules' but in a much richer fashion overlap, intertwine, collaborate and antagonise, thereby contributing to a constantly changing space that Saskia Sassen has referred to as both institutional *and* normative. From the perspective of RCRC, the transnational regulatory landscape that *is* corporate governance today, is marked by the unavoidable collision of public, private and hybrid, ceaselessly evolving norm-making processes that arise between regulatory arenas populated by actors inside and outside of the nation-state. These norm-making processes we have identified above as being messy in the sense that the identification of either co-ordinative or regulatory functions can no longer occur on the basis of distinguishing between the public or private nature of the actors involved. Instead, the norm-making processes have to be seen as *law generating* when and where we are willing to recognise the inseparability of the co-ordinative/regulatory dimension from the authority/affectedness dimension of these processes.

Against this background, what can be learned from this example for other contemporary forms of law-making? Recognising a growing interest among legal scholars in the origins and prospects of what is conventionally referred to as a 'privatisation of law',[167] we need to emphasise that the *regulatory* function of the Code does not follow from the state's enactment of a statutory disclosure obligation, as was repeatedly argued by those identifying the Code as a public regulatory instrument. What we have

[166] See Hans Großmann-Doerth, 2005; Dieter Hart, 1984.
[167] Johannes Köndgen, 2006; Georg Borges, 2003.

above identified as an unsatisfactory answer to the question of whether or not the Code is law, resulted from the recognition that in fact not only the underlying drafting process but also the envisioned enforcement mechanism are intriguingly complex and arguably open-ended for a reason. The government did not make the Code directly or indirectly enforceable, when it enacted the disclosure requirement, as it did not itself enact an ultimately effective sanctioning mechanism for the case of non-disclosure or deficient disclosure. Instead, the government's action in this regard illustrates what we have before identified as the defining features of the RCRC model. The Code can only fulfill its function of influencing corporate behaviour (and, as such, rendering German corporations more competitive) if a sufficient number of market participants endorse the Code's rules to make them matter. In that sense, a rough consensus regarding the Code's normative obligations must exist for it to have any influence on the corporate landscape. This rough consensus need not encompass each and every one of the Code's recommendations or, perhaps even less so, its suggestions. Instead, it suffices that there is among market participants a far-reaching agreement—a rough consensus—as to the binding quality of the Code's content. That this is the case has been verified by a number of empirical studies since its publication.[168] Secondly, the particular quality of the Code's three-pronged regulatory scheme of information (restatements), recommendations and suggestions in connection with the statutory disclosure requirements for recommendations leads to a complex constellation of the Code's regulatory impact. Where a rough consensus is being attained, it might set into motion the generation and crystallisation of a *customary law* of corporate governance norms, namely with the passage of time and an increasing acceptance of the Code among market participants. With the crystallisation of certain corporate governance rules, parts of the law of corporate governance can develop into a regime, which can further develop and solidify in the future. In light of such an incremental growth of norms through piloting (drafting a code), implementing (publishing it) and enforcing them (through a communication obligation set by the state on the one hand, and a market shaming process, on the other), the Code can contribute to the growth of a corporate governance regime, which can become ever more comprehensive, while at the same time being more flexible, open and adaptive to changes than a statutory provision would be. Seen in this light, the Code is illustrative of how recommendations can be made to enter a regulatory realm, which is occupied by both public and private norm-enrrepreneurs, including the state that is pursuing corporate law reform, and private actors such as banks, investments funds and expert groups who are calling for

[168] Axel von Werder, Till Talaulicar and Georg L Kolat, 2003; Peter Oser, Christian Orth and Dominic Wader, 2003; Jürgen van Kann and Mira Eigler, 2007.

new rules governing corporate conduct, but also other stakeholders such as unions and business ethics propagators. From this perspective, the Code denotes how recommendations can increasingly be recognised as 'rules to be followed', long before they may grow into widely accepted norms of 'good governance'. That the latter is not oriented towards a reductionist concept of market efficiency is maintained by connecting the co-ordinative/regulatory dimension with that of authority/affectedness. It is against this background, then, that we need to not only return again to the original question of whether the Code is law, but also to dare asking whether we have been asking the right question.

As suggested, the perspective taken vis-à-vis reform issues relating to corporate governance has for the longest time been informed by both a public-private, official-non-official distinction between law and non-law and by a deeply felt scepticism about the chances for the law reform of historically grown, path-dependent norms and institutions, not only in 'Germany Incorporated'.[169] And, indeed, the legacies with which we have been struggling are weighty. In the face of these legacies, we have put forward an approach that seeks to draw out the institutional and methodological dimensions of norm-setting and law-making in the context of increasingly 'privatised' law-making forms. As it stands, law reform continues to be conceptualised largely with regard to a dualistic perception of state regulation and 'intervention', on the one hand, and market order and self-regulation, on the other. Traditionally, the German choice was thus: '[t]o regulate or not to regulate'. And the traditional answer was, indeed, to regulate.[170] The realm of options for the protection of shareholders' interests has thus been perceived to range from coercive, binding law ('vested rights') to an approach of entrusting this protection to the capital market. In the latter extreme, the shareholder's position as that of a rights-holder in a corporation would basically be seen as a tradable asset, the value of which would be determined by the market, not by 'the law'.[171] There is, certainly, much more to be said to this set of alternatives, and the dramatic substitution of post-ENRON corporate governance reform[172] by an overwhelming task to

[169] Peter A Hall and David Soskice, 2001a.

[170] See, hereto the brilliant account by Gerald Spindler, 1998, 53, 57, stressing the different approach taken by American corporate law, which—for the most part—was state law and in turn 'enabling' law, giving firms great discretion in designing their governing law. 'Corporate law' as such, then, serves for one as framework providing default rules, while it does, on federal level, contain a considerable number of binding rules pertaining to safeguard investors's interest and the trust in the capital market; Peter Ulmer, 2002, 178–79, contemplating the code's allegedly meager achievements as to further de-regulate corporate law; but see Jeffrey N Gordon, 1999, see also, Werner F Ebke, 1998, 109–12.

[171] Gerald Spindler, 1998, 59.

[172] Interestingly, commentators were quick to point out the futility of premature European triumphancy with regard to the events in corporate America at the time of Enron and WorldCom's collapse: see *The Economist*, 13 July 2002, 54, denouncing any pride in 'Europe's

come to terms with the current financial and economic crisis underscores the dimensions of the task faced.

But it is against this background that—on both sides of the Atlantic—the search for 'good governance' in company law will continue. It will do so by involving the wide range of public, private and hybrid law-making forms which we have increasingly grown accustomed to. For this, valuable lessons can be drawn from earlier examples of self-regulation (eg standard contracts), as well as from other, contemporary developments in other fields (eg transnational commercial law). The rich spectrum of experiences on the national, European and international level is reflective of an on-going search for ways to adequately mobilise societal knowledge while being aware and conscious of divergent national trajectories of socio-legal and economic development. The enactment of the German Corporate Governance Code and the installation and indeed highly effective continuation of a 'standing commission' to review its acceptance and the need for amendments are both illustrations of a change in approach to law reform in a politically highly contested area. At the same time, the development of codes, in Germany as in many other countries around the world, by private and public actors, both domestically and transnationally, gives testimony of an emerging legal regime that can no longer adequately be relegated to either a state or market realm. Instead, the emerging regime of a transnational law of corporate governance is characterised by its 'spatial' character, both with regard to its normative scope and its institutional origin.

II. TRANSNATIONAL CORPORATE GOVERNANCE AND EXECUTIVE COMPENSATION

This section addresses the regulation of executive compensation and in particular the disclosure requirements as developed in the EU in recent years as as another example of a transnational law regime, displaying all of the features of recombinant governance developed in chapter two. In looking at this example through the lens of RCRC, we suggest to study the regulation of executive compensation as part of an emerging *transnational law regime* of corporate governance.[173] The defining feature of this body of law must be seen in the intricate combination of, again, substantive/procedural, co-ordinative/regulatory and authority/affectedness dimensions. After our preceding discussion of the making of norms of transnational private law

gentle form of Capitalism' in light (or shadow, for that matter) of highly disputable governmental interventions at the side of falling corporate giants.

[173] In this regard Klaus-Stefan Hohenstatt, 2009, 1351, highlighting the need to acknowledge levels of executive remuneration in the context of global capital markets and commercial affairs.

has laid out the structure of recombinant governance in the examples of consumer contracts and corporate governance codes, we use our third example to suggest that RCRC has to be seen as an important building block of a distinct methodological approach in legal theory, which shall be referred to as 'transnational legal pluralism'.[174]

A. The Transnational Embeddedness of European Corporate Governance Regulation

The European Commission's corporate governance agenda occupies a unique place within the European imagination. Since the beginning, the European company law scene'[175] has occupied regulators and policy-makers inside and outside of Europe, and recent innovations and changes in approaches to regulatory governance have given this area a set of noteworthy turns.[176] The arrival of 'new governance' in the area of European Corporate Governance Regulation (ECGR) brings the already charged interests and dynamics that are at stake in this area into much sharper contours. New Governance (NG) is itself a label for a tremendously challenging and provoking trajectory for the EU's transnational governance. Ever since 'governance' entered the scene through the Commission's '*White Paper on European Governance*' in 2001,[177] the spectre of a fundamental transformation of law-making has been haunting Europe.[178] The Commission's definition of governance as 'a very versatile one ... being used in connection with several contemporary social sciences, especially economics and political science', and as one originating 'from the need of economics (as regards corporate governance) and political science (as regards State governance) for an all-embracing concept capable of conveying diverse meanings not covered by the traditional term "government"'[179] is very open-ended and leaves one wondering whether the definition is meant to conclude or open an inquiry into the changing nature of market regulation.[180]

[174] The following draws in particular on Peer Zumbansen, 2006d, and Peer Zumbansen, 2008b.

[175] Clive M Schmitthoff, 1973.

[176] For excellent accounts, see Richard Buxbaum and Klaus J Hopt, 1988, ch 3, Jan Wouters, 2000, Mathias Habersack, 2003, Stefan Grundmann, 2004, Luca Enriques and Paolo Volpin, 2007.

[177] 'European Governance. A White Paper' COM(2001) 428 final, dated 25 July 2001, available at: aei.pitt.edu/1188/01/european_governance_wp_COM_2001_428.pdf.

[178] See Fritz W Scharpf, 1999, the contributions in Christian Joerges, Yves Mény and Joseph HH Weiler, 2001, and the analysis by David Trubek and Louise G Trubek, 2005.

[179] European Commission: 'GOVERNANCE', available at: ec.europa.eu/governance/index_en.htm.

[180] See Christoph Möllers, 2006 (for a critique of the omnipresent resorting to a still poorly defined and demarcated concept).