

## Legal Order in a Global World

### – The Development of a Fragmented System of National, International, and Private Norms –

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*A. von Bogdandy and R. Wolfrum, (eds.),  
Max Planck Yearbook of United Nations Law, Volume 14, 2010, p. 1-49.  
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\* This article was developed within the framework of the initiative “MPG 2010+,” with which the Max Planck Society identifies future forward-looking research for its institutes. For their valuable comments, I would like to thank my colleagues Profs. Dres. Armin von Bogdandy, Josef Drexler, Thomas Duve, Sigrid S. Quack, Michael Stolleis, Wolfgang Streeck, Rüdiger Wolfrum, and Reinhard Zimmermann. Special thanks are due to Emily Silverman for translation from the German; the German version appeared in the journal *Rechtstheorie* Vol. 41 (2010), 151–198. The article is dedicated to my Munich colleague Prof. Dr. Heinz Schöch in honor of his 70th birthday on 20 August 2010.

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## Legal Order in a Global World – The Development of a Fragmented System of National, International, and Private Norms

*Globalization affects the law in fundamental ways. As a consequence, the legal order in the global world has become an important interdisciplinary research focus of the Human Sciences Institutes of the Max Planck Society. This article presents an overview of the ensuing challenges, changes, and perspectives as well as of future research questions: the first part analyzes changes in the regulated subject matter and the resulting legal questions specific to globalization. The second part describes the fundamental changes in legal and societal control systems. On this basis, the third part examines possible models and concepts that could be implemented to meet the transnational and global challenges. The final part identifies the most important questions and the perspectives of future research.*

### I. Changes in Subjects of Regulation

#### 1. Societal Changes in a Global World

The emergence of a “*global society*” is not a phenomenon unique to the 20th and 21st centuries. Ancient empires already established vast territories of communication and domination that reached far beyond national borders. With the colonization of other continents in the early modern era, Europe also developed a worldwide perspective. The numerous technical, social, economic, cultural, and political developments of the last several decades, however, have significantly accelerated and intensified these exchange processes.

These changes – especially the technical progress in the transportation of people, goods, and data – bring the inhabitants of the “*global risk society*” together ever more quickly and intimately. This sets the stage for economic and cultural progress in many areas but also leads to global problems in such areas as climate, health, financial markets, and international security. Today, the Internet and the global cyberspace symbolize the new quality of worldwide interaction in the modern *global information society*; at the same time, computer viruses and Web attacks – the flip side of the Internet – exemplify the ensuing global risks and illustrate the interdependence of all human beings. The cur-

rent financial crisis also demonstrates the potential consequences of the interconnectedness of the global society.

## 2. Transnationalization and Globalization of Subjects of Regulation

The development of the “*global society*” – also referred to as “*globalization*”<sup>1</sup> – brings about fundamental changes not only in the economy, in society, and in politics but also in the law. These changes affect the areas *subject to legal regulation*. The technologies of communication and travel, the expanded economic areas, and the political opening of states lead to increases in cross-national communication, international dispersion of production systems, transnational trade, global markets, mobility of people and businesses, and offshore investment. These processes have both desirable, socially advantageous effects as well as effects that are damaging to society. The dissemination of newspapers is simplified as is the dissemination of hate speech; trade with legal goods profits as does trade with illegal goods; mobility of tourists and workers is facilitated as is that of unwanted persons. All of these processes are subjects of laws that are designed to create a framework conducive to international exchange and at the same time to minimize risks.

Due to the increasing transnationalization of activities subject to legal regulation, *legal questions that transcend borders* arise more and more frequently. This is true of all three major branches of law. In the private law context, parties in different countries sign contracts of sale, multinational enterprises form competition-limiting cartels that affect the world market, and – through the dissemination of files in the Internet – copyright violations occur in a multitude of states simultaneously. Similarly, public law is confronted by cross-border cases when emissions damaging to the domestic environment are released from foreign territory, foreign suppliers offer gambling via the Internet, multinational concerns divert profits to subsidiaries located in offshore tax ha-

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<sup>1</sup> On the concept of globalization, see, e.g., M.L. Djelic/ S. Quack (eds), *Globalization and Institutions*, 2003; B. de Sousa Santos, *Toward a New Legal Common Sense – Law, Globalization, and Emancipation*, 2nd ed., 2002, 85–311; W. Streeck, “Globalisierung: Mythos und Wirklichkeit”, in: H.J. Aretz/ C. Lahusen (eds), *Die Ordnung der Gesellschaft, Festschrift zum 60. Geburtstag von Richard Münch*, 2005, 355–372. See also below under part IV. 1.

vens, and financial supervisory authorities control the sale of foreign financial products. In criminal law, corresponding challenges arise when, in the prosecution of transnational terrorism and global organized crime, cross-border investigations must be coordinated and access to persons or evidence abroad obtained. In the area of international criminal law, too, new problems arise when armed groups attack foreign territories rather than their own country. It is a seamless transition from *cross-border* activities, which take place in the territories of two or more countries, to activities of *global* magnitude, whose effects are felt all around the world and which can only be solved by the joint efforts of the world community of states. As a result of this increasing need for cross-border regulation, the traditional law of the nation-state is confronted more and more frequently with “transnational” activities that affect several states, engender legal decisions that must be enforced in foreign territory, and raise issues that can only be solved on a global level.

### 3. Core Legal Issues of Transnational and Global Subjects of Regulation

At first glance, the legal problems caused by transnational activities in the three branches of law appear to be heterogeneous and difficult to categorize. If the crux of the legally relevant changes is analyzed, however, in terms of activities that affect several states, engender legal decisions that must be enforced in foreign territory, or raise issues that can only be solved on a global level, *two fundamental problems* become clear. In all three major branches of law, the issue is, on the one hand, the transnational applicability of law and enforceability of law in foreign territory (see below I. 3. a.) and, on the other hand, the need to cope with new global challenges that overwhelm the regulatory capabilities of individual nation states (see below I. 3. b.).

#### a. Transnational Applicability and Enforceability of Law

##### *Transnational Applicability of Law*

The issue of the applicability of a national legal system to *activities that exhibit transnational attributes* arises in all three major branches of law. In criminal law, the issues are whether substantive criminal offense definitions encompass activities with a foreign nexus (e.g., does German

criminal law apply to a German company that bribes an official outside of Germany?) and whether German criminal law is applicable abroad (so-called extraterritorial applicability of national criminal law); here, with very few exceptions,<sup>2</sup> German law enforcement authorities can only apply their own national criminal law. However, the mere fact that German law is applicable does not mean that other legal systems are perforce inapplicable; the parallel applicability of another legal system (or systems) may be avoided, in certain cases, by the principle *ne bis in idem*. In private law, additional conflicts-of-law questions are raised, as international private law requires courts, under certain circumstances, to apply foreign law. According to general rules of international law, states have the authority to prescribe law with respect both to conduct that takes place partially or entirely within its territory (territoriality principle) as well as to conduct that – emanating from the territory of another state – has effect within its territory (effects principle).<sup>3</sup> Due to the numerous globally-applicable systems, it is often the case – in all three major branches of law – that more than one legal system may be applicable to one and the same activity so that not only are provisions regarding the applicability of law necessary but also rules governing conflicts of law, namely, rules that establish the priority of a particular legal system or that eliminate conflicting norms or values.

As legal systems often differ from one another considerably, the choice of applicable law can lead to *significant advantages and/or disadvantages* for the affected parties. In practice, these differences are exploited – in private law – to avoid consumer or creditor protection provisions (by means of the appropriate choice of law by the contractual parties) and – in criminal law – to evade domestic criminal norms by shifting activities abroad. Examples of this kind of forum shopping include the use by domestic companies of foreign forms of corporate structure (such as the British “Limited”), the offering in the Internet of

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<sup>2</sup> U. Sieber, “Strafrechtsvergleichung im Wandel”, in: U. Sieber/ H.J. Albrecht (eds), *Strafrecht und Kriminologie unter einem Dach*, 2006, 78 et seq. (100).

<sup>3</sup> See generally, PCIJ, “Lotus” Case, PCIJ, Series A., No. 10, 1927, 4–108, 25; “Trail-Smelter” Case, 1938/1941, Reports of International Arbitral Awards Vol. III, 1905–1982. An additional state regulatory competence for situations involving nationals of the state emerges – in addition to the principles of territoriality and effectiveness – from the active and passive personality principles. The respective scopes of the effects principle and the passive personality principle are subject to debate when national sovereignty and the principle of non-intervention clash.

gambling opportunities based in Gibraltar, the disposal of environmental contaminants in countries with minimal environmental protection standards, and the announcement by financial institutions of their “move” to another country if they are subject to more stringent regulation in their current domicile. Forum shopping is tempting not only for citizens and businesses but also for the state. A recent example of forum shopping by states can be seen in the ships deployed by NATO to combat piracy in the Gulf of Aden that are outfitted with so-called shipriders from adjoining African countries. The presence of shipriders allows for the transfer of suspected pirates to the judicial system of the shipriders’ home countries without an evaluation of the difficult human rights issues posed by such “hand-offs.” Thus, clear *jurisdictional and conflict-of-laws rules* for the various legal systems are necessary, both to insure the continued viability of legal security as well as to prevent abuses of law and forum shopping.

#### *Transnational Enforcement of Law*

If it is clear that a particular national law is applicable to a particular activity, the effectiveness of the respective regulations in a global world often depends, additionally, on the concrete *enforcement of national norms* and especially of *criminal judgments* in foreign territory. For in criminal law, national criminal justice authorities can, as a rule, only enforce their decisions – such as arrest warrants, search warrants, and judgments – within their own territory. The same is true of decisions of civil courts and administrative agencies. The enforcement of national coercive measures abroad thus requires special legal regulations and implementation procedures.

If the applicability and enforceability of national law in foreign territory is not assured, activity that is criminal in one country may be rendered unpunishable or difficult to prosecute due to the existence of so-called crime havens, consumers may lose the protection of their national law, and workers may be harmed as a result of social dumping. In this situation, the *regulatory authority of the nation state* is reduced to a race to the bottom.<sup>4</sup> Thus, an important task of the law in the global

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<sup>4</sup> On labor law and social law, see S. Krebber, “Globalisierungsbedingter Verlust der Bindungswirkung staatlicher Regulierungen und die sich entwickelnden Alternativen”, in: J. Schwarze (ed.), *Globalisierung und Entstaatlichung des Rechts*, Vol. I, 2008, 143–189; D. Pieters, “Social Security Law and the Challenge of Globalization”, *ibid.*, 191–209.

world is to guarantee that, where necessary, regulations are not only nationally but also *transnationally applicable and enforceable*.

### **b. Regulation of Global Challenges**

A second core task of law in a global world involves dealing with *large-scale challenges* in which the issue at hand is no longer merely one of enforcing the interests of individuals from one territory in another territory but rather the issue to be solved implicates the interests of several states. Such issues include protecting security in the face of terrorism and protecting the climate, the arctic, financial markets, international competition, intellectual property in the Internet, as well as the new international institutions and values (whose very existence is a result of globalization), such as the common European currency, the financial interests of the European Union, and the functionality of international tribunals.<sup>5</sup> Thus, the question arises in all three major branches of law as to the cases for which these kinds of common solutions are necessary and the models and structures with which the solutions can be achieved.

### **c. Consequences for the Legal Order**

For activities with transnational connections, globalization thus requires that the scope of application of national law be defined, that the cross-border enforcement of law be facilitated, and, for the challenges that can only be solved globally, that an effective regulatory system be created. Due to the acceleration and intensification of the globalization process, these demands have become more and more important for the global economy and society. In the meantime, the – partial – realization of these demands has brought about fundamental changes in the law of the world society that have not only led to new legal regulations but – as will be shown in the following – have also led to fundamental changes in the legal control systems, changes that, in turn, raise pivotal questions.

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<sup>5</sup> On the emergence of global security strategies against terrorism, see, e.g., H.J. Albrecht, “Terrorism, Risk and Legislation”, *Journal of National Defense Studies* 6 (2008), 9 et seq. (17–23).



## II. Changes in Normative Control Systems

*Normative control systems change* in the course of globalization, primarily because, in fulfilling the aforementioned demands, traditional national law reaches its territorial limits (1.). As a result, it is increasingly overlaid with international and supranational regulations (2.) and with non-state control mechanisms (3.). Viewed from a historical perspective, the modification these developments have caused to legal control systems can be seen as a paradigm change (4.). These changes force law and the social sciences to confront pivotal questions as to the legitimacy and control of the legal order in the global society (5.).

### 1. Limits on Enforceability of National Law

The technical, economic, social, and political changes described above cause the boundaries of cultural and economic interactions to conform less and less to the territorial borders of nation-states established in the 19th century. Thus, the regulatory authority of nation-states and especially the lawmaking monopoly of national legislatures dwindles. The solution of resulting problems by means of a direct extraterritorial enforcement of national law on foreign territory enjoys only limited success and is often of dubious legality. An example is the pressure exerted by the United States in 2009 on the Swiss Bank UBS to disclose client account information: in response to the threat of the United States to prosecute UBS for tax evasion, which could have jeopardized the bank's very existence, Swiss banking authorities released the sought-after information; subsequently, however, the Swiss Federal Administrative Court held that the disclosure was illegal. Similar legal difficulties associated with extraterritorial investigations arose in the course of the transnational corruption investigation conducted by the American Securities and Exchange Commission (SEC) against the Siemens company in the course of which attorneys from an American law firm – paid by Siemens – served in Germany as private investigators with a public mandate for an American agency. In criminal law, these difficulties are not resolved by the principle of universality or by other international criminal law principles that go beyond the principle of territoriality. These principles merely expand the area of applicability of national criminal law to foreign territory; they do not permit the direct enforcement of coercive measures of criminal procedure in foreign nations. The covert penetration by investigative authorities of foreign

computer systems violates international law just as does the kidnapping of terror suspects abroad. In addition, one-sided extraterritorial enforcement of law runs into practical enforcement problems. The fact that attempts to engage in this kind of extraterritorial enforcement are becoming more frequent indicates the need for legally regulated forms of cooperation.

## 2. Expansion of International and Supranational Law

To overcome the limits of the national approach to regulation in the context of transnational activities, the classical solution is to supplement national regulations and the enforcement of national law with international forms of cooperation. These are manifested not only in relevant national legal provisions but most importantly in the cross-border cooperation of national agencies as well in the creation of international and supranational institutions.

Interstate cooperation often takes place by means of *informal transnational networks*. At this level, there is direct cooperation between national ministries and special agencies, and expert groups and committees are created.<sup>6</sup> This kind of governmental-technocratic cooperation outside the bounds of formal legal rules can be seen, for example, in the meetings of the G-8 countries and their experts, which – as in the case of law enforcement activities in the cybercrime context – influence subsequently created legal regulations.<sup>7</sup> Informal international cooperation in the development of common regulations and procedures can be found not only in the cooperation of police and intelligence agencies but also in many areas subject to the oversight of economic control agencies. One example is the assembly of national securities regulation agencies in the International Organization of Securities Commissions (IOSCO), an organization that develops minimum standards that are referred to as “non-binding” but whose broad implementation is agreed to by the members. The same is true of the Basel Committee on Banking Supervision that, with the (confidentially negotiated) Basel I Framework and the (publically developed) Basel II Framework, created

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<sup>6</sup> G. Lübke-Wolff, “Europäisches und nationales Verfassungsrecht”, *VVDStRL* 60 (2001), 246 et seq. (267–273).

<sup>7</sup> U. Sieber, “Mastering Complexity in the Global Cyberspace”, in: M. Delmas-Marty/ M. Pieth/ U. Sieber (eds), *Les chemins de l’harmonisation pénale*, 2008, 127 et seq. (139, n. 10).

a uniform structure in the form of informal agreements of bank regulators for assessing the capital adequacy of banks in over 100 states. These successes make clear that the cooperation of peers in technocratic networks can exert a great deal of “soft power” on the unification and export of legal regulations whose content – as a result – are no longer molded by national administrative agencies and parliaments but rather are significantly influenced by the international networks instead.<sup>8</sup> Cooperation involving national experts in networks, however, is not very transparent and is difficult to control. As a consequence, the evolution of informal (transnational) networks is the subject of controversy. While cooperation in transnational regulatory networks is considered by some in the American political science literature to be the optimal form of cooperation in the modern information society and a “blueprint for the international architecture of the 21st century,” others consider it only a limited supplement to treaty-based cooperation among international institutions.<sup>9</sup> On the basis of traditional international treaties, these networks often develop into international institutions whose existing structures and procedural provisions offer better conditions for the development of norms than does purely informal cooperation.

Today, *international and supranational institutions* thus play a central role in the interstate coordination and development of norms. Examples of these kinds of international regulatory forms include recommendations, treaties, resolutions, and other measures of the United Nations, the OECD, the WTO, the World Bank, and the Council of Europe as well as of numerous other – in some instances less well-known – institutions such as IMF, ILO, ICAO, IMO, the International Seabed Authority (ISA), the international fisheries organizations, the International Telecommunication Union (ITU), WIPO, the International Competition Network (ICN), the Codex Alimentarius Commission, as well as the International Criminal Court (ICC) and other international criminal tribunals. Numerous human rights treaties have also led to comprehensive international regulations and institutions, as human rights protection, in particular, requires supranational law and

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<sup>8</sup> K. Raustiala, “The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law”, *Va. J. Int’l L.* 43 (2002), 1 et seq. (51–70).

<sup>9</sup> See A.M. Slaughter, “The Real New World Order”, *Foreign Aff.* 76 (1997), 183 et seq. (quotation in text found on page 197); A.M. Slaughter, *A New World Order*, 2004; for another opinion, see Raustiala, see note 8, 5, 91; P.H. Verdier, “Transnational Regulatory Networks and Their Limits”, *Yale L. J.* 34 (2009), 113 et seq. (113).

cannot be left up to the disposition of individual states.<sup>10</sup> The same is true of international criminal law and environmental protection. As a result of this development, numerous people depend on the decisions and norms of international organizations. The legislative and executive decisions of the International Seabed Authority, for example, directly affect the pecuniary interests of states, businesses, and individuals. Similarly, the credit decisions of the World Bank concerning programs to fight illness and the decisions of the WTO regarding agrarian support can have serious effects on the lives and economic existence of people in numerous countries.

Although many international organizations are active only in limited areas, the development of *broader government-like structures* in the context of globalization is becoming more and more common. This can be seen not only in the expansion of their areas of activity but also in the fact that they are taking over additional executive, legislative, and judicial functions and expanding their spheres of influence. This expansion of the areas of activity of international organizations takes place, on the one hand, by means of *new and extended mandates* that are necessary for the solution of current global problems. On the other hand, international organizations themselves expand – extensively and in a flexible manner – their areas of activity. The imposition by the United Nations Security Council, operating on the basis of a broad conception of peacekeeping, of criminal law-like sanctions not only on states but also on terrorist organizations and individuals is an example. An expanded mandate for the *creation of previously unforeseen enforcement measures* exists when, in the context of money-laundering prevention and anti-corruption activities, the OECD and the Council of Europe develop peer-review proceedings and processes of naming and shaming in the course of which representatives of Member States engage in mutual evaluations regarding compliance with certain standards and, at the same time, exert significant pressure by means of public shaming in cases of deficient implementation.<sup>11</sup>

The assumption by international organizations of *legislative activities* takes place not only via the mandates of the institutions discussed

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<sup>10</sup> For a summary, see C. Tomuschat, “Möglichkeiten und Grenzen der Globalisierung”, in: J. Schwarze (ed.), *Globalisierung und Entstaatlichung des Rechts*, Vol. I, 2008, 21 et seq. (36–44).

<sup>11</sup> U. Sieber, “The Forces Behind the Harmonization of Criminal Law”, in: M. Delmas-Marty/ M. Pieth/ U. Sieber (eds), *Les chemins de l’harmonisation pénale*, 2008, 385 et seq. (412).

above, it also happens – *de facto* – when, by engaging in the legal evaluation of activities, human rights and other expert committees, monitoring commissions, courts, arbitration tribunals, and arbitration committees end up simultaneously creating new law. *Judicial functions* are carried out by international organizations primarily in the area of human rights protection (e.g., the European Court of Human Rights), by the various international criminal tribunals, and by the increasingly popular arbitration courts in international trade law. A clear example of a more far-reaching, “multi-functional” shift of activities previous carried out by nation states to the United Nations Security Council is apparent when, with its new “smart sanctions,” the Security Council simultaneously exercises legislative, judicial, and executive functions in the fight against terrorism by creating new systems of sanctions and – by means of a list – itself imposing the new sanctions against persons suspected of terrorist activity.<sup>12</sup> This example also illustrates the expanded scope of addressees of international regulations, in that these regulations increasingly affect not only states but also businesses and individuals as can be seen clearly in the right of individuals to sue under the Convention on the Settlement of Investment Disputes. The more far-reaching, government-like structures of international institutions – created in this way – interfere significantly with the traditional spheres of activity of nation-states. As a result, in certain areas nation-states have become, in practice, the mere implementing organs of the international organizations.<sup>13</sup>

The *European Union*, with its broad, government-like structure, is a particularly strong supranational organization with executive, legislative, and judicial powers. In the meantime, many of the norms currently applicable in Europe are the result of Union regulations and directives. In December 2009 alone, for example, the Union promulgated 97 regulations and 17 directives in its official journal.<sup>14</sup> According to statistics kept by the administration of the German Parliament (Bundestag), in 2009 some 31 per cent of all laws it passed in the previous legislative pe-

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<sup>12</sup> On this point, see also under note 36, below.

<sup>13</sup> For a summary, see R. Wolfrum, “Legitimacy of International Law from a Legal Perspective: Some Introductory Considerations”, in: R. Wolfrum/V. Röben (eds), *Legitimacy in International Law*, 2008, 1 et seq. (10–19).

<sup>14</sup> OJ L 314, 1 December 2009 through OJ L 353, 31 December 2009.

riod were prompted by the EU.<sup>15</sup> Indeed, EU regulations affect – to a greater or lesser extent – all important policy areas: the internal market, free movement of goods, agriculture and fisheries, free movement of persons, security, transport, competition, intellectual property, economic and monetary policy, employment, social policy, education, culture, health, consumer protection, trans-European networks, research, environment, energy, tourism, civil protection, administrative cooperation, and external action. In the attempt to insure an area of freedom, security, and justice, the criminal law, too, long considered part of the sovereign domain of nation-states, has been involved to a significant degree. EU regulations are directly applicable in the Member States; directives are also binding, as far as the results to be achieved are concerned, but they leave to the national authorities the choice of form and methods. This EU legislation – like domestic norms – works in tandem with a far-reaching system of legal protection that is responsible for important decisions in Europe and that, in some respects, replaces the jurisdiction of national courts.

This shift of legal activities from the national to the international and supranational levels can also be seen from an institutional perspective in the increase in the number of large, multinational law firms,<sup>16</sup> firms that reflect the transnationalization of their areas of specialty and of the three major branches of law. These firms focus on business law; in response to the beefing-up of European law enforcement agencies, however, calls for a European network for criminal defense attorneys are also becoming louder.

### 3. Growth in Private Regulation

The development of international and supranational regulations often proceeds slowly due to both the lack of willingness of nation-states to give up sovereignty and to the lack of consensus among the states. As a result, private actors are creating more and more new, *non-government-*

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<sup>15</sup> <<http://www.faz.net/s/Rub0E9EEF84AC1E4A389A8DC6C23161FE44/Doc~ECE53A3E51DAD46E3AAFC3E6424FC109C~ATpl~Ecommon~ScContent.htmlFAZ.net>>.

<sup>16</sup> See the empirical study conducted by G. Morgan/ S. Quack, “Institutional Legacies and Firm Dynamics: The Growth and Internationalization of British and German Law Firms”, *Organization Studies* 26 (2005), 1765 et seq.

*tal control instruments* that are not part of national, international, and supranational law. In fact, these kinds of private, autonomous self-regulation – e.g., the *lex mercatoris* of merchants – have existed for generations. Today, however, they are developed more for global activities, the international or supranational regulation of which cannot be achieved politically or whose complexity and dynamics prevent them from being dealt with appropriately by means of state regulation. As these private systems are not subject to territorial limitations, they are more effective internationally than are governmental systems.

The related “denationalization” of normative control can already be seen in the substantive *effect on the preliminary stages of international and supranational law*. Particularly in the area of private law, academics and private organizations are creating new soft-law instruments, such as the “Principles of European Contract Law,” the “Principles of European Tort Law,” model codes, and corporate governance codices, some of which have been adopted (to one degree or another) by national and/or international lawmakers.<sup>17</sup> In the area of criminal law, too, there have long been calls for international model codes in order to overcome the stagnating process of legal harmonization as conducted by national and international institutions.<sup>18</sup> In the area of private business law, *international law firms* have taken on a leading role in the development of standards and model contracts as sources that can be used to support the development of transnational law.<sup>19</sup>

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<sup>17</sup> R. Zimmermann, “Comparative Law and the Europeanization of Private Law”, in: M. Reimann/ R. Zimmermann (eds), *The Oxford Handbook of Comparative Law*, 2008, 539 et seq. (560–574); R. Zimmermann, “The Present State of European Private Law”, *American Journal of Comparative Law* 57 (2009), 479 et seq.

<sup>18</sup> In support of a European Model Penal Code, see U. Sieber, “Memorandum on a European Model Penal Code”, *European Journal of Law Reform* 1 (1999), 445 et seq. (written at the request of the Council of Europe).

<sup>19</sup> S. Quack, “Legal Professionals and Transnational Law-Making”, *Organization* 14 (2007), 643 et seq.; S. Quack, “Governance durch Praktiker: Vom privatrechtlichen Vertrag zur transnationalen Rechtsnorm”, in: S. Botzem/ J. Hofmann/ S. Quack/ G. Schuppert/ H. Straßheim (eds), *Governance als Prozess, Koordinationsformen im Wandel*, 2009, 575 et seq.; S. Quack, “Who Fills the Legal ‘Black Holes’ in Transnational Governance? Lawyers, Law Firms and Professional Associations as Border-crossing Regulatory Actors”, in: G. Schuppert (ed.), *Global Governance and the Role of Non-State Actors*, 2006, 81 et seq.

In this process, the creation of additional, *independent, normative regulations* by non-state actors are particularly important. Examples include the “home-made law” of professional associations and interest groups, arbitration agreements and tribunals in the business context, operating agreements, codes of conduct established by research institutions, self-regulatory activities of businesses and business associations, internationally applicable ethics and behavioral guidelines, general terms of business of multinational corporations, regulatory instruments of international sporting associations, international rules of standard (e.g., the ISO), standardized contracts,<sup>20</sup> and the administration of domain names and Internet addresses by ICANN (Internet Corporation for Assigned Names and Numbers). “Responsible Care,” the voluntary initiative of the chemical industry whose code of conduct containing regulatory standards for the areas of environment, health, and security has been embraced and implemented – to a greater or lesser extent – by national industry associations all over the world, is an example of business norms of this kind.<sup>21</sup> In cyberspace, denationalization, dematerialization, and ubiquity together with the difficulty of enforcing national law hasten the development – primarily by technical and electronic associations – of additional non-state regulations in virtual worlds and electronic market places, where affiliation to a particular nation-state is replaced by membership in a “community.”<sup>22</sup> In many cases, these new forms of private regulation lead to a blurring of the traditional distinc-

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<sup>20</sup> With respect, for example, to standard license agreements for the expansion of options of copyright holders regarding the dissemination of digital media, see L. Dobusch/ S. Quack, “Internationale und nichtstaatliche Organisationen im Wettbewerb um Regulierung: Schauplatz Urheberrecht”, in: K. Dingwerth/ D. Kerwer/ A. Nölke (eds), *Die Organisierte Welt – Internationale Beziehungen und Organisationsforschung*, 2009, 235 et seq.

<sup>21</sup> On this point, see H. Keller, “Codes of Conduct and their Implementation: the Question of Legitimacy”, in: Wolfrum/ Röben, see note 13, 219 et seq. (251).

<sup>22</sup> J.P. Bonnici, *Self-Regulation in Cyberspace*, 2008; C. Engel, “The Role of Law in the Governance of the Internet”, *International Review of Law, Computers & Technology* 20 (2006), 201 et seq.; L. Lessig, *Code and Other Laws of Cyberspace*, 1999; Sieber, see note 7, 132–137; U. Sieber, “Legal Regulation, Law Enforcement and Self-Regulation: A New Alliance for Preventing Illegal Content on the Internet”, in: J. Waltermann/ M. Machill (eds), *Protecting Our Children on the Internet*, 2000, 319 et seq.



tions between public and private law and between the creation of norms and the drawing up of contracts.<sup>23</sup>

Even in the field of *public security*, which for a long time was considered a domain of the public sector, the growing importance of private security companies (especially guard and investigation companies) is now leading to new codes of conduct. With the creation of company disciplinary rules and articles of association that address athletic misconduct (and enforce internationally sanctions such as professional bans in cases of doping), private actors have even developed *functional equivalents to the state-based criminal law protection of legal interests*. Together with additional factors unrelated to globalization (such as the increasing importance afforded the perspective of crime victims), this development forces the criminal law to address the issue of whether the time has come to reconsider – and perhaps to undo to some extent – the deprivatization of law enforcement that dates to the Middle Ages. In the public law context, too, traditional areas of state-based administration are being supplemented by new forms of private governance that are geared to the common welfare of the international community. In international law, the growing influence of private actors is accelerating the move away from traditional, state-based international law.

The broad autonomy of and the significant role played by private, subject-matter-specific regulations are particularly apparent in cases in which norms are not only created by *quasi-legislative institutions* but are also enforced by means of *institutionalized arbitration processes* (especially arbitration tribunals). Some academics argue that, to some extent, the applicability of these norms can no longer be derived from other fundamental norms but rather from a self-organizing process of global contracts that themselves create their own, non-contractual legitimacy.<sup>24</sup>

Generally speaking, the *state* approves of the participation of non-state actors in the sovereign legislative process and approves of private

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<sup>23</sup> G. Bachmann, *Private Ordnung, Grundlagen ziviler Regelung*, 2006, 196 et seq., (413–416).

<sup>24</sup> G. Teubner, “Globale Bukowina, Zur Emergenz eines transnationalen Rechtspluralismus”, *Rechtshistorisches Journal* 15 (1996), 255 et seq. (264–279). The question of whether these norms can be considered “law” cannot be addressed here. See G. Teubner/ P. Korth, “Zwei Arten des Rechtspluralismus: Normkollisionen in der doppelten Fragmentierung der Weltgesellschaft”, in: M. Kötter/ G. Schuppert (eds), *Normative Pluralität ordnen*, 2009, 137 et seq.; see also part III. 6., below.

regulation; monitors this development to some extent for abuse; expressly recognizes it, in some cases; supports it by offering privileges (e.g., reduced liability); transforms it into state law; and even compels it in specific areas by means of new forms of co-regulation (as in the regulation of content on the Internet that is inappropriate for minors) or by requiring the participation of the private sector in the provision of public security (as in the prevention of money-laundering, insider trading, and fraudulent invoicing by physicians).<sup>25</sup> New hybrid forms of state-private cooperation, described as “governance at a distance,” are particularly evident in the Swiss anti-money laundering law and its “self-regulating bodies.”<sup>26</sup>

International and supranational institutions also play a role in the privatization process when, for example, they act on private initiatives or delegate their own responsibilities to non-state actors. The *European Union* supports this development by providing for the delegation of the decision-making authority of the European Commission not only to committees made up of representatives of Member States (so-called comitology procedure) or to broadly independent regulatory agencies with their own legal personality but also to private or public-private agencies that, as “offices for technical assistance” or profit-oriented businesses, administer – for example – European subsidy programs worth billions of Euros. Similarly, the European Union can delegate public responsibilities to technical committees and independent standards bodies that, with their regulations, substantiate – for example – guidelines.<sup>27</sup> Herewith, state, international, and private regulation blur.

Non-state norms are additionally supplemented by internationally applicable *political, social, and economic control mechanisms*. Emerging political regulatory mechanisms designed to influence state conduct include, for example, international systems of comparison, such as the OECD’s PISA policy with its national policy assessment studies. In the area of public security, security businesses in the private sector, public-

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<sup>25</sup> U. Sieber, “Grenzen des Strafrechts”, *Zeitschrift für die gesamte Strafrechtswissenschaft* 119 (2007), 1 et seq. (40–43); U. Sieber, “Compliance-Programme im Unternehmensstrafrecht – Ein neues Konzept zur Kontrolle von Wirtschaftskriminalität”, in: U. Sieber/ G. Dannecker/ U. Kindhäuser/ J. Vogel/ T. Walter (eds), *Festschrift für Klaus Tiedemann zum 70. Geburtstag*, 2008, 449 et seq. (460–463).

<sup>26</sup> N. Capus, “Self-Regulation in Combating Money Laundering”, *Journal of Money Laundering Control* 6 (2003), 355 et seq.

<sup>27</sup> Lübke-Wolff, see note 6, 267–273.

private partnerships, and new security alliances are becoming more and more important. Increasingly, markets are taking on supervisory functions. The number and type of these kinds of control systems continue to increase and state regulation continues to decrease.

In addition, the *movement of refugees and poverty-induced migration* lead to the existence of a variety of different groups within nation states that do not assimilate but, in some cases, purposely remain – ethnically and religiously – segregated and import their own normative constructs. Religious communities that give priority to religious law over secular law represent a challenge to the legal orders of secular western nations. The regulations of regional cultures and religious communities must be considered in addition to the norms of individual groups, communities, and social networks.<sup>28</sup> They add to the paucity of identity and legitimacy as well as to the tension between the various national, international, and private institutions. “Honor killings” in immigrant families, fatwas, and attacks on the author of the Mohammed cartoons that originally appeared in the Danish press illustrate the great potential for conflict deriving from these – actually existing or unfairly assumed – ethnic and religious norms, which overlap and compete with national law and which add to the diversity of private norm systems.

## 4. Historical Changes and Outlook for the Future

### a. The Changing Face of Statehood

The change seen in legal control mechanisms is not a coincidental phenomenon. The causes of change are deeply rooted and go hand in hand with fundamental changes in the social and state order: the increasing amount of interaction between similarly situated parties located within different territorial entities as well as the increasing number of problems of a global nature contribute to the gradual dissolution of the congruence between the territorial control potential of the traditional nation-state and “its” citizens. This leads to a weakening of the hegemony of the state, which is legitimated through democratic election by a territorially-organized citizenry and therefore protected against any outside interference by the principle of sovereignty as recognized in interna-

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<sup>28</sup> For examples of regulations of this kind, see the study on the social structure of the favelas in Brazil carried out by de Sousa Santos, see note 1, 99–162.

tional law.<sup>29</sup> The “internal” diversity of different groups within the state (due in part to the movement of refugees and to economic migration) further erodes the prevailing 19th century ideal of a unified national culture as well as the related concept of a national people and continues to challenge the role of the nation-state in the creation of a central regulatory framework. In this process, the traditional “pyramidal” relationship of the state and its legal subjects – the basis of traditional parliamentary accountability and political *legitimation* for the exercise of governmental power by means of law – is dissolved.

This development leads to a “denationalization” of law (b. below) and to a plurality of co-existing regulatory systems (c.). Historical changes in the law result (d.) that, in turn, are associated with fundamental challenges – especially with regard to legal policy.

#### **b. Denationalization of Law and New Actors**

The changes in normative control systems outlined above have already showed that a “*denationalization*” of law is taking place on two levels: in the area of traditional *sovereign regulation*, regional or global regulations outside the nation-states are developing due to the political governance exerted by international and supranational institutions. This “denationalization” of public and common welfare-oriented regulations is being supplemented in the domestic and foreign relations of nation-states by the growing body of norms established by *private actors*, who are creating their own transnationally applicable regulations in numerous fragmented areas. In contrast to the norms of international institutions, however, these private regulations do not develop through political processes involving political management “from above,” but rather through social processes “from below”; they are no longer based on the sovereign legislation of a territorially-organized, constituent people but on the individual membership in associations, on the contractual acceptance of standardized regulations, and on processes of negotiation.<sup>30</sup> This leads to the blurring of the traditional separation of private and public law as well as to seamless transitions between law and other normative systems.

Unlike state law, the international, supranational, and non-state regulations are often not dominated by parliaments but rather by *other*

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<sup>29</sup> See A. von Bogdandy, “Demokratie, Globalisierung, Zukunft des Völkerrechts – eine Bestandsaufnahme”, *ZaöRV* 63 (2003), 853 et seq. (854–856).

<sup>30</sup> On this distinction, see also part II. 3. and part II. 4. a., above.

*actors*: in the case of law-making by the political management of international and supranational institutions, representatives of national governments (primarily from economically strong states) and bureaucrats from international institutions are becoming more and more important. This is true even in cases in which highly intrusive regulations must be implemented later on by national parliaments, since at the time of these parliamentary decisions regarding internationally-negotiated agreements, there is often no room left for maneuvering. Representatives of business as well as – especially in cases it treats as scandals – the press, international non-governmental organizations, and other elements of the civil society also influence these processes. Similarly, scientists and other experts consulted by international institutions acquire more influence.<sup>31</sup> This can be especially problematic if experts from the business sector who are engaged by international organizations pursue their own interests. In order to avoid such losses of power, many international organizations such as the UN and the Council of Europe have reserved important final decisions – such as the passage of resolutions – to inter-governmental organs. Despite such mechanisms, the establishment of expert committees and the strengthening of secretariats within international organizations lead to a decrease in the influence of the national governments that created these organizations. The main losers of power, however, are the national parliaments, whose functions of legitimization and control are considerably reduced or even lost entirely.

In contrast, if global, private norms are established in fragmented areas by the *civil society* “from below,” the representatives of large, internationally-oriented (mostly American and British) law firms gain influence over *de facto* processes of standardization: they create new specimen contracts that become standard contracts and later influence norms promulgated by other actors. Lawyers’ associations and private arbitration tribunals support this development. The setting of norms “from below” is also influenced to some degree by international institutions that adopt standard contracts and other instruments of soft law and integrate them into their own regulations. Thus, both developments – the spontaneous case-by-case creation of law by private actors “from below” and the more strategic, political creation of law by international organizations “from above” – merge in some areas. The sum of the effects of these mechanisms contributes to the displacement of the nation-state.<sup>32</sup>

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<sup>31</sup> Sieber, see note 7, 175–185; Sieber, see note 11, 414 et seq.

<sup>32</sup> Quack, “Legal Professionals ...”, see note 19, 648–652.

### c. Plurality of Regulations and Fragmentation

The development described above leads to a *plurality of – state and non-state – regulatory systems*. The overlapping and the influence the various systems have on each other is apparent, for example, in the fact that anti-money laundering norms exist simultaneously in national law, European law, in the requirements and peer-review processes of the OECD and the United Nations, as well as in the private compliance-regimes of financial institutions and their associations. An additional example of *regulatory pluralism* can be seen in the attempt to deal with the genocide in Rwanda by means of the parallel activities of an international tribunal (on the basis of international criminal law), national courts (on the basis of Rwanda's post-colonial national criminal law), and the village Gacaca courts (on the basis of modified African tribal law). A complex regulatory pluralism of private norms can be seen in the numerous sporting associations that are organized functionally and territorially. In this area, sovereign and private regulations often apply simultaneously.<sup>33</sup> Thus, on the international level, there is competition not only among goods and services but also among political control mechanisms, each with its own framework.<sup>34</sup>

These co-existing norm systems lead to many-layered regulatory systems (so-called *multi-level systems*) and a *fragmentation of the law*. Among the various national, international, and private legal systems, there is neither a hierarchical order nor is there legal unity but rather a situation characterized by conflicts of laws and values. The lack of hierarchy in the new global order is apparent, for example, when the International Criminal Tribunal for the former Yugoslavia recognizes the ICJ as the "principal judicial organ of the United Nations" (Charter of the UN, Article 92) but at the same time refers to itself as an autonomous judicial body that may come to conclusions that differ from those of the ICJ.<sup>35</sup> A clear, normative contradiction between the law of the

<sup>33</sup> On this point, see part III. 5. and 6., below.

<sup>34</sup> G. Morgan/ S. Quack, "Law as a Governing Institution", in: G. Morgan/ J. Campbell/ C. Crouch (eds), *The Oxford Handbook of Comparative Institutional Analysis*, 2010 (forthcoming), 275 et seq.; S. Quack, "Law, Expertise, and Legitimacy in Transnational Economic Governance: An Introduction", *Socio-Economic Review* 8 (2010), 3 et seq.

<sup>35</sup> *Celebici* Case IT-96-21-A, 20 February 2001, No. 24. See also *Prosecutor v. Dushko Tadić* Case IT-94-1-A, 15 July 1999, paras 115 et seq. as well as the summary in: M. Koskeniemi/ P. Leino, "Fragmentation of International Law? Postmodern Anxieties", *LJIL* 15 (2002), 553–579.

European Union and the law of the United Nations (as well as, possibly, conflicts between various norms of UN law) can be seen when, on the basis of lists of terror suspects, the United Nations Security Council in a – from the perspective of the rule of law – questionable administrative procedure orders the imposition of smart sanctions such as the freezing of financial assets and travel limitations in contravention of European Union human rights standards.<sup>36</sup>

In the global world, the result is a very much stronger dissonance between authority and regulation than in the past. This shows clearly that legal order and social control in the modern global society have become very much more complex than they were in the days of the traditional relationship between the citizen and the nation-state.<sup>37</sup>

#### d. Fundamental Developments and Perspectives

From a *historical perspective*, the law in today's global world displays characteristics similar to those found in the law of the Middle Ages<sup>38</sup> and the early modern era: the *lack of unity between state power and legal order*; the greater importance accorded to negotiated processes than to institutionalized force exercised by authorities; the lack of a clear separation between public and private law; the seamless transition between law and other norms; and the diversity of law due to the participation of various actors.<sup>39</sup> Already in the Middle Ages, the resulting limited influence of the state on the normative system encouraged the development of law applicable across borders. The Roman law of the Middle Ages was not promulgated by the state; rather, its beginnings were in the university lecture halls, from there it was adopted by practitioners, and ultimately it developed into an academically-based private law of transnational scope.

From the perspective of the legal historian, one of the more interesting questions posed by this development is whether *the era of the sov-*

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<sup>36</sup> ECJ C-402-05 and C-415-05 of 3 September 2008, No. 158–376 (Kadi/Al Barakaat). On the treatment of conflicting norms, see part III. 6., below.

<sup>37</sup> On this point and for more detail on the treatment of conflicting norms and values, see part III. 6., below.

<sup>38</sup> S. Quack, “‘Global’ Markets in Theory and History: Towards a Comparative Analysis”, *Kölner Zeitschrift für Soziologie und Sozialpsychologie*, Special Issue 49 (2009), 126 et seq. (132–137).

<sup>39</sup> M. Stolleis, “Vormodernes und postmodernes Recht”, *Quaderni Fiorentini per la storia del pensiero giuridico moderno* 37 (2008), 543 et seq. (546).

*ereign nation-state* has turned out to be a comparatively short historical epoch of western history and one that has served its time.<sup>40</sup> As far as *sovereign regulation* is concerned, this question – at least for Europe – has a clear answer: in this context, regulation has clearly shifted from the nation-state to international and supranational institutions that, over time and with their secretariats and organs, have emancipated themselves more and more from their nation-state creators. The European Union shows that, under certain circumstances, democratically legitimated sovereign authority can be exercised not only by the nation-state but also by other forms of European democracy.<sup>41</sup>

As far as the *relationship between sovereign and private exercise of authority* is concerned, the answer to the question of the future of the nation-state is more differentiated and partially still open: in the area of business, the “denationalization” of law and the self-regulation of business and society is increasing worldwide. In other areas, however, nation-states in cooperation with international institutions are also actors and beneficiaries of globalization,<sup>42</sup> such as when they – as has been the case recently in the context of anti-terrorism powers – win back or create for themselves additional worldwide (regulatory and enforcement) power by means of self-created international structures.

In connection with these shifts, an additional question addresses how the future transnational *world legal order* – influenced by international organizations and actors of civil society – will be constructed and dominated: will the new world law be based on the politically and strategically-oriented management of various regional blocs and the international and supranational organizations they have created, perhaps with the decisive participation of the United Nations? Or will civil society – at a distance from politics – increasingly develop its own “living” norms “on the periphery of law” in numerous fragmented, indi-

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<sup>40</sup> M. Stolleis, “Was kommt nach dem souveränen Nationalstaat? Und was kann die Rechtsgeschichte dazu sagen?”, in: A. Héritier/ M. Stolleis/ F. Scharpf (eds), *European and International Regulation after the Nation State*, 2004, 17 et seq.

<sup>41</sup> See also Stolleis, see note 40, 26–30; U. Sieber, “Die Zukunft des Europäischen Strafrechts – Ein neuer Ansatz zu den Zielen und Modellen des europäischen Strafrechtssystems”, *Zeitschrift für die gesamte Strafrechtswissenschaft* 121 (2009), 1 et seq. (17–22, 28–43).

<sup>42</sup> P. Glenn, “Globalization and National Legal Traditions”, in: J. Schwarze (ed.), *Globalisierung und Entstaatlichung des Rechts*, Vol. I, 2008, 58–69; Sieber, see note 7, 175–176; Sieber, see note 11, 396–403.



vidual areas, as *Eugen Ehrlich* predicted in 1913 in far-off Bukovina of the Austrian Empire?<sup>43</sup> The complexity of the problems to be regulated as well as the lack of consensus among the national political actors could argue for the dominance of decentralized (especially private) actors; this dominance would not, however, be made up solely of either the ideal type of a universal legal system or a “lex Bukovina” but rather would lead to the development of numerous mixed forms and combinations of substantive and procedural co-regulation as well as flexible transnational networks.

As state power has been perforated by and overlaid with other international and private powers, the nation-state has lost comprehensive, territorially-based legal sovereignty over its citizens.<sup>44</sup> Thus, while the nation-state will remain powerful in the future (especially as far as the maintenance of public security is concerned), by ceding powers to larger organizational units, it will undergo significant changes.<sup>45</sup>

## 5. Central Challenge: Legitimacy and Control beyond the Nation-State

The historical changes taking place in the legal systems categorically challenge both the structures of legal control mechanisms as well as the central accomplishments of law since the Enlightenment: the broad denationalization of law leads to a loss of important protective functions that must be fundamentally reconceptualized for the new international and private regulations.

### a. Loss of the Protective State

With the shifting of traditional activities of the nation-state to the international and private arena, the law leaves *the protective framework of the legitimate state power monopoly* further and further behind. For the further one distances oneself from this accomplishment of modernity, the more the law of the economically or politically stronger applies.<sup>46</sup> Thus, the mechanisms of democratic legitimacy, the separation of pow-

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<sup>43</sup> Teubner, see note 24, 255–290; likewise Quack, “Legal Professionals ...”, see note 19, 648.

<sup>44</sup> Stolleis, see note 39, 546.

<sup>45</sup> V. Boehme-Neßler, *Unscharfes Recht*, 2008, 140 et seq. (172).

<sup>46</sup> Stolleis, see note 39, 546.

ers, human rights, and legal protections developed by the parliamentary nation-state to tame the “Leviathan” have retained only a limited effect within international and private norm-setting.

A clear example of what this shift can mean for the affected *citizens* are the so-called smart sanctions of the United Nations – an institution not subject to judicial review – for use against suspected terrorists.<sup>47</sup> The same problems of legitimacy and control of international institutions can also be seen with regard to *nation-states* when, in the negotiation of international agreements, economically powerful actors dominate, developing countries are not represented at all, and representatives of business and other interest groups exert disproportional and uncontrolled influence. Examples include complaints raised with regard to expansions in the international protection of intellectual property and the resulting difficulties in gaining access to essential medications, seeds, or publications relevant to education and research.<sup>48</sup> The conduct of certain multi-national corporations in Africa as well as that of private security firms in Iraq, where abuse of power has been exercised with impunity, make clear that the effects of denationalization on the control of *private economic and military power* can be very much more serious. Thus, legitimacy and control of non-state regulations and institutions are central issues to be addressed in the context of the new forms of control in the global world.

## b. Fundamental Concepts of Legitimacy and Control

As far as the central, key question concerning the legitimacy<sup>49</sup> and control of non-state institutions and regulations is concerned, it is necessary to differentiate between sociological and normative concepts. *Sociological concepts of legitimacy* treat the *acceptance* of the regulations as a prerequisite for a stable social order. In the context at issue here, they show that the legitimacy of the new international, supranational, and

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<sup>47</sup> See note 36.

<sup>48</sup> On the creation of an international law of antitrust that also serves the interests of developing countries, see, J. Drexler, “International Competition Policy after Cancún: Placing a Singapore Issue on the WTO Development Agenda”, *World Competition* 73 (2004), 419 et seq.

<sup>49</sup> In German, a distinction is sometimes made between the term *Legitimation* and the term *Legitimität*. For a discussion of terminology, see the references at note 52, below, and Bachmann, see note 23, 159 (where the terms are used synonymously). For a discussion of the relationship between “legitimacy” and “legality,” see note 52.

hybrid forms of regulation depends on inclusiveness of participation, expertise-based effectiveness, and procedural fairness.<sup>50</sup> These criteria of input, throughput, and output legitimacy are important – also from the perspective of legal policy – in order to evaluate and enhance the effectiveness of the relevant regulations.

In contrast, as far as the *normative concepts of legitimacy* are concerned, the issue is not one of the description and stabilization of social order by means of the acceptance of norms but rather of the *justification* of norms.<sup>51</sup> In the context of law-making by new – international and private – actors, legal scholars do not address the acceptance of or the confidence in legitimate regulations; rather, they examine the *justification for the exercise of authority to set and enforce binding rules*.<sup>52</sup>

<sup>50</sup> On the criteria of Input-Legitimation, Output-Legitimation, and Throughput-Legitimation, see Quack, see note 34, 3–16; a critical approach is taken by von Bogdandy, see note 29, 854–56. On this point, see also F. Scharpf, *Regieren in Europa*, 1999, 16–28.

<sup>51</sup> On the function and rationale of the legitimacy issue, see the papers and the final discussion published in the conference proceedings Wolfrum/ Röben, see note 13, 381–403.

<sup>52</sup> D. Bodansky, “The Concept of Legitimacy in International Law”, in: Wolfrum/ Röben, see note 13, 309 et seq.; A. Buchanan/ R. Keohane, “The Legitimacy of Global Governance Institutions”, *ibid.*, 24 et seq. (25–26); H. Keller, “Codes of Conduct and their Implementation: the Question of Legitimacy”, *ibid.*, 219 et seq. (266–270); Wolfrum, *ibid.*, see note 13, 1 et seq. (6); *Id.*, “Legitimacy of International Law and the Exercise of Administrative Functions: The Example of the International Seabed Authority, the International Maritime Organization (IMO) and International Fisheries Organizations”, in: A. von Bogdandy/ R. Wolfrum/ J. von Bernstorff/ P. Dann/ M. Goldmann (eds), *The Exercise of Public Authority by International Institutions – Advancing International Institutional Law*, 2010, 917 et seq. (918–924).

“Legitimacy” is a broader concept than “legality,” and the requirements for establishing the legitimacy of an institution or regulation can be stricter than those establishing legality. This is because – for example – the legitimacy of a legal system is not only dependent on its validity (its “legality”) from the perspective of positive law but is also subject to evaluation at the hands of external control instruments. Furthermore, non-legal exercises of authority can raise issues of legitimacy, and the legitimacy of newly created institutions – those for which legal rules do not yet exist – can also be discussed. On this point, see D. Bodansky, *ibid.*, 311–312; U. Fink, “Legalität und Legitimität von Staatsgewalt im Lichte neuerer Entwicklungen im Völkerrecht”, *Juristen Zeitung* 53 (1998), 320 et seq. (320–321). On the use of terminology, see note 49, as well as Bachmann, see note 23, 159–160.

The bases of this legitimacy can be categorized in various ways: one approach – similar to that taken in the social sciences – distinguishes between source-based, process-based, and output-based legitimation factors.<sup>53</sup> Other legal scholars trace these dimensions of input, throughput, and output legitimacy in the context of the authority to make law back to two main concepts: justification based on the *consent of the affected* (dominant in private law) and justification based on the *common welfare* (dominant in public law).<sup>54</sup>

In practice, these two concepts are usually *combined and modified*: the democratic legitimacy of *all parliamentary law* (based on the principle of the sovereignty of the people) relies on the consent of a majority of the voting public, i.e., legitimacy based on participation and procedure; as far as the defeated minority is concerned, public law can also rely on the claim that the required majority decision serves the common welfare. In contrast, *private law* (based on the ethical principle of self-determination) earns its legitimacy in many cases also through the consent of its addressees; it is, however, as is especially apparent in the area of consumer protection, frequently corrected on the basis of the common welfare. In *international treaty law*, the consent of states with regard to relations with the outside world and their authority with regard to domestic relations provide a two-fold legitimacy,<sup>55</sup> which, however, due to the pervasiveness of comprehensive government-like structures, the partially undefined authorization norms, as well as the increasing direct effect of international law on individuals, is under considerable pressure to justify itself.

### c. Further Development of the Principles of Legitimation for International and Private Regulation

The normative factors input, throughput, and output legitimacy as well as “consent” and “common welfare” also serve as the general *criteria for the evaluation of international and private regulations* in a global world. The distinction between private law, public law, and interna-

<sup>53</sup> See Quack, “Law, Expertise ...”, see note 34, 6–9; Wolfrum, see note 13, 6–21; Wolfrum, see note 52, 918–924. See also T. Würtenberger, “Legitimität und Gesetz”, in: B. Rüthers/ K. Stern (eds), *Freiheit und Verantwortung im Verfassungsstaat*, 1984, 533 et seq.

<sup>54</sup> Bachmann, see note 23, 159–226.

<sup>55</sup> On the relevance of internal deficits to foreign relations, see arts 27, 46 Vienna Convention on the Law of Treaties.

tional law shows, however, that – even in the context of the state – there is no one, single way of establishing the legitimacy of the exercise of law-making authority. It follows that the simple application of the democratic nation-state model or of the private law consensus model of legitimacy cannot do justice to the diverse regulatory forms of international governance, in which private and public law meld, the degree of interference experienced by affected parties varies widely, and many different kinds of cooperations and organizations – regional and global – are affected.

As a result, in order to evaluate the legitimacy of the diverse norms in place to create order in a global world, it is necessary to take a more differentiated approach. In addressing the legitimacy question, international public law rightly examines all actions that limit the freedom of activity of other subjects.<sup>56</sup> What is required for a regulation to be considered legitimate depends, however, on whether the addressees of the regulation are other states or are individuals, on the extent to which the regulation interferes with individual rights, and on whether the authority exercised by the international institution regulates only a narrow sector of life or establishes a comprehensive system of international governance.<sup>57</sup> For the more international organizations exercise authority over individuals in a way similar in scope and intensity to that exercised by the nation-state, the greater the need to develop principles of legitimacy and protective mechanisms equivalent to those in place for state authority. Thus, for example, it is also relevant to the question of legitimacy whether the control exercised by an international organization takes place by means of binding rules, non-binding recommendations, or by means of the simple publication of information.

International norms thus require a higher degree of legitimacy when they affect the liberty rights of individuals (as with sanctions such as UN smart sanctions) than when they influence the education systems of their Member States through the publication of comparative information from the PISA study. Using criminal sanctions as an example, this kind of differentiation with regard to what is required to establish legitimacy becomes clear on the basis of the principle *nullum crimen sine lege parlamentaria*, which for the legality of criminal law – at least in its

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<sup>56</sup> A. von Bogdandy/ P. Dann/ M. Goldmann, “Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities”, in: von Bogdandy/ Wolfrum/ von Bernstorff/ Dann/ Goldmann, see note 52, 3 et seq. (11–16).

<sup>57</sup> Bodansky, see note 52, 316.

core area and in democratic states – requires a parliamentary law. This principle is derived not only from the principle of democracy but also from the principle of the separation of powers, from additional principles specific to the criminal law, and from a long history of the political abuse of the criminal law. If competences for creating criminal law are transferred by states to international organizations, the principle of the parliamentary legitimation of criminal norms (constitutionally guaranteed in Germany) must also be guaranteed and upheld – at least by means of functional equivalents – when an international organization makes criminal law. Thus, the transfer of legitimacy for the creation of criminal law from the nation-states to an international organization that is dominated by the executive and that lacks a separation of powers is not acceptable for the creation of supranational core criminal law.<sup>58</sup> In addition, problems with legitimacy transferred by the nation states to the international level can also arise in the case of coercive powers of international organizations if their authority is not defined in a concrete and static manner but rather is defined generally and dynamically (i.e., expanded over the course of time by the institutions).<sup>59</sup>

For the most part, the *consent of the Member States* suffices in *international law* as a basis for legitimacy, if this provides an effective legitimacy chain for which the national law often requires parliamentary consent.<sup>60</sup> Supplementing and expanding this picture, alternative and more flexible concepts of legitimacy can also be considered that combine the various factors and, for example, make the international insti-

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<sup>58</sup> For a general discussion of the legitimacy of criminal law measures promulgated by international and supranational organizations, see Sieber, see note 41, 50–63; for a discussion of the regulations of the United Nations Security Council, see J. Macke, *UN-Sicherheitsrat und Strafrecht – Legitimation und Grenzen einer internationalen Strafgesetzgebung*, 2010, 264 et seq.

<sup>59</sup> See Wolfrum, see note 13, 21; Wolfrum, see note 52, 920–924. On this point, consider also the principle of implied powers (Reparation for Injuries Suffered in the Service of the United Nations, ICJ Reports 1949, 174 et seq., (180, 182)) as well as the teleological development of community law by the European Court of Justice (fundamental: Case 26/62 ECR 1963, 1 *Van Gend & Loos* and Case 6/64, ECR 1964, 1251 *Costa v. E.N.E.L.*; on the “effet utile,” see Case 34/62 *Germany v. Commission*, ECR 1963, 289, 318). For a narrow interpretation of the norms establishing the competence of the European Union, see BVerfG NJW 62 (2009), 2267 et seq. (2288–2290), margin nos 360–369.

<sup>60</sup> On the relevance of internal deficits to foreign relations, see note 55.

tutions more dependent on the consent of the states, require judicial control of international institutions, place more weight on procedural rules guaranteeing fairness for the affected parties, and involve neutral expert commissions in the decision-making process.<sup>61</sup> In cases of more coercive, broader government-like structures, these aspects of throughput legitimacy are also necessary in order to develop the functional equivalents to traditional protective mechanisms in the area of state power demanded above.

In contrast, as far as *private regulation and hybrid control models* – to be discussed in more detail below – are concerned, other concepts of legitimacy are relevant, concepts that are based primarily on the consent of the affected parties and in which control of the consent of the affected parties is central for common welfare reasons. Specifically, however, it is necessary to distinguish between the various private rules. Standard business conditions are legitimized primarily on the basis of consent. Similarly, the legitimacy of codes of conduct can – as for example in labor law – derive from a corresponding consent of the affected. In other constellations, input, throughput, and output legitimacy can also be of importance if the regulations are recognized for the high degree of authority of their creators, a participatory and fair developmental process, as well as the general acceptance of their standards and values.<sup>62</sup> If norms are not binding and thus not legally enforceable, the question of legitimacy plays a lesser role than it does in the context of norms promulgated by the sovereign. These area-by-area distinctions confirm yet again the finding discussed above that the complex questions concerning global governance by international organizations and the private regulation of many single areas and conglomerate areas cannot be solved solely in accordance with parliamentary nation-state models but rather demand much more complex solutions. Thus, while the constitutions of democratic nation-states can serve – especially for broader government-like structures of international institutions – as “lodestars of a global order,”<sup>63</sup> they do not offer a generally applicable blueprint for the development of international models of legitimacy.

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<sup>61</sup> On this point, see Wolfrum, see note 13, 21–24, and – using the example of the International Seabed Authority – Wolfrum, see note 52, 923–924. On the combination of the various aspects of legitimacy and how they support one another, see Sieber, see note 41, 50–60 and part III. 3.–5., below.

<sup>62</sup> See Keller, see note 52, 261–279.

<sup>63</sup> So the terminology of von Bogdandy, see note 29, 871. For a summary, see Wolfrum, see note 13, 21–24.

This discussion confirms the fact that the factors of legitimacy and control are central questions for the development of the future order in a global world. Thus, they must also play a decisive role when, in the following, the possible models and approaches to the challenges posed by transnationalization and globalization are analyzed and evaluated.

### III. International Models for Regulation

The question as to which control systems, models, and solutions can be used to ensure not only *effectiveness* but also *legitimacy and control* can be analyzed on the basis of the transnational subjects of regulation and their legal questions, the changing control systems, and the corresponding legitimacy issues discussed here. The mechanisms employed in practice hint at the systems and models to be considered. Based on legal harmonization and comparative law (1. below), they range from the cooperative national, the supranational, and the private models to the hybrid models (2.-5.). The future order of the global world depends, however, not just on the individual subsystems used but also on their coordination (6.).

#### 1. Importance of Legal Harmonization and Comparative Law

Given the existing palette of options, problems of international applicability and enforceability of law as well as common global questions can best be solved on the basis of *legal harmonization*. For the enforceability of foreign law (e.g., in the context of mutual legal assistance), the agreement on a new, supranational law (e.g., in the framework of the EU), and the development of transnationally applicable private norms (e.g., from corporations) are more easily achieved when the relevant regulations are similar to one's own law. In many areas, jurisprudence and politics have already achieved a broad approximation of law, such as in the harmonization of intellectual property law and international criminal law. In contrast, in other areas of law, harmonization is progressing slowly as a result of the differing interests of the nation-states. This is the case in many areas of the criminal law, which is viewed as an expression of the sovereign power of the state and therefore often postulates reservations in the context of international legal assistance.

Thus, one of the important functions of legal research is to analyze the *driving forces, methods, and conditions necessary for the success of*



*legal harmonization*.<sup>64</sup> Successful approximation of law is not solely a result of comparable fundamental legal values. Rather, the interests behind legal harmonization, the political power of the actors representing these interests, and the available implementing instruments play an important role. Among the latter are “soft” non-binding methods (such as recommendations of international organizations, model codes, and simple information) as well as “hard” binding mechanisms (such as the directives of the European Union, which have been responsible for a surge in the approximation of European law). Implementation studies conducted by academics, peer-review procedures in practice, as well as the related processes of naming and shaming<sup>65</sup> have also proven to be important instruments in the achievement and evaluation of success. Relevant research on the approximation of European law and the mutual enhancement of national legal orders also includes studies on the reception of foreign law and the ways in which legal transplants are changed by the receiving legal order.

*Comparative law*, which can highlight differences and commonalities among (national and international) legal orders and identify best practices, is an essential prerequisite for successful legal harmonization. Comparative research aimed at the approximation of law or at better regulation has a strong tradition in the three major branches of law. Private law, for example, proves this with its International Congress for Comparative Law, organized in Paris in 1900, whose guiding principle was a “droit commun de l’humanité civilisée.” Of current importance are the comparative activities of the International Institute for the Unification of Private Law (UNIDROIT) in the area of civil law, the United Nations Commission on International Trade Law (UNCITRAL), the American Law Institute, and the Principles and Common Frames of Reference developed by means of comparative law for the unification of European contract law, commercial law, law on sales, consumer protection, and for other areas of European civil law. Calls for the unification of private law were made by the European Parliament already in 1989 and 1994.<sup>66</sup> A corresponding example in the area

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<sup>64</sup> On this point, see the contributions in: M. Delmas-Marty/ M. Pieth/ U. Sieber (eds), *Les chemins de l’harmonisation pénale*, 2008.

<sup>65</sup> See note 11.

<sup>66</sup> The significance of comparative civil law for these reform processes is discussed in Zimmermann, “The Present ...”, see note 17, 479–512; for a comparison of denationalized law, see M. Reimann, “Die Entstaatlichung des Rechts und die Rechtsvergleichung”, in: R. Zimmermann (ed.), *Globali-*

of criminal law is the “Corpus Juris” for the protection of European financial interests,<sup>67</sup> requested by the European Parliament and authored by criminal law scholars on the basis of comparative legal studies, which is slated for further development in 2010 and 2011 as part of the establishment of a European prosecutor.<sup>68</sup>

The significance of comparative law has increased considerably due to the *development of the EU*, especially in the creation of the European single market and the European area of freedom, security and justice. As a result, comparative legal projects and implementation studies have developed into a politically influential area of (often commissioned) research. Although the growing *acquis communautaire* of law is also greatly influenced by future-oriented legal policy decisions, it cannot be formulated, however, even in the future, on an intellectual *tabula rasa*, that is, without a conceptual, doctrinal, and substantive review of the *acquis commun*.<sup>69</sup> Thus, in the future, comparative law and legal harmonization will continue to be important prerequisites for both traditional nation-state cooperation as well as for the development of supranational solutions.

## 2. National Cooperation Models

In practice, both fundamental challenges to the transnational applicability and enforceability of law and global legal problems are solved today all over the world with the help of a *cooperation model* that defines the scope of applicability of national laws and that makes the decisions of one legal system effective within the area of jurisdiction of another legal system. This transformative function of the traditional cooperation model can be seen, for example, in national regulations regarding the

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*sierung und Entstaatlichung des Rechts*, Vol. II – *Nichtstaatliches Privatrecht: Geltung und Genese*, 2008, 1 et seq.

<sup>67</sup> First version: M. Delmas-Marty (ed.), *Corpus Juris Introducing Penal Provisions for the Purpose of the Financial Interests of the European Union*, 1997. Second, revised version: M. Delmas-Marty/ J. Vervaele (eds), *The Implementation of the Corpus Juris in the Member States: Penal Provisions for the Protection of European Finances*, 4 Vol., 2000.

<sup>68</sup> On the purpose and methodology of comparative criminal law, see Sieber, see note 2, 78–130.

<sup>69</sup> N. Jansen/ R. Zimmermann, “Restating the Acquis Communautaire?” *The Modern Law Review* 71 (2008), 505 et seq. (517); Zimmermann, “Comparative ...”, see note 17, 539–578.

recognition of foreign agency decisions as well as decisions of foreign civil, criminal, and administrative courts by means of administrative and legal cooperation. If the legal regulations and the political decisions of nation-states are designed with the same goals in mind, then new global challenges, too, can be overcome with the help of a cooperation model.

This coordination of national decisions and their transformation in another legal system are usually unproblematic if the two legal systems share the *same values and have similar legal regulations*. In contrast, the extension of the application of administrative and judicial decisions runs into difficulties if the decision of the requesting state could not have been taken in the same way in the requested state. It is particularly difficult if the decision of one state violates the *ordre public* or any other fundamental values of the other state. The law of cooperation is thus characterized to some extent by reservations and exceptions. This can be seen in criminal law in the context of traditional administrative and legal assistance with its restrictions regarding the fields of military and financial offenses, legal systems with the death penalty, and offenses committed by a country's own citizens.

The controversy surrounding the principle of mutual recognition of judicial decisions in the context of the European arrest warrant, too, shows that an effective law of cooperation, according to which the judicial decisions of one state are recognized in another, is possible only on the basis of *legal harmonization and mutual trust*. The discussion of the principle of mutual recognition of judicial decisions in civil and criminal cases – a goal of the European Union – illustrates the innovative capacity of European law in the development of new forms of interstate cooperation. This is also true of the creation of the new hybrid institutions designed to improve cooperation between national agencies (e.g., the agency Eurojust, which supports offices of the prosecutor, and the police agency Europol).

Recent studies of criminal law-related cooperation in the European Union show that the traditional nation-state cooperative model enables the transnational enforcement of law by means of a combination of the following three elements: *harmonization of law*, an effective *law of cooperation* (containing rules regarding competences and conflicts of law as well as rules of transformation), and special *institutions* created to support the cooperation. The coordination of the 27 different legal systems in the European Union clearly shows, however, that nation-state systems of cooperation can cause significant problems and losses of efficiency even if they function within the context of an economic community that has at its disposal effective instruments of legal harmoniza-

tion (by means of directives) and the ability to create a law of cooperation (e.g., by means of directly applicable regulations).

If there is a commonly defined policy, international cooperation models are also well situated to contribute to the solution of global problems. Their regulations can also easily be *legitimated* by national parliaments. In addition, cooperation models have the fundamental advantage of maintaining, to a great extent, the national *sovereignty* of the participating states and in so doing supporting the *principle of subsidiarity*. Despite these advantages, difficulties are frequently encountered in cases in which there is a lack of harmonization and unity, including the aforementioned reservations regarding the transnational implementation of national decisions as well as problems that arise due to the lack of agreement or to the difficulty of coming to agreement with regard to global solutions. Thus, cooperation models are regularly associated with a *loss of efficiency*.<sup>70</sup>

### 3. Supranational Models

The difficulties cooperation models encounter in the coordination of different national legal orders make *unified international or supranational solutions* an intriguing alternative. The supranational model with its harmonized supranational law is (as an alternative to the nation-state oriented cooperation model) characterized by a single regulatory framework created for a large territorial area encompassing several nations and by the fact that ensuing decisions (of national or supranational courts) are valid *a priori* in the entire territory. This kind of solution can be found, for example, in the uniform protection of human rights provided by the European Human Rights Convention and, for the regulation of numerous additional issues, in European Union law (e.g., antitrust law). In the EU, these supranational solutions are typically based on regulations (as in European antitrust law) that apply to the entire territory of the Union uniformly and directly. In this way, the standardized supranational law created by international institutions can be effectively implemented in a large area. It is especially suited to regulatory areas in which territorial boundaries become blurred – such as in

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<sup>70</sup> On the advantages and disadvantages of various models in criminal law, see Sieber, see note 41, 17–53.

the Internet – and a solution to the problem by means of conventional law becomes “fuzzy.”<sup>71</sup>

The supranational model is problematic, however, with regard to the *legitimacy* of supranational law, especially if the regulations promulgated by international institutions are developed by government representatives. The European Union has solved this problem with the Treaty of Lisbon, which requires the increased involvement of the European Parliament – in addition to qualified majority decisions in the Council. In this way, the European Union transfers the national (and especially the federal) parliamentary model of legitimacy – in modified form – to the supranational level. As a result, the legitimacy of European legislation today derives primarily from the affirmative vote of the European Parliament and the consent of the elected national governments in the European Council to each individual piece of European legislation as well as from the formal approval of the national parliaments to the competences in European primary legislation.<sup>72</sup> Furthermore, the directives of the European Union follow the approach – as do regulations of other international institutions (e.g., recommendations of the Council of Europe) – of strengthening the legitimacy of the developed norms – in much the same way as the cooperation model – via the parliamentary legislation of nation-states. This illustrates that the replacement of the monocentric “demos” by the polycentric “multiple demoi” leads in the transition from democracy to “demoicracy” to complex questions of constitutional law and political philosophy.<sup>73</sup>

In other international institutions, the legitimacy of international law remains questionable in some instances: this is the case, for example, when for highly intrusive measures (such as the aforementioned UN Security Council blacklists<sup>74</sup>) and for more comprehensive dynamic government structures there is neither (international) parliamentary legitimation of the supranational institutions and rules nor parliamentary implementation of the provisions by the nation-states. Thus, for most international organizations, the limited manifestation of the principles of democracy and the separation of powers in the interna-

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<sup>71</sup> See Boehme-Neßler, see note 45.

<sup>72</sup> For more details, see Sieber, see note 41, 17–22, 28–43.

<sup>73</sup> A. Graser, “‘Demoikratie?’ Konsistenzängste im deutschen Staatsrecht”, in: M. Stolleis/ W. Streeck (eds), *Aktuelle Fragen zu politischer und rechtlicher Steuerung im Kontext der Globalisierung*, 2007, 77–96. See also BVerfG, see note 59, 2267–2295, 2279–2280, margin nos 289–297.

<sup>74</sup> See note 36.

tional arena is insufficient to establish a degree of legitimacy comparable to that associated with traditional parliamentary law-making.<sup>75</sup> If, however, regulation by international or supranational organizations does not involve extensive governance but rather entails only static or less invasive measures, the consent of the Member States, discussed above, can still establish an effective chain of legitimacy. The above-mentioned alternative concepts of legitimacy should be taken into consideration in this process.<sup>76</sup>

Due to the state's monopoly on the use of force and the limited authority of international organizations to employ coercive measures, supranational models are confronted with the *additional* challenge of how they can be *enforced coercively* in the still-existing, sovereign-protected territories of nation-states. Supranational systems (such as international criminal law and, to some degree, European law) often draw on the enforcement mechanisms of nation-states. This is the case, for instance, when arrest warrants issued by international courts are enforced by nation-states and when the European antitrust authority must file its search warrants with national courts. It is not the case, however, when the European anti-fraud office OLAF itself examines witnesses. Nonetheless, international organizations are also increasingly evolving independent enforcement and sanctioning systems, such as the above-mentioned process of "naming and shaming."

Thus, supranational models can be considerably more *effective* than transnational cooperation models. The political dilemma associated with supranational models, however, which goes beyond the question of legitimacy, is that nation-states must essentially *give up their sovereign rights*. Thus, supranational models can well be employed by closely connected communities legitimated by parliament within the framework of the subsidiarity principle to address supranational problems that cannot be resolved at the national level. They are also indispensable as a peacekeeping tool at the level of the United Nations – whereby this level is in serious need of reform. In the future, supranational models – primarily in the form of hybrid cooperative and supranational systems – will become increasingly important in practice as traditional cooperation systems based on the subsidiarity principle are augmented with (only) those supranational elements of the justice sys-

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<sup>75</sup> See Graser, see note 73, 80–96.

<sup>76</sup> See part II. 5 and see note 61.

tem that are necessary to overcome specific and empirically-proven co-operation problems.<sup>77</sup>

#### 4. Private Rule-Making

In contrast to the sovereign forms of rule-making, the private control mechanism discussed above has the advantage that it affords the civil society the *freedom necessary for regulations* that are narrowly tailored, flexible, quickly realizable, and not limited by the boundaries of nation-states.<sup>78</sup> Issues of legitimacy, the fair balancing of interests, justice, and the enforceability of decisions are more complicated, however, in the context of private regulations than they are in the context of intergovernmental or supranationally-created sovereign legal rules.

As a result, the autonomous self-regulation of groups as well as regulation by markets raise not only the question of *legitimacy*<sup>79</sup> but also – even in the case of purely *national, private rule-making* – the question of whether there are legal and extra-legal *control mechanisms* to guarantee the adequate protection of affected persons, businesses, as well as other interests (e.g., the environment). Thus, in the interest of the common welfare, systems of technical, economic, social, and scientific self-regulation must be coupled with control mechanisms and mechanisms to ensure their legitimacy similar to the measures developed by private law in the control of general business conditions.<sup>80</sup> The necessary legitimacy and control of private regulations can be established either by the private regulatory systems themselves (e.g., with a fair election of decision-makers by the affected parties or by means of their contractual agreement) or *externally* by means of state law (e.g., with control and recognition procedures of the nation-states). In many cases, a combination of these two legitimating techniques is adopted, using elements of consent and common welfare. This kind of combined protective concept can result from a consensual procedure of the affected parties under the supervision of the state or other institutions. Other possibilities include procedures in which the state has a say or in

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<sup>77</sup> On this concept, see Sieber, see note 41, 45–49.

<sup>78</sup> Sieber, see note 22, 324–326; Sieber, “Compliance ...”, see note 25, 474–476.

<sup>79</sup> See part II. 5.

<sup>80</sup> M. Vec, “Das selbstgeschaffene Recht der Ingenieure”, in: A. Héritier/ M. Stolleis/ F. Scharpf (eds), *European and International Regulation after the Nation State*, 2004, 93 et seq. (111–112).

which the state subsequently recognizes a privately developed norm. In this way, new forms of self- and co-regulation emerge in which auto-poietic private systems are combined with state law.<sup>81</sup>

An additional question arises on the *transnational* level, namely, who should *take over the functions fulfilled by the state on the national level* with respect to the issues of legitimacy and control (for example in the creation of a transnational, non-state labor law). While in a global world non-governmental organizations have taken on important complementary functions, they are hardly in a position to provide broadly for the public welfare.<sup>82</sup> Individual nation-states and especially hegemonic powers are also not ideal guards of the common global welfare. International organizations themselves, especially those outside the European Union, suffer from deficits in their legitimacy. The principles of democracy, separation of powers, rule of law, legal protection, and civil rights, whose loss of influence parallels the retreat of the nation-state, do not automatically reappear on the international level. Thus, they must be guaranteed by means of other mechanisms.<sup>83</sup>

## 5. Hybrid Forms of Rule-Making

Due to the problems discussed above, none of the aforementioned ideal types of international rule-making can be considered the only viable contender. Depending on the region and problem at issue, *tailor-made solutions* as well as *hybrid and combined forms* of the models discussed above can be found in practice. This is true of the blending of international and national systems, of cooperation models and supranational models, as well as of state and private regulatory systems. There are numerous relevant examples: international criminal law, for example, has developed hybrid tribunals (most recently in Cambodia) that combine international elements with the significant participation of the national justice system exercising territorial jurisdiction. The European Union is based on a cooperation model, which over time has been enriched with more and more supranational subsystems. The United Nations and the International Committee of the Red Cross are currently negotiating with private military and security agencies with regard to the governance of international private military operations. In the

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<sup>81</sup> Sieber, "Compliance ...", see note 25, 460–463, 481–483.

<sup>82</sup> Tomuschat, see note 10, 46–52.

<sup>83</sup> Tomuschat, see note 10, 36–44.



criminal law context, economic crime is prosecuted in the European Union by national criminal justice systems, which, thanks to supranational requirements and hybrid institutions (such as Eurojust), are coordinated and in certain areas supplemented by supranational subsystems. Both the United States and Italy combine in highly innovative ways involving co-regulation the state's criminal justice system with private compliance regimes: a company that has implemented a compliance regime will receive a lighter sentence if at some point crimes are committed.<sup>84</sup> The aforementioned international governance of banks by the Basel Committee on Banking Supervision is also based on a public-private partnership. As far as the private compliance of businesses is concerned, the private law provides for advantages if certain measures of self-regulation are fulfilled. These kinds of hybrid forms of governance can take advantage of certain aspects of one regulatory system and avoid other less appealing aspects of the system by selecting elements of another model.<sup>85</sup>

Specific problems also accompany the legitimation and constitutional control of these hybrid control systems. Not only does the question arise as to the extent to which protective mechanisms of the national constitutional law – developed for activities carried out by the state – are applicable to private organizations and hybrid state-private organizations on its own territory, the problem of the application of these kinds of national control mechanisms to activities conducted by private foreign organizations must also be addressed.<sup>86</sup> Thus, the need for research in the areas of legitimacy, enforceability, and control of *transnationally-effective non-state regulations* is great.

The combination and blending of the various forms of rule-making as seen in the hybrid models are used in practice to shape much-needed solutions to concrete problems. In any case, legal and social control based on the simple *pyramidal model* of the relationship of nation-state and citizen is no longer possible in the global world but rather requires a *complex network* of various regulatory orders and instruments.<sup>87</sup>

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<sup>84</sup> For general remarks on this point, see Sieber, see note 25, “Compliance ...”, 461–496.

<sup>85</sup> On the combination of international models, see Sieber, see note 41, 28–63.

<sup>86</sup> C. Engel, “Hybrid Governance Across National Jurisdictions as a Challenge to Constitutional Law”, *European Business Organization Law Review* 2 (2001), 569 et seq. (577–583).

<sup>87</sup> On this point, see F. Ost/ M. van de Kerchove, *De la pyramide au réseau?*, 2002.

## 6. Order in the System as a Whole

The normative order in the global world consists of a large number of subsystems that are structured and legitimated in different ways. Due to this fragmentation of subsystems, the legal order in a global world requires contemplation not only of the conception of sectorial legal regimes but also of the *normative order of the system as a whole*. Clarification is necessary, both with regard to competition among the various legal sub-orders as well as with regard to the principles employed to *prevent conflicts of norms and values*.

These questions are relevant not only in the context of inter-national conflicts but also in the context of inter-systematic conflicts between various types of regulation. This is because national, international, and supranational norms, transnational private regimes, indigenous norms of regional cultures, as well as differing social conventions from various backgrounds collide in the global world.<sup>88</sup> Centrifugal as well as centripetal forces play a role in the development of and competition among these system: whereas national legal systems are becoming more and more alike under the influence of international law, at the same time in the system of worldwide norms as a whole, new *functional distinctions* are developing that are overlaying the traditional *national differences* in law and leading to new conflicts in a polycentric world.

These conflicts between differing – national and functional – legal regimes are inherent to a pluralistic global order. This is apparent already in the case of separate – and prone to conflict from the get-go – regimes of economic protection and environmental protection rules, of (national or international) human rights guarantees and humanitarian law (law of war), as well as in the context of the universal law of the sea and regional laws of fisheries. Conflicts also develop when global Internet ICANN regulations clash with traditional national rules of civil law and when international intellectual property law and decentralized customary law for the protection of local knowledge conflict. The conflict between state law and religious and cultural norms has already been illustrated on the basis of “honor killings” and the fatwa imposed on the occasion of the Mohammad cartoons. A conflict of values between religious and secular law could also be seen, in the Christian world, when the law of the state sought to punish the sexual abuse of children by means of the criminal law and the – globally applicable – law of the Catholic Church was more disposed to secrecy. These conflicts are of-

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<sup>88</sup> Teubner/ Korth, see note 24, 137–168.

ten manifested both on the level of substantive law as well as on the institutional level (especially the courts).<sup>89</sup> Given the variety and the sheer number of quasi-autonomous systems, legal unity, homogeneity, and a hierarchy of norms are no longer possible; this situation can be contrasted to the situation as it was in the national law context. Legal uniformity can even be seen as a threat to a pluralistic legal culture.

The Vienna Convention on the Law of Treaties and the canon of the traditional rules of priority as expressed by the Latin maxims *lex specialis*, *lex posterior*, and *lex superior*, taken alone, are equally unable to *prevent inconsistencies in norms and values* in a global world.<sup>90</sup> Additional collision rules that take into consideration the nature of the regulations, their place in society as a whole, and their legitimacy are necessary. Corresponding principles can only be mentioned briefly here: the nature of the regulation, for example, is important with regard to social norms whose status as law is debatable so that the very existence of a conflict with state law is questionable. The place of norms in society as a whole is relevant, for example, when national legal provisions take priority over specialized transnational regimes because the former are based on a comprehensive balancing of interests within the framework of a position within an entire society whereas specialized, self-contained regimes often suffer from tunnel vision, i.e., they regulate only a narrow section of social life and do not take competing interests into consideration.<sup>91</sup> The perceived lack of legitimacy of private regulations can lead to their non-observance; this may be the case, for example, if they were established without input from affected parties and thus do not become part of common usage.

While transnational private regimes and indigenous norms can collide with state and international norms, they can also be integrated by them – e.g., via blanket clauses – leading to the emergence of new substantive norms. Parallel norm systems with differing backgrounds can thus join and permeate one another in many ways without growing into a uniform “regional” or “world” law. The worldwide enforceability of ICANN policies as a global *lex digitalis* and as part of national legal systems is an example of this kind of interweaving.<sup>92</sup> In practice, how-

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<sup>89</sup> On this point, see the example at note 35.

<sup>90</sup> On this point, see ILC, “Fragmentation of International Law, Report of the Study Group of the International Law Commission”, edited by the United Nations General Assembly, 2006, 247.

<sup>91</sup> See Teubner/ Korth, see note 24, 137–168.

<sup>92</sup> On this point, see Teubner/ Korth, see note 24, 137–168.

ever, not only legal questions but also economic interests, political problems, and claims to power are at issue in many cases.

Pluralism and the fragmentation of law need not necessarily be disadvantageous for the system as a whole but rather may present an opportunity – just as the existing plurality of state legal systems has done. If the legitimacy of the fragmented systems is guaranteed and appropriate collision rules are developed, the fragmentation of the various subregimes can also lead to a new separation of power in the emerging complex, multi-level system of world law, a situation preferable to a despotic world federation.<sup>93</sup>

A prerequisite for the positive evaluation of such a system as a whole is, however, not only the successful integration of the various orders at least in individual cases; rather, the compatibility of the central value decisions of their constituent subsystems is essential for an integration of the various regimes – just as in the case of cooperation among national legal systems. This is especially true for questions of human rights protections and the aforementioned question of legitimacy and control; thus, these issues must be central to future interdisciplinary and comparative legal research.<sup>94</sup>

#### IV. Challenges to Basic Research

The discussion above shows that current research on the legal order in a global world can present not only a clear picture of the changed subjects of regulation, the legal questions, and the control systems but can also offer theory-driven and praxis-oriented models for future regulation. Up to now, research findings indicate clearly that more in-depth results could be achieved on the basis of fundamental research that is interdisciplinary, international, and comparative. These future research needs will be specified in the following with regard to subject matter, goals, methods, and potential gains.

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<sup>93</sup> On this point, see von Bogdandy, see note 29, 872.

<sup>94</sup> On this point, see E. de Wet, “The International Constitutional Order”, *ICLQ* 55 (2006), 51 et seq.; Wolfrum/ Röben, see note 13.

## 1. Research Subject

The many and varied problems of the legal order in a global world can be divided for future research purposes into *separate areas*: the activities subject to regulation, the relevant legal questions, the normative control systems, and the development of new problem-solving models.

Two types of problems, identifiable by the catchwords “transnational” (or, if states are involved, “international”) and “global,” can be distinguished in each of these areas: first, transnational or international activities, legal questions, regulations, and cooperations arise on a *cross-border level*. These have to do primarily with *relationships among individual states or their territories*. These transnational problem areas have existed in law for some time but have grown significantly in quantity in the global society. The quantitative changes in cross-border or transnational problems turn into qualitative changes when problems encountered on the – second – *global level* immediately affect a supranational area or can only be solved with the assistance of globally effective – state or non-state – control systems.

This is not the place to discuss in detail the fact that in many cases these levels are blurring – just as are many other categories of the global world. The question can also be left aside of whether the changes on the two levels can both be characterized by the concept of the globalization of law or whether – as here – a distinction should be made between the terms “transnationalization (or “internationalization”) and “globalization.”<sup>95</sup> Another issue that cannot be discussed is the extent to which transnationalization (or internationalization) and globalization in comparison to a (to be defined!) point in history are “new” or whether the issue here is only a quantitative development.<sup>96</sup> For future research, it is more important that transnational and global changes pose *similar challenges* to the legal order in the world society so that these processes, in light of their actual changes, their legal questions, their control systems, and, above all, the development of new global solutions, must be exam-

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<sup>95</sup> Regarding such questions and the internationalization of the economy as a prerequisite for globalization, see R. Birk, “Globalisierung und Entstaatlichung des Rechts – Fragestellungen und Entwicklungen am Beispiel des Arbeits- und Sozialrechts”, in: J. Schwarze (ed.), *Globalisierung und Entstaatlichung des Rechts*, Vol. I, 2008, 3 et seq. (4–6).

<sup>96</sup> On this point, see Héritier/ Stolleis/ Scharpf, see note 40, 9. Instructive on this point, P. Häberle, *Verfassungsvergleichung in europa- und weltbürgerlicher Absicht*, 2009, 262.

ined comprehensively. Thus, the research subject of future studies should be broadly defined, at least in a preliminary working hypothesis, and all transnational and global aspects should be included to the same extent.

## 2. Research Goal, Research Fields, and Research Questions

### a. Research Goal

In light of the complexity of the research subject, future basic research on the legal order in a global world must synthesize numerous findings on individual aspects into a *comprehensive theory*. Only this kind of synopsis of many isolated questions and isolated answers offers the possibility of providing answers to the “big” challenges and the so-called “questions of the century.” By employing a systematic approach, fundamental knowledge can be gained and the solution of concrete social problems achieved, for example by posing the following question that brings together the questions discussed above:

*How do transnationalization and globalization change the subjects of regulation, the legal problems, and the normative control systems, and with what systems, models, and solutions can social order be established, legitimated, and controlled under these circumstances?*

### b. Research Fields and Special Questions

The following *research fields and special research questions* derive from the question posed above:

a) The *first research field* addresses *changes in the legally regulated subject matter* and the resulting *contextual problems of law*. In this research field, the following questions arise for all three major branches of law: which factual changes that have taken place are decisive for the new transnational and global challenges to law? What are the new legal problems posed by transnationalization and globalization? To what extent are these questions the same in the three major branches of law and how do they differ?

b) The *second research field* encompasses the changes transnationalization and globalization cause to the *normative control systems*. Relevant problems here include the following: what national, international, supranational, and private regulatory systems have developed? Who are the actors and what are the interests behind these changes? To what ex-

tent have there been norm and value conflicts among the various regulatory systems? Which norms should be accorded the moniker “law” and the ensuing ability to create conflicts of law? How do institutions that engage in cross-border activities develop? Are the new control systems in fact influenced not only by the transnationalization of the subject matter and legal systems but also by other agendas such as the expansion of hegemonic power claims, for example, with a “government through crime” (as could be the case in the efforts to protect intellectual property, in the European-American exchange of SWIFT bank data, in international anti-corruption and anti-money laundering efforts, and in the establishment of international criminal tribunals and fact-finding commissions by the United Nations)? Why do the harmonization of law and the coordination of various legal orders succeed in some areas and not in others?

c) The *third research field – central for legal policy* – involves the *analysis, evaluation, and optimization of the newly developed control systems* with a view to a legitimate, just, and effective regulation of transnational and global activities. Questions such as the following can be posed in all three major branches of law and in the social sciences: which models and concepts can solve these new challenges? What are the requirements for application and what are the advantages and disadvantages of the various national, international, supranational, and private control systems, models, and concrete proposals? Do these systems have common requirements? Which of the various state and non-state systems are appropriate for which regulatory issues? How can these subsystems be synthesized into an effective, comprehensive system? What kinds of national and “post-national” constitutions, “constitutionalizations,” and other forms of “(inter)national governance” can be used to develop or stabilize the European Union, other regional conglomerates, and disintegrating states (e.g., those in the territory of the former Yugoslavia or in Africa)? To what extent do the new international and private control instruments consider the interests of participants, to what extent are they sufficiently legitimated, and to what extent do they achieve just solutions? How do the various regulatory systems affect one another? How can the norm and value conflicts that are the result of the fragmentation of law into global multi-level systems be solved? What problems can no longer be solved on a national but only on an international level, and what mechanisms and models are there for this kind of solution? How does globalization affect the existing realization of the principle of democracy? How can the various normative systems be legitimated outside the nation-state? How are human rights,

consumers, common welfare interests, and the rights of local minorities protected in international systems? To what extent must the decision-making structures and the law in the European Union be unified in order to enable the Union to compete with other regional powers? Should the necessary European harmonization processes be implemented or promoted by means of regulations, directives, and other “hard” instruments or by means of the simple exchange of information, model codes, and other “soft law” instruments? Which cooperation systems and international mechanisms can be recommended for the resolution of concrete problems, such as the prevention of the dangers posed by international terrorism, the new asymmetric wars, and failed or failing states?

### 3. Research Methods

The above examples show that the fundamental questions posed are of *great practical relevance* to numerous concrete regulatory problems. The practical consequences of the fundamental questions regarding the legal order in a global world reach from the future development of the European Union, the creation of a European Civil Code, and international peacekeeping to the international regulation of banks, private military operations, and biological research to international regulation of climate protection. These questions affect all national and international legal systems. They encompass private law, public law, criminal law, and private and hybrid regulations equally.

An answer to these practical questions is possible only on the basis of comprehensive *basic research*. In light of the blurring of the borders between the three traditional branches of law, between state and non-state, as well as between legal and social approaches, research must be conducted in *interdisciplinary cooperation* involving the three branches of law, their major subject areas, as well as the social, political, and economic sciences. In contrast, purely legal research conducted without the insight of the social sciences could establish normative models but could make no broader scientific statements about social cause-effect relationships between problems and solutions in law. Thus, a decisive added-value of legitimacy, acceptance, and effectiveness of law in the global world emerges only in that normative findings – based on the comparison and evaluation of systems of law – and social-scientific interrelationships – studied empirically – are brought together.

In addition, *international* cooperation is necessary. This interdisciplinary and international scientific reflection on research questions is



complicated by the fact that various disciplines of the human sciences, various disciplines of law, national approaches, and scientific traditions converge and perhaps clash with one another. Continental European (legal) science is based on a systematic and rational approach. Anglo-American legal tradition, in contrast, is more pragmatic and – perhaps as a result of its more limited doctrinal design – very innovative. Thus, the differing traditions and the specific questions of the various subdisciplines must be brought together.

#### 4. Research Gains

Finally, future research should develop a *theory of the legal order in a global world*. Not only can such a theory shed new light on the fundamental issues of our time, it can also provide new answers to pressing social questions of the present and future.

In view of the expected theoretical and practical gains, three areas of basic research appear especially promising: further analysis of *legitimacy, control, and acceptance of non-state (international and private) norms* can supply an important contribution to a more just order in a global world and serve as the basis for better models of international and supranational governance.<sup>97</sup> The in-depth comparative study of the various *models for the creation of transnationally effective regulations* promises more effective regulation by the various national and international institutions.<sup>98</sup> The increased inclusion of non-state (especially private) rule-making and the possible *connex of non-state and state regulation in the form of co-regulation* may well lead to the unburdening of the legal system and may bring forth forms of control that are much more effective than the purely law-based control systems that have been in use up to now.<sup>99</sup>

Thus, new insights regarding the complex questions of the legal order in a global world will be generated less in the core areas of traditional disciplines and more in the interdisciplinary boundary areas of the various subdisciplines of law (private law, public law, and criminal law), sociology, legal anthropology, and criminology as well as in comparative international research.

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<sup>97</sup> On this point, see the references in notes 45–80.

<sup>98</sup> See the reference in note 70.

<sup>99</sup> On the link between national economic criminal law and private compliance measures, see the reference at note 25.