

Foreword

Rough Consensus & Running Code is a provocative and important book. Thinking about law often is based on the assumption of a national state that provides legitimacy through political institutional authority, democratic accountability and established enforcement procedures. The authors look at transnational transactions where national states operate through “soft law” or where national states are missing almost entirely or play a very reduced role.

Rough consensus and running code (RCRC) is a concept drawn from the process by which technical standards were developed for the Internet. A nongovernmental organization put forth proposals and asked for comment. The chair announced that a rough consensus had been reached when there was a more or less common core of agreement. The standards were modified as experience suggested future improvements. The process involved “the gradual codification and implementation of law dependent on the consent of the addresses of the norms.”

The authors offer several case studies where they see something similar to RCRC operating. They look at the establishment of large-scale “word of mouth” networks on the Internet where potential buyers have access to formalized systems for reporting sellers’ reputations. They look at transnational corporate governance, and particularly European approaches, where there is “the unavoidable collision of public, private and hybrid, ceaselessly evolving norm making processes that arise between regulatory arenas populated by actors inside and outside of the nation state.”

The authors insist that “law” can be but need not be state-originated, and it can be but need not be privately created or result from a complex interaction between official and unofficial norm-creation. Legitimacy is a major problem. Transnational legal principles are “legitimated not by the authority under which they have been issued but rather from their inherent rational content.” The authors insist that they are talking about norms, practices and institutions that are properly called “law.” Even if others want to limit the term “law” to normative arrangements, practices and institutions that are part of state action, any theory about law that claims connection to the world must deal with these new regulatory frameworks that exist both inside and outside the regulatory state.

Many of us have called for a new legal realism where we focus seriously on the law in action. *Rough Consensus & Running Code: A Theory of Transnational Private Law* is an important and major step in this direction.

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Preface

This book explores questions of legal theory, philosophy of law as well as legal sociology in the context of a fast evolving transnational regulatory landscape. Aiming to contribute to the theoretical debate on the theme of 'global governance', our project draws on research in transnational law, legal pluralism, new institutional economics, economics of governance, social norms theory and new economic sociology. Starting from the premise that a legal theory of global governance must inevitably grow out of an interdisciplinary inquiry into the relationship between legal and non-legal market regulation, one of the central aims of the book is to make more transparent the methodological challenges facing contemporary legal theory in addressing transnational regulatory phenomena. It will thus begin with a reconstruction of the emergence of the concept of transnational law, as introduced by Phillip Jessup in the 1950s and subsequently follow its development in the context of a fast-evolving and extremely rich set of theoretical approaches to the study of transnational regulation. Against this background, we will discuss both the aspirations and shortcomings of existing approaches to the study of transnational regulatory phenomena, including *lex mercatoria*, transnational commercial law and global governance before suggesting a particular methodological approach, entitled 'Rough Consensus and Running Code' (RCRC). After offsetting this approach from its first use in the context of Internet governance, we apply RCRC to two important areas of transnational commercial activity, consumer contracts on the one hand and corporate governance on the other. While we suggest an interdisciplinary approach as both a necessary and inevitable precondition for the development of transnational legal theory, we argue against a fusing of different disciplinary approaches into a purportedly superior meta-theory. Instead, the hope is, by carefully assessing the theoretical proposals brought forward in the contemporary debate, to provide for a better understanding of the nature and role of legal regulation in the context of emerging regulatory models from a transnational perspective. As a result, the book does not sit exclusively within a particular doctrinal framework nor does it decidedly side with one or other of the theoretical proposals that have been developed in response to the challenges to law arising from global governance. Rather, as a contribution to the study of law in the 'post-national constellation' (Habermas), the book will likely upset a number of traditionally held views about the nature and scope of law, about its relation to the state and about the prospects—may they be dire or utopian—for legal regulation. While we do not purport to develop a coherent, unified theory of 'law

beyond the state' we ultimately hope to contribute a number of distinct elements towards ongoing projects that are concerned with the study not only of transnational law as concerned with border crossing regulation, but of the nature of legal regulation in a highly differentiated world society. We understand transnational law primarily as a *methodological* perspective rather than as a demarcated substantive field of law. While we think that every field of law is in fact at the core an expression of a specific methodological programme by which we arbitrarily/decidedly distinguish between, say, contract and property, labour and corporate, or 'public' and 'private' law, transnational law offers, in fact, a particularly rich set of opportunities to explore the methodological architecture that leads to the constitution of legal fields. With transnational law continuing to occupy a space which, from a doctrinal view, is neither captured by private international law ('conflict of laws') nor by public international law ('international law'), this situation presents a welcome opportunity to engage in a series of investigations into evolving regulatory frameworks ('transnational law regimes'), which serve as exemplary case studies in the illustration of the ambivalent form of law today. The study of concrete rules and instruments in the areas of contract law and corporate governance highlighted here should allow the reader to better grasp the connection between the way in which a particular legal framework is evolving and the larger transformation of regulatory entities and processes in both spatial and temporal dimensions.

The starting observation is that today law has become distinctly and irreversibly transnational. It is no longer a choice for the study of law to so 'localise' a rule or instrument as to effectively isolate it from its embeddedness in a hybrid, simultaneously domestic and 'trans'-national regulatory landscape. As such, *transnational law as methodology* formulates a much richer and more ambitious claim than most comparative lawyers, after decades of frustration with the field's struggles for recognition in the academy, would venture to imagine. Transnational law's claim is to understand law as part of a radically opened up regulatory and normative space. This space, constituted by fields of legal, economic, political, cultural consciousness and practice, cannot adequately be depicted by a legal methodology that compares law in, say, jurisdictions A and B—even when the comparatist recognises the intricate dynamics of mutual influences between both jurisdictions, through the identification of 'transplants' or 'migrations' of legal principles. Transnational law—as methodology—picks up on past and present contestations of the relationship between law and society and unfolds these anew in the context of an interdisciplinary assessment of governance models in a global world. Whether law, in a dramatically disembedded global institutional environment, can provide reliable yardsticks for different forms of conflict resolution and power struggles, remains a pressing issue. Learning from early attacks on law's formality by legal sociologists as well as from lasting contestations of law's autonomy by Legal Realists,

cultural theorists and Law and Society scholars on both ideological sides (*legal pluralism*, but also *law and economics*), we suggest transnational law as a perspective from which to study law as a particular and yet immensely layered and complex series of arguments about normative arrangements. In a highly differentiated world, however, such normative arguments can no longer simply be put forward from ‘universal’ or ‘objective’ vantage points: instead, law appears increasingly functional. From such a perspective, legal arguments constitute a particular social communication, which is occurring in a myriad of highly specialized contexts. On this basis, transnational law provides for a lens through which to study legal structures and their relation to alternative forms of normativity. Transnational law provides a space to inquire into the dynamics of neutralization and re-politicisation of regulatory governance through a critical scrutiny of law’s self-proclaimed legitimacy. Such inquiry takes place in light of sobering accounts of law’s exhaustion and ineffectiveness—in the face of de-territorialised, ‘global’ regulatory challenges. Fields such as transitional justice, environmental law or ‘global administrative law’ and concepts such as ‘regulatory capitalism’ or ‘global legal pluralism’ have in recent years become powerful illustrations of the need to study law in a transnational context and for a recognition of law and regulation as being part of an irreversibly trans-jurisdictional search for adequate means to address common and border-crossing concerns. As the economic crisis of 2007–2009 and its embeddedness in a tragically mis-regulated financial system makes abundantly clear, the need to develop adequate transnational legal models will only become more urgent in times to come. It is against this background that we engage in a reflection on the transnational challenge to law regarding two highly prolific and pertinent regulatory areas in the hope of being able to carve out some distinct elements that a transnational legal theory would have to consider.

Such an undertaking is itself embedded in a variety of spaces and times. In the attempt to duly recognise the tremendous inspiration and support we received when working on this study, we would like foremost to acknowledge the ideal settings found at the Collaborative Research Centre (CRC) 597 ‘Transformations of the State’ at the University of Bremen, where the major part of the book was written over the course of three summers (2006–2008). The CRC is itself a telling illustration of the inevitably interdisciplinary context in which such a study must take place and from which its authors have continuously drawn and received inspiration, orientation and critical feedback. The generosity of the CRC’s Director/Speaker, Professor Stephan Leibfried, in inviting both co-authors to spend their first of three summers at the Centre for a period of concentrated research and writing, is significantly matched by his sensitivity to fruitful collaborations, intellectual networks and forward-looking and courageous mapping and exploration of themes. We would like to express our appreciation and gratitude to Professor Leibfried and to the German Research Council (*Deutsche*

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Graf-Peter Calliess & Peer Zumbansen
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