

Mediating Contestations of Private, Public and Property Rights in Corporate Capitalism

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Picciotto, S., 2013. Mediating Contestations of Private, Public and Property Rights in Corporate Capitalism. *Oñati Socio-legal Series* [online], 3 (4), 622-646. Available from: <http://ssrn.com/abstract=2340587>



Abstract

The law and lawyers have played a key part in creating the concepts and institutional forms of corporate capitalism in the past century and a half. Legalization has been playing an equally central role especially in the recent decades in forming the institutions of the new global governance. What has been constructed is a corporatist economy, in which highly socialized systems of economic activity are managed in forms which allow and indeed facilitate private control and appropriation. Yet they are very different from those of the 'market economy' envisaged by classical liberal philosophy and political economy. Although the state and the economy appear as separate spheres, they are intricately interrelated in many ways, especially in the definition and allocation of property rights, and in extensive state support and interventions, which play a determining role in investment and profit rates. Working at the interface of the public and private in mediating social action and conflict, lawyers have played a key role in constructing corporatist capitalism, and are central to its governance and legitimation. This is also due to lawyers' techniques and practices of formulating and interpreting concepts and norms which are inherently malleable and indeterminate, which provide the flexibility to manage the complex interactions of private and public. These techniques and the lawyers who deploy them have also been central both to the construction of the classical liberal system of interdependent states, and during the current period of its gradual fragmentation and the transition to networked regulation and global governance.

Key words

Law; sociology; economics; history; lawyers; corporations; capitalism

Article resulting from the paper presented at the workshop *Law, Contestation, and Power in the Global Political Economy* held in the International Institute for the Sociology of Law, Oñati, Spain, 7-8 June 2012, and coordinated by Edward S. Cohen (Westminster College) and A. Claire Cutler (University of Victoria).

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Resumen

La ley y los abogados han desempeñado un papel decisivo en la creación de los conceptos y las formas institucionales del capitalismo corporativo en el último siglo y medio. La legalización ha estado desempeñando así mismo un papel central, sobre todo en las últimas décadas, en la formación de las instituciones de la nueva gobernación global. Lo que se ha construido es una economía corporativista, en el que los sistemas altamente socializados de la actividad económica se administran en formas que permiten, y de hecho facilitan, el control y la apropiación privada. Sin embargo, son muy diferentes de los de la 'economía de mercado' previsto por la filosofía liberal clásica y la economía política. Aunque el estado y la economía parezcan esferas separadas, están íntimamente relacionadas entre sí en muchos aspectos, sobre todo en la definición y asignación de los derechos de propiedad y de un amplio apoyo del Estado y de las intervenciones, las cuales juegan un papel determinante en la inversión y las tasas de ganancia. Al trabajar en la interfaz de los sectores públicos y en la mediación de la acción social y el conflicto, los abogados han desempeñado un papel clave en la construcción del capitalismo corporativista, y son fundamentales para su gobernabilidad y legitimación. Esto se debe a las técnicas y prácticas de los abogados en la formulación e interpretación de conceptos y normas que son inherentemente maleables e indeterminados, y que proporcionan la flexibilidad necesaria para gestionar las complejas interacciones de lo privado y lo público. Estas técnicas y los abogados que los despliegan también han sido fundamentales en la construcción del sistema liberal clásico de los Estados interdependientes, así como en el actual período de su fragmentación gradual y la transición a la interconectada regulación y gobernación global.

Palabras clave

Ley; sociología; economía; historia; abogados; corporaciones; capitalismo

Table of contents

1. Introduction.....	625
2. Globalization and legalization	625
2.1. Perspectives on the role of law.....	625
2.1.1. Law in heterarchy.....	627
2.1.2. Lawyering practices	629
2.2. Law and power, property and the State.....	631
2.3. From transnational corporatism to networked governance.....	633
3. Constructing global governance	635
3.1. Legal creativity, interpretations and interactions.....	635
3.2. Legal legitimacy and its limits	636
3.3. Technocratic governance and democratic dilemmas	639
Bibliography	642

1. Introduction

The law and lawyers have played a key part in creating the concepts and institutional forms of corporate capitalism in the past century and a half. Legalization has been playing an equally central role especially in the recent decades in forming the institutions of the new global governance. This paper, largely based on the final chapter of my book (Picciotto 2011) with some revisions and additions, will evaluate some of the main theories and debates about this role of law, and put forward my own perspective, in the light of the accounts and analyses put forward in the main chapters of the book.

The general argument is that what has been constructed is a corporatist economy, in which highly socialized systems of economic activity are managed in forms which allow and indeed facilitate private control and appropriation. Yet they are very different from those of the 'market economy' envisaged by classical liberal philosophy and political economy. Although the state and the economy appear as separate spheres, they are intricately interrelated in many ways, especially in the definition and allocation of property rights, and in extensive state support and interventions, which play a determining role in investment and profit rates.

Working at the interface of the public and private in mediating social action and conflict, lawyers have played a key role in constructing corporatist capitalism, and are central to its governance and legitimation. This is also due to lawyers' techniques and practices of formulating and interpreting concepts and norms which are inherently malleable and indeterminate, which provide the flexibility to manage the complex interactions of private and public. These techniques and the lawyers who deploy them have also been central both to the construction of the classical liberal system of interdependent states, and during the current period of its gradual fragmentation and the transition to networked regulation and global governance.

2. Globalization and legalization

2.1. Perspectives on the role of law

The role of law and lawyers in global governance has been analyzed in very different ways. One influential group of American commentators has discussed the legalization of world politics from an essentially Weberian perspective, which sees law as providing predictability and certainty through a framework of clear rules regarded as binding (Goldstein *et al.* 2001). They assess the extent of legalization along a spectrum according to three criteria: being based on rules which are regarded as binding, which are precise, and the interpretation of which has been delegated to a third party adjudicator (Abbott *et al.* 2000, p. 404-6). This has been criticized as taking a narrow view of law (Finnemore and Toope 2001), and it has been pointed out that there is a need to take account of divergent views of the epistemic relevance of legalization, and to re-frame the debate to include processes of 'complex legalization', involving a wider range of participants (Brütsch and Lehmkuhl 2007, p. 21-27).

Interestingly, these three proposed characteristics of formal legality are rarely found in combination. In particular, rules which are considered binding are often not precise. Formal obligations, especially in international law, are usually expressed in abstract terms, establishing general principles for the long-term, and aiming for wide acceptance. Hence, provisions in formally binding multilateral treaties are often indeterminate and open to interpretation. Many such examples can readily be found, in virtually every aspect of legal regulation (see generally 2011, *passim*). In particular, even a cursory study of the extensive provisions of the World Trade Organisation (WTO) agreements shows the ample scope for interpretation inherent in the rules of these treaties, although they are both formally binding and subject to third party adjudication. Such indeterminacy is hard

to square with the view that states enter into treaties to provide 'credible commitments' through clear rules ensuring predictable conduct.

Sometimes ambiguity is the result of compromises during negotiations, resulting in a text attempting to accommodate contending viewpoints. One example of this is the provision in the International Treaty on Plant Genetic Resources for Food and Agriculture prohibiting the claiming of intellectual property rights (IPRs) on material derived from plant genetic resources 'in the form received'; this leaves open to interpretation many key issues about the legitimate uses of genes isolated from plant material 'borrowed' from public repositories (see 2011, chapter 9.2.5.1). Equally, the WTO agreements include many provisions which raise issues of interpretation which were known to be highly contestable, and indeed were being contested, in the period when the texts were negotiated and agreed (2011, chapter 8). A number of the key disputes pursued under the WTO were continuations or replays of disputes already raised under its predecessor the General Agreement on Tariffs and Trade (GATT): for example concerning food safety, corporate taxation, or compulsory licensing of patents. Far from taking the opportunity to resolve such issues in the political context of the Uruguay Round negotiations and embody agreed outcomes in an unambiguous text, the negotiators often settled for general formulations which they must have known would frame future battles.

Both diplomacy and the law can take advantage of the inherent indeterminacy of language, which takes its meaning from the social context. Technical language in particular is subject to interpretation according to the understandings of the specialized communities by and in which it is deployed. However, indeterminacy is a particular characteristic of law, since it is due not only to the inherent ambiguity of language, but the nature of liberal legality itself (2007). Liberal legal rules are normally expressed in general and abstract terms, aiming to encompass a range of future possibilities. Hence, they are inherently open to interpretation. For example, the non-discrimination principles of national and most-favoured-nation treatment (NT and MFN) which are central in international economic law, and form the core obligations in both trade and investment treaties, do not establish clear bright-line obligations, but principles expressed in general terms.

Furthermore, being normative in character, legal rules invite contending teleological interpretation by protagonists seeking justification for their preferred version. Hence, rather than providing a clear and precise basis on which parties affected can plan their activities, they generally create a field in which such parties pursue their conflicting and competing strategies mediated by contending interpretations of the rules. Thus, to adapt Clausewitz' famous aphorism, legalization is a continuation of politics by other means.

Furthermore, the view that 'hard' law provides precise rules, while quasi-legal 'soft' law is more vague or imprecise, does not stand up to examination. For example, financial market regulations (discussed in 2011, chapter 7), whether developed by private bodies such as the International Swaps and Derivatives Association (ISDA) or public ones such as the Basel Committee on Banking Supervision (BCBS), are as detailed as any legislation, but they are formally 'soft' law. On the other hand, from the formalist viewpoint, the WTO agreements rate highly as exemplars of legalization, since they lay down an enormous quantity of formally binding rules, the interpretation of which has been delegated to the WTO's Appellate Body (AB) as an adjudicator. Yet as we have seen, the suggestion that WTO rules are precise and unambiguous is highly dubious. They rely on abstract principles which necessarily leave scope for interpretation, often involving a 'balancing' of the non-discrimination obligations against permitted exceptions. The WTO's Appellate Body has itself described the key term 'like products' as an 'elastic' concept (2011, chapter 8.3.2.2).

Conversely, even in regimes which are considered formally non-binding, a wide range of enforcement and compliance monitoring arrangements may be

established, including third-party adjudication.¹ Furthermore, soft and hard law interact in many ways, to form what has been described as a 'tangled web' (Webb and Morrison 2004). For example, WTO law refers to and in effect implements the voluntary norms of standards bodies, such as the Codex Alimentarius Commissions for food safety (2011, chapter 8.2.2); and there are many ways in which corporate and industry codes can be enforced (2011, chapter 5.2.2.2). The formalist perspective overstates the effects of hard law and underestimates the role of soft law in the networked governance processes characteristic of contemporary corporate capitalism.

2.1.1. Law in heterarchy

Much more appropriate to the heterarchical character of regulatory networks are concepts of legal pluralism. These emerged from legal anthropology in the post-colonial period, and have become important in the sociology of law. A legal pluralist perspective is particularly apposite, because it decentres state law, and brings to the fore both the plurality and the many modes of interaction of normative systems (e.g. Snyder 2000). However, legal pluralism's interest in the norms of a great variety of communities and social groups also means that it tends to view state law as just another normative system. What tends to be lacking is a theory or understanding of the state, and the relationship of state law to other norms (Fitzpatrick 1984). Hence, while pluralism may help in drawing attention to the existence and interactions of multiple legal orders, it is prone to the criticism advanced by von Benda-Beckmann that 'talking of intertwining, interaction or mutual constitution presupposes distinguishing what is being intertwined' (cited in Melissaris 2004, p. 61), or more sharply that it leaves us 'with ambiguity and confusion' (Teubner 1992, p.1444).

The most sophisticated and complex attempt to establish a conceptual analysis which incorporates a pluralist approach has been that of Boaventura de Sousa Santos (1987, 1995, 2002). He distinguishes his perspective from that of traditional legal anthropology which conceived different legal orders as 'separate entities coexisting in the same political space', and sees socio-legal activities as operating in three time-spaces, the local, the national and the global. For him, the loss of dominance of state law has ushered in a third period of postmodern legal plurality: 'whereas before, debate was on local, infrastate legal orders coexisting within the same national time-space, now it is on suprastate, global legal orders coexisting in the world system with both state and infrastate legal orders' (Santos 2002, p. 92).

Santos cogently argues that '[w]e live in a time of porous legality or legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassings. Our legal life is constituted by an intersection of different legal orders, that is by *interlegality*' (Santos 1995, p. 473). He uses the metaphor of cartography to suggest that different types of laws are based on different scales, projections and symbolizations, and that social groups become more adept in the types of action suited to the legal order within which they are predominantly socialized (ibid., 465-6). However, his analysis tends to be structuralist: he conceives of different legal orders as overlapping but mutually exclusive and that 'each legal construction has an internal coherence' (ibid.: 473). For example, he argues that the new *lex mercatoria* and the proliferation of business and corporate codes constitute 'the emergence of new legal particularisms' which 'create a transnational legal space that often conflicts with national state legal space' (ibid., 469). However, the concepts of porosity and interlegality suggest that legal orders are capable of interpenetration and accommodation, rather than being conflicting and exclusive.

¹ For example, even Nestlé established a Commission chaired by former US Secretary of State Edmund Muskie to hear complaints under its corporate code based on the WHO Baby-Milk Code, although it was dissolved, after it found some violations.

Analysts of regulation have attempted to capture the characteristics of different layers of regulation and their interaction. This kind of approach to regulatory interactions deploys concepts of responsive or reflexive law. As part of the response to the crises of the welfare state, Nonet and Selznick put forward a new modernist paradigm of responsive law, as an evolution from the repressive and autonomous phases of law, and envisaging regulation as an interactive process of developing methods to realise purposes expressed through law and thereby clarifying the public interest (Nonet and Selznick 2001). The concept was taken up in regulation theory notably by Ayres and Braithwaite (1992), seeking to reassert a civic republican tradition in which layers of social institutions, from the state through industry associations and down to individual corporations, play their different parts in social regulation, lubricated by a two-way flow of public discourse.² This can help to frame an understanding for example of the relationship between state law and corporate and industry codes of conduct.

The interaction of public and private has been analysed within this perspective through the concept of 'meta-regulation', or the supervision by public bodies of the adequacy of private regulation. The approach is helpful in suggesting that the content of law and of what is meant by compliance are negotiable, although it perhaps too easily accepts that consensus can be reached, and under-estimates the competitive and strategic behaviour of actors in legal fields. This seems an appropriate lens through which to view, for example, the approach in the BCBS's Basel II framework for financial risk management, (discussed in 2011, chapter 7) which aimed to supervise the banks' own risk monitoring systems. The concept of meta-regulation was applied initially to national state laws which lay down overarching requirements or standards (for example, for environmental protection) with which more specific industry or corporate codes are expected to comply (Gunningham and Grabosky 1998, Parker 2002). It has been extended to describe the 'disciplines' laid down by WTO law on national states by Bronwen Morgan (2003), who described WTO rules as 'global meta-regulation', or rules prescribing how states should regulate. This formulation helps to characterize the form of overarching regulatory frameworks such as Basel II and the WTO, and their interaction with national law; although it is perhaps less apt in relation to the interactions of WTO rules with other regulatory arrangements discussed in chapter 7, such as those of the SPS with Codex standards, or the intricate interactions between the WTO and ITU regulatory systems for telecommunications.

A different analysis has been offered by Gunther Teubner, whose pioneering work argued that the emergence of reflexivity in modern law resulted from the 'trilemma' created by the increased legalization or juridification of the social sphere (Teubner 1983, 1987). For Teubner it is the autonomy of the legal field that generates its autopoietic self-referentiality, but the politicization resulting from increased application of law into social fields creates expectations which require instrumentalization, perhaps through new forms of self-regulation. The pressure for legal regulation to go beyond the limits possible through the autonomous logics of self-reproduction means, according to Teubner, that it either lapses into irrelevance, or results in disintegration either of the social field to which it is applied or of the law itself. Hence, regulatory failure is the rule rather than the exception.

In his work on globalization Teubner welcomes the potential it offers for law to become more detached from the political sphere of states, and instead to institutionalize constitutions for autonomous social sectors and the norms which they generate, which he suggests could enable new forms of repoliticization

² It was also linked to John Braithwaite's general notion of the 'regulatory pyramid', seeing regulation as an interactive process, in which enforcers can escalate their responses to encourage or coerce compliance; he has applied the concepts to all manner of contexts, which has also led him to refine it in response to criticism and recognition of some of its limitations, by introducing the concept of 'nodal governance' (Braithwaite 2008: 87-108).

(Teubner 2004). He rightly criticizes the view of globalization as an economic process which reduces the prospects of regulation through law, and points to the many new normative forms underpinning globalization, which seek validation through law. However, this systems-theoretical perspective significantly overstates the autonomy of the ill-defined social sub-systems, and the self-referential nature of 'neo-spontaneous' generation of 'global law without a state', of which *lex mercatoria* is given as an example (Teubner 1997).³

2.1.2. Lawyering practices

It is important to complement perspectives analyzing law as part of social structure with others which consider social agency. A more actor-oriented approach is taken by Pierre Bourdieu, who criticises the confusion in systems theory between the symbolic structures of the law and the objective orders of the legal and other professional fields, in which agents and institutions compete for the right to formulate the rules, 'le droit de dire le droit' (Bourdieu 1986, 1987). This is especially valuable in providing a basis for empirical and sociological studies of the actual practices of lawyering (McCahery and Picciotto 1995).

The techniques and practices deployed by lawyers centre on the formulation and interpretation of legal texts. Bourdieu argues that this involves the appropriation of the 'symbolic power which is potentially contained within the text', in terms of competitive struggles to 'control' the legal text (Bourdieu 1987, p. 818). He suggests that coherence emerges partly through the social organization of the field, which produces mutual understandings based on 'habitus'; and partly because, to succeed, competing interpretations must be presented 'as the necessary result of a principled interpretation of unanimously accepted texts' (ibid.).

This explains the apparent paradox that, while lawyers spend much of their time disagreeing about the meaning of texts, they generally do so from an objectivist perspective. They usually prefer to deny that indeterminacy is inherent in legal rules, and tend to attribute disagreements to bad drafting and lack of clarity in the texts, which are said to create 'loopholes' in the logical fabric of the law. Bourdieu's perspective can also be integrated with the 'interpretivist turn' in socio-legal studies, and critical approaches to law. These study the ways in which the indeterminacy of legal texts provides the space for the deployment of legal skills and techniques, the introduction of political preferences and social values, and ultimately the ways in which law is deployed in and mediates struggles over power.

Based on an approach from Bourdieu, the extensive sociological research of Dezalay and Garth has provided a more convincing account of *lex mercatoria* than either Santos or Teubner. They examine especially how law as a social practice mediates transformations of both the 'private' sphere of economic activity and the 'public' sphere of politics, and their interaction. They argue that the concept of *lex mercatoria* was a strategic move in the competitive struggles between arbitration centres, in which lawyers mediated skilfully between the spheres of political and corporate power to create the new arena of international commercial arbitration (Dezalay and Garth 1995, 1996). They show how the learned doctrine of *lex mercatoria*, backed by the neutral authority of the grand European professors which validated it in the eyes of their disciples in the third world, helped to provide a 'middle way' in the postcolonial clashes over the scope of state sovereignty, especially concerning the control of oil; but in practice the legal arbitrations were only one strand (and a minor one) in the broader political negotiations (Dezalay

³ Teubner follows Luhmann, who considers that 'law is a normatively closed but cognitively open system': closed in that normativity must be decided by its internal self-referential processes, but open because it is dependent on being able to determine whether certain factual conditions have been met (Luhmann 1987: 18-20). Many have doubted the applicability of the theory of 'autopoiesis' (derived from biology) to social systems, which produces a highly structuralist model of society; although others reject this criticism, arguing that the social sub-systems are seen as constituting society through their different modes of communication.

and Garth 1995, p. 83-91, 1996, p. 313). Rather than creating a purely private legal sphere outside the realm of state law, the two have been deeply entangled, and the authority of law, especially legal concepts of private rights, has been used to counter political notions of state sovereignty in the struggles to reconfigure economic and political power. This perspective is very relevant also to understanding the opening up of new legal fields, such as the rapid growth of investment arbitration under the North Atlantic Free Trade Area (NAFTA) and bilateral investment agreements (BITs, discussed in 2011, chapter 5.2.1.3).

Dezalay and Garth emphasize the importance of studying how and by whom law is produced, and their focus is on the legal elites and the resources and strategies they employ to dominate the production of law. Investment in legal expertise is seen as a means of building social capital, and conflicting perspectives about the content of law as essentially strategies in competitive struggles. For them, law's claims to neutrality and universalist ideals are deployed simply to give legitimacy to the elite lawyers' powerful clients, which are governments and large corporations. They consider that '[l]aw and lawyers have been central to what can be characterized as US "imperial strategies" throughout the twentieth century' (Dezalay and Garth 2008, p. 718), although their role and character have changed. In particular, the enormous new investments in professionalized law and the trends to legalization since the 1970s have replaced the old establishment of 'gentleman lawyers' and legal generalists with a 'multi-polar field of quasi-state power with a much more institutionalized division of roles' (ibid., p. 752).

However, their emphasis on studying *who* and *how* tends to disregard or discount the questions of *what* and *why*. The content of political and economic changes and conflicts, which provide the essential motive forces for change, are exogenous to their perspective. They characterize the success of law as resting on 'the ability of lawyers to take external conflicts within and among the leading institutions of the state and manage them by translating them into law'. For them, the conflicts are between 'factions contending for the definition and control of the state' (ibid., p. 756), but this does not explain the nature or content of those struggles. They do accept that 'the content that emerges from these battles is important' (ibid., p. 719), but their general assumption is that lawyers are an elite group acting on behalf of the powerful. Hence, whether lawyers choose to 'invest in' corporate or commercial law or human rights makes a difference only in terms of the form of domination they help to construct. They rightly point out that lawyers do not always favour liberal legality, but often side with authoritarianism, while on the other hand, at a different phase of the political cycle, a lawyer may need to invest in legitimacy by acting as 'reformer, modernizer, or promoter of social welfare'. However, Dezalay and Garth see this as 'the preventive management of social inequalities and tensions' by 'providing channels for incremental political and social change' (Dezalay and Garth 2010, p. 251).

This is a valuable corrective to perspectives which perhaps too readily accept the emancipatory potential of some formulations or fields of law, such as human rights. At the same time, it is also important to guard against a pessimistic reductionism which implies that power is always hegemonic and self-reproducing, and that the forms of domination are epiphenomenal. To say that law mediates power does not mean that it is a mere fig-leaf for the 'real' relationships of power which occur somewhere else; on the contrary, it means that the exercise of power takes specific legalized forms. This also entails a recognition that legal forms legitimize acquisition and dispossession, and hence both the accumulation of wealth and economic exclusion and inequality, and that law also of course governs the legitimate use of force, and hence authorizes both economic and physical retribution and punishment. But to engage in critique of the strong claims made for the neutrality, objectivity, rationality, certainty and predictability that the rule of law is supposed to provide does not mean that law-governed decision-making is necessarily

arbitrary, or that legal reasoning is irrational or merely a justification of political or economic power.

2.2. Law and power, property and the State

Considering what lawyers do also helps us to understand how specific legal forms help to construct social institutions and relationships and hence how they affect the particular ways in which power is exercised. This also entails consideration of the *power of law itself* as a form of legitimation. In general terms the power of the 'rule of law' lies in the claims of classical liberal or bourgeois legality to provide justice based on universal principles granting equal rights for all legal subjects. The central critique of these claims to legal justice is that enforcing formal equality between those who are unequal in material terms (economically, physically, socially, politically) reproduces inequality: 'between equal rights, might prevails' (Miéville 2005). However, this again implies that inequality and power are somehow external to law, and that law's neutrality merely provides a cloak for extra-legal forms of power.

This is a serious mistake, especially in the realms of economic law. To focus on law only as a balancing of rights is to restrict attention to economic exchange, where indeed all that is needed is to ensure the enforcement of apparently equal rights. Certainly, the ideologies of both classical liberalism and contemporary neo-liberalism consider that the role of law is simply to enforce contracts and protect property rights. Against this, welfare liberalism argues that there is a need for greater intervention to correct 'market failures', remedy asymmetries between parties to contracts, and perhaps even for some redistribution to correct excessive social inequalities. Thus, principles of equal treatment may sometimes be modified by permitting differential treatment, though usually without affecting the basic structures.

What is generally overlooked is the role of law in shaping and defining the property rights on which exchange depends, as well as the extensive state interventions affecting pricing and profit rates, which take place through legal regulation. Property is commonly thought of as a natural institution, usually fetishized as control over a thing. Most analyses fail to take a historical perspective, and too readily accept a-historical concepts, particularly that of 'the market'. Hence, the importance of adopting an approach which traces the historical development of the central institutions of corporate capitalism. This helps to illuminate the dramatic changes that have taken place in the character and content of property, and hence in both 'the market' and the role of the state.

Basic theory tells us of course that markets require property rights. Beyond that, academic theory has told us surprisingly little useful about property rights. This seems to be largely due to a fixation on the concept of private property, amounting to an identification of property with private property. Philosophical and political theories have focused on the justifications for private property, going back at least to C. B. Macpherson's seminal critique (1962), and have therefore been largely irrelevant to the complexity and malleability of property institutions, as Andrew Reeve has pointed out (Reeve 1991, p. 108-111). Economic theory, not surprisingly, has been focused on particularly simplistic notions of private property. Thus, Barzel defines property in economic terms as an individual's ability to consume a good, directly or indirectly through exchange (Barzel 1997, p. 3). In development economics, a common prescription is to ensure security of property rights; indeed, this notion has been turned into a creed by Hernando de Soto. Yet such prescriptions are based on a ready acceptance of the fetish of private property, which imagines for example that providing individual titles to slum shack dwellings to be used as security for loans could solve the problems of lack of urban services to *favelas*. Sociology has largely neglected the analysis of property (Carruthers and Ariovich 2004), and when it does consider the matter is concerned

mainly with the implications of property rights rather than analysis of the forms they take. In legal theory, Hohfeld's insights showed that property consists of a bundle of rights regulating the relationships of persons, and Robert Hale also left a strong legacy, arguing that law defines the 'background' rules of property, so that contractual exchange consists of 'mutual coercion' (Ireland 2003). However, more recent work has tended to adopt either a political philosophy perspective (e.g. Waldron 1988), or that of law and economics.⁴

In fact, the basic legal forms of property and contract are infinitely malleable. In particular, the concept of exclusive private property rights has been extended to intangible or 'fictitious' property. Thus, a legal claim on assets such as a share in a company came to be treated as a private property right, so that the corporation is conceived as a private legal person, governed by contract, and 'owned' by its shareholders. Not only shares, but all manner of financial instruments have been formulated in terms of increasingly ingenious combinations of property and contract. The concept of 'intellectual property' enabled the complex and contentious interactions of science with nature on the one hand and commerce and business on the other to be articulated in terms of proprietorial control over new technologies. Literature, the arts and cultural life generally have also become moulded by proprietorial principles, and hence dominated by the media industries. Similarly, contracts have been transformed from simple bargains between individuals, and adapted to serve all kinds of administrative and regulatory purposes, otherwise thought of as the domain of public law (Campbell 1999).

The skilful use and adaptation of these private law forms have enabled continued private appropriation, even though economic activity and its organization have become increasingly *socialized*. This is above all the case for the corporate form, which enables the coordination of labour and assets on an enormous social scale, but within a framework of private ownership and control. The oligopolistic corporations which came to dominate the key global industries of the twentieth century, first in oil, minerals, chemicals, engineering, automobiles, food and agribusiness and then in pharmaceuticals, computing, media and the internet, can generate extraordinary profits. At the same time, their dominant positions have depended in many ways on state support. Many require concessions or licences: natural resource firms such as oil, mining, and logging; now also telecommunications and broadcasting; construction and property development; and a wide range of professional services. Others have depended on state construction of infrastructure, such as roads, railways, telecommunications and energy networks; and the terms of access to such networks remain crucial. For many, such as pharmaceuticals, aircraft and electronics, the state is their major customer. At the same time, the enormous growth of state expenditure has made the incidence of taxation, including subsidies and incentives, a major element in profitability, especially in sectors such as oil, mining, banking and finance. Hence, tax 'planning' has become routinized; and TNCs in particular can take advantage both of competition to offer incentives to attract investment, and opportunities for international avoidance. Increased regulation in fields such as consumer and environmental protection also has a direct impact on profitability. In basic infrastructure and utilities industries, such as telecommunications, broadcasting, gas, electricity and water, decisions on the often very high levels of fixed investment and its financing by charges to consumers or general taxation are of major social importance. It has been to a great extent the difficulty of managing these decisions through state bureaucracies and financing them by taxation that led to privatization, although generally under public supervision. This has resulted in experiments in many forms of regulation, and public-private partnerships. Finally,

⁴ There are some alternative and critical perspectives, notably Margaret Radin's critique of mainstream law and economics, which links in with some more radical economic analyses (Radin 1993).

as we have seen only too starkly in the crisis of 2008-9, the entire financial system and hence the world economy depend very directly on state support.

None of this looks remotely like the market economy envisaged by Adam Smith or the other great liberal political economists or philosophers. Instead, the key feature of 'regulatory capitalism' is the close relationships and tight interactions between the public and private, the state and the economy, government and corporations. Paradoxically, however, we have seen a parallel process of the functional fragmentation of the state, as well as an increased decentralization of business, and hence the emergence of both corporate networks and multi-level governance.

2.3. From transnational corporatism to networked governance

The enduring ability of private law forms to be adapted and reformulated to provide the institutional forms of corporate capitalism perhaps helps to explain the continuing myths of the market economy. In fact, what emerged from the end of the nineteenth century was a corporatist economy (outlined in 2011, chapter 4). It is notable that the period 1880-1930 also saw sharp debates about the nature and the appropriate form of the corporation and of competition, and the emergence of new forms of regulatory law. This was strongest in the USA, with its antitrust law and sectoral regulatory Commissions; while in Europe and elsewhere governments took a more direct role in economic management, at least at national level. The inter-state rivalries and conflicts of the first half of the twentieth century offered stony ground for international politics and public international law, so the first lawyer-diplomats began to fashion forms of international economic regulation based on private law. Major firms in key industries used cartels to manage international trade and pool knowledge of new technologies; international shipping was registered under the privately managed system of 'flags of convenience' (2011, chapter 3.2.3); conflicts and overlaps of national claims to tax international business were eliminated by devising international tax avoidance structures using the flexibilities offered by the corporate form and other legal entities such as trusts (2011, chapter 6.3.1).

In the second half of the twentieth century, regulatory law became transnationalized. To a great extent US lawyers took the lead, shaping the legal forms as agents of the increasingly powerful US corporations. Indeed, they invented the TNC, by exploiting the freedom of incorporation (overcoming some initial opposition) to create complex corporate group structures, exploiting jurisdictional regulatory differences. They extended the reach of US regulatory law itself through expansive doctrines of jurisdiction (chapter 2.2); and theorized 'transnational law' as a mixture of national and international, public and private law, also drawing on older doctrines of the *jus gentium* such as comity (2011, chapter 2.3.1). American ideas, concepts and institutions were transplanted into other national legal fields, often with the help of local lawyers, some of whom had absorbed such perspectives by pursuing postgraduate study in the USA. However, such transplants were also in some cases adapted by local acolytes to their own ideas and conditions, influenced by different legal cultures, producing hybrids.

For example, the export of the US antitrust philosophy to Europe and Japan resulted in significant adaptations (2011, chapter 4.3.1); the European Commission indeed became an enthusiastic convert to the competition law gospel, although US lawyers have complained that Europe applies a perverted version of the doctrine. In some arenas, non-US lawyers made their own contributions. For example, techniques to avoid perceived regulatory burdens such as double taxation, by exploiting jurisdictional interactions and the legal personality of companies and trusts, were developed also in the UK, France and the Netherlands (which became the home of the influential International Bureau for Fiscal Documentation). The strengthening of banking secrecy to develop a financial entrepôt and a system of discreet private banking was pioneered in Switzerland from the early 1930s (2011,

chapter 6.3.5). Lawyers and bankers in London took advantage of the Bank of England's relaxation of exchange controls to use dollar deposits for sterling-dollar swaps, and create the Eurodollar market (2011, chapter 7.1.2). The field of IPRs has been dominated by continental European lawyers, especially from Germany and France, who have been in the forefront in developing the international framework and expanding IP to ensure corporate control of new technologies. This has involved both developing interpretations of general principles such as the right of reproduction in copyright, and isolation from nature for patents, and devising new concepts such as plant variety protection (2011, chapter 9).

A particular contribution of European lawyers has been forms of supranational constitutionalism. Indeed, Europeans going back to Vitoria and Grotius first devised the notion of the *jus gentium* to manage and legitimize the complexities of conquest and colonialism (2011, chapter 2.1.1). Liberal internationalism from the last part of the nineteenth century also created of the first wave of international institutions, whether private (e.g. the International Chamber of Commerce), quasi-public (e.g. the International Committee of the Red Cross), or intergovernmental (though with a strong private input), e.g. the international Unions (2011, chapter 2.1.2). Europeans also originated and sustained the organizations for international legal harmonization (the Hague Conference and UNIDROIT), launched in the early twentieth century, and which took on a new life in its second half. In the second half of the twentieth century came first the building of international human rights institutions (more recently strengthened by the Rome Statute for the International Criminal Court), the Council of Europe, and then the great project for an ever-wider European union (Madsen and Vauchez 2004). As the EU became transformed from a proto-confederation to a system of multi-level governance using a variety of modes of coordination, its development interacted with the emerging networks of global economic governance, especially through the WTO.

Although the two global governance models of supranational constitutionalism and transnationalism appeared to be very different, there has been an increasing convergence. This suggests that the processes of their construction have shared a similar dynamic. Indeed, it seems that the actual practices of lawyers, acting both on behalf and sometimes as critics of corporate capital, have significant similarities, even if the contexts in which they operate involve different legal cultures. Lawyers are also influenced by their clients: the economic and military dominance of the US since the mid-twentieth century has meant that US governments have veered between asserting unilateral power and supporting multilateral frameworks. Since the US would inevitably dominate any multilateral body, they are more likely to be proposed by the friendly rivals of the US, such as Canada, or Europeans. With the formation of the EU as a major economic bloc counter-weighting the USA, projects such as the WTO are increasingly multilateral, especially with the emergence of China and a wider group of important developing countries (Brazil, India, South Africa). However, multilateralism makes decision-making in many ways more difficult, as seen with the stalling of the WTO's Doha Round (2011, chapter 8.1.3), and the response to the financial crisis (2011, chapter 7.3.2.1).

Hence, the emergence of global governance, although dominated by the US as the major power, is not just a process of Americanization, but perhaps a new form of empire. It has involved contributions from not only characteristically American styles, but also European, Latin American, and Asian 'ways of law' (Dezalay and Garth 2001, 2010, Kagan 2007, Gessner and Nelken 2007). This indeed is a central element in the power of law: the ability of its general principles, norms and institutions to offer universal prescriptions, while being capable of adaptation by interpretation to suit local circumstances and cultures.

Furthermore, contributions can be made to the construction of the legal edifice from many hands and in different styles. Legal principles can be sufficiently flexible both to allow and to absorb radical departures. For example, the 'open source'

movement has overturned the exclusive private rights paradigm of IPRs, but by asserting authors' rights; and Open Source licences provide the flexibility to explore a variety of methods of both organizing and commercializing creativity and innovation, based on a kind of common property (2011, chapter 9.3.3.2). The issues raised by transnational liability litigation, seen most dramatically in the Bhopal case, cannot be described simply as an imperialist attempt to export American law or legal culture; but they do put into question the 'uncertain promise' of law in managing both hazardous activities and compensating victims (2011, chapter 5.1.3.2). Law is not neutral, it shapes and legitimizes social relations of power; but the directions of change depend not only or even mainly on law but on more general social processes of which law is part.

3. Constructing global governance

3.1. Legal creativity, interpretations and interactions

The important role of law in the construction of institutions and arenas of governance is therefore due to the key position of lawyers acting as professionals working for private clients or public bodies, and often both, and hence operating at the interface of the private and public spheres, and moving between the two (Dezalay 1996). Thus, William Cromwell could facilitate the creation of Panama as a state, then act for US shipowners using his knowledge of and contacts in Panama to create a convenient ship registration system, to be managed by John Foster Dulles, who later became the US Secretary of State. This idea was taken a stage further by former oil industry lawyer and Roosevelt's Secretary of State Edward Stettinius, who set up Liberia's registry to be run by a company in Virginia (2011, chapter 3.2.3). Similarly, Mitchell Carroll worked first for the US Commerce Department as adviser and representative to international tax meetings, then chaired the Fiscal Committee of the League of Nations and carried out for it a 26-country study funded by the Rockefeller Foundation, while building a tax practice representing firms such as Esso and Unilever, helping to found the International Fiscal Association and proselytising in the American mid-West and the US Congress in support of the proposed UN (2011, chapter 6.2.2 and Carroll 1978). However, such figures are lawyer-diplomats, and do not necessarily advance the claims of law: for example Sir Eric Wyndham White as head of the GATT Secretariat opposed the creation of a legal section, which did not occur until some time after his retirement, when circumstances and the nature of trade conflicts had changed (2011, chapter 8.3.2.1).

Law's key role is also importantly due to the techniques that lawyers have developed as creative ideologists of the texts which define the institutions and terrains through which economic activity is conducted. The key element of these techniques is the ability to assert authoritative interpretations of texts which are nevertheless inherently indeterminate and highly malleable. These techniques provide great advantages in managing the interactions between the different sites of law-making, adjudication, application and enforcement; as well as between different jurisdictions and arenas. In that sense, law is what Halliday and Carruthers (2007) have described as a recursive process. Social changes and political pressures are mediated through the formulation of legislative or administrative measures, which create a new potential legal field. Such a field may be left neglected and barren, if there is little incentive to cultivate it; but if it offers opportunities to build legal capital or exploit lucrative possibilities of representation, the work of cultivation will be intensive. Thus, the inclusion of investor-state arbitration provisions in the new-wave BITs in the 1990s and especially the NAFTA drew the attention of lawyers who quickly stimulated the growth of corporate litigation against states and its accompanying doctrinal debates (2011, chapter 5.2.1.3). Sometimes, a new field can be constructed largely by legal creativity making use of existing provisions, as with the development of anti-corporate

litigation in the 1990s: in the USA the rediscovery and reinterpretation of the ATCA by Peter Weiss and his team, and the creative use of tort liability to sue TNCs in the UK by Martin Day's firm (2011, chapter 5.1.3.2).

Lawyers are able to move not only between the private and the public, but also between different public or semi-public arenas: they lobby legislatures and help to draft statutes; then devise legal forms to comply with, adapt to, or evade the measures; they make representations to executive bodies and administrative agencies charged with implementation; and they represent their clients before courts and tribunals which deliver adjudicative interpretations of the texts. Such processes have created and shaped the key legal institutions of corporate capitalism. Notably, the debates over corporate concentration in the US in the period 1880-1915 were mediated by lawyers devising legal forms (agreements, trusts, mergers), lobbying legislatures (New Jersey and Delaware as well as the US Congress), and debating interpretations of the Sherman Act with the executive and in the courts (2011, chapter 4.1.1.2). The outcome was the creation and legitimation of the oligopolistic firm, organized as a corporate group, able to spread its tentacles around the world as a TNC.

Indeed, it is the development of these strategies that has created multi-level networked governance. This can be seen notably in the long-term development of the international patent system (2011, chapter 9): it was the professional patent experts who moulded national patent systems, then helped negotiate the Paris Convention, and began to develop strategies for international protection. In relation to medicines in particular, they explored the limits and extended the boundaries of the 'isolation from nature' principle, which became legitimized as a means of enabling and justifying protection for the large investments of the big pharmaceutical firms in blockbuster drugs. Meeting strong opposition to strengthening the Paris Convention in the 1970s, they shifted to the trade arena and achieved the implantation of the TRIPS agreement in the WTO; then they moved back again to advance the extension of protection by national implementation measures and bilateral treaties (Deere 2009). The malleability of the concepts has also been shown by the ways in which counter-attacks by insurgent patent-warriors have been accommodated, by formulating norms for access and benefit-sharing, and mediating conflicts over use of plant germplasm in biotechnology through the International Treaty on Plant Genetic Resources for Food and Agriculture (IT-PGRFA) and the Standard Material Transfer Agreement, although these still remain controversial and conflictual (2011, chapter 9.2).

3.2. Legal legitimacy and its limits

Hence, the fragmentation of the classical liberal international system was to a significant extent the result of these strategies, and has provided lawyers with boundless new opportunities. The past thirty years in particular has seen an enormous increase in transnational law and lawyers. Although the main fields are now largely dominated by large internationalized law firms, there is considerable scope for other players. Some 'grand old men', gentlemen lawyer-diplomats and professorial practitioners continue to play a part, notably as arbitrators. Niche firms are able to build specializations, and can grow by merger or expansion, as with those specializing in offshore law and tax avoidance such as Appleby, originating in Bermuda, Maples & Calder of Cayman, and Mourant du Feu & Jeune of Jersey, which are all now sizeable international law firms. At the same time, corporate critics and activists have also mobilized, and have had some impact on the emerging patterns of governance. The work of the WTO and its many tentacles has been closely monitored by a variety of groups and NGOs, some of whose experts such as Martin Khor are pre-eminently well-connected and knowledgeable. The combination of activism and esoteric knowledge has also had an impact in areas such as taxation, especially since the formation of the Tax Justice Network. Campaigns, such as that against the multilateral agreement on investment (MAI:

2011, chapter 5.2.1.4), the intervention of the 'patent warriors' opposing the neem patent application (ibid., chapter 9.2.4.1), and the access to medicines movement (ibid., chapter 9.1.3), have been quite effective.

The fragmentation of governance has also placed great weight on law as a form of legitimation, and exposed its limits. The exploitation of jurisdictional arbitrage and creation of new arenas have led to accusations of privatization and commercialization of sovereignty. This can be seen for example in the debate over tax havens. Although a key role was played by private professionals in exploiting existing legal provisions in convenient jurisdictions, and then advising their governments on creating new ones, these strategies as well as the consequent development of the 'offshore' financial system, owed much to the tolerance, collusion and support of regulatory authorities in the leading countries. Yet when the political backlash has come, it has tended to focus on the commercialized sovereignties of the small haven jurisdictions, and to overlook the continued availability of facilities in London and New York for bank secrecy to attract finance (ibid., chapter 6.3.3 and 6.4.2).

Indeed, the resort to law has often resulted from failure to achieve agreement or consensus by political means. In such situations, law can provide subtle combinations of public and private regulation, suited to particular issues or fields. As already mentioned, law's indeterminacy can provide a formulation which sufficiently accommodates contending viewpoints, deferring conflicts to be dealt with in the future on a case-by-case basis. For example, conflicts in Europe over the patentability of business methods and computer programs have prevented clarification of the EPC provision prohibiting their patentability 'as such', leading the issue to be pursued through the subtle formulation of patent applications and debate in opposition procedures and litigation (ibid., chapter 9.2.1). It has also been argued that the main reason why the bulk of credit derivatives have remained bespoke contracts traded privately in the OTC market is due to continuing doubts about their uncertainty, despite efforts to give them a wider legitimacy through more formalized regulation (Huault and Rainelli-Le Montagner 2009, 2011, chapter 7.2.3). This demonstrates the limits of the power of specific cognitive communities to create social institutions with a broader legitimacy.

It is in this context that we can consider the role of supranational adjudication. This entails a move to try to legitimize international regulation by deferring thorny political questions to be dealt with pragmatically, case-by-case in a formalized legal-diplomatic arena. The role of the ECJ in the 'transformation of Europe', aiming to achieve integration through law, demonstrates both the power and the limits of such an institution. Although similar tribunals have been established in other regions, and indeed seem to be proliferating, their rhetoric and decisions are much more respectful of state sovereignty, notably the Andean Court of Justice (ibid., chapter 5.2.1.1). It is instructive that the adjudicative system of the WTO was formulated in a much more modest way, avoiding any suggestion of delegation of decision-making power through interpretation of the rules to the adjudicators; and they themselves have respectfully played the game by couching their decisions, although carefully attuned to the concerns of trade diplomacy, in formalistic terms (ibid., chapter 8.3.2). Much more problematic has been the development of international investment arbitration, which is not only procedurally a system of private justice, but entails judgments on public policies from the perspective of private, or at least corporate, interests (ibid., chapter 5.2.1.3). Other arenas, such as the arbitration of double taxation disputes have remained even more discreetly private, refusing even a basic obeisance to formal legal legitimacy such as publication of decisions.

There are dilemmas of partial judicialization. Once issues are brought more into the open by providing for arbitration, they become more visible and attract attention, and sometimes criticism. This is especially the case where they are seen to provide

private procedures for dealing with matters of public concern. One option is to maintain the legalization momentum, with proposals for the 'constitutionalization' of supranational adjudication. At a minimum, this would entail a clearer judicialization of the tribunals: permanent independent judges instead of ad hoc arbitrators who continue to represent private clients; open hearings and publication of judgments; rights of intervention by third parties and public interest groups. Although these seem logical steps to lawyers, there is not always political support, perhaps because of the conflicting interests involved (e.g. investment arbitration: 2011, chapter 5.2.1.3).

Some would go further, and constitutionalize the rules themselves by 'balancing' economic rights with human rights, and even entrench the rules as individual rights directly applicable in national law, with a right of complaint by individual legal persons (including of course corporations) to the supranational court (ibid., chapter 8.3.3). This would amount to a kind of global ultra-liberal constitutionalism. Some political theorists have proposed neo-Kantian models, which accept the need for a strengthening of the international institutional framework to provide an underpinning for 'cosmopolitan democratic public law'. However, this seems little different from the ultra-liberal model, somewhat reinforced by improving the representativeness of regional and international organizations.⁵ The concept of constitutionalization itself can be interpreted very differently. In particular, it may aim to constrain collective action through states or public bodies, or be conceived in an enabling and democratized version (Schneiderman 2008, p. 8-17, 2011, chapter 8.3). However, if Europe has been the leader in supranational constitutionalism, the failure of the project for a European Constitution, despite the many contradictions and legitimation problems of the 'market without a state', demonstrates the limits of constitutionalization of global governance. Perhaps its basic dilemma is that social action and interest representation remain firmly focused on national (or subnational) states; while on the other hand the dominant elements in corporatist capitalism are confident in their ability to control networked governance, which indeed they helped to construct.

More modest roles can be devised for law in global governance, though they are nevertheless ambitious. From the viewpoint of traditional public international law, the extraordinary expansion of international legalization is certainly to be welcomed, but the fragmented and uncoordinated character of this growth, in the form of autonomous ad hoc rule-complexes, raise questions about the lack of coherence of international law. This was taken up by the UN's International Law Commission (ILC) through a Study Group, whose conclusions were cautiously reassuring (ILC 2006). It took the view that such fragmentation is natural, and results from both the multiplicity of issues facing the world and the 'differing pursuits and preferences of actors in a pluralistic (global) society'. It was content to find that 'international law was always relatively "fragmented" due to the diversity of national legal systems that participated in it'; yet 'the vitality and synergy of the system and the pull for coherence in the law itself' are reflected in tools it has developed (ibid., paragraph 11).

Singled out in particular were the rules of interpretation notably in the Vienna Convention on the Law of Treaties. These of course have been relied upon heavily by the WTO's AB, although the AB's decisions have been cautious and selective in interpreting WTO rules in ways which could be said to contribute to any global systemic coherence.⁶ Nevertheless, adjudicators are in some ways becoming a specialist community, and some have served in different forums, for example as WTO Panel or AB members and investment arbitrators. Some decisions have applied common principles or created links between related régimes: for example,

⁵ This appears to be the argument of David Held: see Held 1995, 1997, and its incisive critique by Dryzek 1999.

⁶ Perhaps more the Panels than the AB itself: see 2011, chapter 8.3.3.1.

the desirability of an independent regulatory agency was an important factor in the both the WTO Panel report in *Mexico – Telecomms* 2004 (2011, chapter 8.2.3.3) and the BIT arbitration in *Biwater v. Tanzania* 2008 (ibid., chapter 5.2.1.3). There are certainly many common concepts such as non-discrimination principles in parallel régimes such as investment treaties and the WTO, although also differences in the way they are understood for example in tax or IP treaties. Hence, the ILC could assert that international law is after all still 'a legal system' and not just a random collection of norms (ILC 2006, 14). Public international lawyers and theorists continue to investigate the issues of 'regime interaction' (Young 2011).

Perhaps more promising than schemes for constitutionalization or even attempts at coherence is the quest for a global administrative law.⁷ This has been led in particular by the Global Administrative Law Project based at New York University. It began from a realization of the 'vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence' but also an identification of the concomitant growth of a 'little-noticed but important and growing body of global administrative law' (Kingsbury *et al.* 2005, p. 15-16). This enabled a pragmatic approach, surveying the multiplicity of institutions and arenas to discover and analyze the practices and principles which have developed, while putting forward a schema for systematization and proposals for the development of a putative administrative law for heterarchical global governance. Although this approach may contribute towards establishing principles of good practice and procedure, the issue of legitimacy of the substantive decision-making is unavoidable, and here the pragmatic conclusion is pessimistic: 'no satisfactory democratic basis for global administration is available but ... global administrative structures are nevertheless required to deal with problems national democracies are unable to solve on their own' (ibid., p. 50). Here again we come up against the limits of 'global law without a state'.

The reassertion of a public law perspective can certainly be used to challenge the often highly privatized institutions and arenas of global governance, notably international investment arbitration (van Harten and Loughlin 2006, see 2011, chapter 5.2.1.3). Yet, as with models of constitutionalization, there are different perspectives on the role of public administration. Indeed, the investment treaty regime can also be seen a classic form of public law, establishing at the international level a framework for managing the 'universal tension between property rights and the public interest', to provide a check on illegal and arbitrary state action (Montt 2009). From this perspective, while procedural reforms could be conceded, they would hardly resolve the issue of political legitimacy.

3.3. *Technocratic governance and democratic dilemmas*

These questions about the role of law are also part of a broader debate about technocratic governance. The moves to legalization represent not only a failure to resolve issues politically, but also a concern that they should not be left solely to a specialized technocracy. Many issues and areas of global concern are indeed now governed by delegation to experts. For example, although article 27 of the WTO's Treaty on Trade-Related Intellectual Property Rights (TRIPs) now establishes a global standard of patentability, it takes the form of a principle expressed in broad and general terms. This leaves open important specific decisions about patentability, in the forefront of which is biotechnology. No formal arena is available at the international level to consider this, and even in Europe adjudication remains at the national level. The gap has been filled by the creation of the informal

⁷ See www.iilj.org/GAL for materials; in particular special issues of *Law & Contemporary Problems* (2005), the *European Journal of International Law* (2006), and *Acta Juridica* (2009). This was a significant reorientation from earlier (although itself also pioneering) work, which focused on the impact of globalization on national administrative law (e.g. Harlow 1999, Aman 2002).

network of the Trilateral patent offices, which conducted a technical study of the patentability of genetic fragments, enabling some convergence of their national standards (Davies 2002, 2011, chapter 9.2.2 and 9.2.4). Similarly, despite a global diffusion of laws to regulate competition and considerable convergence of approaches, no formal global framework has been established. Nevertheless, informal networks and an expert community supply a degree of coordination that is probably as effective as would be provided if a competition agreement along the lines of the TRIPS had been included in the WTO, as some have advocated (2011, chapter 4.3.3, 4). Very many examples of this type could be given.

Indeed, technocracy constitutes the main form of global governance. This results not only from the difficulties of reaching international agreement, but from the more fundamental social changes that have led to the transformations of the state, its functional fragmentation, and the emergence of regulatory governance (*ibid.*, chapter 1.2.2). This has raised fundamental questions about the legitimacy of technocratic decision-making. Within national states, these have been dealt with in liberal states mainly through Weberian models of bureaucracy, according to which specialist technocrats must take decisions on the basis of an objectivist and instrumental rationality, within a framework of values decided by political processes, to which they are accountable. However, these models have come under increasing pressure, as a variety of factors has led to a growing public mistrust of expertise and science (*ibid.*, chapter 1.3.3). Expertise is important and indeed necessary especially in today's complex world. However, it needs to operate within new structures to ensure that specialist knowledge is developed and deployed responsibly and accountably.

Taking a wider perspective, some political theorists have argued that the effects of liberalization and globalization have been to unleash socially destructive behaviour based on the competitive pursuit of self-interest, as existing normative and institutional restraints are undermined or dismantled. They argue that this necessitates the reconstitution of democracy based on principles adapted to the emerging forms of the new public sphere, but which explicitly aim to structure it to ensure the most effective forms of popular participation. Indeed, new forms of active citizenship and political action have been developing, often around the local and national impact of regional or global policies. Some have also been institutionalized, for example the system of participatory budgeting pioneered in Porto Alegre and other parts of Brazil, which have also spread worldwide, although too often in forms which reinforce existing systems of political patronage (van Zyl 2010, 2011, chapter 6.1.2).

The recognition that the public sphere has become fragmented into multiple intersecting networks and overlapping jurisdictional spheres emphasises the importance of building democratic participation through new political principles, institutions and practices. These should recognise the diversity of political sites in which public policies are developed and implemented, also involving processes of reflexive interaction between these sites.

Jürgen Habermas in particular has argued that such principles must attempt to transcend the two main traditional constitutional models, which are increasingly proving inadequate for the contemporary phase of globalization (Habermas 1996, 2001). On the one hand, liberal conceptions, based on a view of society as composed of individuals pursuing their self-interest or pre-formed 'preferences', see the role of the polity as complementing the market, and as aiming to identify a collective interest either by authoritarian means, or via majoritarian representative democracy. However, post-industrial capitalism, with its integrated global production and marketing networks, raises a wide range of social, environmental and moral issues, which cannot adequately be resolved by aggregating individual preferences, using either authoritarian or democratic methods. The alternative model of civic republicanism rejects the narrow view of citizenship based on

weighing and balancing competing private interests. However, its stress on an ethical politics based on visions of the common good implies a communitarianism requiring shared values, which in today's culturally fractured world is hard to achieve, or can take reactionary forms, so may generate conflict rather than consensus.

Habermas has suggested that, whereas both these views tend to see the state as the centre, deliberative politics can be adapted to a decentered society.

This concept of democracy no longer needs to operate with the notion of a social whole centered in the state and imagined as a goal-oriented subject writ large. Just as little does it represent the whole in a system of constitutional norms mechanically regulating the interplay of powers and interests in accordance with the market model. (Habermas 1996, p. 27).

Others also have stressed the attractiveness of a direct, deliberative form of participatory democracy for solving problems in ways unavailable to representative systems:

collective decisions are made through public deliberation in arenas open to citizens who use public services, or who are otherwise regulated by public decisions. But in deciding, those citizens must examine their own choices in the light of the relevant deliberations and experiences of others facing similar problems in comparable jurisdictions or subdivisions of government. (Cohen and Sabel 1997, p. 313-4).

In this perspective, decision-making, especially by public bodies, should result as far as possible from active democratic participation based on discursive or deliberative rather than instrumental reasoning. Instead of the pursuit of individual interests based on the assumption of fixed preferences, the aim is to go beyond an objectivist rationality (in which choices are considered to be made by reference to absolute and objective standards), without falling into the trap of relativism (Dryzek 1990). Thus, while accepting that there is no single objective standard of truth, since perspectives are always subjective (and hence epistemology is to that extent relativist), truth can be said to be an emergent property of the deliberative interaction between perspectives (and hence its ontology is objective). In other words, there is an objective truth, even if we can only know it through subjective interactions. This is the most basic justification for democracy.

Deliberative democracy accepts the existence of a diversity of perspectives, and aims to facilitate interactive deliberation about values through which preferences may change, or may be accommodated to each other. An emphasis on process may help to overcome the weaknesses of this model if conceived as a political ideal, or as relying on the generation of consensus purely through the public use of reason. Crucially, account must also be taken of inequalities of power, which generate conflicting interests as well as imbalances in capacities to participate in a politics based on reasoning.

Thus, a key element is the fostering of informed participation in deliberative decision-making, rather than merely elite or expert deliberation. There is a certain tension between the two, since the deliberative evaluation of specialized knowledge or data entails a degree of insulation or autonomy from private interests and other pressures.⁸ However, this may result in an unjustified authority being claimed by or

⁸ Thus, the work of Joerges and Neyer on the role of expert and scientific committees in regulatory decision-making in the EU (Joerges and Neyer 1997, Joerges 1999) characterised them as 'deliberative', in the sense that the participants approach issues open-mindedly rather than from pre-formed positions (in particular in favour of national interests), seeking to reach consensus through evaluation of valid knowledge (Joerges 1999: 320). However, they had reservations, especially about the management of the interaction between various types of committee, so that it was still questionable whether the EC committee system 'gives proper expression to the plurality of practical and ethical views which should be included within risk assessment procedures'. The conclusion seemed to be that the system is certainly not a closed or homogeneous epistemic complex, but its openness is limited or haphazard, if not selective (ibid.: 321). Others have been more explicitly critical of the ways in which the European Commission's restriction of public consultation and involvement, through its management of the

given to the judgments of specialists or experts. Thus a key element in democratic deliberation is to ensure a fruitful interaction between various sites of deliberation, and an awareness by specialists of the conditional or contingent nature of their expert knowledge and judgements (Wynne 1992). Thus, experts should be more explicit about the assumptions behind the abstract models underpinning their evaluations, and allow input into their deliberations from both other specialists and alternative perspectives and social values.

This has important implications for lawyers, since law generally structures regulatory arenas and interactions, as well as mediating social conflicts and interactions. As we have seen, a significant weakness of international legalization is that it has reinforced formalism and instrumental rationality. Notably, international adjudicators have tended to rely on a closed epistemology, based on an objectivism which treats the abstract concepts in the texts through an instrumental rationality, resulting in decisions expressed in legalistic terms. This closure tends to exclude debate about the values involved in the interpretive choices made by the adjudicator, which would entail acceptance of a more extended and direct accountability to a broader political constituency, rather than through national governments. It is also technicist (taking its specialist part for the whole), since its closed rationality excludes reflexive dialogue with those outside its specialist epistemological sphere. The reasoning shown in the decisions of the WTO's AB (2011, chapter 8) reflects its accountability dilemma, hence they are generally expressed in legalistic terms, but astutely tread a difficult political line aimed at ensuring their acceptability to its various constituencies.

It is clearly illusory to consider that law alone can provide adequate legitimacy for global governance. It is nevertheless equally clearly important that the law and lawyers should play their part. This includes helping to construct forms and arenas of governance which are insulated from undue influence from private interests, and which foster democratic participation and deliberation based on explicitly articulated values and aims. Lawyers play a crucial role in accommodating public concerns to private interests. Lawyering entails interpretive practices which mediate between the public standards and values expressed in the wide variety of norms, and the particular activities and operations of economic actors, offering the hope that economic power might be exercised ultimately for the general good. However, this aspiration is illusory unless law operates within a broader democratic framework, in which legal practices themselves are also subject to high standards of transparency, accountability and responsibility. This includes the responsibility of each individual to reflect on their own practice and methodology, and when putting forward either analyses or prescriptions to do so on the basis of clearly articulated assumptions, taking due account of the perspectives of others, even if within a critical evaluation.

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committee system, has undermined the legitimacy of some decision-making in the EU regulatory networks (Landfried 1999, Vos 1999).

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