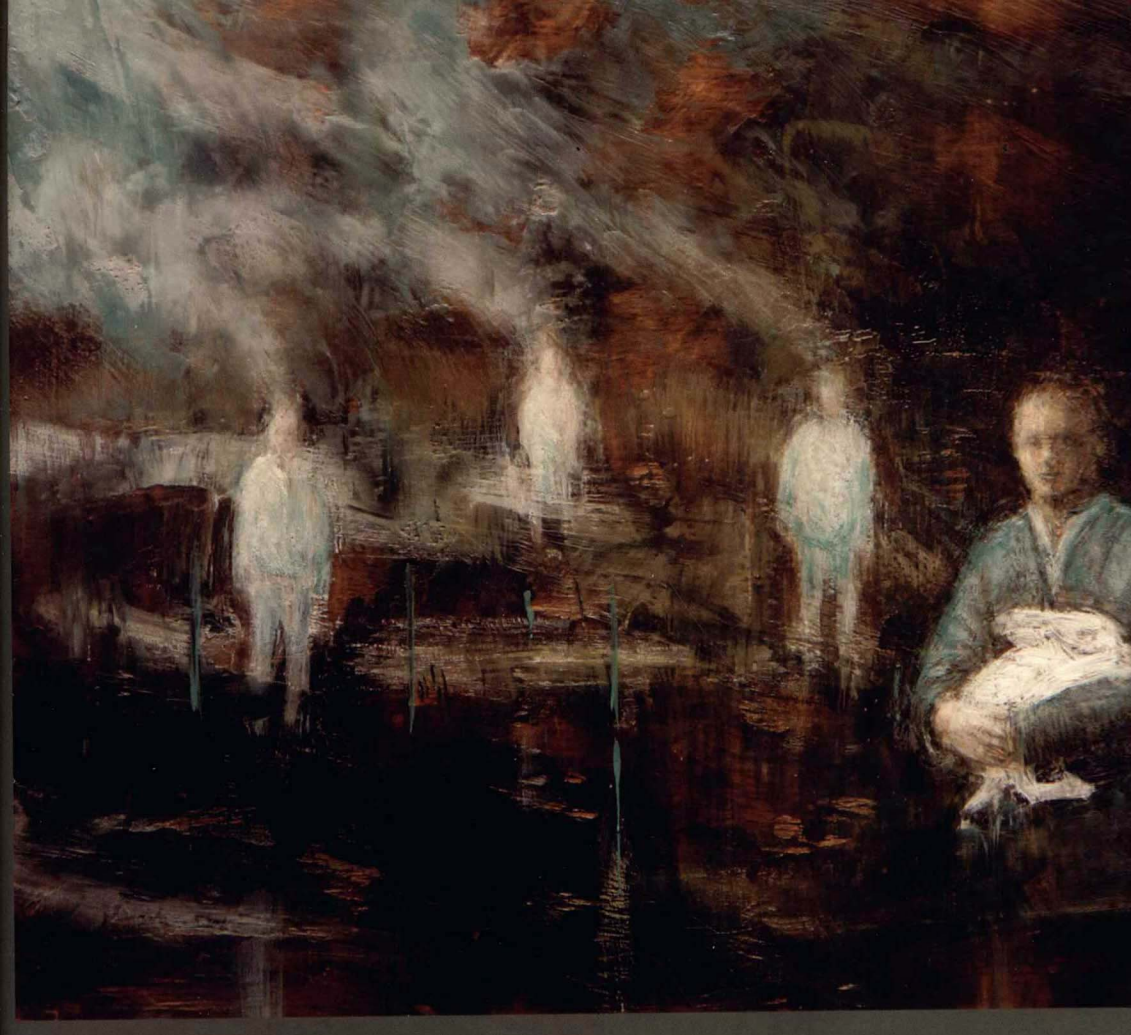

Rough Consensus and Running Code

A Theory of Transnational Private Law

GRALF-PETER CALLIESS
PEER ZUMBANSEN

HART MONOGRAPHS IN
TRANSNATIONAL & INTERNATIONAL LAW

Rough Consensus and Running Code

A Theory of Transnational Private Law

Gralf-Peter Calliess
and
Peer Zumbansen

OXFORD AND PORTLAND, OREGON
2010

Published in the United Kingdom by Hart Publishing Ltd
16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530
Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: http://www.hartpub.co.uk

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
E-mail: orders@isbs.com
Website: http://www.isbs.com

British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84113-974-6

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

Rough Consensus and Running Code

Private law has long been the focus of efforts to explain wider developments of law in an era of globalisation. As consumer transactions and corporate activities continue to develop with scant regard to legal and national boundaries, private law theorists have begun to sketch and conceptualise the possible architecture of a transnational legal theory. Drawing a detailed map of the mixed regulatory landscape of 'hard' and 'soft' laws, official, unofficial, direct and indirect modes of regulation, rules, recommendations and principles as well as exploring the concept of governance through disclosure and transparency, this book develops a theoretical framework of transnational legal regulation.

Rough Consensus and Running Code describes and analyses different law-making regimes currently observable in the transnational arena. Its core aim is to reassess the transnational regulation of consumer contracts and corporate governance in light of a dramatic proliferation of rule-creators and compliance mechanisms that can no longer be clearly associated with either the 'state' or the 'market'. The chosen examples from two of the most dynamic legal fields in the transnational arena today serve as backdrops for a comprehensive legal theoretical inquiry into the changing institutional and normative landscape of legal norm-creation.

Hart Monographs in Transnational and International Law: Volume 5

Hart Monographs in Transnational and International Law

Series Editor: Craig Scott, Professor of Law, Osgoode Hall Law School of York University, Toronto.

The objective of this series is to publish high-quality scholarship in public international law and private international law, as well as work that adopts 'transnational law' as its thematic, theoretical or doctrinal focus. The series strives to be a leading forum for work of the following sort:

— critical reappraisals of foundational concepts and core doctrinal principles of both public and private international law, and their operation in practice, including insights drawn from general legal theory;
— analysis and development of conceptions of 'transnational law', including in relation to the role of unofficial law and informal processes in transnational regulation and in relation to theories and studies of 'governance' in transnational spheres; and
— empirical studies of the emergence, evolution and transformation of international and/or transnational legal orders, including accounts and explanations of how law is constructed within different communities of interpretation and practice.

The series will also be home to monographs that explore the interactions between the ever-integrating fields of public and private international law. Of special interest are explorations of the extent to which these interactions are structured by higher-order principles and policies, on the one hand, and by politics and the exercise of various forms of power, on the other.

The series is open to work not only by law scholars but also by scholars from cognate disciplines.

Titles in this series

Volume 1: Terrorism and the State: Rethinking the Rules of State Responsibility
Tal Becker

Volume 2: Transnational Law and Local Struggles: Mining, Communities and the World Bank
David Szablowski

Volume 3: The Institutional Veil in Public and International Law: International Organisations and the Law of Treaties
Catherine Brölmann

Volume 4: Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-National Constellation
Poul Kjaer

Volume 5: Rough Consensus and Running Code: A Theory of Transnational Private Law
Gralf-Peter Calliess and Peer Zumbansen

Sovereignty is fiction. State legislators have to navigate an ever rising tide of rules, acts of authority, norms and exercises of power beyond their control. Formal law has ceased to be the primary, or the privileged tool for governing society. Under the label of 'transnational law', the authors resurrect the law as a social practice, and they herald in a more timely mission for the law as an academic discipline.

Christoph Engel, Director, Max Planck Institute for Research on Collective Goods, Bonn

World society has long served as a hothouse for the frenzied and disorderly production of widely diverse and disparate legal and social norms. Against the background of current scholarly attempts to understand this process, *Rough Consensus and Running Code* brings us to a new level of awerness. Taking an original approach based on a holistic view of the making, application and enforcement of law, it provides not only a comprehensive overview of the current state of global law, but also a refreshingly efficient framework for the analysis of ongoing transnational legal processes. A milestone in modern legal scholarship.

Marc Amstutz, Professor of Commercial Law, Legal Theory and Sociology of Law at the University of Freiburg

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.

Stewart Macaulay
Professor Emeritus
University of Wisconsin Law School

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*

Forschungsgemeinschaft) for generously facilitating a fruitful environment for the authors in Bremen and to the Social Sciences and Humanities Research Council of Canada (Research Grants # 410-2005-2421, and # 410-2007-0265), the *Hanse Wissenschaftskolleg* in Delmenhorst, Germany, and to University College Dublin School of Law, Ireland, for providing an inspiring and welcoming environment for Peer Zumbansen during the finishing stretch of the manuscript from July to October 2009. In addition, we would like to express our special gratitude to a number of wonderful colleagues in Bremen and beyond for allowing us to work on a book that we think very distinctly expresses the central concern of the 'Transformations of the State' project. As an admittedly ambitious study of regulatory models in transnational spaces, it must pay adequately address the dramatic changes that law's twentieth-century principal orientation points ('government', 'state') and binaries ('public versus private') have been undergoing. As such, these 'Transformations' are—like the transnational law methodology proposed in this book—a lens through which to study the intricate cross-relations between different social science disciplines in their assessment and creation of a complex global world.

In our work for this book we have, in particular, benefited from very helpful comments by Marc Amstutz, Simon Archer, Harry Arthurs, Phillip Bevans, Simon Deakin, Roy Kreitner, Andreas Maurer, Maria Panezi, Oren Perez, Moritz Renner, Colin Scott, Craig Scott, Fenner Stewart, Cynthia Williams, Gunther Teubner, Robert Wai, Rudolf Wiethölter and Mauro Zamboni. For excellent assistance in the finishing stages of the book, we are grateful to Monika Sniegs, Petra Schreiber, Insa Buchmann, Lisa Rieder, Cathérine Jansen and Nadja Alpers in Bremen and Berlin and to Meghan Macdonald and Charles Sherman in Toronto.

Gralf-Peter Calliess & Peer Zumbansen
Bremen, Toronto/Dublin, April 2010

'Laws and Government are to the Political Bodies of Civil Societies, what the Vital Spirits and Life itself are to the Natural Bodies of Animated Creatures; and as those that study the Anatomy of Dead Carcasses may see, that the chief Organs and nicest Springs more immediately required to continue the Motion of our Machine, are not hard Bones, strong Muscles and Nerves, nor the smooth white Skin that so beautifully covers them, but small trifling Films and little Pipes that are either overlook'd, or else seem inconsiderable to Vulgar Eyes; so they that examine into the Nature of Man, abstract from Art and Education, may observe, that what renders him a Sociable Animal, consists not in his desire of Company, good Nature, Pity, Affability, and other Graces of a fair Outside; but that his vilest and most hateful Qualities are the most necessary Accomplishments to fit him for the largest, and according to the World, the happiest and most flourishing Societies'.

Mandeville, *The Fable of the Bees*, Preface.

'We know very little, in fact, about the structure of global society. How is public power exercised, where are the levers, who are the authorities, and how do they relate to one another? Everywhere we can see the impact of things global, foreign, faraway. How does it all work? How do all the pieces fit together? Are the worlds of politics, markets, and cultural influence held together in a tight structure or is it all more loose and haphazard? Is there more than one global order—how much, in the end, is simply chaos, and how much the work of an invisible hand?'

David Kennedy, *The Mystery of Global Governance* (2009), 38.

Contents

Introduction

Private law has long become a case in point for investigations into the nature of legal regulation in the global arena. With consumer transactions and corporate activities continuing to unfold with little regard to jurisdictional or geographical boundaries, private law theorists have to turn their attention to the growing need to critically and constructively explore the relationship between 'hard' and 'soft' laws, official/unofficial, and direct/indirect regulation. This book attempts to develop a framework for a private law regulatory methodology that takes its cues from century-old inquiries in the philosophy of law, legal theory and sociology of law into state-society and public-private relations on the one hand and into fast-evolving transnational normative and institutional 'fields' (Bourdieu) and 'spaces' (Sassen) of new actors and norms on the other.

The risk facing a project that focuses selectively on transnational *private* law may result from its unspecified relation to other complementing, current investigations into the nature and role and even the very possibility of law in the emerging architecture of 'global governance'. Especially today—where scholars, policy-makers and the general public express a deep-seated concern with the lack of coherence, effectiveness and discernable compliance in the context of the 'post-instrumentalist' regulatory paradigm that has come to be associated with the post-welfare state's turn to privatisation, public-private partnerships and delegated norm-creating authority to private actors—a project more or less associated with accompanying theories of 'reflexive', 'responsive', 'learning' and 'adaptive' law might be seen as ill-timed at best?.[1]

Conscious of this pressure and such 'demands' of our time, we attempt to show that a legal theoretical project predominantly grounded in private law and illustrated through a number of private law case studies, indeed offers tremendous potential to illustrate, in particular, the methodological foundations and implications of evolving transnational legal orders. In that spirit, 'Rough Consensus and Running Code' (RCRC) is offered as both an explanatory and a constructive tool to describe, assess and further develop the different law-making regimes, which can be observed in the

[1] William E Scheuerman, 2000; William E Scheuerman, 2004; Michael Blecher, 2009; John Paterson, 2009.

transnational arena. As is true for the changing nature of the institutional framework of actors involved in the transnational production of regulatory norms, the norms themselves seem to fluctuate between so-called official, 'hard' law and unofficial, 'soft law', ranging from standards, recommendations, business practices, best practice guidelines, to codes of conduct and transparency rules. A major challenge, which has been addressed by scholars of public and private international law alike, is how to adequately incorporate this new host of norms into the existing bodies of law. Law and economics scholars such as Robert E Scott and Paul B Stephan have recently raised a number of very important observations with regard to the area of public international law about the need to adopt a new, more differentiated approach to the issue of enforcement in order to adequately account for the 'softer, non-state-based mechanisms of enforcement in the international arena.[2] Such an approach is remarkable at a time when critics of international law have either gathered to carry the discipline off to the grave for its allegedly flagrant lack of effectiveness or to scrutinise it for its purported infringement on states' sovereignty claims.[3] Yet, we contend that even such ambitious theories, which aim at integrating domestic contract law theory and international law theory and international relations, such as the approach taken by Scott and Stephan, would still have to take a wider view on the wealth of emerging normative structures outside of the nation-state. The well-argued connection between contract doctrine and state-to-state relations put forward by Scott and Stephan does allow for a much needed appreciation of the hybrid and mixed regulatory regimes that have been an integral part of the transnational arena; this *terra incognita et obscura* from the point of view of traditional, state-based international law. However, we feel there is 'something rotten' in this state of depiction of *traditional* and *contractual* international law, which Scott and Stephan so eloquently lay out. While their approach manages to integrate a considerable wealth of previously disregarded or dismissed, existing and continuously emerging private, 'informal' and hybrid enforcement regimes, such as arbitration and other examples of private enforcement of international rules, into the framework of 'hard' international law, their general architecture is informed by an understanding of contract law that has its most important roots in a specifically functionalist form of liberalism. With that, while the theory is sensitive to the pressures arising before any judge to adequately assess the competing claims between contested, ill- or non-defined contract terms and the 'social norms' that inform and shape the conflict at hand, this discovery of social norms occurs in an affirmative manner insofar as it

[2] Robert E Scott and Paul B Stephan, 2006.
[3] Jack Goldsmith and Eric Posner, 2005.