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Private governance of global value chains from within: lessons from and for transnational law

Klaas Hendrik Eller

PhD Candidate, University of Cologne, Law Faculty/École des Haute Études en Sciences Sociales (EHESS), Centre d'études des normes juridiques, Paris

ABSTRACT

Global value chain (GVC) capitalism has taken a peculiar social form and produces conflicts which are in the blind spot of political institutions as well as classical legal doctrine. This paper addresses the lack of legal concepts reflecting the systemic nature of GVCs as a key challenge for their regulation. Innovative governance alternatives originate bottom-up in civil society, rather than through legislation. In particular, third-party certification may be an instrument that matches GVCs as regulatory subjects and embodies a tailored concept of responsibility. While the current proliferation of such schemes and their diverging degree of rigidity has raised concerns, certification represents an indispensable building-block of transnational regulation. Transnational law must carefully trace the regulatory logic and flank the emergence of such social institutions reflexively. Only then can the scholarly endeavour of 'transnational law' rise to the challenge of projecting and rearranging guarantees of political autonomy beyond the state.

KEYWORDS Transnational law; corporate social responsibility and governance; global value chains; certification; societal constitutionalism

I. Introduction

Modern society disposes of a plurality of sophisticated regulatory techniques that require specific forms of normativity. Among these, the polymorphic institution of the 'law' appears only as one, albeit central resource for social ordering.[1] While it is today widely acknowledged that law has arrived at a historic transition point, and that 'globalisation' is one of the main driving forces behind this development,[2] the narrative of law being the dependent variable

CONTACT Klaas Hendrik Eller klaas.eller@gmail.com
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[1] As demonstrated famously in the genealogy of normativities by Foucault, arguing that the legal form flourishes precisely because it allows masking the actual shape of the evolving 'disciplinary' power in society. See Michel Foucault, *La Volonté de Savoir* (Gallimard, 1976) 190. For an insightful analysis, see Paolo Napoli, 'Foucault et l'histoire des normativités' (2004) 60 *Revue d'histoire moderne et contemporaine* 29. All websites last accessed 3 March 2017.

[2] The accounts of which, of course, vary considerably depending on the degree of emphasis put on the role of new actors, norms or cross-cutting processes. Zumbansen brings these elements together as an

adapting to novel social structures falls short in an essential respect. Asking how law might solve a novel regulatory problem suggests that law is confronted with a pre-formulated task and a given 'reality'.[3] However, taking the epistemological turn seriously, the way these questions arise in the first place is shaped by law and the social institutions it upholds. Critical legal thinking has revealed that any conception of law as sheer external regulatory remedy is inappropriate. Deciphering instead the co-constitutive relation between law and social spheres becomes particularly important when assessing the role of law in global governance.[4] Unlike what the popular metaphor suggests, the 'global governance gap' does not simply result from the opening up of new transnational fields of action that nationally tied law-making has been unable to keep pace with. Rather, the invisible hand of the law remains highly formative beyond the confines of the nation-state, be it by enacting or omitting legal regulation. In this sense, the multiple factors which structurally contribute to the perception of a 'governance gap' need to be spelled out. First and foremost, this includes the relatively easy transnational reach of the liberal institution of contract[5] as compared to the state-centric structure of international law and its perpetuation in the global political economy.[6]

Contracts, *sans ou avec loi*,[7] are the normative building-blocks that facilitate the differentiation of society following autonomous social logics of action. With little respect for the aesthetics of a unitary legal order, these highly diverse rationalities unfold to create fragmented legal regimes that

'ANP'-approach. See Peer Zumbansen, 'Lochner Disembedded: The Anxieties of Law in a Global Context' (2013) 20 *Indiana Journal of Global Legal Studies* 29.

[3] On the illusion of a single reality of the law, see Ino Augsberg, 'Some Realism about New Legal Realism: What's New, What's Legal, What's Real?' (2015) 28 *Leiden Journal of International Law* 457.

[4] Cf David Kennedy, who states that

> it would be surprising if the new order were waiting to be found rather than made … If there is to be a new order, legal or otherwise, it will be created as much as discovered … as the world is re-ordered, law will be there, imagining it, making it, writing it down, consolidating and contesting the new arrangements. See David Kennedy, 'The Mystery of Global Governance' (2008) 34 *Ohio Northern University Law Review* 827, 832.

[5] Illustrated by the early proponents of a new 'lex mercatoria', most notably, Goldman. See Berthold Goldman, 'Frontières du droit et "lex mercatoria"' (1964) 9 *Les Archives de Philosophie du Droit* 177. For a more cautious view from practice, see Georges Delaume, *Law and Practice of Transnational Contracts* (Oceana Publications, Inc., 1988) 53. For a concise summary of the debate, see Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (Kluwer Law International, 2nd edn 2010) 17–51.

[6] On the legally induced separation of economic activity and political contestation, see David Kennedy, 'Law and the Political Economy of the World' (2013) 26 *Leiden Journal of International Law* 7, 12.

[7] The private international law figure of a 'contrat sans loi' denotes a contract detached from any specific state legal order. Cf Berthold Goldman, 'Les conflits des lois dans l'arbitrage international de droit privé' (1963) 109 *Recueil des Cours* 347, 348–485; Pierre Mayer, 'La neutralization du pouvoir normatif de l'État en matière de contrats d'État' (1986) 133 *Journal du Droit International (Clunet)* 5, 25. This autonomy is inconceivable, however, vis-à-vis the legal code itself which remains indispensable. See the discussion of the 'logical genesis of rights' in Jürgen Habermas's, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Massachusetts Institute of Technology [MIT] Press, 1996) 121–5 [translated by William Rehg].

characterise both transnational private and international law.[8] This development allows for the stabilisation of complex and evolutionarily improbable social cooperation in fields as varied as internet regulation (Internet Corporation for Assigned Names and Numbers, or ICANN), academia (eg standardisation of access to publication through intermediaries as the Social Science Research Network, SSRN) or financial markets. However, the self-sufficiency of these regimes points to the ultimate absence of central steering capacity beyond the state. Any regulation sensitive to the logic of these respective fields cannot help but become decentred and pluralistic itself, encompassing both state and non-state societal actors as regulators[9] and drawing on both public and private normative regimes. This reflexivity leads to the collapse of the clear-cut distinction between regulators, regulatory instruments and their subject matter[10] as implied in the broader yet amorphous concept of 'governance'.[11] Regulation closely entangled with its social field of application does not only become conceptually highly demanding. It gains traction less through hierarchical steering of command-and-control (power), but through the distribution and allocation of learning capacities within the regulated field (cognition).

Here, regulation operates independently of classical ascriptions of legal subjectivity. It can emanate from loosely set up bodies devoid of legal personality (such as the G8[12]) or it can lack any precise addressee (as in the case of rankings, such as the Programme for International Student Assessment, or PISA[13]). Most interestingly, by imposing specific cognitive obligations (such as regular self-evaluation of corporate conduct) upon a peculiar entity, reflexive regulation can elevate these entities to a superior position within, for

[8] For an emphasis on the contractual basis of fragmented transnational legal regimes, see Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World-Society' in Gunther Teubner (ed), *Global Law Without a State* (Dartmouth Pub Co, 1996) 3–28. Koskenniemi and Leino discuss the fragmentation of international law as an expression of political pluralism. See Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553.

[9] Cf Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post Regulatory" World' (2001) 54 *Current Legal Problems* 103. See also Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press, 2013).

[10] See Oren Perez, 'Responsive Regulation and Second-Order Reflexivity: On the Limits of Regulatory Intervention' (2011) 44 *The University of British Columbia Law Review* 743.

[11] Cf Rosenau and Czempiel highlight the move from actors towards structures. See James Rosenau and Ernst-Otto Czempiel (eds), *Governance Without Government: Order and Change in World Politics* (Cambridge University Press, 1992). In a more skeptical account, Möllers stresses the origin in economics. See Christoph Möllers, 'European Governance: Meaning and Value of a Concept' (2006) 43 *Common Market Law Review* 313. See also Claus Offe, 'Governance: An "Empty Signifier"?' (2009) 16 *Constellations* 550.

[12] Cf Martina Conticelli, 'The G-8, the Others and Beyond' in Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri and Euan MacDonald (eds), *Global Administrative Law: The Casebook* (Institute for Research on Public Administration [IRPA] and the Institute for International Law and Justice [IILJ], 3rd edn 2012) ch I.D.1.

[13] Cf Armin von Bogdandy and Matthias Goldmann, 'Taming and Framing Indicators: A Legal Reconstruction of the OECD's Programme for International Student Assessment (PISA)' in Kevin Davis, Angelina Fisher, Benedict Kingsbury and Sally Merry (eds), *Governance by Indicators: Global Power Through Quantification and Rankings* (Oxford University Press, 2012) 52–85.

instance, a given organisation, and thereby modify its comprehensive epistemic infrastructure. An example would be the requirement for corporations to install Corporate Social Responsibility (CSR) Committees.[14] Although deprived of executive power, theses corporate organs function as unique and specialised transmission belts between executive decisions and their perception in the social environment. In certain cases, finally, regulation may even group together certain social units to form a novel regulatory subject[15] that finds no equivalent in any overarching legal framework.

I shall argue in this article that this constructive dimension of regulation becomes apparent in pervasive governance modes of global value chains (GVCs).[16] Despite the metaphor of a 'chain', it would be misleading to conceptualise this archetype of contemporary production, which accounts for 80% of global trade,[17] as a linear stream of contracts with a clear semi-hierarchical power structure. While lead firms indisputably have far-reaching influence to dictate conditions of production to their first- and second-tier suppliers, they, too, form part of a dynamic network in myriads of contracts and legally autonomous units. The ongoing and vivid debate around corporate responsibility for rights violations in the Global South[18] remains centred around the idea of 'piercing the corporate veil'[19] in order to attribute responsibility to lead firms or mother companies.[20] However, the strategy of imputing a single actor cannot accommodate the systemic and emergent nature of GVCs in which norms are diffused de-centrally and spontaneously. Equally, any territorially fragmented regulatory response (such as through trade

[14] Cf Companies Act 2013 (India), s 135(1). This provision obliges any company, Indian or foreign, with an annual turnover or profit exceeding a certain threshold to constitute a CSR committee of the Board that shall elaborate a CSR policy and monitor its application. Another example can be found in the organisational requirements under the International Organization for Standardization's guidelines on social responsibility. See ISO 26000:2010.

[15] A concept of subjectivity regulation drawing on Latourian Actor-Network Theory has been fully developed by Mika Viljanen, 'Making Banks on a Global Scale: Management-Based Regulation as Agencement' (2016) 23 *Indiana Journal of Global Legal Studies* 425.

[16] An overview of the concept can be seen in the seminal work by Gary Gereffi, John Humphrey and Timothy Sturgeon, 'The Governance of Global Value Chains' (2005) 12 *Review of International Political Economy* 78. Bair makes an excellent contextualisation of this as well. See Jennifer Bair, 'Global Capitalism and Commodity Chains: Looking Back, Going Forward' (2005) 9 *Competition & Change* 153.

[17] Cf UNCTAD, 'Global Value Chains and Development: Investment and Value Added Trade in the Global Economy' (27 February 2013) UN Doc UNCTAD/DIAE/1, iii.

[18] Literature on 'business and human rights' is abundant and hardly classifiable. As to the standard of responsibility, a strong focus has classically been on international public law approaches while the pathways of civil and criminal liability—informed through human rights—have been explored more recently, alongside with debates concerning the appropriate judicial forum.

[19] See Philipp Blumberg, 'The Corporate Entity in an Era of Multinational Corporations' (1991) 15 *Delaware Journal of Corporate Law* 283.

[20] The social autonomy of the subsidiary has long been underestimated within corporate groups too. See Marc Amstutz, *Konzernorganisationsrecht [Corporate Organisational Law]* (Stämpfli, 1993) 256–320 (in German) [author's translation]. On the similarities between external network liability and liability within corporate groups, cf Hugh Collins (ed), 'Introduction to Network as Connected Contracts' in Gunther Teubner, *Network as Connected Contracts* (Hart Publishing, 2011) 1, 16 [translated by Michelle Everson].

restrictions)[21] suffers from important structural shortcomings. When taking the social structure of GVCs seriously, the direction of search rather points towards mechanisms that work explicitly on the plenitude of links within the production network. Such norms to which reference is made across the value chain may be embodied in third-party certification schemes, ie for social, environmental and safety standards. Prominent examples include Social Accountability International (SA8000),[22] GLOBALG.A.P.[23] or Fairtrade International.[24] While there is great variation in both their institutional designs and the rigidity of standards that constitute the benchmark of compliance,[25] these schemes allow for high context sensitivity with regard to the structure of a specific value chain. At the same time, these present institutional dynamics in certification are responses to the acknowledged fragility of its regulatory mode which, beyond 'regulating', is itself creative of a powerful form of assurance and comfort.

This article will critically analyse conventional assumptions concerning the way certification deploys its regulatory capacity. As will be shown, private governance instruments in value chains are usually assessed in the light of what has been termed a 'traditional compliance model'.[26] This view remains overly inspired by a logic of deterrence and sanctioning known from national administration. It also overstretches the role of lead firms as private regulators in value chains. Private regulation is approached in the light of a statist legal paradigm, while global corporations are thought of as being equipped with legislator-like regulatory powers. These assumptions need to be nuanced both in its legal and GVC theoretical core. I will therefore propose a theoretical framework that illustrates to what extent value chain certifications can transcend corporate regulation (remaining in an individualistic framework) and ultimately 'constitutionalise' the social system formed by such value chains. In doing so, I shall argue that they add a level of self-reflexivity to corporate conduct and form part of the legal portfolio of a 'Second Modernity'.[27] Conceptualising private governance regimes of GVCs

[21] Petersmann considers drawing on human rights to 'pluralise' the goals of trade law beyond market integration. See Ernst-Ulrich Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *European Journal of International Law* 621.

[22] Cf Social Accountability International, 'Social Accountability 8000 Standard (SA8000®)' (2014), online: <http://sa-intl.org/_data/n_0001/resources/live/SA8000%20Standard%202014.pdf>.

[23] Cf GLOBALG.A.P., 'What We Do' (2016), online: <www.globalgap.org/uk_en/what-we-do/>.

[24] Cf Fairtrade Labelling Organizations International, 'Standards' (2017), online: <www.fairtrade.net/standards.html>.

[25] See Axel Marx, 'Varieties of Legitimacy: A Configurational Institutional Design Analysis of Eco-labels' (2013) 26 *Innovation: The European Journal of Social Science Research* 268.

[26] Richard Locke, Matthew Amengual and Akshay Mangla, 'Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains' (2009) 37 *Politics & Society* 319, 320–1.

[27] For an elaboration, see Ulrich Beck, 'What Comes after Postmodernity? The Conflict of Two Modernities' in Ulrich Beck (ed), *Democracy Without Enemies* (Polity Press, 1998) 19–31.

reveals how much they constitute a paradigm case for scholarly approaches to transnational law. I will draw on guidance by existing scholarship under this rubric, but also critically use GVCs as an example for a sociologically enlightened self-understanding of transnational law which is yet to be fully unfolded.

The remainder of the paper follows a twofold structure. In Section II, I shall demonstrate that 'transnational law' has not yet risen to the challenge of projecting and rearranging institutional guarantees of national democratic lawmaking beyond the state. Three principal methodological contentions will be made to illustrate how transnational law can become a more adequate legal form of 'World Society'.[28] In Section III, these three pathways are shown to be interlinked in the study of GVCs. After identifying the present lack of legal concepts reflecting the systemic nature of GVCs as key challenge for the regulation of global production, private third-party certification will be discussed as an evolutionary achievement to address GVCs more accurately. As a conclusion, key findings will be summarised in Section IV.

II. Transnational law between first and second modernity

1. From phenomenology to an analytical tool

In a way, transnational law 'has never been modern'.[29] Beginning with Jessup's pioneering definition,[30] it has been a legal endeavour that reaches out beyond the binary categories which condition the mind of the modern lawyer. It has evolved as an inquiry into the elusive boundaries of the law, calling for a productive irritation of legal thought and putting new regulatory techniques, actors and normative assemblages on its agenda.[31] Drawing on the dichotomy of Nature/Society, Bruno Latour has retraced how the dual process of 'purification' and 'hybridisation' created constant disquietude for the project of modernity. Importantly and unlike chronological narratives of 'rise and fall', his analysis suggests that the productive 'blind spot' of modernity is the simultaneous existence of these two processes.[32] For Latour, the paradox is that streamlining our conceptions of society to neat categories of

[28] See Niklas Luhmann, 'Globalization or World Society: How to Conceive of Modern Society?' (1997) 7 *International Review of Sociology* 67.

[29] Alluding to Bruno Latour, *We Have Never Been Modern* (Harvard University Press, 1993) 36 [translated by Catherine Porter].

[30] I shall use … the term 'transnational law' to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories. See Philip C Jessup, 'Transnational Law' (Storrs Lecture on Jurisprudence at Yale University, New Haven, 1956) 1.

[31] Cf Marc Amstutz, 'Métissage: On the Form of Law in World Society' (2013) *112 Zeitschrift für vergleichende Rechtswissenschaft* 336.

[32] Cf Latour (n 29) 11.

'persons' and 'things' ultimately leads to a proliferation of syncretism and 'hybrids' as driving force of modernity. And while the limited conceptual inventory of modern society did not inhibit a novel recombination and evolution of its social structures, its self-description has become more and more an empty shell.

These inherent conflicts or antinomies of modernity pervade many social spheres, including the law at the time of its transnationalisation. Since the twentieth century, private law, for instance, has conserved its principal institutions of normative individualism precisely *through* drastic modernisation and reaction to critics.[33] In the same sense, transnational law pushes further what would in Latour's terminology be 'purified' concepts, such as freedom of contract, by trying to adapt them 'from within' to the internal struggles within the idea of modernity, unveiled drastically by globalisation.

In obviously sketchy terms, the central figures of modernity as formulated in the Enlightenment concentrated on legitimising patterns for social and political organisation (social contract, normative individualism, freedom) through objectivity and universalisation.[34] Since the recourse to metaphysical truth-conditions was cut off, specialised discourses were institutionalised around proper worldviews. Being closed-circuited, the law had to shift for itself and build a self-referential operational logic that has been widely congruent with the functional necessities of an early capitalist political economy.[35] Against this straightforward depiction, modernity has been continuously destabilised by immanent counter-movements which urged for a reflection of its limits and contradictions.[36] Today, global social systems such as financial markets operate at a degree of differentiation which is highly effective pursuant to its social logic, but by its external effects ultimately undermines its own basis. In the light of this awareness of self-created ecological, economic or social risks through the successes of modernity, societal differentiation is suddenly recognised as part of the problem, not its solution.[37] This tendency resonates in various subsystems and has been coined as 'second' or 'reflexive' modernity.[38]

[33] See Marietta Auer, *Der privatrechtliche Diskurs der Moderne [The Private Law Discourse of Modernity]* (Routledge, 2014) 5, 53 (in German) [author's translation].

[34] Cf Jürgen Habermas, 'Modernity: An Unfinished Project' in Maurizio Passerin d'Entrèves and Seyla Benhabib (eds), *Habermas and the Unfinished Project of Modernity: Critical Essays on The Philosophical Discourse of Modernity* (MIT Press, 1997) 38, 45.

[35] Cf Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany* (Clarendon Press, 1995) 353 *et seqq* [translated by Tony Weir].

[36] Cf Max Horkheimer and Theodor W Adorno, *Dialectics of Enlightenment* (Stanford University Press, 2002) [translated by Edmund Jephcott].

[37] For examples from various social fields, see Niklas Luhmann, *Ecological Communication* (University of Chicago Press, 1989) [translated by John Bednarz].

[38] See Ulrich Beck, Wolfgang Bonss and Christoph Lau, 'The Theory of Reflexive Modernization. Problematic, Hypotheses and Research Programme' (2003) 20 *Theory, Culture and Society* 1. Within the legal discourse, this insight has incited enlarged interest in unintended effects of legal regulation and more broadly in the epistemic preconditions of governance under uncertainty. Cf Karl-Heinz

The extent to which society under 'reflexive' modernity can actually work on itself is crucially contingent upon the toolkit provided by transnational law. For transnational law to be supportive of the creation of reflexive processes in society, it must adequately conceptualise its own function. I will demonstrate that a such self-portrayal is still being developed, as transnational law continues to oscillate between facets of 'first' and 'second' modernity.

Generally speaking, the rise of transnational legal regulation can be read as a result of the evolutionary success of the legal form, which has provided a blueprint instrument to allow for a stabilisation of expectations irrespective of political boundaries without leading to global convergence of legal systems.[39] This development has hollowed out or even shattered close ties between law and state. Those were the cornerstone of a 'statist legal paradigm'[40] which had somewhat frivolously been expected to constitute the ending point of legal evolution. After the rich experience with stateless law[41] had fallen into oblivion, the scholarly project of 'transnational law' was initiated with an epistemological mission. It offered an account and a vocabulary to perceive and articulate legal normativity beyond the state. A crucial step was to break out of the matrix of binary categories,[42] such as state/society, public/private, market/hierarchy, law/social norms or rule setting/rule application. Given this vantage point, legal and social practices which crisscross these frontiers could easily fly under the radar of disciplinary concern. The implicit *tertium non datur* was rejected by transnational legal scholars who began to develop a perspective from which these dichotomies themselves might be questioned (or in a Hegelian sense, 'sublated').[43] Examples can be found in the re-orientation on the concept of collision rules from conflict of laws to intra-regime collisions (both with regard to normative orders and social systems)[44] or in the study of networks as social

Ladeur, 'Coping with Uncertainty: Ecological Risks and the Proceduralization of Environmental Law' in Gunther Teubner, Lindsay Farmer and Declan Murphy (eds), *Environmental Law and Ecological Responsibility* (Wiley, 1993) 299–336.

[39] Cf Pierre Legrand, 'European Legal Systems Are Not Converging' (1996) 45 *The International and Comparative Law Quarterly* 52.

[40] Cf Lars Viellechner, *Transnationalisierung des Rechts [Transnationalisation of Law]* (Velbrück Wissenschaft, 2013) 20–60 (in German) [author's translation].

[41] For a recent overview, see Helge Dedek and Shauna Van Praagh (eds), *Stateless Law: Evolving Boundaries of a Discipline* (Routledge, 2015).

[42] See Roberto Mangabeira Unger, 'Legal Analysis as Institutional Imagination' (1996) 59 *Modern Law Review* 1. In his critique, Unger discusses binary categories as 'sustained exercise in correction'. Unger (this note) 2.

[43] On the rules versus standards-dichotomy, see Pierre Schlag, 'Rules and Standards' (1985) 33 *UCLA Law Review* 379. 'The conventional forms of legal thought allow us no place outside of the rules v. standards dichotomy *from where we can make sense of the dispute*'. Schlag (this note) 381 [emphasis added by author].

[44] See also Christian Joerges, Poul F Kjaer and Tommi Ralli, 'A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation' (2011) 2 *Transnational Legal Theory* 153.

structure beyond the contract/organisation divide.[45] Hence, 'transnational law' constitutes a flourishing 'third' way between these long exclusive categories.

Why then doubt the genuinely reflexive nature of transnational law? By offering a terminological framework, early contributions to the field remained at the level of an eye-opening theory of a normative corpus. There was no way of escaping the 'war of faith'[46] fought around the possibility or impossibility of law beyond the state, a debate which spilled much ink and prevented the more virulent questions of *why* and *how* transnational law exists from taking centre stage. Philip Jessup drew our attention to the transnational context of seemingly domestic matters by pointing to the transnational rules of various types bearing upon them.[47] Gunther Teubner's seminal article on the 'Global Bukowina' presented tentative characteristics of an emerging 'global law' which gained independence from the statist legal paradigm through the universal binary code legal/illegal.[48] Subsequent studies of the legal regimes in various transnational social fields (under the rubric of a *lex mercatoria*,[49] *lex digitalis*,[50] *lex sportiva*,[51] *lex financiaria*[52] or *lex maritima*[53]) have championed self-regulation as expression of a stateless civil society. They were joined by legal practitioners who developed considerable interest in the scholarly debate.[54] After decades of concern among private lawyers that public law values were disseminating into the sacrosanct private order,[55] references to public interest seemed to fade behind largely self-contained regimes. In the absence of an institutionalised global political sphere, private law (understood in a Kantian tradition as the pre-political civil order[56]) suddenly became the

[45] For a state-of-the-art overview, cf Stefan Grundmann, Fabrizio Cafaggi and Giuseppe Vettori (eds), *The Organizational Contract: From Exchange to Long-Term Network Cooperation in European Contract Law* (Routledge, 2013).
[46] Teubner (n 8) 8.
[47] Jessup (n 30) 4–11.
[48] Teubner's work draws upon a fully fledged theory of globalisation. See Teubner (n 8) 14.
[49] A *locus classicus* for transnational law with innumerable and heterogenous scholarly references. For a critical overview, cf Alec Stone Sweet, 'The New Lex Mercatoria and Transnational Governance' (2006) 13 *Journal of European Public Policy* 627.
[50] Cf Aron Mefford, 'Lex Informatica: Foundations of Law on the Internet' (1997) 5 *Indiana Journal of Global Legal Studies* 211.
[51] See also Antoine Duval, 'Lex Sportiva: A Playground for Transnational Law' (2013) 19 *European Law Journal* 822.
[52] Cf Christopher Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (Cambridge University Press, 2nd edn 2015) 46.
[53] Cf Andreas Maurer, *Lex Maritima: Grundzüge eines transnationalen Seehandelsrechts [Lex Maritima: Foundations of the Transnational Law of Maritime Trade]* (Mohr Siebeck, 2012) (in German) [author's translation].
[54] Gaillard presents *lex mercatoria* as a normative order that qualifies as 'law' to be selected by an arbitrator, thereby cutting off references to state law. See Emmanuel Gaillard, 'Transnational Law: A Legal System or a Method of Decision Making' (2001) 17 *Arbitration International* 59, 71.
[55] Cf Max Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie [Economy and Society: An Outline of Interpretive Sociology]* (Mohr Siebeck, 5th edn 1980) 503 *et seqq*.
[56] See Immanuel Kant, *Metaphysik der Sitten [Metaphysics of Morals]* (Friedrich Nicolovius, 1797) § 41.

sole candidate to embody a comprehensive global order. These are striking traits of universality inherited from the project of modernity. The 'purifying' guiding principle of individual autonomy[57] thus persisted and proved to be highly influential for the practice of transnational rule-making, but also for an emerging scholarly project of transnational law. On this track, transnational norms were ultimately falling in line with other recognised normative and empirical shortcomings of a liberal will theory and its institutional preconditions. In addition, a conceptual apparatus allowing one to address the justice concerns arising from the public dimension of private governance regimes was yet to be developed. This would not remain without impact on the direction of research, with many of the early studies of a phenomenology of transnational law rather descriptively mapping the normative infrastructure in a respective field.[58] Many of these still constitute playgrounds of transnational law. Authors addressing normative implications did this most likely through the lens of democratic constitutionalism, concluding that transnational private regulation was, if not legally irrelevant, then simply illegal.[59]

The merit of this first wave of scholarship was to introduce transnational norms to the legal arena. Subsequently, the heart of the debate shifted towards a more analytical approach when theories of globalisation were introduced on a broader scale. Transnational law became an integrated study of norms and transnational social institutions that act simultaneously as rule-makers or rule-takers and decide upon the practical conditions which give meaning to transnational norms. If '(a)dding "transnational" to "law" is like adding a question mark',[60] the project was well suited to be turned into a broader self-ascertainment of the role of law in globalisation[61] which would link analysis, justification and critique. This implies conflicts erupting 'inside the institutions over foundations and developmental alternatives'[62] as characteristics of a 'second' modernity. As a consequence, the emphatic discovery of an increase in the number of self-regulatory regimes within the global realm has been clouded by the quest for mechanisms that might re-integrate concerns of the respective social environment ('public interest').

[57] Cf Arthur Ribstein, 'Private Order and Public Justice' (2006) 92 *Virginia Law Review* 1391. On the Rawlsian 'division of responsibility' between a liberal private legal order and public justice concerns, see Ribstein (this note) 1395–402.

[58] A comparable quest for a 'normative turn' with regard to Global Administrative Law (GAL) is expressed by Stewart. See Richard Stewart, 'The Normative Dimensions and Performance of Global Administrative Law' (2015) *13 International Journal of Constitutional Law* 499. Concepts of legitimacy and accountability have proven to take different effects when applied nationally or in the realm of global governance.

[59] Cf Udo di Fabio, 'Verfassungsstaat und Weltrecht [Constitutional State and World Law]' (2008) 39 *Rechtstheorie* 399, 405 (in German) [author's translation].

[60] Roger Cotterell, 'What Is Transnational Law' (2012) 37 *Law & Social Inquiry* 500, 502.

[61] See Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing, 2012) 96–148.

[62] Beck (n 27) 24.

Any of these normativities operate at the fine line of global legal pluralism[63] which pertains to the janus-face of the legal form: Democratic law-making on the one hand restricts access to power by establishing safeguards for individual liberties, and thereby limits emancipatory invocation of normative ideas. On the other hand, the immediate and unfiltered crafting of legal regimes by influential business sectors, professions and global networks may result in a normative 'self-service'[64] bare of any coordinative framework. This tension, inherent to the concept of law, cannot be dissolved but forms part of the inescapable paradoxes of the law.[65] In this respect, global legal pluralism[66] is far from drawing a harmonic or even romanticised picture (as some of its precursors around the turn of the century were induced to do by a focus on intra-regime relations[67]), but stresses the actual level of abstraction at which normative struggles arise in World Society.

2. Pathways towards a sociologically enlightened transnational law

The global realm is increasingly emerging as a laboratory for experimental law-making. Regulatory patterns and established normative shapes are mixed, transformed and newly made up, leading, for instance, to the creation of hybrid investment arbitration regimes,[68] a standards-based private architecture for global accounting[69] or the institutionalisation of global

[63] Cf Klaus Günther, 'Normativer Rechtspluralismus – Eine Kritik [Normative Legal Pluralism – A Critique]' (2014) Goethe-University Frankfurt, Normative Orders Working Paper 7–8 (in German) [author's translation], online: <http://publikationen.ub.uni-frankfurt.de/frontdoor/index/index/docId/34664>.

[64] See Alain Supiot, 'Du Nouveau au Self-service Normatif: La Responsabilité Sociale des Entreprises [Towards a Normative Self-service: The Social Responsibility of Corporations]' in Albert Arsequel *et al* (various contributors), *Analyse Juridique et Valeurs en Droit Social, Études Offertes à Jean Pélissier* (Dalloz, 20014) 541 (in French) [author's translation].

[65] In a productive turn of this figure, Teubner explicates the contradictions of a self-referential legal system. See Gunther Teubner, 'Dealing with Paradoxes of Law' in Oren Perez and Gunther Teubner (eds) *Paradoxes and Inconsistencies in the Law* (Oxford Publishing: 2006) 41–64. Goodrich acknowledges this as 'the greatest contribution of the autopoietic theory of law'. See Peter Goodrich, 'Anti-Teubner: Autopoeisis, Paradox, and the Theory of Law' (1999) 13 *Social Epistemology* 197, 198.

[66] See Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2014).

[67] The institutional history of Otto von Gierke, for example, suggests an inner homogeneity and stability of an organic community. Likewise, the Italian institutionalist Santi Romano, in his 1918 work *L'ordinamento Juridico*, develops a notion of 'legal order' that denotes a rule-based pattern of social organisation and is synonymous with the notion of 'institution' itself. See Filippo Fontanelli, 'Santi Romano and L'ordinamento Giuridico' (2011) 2 *Transnational Legal Theory* 67. Somewhat surprisingly, despite the short-circuiting of law and social facts, the analysis of relations between legal orders (centred around the degree of 'relevance' of one order for another) proceeds in a formalistic manner and draws on concepts partly borrowed from Kelsen's Pure Theory (superiority/subordination). See Hans Kelsen, *Pure Theory of Law* (University of California Press, 1970) [translated by Max Knight]. For further analysis, see Fontanelli (this note) 80–83. On the discursive connection between contemporary and nineteenth-/early twentieth-century legal pluralism, see Anna di Robilant, 'Genealogies of Soft Law' (2006) 54 *American Journal of Comparative Law* 499, 539–52.

[68] Cf Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 *American Journal of International Law* 45.

[69] Cf William Bratton, 'Private Standards, Public Governance: A New Look at the Financial Accounting Standards Board' (2007) 48 *Boston College Law Review* 5.

commons through private licences.[70] Since these evolving governance regimes are not directly accountable to national electorates and escape jurisdictional control in its conventional sense, it is incumbent upon the law itself and the actors involved in transnational legal processes to elucidate how law operates beyond the state. Any sound reformulation of the concept of law will have to project beyond the state the many contradictory elements that make up the law's *proprium*: its technical yet democratically charged nature, its seesawing between facts and norms and the various simultaneous social contexts in which it gains meaning. In this sense, transforming transnational law from a *study of norms with transnational reach* to a *comprehensive approach to law and globalisation* may allow a better and reflexive understanding of the inherently political nature of normative processes beyond the state.

i. Adequate perception of global fault lines

For this endeavour, a crucial challenge lies in the adequate legal perception of global social conflicts. Constructivist scholarship has shown that the complex relation between law and social 'reality' is primarily a matter of perspective.[71] Law does not perceive a holistic reality as such, but very selectively recognises social facts that are relevant for its doctrinal rubrics.[72] To take an obvious example, criminal law is sensitive to the act of A robbing B, but, in principle, insensitive to other parameters of the social relation between them. It is through reasonable indifference that law reconstructs social conflicts in order to operationalise and ultimately allow for a decision. Law decontextualises, inevitably alienates and thereby *creates* a specific legal reality by means of representation or projection of the social world within the law (*homo juridicus, societa juridica*). This operation is led by intellectual assumptions on causation and the existing economic, social and political order which have been conceptualised as 'social models'.[73] Those models remain implicit in most cases, but over time reveal changes in the legal representation of social structures and power relations. As various authors have shown, the formal liberal paradigm of the nineteenth and early twentieth century in both Europe and the US has been adjusted to better distribute the aggregation of power among those who enjoy equal freedom.[74] However, the materialisation of

[70] See Dan Wielsch, 'Private Governance of Knowledge: Societally-Crafted Intellectual Property Regimes' (2013) 20 *Indiana Journal of Global Legal Studies* 907, 932–40.

[71] For an overview of key contentions, see the seminal study by Peter L Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Anchor, 1967).

[72] Cf Gunther Teubner and Peer Zumbansen, 'Alienating Justice: On the Social Surplus Value of the Twelfth Camel' in David Nelken and Jirí Pribán (eds), *Law's New Boundaries: Consequences of Legal Autopoiesis* (Ashgate Publishing, 2001) 21–44.

[73] Pioneering thought by Franz Wieacker, *Das Sozialmodell der klassischen Privatrechtsgesetzbücher und die Entwicklung der Modernen Gesellschaft [The Social Model of the Grand Codifications and the Development of Modern Society]* (C.F. Müller, 1953) in German [author's translation].

[74] See Rudolf Wiethölter, 'Materialization and Proceduralization in Modern Law' in Gunther Teubner (ed), *Dilemmas of Law in the Welfare State* (Walter de Gruyter, 1988) 221–49. See also the reply by Duncan

law was limited to the individual level of analysis, mostly leaving out institutional and societal dimensions. In an overall approach, it concentrated on unequal bargaining power and structural inequalities (in consumer law, labour law or tenancy law) by neutralising the symptoms, rather than setting free emancipatory dynamics.

Transnational constellations differ considerably both with regard to their complexity and their disembeddedness from a background order of democratic states. Drawing on the concept of 'social models' may raise awareness for atypical, *transversal conflicts* for which no judicial forum or encompassing justice order exists. Identifying the 'definite seat of a legal relation' as suggested by *Savignian*[75] international private law is not only difficult with regard to a spatial localisation, but towards a legal framework generally. What precisely forms part of the context of a case that is of normative relevance? Between whom or what does law arbitrate here? As an illustrative example, international law of war was propelled to adapt its mere interstate model of conflicts to the reality of non-state armed groups operating across borders in order to avoid artificial conceptualisation.[76] Other examples would include, for instance, migrants being excluded from the *demos* of their country of residence,[77] or conflicts between states and investors governed by bilateral investment treaties that cut across national legislations. It is these cases, which are paradigmatic of the contemporary normative design of World Society, that indicate the need to create institutions to fulfil the welfare state's claim of combining economic rationality with a sustainable and humane political and social order.[78] What is of particular concern then is the societal role of multinational corporations constrained by the dynamics of global financial markets and sourcing practices. Here, the porosity of political boundaries inevitably brings to life new collisions, less between individual legal persons but between systemic rationalities, amorphous communicative patterns and flows of capital, goods and information.[79] It is along these linkages that corporate conduct takes remote effects and that

Kennedy, 'Comment on Rudolf Wiethölter' in Christian Joerges and David Trubek (eds), *Critical Legal Thought: An American-German Debate* (Nomos Verlagsgesellschaft, 1989) 511–24.

[75] Friedrich Carl von Savigny, *System des Heutigen Römischen Rechts [System of Modern Roman Law]* (Veit und Comp., vol VIII 1840) 108 (in German) [author's translation].

[76] Cf Andreas Paulus and Mindia Vashakmadze, 'Asymmetrical War and the Notion of Armed Conflict: A Tentative Conceptualization' (2009) 91 *International Review of the Red Cross* 112.

[77] Referring to Benhabib on the 'democratic paradox of membership'. See Seyla Benhabib, 'Another Cosmopolitanism: Hospitality, Sovereignty, and Democratic Iterations' (Berkeley Tanner Lectures, California, 2008) 147, 168.

[78] Cf Jürgen Habermas, 'Learning from Catastrophe: A Look Back at the Short Twentieth Century' in Max Pensky (ed), *The Postnational Constellation: Political Essays* (MIT Press, 2001) 38–57, 52.

[79] See Andreas Fischer-Lescano and Gunther Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999. See also the contributions in Kerstin Blome, Andreas Fischer-Lescano, Hannah Franzki, Nora Markard and Stefan Oeter (eds), *Contested Regime Collisions: Norm Fragmentation in World Society* (Cambridge University Press, 2016).

global circumstances can trickle down to the local or individual sphere. In this view, the autonomous 'legal bubbles'[80] created by corporate self-governance through firm-wide codes of conduct appear as an expression of functional differentiation which reflects the new global interconnectedness of social action.

ii. Reflexive institution building

In the absence of a world government, social institutions not only confer meaning to particular behaviour, but they are what provides for stable and collective frames of social interaction in the transnational realm. In this, they combine formal, informal and ideational dimensions. Understood in the broad terms of the influential definition by Douglass North, institutions 'are the rules of the game in society or, more formally, are the humanly devised constraints that shape human interaction'.[81] Unlike state regulatory activities, institutional ordering is rarely created from scratch but rather through spontaneous evolution with strong elements of path-dependency.[82] This explains why institutions constitute an immensely valuable repository for social learning but remain at the same time relatively resistant to external regulation. On the other hand, institutions are dependent on a backing by a set of certain social resources, such as legitimacy, knowledge but also law. Institutionalist scholars have argued that while institutions at the national level are often supported by democratic rule-making, transnational institutions are more contingent on cognitive and cultural processes.[83]

Despite the rise in importance of the latter factors, the performative role of the law should not be underestimated. Not only can transnational issues under various circumstances be brought before a national judge,[84] but institutional dynamics also regularly require a particular legal configuration. Transnational legal approaches that seek to create fora for the exercise of political autonomy beyond national boundaries should therefore be chiefly concerned with law as central facilitator for social institutions. As pointed out above, this is well established with regard to the social institution of a transnational market. Market rationality is not only fuelled by the transboundary

[80] See Tomaso Ferrando, 'Private Legal Transplant: Multinational Enterprises as Proxies of Legal Homogenisation' (2014) 5 *Transnational Legal Theory* 20.

[81] Douglass C North, *Institutions, Institutional Change, and Economic Performance* (Cambridge University Press, 1990) 3.

[82] See generally James Mahoney and Kathleen Thelen, 'A Theory of Gradual Institutional Change' in James Mahoney and Kathleen Thelen (eds), *Explaining Institutional Change: Ambiguity, Agency, and Power* (Cambridge University Press, 2010) 1–37.

[83] See Marie-Laure Djelic and Sigrid Quack, 'Institutions and Transnationalization' in Royston Greenwood, Christine Oliver, Kerstin Sahlin and Roy Suddaby, *The SAGE Handbook of Organizational Institutionalism* (Sage Publishing, 2008) 299–324, 318.

[84] See, for example, Robert Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' (2002) 40 *Columbia Journal of Transnational Law* 209.

principle of freedom of contract, but has been, in the context of the European Union (EU), enshrined in the specific functional normativity of fundamental freedoms guaranteeing the free movement of goods, capital, services and people among the EU member states. Throughout the European integration process, economic liberties have been considered as proxy of public interest. The ongoing 'constitutionalisation' has only recently opened up this long-standing view to recognise a more plural set of values.[85]

The European example impressively illustrates to what extent a pluralistic society is in need of a law with a likewise pluralistic sensorium. Setting free capacities for social innovation in all spheres of society requires legal concepts *equally* assisting institutions which embed, criticise or alter an expanding market rationality. This is not to project all hopes towards the lifeworld to counter systemic dynamics.[86] Rather, it is to allow for societal integration under conditions of an irreducibly differentiated society. Law upholds its promise of an impartial third perspective (*audiatur et altera pars*) by promoting mechanisms and institutions which internalise externalities of self-centred social processes.

As seen in varied transnational cases, this can influence the protection of anonymity of whistleblowing, the legal framework of alternative currency systems such as bitcoins or the degree of legal protection against 'naming and shaming'[87] practices of non-governmental organisations (NGOs). The extent to which any of the three social institutions can exert a public function is largely predetermined through their legal regime. This is central to the concept of 'reflexive' law[88] which holds as one premise that experimental learning in society is processed through experimental legal forms. While the ordering dimension steps back, 'second' modernity builds on legal forms that enhance learning within social structures in order to induce self-restraint. It is through the intrinsic coupling of 'law' and 'narrative' in

[85] Cf the periodisation by Joseph HH Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403. For a discussion on the normative pluralism underpinned by European fundamental rights, see Dan Wielsch, 'The Function of Fundamental Rights in EU Private Law' (2014) 10 *European Review of Contract Law* 365, 370–2.

[86] Jürgen Habermas, 'Modernity. An Unfinished Project' in Maurizio Passerin d'Entrèves and Seyla Benhabib (eds), *Habermas and the Unfinished Project of Modernity* (MIT Press, 1997) 38–58. Habermas is urging scholars to explore

> if the process of social modernization can also be turned into other non-capitalist directions, if the lifeworld can develop institutions of its own in a way currently inhibited by the autonomous systemic dynamics of the economic and the administrative system. See Habermas (this note) 53.

[87] For a critique of the unforeseeable—and potentially disproportionate—extent of sanctions through communicative processes under corporate disclosure law, see Daniel Dedeyan, *Regulierung der Unternehmenskommunikation [Regulation of Corporate Communication]* (Schulthess Publishing, 2015) 853–7 (in German) [author's translation].

[88] An early outline can be found in Gunther Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Society Review* 239.

juris-generative processes that virtuosic legal concepts are born.[89] To be sure, this requires maintaining a critical distance to established modes of law-making. As a negative example, the notion of 'soft law', in its early usage and often until today, contains a strong normalising assumption based on a peculiar type of state-made enforceable law that reaches beyond heuristics. Instead of labelling norms as deficient, an evolutionary perspective calls for taking seriously movements of trial and error in the spontaneous, networked formation of norms as well as alternative sanction mechanisms.

Given the emancipatory power of self-regulatory instruments, the novel role of intermediaries (such as NGOs, standard-setters or online platforms) in the transnational realm has to be unfolded by accentuating the enabling dimension of institutions. In many fields, intermediaries in a state-like function set the course for the exercise of personal and institutional autonomy or group together as spontaneous protest movements. Here again, the role of law at the formational stage of agents and interests crops up.[90]

iii. Enlarging the normative portfolio: standard setting

Focusing on institutions almost automatically suggests a third pathway, namely to enlarge the normative portfolio of transnational law to encompass societal normativities. Within the positivist paradigm of the nation-state, law was ascribed a selective mission for which universal rules (issued by legislation) were seen as the appropriate instrument.[91] In a globalised world, however, localising rule setting power exclusively with the legislator would meet epistemic, normative and regulatory concerns. As an inquiry into those transnational norms which significantly affect behaviour and raise legitimacy concerns, transnational law is particularly drawn to processes of standard setting. Their role in replacing and directing formal legal regulation by far exceeds the degree known from earlier and somehow antiquated debates around the positivist reception of technical standards. Despite controversies around their effectiveness, accountability and legitimacy,[92] transnational standards have proliferated in recent years to constitute *in praxi* the

[89] Cf Robert Cover, 'The Supreme Court 1982 Term: Foreword – Nomos and Narrative' (1983) 97 *Harvard Law Review* 1, 4. Human rights activists and NGOs are thus encouraged to explore pathways beyond calling for 'binding national legislation'. Without critically taking into account how common attributions to the concept of 'bindingness' have become questionable under globalisation, lobbying towards such legislation may result in a Pyrrhic victory. Rather, these groups are urged to make 'the most imaginative use possible of existing legal tools in venues which could prove to be effective in bringing about progressive change'. See Horatia Muir Watt, 'Future Directions' in Horatia Muir Watt and Diego Fernández Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press, 2015) 343, 345.

[90] For an illustration, cf Bob Jessop, 'Critical Realism and the Strategic-Relational Approach' (2005) 56 *New Formations* 40, 43.

[91] Reflective of Kant's work *Einleitung in die Rechtslehre [Introduction to the Doctrine of Right]* in German. See Kant (n 56) § B.

[92] Cf Anne Peters, Till Foerster and Lucy Koechlin, 'Towards Non-state Actors as Effective, Legitimate, and Accountable Standard Setters' in Anne Peters, Lucy Koechlin, Till Förster and Gretta Fenner Zinkernagel, *Non-state Actors as Standard-setters* (Cambridge University Press, 2009) 492–562.

widely hidden normative backbone of complex societies.[93] 'Standards' here are not to be understood in their classical sense as open textured norms in opposition to bright line 'rules' (as in an familiar debate around types of norms from which a legislator may choose).[94] Rather, 'standards' refers to rules which, in responding to a practical need by various actors, emanate from specialised private or hybrid bodies and become mandatory—not through legislation, but selectively through business practice, membership or contractual reference.

Historically, standardisation emerged as an instrument to assure compatibility in the use of technical innovations,[95] an argument that is echoed today by the reduction of transaction costs. Until today, many technical standards find their primary objective in the contingent fixation of certain parameters towards uniformity. Normative questions arise less from the standard itself than from the use made of it, eg in shaping markets or defining access.[96] Many transnational standards, however, concern normative issues on which international political consensus cannot be obtained or, as far as highly dynamic matters are concerned, cannot provide for sufficient procedures for revision. They are representative of a new mode of governance through procedure and knowledge (instead of hierarchy and command) under conditions of growing uncertainty. It becomes clear that the long-standing question whether standards *are* law has obscured the insight that standards *operate as* law and *inform the* law with regard to certain social practices. They set benchmarks for private/public conduct alike and, with some generalisation, seek to render this conduct compatible with affected social rationalities (ie economic, ecological, technical, social, cultural or political), rather than aggregated individual interests. This holds true for various examples: industry regulation,[97] technical coordination,[98] policy

[93] See generally Nils Brunsson and Bengt Jacobsson, *A World of Standards* (Oxford University Press, 2000); Stefan Timmermans and Steven Epstein, 'A World of Standards but Not a Standard World: Towards a Sociology of Standards and Standardization' (2010) 36 *Annual Review of Sociology* 69; Dieter Kerwer, 'Rules That Many Use: Standards and Global Regulation' (2005) 18 *Governance* 611. For a compelling analysis on the national reception of global standards, cf Richard Stewart, 'Global Standards for National Societies' in Sabino Cassese (ed), *Research Handbook on Global Administrative Law* (Edward Elgar Publishing, 2016) 175–95.

[94] Kaplow further elaborates by stating that 'the only distinction between rules and standards is the extent to which efforts to give content to the law are undertaken before or after individuals act'. See Louis Kaplow, 'Rules Versus Standards: An Economic Analysis' (1922) 42 *Duke Law Journal* 557, 560. For a critique of the binary approach, see Schlag (n 43) 379.

[95] Cf Miloš Vec, Tilmann Röder and Margrit Seckelmann, 'Standards, Norms and the Law: The Impact of Industrial Revolution', EUI Working Paper, HEC No. 2003/5 23–44, online: <http://cadmus.eui.eu/bitstream/handle/1814/1867/HEC03-05.pdf>.

[96] See Christian Struck, *Product Regulations and Standards in WTO Law* (Wolters Kluwer, 2014).

[97] On the financial industry, see Annelise Riles, *Collateral Knowledge*: *Legal Reasoning in Global Financial Markets* (University of Chicago Press, 2011).

[98] Such as audio and video compression standards by the Moving Picture Experts Group (MPEG), a subgroup of the International Organization for Standardization and the International Electrotechnical Commission. See MPEG, 'About MPEG' (last revised 26 November 2016), online: <http://mpeg.chiariglione.org/about>.

benchmarks,[99] sustainability standards[100] or responsible lending criteria. While social sciences have revealed this poly-functionality of standards, no corresponding comprehensive 'standards law' has been developed yet,[101] even less for the transnational realm.

In the next part of this article, the case of global production will be used illustrate how the three essential pathways for transnational law I described in this section intermingle and allow to take a nuanced stance at the potential of regulatory regimes in this field.

III. The constitution of global production

Value chain capitalism, as I will argue, has taken on a particular social form which produces certain conflicts that are overlooked by both political institutions and classical legal doctrine. In order to sharpen the legal idea that the existence and prevalence of value chains serve as globally effective social units, emerging private governance schemes drawing on social and environmental standard setting will be analysed. As a depiction of the operational structure of third-party certification will reveal, these instruments bear the potential to *legally* reflect the systemicity of value chains by constituting and programming them from within.

1. From corporate to value chain governance

Alongside other factory fires, the collapse of Rana Plaza in Bangladesh in 2013[102] has become emblematic of the social externalities of global production. Pervasive effects in the fields of environment, family life, culture and politics may easily be added. In a way, the fissures in the factory walls epitomise the instability of the patch-worked legal regime governing the far-flung and dispersed networks of capital and labour. While the discipline of supply chain management has helped this mode of production to thrive to its contemporary degree of sophistication,[103] legal scholarship is only

[99] See Transparency International, 'Corruption Perception Index' (2016) online: <http://www.transparency.org/research/cpi/overview>.

[100] For an overview of the plethora of existing schemes, cf Axel Marx and Jan Wouters, 'Competition and Cooperation in the Market of Voluntary Sustainability Standards' (1 April 2014) Leuven Center for Global Governance Studies Working Paper No. 135, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2431191>.

[101] See Harm Schepel, *The Constitution of Private Governance* (Hart Publishing, 2005) 7.

[102] For a detailed recital of the facts and an insightful analysis of legal developments in the aftermath of the collapse, see Larry Catá-Backer, 'The Collapsing Structure of Regulatory Factories' (forthcoming) *UC Irvine Journal of International, Transnational, and Comparative Law*.

[103] Cf David Simchi-Levi, Philip Kaminsky and Edith Simchi-Levi, *Designing and Managing the Supply Chain: Concepts, Strategies & Case Studies* (McGraw-Hill Education, 3rd edn 2007), alongside with a considerable number of specialised journals, both from a rather analytical and empirical angle (eg *Journal of Supply Chain Management*, *Supply Chain Management: An International Journal*, *Journal of Operations Management*, *Journal of Purchasing & Supply Management*).

recently shedding light on the obscurity of chains as unit of analysis.[104] Together with states engaging in regulatory competition, anchored in the institutions of the global political economy and spurred by the logic of global financial markets, the legal regime of value chains has fostered a growing fragmentation of global production. The leading paradigm remains disintegration through subcontracting, concessions and outsourcing that has added a crucial international dimension to the division of labour.[105]

Isolated approaches to production networks through the lens of contract, corporate law, etc have long disguised the fact that these networks or chains (and not individual corporations) constitute the relevant primary phenomenon. This, however, figures among the key insights of research on 'global value chains'[106] in the fields of political economy and sociology. As a legal form, GVCs occupy a space between 'contract' and 'organisation', draw on elements from both private/public law, are composed of numerous normative layers and driven by opaque power asymmetries.[107] It is precisely this boundary-crossing with regard to legal concepts that makes them a prime and commendable study field for transnational law. Conceiving of GVCs in this manner invites reflections with long pedigree in critical legal thinking. Chains meander in the national or international legal landscape. In fact, the conceptual and political challenges posed by GVCs resonate many of the most avant-gardist transnational accounts on law. Just like how 'formalism' in law subsisted when the bourgeois society it reflected had disappeared,[108] GVCs emerge in the light of a continuously influential 'statist' paradigm in law which separates the spheres of economic activity and political contestation.

Four features have been identified as characteristics of GVCs: (1) an input–output structure, ie the process of transforming raw materials and labour into final products, (2) a geographical configuration, (3) a governance structure resulting in an exposed role of lead firms in the distribution of value and (4) an institutional and normative context.[109] Both governance structure and normative context directly allude to a need for normative coordination. This is provided essentially through contracts and their embeddedness in

[104] For a recent analysis of the reasons and effects of this lacuna and an interdisciplinary conceptualisation, cf Institute for Global Law & Policy (IGLP) Law and Global Production Working Group, 'The Role of Law in Global Value Chains: A Research Manifesto' (2016) 4 *London Review of International Law* 57.

[105] Cf Folker Fröbel, Jürgen Heinrichs and Otto Kreye, *The New International Division of Labour* (Cambridge University Press, 1980).

[106] See Gereffi, Humphrey and Sturgeon (n 16) 78; Bair (n 16) 153.

[107] Cf Kevin Sobel-Read, 'Global Value Chains: A Framework for Analysis' (2014) 5 *Transnational Legal Theory* 364, 365–73.

[108] See eg Franz Wieacker, *A History of Private Law in Europe: With Particular Reference to Germany* (Clarendon Press, 1996) 353–62 [translated by Tony Weir].

[109] See Gary Gereffi, 'The Organization of Buyer-Driven Global Commodity Chains: How U.S. Retailers Shape Overseas Production Networks' in Gary Gereffi and Miguel Korzeniewicz (eds), *Commodity Chains and Global Capitalism* (Greenwood Press, 1994) 95–122.

complex trust-producing business practice,[110] with no longer bilateral but dyadic structures. We can observe how actors within the chain develop normative mechanisms which can 'cover' or operate throughout the chain and take it as point of reference. Examples are codes of conduct imposing obligations all the way down to the factory level[111] or standard contract terms in supply contracts.[112] Here, the systemic nature of the chain is reflected in its coordinating legal form.[113] In a small number of sectors, lead firms have also begun to consolidate and reintegrate some of their supplier relations.[114] In fact, unlike contractual networks which pertain to a shared objective realised through cooperation and where involved actors are bound by some degree of abstract reciprocity,[115] value chains are segmented and modularised. Every link in the chain constitutes a translation point for flows of knowledge and exercise of control, where each level of production is granted with some factual and normative autonomy. This autonomy may be limited in simple chains with a single tier of suppliers but grows exponentially when many tiers and multiple layers of contracting are involved.[116] Given the absence of a focal point through which regulation might affect the entire chain, GVCs appear as an impersonal and emerging social structure. Some conditions downstream are directly induced by upstream business practices (such as time flexibility and diversity in apparel collections)[117] while others result from a diffused concurrence of factors along the chain. Hence, value

[110] Cf the seminal work by Macaulay. See Stewart Macaulay, 'Non-contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55; Stewart Macaulay, 'Private Government' in Leon Lipson and Stanton Wheeler (eds), *Law and the Social Sciences* (Russel Sage Foundation, 1986) 445. By stressing this regulatory dimension of contracts, global value chain analysis can learn from studies on long-term contracts. Such works include Stefan Grundmann, Fabrizio Cafaggi and Giuseppe Vettori, 'The Contractual Basis of Long-Term Organization – The Overall Architecture' in Grundmann, Cafaggi and Vettori (n 45) 3–38; Erich Schanze, 'Symbiotic Contracts: Exploring Long-Term Agency Structures Between Contract and Cooperation' in Christian Joerges (ed), *Franchising and the Law: Theoretical and Comparative Approaches in Europe and the United States* (Nomos Verlagsgesellschaft, 1991) 67–104.

[111] For a fully fledged legal analysis of this mechanism, cf Anna Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-regulation and National Private Law* (Hart Publishing, 2015).

[112] Cf Li-Wen Lin, 'Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example' (2009) 57 *The American Journal of Comparative Law* 711. For a discussion of contractual control in value chains, cf Jaakko Salminen, 'Contract Boundary Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities' (2016) 23 *Indiana Journal of Global Legal Studies* 709.

[113] This element is also highlighted by authors who give preference to a concept of 'global production networks' to avoid the linearity implied by the terminology of 'global value chains'. See Timothy Sturgeon, 'How Do We Define Value Chains and Production Networks' (2001) 32 *IDS Bulletin* 9.

[114] Cf Gary Gereffi, 'Global Value Chains in a Post-Washington Consensus World' (2014) 21 *Review of International Political Economy* 9, 16.

[115] Cf Walter Powell, 'Neither Market nor Hierarchy: Network Forms of Organization' (1990) 12 *Research in Organizational Behaviour* 295, 304–5.

[116] In the typological framework established by Gereffi *et al*, this applies to 'relational', 'modular' and 'market' type value chains. See Gereffi, Humphrey and Sturgeon (n 16) 89,

[117] Referring to Locke's statement: 'we need to look not just at these plants but also more broadly at the entire value chain'. See Richard Locke, *The Promise and Limits of Private Power: Promoting Labour Standards in a Global Economy* (Cambridge University Press, 2013) 142.

chains pose particular challenges to any actor-centric theorisation.[118] Legal analysis is used to hold individual agents, not social processes, accountable. Law observes the social world through the lens of individualistic semantic categories which form the cornerstone of both substantive (centred on 'persons' or 'rights') and procedural law. Beyond the study of transnational corporations and their global subsidiaries, for instance, corporate governance has to expand its scope of inquiry to GVCs as expression of a chain-specific logic of autonomous yet interlocked economic conduct.[119] Given the need for law to consider 'subjects' as bearers of responsibility,[120] it is called upon to look for legal mechanisms that address value chains beyond the individual actors involved.[121]

2. Tracing chain dynamics through third-party certification

i. Towards a proper legal narrative of corporate social responsibility

Candidates for such legal innovation spring from private governance and lay out a specific corporate social responsibility (CSR) in reaction to a particular dialectic between business, state and society. I shall here focus on third-party certification of social, ecological, technical and human rights compliance. While many institutional variants exist, its basic mode of functioning consists in a standard-setting association which will accredit auditors and grant the use of a certification mark.[122] Before turning closer to this mechanism, I shall briefly position it in the context of a heated debate around the role of law for CSR.

A legal dimension to CSR has long been rejected by legal scholars since CSR, following a common definition, intends to go *beyond* the law.[123] The

[118] This is one of several characteristics which value chain regulation shares with the regulation of financial markets, especially regarding the spread of systemic risks and the role of intermediaries.

[119] Cf Dan Danielsen, 'Beyond Corporate Governance: Why a New Approach to the Study of Corporate Law Is Needed to Address Global Inequality and Economic Development' in John Haskell and Ugo Mattei (eds), *Research Handbook on Political Economy and Law* (Edward Elgar Publishing, 2016) 195–204.

[120] Cf Supiot, who comments: 'Le droit se trouve alors mis en échec en son point le plus sensible: la notion de sujet de droit et la possibilité d'imputer à une personne déterminée la responsabilité d'un acte ou d'un manquement dommageable.' See Supiot (n 64) 553. In English, this is 'The law is then deeply challenged at its most sensitive point, namely the notion of the legal subject and the possibility of imputing responsibility for an act or a harmful breach to a particular person.' [author's translation].

[121] On this point, again, instructive reference can be made to GAL scholarship where a similar movement has taken place. GAL emerged as response to the disaggregation of statehood which would no longer permit to attribute public authority to any sovereign. In the same vein, GVC analysis shows how private power frays out, transcends the classical attributions to legal entities and requires the resulting emerging phenomenon to be treated in its own right.

[122] For an overview, see Tim Bartley, 'Certification as Mode of Social Regulation' (May 2010) Jerusalem Papers in Regulation & Governance, Working Paper No. 8, online: <http://regulation.huji.ac.il/papers/jp8.pdf>. For work emphasising food safety, see Paul Verbruggen, *Enforcing Transnational Private Regulation* (Edward Elgar Publishing, 2014) 175–213. See also Axel Marx, 'Global Governance and the Certification Revolution: Types, Trends and Challenges' (November 2010), Leuven Centre for Global Governance Studies, Working Paper No. 53, online: <https://ghum.kuleuven.be/ggs/publications/working_papers/new_series/wp51-60/wp53.pdf>.

[123] See European Commission, *Green Paper, Promoting a European Framework for Corporate Social Responsibility* (18 July 2001) COM (2001) 366 final, online: <http://www.europarl.europa.eu/meetdocs/committees/deve/20020122/com(2001)366_en.pdf>. The Commission spoke of companies 'voluntarily

paradox can be resolved when focusing less on substantive legal obligations and more on the operational logic of CSR, which does indeed go beyond conventional legal mechanisms and takes shape in the context of globalisation.[124] Here, CSR shares the virtues and dilemmas of transnational ordering. Rather than expecting CSR to fundamentally alter the logic of capitalism in a breath, we should see it as a potential forum that both moderates competing social rationalities and reflects the rise of corporations to political and societal actors. As such, it does not operate as self-enacting legal automatism, but can discursively be filled with meaning to unfold justificatory and emancipatory power.[125] It therefore misses the operational logic of CSR to take the viewpoint of positivist legal doctrine and highlight the 'non-bindingness' of CSR as a characteristic feature.[126] CSR creates procedures and opens up new venues for compromise between incommensurable logics of action.[127] Its normativity remains, however, precarious and flat if solely interpreted through the lens of economic actors. Only when the attribution of meaning remains unilaterally governed does the corporate actor have the power to determine the extent of 'bindingness'. Other interpretive communities can and must effectively join in to make use of the dynamic nature of CSR.[128] The different contexts in which CSR operates are therefore crucial for a *legal* conceptualisation of CSR. Beyond the common 'business case'[129] for CSR, it conveys meaning through different mechanisms for workforces and consumers, as well as institutionally for law, politics and the environment. This polyvalent functioning suggests, as a leading paradigm for its legal reception, a 'societal' case for CSR would be best. Stressing how CSR provokes

taking on commitments which go beyond common regulatory and conventional requirements, which they would have to respect in any case'. See European Commission (this note). With Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain legal undertakings and groups, the European legislator has recently opted towards a more legalised approach to CSR. Further, see Christine Parker, 'Meta-regulation: Legal Accountability for Corporate Social Responsibility?' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law* (Cambridge University Press, 2007) 207–37.

[124] Cf Marc Amstutz, 'The Evolution of Corporate Social Responsibility: Reflections on the Constitution of a Global Law for Multinational Enterprises' (2015) 3 *Schweizerische Zeitschrift für Wirtschaftsrecht* 189.

[125] On the risk of a mere stabilisation of the present regime of value extraction, see Grietje Baars, '"It's Not Me, It's the Corporation": The Value of Corporate Accountability in the Global Political Economy' (2016) 4 *London Review of International Law* 127.

[126] For a debate on voluntary/mandatory nature, see Radu Mares, 'Global Corporate Social Responsibility, Human Rights and Law' (2010) 1 *Transnational Legal Theory* 221.

[127] This comes close to the function of 'compromises' in Luc Boltanski and Laurent Thévenot, *On Justification. Economies of Worth* (Princeton University Press, 2006), ch 10.

[128] On the virtue of 'interpretive communities' for legal development, see Cover (n 89) 44–53. For further comparison, Bair and Palpacuer present CSR as key domain for contestation against value chain governance. See Jennifer Bair and Florence Palpacuer, 'CSR Beyond the Corporation: Contested Governance in Global Value Chains' (2015) 15 *Global Networks* 1.

[129] Cf Archie Carroll and Kareem Shabana, 'The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice' (2010) 12 *International Journal of Management Reviews* 85. See also David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press, 2005).

continuous interpretive struggles illustrates how it may adapt to govern distant and highly localised conflicts despite the uniformity of its standards. This avoids risks of regulatory capture and may prove valuable in challenging the conceptual and empirical critique of CSR as mere window dressing without credible enforcement mechanisms.[130]

ii. Product as proxy: basic elements of third-party certification

The well-known, colourful tiny labels, displayed on product packaging and corporate websites, are just the visible keystones of the complex transnational governance structure of certification regimes. Referring to this practice as 'labelling' therefore selectively concentrates on the informational dimension on the consumer side of the mechanism while leaving out its regulatory dimension along the chain.[131] Similarly, the broader term of 'conformity assessment'[132] which is becoming more and more prevalent, suggests a rather technical and disinterested process. Instead, preference is given to the notion of 'third-party certification' since it has a procedural connotation (*certum facere*) and reveals the multidimensional governance structure. First-party certification generally relates to a self-verification conducted by the firm itself, while in second-party certification, compliance is usually verified by the standard-holding body. Third-party certification assigns the functions of standard setting and conformity assessment to distinct bodies, the latter generally conditioned upon accreditation. All three forms ought not to be confused with non-certifiable membership-based initiatives such as 'Sedex' or the 'Business Social Compliance Initiative'.

To be sure, it is a fairly old phenomenon to have trustworthy intermediaries verify whether products or processes align with specific standards. Kosher certification in the field of food law may immediately come to mind as an example that has endured throughout different stages of the industrialisation of food production.[133] What has, however, triggered a veritable 'certification revolution'[134] it that the mechanism can be scaled to any degree of complexity and reach, irrespective of boundaries between nation-states or legal systems. Extraterritorial application is no hurdle for private regulation.

What is of interest for the present context is that the requirements set by a standard are not to be fulfilled by a single actor, but throughout all links of the

[130] See the extensive study on private value chain governance by Locke (n 117) 102 *et seqq.*

[131] Labels are seen to affect the choice architecture in the light of which consumer preferences arise. See Cass Sunstein, 'Behavioural Economics, Consumption and Environmental Protection' in Lucia Reisch and John Thørgersen (eds) *Handbook of Research on Sustainable Consumption* (Edward Elgar Publishing, 2015) ch 20.

[132] Cf Georgios Dimitropoulos, 'Implementing Global Standards: The Case of Conformity Assessment' in Cassese *et al* (eds) (n 12) ch. I.E.11.

[133] For a genealogy, see David Lytton, *Kosher: Private Regulation in the Age of Industrial Food* (Harvard University Press, 2013).

[134] Cf Michael Conroy, *Branded! How the 'Certification Revolution' is Transforming Global Corporations* (New Society Publishers, 2007).

chain. The SA8000 standard, for instance, formulates an obligation for companies to conduct due diligence with regard to its suppliers and sub-suppliers and establish monitoring systems to address identified risks of non-compliance.[135] Other certification standards go beyond the procedural character of (lead firm) due diligence in demanding full compliance through chain-of-custody traceability.[136] Of course, whenever norms are to be complied with across such a wide array of socio-cultural and legal contexts, distortions through diverging interpretation become inevitable and draw attention to matters of interpretive authority. The effects of this are mitigated, however, by the exact and ultimately bureaucratic design of audit reports and its individual items. On the other hand, the way in which complex attributes are broken down into auditable criteria becomes a crucial process of translation and knowledge creation.

The fragmented structure of value chains is constructed as a chain of trust and responsibility. Factual transnational interdependence becomes reflected legally. The upstream firms and retailers can only benefit from the certification mark if conditions are satisfied, which they are by themselves unable to guarantee and may even *de facto* be operating against. In order to ensure certification, actors in the chain will need to incorporate the standards in question into their supplier contracts along the chain, which gives them significant outreach.[137]

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[135] Cf SA8000:2014, stating that

> the organisation *shall* conduct due diligence on its suppliers/subcontractors, private employment agencies and sub-suppliers' compliance with the SA8000 Standard. The same due diligence approach *shall* be applied when selecting new suppliers/subcontractors, private employment agencies and sub-suppliers. The minimum activities for the organisation to fulfil this requirement *shall* be recorded and *shall* include … establishing monitoring activities and tracking performance of suppliers/subcontractors, private employment agencies and sub-suppliers to ensure that these significant risks are effectively addressed. See Social Accountability International (n 22) Art. 9.10.1.

This provision has undergone substantial revision compared to the previous SA8000:2008, which required more thoroughly that a company

> shall maintain appropriate records of suppliers/subcontractors' (and, where appropriate, sub-suppliers') commitments to social accountability, including, but not limited to, contractual agreements and/or the written commitment of those organisations to … conform to all requirements of this standard and to require the same of sub-suppliers. See Social Accountability International, 'Social Accountability 8000 Standard (SA8000®)' (2008) [now superseded by SA8000®:2014], online: <www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf>, Art 9.7.

Here, both the company and its suppliers (of any tier) had to commit to the standard, whereas SA8000:2014 addresses suppliers through monitoring by the lead firm.

[136] Cf the complementing documents of GLOBAL G.A.P. on the 'Chain of Custody'. See GLOBALG.A.P., 'Chain of Custody: General Regulations/Control Points and Compliance Criteria/Checklist' (V5.0, 15 December 2014), online: <www.globalgap.org/uk_en/documents/>.

[137] See Doreen MacBarnet and Marina Kurkchiyan, 'Corporate Social Responsibility Through Contractual Control? Global Supply Chains and "Other-regulation"' in Doreen McBarnet, Aurora Voiculescu and Tom Campbell (eds), *The New Corporate Accountability: Corporate Social Responsibility and the Law*

By interlacing a plurality of regulatory mechanisms, these instruments are exemplary of transnational law. Qualifications as 'governance by information'[138] or 'non-state market-driven'[139] regulation rightly point to key characteristics, but ultimately seem too narrow: certifications not only inform, but also carry and stabilise normative expectations. While their enforcement is realised through market forces, it is crucial that these are confronted with social and ecological concerns. In this view, 'product' certification today goes far beyond mere information for consumers. It does, indeed, answer to information asymmetries[140] since GVCs function as 'veil of ignorance' from a consumer perspective, given that the final vendor will most likely not have knowledge about prior stages of the chain. Here, certification may go beyond public disclosure obligations which have so far been centred around physical and health-related attributes, while consciously leaving out process-related elements.[141]

However, certification has become a regulatory technique in which the product itself ultimately serves as a proxy not only for its own production process, but in a larger sense for the chain from which it results. Choosing the product as starting point is a heuristic means for an indirect regulatory approach. Often, compliance with standards of sustainability or labour conditions will require organisational measures (adjustment of sourcing practice, method of production or social conditions) which the product embodies only in a remote way. These issues are narrowed down to a single product, an idea that we have already described as 'alienation' of the social issue by legal means. Then, upon closer inspection, certifications take a step back from the product itself and attest compliance of a *social relation* with the requirements it sets up.[142] It 'triangularises' the contractual regime of the chain[143] by adding an observing perspective of a 'third actor'.

(Cambridge University Press, 2007) 59–92, 68–81; Katja Creutz, 'Law Versus Codes of Conduct: Between Convergence and Conflict' in Jan Klabbers and Touku Piiparinen (eds), *Normative Pluralism and International Law: Exploring Global Governance* (Cambridge University Press, 2013) 166–200.

[138] Cf Verbruggen (n 122) 167.

[139] With regard to forest certification, see Benjamin Cashore, 'Legitimacy and the Privatization of Environmental Governance: How Non–State Market–Driven (NSMD) Governance Systems Gain Rule–Making Authority' (2002) 15 *Governance* 503.

[140] On this concept, cf George Akerlof, 'The Market for "Lemons": Quality Uncertainty and the Market Mechanism' (1970) 84 *The Quarterly Journal of Economics* 488.

[141] See Douglas Kysar, 'Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice' (2004) 118 *Harvard Law Review* 525.

[142] Drawing on the distinction between a formal, product-related layer of supply chains and more informal, eg labour-related layers established by some authors, this suggests that certification, while displayed on the product, is not necessarily restricted to the 'product supply chain'. For this distinction, cf Jean Allain, Andrew Crane, Genevieve LeBaron and Laya Behbahani, 'Forced Labour's Business Models and Supply Chains' Joseph Rowntree Foundation Report (November 2013) 39–53, online: <www.jrf.org.uk/file/44375/download?token=zajktG3Q&filetype=full-report>. Informal layers would be made invisible if a supply chain was mapped (as is done by supply chain management studies) by simply tracing the processing of a commodity.

[143] Similarly, on consumer trustmarks in digital markets, see Calliess and Zumbansen (n 61) 167.

The idea of a 'third actor' has a long history in social theory.[144] Often, the law itself has been understood as reclaiming a third perspective to a social conflict by mediating between individuals, discourses and competing rationalities.[145] This may hold true for value chain certification in a twofold sense. Operating at the intersection between the legal and the economic rationality of a value chain, certifications provide secondary rules to which the chain is expected to adhere in order to obtain certification.[146] Hence, the self-constitutionalising potential of social systems is activated in order to provide for an inner constitutionalisation instead of external regulation of the chain.[147] The underlying theory of transnational societal constitutionalism unravels the ties that bind the very idea of constitutionalism to statehood, institutionalised politics and power as its respective medium. It recalls the limited influence of the political constitution on decentralised social systems, based on observations of the multiplicity of normative orders coexisting in pluralistic societies. Drawing on this analytical foundation, it combines insights from regulatory theory with a normative idea of transnational governance and suggests thinking of transnational regimes as potential, or actual, constitutional subjects. In the absence of a global political constitution, an emphasis on transnational constitutional ordering at the level of social institutions does not erode constitutional semantics—instead, it highlights and investigates actual and ongoing constitutional processes. With this perspective, certification creates a 'constitutional moment' by framing the communicative operations underlying a GVC *as a GVC*. Autonomy as a social system is grounded in this coupling with an external (and legal) validation. Since law appears indispensable in backing autonomous social systems and allowing for their constitutionalisation, it has to be equipped to fulfil this role with regard to transnational regimes.

This includes a careful reflexivity of the state legal system in enforcing or declining to enforce transnational norms. Furthermore, transnational rules, drawing on an a-national code of legality,[148] may be seen as a form of legal

[144] See Gesa Lindemann, 'The Emergence Function and the Constitutive Function of the Third Actor: Perspectives for a Critical-Systematic Theory Construction' (2006) 35 *Zeitschrift für Soziologie* 82.

[145] See Gunther Teubner, 'Altera Pars Audiatur: Law in the Collision of Discourses' in Richard Rawlings (ed), *Law, Society and Economy* (Oxford University Press, 1997) 149–76.

[146] Gralf-Peter Calliess and Moritz Renner, 'Between Law and Social Norms: The Evolution of Global Governance' (2008), 22 *Ratio Juris* 260. Calliess and Renner have argued that CSR cannot be qualified as 'law' since it has not yet developed second-order observation mechanisms. See Calliess and Renner (this note) 276–7. In the light of the foregoing, CSR appears *itself* as second-order regulation. In the case of certification, review-procedures for standards and dispute resolution add another level of reflexivity.

[147] Cf Gunther Teubner, *Constitutional Fragment: Societal Constitutionalism and Globalization* (Oxford University Press, 2012).

[148] See Klaus Günther, 'Legal Pluralism and the Universal Code of Legality: Globalisation as Challenge to Legal Theory' in Camil Ungureanu, Klaus Günther and Christian Joerges (eds), *Jürgen Habermas* (Ashgate, vol II 2011) 305–22.

self-critique as they reconfigure state legal systems to increase responsiveness towards the requirements of a polycentric World Society. Certification regimes may conceive themselves in opposition to a state legal system deemed unsatisfactory.[149] Through their connection to social movements, they allow for a more thorough representation of competing interests than state legal systems.[150] The resource certifications can draw upon is arguably the most important asset in transnational economic relations, namely reputation. Since reputation is evidently a social construct,[151] corporations are not only vulnerable to societal contestation, but dependent on societal forces for the co-creation of reputation (ie on certain representative groups of buyers).[152]

iii. Programming from within: how regulatory subjects observe their environment

Certification, just like various other CSR instruments, is commonly referred to as a practice of 'self'-regulation. The term is ambivalent in a meaningful way. Not only does it raise questions about what constitutes the 'self', it equally leaves open whether the 'self' is author or object of regulation. In its usual connotation, 'self-regulation' denotes a practice in which an actor generates all elements of regulation by herself. She will freely and voluntarily set up rules to which she wishes to be submitted in order to achieve an ordering effect. This last element implies a strategic dimension which sets it apart from its roots in the Kantian concept of autonomy. For Kant, adhering to laws that are self-given under conditions of freedom is possible only since freedom is realised through universal laws. The idea of reason allows universal laws to become congruent with individual will. Idealism conceived of law as not a restriction to, but a medium of, freedom. The universalisability test of the Categorical Imperative charges every individual as moral legislator to assure that individual action aligns with public weal.[153] Nonetheless, legal obligations can impose constraint only on condition that they remain limited to external

[149] See Klaas Eller, 'Rechtskritik durch Vertrag: Zu den Semantiken des transnationalen Rechts [Legal Critique Through Contract: On the Semantics of Transnational Law]' (2014) 97 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 191 (in German) [author's translation].

[150] For an assessment of structural difficulties, see René Urueña, *No Citizens Here: Global Subjects and Participation in International Law* (Martinus Nijhoff, 2012), part II.

[151] Cf Tim Bartley and Curtis Child, 'Shaming the Corporation: The Social Production of Targets and the Anti-Sweatshop Movement' (2014) 79 *American Sociological Review* 653; Michael Power, Tobias Scheytt, Kim Soin and Kerstin Sahlin, 'Reputational Risk as a Logic of Organizing in Late Modernity' (2009) 30 *Organization Studies* 301.

[152] Critics argue that reputation is an inappropriate battlefield for social values since risks-to-people (such as human rights infringements at the workplace) are transformed into risks-to-corporations. Cf Ronen Shamir and Dana Weiss, 'Semiotics of Indicators: The Case of Corporate Human Rights Responsibility' in Davis *et al* (eds) (n 13), 110, 113 *et seqq*, 129.

[153] Immanuel Kant, *Grundlegung zur Metaphysik der Sitten [Groundwork of the Metaphysics of Morals]* (Johann Friedrich Hartknoch, 1785) BA 52 (in German).

freedom, requiring mere compliance regardless of individual motivations.[154] Democratic theories have built on this and have described as distinctive function of law its compensation for inherent weaknesses of morality, most importantly morality's lack of collision rules and enforceability.[155] In this view, corporate self-regulation seems to go beyond the sphere of external freedom by programming the corporate actor from the inside, ie by imposing an internal makeup and a decision-making process. Drawing parallels to moral persons, such limits to freedom of an actor would, in a Kantian perspective, set the bar of justification particularly high. However, CSR reaches out to the corporate subjectivity at a time where individualistic social philosophy is facing the deconstruction of subjectivity.[156] *Per se* a social construct, the subject can then no longer claim to remain untouched by the law. Attributing subjectivity through law then appears as nothing new, but rather becomes the *only* way law can actually approach the subject.

The programming of the internal decision-making structure of a corporation is an essential component of any CSR instrument. For instance, the EC Green Paper distinguishes an external dimension of CSR from an internal dimension,[157] the latter including human resources management, health and safety at work, adaption to change and management of environmental impacts and natural resources. Both dimensions are of course intertwined, as Foucault's studies on the internalisation of external normalisation through habitual practices suggest.

Many strands of critique of CSR seem to rely on a misunderstanding of its indirect regulatory approach. It reconciles 'compliance needs and organisational learning'.[158] The primary aim is to extend observational capacities within the regulatory subject. Without ambitions as far-reaching as to create a 'corporate conscience',[159] CSR modifies the organisational structure of the subject to redefine the relationship with its environment. The case of value chains is particular in the sense that unlike corporations, chains have not institutionalised their self-observation in the same manner. Here, it is precisely through certain modes of governance that a regulatory subject is composed, constituted and endowed with cognitive infrastructure. The desired mode of observation is of second order: while first-order observation perceives societal protest as danger emanating from outside of the system, only second-order observation enables a corporation to realise the diverging

[154] See Arthur Ripstein, *Force and Freedom. Kant's Legal and Political Philosophy* (Harvard University Press, 2009) 30–56; Sharon Byrd and Joachim Hruschka, *Kant's Doctrine of Right, a Commentary* (Cambridge University Press, 2010) 76–93.
[155] See Jürgen Habermas, 'Law and Morality' (The Tanner Lectures on Human Values vol 8, 1988) 245.
[156] *Locus classicus* Michel Foucault, *Les Mots et les Choses [The Order of Things]* (Éditions Gallimard, 1966).
[157] Promoting a European framework for Corporate Social Responsibility. See European Commission (n 123).
[158] Michael Power, 'From Risk Society to Audit Society' (1997) 3 *Soziale Systeme* 3, 7.
[159] Term from Philip Selznick, *The Communitarian Persuasion* (Woodrow Wilson Centre Press, 2002) 101.

perspective of observed systems (such as civil society, mass media, the political system and also competitors).[160] Some scholars have rightly pointed to the risk that corporations might use knowledge gained through observation of the social environment to 'rationalise' their continuous misconduct and legitimise endemic features of global production.[161] On the other hand, certifications reveal here their dialectic relation to a critical civil society since self-regulation is used to create new 'vulnerabilities' of economic actors, thereby deviating from neo-liberal governance.[162]

These vulnerabilities, however, come at a certain cost. Certification and the auditing practice it relies on not only promotes the rationalities which it is meant to test, but becomes a rationality in itself. Auditing creates forms of knowledge that not only raise long-standing questions with regard to the role of expertise,[163] but need to be considered as performative and constructed. Auditing does transform the audited practice, however, primarily with the aim of making it more 'auditable'. The promise of certification, namely to drastically reduce complexity, often limits audits to a sort of 'checklist compliance'.[164] In the same vein, auditing normalises public perception of the audited practices by displaying exclusively positive features. Personal and institutional integrity of auditors also becomes an issue when certifiers are dependent on financing by the very same businesses they have to evaluate.[165] However, these concerns come as little surprise from a perspective of critical legal scholarship that has a distinct record in analysing structural biases and enforcement deficits in both public and private regulation. Rather than seeing the aforementioned concerns as genuine limitations of private law-making, it may prove more fruitful to think of them as conceptual challenges *any* type of contemporary regulation faces. This may bridge the gap to prior experience with state law.

iv. Evolution of responsibility

By allowing to address chain dynamics as such, third-party certification adds a novel concept of 'responsibility' to the pool of legal concepts and semantics. 'Responsibility' is a basic concept in multitude of discourses, including both

[160] See Damien Krichewsky, 'The Socially Responsible Company as a Strategic Second-Order Observer' (2014) MPIFG Discussion Paper 14/10, online: <http://www.mpifg.de/pu/dp_abstracts/dp14-10.asp>.

[161] See Marc Amstutz, 'Globalising Speenhamland: On the Transnational Metamorphosis of Corporate Social Responsibility' in Christian Joerges and Josef Falke (eds) *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart Publishing, 2011) 359–93.

[162] For a comprehensive critique, see Julie Guthman, 'The Polanyian Way? Voluntary Food Labels as Neoliberal Governance' (2007) 39 *Antipode* 456.

[163] See David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016).

[164] Cf Genevieve le Baron and Jane Lister, 'Benchmarking Global Supply Chains: The Power of the "Ethical Audit" Regime' (2015) 41 *Review of International Studies* 905.

[165] This incentive structure seems be particularly detrimental in the field of social auditing and less for eco-technological and safety audits.

the moral and the legal discourse, from which it originates.[166] Its recent rise in importance, leading some to call out an 'age of responsibilization',[167] relates to the challenges resulting from the 'new obscurity' of World Society.[168] Unlike modes of 'liability' that rely on rather rigid ordering models of contract, corporation and state, the broader and polyphonic concept of 'responsibility' is discovered as a discursive arena to debate standards of individual and systemic rationality in complex societies.

In its core structure, 'responsibility' implies a fourfold relation according to which an agent (individual or collective) is responsible for something or someone in a particular instance, with regard to a certain normative criterion determining his scope of responsibility. In law, such causal concepts of responsibility form the basis of criminal theory and most liability regimes in private law, where responsibility is then read as liability. The recent dissociation of both mirrors developments in regulatory theory and global justice: while 'liability' sanctions past action, 'responsibility' can be seen as a future-oriented steering concept under conditions of uncertainty. More importantly, even in the variants which have been adopted within the liberal legal framework (both strict and fault, individual and collective), the presuppositions of 'liability' are challenged under conditions of either division of labour, societal differentiation into social systems or growing transboundary complexity of social action. Identifying attributable individual action becomes increasingly fictitious and in addition has discharging effects towards other actors involved. Semantically, 'responsibility' therefore arose as follow-up to notions such as 'imputation' and 'duty'.[169]

Scholarship on global justice is particularly confronted with complex layers of time, space and interconnectedness of action. Therefore, individual causal responsibility is complemented by broader concepts which accommodate both the plurality and the institutional context of actors. 'Shared' responsibility is a differentiated regime which attributes responsibility taking into account multiple and more remote actors.[170] Concepts of 'structural' or

[166] Cf Frieder Vogelmann, *Im Bann der Verantwortung [Under the Spell of Responsibility]* (Campus Verlag, 2014) 27 *et seqq* (in German) [author's translation].

[167] Cf Ronen Shamir, 'The Age of Responsibilization: On Market-Embedded Morality' (2008) 37 *Economy and Society* 1.

[168] Cf Jürgen Habermas, 'The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies' (1986) 11 *Philosophy and Social Criticism* 1.

[169] See Kurt Bayertz, 'Eine kurze Geschichte der Herkunft von Verantwortung [A Short History of the Origin of Responsibility]' in Kurt Bayertz (ed), *Verantwortung: Prinzip oder Problem?* (Wissenschaftliche Buchgesellschaft, 1995) 3–71 in German [author's translation].

[170] For an analysis in the field of labour standards, see Yossi Dahan, Hanna Lerner and Faina Milman-Sivan, 'Shared Responsibility and the International Labour Organization' (2013) 34 *Michigan Journal of International Law* 675. A 'semantic toolbox' for questions of shared responsibility between states and non-state actors in international law is provided by Nollkaemper, who particularly interrogates into potential structures of multi-party international disputes. See André Nollkaemper, 'Shared Responsibility in International Law. A Conceptual Framework' (2011) Amsterdam Law School Legal Studies Research Paper No. 2011–17.

'political' responsibility deem sufficient mere contributions to the background structure in terms of its establishment, persistence or participation in an institutional setting despite a possibility to modify it.[171]

Whereas individualistic causal responsibility could easily find corresponding legal concepts of liability, any consideration of an institutional level leads to difficult normative and conceptual problems. When leaving the framework of individual actor-centrism, we are increasingly observing impersonal forces, communicative processes, systems and organisations that draw on rights to unfold their specific logic of operation.[172] As we have seen, the power structure of certain GVCs also suggests a depiction in such systemic terms. However, legally conceptualising 'systemic'[173] or 'joint'[174] responsibility has to respond to a deeply rooted anthropo- and actor-centrism of the law. As debates around corporate personhood remind us, the law disposes of tools to construct any collective as legal person, irreducible to smaller elements.[175] Within the ecological movement and later inspired by Bruno Latour's actor-network theory,[176] there have been attempts to extend the actor-status to non-human entities.[177]

It is in this context that the privately crafted instrument of certification schemes can enrich the conceptual portfolio of the law.[178] This does not imply a conceptualisation of value chains in holistic categories as *a legal entity*, since this is a perspective that would be incompatible with their

[171] See, for example, Iris Marion Young, 'Responsibility and Global Labour Justice' (2005) 12 *Journal of Political Philosophy* 365.

[172] See Michel Freitag, *L'abîme de la Liberté: Critique du Libéralisme [The Abyss of Liberty: A Critique of Liberalism]* (Éditions Liber, 2011) 487 *et seqq* (in French) [author's translation].

[173] Cf Ludger Heibrink, 'Companies as Political Actors: A Positioning Between Ordo-Responsibility and Systems Responsibility' in Christoph Luetge and Nikil Mukerji (eds), *Order Ethics: An Ethical Framework for the Social Market Economy* (Springer International, 2016) 251–78, 257 *et seqq*.

[174] Cf Mark Anner, Jennifer Bair and Jeremy Blasi, 'Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks' (2013) 35 *Comparative Labour Law and Policy Journal* 1.

[175] Teubner shows how the law in the absence of appropriate actors to whom liability can be attributed creates 'actors' or groups of actors based on membership ('risk pools'). See Gunther Teubner, 'The Invisible Cupola: From Causal to Collective Attribution in Ecological Liability' in Gunther Teubner, Lindsay Farmer and Declan Murphy (eds), *Environmental Law and Ecological Responsibility* (John Wiley and Sons, 1994) 17–47. Although those groups are composed by individual actors, ties to an individual concept of liability are becoming looser.

[176] See, most importantly, *Politics of Nature* (Harvard University Press, 2004) [translated by Catherine Porter].

[177] See famously Christopher D Stone, 'Should Trees Have Standing? Towards Legal Rights for Natural Objects' (1972) 45 *Southern California Law Review* 450. Teubner adds to this by drawing on Latour. See Gunther Teubner, 'Rights of Non-humans? Electronic Agents and Animals as New Actors in Politics and Law' (2006) 33 *Journal of Law and Society* 497.

[178] Eg with regard to the ongoing EU legislative procedure and the latest amendments to the proposal for particular regulations. See EU Parliament, Committee on International Trade (CIT), 'On the Proposal for a Regulation of the European Parliament and of the Council Setting up a Union System for Supply Chain Due Diligence Self-Certification of Responsible Importers of Tin, Tantalum and Tungsten, their Ores, and Gold Originating in Conflict-Affected and High-Risk Areas' (24 April 2015) A8-0141/2015, online: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2015-0141+0+DOC+PDF+V0//EN>.

constantly evolving and open nature. It has been pointed out that elements of 'systemic' responsibility, if tailored to the context, require some degree of *social organisation* of the distribution of responsibility.[179] By societal framing of due diligence obligations through consultation processes and drafting by NGOs, third-party certification may embody such socially adjusted concepts of responsibility. They can be seen as emanations of a reflexive type of law-making that seriously considers the particular dialectic relationship between law and the regulated field.[180] As much as this goes into the right direction by taking GVCs as starting point, new blind spots and new exclusionary processes emerge, possibly preventing weak suppliers and informal sectors from accessing GVCs. Private regulation can in fact formulate barriers of entry as high as state legislation and become an issue for competition law.[181] Carefully attuned state law can prove essential in strengthening the regulatory dynamic of private regimes. Another example consists in the establishment of standards of care for certifier and auditor liability,[182] who at present generate a high level of trust while incurring almost no legal risk. In this regard, the recent ruling by the ECJ in the 'PIP silicone breast implants' case provides only limited guidance for certifiers outside of the highly regulated domain of EU (medical) product safety law.[183]

[179] Cf Stefan Gosepath, 'Politische Verantwortung und rechtliche Zurechnung [Political Responsibility and Legal Imputation]' in Matthias Kaufmann and Joachim Renzikowski (eds), *Zurechnung und Verantwortung*: *ARSP-Beiheft n° 134* (Franz Steiner Verlag, 2012) 18 (in German) [author's translation].

[180] Cf Rudolf Wiethölter, *Proceduralization of the Category of Law (1984)* (2011) 12 *German Law Journal* 465, 468–9 (reprinted).

[181] For a recent summary, cf Inara Scott, 'Antitrust and Socially Responsible Collaboration: A Chilling Combination?' (2016) 53 *American Business Law Journal* 97.

[182] For an analysis of existing risks of liability, cf Matteo Ferrari, 'The Liability of Private Certification Bodies for Pure Economic Loss' (2010) 1 *Journal of European Tort Law* 266.

[183] Cf ECJ, Case C-219/15, *Elisabeth Schmitt v. TÜV Rheinland LGA Products GmbH*, Judgement of 16 April 2017 (ECLI:EU:C:2017:128). The case concerns claims for damages caused by defective breast implants made of silicone. The French manufacturer (PIP), which became become insolvent after the fitting, had mandated TÜV Rheinland to evaluate its quality system. While TÜV made announced visits, it did not proceed to do an inspection of business records or the devices themselves. Upon request for a preliminary ruling by the German Federal Court of Justice (German BGH 9 April 2015 - VII ZR 36/14, Neue Juristische Wochenschrift 2015, 2737, in German), the ECJ held that the role of 'notified bodies' under Council Directive 93/42 93/42/EEC of 14 June 1993 concerning medical devices attributed is to 'protect end users of medical devices'. This does not, in the eyes of the Court, put them under a general obligation to carry out unannounced inspections or to examine devices; however, when evidence of non-compliance of a device occurs, they must take 'all necessary steps' to fulfil their obligations under the Directive. The conditions under which a failure to fulfil these obligations may give rise to liability of 'notified bodies' vis-à-vis end users are governed by the respective national laws. For the referring German Federal Court of Justice, this implies that Directive 93/42 may qualify as a rule conferring legal protection under Sect. 823 para 2 German Civil Code. To be sure, this reasoning is to be seen in the particular context of safety risks by medical devices as regulated by the Directive. Addressee and protected parties are identical, which is not necessarily the case with ecological or social certification discussed in this paper. Yet, the ECJ ruling represents an important step by demonstrating that besides being a contractually agreed upon service, certification fulfils a public communicative function. This is also implicitly recognised by economic arguments in favour of liability of certifiers towards third parties, cf recently Gerhard Wagner, *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (Beck, 7th ed 2017), Sect. 823 paras 803–5 (in German).

IV. Conclusion

Transnational law steps up to a delicate mission which is to make sense of novel normativities beyond the state, without being constrained by established categories of legal thought. Epistemologically, it must resist the lawyer's common predisposition to conceive of the unknown as composite of established concepts, not as something genuinely new. To do so while at the same time bearing in mind the learning experience made within national legal orders implies a tightrope walk. The chances of mastering it rise to the extent to which transnational law becomes aware of its plural and diverging sites, values and functions. This article has mobilised sociological insights to suggest what transnational law ought to be concerned with, namely to develop fora for transboundary conflicts that escape conceptualisation in state legal orders. Candidates for such fora are often provided by social institutions and standard-setting processes which counter-balance sophisticated social rationalities. Identifying which specific self-regulatory practices can serve as an effective leverage in this regard ultimately helps to restore the promise of the welfare state and democratic law creation more generally beyond political boundaries.

The case study of third-party certification has corroborated these findings. In its general structure, it appears as a socially useful institution that can help to regulate GVCs considerably deeper and more accurately than due diligence obligations imposed on lead firms. In particular, conflicts surrounding global production have been described as no longer inter-individual or inter-state, but systemic in nature. The paper has pointed out structural difficulties which restrain the law's ability to reconstruct these conflicts within its individualistic framework and understanding of responsibility as liability. The peculiar interlinkage of corporate conduct, as I have argued, can be reflected in chain-wide certification.

This proposition has by no means overlooked that current certification practice is marked by a number of flaws. However, to a considerable degree these matters are not specific to private forms of GVC regulation. In addition, a 'good governance' of certification to address these matters is only beginning to take shape. Developing professional standards for auditing, immunising certifiers from financial risk (in case the deliverance of a certificate is rejected) and establishing proper standards of liability are all exemplary objectives at the intersection of law and social institutions. At this point, the formative role of the law can play out to consolidate certification practice. Having remained subsurface within the nation-state, this mutual dependence of law and social institutions vigorously comes to light in the transnational realm. A transnational law thriving to rise to the promises associated with the legal form cannot do so exclusively by its proper means.

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