Politics and Governance
Open Access Journal | ISSN: 2183-2463
Volume 5, Issue 1 (2017)

Legitimization of Private and Public Regulation: Past and Present

Editors

Klaus Dieter Wolf, Peter Collin and Melanie Coni-Zimmer

COGITATIO

Politics and Governance, 2017, Volume 5, Issue 1
Legitimization of Private and Public Regulation: Past and Present

Published by Cogitatio Press
Rua Fialho de Almeida 14, 2º Esq.,
1070-129 Lisbon
Portugal

Available online at: www.cogitatiopress.com/politicsandgovernance

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COGITATIO

Politics and Governance (ISSN: 2183–2463)
2017, Volume 5, Issue 1, Pages 1–5
DOI: 10.17645/pag.v5i1.915

Editorial

Editorial to the Issue on Legitimization of Private and Public Regulation: Past and Present

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Submitted: 13 February 2017 | Published: 15 March 2017

Abstract
This thematic issue brings together research from political science and legal history about legitimacy discourses covering different forms of public–private co-regulation and private self-regulation, domestic and transnational, past and present. These forms of governance highlight the important role of non-state actors in exercising public authority. There has been a growing debate about the legitimacy of non-state actors setting and enforcing norms and providing public goods and services. However, the focus of this thematic issue is not on developing abstract criteria of legitimacy. Rather, the authors analyze legitimacy discourses around different cases of privatized or partly privatized forms of governance from the early 20th century until today. Legitimacy is subject to empirical and not normative analysis. Legitimacy discourses are analyzed in order to shed light on the legitimacy conceptions that actors hold, what they consider as legitimate institutions, and based on what criteria. The particular focus of this thematic issue is to examine whether the significance of democratic legitimacy is decreasing as the importance of regulation exercised by private actors is increasing.

Keywords
hybrid regulatory regimes; legal history; legitimacy discourses; patterns of legitimation; public and private regulation; transnational governance

Issue
This editorial is part of the issue "Legitimization of Private and Public Regulation: Past and Present", edited by Klaus Dieter Wolf (Peace Research Institute Frankfurt, Germany), Peter Collin (Max Planck Institute for European Legal History, Germany) and Melanie Coni-Zimmer (Peace Research Institute Frankfurt, Germany).

1. Non-State Actors and Different Forms of Governance

In political science, the growing role played by non-state actors in governing domestic affairs has been acknowledged since the 1980s. With regard to transnational regulation, International Relations scholars have analyzed the growing regulatory pluralism mainly since the 1990s when global governance institutions in which non-state actors exercise public authority began to mushroom (Abbott & Snidal, 2009; Dingwerth & Pattberg, 2009; Rittberger, Huckel, Rieth, & Zimmer, 2008). However, political scientists tend to neglect that forms of governance, including non-state actors, are not a recent phenomenon. Autonomous regulations of merchants that developed since the medieval times (Cutler, 2003), or the activities of chartered companies in foreign territories (Wolf, 2010) are but two examples. Focusing on the domestic context, research from legal history has shown that private and hybrid forms of regulation have existed long before, complementing or even substituting state regulation (Collin, Bender, Ruppert, Seckelmann, & Stolleis, 2014).

To take as wide account as possible of different kinds of privatized regulatory activities, the contributions to this thematic issue start out from a broad understanding of regulation. From the perspectives of their respective disciplines, the authors address debates about the

legitimacy of public, private and hybrid norm setting, concretization, implementation, and enforcement, but also of activities regarding the provision of public goods. Different types of regulation are analyzed at the local, regional, national or transnational level. The degree of autonomy that non-state actors enjoy in exercising regulatory functions may be assigned case-by-case to a continuum on which the role of the state is decreasing and the role of non-state actors is increasing (Börzel & Risse, 2005, p. 201). Forms of governance that can be located along this continuum include the delegation by the state to private actors where the role of the state remains rather strong, different forms of public–private co-regulation where authority is shared between the states and non-state actors, and private self-regulation where non-state actors take center stage. Against the notion that the state has no role in purely private initiatives, we hold the view that there is always some kind of public 'shadowing' because the state or intergovernmental authorities can—at least theoretically—intervene and regulate. In that sense, we understand public authority exercised by private actors as *regulated* self-regulation (Wolf, 2014) because it takes place under the shadow of hierarchy.

2. Legitimacy and the Importance of Democratic Standards

Examining the legitimacy of institutions has become a pertinent topic in legal history, political science and other disciplines. The growing role of public–private and private forms of governance—in the domestic sphere and beyond the nation-state—makes things more complex.[1] From the perspective of law, attempts to justify the exercise of regulatory authority by non-state actors have always been a great challenge. In political science, normative approaches[2] prevail in which certain normative standards are developed and/or applied in empirical studies to evaluate the extent to which a given institution meets them. The literature usually distinguishes between input and output legitimacy (Scharpf, 1999).[3] Input legitimacy refers to procedural standards to secure democratic rights to participation, transparency or accountability. Output legitimacy relates to the effectiveness of regulation, to its responsiveness or reliability or to the achievement of goals in the common interest.

Taking up this distinction between input and output legitimacy, the approach taken by the contributors to this thematic issue is nevertheless different. They analyze in their respective empirical cases which of the above patterns of legitimation are actually used in concrete discourses around current and historical regulatory institutions. The overarching question concerns the role of democratic standards for the legitimation of private and public–private forms of governance in contrast to output-related criteria. Existing research strands lead to different expectations regarding this issue (see Wolf, 2017, pp. 63–74). On the one hand, the rise of the output-oriented neoliberal, new public management and governance paradigms with their focus on problem solving and the provision of public goods leads to the conjecture that justificatory grounds relating to democratic legitimacy are diminishing in importance vis-à-vis output-centered criteria. Moreover, private actors' epistemic authority, i.e. their acknowledged expertise or moral authority, differs from the political authority attributed to the state and might for that reason alone require different justificatory grounds (see Simmerl & Zürn, 2016). On the other hand, increasing reference to input-related democratic legitimacy standards could be expected because of the extending quality of public authority exercised by private regulators, including more coercive mechanisms instead of voluntary coordination and a stronger interference with state-based regulation.

3. Contributions and Results

The types of privatized forms of governance addressed in this issue cover the period from the early 20th century until today. In the first three contributions, legal historians examine different forms of co-regulation in the domestic sphere in the interwar period. They analyze legitimation discourses in the scholarly literature in Belgium and France (Rudischhauser), Germany (Collin), and Italy (Cau). The next two contributions provide a long-term perspective on self-regulatory initiatives: Casagrande (2017) analyzes the development of social clubs, a form of societal self-regulation, in the province of Buenos Aires, Argentina. Balleisen (2017) examines the development of Better Business Bureaus, a business self-regulation initiative, in the USA. Moving on to the sphere beyond the state, the three following contributions by political scientists focus on contemporary forms of transnational governance. The contribution by Krahmann (2017) looks at two contemporary cases of delegation of authority to private actors as part of the international intervention in Afghanistan. Wolf (2017) examines the public–private co-regulation in the field of sports, and Dingwerth (2017) analyzes privatized forms of governance in the field of sustainability governance.

In an overall assessment of the various findings no single identifiable pattern can be discerned which could provide an easy answer to the overarching question. The significance of criteria for legitimacy varies over time and according to the specific context. Collin (2017) and Rudischhauser (2017) point to the importance of the output dimension for the legitimation of self- and co-regulatory regimes in the interwar period. The protagonists in con-

[1] See, among others, Brassett and Tsingou (2011), Dingwerth (2007), Bernstein (2011), and Take (2012).
[2] Generally, normative and sociological approaches to the study of legitimacy can be distinguished (see Buchanan & Keohane, 2006; Peters, 2013; Bernstein, 2011).
[3] See, among others, Buchanan and Keohane (2006), Dingwerth (2007), Flohr, Rieth, Schwindenhammer and Wolf (2010), and Take (2012).

temporary scholarly debates emphasized an improved quality of norms and the superior expertise of non-state actors. Moreover, the contributions highlight that justifying the exercise of authority by private actors was closely intertwined with the perceived crisis of parliamentary systems. In contrast to the three studies on the interwar period, the long-term study of social clubs in Argentina by Casagrande (2017) highlights the use of classic democratic criteria, such as participation, for legitimizing self-regulation. In addition, these four studies, as well as Balleisen's (2017) contribution, demonstrate how deeply intertwined justificatory discourses are with the specific national normative environment to which (new) governance initiatives must be linked. Among the contributions analyzing current cases of transnational governance, Dingwerth (2017) argues that the importance of democratic legitimation narratives has declined over time in the field of sustainability governance. Democratic legitimation was more important in the 1990s when private transnational governance schemes became much more prominent. They became less relevant when privatized governance had become more common and accepted. Democratic criteria are also less important when the 'state prerogative' holds, i.e. when intergovernmental regulation exists. This finding is echoed by Krahmann's study (2017). Foreign interventions in health and security governance in Afghanistan are primarily legitimated with regard to (expected) performance. This might be due to the fact that these non-state interventions are already backed by a strong government, and a net of donors and international organizations, respectively. In addition, her contribution points to potential trade-offs between input and output legitimacy. In his contribution on the sporting world's hybrid regulatory regime, Wolf (2017) concludes that the values used to appraise the state-based components of the regime do not differ systematically from those used to appraise the private elements. Justificatory grounds founded on normative criteria relating to fundamental individual rights and democratic procedure do not appear to be diminishing in importance vis-à-vis performance-related considerations. A reason for this may indeed be the new quality of public authority exercised by private regulators.

Next to the expected input- and output-related arguments, whose importance varies in the different case studies depending on the context, it might be valuable for future research to put more emphasis on examining criteria that go beyond this dichotomy for legitimating certain forms of governance. Such criteria might be a result of tying justificatory arguments to the specific historical and national contexts. For example, in his study of societal self-regulation in Argentina, Casagrande (2017) highlights the importance of emotional appeals selected to represent the past. Collin's (2017) analysis of corporatist thinking in Germany also hints at the use of such criteria when scholars emphasize a corporative tradition in Germany that is thought to match the national identity. Such unorthodox, unexpected arguments used to legitimize regulatory arrangements can only be identified when using an empirical, bottom-up approach to the analysis of legitimacy discourses, as employed by the contributors to this issue.

Obviously, context is of high significance for the criteria and standards used to legitimize private and public–private forms of governance (see also Bernstein, 2011). This holds true for different national contexts, but also for 'world time'. The importance of embedding legitimation discourses in different national contexts is best demonstrated by the three historical contributions on the interwar period: In Germany and Italy with their (almost) uninterrupted tradition of semi-autonomous associations and corporations, the debates showed more openness for corporatist arguments than in France with its 'jacobine' doctrine. The fact that corporatist structures were anchored in the constitutional order of Italy shaped the lines of argumentation in a different way than in Germany, where appropriate regulations only existed in embryonic form (Collin, Cau, Rudischhauser). The study on social clubs also shows impressively how arguments supporting self-regulatory practices are shaped by national history and collective experiences (Casagrande). The importance of world time is underpinned by the two long-term studies on self-regulation (Casagrande and Balleisen) as well as by the study on governance in the field of sustainability (Dingwerth). In particular, Balleisen's study on Better Business Bureaus demonstrates how legitimation discourses can change over time. The study by Dingwerth shows how the development of sustainability governance has changed the legitimation requirements that new institutions face.

The contributions to this issue also highlight the importance of different audiences that may be addressed by and involved in legitimation discourses. These discourses might develop rather independently, or they might be linked and influence each other. Audiences can be located within a single state (see Balleisen's contribution), in different states, or in the domestic and transnational sphere (see Krahmann, 2017). This may lead to contradictions and trade-offs because different audiences can have different expectations with regard to what a legitimate institution should look like. The same argument may, therefore, increase the legitimacy of an institution with one audience and at the same time decrease it with other audiences. For further research, it might be instructive to explore more systematically different audiences of transnational governance institutions in national contexts where heterogeneous expectations might exist.

Finally, the contributions to this issue also provide interesting insights into the role of the state with regard to the emergence of private and public–private forms of governance and their legitimation. Arguments in favor of corporatist systems in the interwar period were closely linked to the limited acceptance of parliamentary systems. A 'perceived crisis of state regulation' (Rudischhauser, 2017, p. 13) was the point of departure

for arguing for a more important role for non-state actors. Justifications for the latter were related to the delegitimation of parliaments. In a similar vein, the emergence of privatized forms of authority in the transnational sphere can be linked to the failure of the state and intergovernmental institutions to regulate transnational problems. Public regulators are perceived as 'overburdened' (Krahmann, 2017, pp. 54–62) which results in governance gaps that non-state actors seek to fill (Dingwerth, 2017). But the emergence of private regulatory authority is not limited to areas where such governance gaps exist. It can also be employed to support the implementation of state regulation. In particular, the long-term studies by Balleisen (2017) and Casagrande (2017) demonstrate that the role of the state in legitimating self-regulatory arrangements can change over time and that self-regulatory initiatives adapt their strategies as a response to changing capacities of and ideas about the state. The public–private pendulum seems to be swinging over time and will probably do so in the future, influencing how public and private governance contributions are perceived and legitimated.

Acknowledgements

This publication was supported by the DFG-funded Cluster of Excellence 'Normative Orders' at Goethe University Frankfurt am Main. It draws on papers presented at an international workshop held on April 8th–9th 2016 and organized by the Peace Research Institute Frankfurt, the Max Planck Institute for European Legal History, and the Cluster of Excellence. We are grateful to the contributors for accepting our invitation, to the anonymous reviewers for their valuable suggestions, to the editorial team of *Politics and Governance* for their efficient support, and to Rodrigo Gomes Quintas da Silva for his encouraging and efficient handling of the entire process.

References

Abbott, K. W., & Snidal, D. (2009). The governance triangle: Regulatory standards institutions and the shadow of the state. In W. Mattli & N. Woods (Eds.), *The politics of global regulation* (pp. 44–88). Princeton, NJ: Princeton University Press.

Balleisen, E. J. (2017). American Better Business Bureaus, the truth-in-advertising movement, and the complexities of legitimizing business self-regulation over the long term. *Politics and Governance*, *5*(1), 42–53.

Bernstein, S. (2011). Legitimacy in intergovernmental and non-state global governance. *Review of International Political Economy*, *18*(1), 17–51.

Börzel, T., & Risse, T. (2005). Public-private partnerships: Effective and legitimate tools of international governance? In E. Grande & L. W. Pauly (Eds.), *Complex sovereignty: Reconstituting political authority in the twenty-first century* (pp. 195–216). Toronto: University of Toronto Press.

Brassett, J., & Tsingou, E. (Eds.). (2011). Legitimacy and global governance [Special Issue]. *Review of International Political Economy*, *18*(1).

Buchanan, A., & Keohane, R. O. (2006). The legitimacy of global governance institutions. *Ethics & International Affairs*, *20*(4), 405–437.

Casagrande, A. E. (2017). Between history and passion: The legitimacy of social clubs in the Province of Buenos Aires (2001–2007). *Politics and Governance*, *5*(1), 34–41.

Cau, M. (2017). The public–private dichotomy in Fascist corporativism: Discursive strategies and models of legitimization. *Politics and Governance*, *5*(1), 26–33.

Collin, P. (2017). The legitimation of self-regulation and co-regulation in corporatist concepts of legal scholars in the Weimar Republic. *Politics and Governance*, *5*(1), 15–25.

Collin, P., Bender, G., Ruppert, S., Seckelmann, M., & Stolleis, M. (Eds.). (2014). *Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20. Jahrhunderts*. Frankfurt am Main: Klostermann.

Cutler, A. C. (2003). *Private power and global authority: Transnational merchant law in the global political economy*. Cambridge: Cambridge University Press.

Dingwerth, K. (2007). *The new transnationalism: Transnational governance and democratic legitimacy*. Houndmills: Palgrave Macmillan.

Dingwerth, K. (2017). Field recognition and the state prerogative: Why democratic legitimation recedes in private transnational sustainability regulation. *Politics and Governance*, *5*(1), 75–84.

Dingwerth, K., & Pattberg, P. (2009). World politics and organizational fields: The case of transnational sustainability governance. *European Journal of International Relations*, *15*(4), 707–744.

Flohr, A., Rieth, L., Schwindenhammer, S., & Wolf, K. D. (2010). *The role of business in global governance*. Houndmills: Palgrave Macmillan.

Krahmann, E. (2017). Legitimizing private actors in global governance: From performance to performativity. *Politics and Governance*, *5*(1), 54–62.

Peters, D. (2013). *Rethinking the legitimacy of global governance: On the need for sociological research and philosophical foundations* (Global Cooperation Research Papers 2). Retrieved from https://www.gcr21.org/publications/research-papers

Rittberger, V., Huckel, C., Rieth, L., & Zimmer, M. (2008). Inclusive global institutions for a global political economy. In V. Rittberger & M. Nettesheim (Eds.), *Authority in the global political economy* (pp. 13–54). Houndmills: Palgrave Macmillan.

Rudischhauser, S. (2017). From 8-hour-day to 40-hour-week: Legitimization discourses of labour legislation between the wars in France and Belgium. *Politics and Governance*, *5*(1), 6–14.

Scharpf, F. (1999). *Governing in Europe: Effective and democratic?* Oxford and New York, NY: Oxford University Press.

Simmerl, G., & Zürn, M. (2016). Internationale Autorität. *Zeitschrift für Internationale Beziehungen*, *23*(1), 38–70.

Take, I. (2012). Legitimacy in global governance: International, transnational and private institutions compared. *Swiss Political Science Review*, *18*(2), 220–248.

Wolf, K. D. (2010). Chartered companies: Linking private security governance in early and post modernity. In K. D. Wolf & N. Deitelhoff (Eds.), *Corporate security responsibility? Private governance contributions to peace and security* (pp. 154–176). Basingstoke: Palgrave Macmillan.

Wolf, K. D. (2014). The non-existence of private self-regulation in the transnational sphere and its implications for the responsibility to procure legitimacy: The case of the lex sportiva. *Global Constitutionalism*, *3*(3), 275–309.

Wolf, K. D. (2017). Patterns of legitimation in hybrid transnational regimes: The controversy about the lex sportiva. *Politics and Governance*, *5*(1), 63–74.

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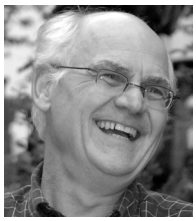

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Politics and Governance (ISSN: 2183–2463)
2017, Volume 5, Issue 1, Pages 6–14
DOI: 10.17645/pag.v5i1.776

Article

From the 8-Hour Day to the 40-Hour Week: Legitimization Discourses of Labour Legislation between the Wars in France and Belgium

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Submitted: 23 September 2016 | Accepted: 9 November 2016 | Published: 15 March 2017

Abstract
In the interwar period both France and Belgium passed legislation reducing the number of working hours and established a hybrid regulatory regime lending a certain degree of official authority to collective agreements. The paper analyses discourses by scholars who, as experts, were close to the political elites, and who tried to legitimize this kind of co-regulation by pointing out the inefficiency of state intervention and the epistemic authority of non-state actors. Stressing the output dimension of legitimacy and the improved quality of legal norms, these discourses had a technocratic tendency and ultimately argued in favour of a shift of power from the legislative to the administrative branch of government.

Keywords
Belgium; France; Georges Scelle; Henri Velge; labour legislation; Paul Grunebaum-Ballin; public–private regulation

Issue
This article is part of the issue "Legitimization of Private and Public Regulation: Past and Present", edited by Klaus Dieter Wolf (Peace Research Institute Frankfurt, Germany), Peter Collin (Max Planck Institute for European Legal History, Germany) and Melanie Coni-Zimmer (Peace Research Institute Frankfurt, Germany).

1. Introduction

This paper addresses a sector-specific regulatory structure, namely legislation reducing the number of working hours per day or per week and, in order to achieve this aim, referring to collective agreements. The laws discussed in this paper make the application of the law dependent on the existence and contents of collective agreements, or leave the concretization of the law to collective agreements, or give them power to derogate from the law. This wide-spread form of public–private regulation emerged right after the end of the First World War and is a dominant feature of labour law in France and Belgium to the present day. Taking up the questions outlined in the introduction, this article will discuss how such hybrids were legitimized in the interwar period.

The problem of legitimization of public–private regulation can be resumed, in this specific case, briefly as follows: Parliamentary democracy acknowledges parliament as the only body representing the will of the nation. Decisions are made by majority; laws apply to everyone. Norm-setting through administrative rulings is only legitimate (and legal) as far as the law, passed by parliament, permits. When workers' collective action was legalized in France and Belgium, trade unions demanded to fix the rules of the trade, negotiating wages and working conditions with employers and their associations. At the outbreak of the war, such collective agreements were widely accepted as legitimate, but their legal status was still under debate. In Belgium, collective agreements were not considered legally binding, representing no more than a 'gentlemen's agreement'. In France, but also in Germany and other countries, they were considered to be contracts, binding only upon the parties of the contract. The French law on collective agreements of 25 March 1919 confirmed this doctrine. Consequently, the idea that trade unions and employers' associations could set norms binding on every member of the trade, their agreements enjoying, within this professional space, the same universal authority as a law, was highly controver-

sial. Practical experience had, however, shown that collective agreements in many cases could only work and be enforced, if every employer and worker, whether member of a union or not, was bound to respect the wages and working conditions laid down in the collective agreement. Making the parties to collective agreements participate in generating and implementing laws on the reduction of working hours was thus an experiment combining the universality of rules set by the state with the negotiation of private contracts.

At first glance, it might seem obvious that such a new, experimental form of public–private regulation of labour on a national scale would stand in need of legitimization. However, when analysing the debates following the laws on the 8-hour day in the after war period, and those surrounding the laws on the 40-hour week in 1936, we find an apparently much higher need for legitimization of regulation on the French side, concerning the 1919 law, and a much more intense debate on the Belgian side in the thirties. Our question of how this type of public–private regulation was legitimized, thus leads us to ask in which specific historical contexts a need for legitimization was perceived, and by whom.

As different ways to combine legislative, administrative, and contractual regulation were developed in France (Fridenson, 2004) and Belgium, we expect to observe different patterns of legitimization. We must, however, take into account that the discourses we analyse do not always reflect the specific regulatory arrangement made by the law in question. In fact, authors refer to these laws, but follow a logic of their own and may pursue political aims only loosely connected to the laws they are pretending to legitimate. Because of the possible gap between the actual public policy implemented and the discourse, it will be necessary to give a detailed presentation of the laws and administrative practises before analysing legitimization discourses.

The first section of the paper will give a brief account of the historical context of the laws on the 8-hour day, present the specific regulatory arrangements in France and Belgium, and discuss which criteria and sources of legitimacy permitted the legislation on the reduction of working hours to pass parliament. The second section will analyse the dominant French discourses on the cooperation between the state and organized capital and labour in producing and implementing labour law. These discourses strongly favour output related arguments to legitimate this cooperation, vaunting it as a first step towards a technocratic form of norm-setting in France. The third section will, again, briefly present the historical context and the content of the laws on the 40-hour week, before showing how Belgian discourses legitimizing the labour laws of 1936 went on to promote larger corporatist projects of state reform. The paper thus focuses on two points in time: the immediate post-war period, and 1936, when both countries knew a period of social unrest and intense debate of labour legislation, the French legislation exerting a strong influence on the Belgian labour movement.

2. The Law on the 8-Hour Day

In both countries, labour legislation before 1914 met with many obstacles. Bills aiming at introducing shorter working days or compulsory social insurance failed in parliament or were delayed for years; more than once, court rulings rendered labour laws inoperable. This lack of support demonstrates that, while workers and their organizations were clamouring for laws reducing working time, state intervention into the working conditions of adult men, which would have limited the 'liberté du travail' of employers and workers, was not considered legitimate by a considerable part of the political and academic elite. If 'legitimacy is indicated by actor's compliance with…a set of social obligations', (Johnson, Dowd, & Ridgeway, 2006, p. 55), labour legislation's legitimacy was low in the eyes of French employers, too. Lawmakers and administrators struggled to devise regulations universal in scope, but sufficiently flexible to adapt to the needs of various industries, without on the other hand being too complex to allow for verification by state inspectors. Labour legislation was criticized in France for being either too schematic or for creating an all-encroaching bureaucracy, when specific regulations adapted to specific socio-economic situations had to be enforced. In a famous text published in 1901, Emile Durkheim (1901) described this dilemma of state regulation: general and uniform labour laws must be inefficient, but detailed regulation for each branch of industry would enhance the tendency towards an 'état hypertrophié', an excessively developed state. Therefore, he suggested creating a modern version of the ancient corporations of masters and journeymen, able to regulate the different branches of industry, and to devolve part of the state's norm—setting power to them, allowing them to produce 'la loi de la profession'. Durkheim considered new corporations, created by law, necessary because of what he and many of his contemporaries perceived as the shortcomings of French trade unions: they did not organize the majority of workers and were thus not deemed 'representative'. Consequently, trade unions and employers' associations lacked democratic legitimacy for setting norms binding upon all employers and workers of a given branch of industry (Rudischhauser, 2016, pp. 810–814).

During the war, however, the French state called upon leaders of trade unions and employers' associations to sit upon a great number of tripartite commissions and bodies set up by the state, where they 'represented' workers' and employers' interests in dealing with social and economic problems, from unemployment to women's work to wage-setting. The state thus acknowledged trade unions and employers' associations and declared their collaboration to be indispensable in organizing the war economy. Through this collaboration with the government, the organizations gained a new legitimacy. Trade unions in France, as in other allied countries, now claimed a role in the post-war national and international order, too. At the International Trade Union

Conference in Leeds in 1916, delegates from the trade unions of Belgium, Italy, France, and the UK drew up a program of workers' rights to be incorporated in the future peace treaty. This program included a reduction of working hours and the establishment of an international labour office. When peace negotiations opened in Paris in January 1919, a commission on international labour legislation was set up to prepare the relevant articles of the treaty, presided over by a trade unionist. Its final report on 4 March recommended the adoption of the 8-hour day. Manifestly, labour legislation, especially the reduction of working hours, had become a matter for international treaties as well as for trade unionists and employers' organizations to decide upon. They were no longer merely consulted. The Versailles Treaty laid the foundations of the International Labour Organization (ILO), whose constitution rested on the principle of tripartism: delegates of national governments (two for each government) and of a nation's 'most representative' trade unions and employers' associations (one delegate each) were to discuss and decide together. The ILO represented a new normative order based on the collaboration of delegates from national governments, capital, and labour for the purpose of norm-setting (Rodgers, Lee, Swepston, & Van Daele, 2009). Legislation introducing the 8-hour day was part of the Versailles Treaty (Art. 427) and the object of the Washington convention, its ratification a chief aim of the ILO.

These developments put the French government under intense pressure. The 8-hour day had been accepted as 'the standard to be aimed at' (Ramm, 1986, p. 107) by the allies and had already been proclaimed in Germany. Not least because of the hopes and emotions raised by the Bolshevist Revolution, the French government was afraid of revolutionary strikes and street protests, and thus it tried to immediately appease some of the workers' expectations. Looking for a quick solution, it decided against normal parliamentary procedure, which in the past had often delayed labour legislation for years on end. Implicating trade unions' and employers' representatives in the making of the law was a must, if the political aim of this legislation, social peace, was to be reached. The government therefore asked the *Commission Interministerielle des Traités Internationaux du Travail* to discuss the 8-hour day, one of the many 'mixed' commissions where state and non-state actors collaborated (Oualid & Picquenard, 1928, p. 321). Here, Charles Picquenard, a top-level public servant at the Ministry of Labour, proposed a two tier system: The principle of the 8-hour day was to be proclaimed by law, the details and modes of application were to be determined by administrative rulings based on collective agreements. The *Conseil d'Etat*, who was to establish the administrative rulings, would not be bound to reproduce the content of the collective agreement in question, but would only have to take it into consideration.

Picquenard's system was essential to make the employers' representatives accept the 8-hour day. The Commission adopted the text, containing only four articles, on 7 April, the government introduced the bill on 8 April, and the Chamber (the Lower House of Parliament) adopted it on 17 April and the Senate (the Upper House) on 23 April, both times unanimously. This consensus and rapidity cannot be explained by the pressure of the workers' movements alone. More important was the fact that delegates of workers' and employers' organizations, considered as legitimate representatives, had already agreed on this solution. The logic of the 8-hour day law—gaining legitimacy for state regulation by integrating those directly concerned into the norm-setting process—was already at work in the making of the law.

Given the context, it might seem plausible to argue that this type of public–private regulation relied mainly on input legitimacy enhanced through the participation of stake-holders in decision-making processes (Scharpf, 1998). However, a closer look at the debates in parliament raises doubts about whether this was the argument that permitted the law to pass. In March 1919 the Senate, the upper house of the French parliament, refused to accept an amendment to the law on collective agreements. This amendment would have given the prefects, the government appointed heads of the regional administrations, power to extend a collective agreement to all employers and workers concerned. The Senate was not prepared to let a prefect turn a collective agreement into a kind of administrative ruling, commanding universal authority. Only four weeks later, the bill on the 8-hour day was accepted, which enabled the *Conseil d'Etat* to give legal and universal force to a collective agreement by transferring its contents into an administrative ruling.

This change of the Senate's attitude is striking, especially since the rapporteur, speaking in favour of the law, and the main speaker answering, were the same both times. There was no difference as to the qualification and legitimacy of collective agreements and the negotiating parties, on which the 8-hour day law was mostly silent. The difference lay in the nature of the state actor and the scope of his prerogatives. The prefect, being an instrument of the respective government, did not provide guarantees to employers, whereas the *Conseil d'Etat*, being an independent judiciary body, did. Functioning also as an administrative court, it was credited with defending individual rights like '*liberté du travail*' against government interventions. Most importantly, the relation between the exercise of state authority and the authority of the private contract was different. Whereas the prefect would have extended the collective agreement as such, having no power to change its content, the *Conseil d'Etat*, when drafting the administrative ruling, retained the upper hand, being only obliged to refer to the collective agreement. The legitimacy of the regulatory regime rested on the legitimacy of the *Conseil d'Etat*, whose source was not democracy, but judicial independence and juridical expertise. The Senators, and especially the powerful industrialists and conservative lawyers who dominated these debates, were firmly re-

solved to enclose the new form of public–private regulation within the older, established forms of norm-setting, which had guaranteed their influence on the decision-making process so far (Rudischhauser, 2016, p. 687f.).

Our argument will become clearer as we consider the Belgian regulatory arrangement. In Belgium, in April 1919, the government installed joint committees ('*Commissions paritaires*'), where trade unions and employers' associations were equally represented, calling them 'study commissions' (*Commission d'Études pour la Réduction de la Durée du Travail dans les Usines Sidérurgiques*; *Commission d'Études pour la Réduction de la Durée du Travail dans les Mines*, etc.), charged to study ways and means to reduce the length of the working day. In fact, they negotiated collective agreements on working conditions and wages. (Neuville, 1976) The Belgian mode of labour regulation resembled the one practised in Britain: the 8-hour day was at first achieved through (state-sponsored) collective bargaining. When a general law on the 8-hour day was passed on 14 June 1921, most major branches had already reached an agreement, which, as in Britain, was not legally binding but nevertheless widely respected. The law allowed companies to apply for authorization to exceed the limit of 8 hours per day respectively 48 hours per week. Authorization could only be given if a prior agreement had been reached with the trade unions *most representative* of the workers employed in the company concerned. The law thus implicitly recognized trade unions as the legitimate representatives of workers and collective agreements as valid contracts, although neither trade unions, nor collective agreements had a legal status. The 8-hour day law gave '*de véritables droits à des organisations dépourvus d'existence légale*' (Velge, 1934, p. 242). Nevertheless, there was hardly any debate on the legitimacy of this regulatory regime in Belgium. The Belgian arrangement proved profitable for both sides: collective agreements laid the foundations for state regulation, improving its legitimacy, while trade unions and employers' associations gained importance and legitimacy, not least in the eyes of their constituencies, as the growth of membership demonstrates.

The implementation of the French law on the 8-hour day provided a stimulus to collective bargaining, but it also put trade unions in a much weaker position than the Belgian law did. At the same time, it sacrificed one of the major advantages of state regulation, namely universality. While the law was supposed to offer the benefit of the 8-hour day to every worker, its application was subject to administrative rulings (*règlements d'administration publique*), which determined when and how the 8-hour day would come into force in a specific 'profession, industry, trade or professional category'. These rulings were based, as far as possible, on collective agreements, of which only some concerned whole branches of industry, others specific professions. Accordingly, administrative rulings were issued for the metal industries on 9 September 1920, for hair-dressers on 26 August 1921, for joiners on 31 December 1921, and so on (Pic, 1930, pp. 567, 584). Norm concretization and implementation was a very slow, piecemeal process, depending on successful negotiations. Trade unions and employers' associations could negotiate a choice from a wide variety of legal possibilities, as the working day was supposed to comport 8 hours on average, the average being calculated per week, per month, or per quarter of the year. Besides, temporary as well as permanent derogations could be agreed upon. But in fact, no state action was taken without a collective agreement being signed first. As a result, the last administrative rulings were issued in 1935 (Leray, 1998). Contrary to the Belgian organizations, which gained legitimacy in the course of the implementation, French organizations lost creditability every time the *Conseil d'Etat's* ruling departed from the original collective agreement. The law on the 8-hour day did not allow trade unions and employers' associations to be the best judges of what arrangement was most appropriate for their specific trade or industry. However, the law did not aim at lending collective agreements additional authority and stability, but rather to help the state out of the dilemma Durkheim had sketched out.

3. Legitimizing the French Model

Because the 8-hour day was rushed through parliament, no elaborate legitimization discourses were developed at the time, and the discourses studied here were elaborated ex post. Shortly after the law on the 8-hour day had been passed, two major articles were published in one of the leading French political journals, the *Revue Politique et Parlementaire*, on the participation of employers' and workers' organizations in the making of laws. Both were written by jurists who were very influential in the public sphere of the 1920s and 1930s, and both presented the 8-hour day law as a model for future labour laws.

Paul Grunebaum-Ballin was a top level public servant and a well-known figure of the left, who had made a brilliant career at the *Conseil d'Etat* (Thuillier, 2001) and acquired experience in collective bargaining as an arbitrator in labour conflicts in the navy. The application of the 8-hour day to the merchant navy in a special law of 2 August 1919 provided the occasion for his article (Grunebaum-Ballin, 1920). The application of the law, following the same system as the general law on the 8-hour day, had been a positive experience for Grunebaum-Ballin: '*Le nouveau mécanisme fonctionne parfaitement*' (1920, p. 46). Both sides had rapidly reached an agreement, assisted by 'technicians', jurists and administrators. The joint committee had been presided over by a *conseiller d'Etat*, who then wrote the report preparing the administrative ruling. Grunebaum-Ballin praises this procedure as much quicker than parliamentary deliberations, and stresses the "competences" of the participants, their professional (= linked to the branch of industry concerned), juridical, and administrative expertise. In his article, the expertise and 'wisdom' of

'the technicians of law' appears as at least as important as the expertise of 'the professionals'. To him, the new mode of regulation represents a collaboration between 'the political' and 'the technical' within the joint committees, which he dubs '*commissions techniques législatives*'. For the future, he recommended that parliament state the principles and leave all the rest of legal norm-setting to '*l'accord collectif des représentants qualifiés des organisations patronales et ouvrières intéressées, à l'ingéniosité et à la sagesse des gouvernants, des fonctionnaires, des juristes qui prépareront, discuteront et signeront les règlements d'administration publique*' (1920, p. 44).

Grunebaum-Ballin was not so much trying to legitimize public–private regulation, as using the law on the 8-hour day to legitimize a reform of the parliamentary system, a constitutional reform. Criticism of parliament was key, and not, as with Durkheim, criticism of bureaucracy or the welfare state. Grunebaum-Ballin relates his very negative experience of parliamentary proceedings, where perfectly well-prepared and carefully drafted projects (in this instance, the *Code du travail maritime*), approved by everybody concerned, were stuck and could not be discussed and passed.[1] This is why he advocates the procedure established in the 8-hour day laws as a new, much more efficient method of legislation. To legitimize this new method, he likens the sovereign parliament to the absolute monarchy, abandoning a part of its prerogatives at the beginning of the 1789 revolution. He quotes Saint-Simon and Proudhon, imagining the rule of contract replacing the rule of law, economic forces replacing political authorities, functional categories—agriculture, industry, commerce—replacing classes. Following the theses advanced by Léon Duguit, Grunebaum-Ballin suggests abandoning the notion of the sovereign state, putting the idea of social service, run by public servants, in its place. In doing so, he argues no longer in favour of Proudhon's rule of contract, but in favour of a rule of technicians: Technocracy. Grunebaum-Ballin's argument implied that lawmaking could be depoliticized, reduced to technical instead of political decisions. As far as he was concerned with the legitimacy of the mode of regulation established through the 8-hour day laws, it rested on the improved quality of legal norms.

A similar pattern of legitimization can be found in the writings of Georges Scelle, a socialist and jurist, better known for his later work on international law. At the time of his article, he taught labour law in Dijon; in 1924, he would become *chef de cabinet* of the minister of labour, Justin Godart, one of the 'fathers' of the law on the 8-hour day in 1919. Scelle's article, as Grunebaum-Ballin's, places the accent on legislative techniques and methods (Scelle, 1920). His starting point is the debate on sources and authors of law, the question of whether law is necessarily a product of parliament. To Scelle, there are other ways of producing law, namely what he calls 'autonomous' law, negotiated between employers and workers. Such a negotiated, contractual law, '*la loi conventionelle, acceptée et non imposée*' (Scelle, 1920, p. 29) has a better chance of being obeyed, will be a better informed and more objective law, taking into account all opinions and interests. In later studies, Scelle would call the law on the 8-hour day itself a 'kind of collective agreement', because it had been negotiated and agreed upon between employers' and workers' representatives in a tripartite commission (Scelle, 1927, p. 208). This notion of a 'contractual law' is linked to an idea of industrial democracy, replacing the 'monarchy' of the employer. Scelle thus represents collective agreements as the 'true' labour laws.

Just as Grunebaum-Ballin, Scelle is very critical of parliamentary methods. Laws voted in parliament are always too late, and incompetent. Parliament should therefore only state the general principles and create the framework to facilitate and stimulate collective bargaining, that is, the 'secondary', 'contractual', true labour law. Scelle elaborates this distinction between 'primary' and 'secondary' legislation in his later textbooks on labour law. In his 1927 *Précis Élémentaire de Législation Industrielle*, Scelle, contrary to Grunebaum-Ballin, does not credit the *Conseil d'Etat* with a technical competence. He limits its role to a control of legality; its main function is to confer obligatory force to a contractual arrangement that would otherwise be binding only to the members of the contracting organizations. Scelle does not consider the *Conseil d'Etat* as the guardian of general interest. He glosses over the fact that legally the *Conseil d'Etat* is not bound to accept the text of the collective agreement and does not mention the instances when the *Conseil d'Etat* had, in fact, not done so. This distortion of the role of the *Conseil d'Etat* enables Scelle to present the 8-hour day law as a step 'towards the autonomy of the regulation of labour'.

But this 'autonomous legislation' is legitimated exclusively by its results, its higher quality, due to the competence of workers and employers, and its inherent flexibility. Scelle is convinced that the new legislative technique will make the modification of legal norms easier when economic situations change, assuming that collective bargaining is always quicker than parliamentary procedure (Scelle, 1922, p. 107), which is obviously not true in the case of the 8-hour day. In his argument, 'autonomy' designates only the 'spontaneous' emergence of this kind of law, as opposed to parliamentary law. Nowhere does Scelle mention or reflect upon a right to self-regulation or the existence of an autonomous normative sphere. Consequently, he does not reflect on the legitimacy of the existing trade unions and employers' associations to set norms which will become compulsory even for outsiders. Scelle and Grunebaum-Ballin's central legitimation *topoi* are expert knowledge and competence, which Grunebaum-Ballin locates with the top administration, especially the *Conseil d'Etat*, Scelle with the employers' and workers' organizations.

[1] Grunebaum-Ballin's real aim was to get 'his' *Code du Travail Maritime* passed. The corresponding law is reproduced in the annex of his article.

Scelle's distinction between 'primary' and 'secondary' legislation became a kind of official doctrine of the French Ministry of Labour, whose department of labour was continuously under the direction of Charles Picquenard until 1937. Picquenard was proud of the new legislative technique he had invented. In his eyes, the main advantage of the 8-hour day law was that it allowed 'the generalization of collective agreements' (Oualid & Picquenard, 1928, p. 292), transforming them into norms binding on everybody working within the branch concerned. The 8-hour day law, in his eyes, compensated for the Senate's refusal of the extension of collective agreements. Picquenard considers the new technique as a means of turning employers' and workers' organizations into second degree lawmakers, into '*les auxiliaires professionnels, techniques ou régionaux du législateur parlementaire*', a technique which opens '*immense horizons*' (Oualid & Picquenard, 1928, p. 295f.). Speaking of a 'division of labour', he adopts Scelle's formula of a '*collaboration hierarchisée entre le législateur parlementaire et le législateur autonome*'.

French jurists of the left, close to or part of the administration, were quite satisfied with this 'autonomy', while corporatists on the right of the political spectrum tended to minimize the importance of this kind of collaboration. Jean Brèthe de la Gressaye, a well-known Catholic corporatist, highlighted the importance of another law, of 29 December 1923, on the weekly day of rest (Brèthe de la Gressaye, 1930, pp. 76–92). It gave the prefect power to order shops to be closed on the day fixed in a corresponding collective agreement. Brèthe considered that this law, contrary to the one on the 8-hour day, gave real regulatory power to the organizations of employers and workers, which they shared with the prefect. Because the prefect could only intervene at their demand and according to the rules fixed in the collective agreement, 'for the first time, the regulatory authority was at the disposal of the professional organizations' (Rivero, 1939, p. 195). But the only argument Brèthe explicitly offered in favour of such a hybrid regulation referred to output: a regulation adapted to the needs of each branch and to local circumstances could only be achieved through the collaboration of the parties concerned.

4. The 40-Hour Week in Belgium: Cautious Corporatists

Just as the introduction of the 8-hour day, the reduction of the number of hours worked per week to 40 was justified on social and economic grounds, namely as a means to fight unemployment. From 1931 onward, an international debate on such a reduction of working time engaged legal experts and trade-unionists in Europe, resulting in ILO Convention No. 47 of 1935 (Chatriot, 2004). But only when in 1936 a massive wave of strikes forced a change of policies did parliaments in France and four weeks later in Belgium pass a law on the 40-hour week. The mode of regulation chosen reflected past experiences with the 8-hour day, but also, in the case of Belgium, a broad debate on new mechanisms and organizations that would enable employers and workers to regulate the economy and participate in norm-setting.

The French law on the 40-hour week, passed on 21 June 1936, superficially resembles the 8-hour day law. Again, a very laconic text was rushed through parliament in a hurry. Ministerial decrees, one for each branch of the economy, were to determine how the 40-hour week would be introduced. Employers' and workers' organizations had to be consulted, the decrees had to refer to collective agreements, if they existed. But this time, the whole procedure was centralized and organized by the Ministry of Labour, which consulted the employers' and workers' organizations of each branch of the economy and then handed the dossier to the competent section of the *Conseil national économique*, on whose report it drafted the decree (*décrets rendus en conseil des ministres*). The legitimacy of the *Conseil national économique* was based on its representative nature, as only organizations deemed to be 'the most representative' of the branch concerned could designate members to the *Conseil national économique* (Chatriot, 2002, 2007). But the political nature of the Ministry's decisions was clearly visible. The negotiations within the sections of the *Conseil national économique* produced the technical advice the ministry was asking for, but did not confer an additional legitimacy to the application of the 40-hour week, which was famously criticized for its 'rigidity' (Chatriot, 2004, p. 84). Its critics did not perceive the law on the 40-hour week as a continuation of the French model of secondary lawmaking, but as a return to state regulation. Consequently, its legitimacy was weak in the eyes of those employers, politicians, and academics, who had always opposed labour legislation. Authors close to these circles, at the same time, praised the flexibility of the Belgian law on the 40-hour week.

This law on the 40-hour week, of 9 July 1936 (Revue du Travail, 1936, pp. 783–784), was to be applied only in industries presenting dangers or health hazards. Consultation of joint committees or trade unions and employers' associations was mandatory. A royal decree could confer legal force to a joint committee's decision (in fact, a collective agreement) and extend it to all employers and workers working in the branch of industry concerned. The same provisions are to be found in the law, passed one day earlier, on paid holidays for workers. The royal decree thus incorporated the content of a collective agreement, transforming it into imperative law, to be controlled and enforced by the state inspection of factories. Contraventions were accordingly penalized. But—perhaps as a precaution—the joint committees were still called study commissions, as in 1919: '*commission d'étude de la réduction de la durée hebdomadaire du travail dans les mines de Houille*' etc. (Revue du Travail, 1937, pp. 709–713).

The 1936 Belgian legislation built on the de facto legitimacy and authority of collective agreements (respectively joint committees), and it did not legislate on collec-

tive agreements as such, nor give a legal status to the existing trade unions and employers' associations. The government did not create the new corporations Durkheim had once demanded, although the creation of '*organisations professionnelles*', able to regulate the economy, had been proclaimed official government policy (Velge, 1937, p. 202) in order 'to simplify the government's task of intervention'. '*Organisation professionnelle*' was a keyword in the Belgian debates on public–private regulation and enjoyed a vague, but broad appeal in the economic and social crisis of the 1930s. All parts of the political spectrum were calling for an organized or planned economy. '*Organisation professionnelle*' came close to representing a kind of consensus, because it appealed to conservatives and liberals hostile to state intervention and bureaucracy, to Catholics inspired by the encyclical *Quadragesimo anno*, and even to many socialists.

The most elaborate proposals for '*Organisation professionnelle*' were made by Henri Velge, professor of law at Leuven University, well-known for his corporatist doctrines and his campaign for the establishment of a Belgian *Conseil d'Etat*. In an article published in the '*Revue du Travail*', the official journal of the Belgian Ministry of Labour, in 1937, Velge defends the 1936 laws as being perfectly constitutional, and he sees the transformation of decisions made by workers and employers' organizations into decrees as a model to be followed and generalized (Velge, 1937). He wants to maintain the prerogatives of the state but turn labour organizations into collaborators of government and parliament. Government should retain the final decision in order to defend the general interest of the nation. But the initiative should rest with the organizations, whose regulations could then be transformed into royal decrees. According to Velge's conception, workers and employers' organizations were not limited to the concretization and application of a law passed in parliament. While the executive was given power to rule by decree, listening to the initiatives and demands of economic organizations, parliament's role was weakened.

Anti-parliamentarism was an important factor in the debates on public–private regulation. The Belgian debate of the 1930s no longer turned around the question of how to pass labour legislation quickly and improve its quality, but aimed at a constitutional reform. In 1937, a study-commission for the reform of the state (*Commission d'Études pour la Réforme de l'Etat* [CERE]), adopted and generalized Velge's conception: any kind of professional regulation could be turned, by royal decree, into a legal obligation for all employers and workers working in the branch of industry concerned. Anybody concerned could oppose such a move, appealing to a special court, which would decide whether the regulation was contrary to the constitution, the laws, or the general interest (Revue du Travail, 1937, pp. 1854–1868). The Belgian government introduced a bill in 1938, based on Velge's project and the proposals of the CERE. 'Every joint committee…may solicit that a collective agreement be transformed into a professional regulation and extended to all producers, distributers and workers belonging to the same branch of industry, agriculture, or commerce….' (Vleeschauwer, 1950, pp. 83–174). All these proposals included provisions about the legal status of trade unions and employers associations, but also created additional legal bodies on top of the private organizations. The proposals refrained from giving private organizations outright regulatory authority and took a lot of precautions to safeguard the authority of the government.

The same caution pervades the legitimization discourses developed. The main argument was, as it had been in France, quality of output. Legal regulation was denounced as incomplete and faulty, because the government lacked the information and expertise, due to the problems of state intervention in a complex society. The collaboration of actors working in the branch of industry concerned was thus necessary to unburden the state: 'public authorities must discharge themselves of a mission they can no longer fulfil' (Velge, 1942, p. 19). This criticism of state intervention as such added to the widespread criticism of parliament, whose legislation, especially on labour, was shown to be ill-prepared, hasty, and uncoordinated.

But behind this well-established pattern of legitimization, authors like Velge harboured ideas for a new society in which everybody was consciously part of a group, the 'profession'. To develop the '*organisations professionnelles*' was consequently a value as such to him. Velge, who knew how highly controversial his vision of a new society was, stayed silent on the nature of the profession (which hardcore corporatists treated as a natural group, like family), and did not give a name to the new organization he was proposing. Although engaged in Catholic politics, he did not once refer to sources of legitimacy like subsidiarity, autonomy, or self-government.

Such general concepts appeared only in the discourses of the 1950s, when both French and Belgian jurists used more audacious terms. In a comprehensive volume on '*organisation professionelle*', Robert Vleeschauwer, professor of law at Leuven University, proclaimed subsidiarity as the principle of regulation corresponding to natural law. In France, Paul Durand, in the first volume of his authoritative treatise on labour law, talked about the spontaneous formation of 'professional law', quoting Scelle, Sinzheimer, and Ihering. He still used the established reference to the shortcomings of '*droit étatique*', criticized as incomplete and rigid, 'unable to adapt to the divers and changing forms of social life'. But the next sentence acknowledged a claim of non-state actors to self-regulation: 'Every group aspires to exert a regulatory power. Corporative law develops spontaneously, which completes and even corrects the legal rule.' (Durand, 1950, p. 124).

5. Conclusion

Legitimization discourses of labour legislation between the wars in France and Belgium had a common point of

departure: a perceived crisis of state regulation. New hybrid modes of norm-setting in Belgium rested on the experience that trade unions and employers' associations could and would arrive at collective agreements, setting the rules for their respective trade. This mode of regulation was widely considered legitimate, but lacked a legal framework, which may explain why legal scholars hesitated to elaborate on its normative foundations. The construction of this legal framework proved difficult still in 1936/37, although the transformation of collective agreements into administrative rulings no longer met with opposition. While the law on the 8-hour day had bolstered the legitimacy of collective agreements, the proponents of '*organisation professionnelle*' in the 1930s were mainly intent on increasing the power of the executive, side-stepping parliament. In France, the law on the 8-hour day had already limited the role of parliament and given considerable power to the administration and the supreme administrative court, the *Conseil d'Etat*. The law established the *Conseil d'Etat* as the defender of the common interest, free to set aside the will of the concerned workers and employers as expressed in their collective agreement. In 1936, the law on the 40-hour week made agreements reached between employers' and workers' representatives within the sections of the *Conseil national économique* part of a procedure so closely organized and dominated by the government that these agreements could not be represented as free private contracts. The mode of regulation chosen for the concretization of the 40-hour week thus did not gain legitimacy.

Delegitimizing parliament proved to be a key element for legitimizing public–private collaboration in the making and application of labour laws in the interwar period. In both France and Belgium, parliament was regularly depicted as overburdened and incompetent. The discourses analysed in this paper followed the logic of Durkheim's argument, calling for hybrid regulation in order to discharge parliament. The legitimacy of hybrid regulation was thus mainly derived from the needs and shortcomings of the state, and from the epistemic authority of non-state actors. Other sources of legitimacy, like autonomy or self-regulation, were hardly referred to. Only after the Second World War, when trade unions had gained considerable prestige and political weight, was the claim of trade unions to participate in norm-setting recognized as legitimate.

Acknowledgements

Published with the support of the Belgian University Foundation (Publié avec le concours de la Fondation Universitaire de Belgique).

Conflict of Interests

The author declares no conflict of interests.

References

Brèthe de la Gressaye, J. (1930). *Le syndicalisme, l'organisation professionnelle et l'Etat*. Paris: Librairie du Recueil Sirey.

Chatriot, A. (2002). *La démocratie sociale à la française. L'expérience du Conseil national économique, 1924–1940*. Paris: Éditions la Découverte.

Chatriot, A. (2004). Débats internationaux, rupture politique et négociations sociales: Le bond en avant des 40 heures, 1932–1938. In P. Fridenson & B. Reynaud (Eds.), *La France et le temps de travail (1814–2004)* (pp. 83–108). Paris: Odile Jacob.

Chatriot, A. (2007). Les apories de la représentation de la société civile. Débats et expériences autour des compositions successives des assemblées consultatives en France au XXe siécle. *Revue Française de Droit Constitutionnel*, *71*, 535–555.

Durand, P. (1950). *Traité du droit du travail* (Vol. 1). Paris: Dalloz.

Durkheim, E. (1901). *De la division du travail social*. (2nd ed.). Paris: Alcan.

Fridenson, P. (2004). La multiplicité des processus de réduction de la durée du travail de 1814 à 1932: Négociations, luttes, textes et pratiques. In P. Fridenson & B. Reynaud (Eds.), *La France et le temps de travail (1814–2004)* (pp. 55–82). Paris: Odile Jacob.

Grunebaum-Ballin, P. (1920). La participation des organisations professionnelles à l'exercice du pouvoir législatif. *Revue Politique et Parlementaire*, *102*, 42–56.

Johnson, C., Dowd, T. J., & Ridgeway, C. L. (2006). Legitimacy as social process. *Annual Review of Sociology*, *32*, 53–78.

Leray, I. (1998). La réduction du temps de travail pour tous: La loi du 23 avril 1919 sur les huit heures. In J.-P. Le Crom (Ed.), *Deux siécles de droit du travail. L'histoire par les textes* (pp. 117–128). Paris: Éditions de l'Atelier.

Neuville, J. (1976). *Histoire du mouvement ouvrier en Belgique. L'évolution des relations industrielles* (Vol. 5). Bruxelles: Vie Ouvrière.

Oualid, W., & Picquenard, C. (1928). *Salaires et tarifs. Conventions collectives et grèves. La politique du ministère de l'armement et du ministère du travail*. Paris: PUF.

Pic, P. (1930). *Traité élémentaire de législation industrielle: Les lois ouvrières*. Paris: A. Rousseau.

Ramm, T. (1986). Laissez-faire and state protection of workers. In B. Hepple (Ed.), *The making of labour law in Europe. A comparative study of nine countries up to 1945* (pp. 73–113). London and New York, NY: Mansell Publishing Ltd.

Revue du Travail. (1936). Loi du 9 juillet 1936 instituant la semaine de quarante heures dans les industries ou sections d'industrie où le travail est effectué dans des conditions insalubres, dangereuses ou pénibles. *Revue du Travail*, 783–784.

Revue du Travail. (1937). Rapport de la commission d'étude de la réduction de la durée hebdomadaire du travail dans les mines de Houille. Plans pour la Reforme de l'Etat. *Revue du Travail*, 709–713.

Rivero, J. (1939). Le repos hebdomadaire, arrêt du Conseil d'Etat du 23 novembre 1938, note. *Droit Social*, *1*, 194–199.

Rodgers, G., Lee, E., Swepston, L., & Van Daele, J. (2009). *L'OIT et la quête de justice sociale, 1919–2009*. Geneve: Bureau International du Travail.

Rudischhauser, S. (2016). *Geregelte Verhältnisse. Eine Geschichte des Tarifvertragsrechts in Deutschland und Frankreich, 1890–1918/19*. Bonn, Weimar, and Wien: Böhlau Verlag.

Scelle, G. (1920). La loi des huit heures, une évolution remarquable de la technique législative. *Revue Politique et Parlementaire*, *105*, 27–39.

Scelle, G. (1922). *Le droit ouvrier. Tableau de la législation française actuelle*. Paris: A. Colin.

Scelle, G. (1927). *Précis élémentaire de législation industrielle*. Paris: Recueil Sirey.

Scharf, F. W. (1998). *Interdependence and democratic legitimation* (MPIfG Working Paper 98/2). Cologne: Max Planck Institute.

Thuillier, G. (2001). Paul Grunebaum-Ballin et la disparition des grands corps en 1944. *La Revue Administrative*, *54*, 467–472.

Velge, H. (1934). L'évolution juridique de la législation sociale belge. *Revue du Travail*, 234–247.

Velge, H. (1937). L'organisation des professions est-elle réalisable en Belgique dans le cadre de la constitution? *Revue du Travail*, 199–207.

Velge, H. (1942). *Profession et législation sociale*. Bruxelles: Casterman.

Vleeschauwer, R. de (1950). *L'organisation professionnelle de l'économie*. Paris: Librarie General de Droit et de Jurisprudence.

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COGITATIO

Politics and Governance (ISSN: 2183–2463)
2017, Volume 5, Issue 1, Pages 15–25
DOI: 10.17645/pag.v5i1.784

Article

The Legitimation of Self-Regulation and Co-Regulation in Corporatist Concepts of Legal Scholars in the Weimar Republic

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Submitted: 29 September 2016 | Accepted: 1 December 2016 | Published: 15 March 2017

Abstract
Corporatist regulation has a hybrid structure in that it covers state regulation, regulated self-regulation as well as private-public co-regulation. Notably diverging from the standard mode of state regulation, such arrangements required a higher degree of legitimation. Corporatist concepts flourished in the Weimar Republic. This paper deals with three legal scholars' considerations regarding how to legitimize corporatist models, namely Edgar Tatarin-Tarnheyden, Heinrich Herrfahrdt, and Friedrich Glum. Their institutional touchstone was the Imperial Economic Council, as provided for by article 165 of the Weimar Constitution. This article envisioned a multi-level system of economic councils ranging from regional economic councils up to the Imperial Economic Council and involving representatives of all occupational groups in the performance of state tasks. However, only a Provisional Imperial Economic Council, with a restricted consultative remit, was ever actually established. Based on this model, Tatarin-Tarnheyden, Heinrich Herrfahrdt, and Friedrich Glum conceptualized organizational structures aiming at the comprehensive inclusion of non-state actors. They were legitimized primarily with reference to their output; that is, these organizational forms were supposed to enable a more appropriate and efficient realization of public interests. The input-based argument was basically a question of participation, which implies considerable proximity to typical *topoi* of democratic legitimation. This similarity is perhaps counter-intuitive, given that corporatist concepts are traditionally associated with anti-democratic ideologies due to their anti-parliamentarian slant. The numerous points of convergence between corporatist and democratic thought simultaneously reflect the heterogeneity of democratic reasoning in the Weimar period and the openness for ideas that were sceptical of—or even hostile to—parliamentary democracy and the party-based state.

Keywords
corporatism; public law; self-regulation; Weimar Republic

Issue
This article is part of the issue "Legitimization of Private and Public Regulation: Past and Present", edited by Klaus Dieter Wolf (Peace Research Institute Frankfurt, Germany), Peter Collin (Max Planck Institute for European Legal History, Germany) and Melanie Coni-Zimmer (Peace Research Institute Frankfurt, Germany).

1. Introduction

Who is supposed to make the law? In Germany during the late nineteenth and early twentieth centuries, the answer was clear: the state. This was the prevailing opinion among the scholars of public law (Anschütz, 1914, pp. 152f.)[1]. Until 1918, legal positivism dominated in the field of public law; an etatist model established in the mid-nineteenth century by Carl Friedrich von Gerber and Paul Laband. According to this model, the state was constructed as a single, unitary entity unable to tolerate any other sovereign beside itself and thus rejecting any alternative legislative authority. This rather superficial finding neither takes into consideration the diverse practice of rule-making nor deviating opinions. Nevertheless, non-state regulation (especially norm-setting) took place outside the established structures and were always in need of legitimation.

[1] One exception was customary law, which, however, had already lost significance by the beginning of the twentieth century.

The aim of this article is to analyse certain concepts connected with societal self-regulation and private-state co-regulation that emerged during the Weimar Republic: corporatist ideas of regulation developed by public law scholars. Which regulatory structures were developed, and how were they legitimized? In order to illustrate the context within which the authors operated at that time, I will begin with a short overview of the non-state and semi-statal forms of regulation that were already existent at the end of the nineteenth and the early twentieth centuries. Next I will briefly outline the jurisprudential and political models that emerged toward the end of the nineteenth century, and which partially served as a breeding ground for the concepts dealt with here (1.1.). The following section introduces the Imperial Economic Council (incorporated in the Art. 165 of the Weimar Constitution), which served as the organizational starting point for the corporatist concepts (1.2.). The main part of this text is broken into two sections: the first section is dedicated to the presentation of these corporatist concepts (2.). Here, we will pursue questions such as: How should the corresponding structures of regulation be composed? What forms of regulatory competences should the actors possess, and what should their relation to state actors be? The second section deals with the legitimation of these norm-setting structures (3.): Which legitimatory considerations were deemed important (3.1.)? Which criteria for legitimation were put in place (3.2.)? Which sources of legitimation and *topoi* were applied (3.3.)? Particular attention will be paid to the role of different concepts of democracy as well as the possible connections to national socialist ideology. As a result, the legitimating structures of a regulatory concept will be exposed; a concept which from the contemporary perspective seems alien and hostile towards democracy. Nevertheless, I want to stress that this understanding was an attempt to react to political crisis and new societal differentiations.

1.1. Traditions of Legal Pluralism and Non-State Norm-Setting Structures in Nineteenth Century Germany

Starting in the second half of the nineteenth century, a variety of new forms of non-state regulation or regulation only partially embedded in the state structures emerged. Generally speaking, we can distinguish between three different kinds: judicial, administrative, and norm-setting. Judicial forms included for instance permanent commercial arbitration courts, which excluded the competence of state courts, arbitrating bodies responsible for labour and social law staffed with representatives of the involved groups, as well as mediation panels for dealing with conflicting group interests, for instance, between health-insurance providers and doctors or between banks, credit cooperatives, and savings banks. Administrative forms included for example the supervision of technical facilities by private associations, the management of water resources by water cooperatives, the organization by health insurance providers or the organization of occupational safety by employers' liability insurance associations (Collin, 2016).

However, what attracted the most attention were the norm-setting forms, for they most sharply called into question the state monopoly on regulation. Here, too, we are dealing with a manifold of forms: transport regulation by railway companies; codification of trade practices by chambers of commerce; competition laws between representatives of business conglomerates; cartel statutes; technical standards by engineering associations; and requirements for vocational training by chambers of crafts (Collin, 2015). Non-state normativity was most vivid and obvious in labour law, as Rudischhauser (2016) shows in a recent study. There was no uniform concept of legitimation for all these norm-setting forms. Nonetheless, it was the concept of autonomy that had the greatest impact. The concept of autonomy, which states that non-state associations are also allowed to set norms, can be found in publications of legal positivism, too. There, however, the right to autonomy was bestowed by the state. Hence, it was no original right, but rather derived from state sovereignty (Kremer, 2012, p. 28).

The *Genossenschaftstheorie* (theory of cooperative associations)[2] also considered autonomy to be a source of law; however, its conception of autonomy was much more state-independent. This theory, which is associated above all with names like Georg Beseler (1843, pp. 182–183), Otto Bähr (1864, pp. 31–32) and—most prominently—Otto von Gierke (1873, 1902), tried to derive the existence of independent fields of law from the existence of non-state cooperative associations, which would also imply the existence of a self-contained legislative power. This concept of autonomy established itself in the legal literature, but its persuasiveness and its scope of validity had noticeably eroded starting in the 1870s, as the sway of the cooperative movement waned and the state convincingly claimed its monopoly on lawmaking (Collin, 2014, pp. 165–228; Kremer, 2012, pp. 3–32).

In the nineteenth century, too, corporative state concepts were becoming more influential (Mayer-Tasch, 1971; Meyer, 1997; Nocken, 1981; Ritter, 1998). Essentially, they aimed at the abolition or relativization of a parliament elected by universal suffrage. They wanted to establish a body of representation composed of representatives from various occupational groups. To an extent, they were still oriented towards pre-modern and pre-constitutional conceptions and models. And in this respect, one could certainly characterize them as conservative. Yet, such a characterization cannot sufficiently

[2] The difference between *cooperative* and *corporatist* in terms of political theory is that the former is mainly concerned with various associations and communities within the state and emphasizes the preservation of their legal capacity. The second concept deals mainly with shaping macro-societal structures. However, there is considerable overlap between the two concepts.

explain the appeal of these concepts exercised. Especially during the second half of the nineteenth century, corporatist ideas were also an attempt to take into account new social differentiations as well as to integrate the working class. To this end, parliamentary-like councils were to be established which were supposed to represent the realities of economic life and which above all had equipped with advisory functions. In practice, however, these ideas never gained traction. Bismarck failed in his attempt to install an economic parliament (*Deutscher Volkswirtschaftsrat*), at the Imperial level, as a competing model to the Reichstag. Furthermore, the Prussian *Volkswirtschaftsrat* that Bismarck had initiated was dissolved a few years later, since the Prussian parliament had refused to fund it.

1.2. The Imperial Economic Council as the Conceptual Starting Point

In certain sense, these concepts crossed paths again after 1918. Once the monarchy had been overthrown, a new constitution was intended to sort out the changed circumstances. The primary author of the draft constitution was the left-liberal jurist, Hugo Preuß, a student of Otto von Gierke. He only envisioned the draft constitution as a purely parliamentarian system. There was no place for councils or boards other than the parliament (Ritter, 1994, p. 77; Westphal, 1925, p. 51). Yet this concept met with bitter resistance on the part of the workers, who were striving to create a council system based on the Russian model. Demonstrations, strikes, and armed assaults were the result of this opposition. The government reacted by offering an amended draft of the constitution. The article at the centre of this struggle was Art. 34a, which provided for the establishment of workers' councils, especially in the companies, and creation of economic councils in which employees and employers alike were represented (Albrecht, 1970, pp. 91–95; Riedel, 1991, p. 126).

However, even the workers' party, the SPD, was partly sceptical towards the idea of establishing councils. Several leading members were confident that it could achieve the party's goals and push forward its ideas in a parliamentarian system. From a number of different directions, attempts were made to convince the constituent assembly of the viability of the council system concept. The Ministry of Economics used economic considerations to make its point: The councils should be part of a *Gemeinwirtschaft* (social economy) (Moellendorff, 1919, p. 8; Gesch, 1926, p. 19). These ideas were mainly propagated by the Undersecretary of State at the Ministry of Economics, Wichard von Moellendorff, one of the most important architects of the concept of social economy, who had the Prussian *Volkswirtschaftsrat* in mind when it came to the creation of an economic council (Glum, 1930b, p. 579). Already before 1918, during the war, he had advocated the establishment of an economic council (Moellendorff, 1916, p. 32). In this case, the economic council was embedded in technocratic approaches based on a planned economy.

Hugo Sinzheimers's line of argumentation turned out to be more persuasive. Sinzheimer was a jurist and SPD deputy in the constituent assembly. He is referred to as one of the "fathers" of labour law, which he considered to be a primary field of application when it came to non-state regulation. Already during the war, he advocated the establishment of economic councils (Sinzheimer, 1916, pp. 198–202). In contrast to Moellendorff, his approach was not technocratic, but—heavily influenced by Gierke—rather emancipatory in its conception: Alongside the domain of the state, there should be a social sphere where the involved parties autonomously establish their own law or at least are involved to a significant extent in the norm-setting process. For this to take place, independent organisational structures were supposed to be established. As a result, a "social parliamentarianism" should be created alongside the "state parliamentarianism", which would primarily be situated within the Imperial Economic Council (Albrecht, 1970, pp. 100–103; Völtzer, 1992, pp. 294–297). Sinzheimers's plea was very well received in the constituent assembly. Having recognized corporative state elements in the idea of the Imperial Economic Council, conservative representatives, too, appreciated Sinzheimers's approach (Albrecht, 1970, p. 143; Pohl, 2002, p. 194ff.; Ritter, 1994, p. 98).

The result of the consultations in the National Assembly was Art. 165 of the Weimar Constitution. Art. 165 III–VI provided for the establishment of a central body in which all of the important professional groups were supposed to be represented, and that it was to be consulted regarding all economically and socio-politically relevant draft bills. In addition, the Imperial Economic Council was supposed to have the right to draft bills of its own. Furthermore, this norm provided for the establishment of regional economic councils (*Bezirkswirtschaftsräte*) with an analog structure. In the end, only the central board, the Provisional Imperial Economic Council (*Vorläufiger Reichswirtschaftsrat*), was ever erected. The effects of this council were limited in scope (Lilla, 2012; Rehling, 2011, pp. 180–182).

Thus, an incomplete institution had been created, an institution that provided a resonance chamber or space for a variety of partly conflicting approaches: for socialist as well as conservative views, for democratic as well as for anti-democratic ideas, for concepts of self-regulation and corporatist state models. The Imperial Economic Council was the conceptual starting point for the authors discussed in the following sections.

2. Corporatist Concepts in Public Law

I will illustrate how the debate itself developed among scholars of public law by looking at the work of three authors: Edgar Tatarin-Tarnheyden, Heinrich Herrfahrdt, and Friedrich Glum. In the literature, quite often just the first two are classified as distinct representatives of

the corporatist movement among public-law professors (Bohn, 2011; Meinck, 1978; Meyer, 1997; Stolleis, 1999, p. 173). It was only a small group in the state law community to which only Franz Jerusalem could also be included (Jerusalem, 1930, pp. 23–25), though he focused on sociology.[3] Friedrich Glum, in contrast, is normally not regarded as a member of this group. Still, his conception of the Imperial Economic Council shows many similarities to corporatist models, which demonstrates the openness of such models to non-corporatist elements. In general, the idea was to base comprehensive models of the state on a specific variation of corporatism in which decision-making power and influence is located in forums organized around particular occupations.

2.1. Edgar Tatarin-Tarnheyden

Of all the public law professors, Edgar Tatarin-Tarnheyden was the one who had developed the most distinct corporatist concept. A Baltic German raised in the Tsarist Empire, he moved to Germany in 1917, completed his habilitation thesis in 1922 and became a professor at the University of Rostock in the same year.[4] Already in his habilitation (second thesis) his preference for the replacing the parliamentary system with a corporatist system was evident. At the time, however, he saw little chance for this to come to pass and, therefore, satisfied himself with calls for the establishment of a second chamber beside the Reichstag (Tatarin-Tarnheyden, 1922, p. 243). Despite this reticence, he developed an extended corporatist concept in his 1922 book that reappeared in later publications. The Imperial Economic Council was his prototype, and he proposed expanding it in three directions. Firstly, it was to be placed on a foundation of local and regional economic councils (Tatarin-Tarnheyden, 1930, pp. 64–66, 1931, pp. 23–24). Secondly, he intended to broaden its social basis by including further professions, such as white-collar professions and other social groups, like mothers (Tatarin-Tarnheyden, 1922, pp. 237–239). Thirdly, he wanted to expand the Imperial Economic Council's powers to include the authority to enact laws (Tatarin-Tarnheyden, 1930, p. 62, 1931, p. 24).

2.2. Heinrich Herrfahrdt

Similarly for Heinrich Herrfahrdt, *Privatdozent* at the University of Greifswald and extraordinary professor since 1932,[5] art. 165 of the Weimar Constitution was the conceptual point of departure. He also proposed expanding the system of corporatist bodies by placing it on a broader and more functionally differentiated foundation (Herrfahrdt, 1921, p. 149). However, in contrast to Tatarin-Tarnheyden, he sought to spare these bodies the dilemma faced by the parliamentary system, namely that questions of substance are secondary to the search for majorities. Therefore, the corporatist bodies should not act by means of voting but through consultation. In order to equip this consulting function with sufficient authority, the corporatist institutions were to be represented in the parliamentary legislative committees by their experts (Herrfahrdt, 1921, pp. 168–170) in order to participate in the regulation of parliamentary processes. This proposal also gained prominence in later publications (Herrfahrdt, 1932, pp. 31–32), as Herrfahrdt shows a more anti-parliamentarian attitude (Meyer, 1997, p. 247f.). However, he expanded it by pleading for stronger corporatist structures at the municipal level as well as for a share of the decision-making power instead of a merely consultative role (Herrfahrdt, 1925, p. 546).

2.3. Friedrich Glum

Friedrich Glum fits less comfortably in this group. Firstly, as mentioned above, he is usually not considered a member of the group of corporatist legal scholars. Secondly, his primary focus lied outside of academic research. Nevertheless, he was a legal scholar holding the professorial qualification (*Habilitation*), and as Director-General of the Kaiser Wilhelm Society (the precursor of the Max Planck Society), he was influential among academics.[6]

Glum was not excluded from the corporatist group without reason. Although his starting point for non-parliamentary regulation was also the Imperial Economic Council, he approached it with a different emphasis, especially in the late 1920s. He explicitly argued against a corporatist system on the basis of occupational representation because he equated this with the hegemony of the economy (Glum, 1929, p. 49, 1930a, pp. 74–75). Despite this, he considered the Imperial Economic Council, which was organized by occupation, to be an appropriate instrument for the realization of his own proposals. Glum employed an argumentative trick to overcome the apparent contradiction: he regarded the Imperial Economic Council not as a body representing the interests of particular occupational groups, but rather as a body representing the overarching economic interests (Glum, 1925, p. 17, 1929, pp. 46, 49). Therefore, Glum refused to consider the Imperial Council in terms of a mere advisory board. Because of its position as a representative of overall interests, so he argued, it would be in a position to set the agenda and not merely serve in an advisory capacity (Glum, 1929, pp. 47–48).

[3] Stolleis (1999, p. 173) includes Ernst Rudolf Huber and Hans Gerber. Huber was indeed concerned with corporatist concepts (Norpoth, 1998, p. 79f.; Walkenhaus, 1997, pp. 63–65), though they did not play a central role for him (Jürgens, 2005, p. 126). He was sceptical about their realism and their opposition to the authoritarian conceptions of the state, which he preferred (Huber, 1932, pp. 953–958). Hans Gerber held a similar conception of the state, but he did not go further than a few complementary comments (Gerber, 1932, p. 27). This also applies to Heinrich Triepel, who likewise neglected to develop concepts of his own in this direction (Triepel, 1928, pp. 36-37; see also Gassner, 1999, p. 419).

[4] For biographical information, see Buddrus and Fritzlar (2007, pp. 397–399).

[5] For further biographical information, see Schwinge (1961).

[6] For biographical infomation, see Weisbrod (1995) and Przyrembel (2004).

3. Legitimation Patterns

While this account of a handful of corporatist theories is admittedly brief, it nevertheless suffices to raise the question of how they treat the legitimation of non-state regulation and private-state regulation, respectively. The models presented below are especially noteworthy in two ways for how they legitimate. On the one hand, they aimed at enlarging the legitimation basis of state activity. Basing the exercise of public power exclusively on parliamentary principles was seen as inadequate, and the inclusion of non-state organizations was intended to compensate for this deficit.

On the other hand, these concepts legitimize non-state regulation in the form of public–private co-regulation, that is, the partial transfer of regulatory functions to non-state actors. Despite Tatarin-Tarnheyden's references to Gierke, nobody supported regulation without any state involvement.

The following observations are structured around the framework described in the preliminary remarks of this special edition. Accordingly, I deal with legitimation requirements, criteria of legitimacy, as well as with sources of legitimation and legitimation *topoi*.

3.1. Legitimation Requirements

There are different types of legitimation requirements to consider: legal legitimation in the sense of justification through existing higher-ranking norms and legitimation in the sense of *de lege ferenda* proposals based upon state theoretical considerations. In either instance, the focus was on the Imperial Economic Council. The Imperial Economic Council did not require special legal legitimation, because it was already provided for in the constitution and thus legitimized by a supreme norm. However, this legal legitimation would not suffice if this structure were to be expanded beyond the authority and boundaries defined by the constitution. Taking the Imperial Economic Council as a prototype for further conceptualizations of general patterns of non-state or private-state regulation required legitimation on the basis of constitutional theory rather than constitutional law, for this was the corporatist project in the proper sense. The crucial point for the corporatist authors was not only staffing state boards with non-state actors, which would have been etatist-centralist corporatism. Rather, their basic idea was a kind of bottom-up corporatism as an encompassing mode of societal self-regulation. Non-state groups should be in charge of their own affairs, and this mode of self-regulation should also be applied to regulatory structures organized by the state. This was, as mentioned above, the common denominator—but with different emphasis.

Tatarin-Tarnheyden started with "internal self-regulation"[7] (Tatarin-Tarnheyden, 1930, p. 62) for the communities on the lowest level and extrapolating this kind of legislation as the primary mode up to the highest level. Similar thinking can be observed in Herrfahrdt's works: "Every group manages its internal affairs autonomously; matters of common interest are to be regulated as much as possible by means of voluntary cooperation"[8] (Herrfahrdt, 1932, p. 24). These conceptions of self-government were ultimately rooted in the thinking of Georg Beseler and Otto von Gierke. In the slightly weaker form of the consultative participation of societal groups, this concept can also be found in Glum's works (Glum, 1925, p. 24).[9] For all of them, the issue came down to entrusting non-state actors with public authority and this required legitimation.

3.2. Legitimacy Criteria

What are the standards for the participation of non-state actors in regulatory activities? The corporatist authors' concepts can be differentiated along the lines of input and output criteria. The input criteria reflect the *topos* of "participation", which would find broad agreement among these authors. The argument was that representative bodies that allow the persons or groups affected to express their concerns would guarantee greater participation than the parliaments where interests were mediated by political parties interested in the accumulation of political power (Glum, 1920, p. 5, 1925, pp. 9, 23, 1929, p. 32; Herrfahrdt, 1921, pp. 149, 168–170; Tatarin-Tarnheyden, 1922, pp. 241–242, 1931, p. 23).

The second legitimacy criterion, the effective realization of public interests, fits more easily on the output side; however, this single criterion displayed considerable internal variation. According to Tatarin-Tarnheyden, communicating special interests in a corporatist representative body posed no threat, because his new, all-encompassing corporatist system would ensure that all particular issues would have an equal voice. Thus, this "ensemble of particular interests" (Tatarin-Tarnheyden, 1922, p. 241) would maximize public interest. Herrfahrdt, by contrast, did not focus on formulating and balancing particular interests, but rather on the integration of expertise from the affected groups into the process of formulating public interests. Effective realization of public interests meant for him primarily the "appropriate" communication of the "true interests of the people", protected from distortions by the party system (Herrfahrdt, 1921, pp. 144–145, 1925, p. 543). Glum also emphasized that corporative representation should be organized such that the struggles among particular interests recede into the background. Instead, communication should be arranged to give prominence to general interests (Glum, 1929, pp. 52–54).

[7] "Normsetzung für den eigenen Kreis".
[8] "Jede Gruppe verwaltet ihre inneren Angelegenheiten selbst, die gemeinsamen Angelegenheiten werden möglichst im Wege freien Zusammenwirkens bewältigt…".
[9] "Heranziehung der Nächstbeteiligten".

3.3. Sources of Legitimation and Legitimation Topoi

A central legitimation *topos* in the concepts described here was "democracy". This is perhaps surprising at first glance, as the authors mentioned here are usually considered anti-democratic.

However, the typology underlying the classification of "democratic" and "anti-democratic" needs revision, because the range of political-conceptual opinions in the Weimar Republic is easily misconstrued. Early research focused almost exclusively on the anti-parliamentarian right-wing, whose program, however diverse it may have been, was summarized under the *topos* of "anti-democratic thinking" (Sontheimer, 1964). Decisive for this classification was the rejection of the parliamentary or party system by the rightists. Thereby, not only did the early research lose sight of "democratic thinking", but, due to the omission of a comparison of "democratic and "anti-democratic" thinking, it meant that there was a lack of sufficient criteria when it came to the precise reconstruction of the political range of opinions (Schönberger, 2000, p. 156).

Recent research has recognized this problem and has contributed to a more nuanced picture. This change of perspective results, first, from placing "democratic thinking" or, to be more precise, the concepts of political theory attributed to the democratic spectrum, at the centre of current research (Groh, 2010; Gusy, 2000; Klein, 2007). Second, right-wing conceptions of democracy have received more attention (Lobenstein-Reichmann, 2014; Rehling, 2015).

These shifts in perspective have led, firstly, to rejecting a uniform understanding of democracy (Groh, 2014, p. 238). This was, on the one hand, due to the fact that the Weimar Constitution equivocates on this question. It contains parliamentary decision-making mechanisms, extensive authority for the president (*Reichspräsident*), direct democracy by referendum as well as the participation of corporatist bodies (Kühne, 2000, p. 126). On the other hand, the term "democracy" was used by almost all of the political forces involved, giving it a variety of inflections. What concept of democracy lay behind any utterance is only partly indicated by adjectives such as "true", "real", "social", "socialist", "bourgeois", "German" and "Christian" (Eitz, 2015, p. 110).

Secondly, recent research has shown that current standards are not very helpful in determining what concepts are to be classified as "democratic". Especially those of the modern German constitution (*Grundgesetz*) are misleading. By today's standards, not only leftist ideas of a soviet republic (*Räterepublik*) found in the early Weimar Republic, but also the concepts of economic democracy (Naphtali, 1928) developed later in the period would be considered "undemocratic" (Gehlen, 2013, pp. 144–145).

To avoid this pitfall, Gusy proposed using a "historically appropriate, realistic concept of democracy" (Gusy, 2000, p. 637). I seek to follow this counsel by using Gusy's criteria to distinguish "democratic" from "undemocratic" (Gusy, 2000, p. 637):

(1) Democracy implies sovereignty of the people understood as all citizens independent of ethnic or racial criteria;
(2) The people are not imagined as an ideal unity, but as a plural entity whose origin is the individual;
(3) The will of the people is not ideally presupposed and merely revealed via elections and referenda, but rather this will first come into being through such elections and referenda;
(4) Shaping of the will of the people requires a complex organization in which parties and associations play an important role in mediating that will;
(5) Managing the affairs of state is not concentrated in the person of an individual leader, but spread among a multiplicity of leaders.

These criteria reveal not only to what extent public law scholars who are usually considered "confirmed democrats" (for instance, Hugo Preuß, Gerhard Anschütz, Hermann Heller) wavered in their democratic attitude (Groh, 2010, pp. 41, 62, 183; Schönberger, 2000, pp. 165–167), they also clarify to what extent the concepts of corporately-minded lawyers overlapped with the democratic spectrum. This point is also emphasized in modern historical research on corporatism (Rehling, 2015, p. 134).

Before subjecting Tatarin-Tarnheyden, Herrfahrdt, and Glum's concepts to the criteria above, a caveat should be mentioned. The premise, shared by all corporatist authors, was the refusal of a democracy based only on, first, a simple headcount principle and, second, on the mediation of the popular will exclusively through political parties. This "quantitative" understanding of democracy was contrasted by a "qualitative" understanding, in which the "true" interests of the people could manifest themselves. Here, too, however, there were a variety of different emphases.

In Tartarin-Tarneyden's concept of an "organic" democracy, small communities at the lowest level were to regulate their own distinct domains, as mentioned above. For higher level legislation, these communities would delegate representatives to "larger units of community work" ("*größeren Zellen der Gemeinschaftsarbeit*"). Thus, Tatarin-Tarnheyen conceived democratic structures organized as being built from the bottom up (Tatarin-Tarnheyden, 1930, p. 62, 1931, pp. 23–24).

Glum similarly thought in terms of a "true" democracy, even though the organizational design was not as distinct as Tatarin-Tarnheyden's concept. His concept of democracy was also characterized by patterns of self-government. However, it must be said that in the late Weimar period, an elitist understanding of democracy was ascendant that displayed admiration for Mussolini's Italy (Glum, 1930a). Furthermore, he considered the participation of non-state actors and the self-organization of social groups as a mode of integration into the state

(Glum, 1929, pp. 32–34, 1930a, pp. 16, 129). By using the term "integration", he alluded to Rudolf Smend's much discussed concept of "integration" (Glum, 1929, p. 34). Smend had confined the application of his concept to state mechanisms and political parties without applying it in semi-official contexts (Smend, 1928),[10] so Glum tried to expand the idea and to thus develop an additional legitimation *topos* for non-state regulation.

While Herrfahrdt did not present an elaborate concept of democracy as a legitimation *topos* for corporatist conceptions, he nevertheless also viewed popular government as a basic premise, though excluding the distorting effects of party domination (Herrfahrdt, 1921, pp. 144–145). In his view, popular government develops best in the context of self-government (Herrfahrdt, 1922, 1932, p. 30). This *topos* is also evident in the writings of the other authors (Glum, 1925, 1930a, 1931, p. 121; Tatarin-Tarnheyden, 1931, pp. 23–24). Self-government was a positively connoted term across all party boundaries. The principle of self-government had a respected heritage, it promised the immediate participation of the groups concerned, and it seemed to suit the German national character better than a parliamentary democracy.

Hence, it should be noted that, on the one hand, there was opposition to the parliamentary democratic model supported by legal scholars designated as democratic, including Preuß, Anschütz, Thoma, Kelsen, and Heller (Herrfahrdt, 1922, 1932, p. 30). On the other hand, the approaches offered by Tatarin-Tarnheyden, Glum, and Herrfahrdt display elements that conform to the criteria sketched out above:

(1) They all start from the sovereignty of the people. Legitimacy is deduced neither from monarchic divine right nor from any kind of charismatic leadership (*Führertum*). Furthermore, the concept of the nation is not understood in an ethnic, racial or biological sense. After 1933, Tatarin-Tarnheyden displayed a clearly ethnic-nationalist mindset (Tatarin-Tarnheyden, 1934, p. 32),[11] but this was not a constituent element of his theory during the Weimar period.

(2) The people are not imagined as an ideal unity but as a plural entity. The elements constituting plurality are, however, not individual citizens, but groups. By positing that group interests should be brought into the social process of determining the popular will, individual citizens, as decision-making subjects, are passed over. The ascription of a status to a certain individual reduced the options to vote positions, parties, or persons not represented in the status group. However, individual interests were not to be completely ignored. The process of reconciling individual or particular group interests was simply shifted to corporate bodies.

(3) The popular will, which consists of particular group interests, is not merely identified but generated in a complex process. This could be carried out in a complex system of corporative bodies, according to Tatarin-Tarnheyden, or in a more consultative setting with parliamentary processes of opinion formation, as in Herrfahrdt's concept. This applies to Glum's approach only to a limited extent, because the processes of opinion formation he refers to, drawing on Smend, serve to "make the community that is to be represented present as a unity" (Glum, 1929, p. 32).

(4) This process of generating the popular will took place in complex organizational structures via interdependent bodies (Tatarin-Tarnheyden) or via the interaction of corporatist consultative bodies and parliamentary decision-making institutions (Herrfahrdt, Glum). Given that they provided for election—or at least delegation—procedures, their conceptions clearly encompassed democratic elements as well as other, in this respect, defective features.[12]

There are important differences to note concerning the decisive role of parties and associations as mediators of interests that democratic theories typically require. To the extent that parties played any role at all in the approaches mentioned, it was a subordinate one, displaying the authors' decidedly hostile attitudes towards them. In contrast to this hostility, the participation of associations was highly valued, although, again, harbouring important differences. The various mediations of interests sketched out by Tatarin-Tarnheyden, Herrfahrdt, and Glum, respectively, defy conventional descriptions. Focusing on the difference between a pluralistic model of associations and an authoritarian corporatism, which is to say between societal and state corporatism[13]—especially evident in older literature[14]—the classification of state or authoritarian corporatism is obvious. But such categories are based on the existence of coercive associations that clearly contradict democratic principles. With regard to the authors considered here, one must remember that they based their theories on the model of the Imperial Economic Council, where principally representatives of free associations sat (Glum, 1930b, pp. 583–584). Moreover, they emphasize the essential role of free associations (Glum, 1925, p. 22, 1929, p. 35; Herrfahrdt, 1925, p. 545, 1932, p. 30),[15] even though this is less pronounced in Tatarin-Tarnheyden's model of tiered representation bodies. What's more, coercive associations possess a noteworthy quality that is also constituent for democratic opinion formation: by involving *all* members of a group, they considerably broaden the constituency and thereby can claim a greater breadth of representation (Collin, 2011, p. 276).

(5) Finally, the concepts presented do not aim to concentrate power in the hands of a single leader. Notions such as "leader" (*Führer*) and "leadership" can be

[10] See also Korioth (1990, p. 132); Otto (2002, pp. 74–76).
[11] His repulsively anti-Semitic inclination becomes obvious in: Tatarin-Tarnheyden (1938), especially page 19, contra Kelsen and Heller.
[12] For a similar argument regarding Tatarin-Tarnheyden, see Bohn (2011, pp. 73–74).
[13] In particular, see Schmitter (1974, pp. 126–128).
[14] For an overview, see Reutter (1991, pp. 177–179).
[15] Presenting a contrary position that stresses a clear distinction between corporatist concepts and free associations, see Groh (2012, p. 41).

found continuously in the literature, including the literature of democratic authors (Eitz, 2015, p. 121); however, this alone does not warrant the attribution of an "authoritarian principle" (*Führerprinzip*) or similar dictatorial ideas. There was surely an "authoritarian fad" at the end of the Weimar Republic, especially among corporatist authors (Beyer, 1941, p. 85; Meyer, 1997, pp. 247–249). However, this boost in popularity was manifested in various ways and not necessarily in the sense of blazing a path toward a dictatorship (*Führerdiktatur*). Glum's sympathies for fascist Italy (Glum, 1930a), which were really more aesthetically than politically motivated, do not indicate a commensurate prescription for Germany. His political machinations aiming at the creation of a united right-wing front (Weisbrod, 1995) did indeed include the temporary suspension of democratic principles, but not their complete abandonment. For Tatarin-Tarnheyden, too, dictatorial mechanisms were at most transitional remedies (Tatarin-Tarnheyden, 1925/1926, p. 34).[16] Herrfahrdt's principle of "arbitral leadership", which was to be implemented should corporatist mechanisms fail (Herrfahrdt, 1925, p. 546, 1932, p. 24), does not imply that power should be concentrated in the hands of a dictatorial strongman (*Führer*). Consequently, he has been criticized by national-socialists because the "Führer", from their perspective, was by no means a neutral arbitrator (Beyer, 1941, p. 83).

In contrast to Sontheimer's thesis (Sontheimer, 1964, pp. 200–201), corporatism and the authoritarian principle were not co-constitutive. And while national-socialism had no great affinity for corporatist concepts,[17] corporatists did make overtures towards national-socialist ideology.[18] It was above all Tatarin-Tarnheyden who tried to reconcile corporatism with the authoritarian principle (Tatarin-Tarnheyden, 1934, p. 28). However, this cannot be said to be the case prior to 1933. Finally, authoritarian thought substantially rebuffed democratic content, but it did not substitute this content with dictatorial concepts.

4. Conclusion

In the Weimar Republic, corporatist thought experienced renewed popularity. Some scholars of public law subscribed to this brand of thinking. Though a minority in the community of public law scholars, they were part of a broad trend in the contemporary debate.

The concepts developed by those scholars built on the institution of the Imperial Economic Council provided for in the Weimar Constitution as an organizational foundation. The idea contained therein to involve separate groups of social protagonists in lawmaking was developed in various ways. The corporatist authors aimed to strengthen societal self-regulation, on the one hand, while restraining parliamentary mechanisms, on the other.

These proposals, however, required justification. As the concepts went beyond the scope sketched out in the constitution, legitimation in terms of public law, even the most supreme law available was insufficient in this respect. Therefore, their focus was on legitimating considerations from the perspective of constitutional theory rather than from the perspective of constitutional law.

The considerations proceeded in two directions: Firstly, they intended to legitimize a significant modification concerning the organization of state lawmaking and, secondly, to justify strengthening societal self-regulation and the establishment of new forms of private–public co-regulation. On the input side, legitimation came from strengthening societal participation, and the more appropriate and effective realization of public interests was to satisfy the output criterion.

One central legitimation *topos* in these corporatist concepts was "democracy", which was closely linked to the notion of "self-administration". This was not only semantic camouflage. The notion of democracy in the Weimar period was very heterogeneous and remote from today's perspective. Understandings of democracy premised on minimum requirements for effective popular sovereignty, and considering contemporary circumstances, a number of substantial interfaces with democratic ideas appear, despite some distinctly authoritarian ideas about legitimation, in the corporatist concepts. They tried to address how power can be divided between the state and societal actors in a modern and functionally differentiated society. Thus, these concepts conceived of modes of mutual and self-determination in society while simultaneously paving the way for dictatorship by discrediting the parliamentary democracy.

Acknowledgements

This work was supported by the Cluster of Excellence "Normative Orders" (Frankfurt/Main) and the Max Planck Institute for European Legal History (Frankfurt/Main).

Conflict of Interests

The author declares no conflict of interests.

References

Albrecht, K. L. (1970). *Hugo Sinzheimer in der Weimarer Nationalversammlung* (Doctoral dissertation). Johann-Wolfgang-Goethe-Universität, Frankfurt am Main, Germany.

Anschütz, G. (1914). *Deutsches Staatsrecht* (7th ed.). Munich: C. H. Beck.

[16] On the incompatibility of his concept with the "Führerprinzip", see also Meinck (1978, p. 97).

[17] See in particular Benöhr (1999, pp. 153–154); Meinck (1978, p. 83).

[18] On Glum, who was displaced after national-socialist hostilities and because of intrigues within the Kaiser Wilhelm Society: Przyrembel (2004, p. 12), Weisbrod (1995, pp. 306–305); on Herrfahrdt: Meinck (1978, pp. 101–102).

Bähr, O. (1864). *Der Rechtsstaat*. Kassel: Wiegand.

Benöhr, S. (1999). *Das faschistische Verfassungsrecht Italiens aus der Sicht von Gerhard Leibholz*. Baden-Baden: Nomos.

Beseler, G. (1843). *Volksrecht und Juristenrecht*. Leipzig: Weidmann.

Beyer, J. (1941). *Die Ständeideologien der Systemzeit und ihre Überwindung*. Darmstadt: L. C. Wittich.

Bohn, S. (2011). *Die Idee vom deutschen Ständestaat. Ständische, berufsständische und korporative Konzepte zwischen 1918 und 1933*. Hamburg: Diplomica Verlag.

Buddrus, M., & Fritzlar, S. (2007). *Die Professoren der Universität Rostock im Dritten Reich: Ein biographisches Lexikon*. Munich: K. G. Saur.

Collin, P. (2011). Privatisierung und Etatisierung als komplementäre Gestaltungsprozesse. *JuristenZeitung*, *6*, 274–282.

Collin, P. (2014). Konzeptionen, Spielarten und Wechselbeziehungen administrativer und justizieller Autonomie in Deutschland im späten 19. und frühen 20. Jahrhundert. *Quaderni Fiorentini per la Storia del Pensiero Guiridico Moderno*, *43*, 165–228.

Collin, P. (2015). Regulierte Selbstregulierung der Wirtschaft. Neue Normierungsstrukturen im späten 19. und frühen 20. Jahrhundert. *Zeitschrift für Neuere Rechtsgeschichte*, *37*, 10–31.

Collin, P. (2016). *Privat-staatliche Regelungsstrukturen im frühen Industrie und Sozialstaat*. Berlin: De Gruyter.

Eitz, T. (2015). Das Deutsche Reich ist eine Republik. In T. Eitz & I. Engelhardt (Eds.), *Diskursgeschichte der Weimarer Republik* (pp. 100–151). Hildesheim: Olms.

Gassner, U. M. (1999). *Heinrich Triepel: Leben und Werk*. Berlin: Duncker & Humblot.

Gehlen, B. (2013). Kommentar zu den Beiträgen von Mathias Schmoeckel und Ekkehart Reimer. In B. Gehlen & F. Schorkopf (Eds.), *Demokratie und Wirtschaft. Eine interdisziplinäre Herausforderung* (pp. 143–149). Tübingen: Mohr Siebeck.

Gerber, H. (1932). *Freiheit und Bindung der Staatsgewalt*. Tübingen: Mohr Siebeck.

Gesch, K. (1926). *Der Reichswirtschaftsrat. Untersuchung über seine Herkunft und seine Gestaltung* (Doctoral dissertation). Friedrich-Alexander-Universität, Erlangen, Germany.

Gierke, O. (1873). *Das deutsche Genossenschaftsrecht* (Vol. 2). Berlin: Weidmann.

Gierke, O. (1902). *Das Wesen der menschlichen Verbände*. Berlin: Duncker & Humblot.

Glum, F. (1920). *Die Organisation der Riesenstadt. Die Verfassungen von Paris, London, New York, Wien und Berlin. Aus Anlaß des Entwurfs der Staatsregierung über die Bildung einer Stadt Groß-Berlin*. Berlin: Springer.

Glum, F. (1925). *Selbstverwaltung der Wirtschaft*. Berlin: H. Sack.

Glum, F. (1929). *Der deutsche und der französische Reichswirtschaftsrat. Ein Beitrag zu dem Problem der Repräsentation der Wirtschaft im Staat*. Berlin and Leipzig: De Gruyter.

Glum, F. (1930a). *Das geheime Deutschland*. Berlin: Stilke.

Glum, F. (1930b). Der Reichswirtschaftsrat. In G. Anschütz & R. Thoma (Eds.), *Handbuch des Deutschen Staatsrechts* (pp. 578–585). Tübingen: Mohr.

Glum, F. (1931, October 22). *Der Freiherr vom Stein und unsere Zeit*. Lecture given at the 4th Technical Meeting of the Rhinland-Westphalian Coal Industry, Essen, Germany.

Groh, K. (2010). *Demokratische Staatsrechtslehrer in der Weimarer Republik*. Tübingen: Mohr Siebeck.

Groh, K. (2012). Gesellschaftliche Selbststeuerung? Verbändepluralismus und demokratische Staatsrechtslehre in der Weimarer Republik. In P. Collin, G. Bender, S. Ruppert, M. Seckelmann, & M. Stolleis (Eds.), *Regulierte Selbstregulierung im frühen Interventions- und Sozialstaat* (pp. 33–52). Frankfurt am Main: Vittorio Klostermann.

Groh, K. (2014). Demokratiekonzepte führender deutscher Staatsrechtslehrer zu Beginn der Weimarer Republik. In H. Kämper, P. Haslinger, & T. Raithel (Eds.), *Demokratiegeschichte als Zäsurgeschichte—Diskurse der frühen Weimarer Republik* (pp. 237–252). Berlin: De Gruyter.

Gusy, C. (2000). Fragen an das "demokratische Denken" in der Weimarer Zeit. In C. Gusy, (Ed.), *Demokratisches Denken in der Weimarer Republik* (pp. 635–663). Baden-Baden: Nomos.

Herrfahrdt, H. (1921). *Das Problem der berufsständischen Vertretung von der französischen Revolution bis zur Gegenwart*. Stuttgart and Berlin: Deutsche Verlagsanstalt.

Herrfahrdt, H. (1922). Die Formen der wirtschaftlichen Selbstverwaltung in Deutschland. *Jahrbuch des öffentlichen Rechts*, *XI*, 1–37.

Herrfahrdt, H. (1925). Verwaltungsreform und berufsständische Bewegung. *Die Tat*, *17*, 542–549.

Herrfahrdt, H. (1932). *Der Aufbau des neuen Staates. Vorträge zur Verfassungsreform mit einem Plan für die Übergangsregelung in Reich und Preußen*. Berlin: Verlag für Zeitkritik.

Huber, E. R. (1932). Die Berufsverbände und der Staat. *Deutsches Volkstum*, pp. 953–958.

Jerusalem, F. J. (1930). *Gemeinschaft und Staat*. Tübingen: Mohr Siebeck.

Jürgens, M. (2005). *Staat und Reich bei Ernst Rudolf Huber*. Frankfurt am Main: Peter Lang.

Klein, M. D. (2007). *Demokratisches Denken bei Gustav Radbruch*. Berlin: Berliner Wissenschafts-Verlag.

Korioth, S. (1990). *Integration und Bundesstaat. Ein Beitrag zur Staats- und Verfassungslehre Rudolf Smends*. Berlin: Duncker & Humblot.

Kremer, C. (2012). Autonomie als Rechtsquelle: Die Diskussion über nicht-staatliche Rechtssetzungsbefugnisse in der Rechtssetzung des 19. Jahrhunderts. In P. Collin, G. Bender, S. Ruppert, M. Seckelmann,

& M. Stolleis (Eds.), *Regulierte Selbstregulierung im frühen Interventions- und Sozialstaat* (pp. 3–32). Frankfurt am Main: Vittorio Klostermann.

Kühne, J. (2000). Demokratisches Denken in der Weimarer Verfassungsdiskussion—Hugo Preuß und die Nationalversammlung. In C. Gusy (Ed.), *Demokratisches Denken in der Weimarer Republik* (pp. 115–133). Baden-Baden: Nomos.

Lilla, J. (2012). *Der Vorläufige Reichswirtschaftsrat 1920 bis 1933/34: Zusammensetzung–Dokumentation—Biographien*. Düsseldorf: Droste.

Lobenstein-Reichmann, A. (2014). Der völkische Demokratiebegriff. In H. Heidrun Kämper, P. Haslinger, & T. Raithel (Eds.), *Demokratiegeschichte als Zäsurgeschichte—Diskurse der frühen Weimarer Republik* (pp. 285–306). Berlin: De Gruyter.

Mayer-Tasch, P. C. (1971). *Korporatismus und Autoritarismus. Eine Studie zu Theorie und Praxis der berufsständischen Rechts- und Staatsidee*. Frankfurt am Main: Athenäum Verlag.

Meinck, J. (1978). *Weimarer Staatslehre und Nationalsozialismus. Eine Studie zum Problem der Kontinuität im staatsrechtlichen Denken in Deutschland 1928 bis 1936*. Frankfurt am Main and New York, NY: Campus.

Meyer, T. (1997). *Stand und Klasse. Kontinuitätsgeschichte korporativer Staatskonzeptionen im deutschen Konservatismus*. Opladen: Westdeutscher Verlag.

Moellendorff, W.v. (1916). *Deutsche Gemeinwirtschaft*. Berlin: Siegismund.

Moellendorff, W. v. (1919). *Der Aufbau der Gemeinwirtschaft. Denkschrift des Reichswirtschaftsministeriums vom 7. Main 1919*. Jena: Eugen Diederich.

Naphtali, F. (1928). *Wirtschaftsdemokratie. Ihr Wesen, Weg und Ziel*. Berlin: Verlagsgesellschaft d. Allg. dt. Gewerkschaftsbundes.

Nocken, U. (1981). Korporatistische Theorien und Strukturen in der deutschen Geschichte des 19. und frühen 20. Jahrhunderts. In U. v. Alemann (Ed.), *Neokorporatismus* (pp. 17–39). Frankfurt am Main and New York, NY: Campus.

Norpoth, M. (1998). *Norm und Wirklichkeit. Staat und Verfassung im Werk Ernst Rudolf Hubers*. Hamburg: Lit.

Otto, P. (2002). *Die Entwicklung der Verfassungslehre in der Weimarer Republik*. Frankfurt am Main: Peter Lang.

Pohl, T. (2002). *Demokratisches Denken in der Weimarer Nationalversammlung*. Hamburg: Verlag Dr. Kovač.

Przyrembel, A. (2004). *Friedrich Glum und Ernst Telschow. Die Generalsekretäre der Kaiser-Wilhelm-Gesellschaft: Handlungsfelder und Handlungsoptionen der "Verwaltenden" von Wissen während des Nationalsozialismus. Forschungsprogramm "Geschichte der Kaiser-Wilhlem-Gesellschaft im Nationalsozialismus"*. Ergebnisse 20. Berlin: Max-Planck-Gesellschaft zur Förderung der Wissenschaften.

Rehling, A. (2011). *Konfliktstrategie und Konsenssuche in der Krise. Von der Zentralarbeitsgemeinschaft zur Konzertierten Aktion*. Baden-Baden: Nomos Verlag.

Rehling, A. (2015). Demokratie und Korporatismus—eine Beziehungsgeschichte. In T. B. Müller & A. Tooze (Eds.), *Normalität und Fragilität. Demokratie nach dem Ersten Weltkrieg* (pp. 133–153). Hamburg: Hamburger Edition.

Reutter, W. (1991). *Korporatismustheorien*. Frankfurt am Main: Peter Lang.

Riedel, H. (1991). *Der Rätegedanke in den Anfängen der Weimarer Republik und seine Ausprägung in Art. 165 WRV*. Frankfurt am Main: Peter Lang.

Ritter, G. A. (1994). Die Entstehung des Räteartikels 165 der Weimarer Reichsverfassung. *Historische Zeitschrift*, *258*, 73–112.

Ritter, G. A. (1998). Politische Repräsentation durch Berufsstände. Konzepte und Realität in Deutschland 1871–1933. In W. Pyta & L. Richter (Eds.), *Gestaltungskraft des Politischen. Festschrift für Eberhard Kolb* (pp. 261–280), Berlin: Duncker & Humblot.

Rudischhauser, S. (2016). *Geregelte Verhältnisse. Eine Geschichte des Tarifvertragsrechts in Deutschland und Frankreich (1890–1918/19)*. Cologne and Vienna: Böhlau.

Schmitter, P. C. (1974). Still the century of corporatism? *The Review of Politics*, *36*, 85–131. doi:10.1017/S0034670500022178

Schönberger, C. (2000). Elitenherrschaft für den sozialen Ausgleich: Richard Thomas "realistische" Demokratietheorie im Kontext der Weimarer Diskussion. In C. Gusy (Ed.), *Demokratisches Denken in der Weimarer Republik* (pp. 156–190). Baden-Baden: Nomos.

Schwinge, E. (1961). Heinrich Herrfahrdt. In E. Schwinge (Ed.), *Festgabe für Heinrich Herrfahrdt zum 70. Geburtstag* (pp. 1–3). Marburg: N. G. Elwert.

Sinzheimer, H. (1916). *Ein Arbeitstarifgesetz. Die Idee der sozialen Selbstbestimmung im Recht*. Munich and Leipzig: Duncker & Humblot.

Smend, R. (1928). *Verfassung und Verfassungsrecht*. Munich and Leipzig: Duncker & Humblot.

Sontheimer, K. (1964). *Antidemokratisches Denken in der Weimarer Republik* (2nd ed.). Munich: Nymphenburger Verlagshandlung.

Stolleis, M. (1999). *Geschichte des öffentlichen Rechts in Deutschland* (Vol. 3). Munich: C. H. Beck.

Tatarin-Tarnheyden, E. (1922). *Die Berufsstände. Ihre Stellung im Staatsrecht und die Deutsche Wirtschaftsverfassung*. Berlin: C. Heymann.

Tatarin-Tarnheyden, E. (1925/1926). Bolschewismus und Faschismus in ihrer staatsrechtlichen Bedeutung. *Zeitschrift für die gesamte Staatswissenschaft 80* (1925/26), 1–37.

Tatarin-Tarnheyden, E. (1930). *Berufsverbände und Wirtschaftsdemokratie. Ein Kommentar zu Art. 165 der Reichsverfassung*. Berlin: Hobbing.

Tatarin-Tarnheyden, E. (1931). *Volksstaat oder Parteienstaat*. Rostock: Hinstorff.

Tatarin-Tarnheyden, E. (1934). *Werdendes Staatsrecht*. Berlin: C. Heymann.

Tatarin-Tarnheyden, E. (1938). *Der Einfluß des Judentums*

in Staatsrecht und Staatslehre. Berlin: Deutscher Rechts-Verlag.

Triepel, H. (1928). *Die Staatsverfassung und die politischen Parteien*. Berlin: O. Liebmann.

Völtzer, F. (1992). *Der Sozialstaatsgedanke in der Weimarer Reichsverfassung*. Frankfurt am Main: Lang.

Walkenhaus, R. (1997). *Konservatives Staatsdenken. Eine wissenssoziologische Studie zu Ernst Rudolf Huber*. Berlin: De Gruyter.

Weisbrod, B. (1995). Das "Geheime Deutschland" und das "Geistige Bad Harzburg". Friedrich Glum und das Dilemma des demokratischen Konservatismus am Ende der Weimarer Republik. In C. Hansen, L. Niethammer, & B. Weisbrod (Eds.), *Von der Aufgabe der Freiheit. Politische Verantwortung und bürgerliche Gesellschaft im 19. und 20. Jahrhundert. Festschrift für Hans Mommsen zum 5. November 1995* (pp. 285–308). Berlin: Akademie Verlag.

Westphal, K. (1925). *Der vorläufige Reichswirtschaftsrat im Gefüge der Reichsorganisation* (Doctoral dissertation). Christian-Albrechts-Universität, Kiel, Germany.

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COGITATIO

Politics and Governance (ISSN: 2183–2463)
2017, Volume 5, Issue 1, Pages 26–33
DOI: 10.17645/pag.v5i1.800

Article

The Public–Private Dichotomy in Fascist Corporativism: Discursive Strategies and Models of Legitimization

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Submitted: 14 October 2016 | Accepted: 21 November 2016 | Published: 15 March 2017

Abstract
The twentieth century starts with a rediscovery of the collective dimension that legal modernity had compressed. The vivid debate that came with the fascist corporatist experiment is an interesting observatory that lets us read this process against the light. According to the major part of Italian legal culture the corporatist cultural project seems to forewarn a new framework of the connections between public and private spheres, state and society, law and economics, statism and pluralism. Corporatism, which did not intend to build a non-statual model of authority, was an answer to the need to attribute legal value and legal autonomy to economic and social actors that weren't adequately represented in the political and normative circuit. The paper is aimed at retracing some of the discursive strategies that characterized the corporatist experiment and the different legitimization models that were proposed by legal theory in order to rebuild the dichotomy between public and private spheres.

Keywords
corporatism; fascism; legal theory; legitimization

Issue
This article is part of the issue "Legitimization of Private and Public Regulation: Past and Present", edited by Klaus Dieter Wolf (Peace Research Institute Frankfurt, Germany), Peter Collin (Max Planck Institute for European Legal History, Germany) and Melanie Coni-Zimmer (Peace Research Institute Frankfurt, Germany).

1. Defining the Field of Inquiry

This paper focuses on a particular case of "public–private regulation" (Collin, Bender, Ruppert, Seckelmann, & Stolleis, 2014) the form of it advanced by Italian fascism via corporativism, amid contradictions and inconsistencies. Fascist corporativism was a major experiment in reorganizing normativity, the aim being to create a juridical area where new form could be given to the traditional dichotomy between public authority and the private sphere.

This is an elusive phenomenon. Corporativism is an ambiguous notion/praxis (Schmitter, 1974; Tarello, 1988) in which the relationship between theory and practice is far from linear. I shall concentrate on the conceptual and doctrinal side to fascist corporativism, since that is where we see most explicitly the legitimating rhetoric used in preparing, accompanying, commenting and criticising that attempt to revise the political and legal set-up enacted between the mid-1920s and the early 1940s.

I shall be referring to corporativism as a historical phenomenon that was typical of Europe between the two wars, focusing on the Italian case which has made corporativism a kind of cradle. Broadly speaking, corporativism is "a way in which political power can reframe in a society invaded by social organizations which jeopardize the traditional closed structure of the State" (Cassese, 2012b, p. 96). I shall explicitly not be going into the specialist sense attached to the term by political science from the 1970s on, whereby corporativism was seen as a useful model by which to analyse certain features of mature capitalist societies (Cerasi, 2001; Schmitter, 1992; Stolzi, 2009; Tarello, 1979).

As historians have often pointed out (Gagliardi, 2010; Mazzacane, 2002; Mazzacane, Somma, & Stolleis, 2005; Santomassimo, 2006; Stolzi, 2007), there developed a

telling gap between the institutional reality of fascist corporativism and the enormous intellectual investment that accompanied it. Legal science at that time produced a minutely argued commentary on the corporative reformulation of the State. Such thinking made no significant impact on the concrete decisions of the regime, but nonetheless forms a fascinating window onto the various discursive strategies that underpinned the fascist legal system presented by its proponents as a breakthrough on traditional forms of state-oriented rule of law.

This was far from the case, but at any rate to begin with (and on paper, at least) corporativism was a legal system that seemed to inject regulatory independence into organised forms of private interest. It thus set up a normative stepping-stone between the two traditional poles of legal dialogue: the private and the public (Stolzi, 2012c). As recently described, "in general legal theorists interested in promoting the nascent corporatistic order saw it as an opportunity, not only to reflect on trade union and production relations, but also, in more general terms, to provide an account of relations between the individual, state and social organizations" (Stolzi, 2014, p. 151).

But it soon became apparent that an experiment which theoretically promised to etch away the state-oriented rule of law and redistribute sovereignty within organised society would not actually enter into competition with the State, but would reconfirm it in its supremacy.

Theoretically speaking, corporativism was a late-nineteenth century development within European social Catholicism—as with Ketteler, Vogelsang, la Tour du Pin, de Mun, Toniolo—(Santomassimo, 2006, pp. 86–91; Schiera, 2005, pp. 44–47; Vallauri, 1971, pp. 10–64) and French solidarism—as with Durkheim, Duguit, Bonjour—(Laborde, 1996; Riquelme, 2010). These sought to readjust relations between the State and society so as to give greater independence (including normative independence) to social dynamics. The fascist experiment soon scotched such aspirations and instead of decreasing the gap between State and individual, gave new centrality to state authority.

However, regime rhetoric was full of the subject of organized groups enjoying regulatory autonomy, insisting (both in intellectual argument and in public discourse) that a third area of law be created in which the identity of State power might be redefined and the ambit of political decision-making thrown open to the various social groups (Stolzi, 2014, pp. 154–160). Such legislative independence soon proved void in point of fact, being rapidly absorbed into the state mentality of fascism, but it did leave its mark on the language of fascist juridical science.

It is interesting to trace some of the main staging posts by which theoretical legitimization was given to corporativism, and how it would every so often be presented as a kind of self-government by society, an opportunity to pick up true post-1789 revolutionary values, a solution by which the gap between State and private citizen could be shortened and the outline of sovereignty readjusted.

2. Corporativism as a Reaction to Crisis of State

Before weighing the role of the public/private dichotomy in the various interpretations of corporativism, we should do well to place the phenomenon in its historical context. The century had begun with rumours that the traditional model of State-based rule of law was facing a crisis. What was in crisis was the image of liberal bourgeois society: the society of the Code, hinging on property and freedom of negotiation. Two sovereign bodies stood opposed: the individual in the field of property and economic action, and the State in the field of command and the community. Society—structured into unions, parties, leagues and associations—was hemmed between these two dimensions. In other words, bourgeois society had buried the "communal" and "social" in the State, obliterating them inside a single political entity envisaged as a person (Grossi, 2012, p. 14; Marchetti, 2006).

One of the first and most astute analyses of this distortion of State structure was provided by Santi Romano. In his well-known *Lo Stato Moderno e la Sua Crisi* (1909) he described the gradual eclipsing of the State, browbeaten by a social movement "governed by laws of its own" and "antagonistic in attitude towards the State" (Romano, 1950)[1]. The mounting claims of the professional associations and new social forces which Romano described as corporativism and trade-unionism, were bringing about no less than the "decomposition of the modern State".

As he would confirm in his 1918 study, *L'Ordinamento Giuridico*, which outlined his institutionalist theory, the legal expert was up against pressure from the collective dimension beyond (and to some extent above) the State. Hence Romano's bid (he was not alone) to recover a series of "public" areas of society detached from the power dimension of the State. The plural nature of society needed to be reinstated and its normative potential progressively reappraised.

The war had made it clear that normativism was no longer an adequate instrument to govern the new model of society. Special wartime legislation had set in place a new equilibrium between the State's ability to intervene in the dynamics of the economy and the inviolability of private independence.[2] By contrast, the complex relations between capitalism and mass society had changed some of the paradigms of traditional legal doctrine. One thinks of the entrepreneur, a forcibly emerging figure who hardly fitted in with the classic patterns of private

[1] The literature on Romano's inaugural address is copious; one may cite Grossi (2011), Cassese (2012a), Ripepe (2012), Luongo (2013).

[2] An illuminating analysis of this point was made by Filippo Vassalli in his inaugural lecture *On Wartime Legislation and the New Confines of Private Law* in November 1918 (Vassalli, 1939).

property, or the pressure to detach labour contract from the bounds of legal negotiation and to include the collective dimension in the dynamics of labour law (Cazzetta, 2007; Grossi, 2000). The bid for more pluralistic articulation of society increasingly pressurized the State. It was to these stimuli that the corporative experiments ushered in during the 1920s responded.

In the case of Italy this process took a line all of its own. Compared with the Weimar experience, Fascism's was branded as pseudo-corporativism (Grossi, 2012, p. 16) owing to the rapid list towards state authoritarianism. Some of the closest observers nonetheless noted the pluralistic vein of all corporativist structure and gave this its due, at least in theory.

The need to make the State fit into the new social reality demanded that not just the individual but organised social groups be given a central importance. New tools of legislation and experiments in institutional engineering were required to redress the relationship between State and organised interests, between politics and the economy, public and private. As Giuseppe Bottai, a charismatic intellectual leader under Fascism, remarked in 1928: "one may not adore the masses, but one cannot reject them, one cannot ignore that they are here to stay" (Bottai, 1934, p. 32).

In short, society was no longer "the mechanical sum of its individuals" (Panunzio); it was forming into subgroups demanding a more active, independent role from a legal point of view, among others. The State as inherited from the French Revolution, in which all legal phenomena boiled down to the relationship between State and citizen, had vanished out of all recognition. One of the leaders in the debate on building the "new State", Sergio Panunzio, recalled: "Its pure, majestic, classical and statutory line has snapped and gone awry. Nor can it be put back to its original form. Absurd: only the wreckage remains of the old idea and old form of the State. The State grows dim and takes a step back; what emerges and comes to the fore is Society" (Panunzio, 1987, p. 157). The "State of individuals", as he remarked in his inaugural lecture at Ferrara University in November 1922, would give way to the "unionised State and inter-union, supra-union law" (Panunzio, 1987, p. 139).

What ratified the "new model of social organisation", literally and intentionally, was the Charter of Labour of 1926 (*Carta del Lavoro*) which ushered in the fascist experiment with corporativism. It established a unified trade-union, introduced collective bargaining, and banned strike action or lock-out. Spontaneous social formations were denied any autonomous legal recognition, though on paper and in increasingly authoritarian terms it did signify some acceptance of the intermediate role of a socio-political compact. The basic assumption was that the trade-union was recognised as the new way of structuring the social sphere, which therefore entailed a new concept of the State (Stolzi, 2014, pp. 153–155).

Right from the outset there were glaring ambiguities. The new social actors were accorded recognition and full legal status, but in the same breath the non-interference pact between State and society was officially rescinded. In theory at least, this trend seemed as though it might pave the way for recognition of the private/social origin of law; in actual fact, its aim was to make the State the sole arbiter of collective life. The main influence behind the 1926 law, Alfredo Rocco, was quite clear that any opening towards a new legal framework for social organisations would be matched by a reorganisation of state power.[3]

Society was seen as somehow "outside" the State, and rules were drawn up to control and limit its independence. While it is true, in Rocco's words, that State authority and power did not mean "bullying and undue interference", the fascist perspective nonetheless implied "the assertion that State goals were superior to those of lesser bodies and individuals" (Rocco, 1938, p. 478).

Hence this was by no means a decentralising of state authority, nor full recognition of the legal independence of the social dimension. There was no room for inroads "beyond the State". In other words, all forms of pluralism were brought within the framework of the State. In Rocco's view, accepting the force of self-organisation by society was not to lead to organisms being set up that might "outweigh the State" (Stolzi, 2007, p. 27). As he remarked in November 1920, the new social ferment formed a threat to the State: "The State is in a crisis; day by day, the State is dissolving into a host of lesser units, parties, associations, leagues, unions, that tie it down, paralyse it, stifle it" (Rocco, 1938, p. 631).

The case of the trade-unions was emblematic in this respect: their private-law statute was absorbed into the public domain of the State. That union organisation was recognised, but it needed disciplining. Intermediate social organisations lying halfway between the State and private individuals became an interlocutor with state power, but were subordinate to state authority. This got round the danger that the vigour of social dynamics might lead to a regulatory framework in competition with the State. The movement to organise private interests, at first seen as a threat to the State, now became an important "governing resource" (Stolzi, 2007, p. 108).

3. The Legal Scholar's Point of View

Fascism's idea of corporativism was designed to bridge the gap in the liberal model whereby power and the individual were kept apart. It made much of the claim to be part of a project: the State proclaimed itself the fruit of radical revising of the basic structures of the traditional legal set-up. Rocco had this in mind when he emphasised that the 1926 Charter of Labour was "the most profound transformation the State had undergone since the French Revolution" (Rocco, 1938, p. 335).

[3] A member of the nationalist movement, Alfredo Rocco (1875–1935) joined fascism in 1923. He was Minister of Justice (1925–1932). For a reconstruction of his thought see D'Alfonso (2004), Simone (2012), Speciale (2012), Chiodi (2015).

Italian legal thinking was divided over the launching of this experiment. A large part, most closely linked to tradition, had little faith that the corporative revolution would reform the coordinates of the juridical system. Authors like Vittorio Emanuele[4] Orlando or Salvatore Pugliatti[5] refused to believe that the nascent corporative system was really capable of overthrowing the traditional model of coexistence, based as that was on sharp separation between private and public, contractual freedom and general interest. For such jurists, recognition of the State's active new role in the social and economic sphere did not imply any substantial change in the ratio between private and public power as nineteenth-century tradition had handed it down.

Another faction took the opposite view: that here was a project that would truly demarcate new boundaries for the private and public spheres.

3.1. Full-Scale Statism Versus Trade-Unionism

One of the clear leaders in this debate was Giuseppe Bottai[6]. In the years when the corporative system was being set in place he held a series of important political posts and would afterwards unceasingly ponder (and criticise) the course that the corporation experiment was taking. To Bottai, corporativism was indeed the way round the old forms of statism. To emerge from the impasse, the State should revert to being "the supreme organiser of the social side" (Stolzi, 2007). The behaviour of the groups into which mass society had fallen was something to govern, so as to prevent them getting out of hand or giving rise to forms of power in competition with the State. But it was a way round the old strategies by which the State had hitherto guided and stemmed the pressures of society: the solution could not lie in simple centralisation of administration or increasing control measures over the doings of intermediate bodies. To Bottai the State's role was not to guide, but to take a new lead in economic and social affairs. To do so it needed new bodies specifically appointed to run society and meanwhile bolster the authority of the overall State (Bottai, 1934).

The way previous statism was reformed was by radicalising it. The basic unit of State ceased to be the individual; the new centre was the corporation and trade-union, which promised to harness social forces with State powers. The unions ceased to be seen as a threat to public power: to Bottai (and also Panunzio)[7] they and the corporations became the fulcrum of that new link between State and society and that new concept of sovereignty which was meant to rest upon social organisations. In this sense, Bottai argued, the corporative State was the fateful outcome of modern history and the death-knell of those French Revolutionary principles whereby the individual was ensured independence and freedom from the State (Bottai, 1934, p. 569).

Recognition of social formations was one way of shortening the distance between the individual and authority, yet ultimately the regime did not accord the intermediate forms of organisation any real regulatory independence. The unions and corporations were not allowed to regulate their own lives, let alone relations with the rest of society and the institutions. The gap separating society from authority would hence be reduced by absorbing the former into the State. Demiurgic state power thus ended by depotentiating the social organisations and robbing them of all the trappings of normative authority. Social forces' self-regulatory power was nothing more than formal, actually ignored in order to avoid the existence of normative powers other than the State itself.

Bottai and Panunzio reacted vigorously at this betrayal by Fascism of the corporative ideal (Stolzi, 2007, pp. 134–167). The corporations gradually grew more bureaucratic, and over the years this deprived the intermediate formations of independence and clout, such that they were quickly encroached on by state power. The fascist regime—charged Bottai—had compressed the social dialectics that it ostensibly wished to promote, in doing which it had taken a leaf out of the old liberal State's book.

3.2. Corporative Idealism: Society to Identify with the State

One of the most radical visions of the corporative venture stemmed from idealist philosophy. To authors like Ugo Spirito[8] and Arnaldo Volpicelli,[9] shortening the gap between State and individual was meant to come about when the two parties identified and the individual's interests were absorbed in public dynamics. The starting assumption—that the traditional framework of social coexistence represented a social deficit—was one they

[4] Vittorio Emanuele Orlando (1860–1950) was the founder of the Italian school of public law, a discipline that he helped set on a theoretical basis. He was not only the most representative jurist of liberal Italy, but also a highly experienced politician who held important posts in government between 1916 and 1920; cf. Cianferotti (1980), Fioravanti (2001).

[5] Salvatore Pugliatti (1903–1976) was one of the most sensitive voices in Italian juridical science; cf. Grossi (2002, pp. 95–119).

[6] Giuseppe Bottai (1895–1959) was one of the most active fascist intellectuals and held many political posts (governor of Rome, governor of Addis Abeba, minister of corporations, education minister). As Sabino Cassese wrote, "Bottai was a keen commentator on corporation activity….In such articles he constantly mentioned the political side to corporations as distinct from the technical aspect of the unions; he was concerned to show that corporativism was not the fruit of arbitrary improvisation but matured out of the crisis of the liberal State; his was a 'statist' approach, and critical of 'mixed unions'"; cf. Cassese (1971).

[7] The jurist Sergio Panunzio (1886–1944) was a keen observer of the fascist movement in which he became one of the most influential theoreticians and technicians. His theory of the fascist State hinged on corporativism. On Panunzio, see Cavallari (1986).

[8] Giovanni Gentile's pupil Ugo Spirito (1896–1979) was a leader in the inter-war philosophical debate. He joined fascism's cultural project and tried to provide corporativism with a theoretical basis. For a reconstruction of his intellectual career, see Dessì (2009).

[9] Arnaldo Volpicelli (1892–1968) was a leading light in the inter-war debate addressing relations between State and society. He studied the philosophy of law under Gentile, and saw corporativism as a way of surmounting the crisis of political and legal modernity; cf. Franchi (2003).

shared with other theoreticians of State crisis; but they proposed different ways out of it. The limitations of State could be surmounted not by focusing on regulation of social groups, but by extending *ad infinitum* the weight, roles and geometry of state power.

Spirito's "full-scale corporativism" (*corporativismo integrale*) reflected a radical organicistic standpoint by which even the trade-unions—that bulwark of social independence—constituted a limit on the normalising effect that State authority was meant to exert upon social dynamics (Breschi, 2010). There was no trace of that rhetorical pluralist ambiguity found in other interpretations of the corporative phenomenon. In short, the individual, along with the intermediate formations, should identify with and be absorbed into the State.

On this view of corporativism, society could not be given the power to regulate itself or generate independent forms of regulation. Society could not devise legal systems parallel or alternative to those of the State, since society could only be envisaged via the State (Stolzi, 2007, p. 186). The intermediate area of the social coexistence—the weak link in the chain of individual–society–State—could but surrender itself to the all-inclusive embrace of the State.

To Spirito and Volpicelli the merging of the individual with the State would reach its acme with the so-called "proprietary corporation"; the complete disappearance of private law and the idea of private interest before the boundless claims of public law. It was a necessary step—argued Spirito—since under fascism "private and public, individual and State had got entangled without really merging and ended up by widening the gap between them" (Spirito, 1932, p. 136). A gap which was to be bridged by absorbing the private into the public.

3.3. Voices of Dissent: The Search for a New Balance between Private and Public

Not everyone thought that corporativism need spell the end of private and social independence, or that putting the collective back centre-stage to resolve the private/public dichotomy need only favour the State. Certainly not the jurists who—we mentioned earlier—sought to interpret the new by tools of traditional legal doctrine. And certainly not Santi Romano or those like him who had all along been sensitive to the hybrid, composite quality of contemporary legal thinking.[10] Even many jurists who sided politically with the regime felt that the solution could not be to turn individuals (and social formations) into organisms of the State.

There could be no arguing as to the centrality of the State, of course. But, to one faction of legal theory, law was not to be "tied up within the regulations" (Stolzi, 2012c), while the private–public tandem could not be resolved within the monochrome framework of the State. Authors like Widar Cesarini Sforza,[11] Lorenzo Mossa,[12] Enrico Finzi,[13] Francesco Carnelutti[14] or Ludovico Barassi[15] were all for shaking free of the doldrums of traditional liberalism, but not to the point of absolutising the State in the dynamics of the law.

Romano should be harkened to, and his warning that organised interests and their potential for regulatory independence should be the linchpin around which to build a new juridical paradigm, a new ratio between individual, society and State catering for an extra-State dimension to the law. Cesarini Sforza's proposal stoutly upheld the collective arm of the law which promised a possible point of encounter between the bid for social autonomy and the guiding control of public power over private enterprise. The potential conflict between state and private interest should be resolved within the collective legal arena which that philosopher of law saw as "more than private and less than public" (Sforza, 1942, p. 189). To Cesarini Sforza the corporative system offered a real *tertium* in legal terms, being so constituted as to safeguard the private dimension without being absorbed lock, stock and barrel in state law. As he would write in 1942, "besides private and public interest, there is collective interest, an idea bound up with recognising the existence of 'social bodies', or organized groups creating legal set-ups and not just manifestations of contractual autonomy (Sforza, 1942, p. IV).

In other words, the distinction between public and private should be retained, though clearly the modern State was evolving towards primacy for the claims of public power. In this respect there was agreement among the various legitimating models forming the theoretical basis of the corporative system. In general it may be said that "the dialectics of autonomy and heteronomy…should comprise not only the law of inner life within the various social groups, but, still more, the new criterion for relationship between the private-social universe and the public-authoritative universe" (Stolzi, 2012c, p. 502). State intervention in the economy was a reality from the wartime years on: it was a road down

[10] Romano's standpoint on the union and corporation model as proposed by Rocco was not all that critical. Romano's pluralism blended with a State-centred vision of law. Thus, intermediate communities (corporations, trade unions, organizations) were a functional part of the State and were to be brought under its guidance, but should not be crushed or identified with the State; cf. Costa (1986, pp. 134ff.).

[11] Widar Cesarini Sforza (1886–1965) was an influential philosopher of law from the idealist school. Corporativism was one of his main areas of research; cf. Costa (1976–1977).

[12] The professor of commercial law, Lorenzo Mossa (1986–1957), ranged in his thinking outside the bounds of traditional liberal formalism. Despite his broadly antifascist stance, he recognised the regime's merit in revising labour law; cf. Stolzi (2012b).

[13] Enrico Finzi (1884–1973) was one of the finest minds in private law and focused on the developments in the law of ownership; cf. Stolzi (2012a); Grossi (2013).

[14] Francesco Carnelutti (1879–1965) was an influential expert in civil trial law. He helped draw up the 1940 code of civil procedure; cf. Grossi (2000).

[15] Ludovico Barassi (1873–1961) was one of the fathers of labour law in Italy. Under fascism he added commentary on corporative to that on civil law; cf. Passaniti (2012).

which one might venture further, but which should not entail the extreme sacrifice of social independence.

Part of Italian legal thinking thus worked to undermine corporativism from inside, or rather that part of the corporative venture which seemed bent on over-radical compression of individual independence. Theoretical skirmishing over the private side to collective bargaining (Barassi, 1939), the exact nature of union representation (Pugliatti, 2008), or the limits to the public dimension of property (Finzi, 2013) served one purpose in reality: to safeguard as far as possible the mainstays of private independence, especially contract and property. The new framework of social coexistence afforded by corporativism was not rejected, but limits should be set to the private being swallowed up by the State, or the individual and intermediate organisations being transformed into intrinsic units of State. The crisis of the individualist model was plain to behold, and so was the process of gradual "publicizing" of legal dynamics; but some jurists staunchly defended the central role of the individual which, despite his collective implications, he might and should preserve.

To authors like Finzi, Cesarini Sforza, Mossa or Capograssi corporativism was a mechanism by which to surmount the limitations of liberal statism, whilst ensuring a disciplined independence for the unstoppable formation of interest groups and social organisations lying halfway between the private and the public. The corporativist venture need not be pursued to its totalitarian extreme; suffice it to make room for a legal form which stemmed from social coexistence, however much it might be channelled within a state framework.

Focusing on the collective aspect of law, as Cesarini Sforza pointed out, would enable "the idea of law to remain free of the State", and the existence of infra-state legal channels to have a recognised existence[16]. To some, like Finzi, this meant giving real content to revolutionary principles from 1789, setting organised interests and the social plane centre-stage and providing a midway version of law—not just state-dominated or only private—at a time when the State was necessarily intervening in the role of protagonist.[17] In this respect organising the State into unions and corporations would enable a "point of equilibrium" to be struck between social activity and individual power over things, which redounds to the well-being and power of the Nation" (Finzi, 2013, p. 68).

There were others, like Mossa, who saw enterprise as the lever by which to keep private and public in communication, and to give independence and a central position to the collective, without it being absorbed wholesale by the State.[18] The institutions overhauled by the new system (from collective contract to corporative regulations) should thus be the concrete tools around which to create new forms of regulation, and hence an intermediate juridical arena midway between autonomy and heteronomy (Stolzi, 2007, pp. 392–424).

4. Conclusions

As the latest historical thinking has shown, corporativism was not just a bluff (Santomassimo, 2006, p. 16). Manoilesco's forecast did not come true (the Romanian scholar had suggested that the twentieth century would be the century of corporativism) (Manoilesco, 1937). The experiment was not just chicanery, even in the authoritarian fascist version. There is, of course, an enormous gap between the words and theory that dressed it, and the concrete product of the corporative revolution which spawned, not a corporative State, but a *bureaucratic* State (Mazzoni, 1943, p. 117; Sforza, 1942, pp. 279–287). That gap reveals a paradox: that a doctrine stemming from the attempt to give the new social relations central importance and independence (including normative independence) should have slid so quickly into diehard statism bent on eliminating all forms of competition with the State. In that sense some in particular maintain that corporativism was an enormous rhetorical hoax. Indeed, the storytelling it spawned is riddled with contradiction and ambiguity: first and foremost, how the ostensible attempt to rewrite the extra-state coordinates of the legal system and give regulatory independence to groups of manufacturers actually led to the establishment of a state-based legal system.

Insofar as the intention (going by the confused and contradictory claims of the would-be reformers) was to give rise to a new kind of state system enabling the early-century crisis to be surmounted, corporativism was indeed an ill-fated experiment: the demand for regulatory independence by organised groups was absorbed into a heavily State-run system. It does remain a highly interesting area for analysis, however: first, for the wealth of theory that it engendered, and second, for the clash between its starting premises (upholding union autonomy, transcending the public/private dichotomy, recognising the authority of new social formations) and the effects it led to (authoritarianism, bolstering of the State, absorbing of social dynamics into public structures).

Conflict of Interests

The author declares no conflict of interests.

[16] To Cesarini Sforza "collective law" was a step above private law but was not to all effects public law; it formed an "intermediate level" between private and public which detracted from harmonious co-existence between them; cf. Cesarini Sforza (1942, pp. 189–190).

[17] Recognising the public law quality of erstwhile private law forms part of this interpretative trend. As Grossi wrote, "Finzi, who is no fascist, is a keen observer of the corporativist movement, his attitude being…to remove the cluttering and superfluous tinsel that fascist officialdom foisted on it and to detect its many similarities with the transition in progress, which he collected and arranged into an innovative scientific argument" (Grossi, 2013, p. XXXVI).

[18] On Mossa's attempt to prevent the whole juridical area being absorbed and reduced inside the bounds of "overweening public law", see his lecture *Notion, Assumptions and Purpose of Economic Law*, delivered in 1934 at the University of Santander and later collected in Mossa (1935, p. 96).

References

Barassi, L. (1939). *Diritto corporativo e diritto del lavoro*. Milan: Giuffrè.

Bottai, G. (1934). *Esperienza corporativa*. Florence: Vallecchi.

Breschi, D. (2010). *Spirito del Novecento. Il secolo di Ugo Spirito dal fascismo alla contestazione*. Soveria Mannelli: Rubbettino.

Cassese, S. (1971). Giuseppe Bottai. In *Dizionario biografico degli Italiani* (pp. 389–404). Rome: Enciclopedia Italiana.

Cassese, S. (2012a). La prolusione romaniana sulla crisi dello Stato moderno e il suo tempo. *Le Carte e la Storia*, *1*, 5–8.

Cassese, S. (2012b). *Lo Stato fascista*. Bologna: il Mulino.

Cavallari, G. (1986). Pluralismo e gerarchia nel pensiero filosofico–politico di Sergio Panunzio. In A. Mazzacane (Ed.), *I giuristi e la crisi dello Stato liberale in Italia tra Otto e Novecento* (pp. 413–428). Naples: Liguori.

Cazzetta, G. (2007). *Scienza giuridica e trasformazioni sociali. Diritto e lavoro in Italia tra Otto e Novecento*. Milan: Giuffrè.

Cerasi, L. (2001). Corporatismo/corporativismo e storia d'Italia. Una questione aperta? Un percorso di lettura. *Contemporanea*, *2*, 367–377.

Chiodi, G. (2015). Alfredo Rocco e il fascino dello Stato totale. In I. Birocchi & L. Lochiamo (Eds.), *I giuristi e il fascino del regime (1918–1925)* (pp. 103–127). Rome: RomaTrE-Press.

Cianferotti, G. (1980). *Il pensiero di Vittorio Emanuele Orlando e la giuspubblicistica italiana tra Otto e Novecento*. Milan: Giuffrè.

Collin, P., Bender, G., Ruppert, S., Seckelmann, M., & Stolleis, M. (Eds.). (2014). *Regulierte Selbstregulierung in der westlichen Welt des späten 19. und frühen 20. Jahrhunderts*. Frankfurt am Main: Klostermann.

Costa, P. (1976–1977). Widar Cesarini Sforza: Illusioni e certezze della giurisprudenza. *Quaderni Fiorentini per la Storia del Pensiero Giuridico Moderno*, *5/6*, 1031–1095.

Costa, P. (1986). *Lo stato immaginario. Metafore e paradigmi della cultura giuridica italiana fra Ottocento e Novecento*. Milan: Giuffrè.

D'Alfonso, R. (2004). *Costruire lo Stato forte. Politica, diritto, economia in Alfredo Rocco*. Milan: Franco Angeli.

Dessì, G. (2009). *Ugo spirito. Filosofia e rivoluzione*. Milan: Luni.

Finzi, E. (2013). *"L'officina delle cose". Scritti minori*. Milan: Giuffrè.

Fioravanti, M. (2001). *La scienza del diritto pubblico. Dottrine dello Stato e della Costituzione tra Otto e Novecento*. Milan: Giuffrè.

Franchi, G. (2003). *Arnaldo Volpicelli. Per una teoria dell'autogoverno*. Naples: Editoriale Scientifica.

Gagliardi, A. (2010). *Il corporativismo fascista*. Rome and Bari: Laterza.

Grossi, P. (2000). *Scienza giuridica italiana. Un profilo storico 1860–1950*. Milan: Giuffrè.

Grossi, P. (2002). *La cultura del civilista italiano*. Milan: Giuffrè.

Grossi, P. (2011). Lo Stato moderno e la sua crisi (a cento anni dalla prolusione pisana di Santi Romano). *Rivista Trimestrale di Diritto Pubblico*, *1*, 1–22.

Grossi, P. (2012). *Il diritto nella storia dell'Italia unita*. Naples: Editoriale Scientifica.

Grossi, P. (2013). Enrico Finzi: Un innovatore solitario. In E. Finzi (Ed.), *"L'officina delle cose". Scritti minori* (pp. V–LII). Milan: Giuffrè.

Laborde, C. (1996). Pluralism, syndicalism and corporatism. Léon Duguit and the crisis of the State. *History of European Ideas*, *22*, 227–244.

Luongo, A. (2013). *Lo Stato moderno in trasformazione. Momenti del pensiero giuridico Italiano del primo Novecento*. Turin: Giappichelli.

Manoïlesco, M. (1937). *Le siècle du corporatisme*. F. Alcan.

Marchetti, P. (2006). *L'essere collettivo. L'emersione della nozione di collettivo nella scienza giuridica italiana tra contratto di lavoro e Stato sindacale*. Milan: Giuffrè.

Mazzacane, A. (Ed.). (2002). *Diritto economia e istituzioni nell'Italia fascista*. Baden Baden: Nomos.

Mazzacane, A., Somma, A., & Stolleis, M. (Eds.). (2005). *Korporativismus in den südeuropäischen Diktaturen*. Frankfurt am Main: Klostermann.

Mazzoni, G. (1943). La "crisi" del diritto corporativo e la validità del corporativismo. *Il Diritto del Lavoro*, *1*, 117–134.

Mossa, L. (1935). *L'impresa nell'ordine corporativo*. Florence: Sansoni.

Panunzio, S. (1987). *Il fondamento giuridico del fascismo*. Rome: Bonacci.

Passaniti, P. (2012). Lodovico Barassi. In *Il contributo Italiano alla storia del pensiero—Diritto* (pp. 430–433). Rome: Enciclopedia Italiana.

Pugliatti, S. (2008). Dalla obbligazione in solido alla rappresentanza sindacale. In S. Pugliatti (Ed.), *Scritti giuridici* (pp. 17–42). Milan: Giuffrè.

Ripepe, E. (2012). La teoria dell'ordinamento giuridico: Santi Romano. In *Il contributo Italiano alla storia del pensiero. Il Diritto* (pp. 475–484). Rome: Enciclopedia Italiana.

Riquelme, S. F. (2010). Corporativismo y sociología en Émile Durkheim. Apuntes de política social. *Nonnullus. Revista Digital de Historia*, *6*, 63–82.

Rocco, A. (1938). *Scritti e discorsi politici*. Milan: Giuffrè.

Romano, S. (1950). *Scritti minori*. Milan: Giuffrè.

Santomassimo, G. (2006). *La terza via fascista. Il mito del corporativismo*. Rome: Carocci.

Schiera, P. (2005). Corporativismo: Concetti storici. In A. Mazzacane, A. Somma, & M. Stolleis (Eds.), *Korporativismus in den südeuropäischen Diktaturen* (pp. 44–47). Frankfurt am Main: Vittorio Klostermann.

Schmitter, P. C. (1974). Still the century of corporatism? *Review of Politics*, *1*, 85–131.

Schmitter, P. C. (1992). Corporativismo/corporatismo. In *Enciclopedia delle scienze sociali* (pp. 458–468). Rome: Istituto dell'Enciclopedia Italiana Treccani.

Sforza, W. (1942). *Il corporativismo come esperienza giuridica*. Milan: Giuffrè.

Simone, G. (2012). *Il guardasigilli del regime. L'itinerario politico e culturale di Alfredo Rocco*. Milan: Franco Angeli.

Speciale, G. (2012). Alfredo Rocco. In *Il contributo Italiano alla storia del pensiero—Diritto* (pp. 559–562). Rome: Enciclopedia Italiana.

Spirito, U. (1932). Individuo e Stato nella concezione corporativa. In *Atti del Secondo convegno di studi sindacali e corporativi* (pp. 179–192). Rome: Tipgrafia del Senato.

Stolzi, I. (2007). *L'ordine corporativo. Poteri organizzati e organizzazione del potere nella riflessione giuridica dell'Italia fascista*. Milan: Giuffrè.

Stolzi, I. (2009). Corporativismo autoritario e neocorporativismi: Modelli teorici a confronto. In G. G. Ballando & G. Cazzetta (Eds.), *Diritti e lavoro nell'Italia repubblicana* (pp. 159–181). Milan: Giuffrè.

Stolzi, I. (2012a). Enrico Finzi. In *Il contributo Italiano alla storia del pensiero—Diritto* (pp. 533–536). Rome: Enciclopedia Italiana.

Stolzi, I. (2012b). Lorenzo Mossa. In *Il contributo italiano alla storia del pensiero—Diritto* (pp. 529–533). Rome: Enciclopedia Italiana.

Stolzi, I. (2012c). Stato corporativo. In *Il contributo italiano alla storia del pensiero—Diritto* (pp. 497–503). Rome: Enciclopedia Italiana.

Stolzi, I. (2014). Private, public and collective: The twentieth century in Italy from fascism to democracy. In M. Rask & C. Thornhill (Eds.), *Law and the formation of modern Europe. Perspectives from the historical sociology of law* (pp. 145–178). Cambridge: Cambridge University Press.

Tarello, G. (1979). Corporativismo. In A. Negri (Ed.), *Enciclopedia Feltrinelli Fischer, scienze politiche, I (Stato e politica)* (pp. 68–81). Milan: Feltrinelli.

Tarello, G. (1988). Il termine "corporativismo" e le sue accezioni. In G. Vardaro (Ed.), *Diritto del lavoro e corporativismi in Europa: Ieri e oggi* (pp. 35–49). Milan: Franco Angeli.

Vallauri, C. (1971). *Le radici del corporativismo*. Rome: Bulzoni.

Vassalli, F. (1939). *Studi giuridici, II*. Rome: Società Editrice del Foro Italiano.

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COGITATIO

Politics and Governance (ISSN: 2183–2463)
2017, Volume 5, Issue 1, Pages 34–41
DOI: 10.17645/pag.v5i1.775

Article

Between History and Passion: The Legitimacy of Social Clubs in the Province of Buenos Aires (2001–2007)

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Submitted: 23 September 2016 | Accepted: 17 January 2017 | Published: 15 March 2017

Abstract
In the last few decades the concept of self-regulation accompanied the process of dismantling the welfare state. In this context, in central countries—Europe and North America—the importance given to private regulations versus public action increased, thus requiring new mechanisms of legitimacy. To this end, appeals to the principles of economy and technical efficiency to legitimate private regulations have been made by several researchers. However, these principles acquired a negative view in Argentina because they were used to use to legitimate processes that led to various crises, especially taking into consideration the neo-liberal experience of the 1990s. Against this historical background, this paper seeks to show a particular case of legitimizing the self-regulation of non-state organizations (social clubs) by using classic *topoi*, which had been historically used to legitimize state action. In order to do so, this text focuses on the analysis of "Luna de Avellaneda" Act of 2007, by which the government of Buenos Aires sought to legitimize the self-regulation of clubs appealing to the classical values of democracy, participation, and solidarity. For this, the historical experience of the Argentinean political community will be observed from the perspective of the history of these clubs, thus recovering the social function they played in the diverse political and economic crises.

Keywords
Argentina; historical representations; legal culture; private regulations; social clubs; state crisis

Issue
This article is part of the issue "Legitimization of Private and Public Regulation: Past and Present", edited by Klaus Dieter Wolf (Peace Research Institute Frankfurt, Germany), Peter Collin (Max Planck Institute for European Legal History, Germany) and Melanie Coni-Zimmer (Peace Research Institute Frankfurt, Germany).

1. Introduction

In the last few decades of the twentieth century, the state was thought of as a phenomenon in crisis and, consequently, underwent a process of dismantling that spread rapidly throughout the world. In this historical context, the concept of self-regulation, which had a long tradition in Anglo-Saxon culture, would reappear as a way of thinking about legal regulation outside of statehood (Bartle & Vass, 2007). Thus, one way of redefining self-regulation would be expressed as "the *private provision* of public goods and private redistribution that takes place *outside the institutions of government* and, hence, *in the realm of private rather than public politics*" (Baron, 2010).

As can be observed, the logical structure of self-regulation pays particular attention both to the juridical form of regulation (public and private) and to the agents who promote it (State or society). However, the main drawback of the concept lies not only in differentiating between the producer of self-regulation and its legal form. Rather, it manifests itself in considering the main substance of self-regulation: the phenomenon that involves *regulating* human behavior.

In that sense, since every "regulation contains the idea of control by a superior; [and] it has a directive function" (Ogus, 2004, p. 2), the production and execution of an order requires a legitimacy of the "superior"—whether public or private. Thus, the legitimacy of the self-

regulation becomes fundamental not only for the analysis of the concept, but also to shape it.

Now, since the very concept of legitimacy has traditionally been conceptualized in a state-based manner, mainly for the legitimacy of nation-state government (Stillman, 1974), it is convenient here to use the broad definition stated by Easton, who considers legitimacy as "the conviction on the part of the member that it is right and proper…to accept and obey the authorities" (Easton, 1965). Thus, the legitimacy of self-regulation in this new historical context raises the question as to which arguments are available to justify the establishment and obedience of the members of a community to a regulation that comes from an authority other than the state government (private actors).

Traditionally, in central countries, state regulations had been legitimized on the basis of being the result of a democratic and rational-legal process that looked at the general welfare. In contrast, in order to provide legitimacy to self-regulation, it was pointed out as justifying advantages: the low cost of self-regulation in contrast with public regulation (Ogus, 1995), the efficiency in its application, and the consideration of self-regulation as "more knowledgeably-informed than direct state or legal regulation" (King, 2007, p. 72). These arguments, however, have been criticized for highlighting the lack of transparency of these regulations and the lack of legitimacy to apply them, requiring, in many cases, the support of the state to enable and guard them.

In Argentina, the typical arguments used to legitimize self-regulation of privates do not enjoy a good reputation. In fact, these principles are easily recognized by the population as the arguments that served to dismember the welfare state, which led to an economic, political, and social crisis with severe consequences for the citizenry (Svampa, 2005). Under these particular circumstances, the way of legitimizing self-regulation tends to differ from what has occurred in central countries. This perception leads to some questions: can all forms of self-regulation be legitimized by appealing to the principles of economy, effectiveness, and special knowledge of non-state agencies? Are the arguments used in the central countries to legitimize self-regulation expandable to the diverse cultural spaces around the world? Are there other arguments available to legitimize self-regulation of civil society organizations?

Based on these questions, the objective of this essay will be to show how in the year 2007 the Buenos Aires provincial government sought to legitimize the self-regulation exercised by social clubs in times of neo-liberal state crisis (1999–2007) using a state-like regulation (Luna de Avellaneda Act). From this norm, the effectiveness of the use of classic *topoi* will be discussed, that is, *topoi* traditionally linked to justify state regulations (democracy, participation, solidarity), to legitimize the self-regulation of the civil society organizations. Both objectives can be synthesized in a hypothesis postulating that the effectiveness of transplanting the arguments used to legitimize diverse forms of self-regulation from central countries depends on their adaptation to the historical memory of the political community of reception.

To achieve this objective, this paper uses two methodological strategies. The first is the historical reconstruction of the experience of self-regulation in social clubs and their relationship with the state in the nineteenth and twentieth centuries (section 2). Furthermore, a recovery of the experience of social containment that social clubs fulfilled during the crisis of 2001, practicing some particular forms of self-regulation (section 3), will be undertaken, and this will serve as the background against which to understand the system of values historically settled in the Argentine political community that were later used by the state to legitimize the self-regulation of the clubs. The second, based on critical discourse analysis, seeks to study the *topoi* and arguments used in the Luna de Avellaneda Act. This will allow us to see how classical values of public political legitimacy can be used to justify the self-regulation of civil society institutions (section 4). Finally, this analysis seeks to show how the government made strategic use of the clubs' history in order to recover the lost legitimacy of the state after a period of neo-liberal politics (conclusions).

2. Social Clubs and Nation-State: The History of a Tension

Among the various non-state self-regulation experiences that can be traced in Argentine history (knowledge societies, transport companies, etc.), social clubs deserve to be highlighted for two reasons. In the first place, it shall be remarked that the experiences of the administrative-economic self-regulation were mostly carried out by transnational companies, which reduced the role of regulatory agency responsible for overseeing Argentinean companies to the mere application of regulations designed abroad. Second, the self-regulation of clubs is part of a long history of associations in Argentina; a history defined by a tension between the action of civil society and the state (private and public–private regulations). The latter motive influences the degree of self-regulation of clubs in civil society, which sees associations as nuclei of social containment and practical organization that have become as naturalized as the state. Thus, the history of the clubs becomes fundamental when trying to understand the process of naturalization involved in this specific form of self-regulation.

More precisely, social clubs in Argentina have played a key role in shaping and modeling society as well as in helping to build the citizenry (González Bernaldo, 2008). Even prior to the creation of the nation-state, associative movements served as places where political parties were constituted (Sábato, 2004). They also secured and reinforced immigrant communities, integrating them into the new country by forging a bond between the various cultures. The creation of some rules for mutual assistance—outside the scope of the state—started in

the nineteenth century with "Associations of Mutual Help", which provided health insurance and took care of widows who were members of those institutions. During the initial organizational stage, they were clearly influenced by the immigrant movements, and their members were reunited under the appeal for their nationality of origin—Italians, Spaniards—(i.e. *Sociedad Italiana de Ayuda Mutual*). Even though their internal regulations did not received formal recognition by the state, the effectiveness of the social protection they provided granted them the support of politicians, who were usually seen as proud members of these associations (Di Stefano, Sábato, Romero, & Moreno, 2002).

During the first half of the twentieth century, after the nationalization process—characterized as a cultural process where extensive public education created the Argentinean emotive core of nationalism—the role of these associations changed: whereas they had previously served a communal function, based on nationality of origin, they developed a territorial role and focused on the infrastructural development of the new neighborhoods created on the periphery of Buenos Aires. In this process, the main goal was to improve the cultural and material living conditions of the local population, a task which was reflected in the very name they acquired: development associations (*Asociaciones de Fomento*). In this period, connection to the local government was strengthened, and they both worked together and regulated the public works for the community, which included building most of the new infrastructure of neighborhoods (private–public creation of public goods). It is worth remembering that during this period these institutions were strategically characterized as "non-political" by their holders, even when a proto-democracy in the electiveness of their authorities was practiced (Romero & de Privitellio, 2005).

During the second half of the twentieth century, both self-regulation and the key role played by these institutions in providing public goods were drastically reduced by the actions of the Peronist state. In 1945 they began to be displaced from that role by the party's political apparatus (*unidades básicas*), which held a central position connecting the needs of the population to the state. As a consequence, the institutions' regulatory ability decreased, and they became chiefly a place to practice sports, thus changing their names once again to "Social Clubs". In those years the Argentinean welfare-state was created and politics in clubs almost disappeared. It should also be pointed out that those institutions that did not follow *Peronist* orders were subject to intervention and pressured by the state (Rein, 2015).

During dictatorships the a-political character traditionally taken up by the clubs had worked as a shelter against direct intervention from *de facto* regimes. In terms of self-regulation, while the so-called bureaucratic-authoritarian state established in 1966 fostered the development of transnational private-regulations chiefly in the field of economy, it forbade any manifestation of private regulations and reclamations by any social institutions under suspicion of disrupting political abuses. Thus, the regulative power of clubs in connection with the provision of public goods was nearly erased.

At this point, the tension between the welfare-state, the bureaucratic-authoritarian state and clubs becomes evident and shows how the political context influenced the possibilities of self-regulation by local institutions. However, it should be stressed that the bond between clubs and local neighbors was far from disappearing. Despite the prohibition to do politics during dictatorships, the role played by clubs strengthened their members' collective memory, which turned clubs into one of the most important socialization spaces of the twentieth century.

During the 1989–2001 neo-liberal regime, the tension between the state control and self-regulation was reconfigured, and both components of the equation—clubs and state—suffered from the dismantling of the welfare-state. The privatization of public companies, such as oil, gas, telephone, water and heavy industry companies, and the opening of the market economy without proper protection of the Argentinean industry, produced unprecedentedly high unemployment rates (Veigel, 2009). This disastrous economic situation was accompanied by a decline in labor solidarity, expressed by the instauration of the ideological presupposition that each individual is responsible for his or her own salvation—winner or loser—and attacked the traditional labor and social bonds (Novaro, 2006). In this novel context, clubs became fundamental and paradoxical. Owing to the discredit of social enterprises under the new ideological paradigm of privatization as well as the incapability of ex-workers to pay the fees required to maintain their facilities, these institutions barely managed to survive. Still, in the face of the dominance of the neo-liberal discourse, and the lack of responses from political institutions, they were the only places where the sudden absence of the state could be resisted and were transformed into places where common neighborhood problems could be shared (Lewcowicz, 2004). Social clubs, especially after the crisis in 2001 and particularly in the periphery of the city of Buenos Aires—where most of the impoverished former middle-class unemployed workers lived—recreated the old territorial solidarity, and, once again, gaining enormous social, economic and political relevance.

3. From Political Collapse to Private Self-Regulation (2001–2007)

For the Argentinean population, 2001 possesses a very different meaning then it does for the rest of the western world. In fact, the attack on the World Trade Center was of lesser significance to Argentina's population than the image of President De la Rua leaving the *Casa Rosada* by helicopter. The sequence of events involving economic collapse, the closure of the main banks, the IMF's refusal to give credit after a decade of orthodox economic poli-

cies were nothing other than a preamble to social disobedience and revolt by the population (Fradkin, 2002). Social revolt was not only a reaction to economic unrest but an expression against neo-liberalism, the endangering of democratic values caused by technocrats and the institutional irresponsibility of professional politicians (Levey, Ozarow, & Wylde, 2014).

In purely economic terms, the collapse of the national economy in 2001 isolated the country from the global economy and erased the federal-state order. Thus, provincial governments had to take control of the situation by implementing several extraordinary measures, the most important of which was the issuance of bonds—quasi money—to help support specific groups but not the population at large. In Buenos Aires this "money" was used to pay the salaries of civil servants, public school teachers and police forces, among others (Colliac, 2005). However, this exceptional currency policy did not entail any gain or profit for the huge mass of unemployed people who lived in Buenos Aires. For them, it was bartering clubs—inside a provincial network—that provided a means to survival. Most of these social projects were emplaced in "community and cultural centers" (social clubs), where the activities were tightly regulated not only through the use of privately-created currency (credits) but also by delimiting the economical practices of their members. In fact, the clubs established several detailed exchange regulations, which led the newspaper La Nación to issue a 2001 notice entitled "The strict rules of bartering clubs" (La Nación, 2001). For example, it was mandated that only those over 18 years of age with a presentation of certificates of bromatology—in the case of food could participate in the bartering. It also stipulated that they must attend at least three meetings per year, and they also have to provide a balance sheet of their transactions. These regulations were formulated by the nodos, by the clubs themselves (private regulation) and, sometimes, in connection with the municipality (private–public regulation). Nevertheless, the direct initiative always came from private actors who needed to exchange goods.

Although most of rules for these "nodos" were composed by a larger bartering association, local clubs became the epitome of new survival trade practicing, demarking a new model of socio-economic self-regulation outside the State and global market (Pearson, 2003).

Moreover, economic self-regulation, expressed in norm-setting that impacted the lives of those in the neighborhoods, was not the only form of reaction that took place within the context of the clubs. The political breakdown and mistrust of professional politicians reflected in *¡Que se vayan todos!* ("Get them all to leave!") enabled the creation of neighborhood assemblies (*asambleas barriales*) with a clear anti-institutional yet political ethos (Dinerstein, 2003). Clubs became places to debate general politics as well as to think about and solve local problems without state intervention. Most of the people spoke about how to foster the "common good" in neighborhoods, and they created a horizontal practice of democracy from the bottom up (Pagina12, 2002). The role of political debate was central, because self-regulation not only fulfills a function of provision of common goods in the production of written regulations, but also in the process of producing them. In this process the political practice limited the existence of free riders and allowed the rebuilding of social tissue through the participation and solidarity of those involved in political debate (Baron, 2010).

In short, in the face of political and social emergency, social clubs took control of the situation on a small scale and provided a place to restore social bonds through bartering and establishing communal relationships. At this point, it should be remembered that in the absence of the state, clubs played a major role in the regulation of social interchange, and this was probably attributable to the historical presence of these institutions, which were easily recognized by the local citizenry. In fact, their actions were naturalized without appeal to a process of discourse legitimacy. As they were the only visible institutions, neighbors got involved in clubs to confront the crisis. Nevertheless, after the crisis subsided, their self-regulatory practices were recognized, especially once the institutional political order tried to resume its lost competence and legitimacy as provider of the "common good" to society. In this context, a law to protect social clubs was enacted in 2007 under the emotive title, "Luna de Avellaneda".

4. "Luna de Avellaneda": The Emotional Rebuilding of State Legal Order

After six years of social and economic recovery, mistrust towards professional politicians who worked for the state apparatus started to diminish. Nevertheless, the new provincial government, formed by *Peronist* politicians who had once belonged to the neo-liberal regime, was in need of new strategies to regain the legitimacy of its power in the face of a self-regulated citizenry. Thus, in order to recover some of the functions fulfilled by social clubs during neo-liberal times, the government could not appeal to the traditional methods: dissolution of civil societies or intervention. The government lacked the infrastructure and the capability to resume the daily tasks that clubs carried out, and politicians lacked popular legitimacy to endorse such kind of actions. They were seen not as members of the true political activity but as enemies of the people.

In this new context, the balance of power between civil society and government seemed to lean toward the former. Consequently, to avoid this contradiction, the government presented itself as the "protector" of civil society organizations rather than as opposing the clubs. In order to accomplish this complex task, a new law was enacted. The project "Luna de Avellaneda" was passed by Congress and published in the *Boletín Oficial* on December 17, 2007. This new Act No. 13747 established a

system of preservation—no taxation, social fees for gas and electricity services, and so on—for all historical social institutions, including clubs and public libraries. This way the link between civil society and local state governments wanted to be *re*-created and, in order to fulfill such goal and to obtain the support of the population, at least three discursive strategies were displayed. Firstly, an emotive appeal was made to "common sense" about the positive side of politics, and in order to achieve this, the government capitalized from a popular and successful movie that related the history of clubs in neo-liberal times (*pathos*). Secondly, the new law made use of a distinctive narration of the past, which recounts and highlights only a few select stages in the history of clubs in Argentina, so as to rebuild the relationship between state and civil society, which is represented in terms of the clubs. Finally, the law made a plea for the positive values upheld by the clubs (democracy, participation, solidarity, and social integration), which would not only serve as *topoi* to legitimize their self-regulation, but also—in the interest of creating a bond between the state and its citizenry—as "common values" shared by post neo-liberal politicians and the civil society.

4.1. Movie and Emotional Pathos: "Luna de Avellaneda"

From a traditional legal perspective, it is shocking to find out that in Argentina even when associations or civil organizations have been constitutionally recognized, the new law makes no reference to the Constitution. This shows that the argumentative form could not rely on traditional legal discourses. On the contrary, the whole narrative rested on a more effective discourse based on an emotional appeal to history. To achieve this, the primary sources used were neither statistics, nor sociological or administrative studies, but rather an image projected by the successful Argentinean movie *Luna de Avellaneda* (released in 2004). The main plot of this movie was the internal conflict experienced in the club "Luna de Avellaneda" between its local "honest" president and a "corrupt" local politician, who wanted to sell the club's facilities to build a casino. As remarked in the Act itself, this tension was presented as a synthesis of a long conflict involving issues of moral legitimacy inside Argentinean society. After the film's success, not only was the Act named after it, but the whole argumentation relied on the image it projected. In fact, in the main text of the Act, it was stated that: "the movie 'Luna de Avellaneda' wonderfully portrays, from an artistic viewpoint, the history of this problem".[1]

This preeminent source presupposed a selection of a specific emotional discourse used to narrate the past. But this narrative not only employed an eloquent strategy, it also expressed certain "common knowledge" about the audience of the message that can help unveil the ground that laid underneath a special "use" of the past to reconcile government and civil society in the present. If the film narrative was taken to be the truth, history then no longer seems to rely on historians' reconstructions—which might interfere with the legitimacy process by criticizing the tension between *Peronism* and clubs—but rather on a *memory* stimulated by emotion. Therefore, present demands could be better answered through partial explanations loaded with emotiveness rather than with facts (Nora, 2008).

The cinema–memory–*story* triangle represents the narrative ground on which the new law could unfold several topics to justify the defense of the social clubs. This use of an "emotional image" looked for a *pathos* that responded to a "knowledge of belief", which can be summarized by an emotional representation charged with social and moral sensitivity in the community (Charaudeau, 2011). Based on this emotive appeal, some uses of the past and some *topoi* were recollected to legitimize social clubs and, by extension, to clean up the image of their self-declared protector.

4.2. A Short History of Two Enemies: Dictatorships and Neo-Liberal Politicians

The movie produced a synecdoche effect through which civil society is represented as pure, well-intentioned and naïve opposite the institutional order. Therefore, the anti-institutional spirit of a time was inscribed in its *ethos*. Now, since the new law wanted to present political actors as also sharing the common problem experienced by civil society, the text intended to oppose society and the political system with two potential enemies of the clubs: dictatorships and neo-liberal regimes. Thus, the historical reconstruction employed in the Act—and evoked by the movie—was directed against those two main oppositional figures, eclipsing the internal tension experienced by clubs under the *Peronist* state. This oblivion was based on the conflicted position of the government, because most of their members belonged to the *Peronist* party that installed the neo-liberal regime in the 1990s. Consequently, the attempt to distance themselves from their own conflicted past was secured by confronting past dictatorships and by the reestablishment of the anti-liberal tradition of this political party as well. Following this intention, the history of the clubs was reduced in the text to just the emergency they experienced from 1860 to 1930 (genetic history), then jumping to the recent memory of their political and financial crisis under the various dictatorships and during the 1990s (recent history). The selection then concealed the opposition against *Peronism* (1945–1955) and avoided attacking the legitimacy of the new protection the state was now trying to provide. The genetic history was in fact used to show the emergence of the "good" values represented by clubs and civil society, while the depiction of recent history was meant to show the decline of their values owing to the harassment by dictators and neo-liberalist regimes.

[1] All translations are ours.

Consequently, with the displacement of the contradiction between state and social clubs by the two administrative and antidemocratic models of government (neo-liberal technocracy and military regimes), two main topics clearly emerged. First of all, in opposition to dictatorships, "democracy" appeared as a solid historical semantic stratum which recalled the struggle for human rights and the return to political-democratic order in Argentina. Nevertheless, democracy alone was unable to reestablish the role of the state as protector since it had been ineffective during the neo-liberal program. Therefore, the topic of "solidarity", especially in the context of social concerns, was used as a counter-concept against individualism and egoism, which came to characterize neo-liberal regimes after the fall of 2001.

4.3. Schools of Democracy and Solidarity: Clubs as a Moral Example

"Democratic life" was a central topic that ran through the history of clubs revisited by the new law. In its narration, we find the following statement:

> Clubs were "schools of democracy", in such a way that their inner life was much more transparent and exemplary than the life of political power. Even during the darkest and most dreadful dictatorships, clubs continued voting and electing their authorities democratically.

The *topos* of democracy turns out to play a central role in the hegemonic discourse of current Argentinean society, and it appeals to recent history in order to restore faith in traditional politics. It serves not only as a premise for a righteous state government, but also as an instrument to resist an extended tendency towards authoritarian behavior. To this extent, it is an example of a significant tool used in the present to judge historical processes. However, this concept has not always been quite so influential. In fact, over the course of the twentieth century, democratic principles in Argentina—theoretically defended by dictators and political parties alike—were not resisted to the extent as is currently being portrayed. Both parts were so intertwined that civil society viewed military forces as political actors (Quiroga, 2004). After 1983, notions of "democracy" and "participation", historically speaking, served one primary function: to restore the public sphere and enable civil society to be involved into politics in the wake of the last dictatorship (1976–1983). In this fashion, talk of democracy was used to vindicate the role of civil society in the face of state-dictatorship. Since 2001 the political activities of the clubs have primarily involved the recognition and defense of these values, which legitimized their anti-institutional as true spaces for doing politics. However, the opposition to dictatorships worked also had its downsides, because in democratic times there was no justification to resist the institutional state order.

However, it was clear that democracy was not enough. In the seventh paragraph of the preamble of the Act, we find the following sentence:

> These institutions do not possess a lucrative goal, because in their Statutes their only goal is the "common good", and they have been, and still are, a huge part of people's social and cultural heritage, *preventing until today the market from altering their social and communal goals*.

The tension between the clubs and the market is clear in this statement. According to this perspective, clubs were the only places where altruistic values, such as socialization, social bonds, the organization of civil society, and *integration*, were still present. To find these elements the "genetic history" needed to portray tradition and market in terms of an opposition. The law states:

> Argentina would not be what it is if clubs had not accomplished their *socializing* role. Clubs developed themselves, acquired proper identities, and *strengthened the organization of the civil society*. [Immigrants] consolidated their *social bonds* with the new place through the creation of their own institutions. Several clubs founded by popular sectors managed to survive, to organize, to issue their own regulations, to establish rules, and to *integrate the neighborhood* in their activities and objectives. These old clubs fulfilled the function of recreation, *social assistance*, *and social security*.

This history was rapidly connected with the present, skipping over some historical events. In 2007 the "privatization of the social cost" and the reduction of citizens to mere consumers were seen as symptoms of the disappearance of the state; in this context, clubs regained their original function in re-generating a social bond based on *solidarity*. Thus, the historical stratum was linked to the failed neo-liberal experience, and it was reactivated to justify private-regulation by the clubs in the face of a retreating state.

In short, according to the text in the Act, after the crisis of 2001, civil society found itself devoid of a democratic welfare-state, and thus the tension between state and civil society changed as the result of a new dialectic, where these once antithetical elements were reunited in a common front against the "market". As a consequence, the restoration of the state worked as a basis from which to protect the "good" values of civil society and as an assurance against the foreign capitalism, which "perverted" those traditional good values. In this way, clubs were reintroduced as parts of a state standing against the two common enemies, and the state could finally be presented as the "protector" of society's "good values". Moreover, in terms of the legitimacy of regulatory practices, after the crisis the self-regulation model was converted into a private–public regulation, and the

state was able to regain its lost capacity to help civil society by supporting clubs.

5. Conclusions

In view of all this, it is worth mentioning that, in order to explore the legitimization of private or private–public regulation, the historical context in which legitimacy discourses are expressed cannot be ignored. Nevertheless, this contextual framework cannot only be taken in a synchronic dimension, but it should also explore the emotional memory condensed in the legitimacy devices used by the narrator. In the case of Argentina during the 1990s, the language used to justify the privatization model of the neo-liberal politics (efficiency, celerity) had a historical relationship with the theory of the state subsidiarity defended during dictatorships. However, only after the crisis of 2001 could this historical stratum be recovered, and it permitted the connection of the two experiences. In this sense, some words and terms which could be seen as neutral in Europe have, in Argentina's local tradition, a rather distinctive meaning, immediately associated with the dramatic episodes still imprinted in people's memory. More specifically, it is only through history that we can understand the misunderstanding concerning the extensive use of what in Europe could be seen as the "antiquated" language of the 1960s and 1970s. This dimension may be fully appreciated in the *topoi* used to justify the self-regulative role of clubs (democracy, solidarity, participation), which resemble idealized alternative experiences to the neo-liberal order.

However, recovering the semantic stratum of values used as *topoi* is not enough. The pragmatic aspects of discourses need to be revealed in order to understand the political meaning hidden in the 2007 tension between public power and private regulation as well as the selection of these *topoi* (Palti, 2014). It is only against the background of this aspect that the sense of Act No. 13747 can be fully understood. In fact, even though the government praised the private-regulation exercised by the clubs, its real intention was to diminish their political power. This dual scheme was realized by acknowledging the positive actions by the club in the past—retrospective legitimacy of private regulation—while at the same time emphasizing the subsidiary role they play once *normality* has been reestablished—prospective legitimacy of public regulation. Theoretically, the redemptive position of the state in the future was attained by minimizing local participation and opposing neo-liberal projects.

In short, reducing the state or regaining its hegemonic role was inscribed in the differentiation between a recovery of good politics versus an egocentric economy. Under this scheme, the idealistically objectified separation between state and civil society became blurred. Thus, regaining state functions has been seen as a way of helping civil society by disregarding the traditional tension involved the dichotomies. This form of logic has had some effects on self-regulation and, beyond this, on the history of the state in Argentina, where the pendulous movement between state and private regulation is still very much in motion.

Acknowledgements

This paper was originally presented and discussed in the Workshop "The Legitimization of Private and Public Regulation: Past and Present" held in Max Plank Institute for European Legal History (7 and 8 April 2016). The author would like to thank the panel's discussant for the feedback, as well as the anonymous reviewers for their suggestions.

Conflict of Interests

The author declares no conflict of interests.

References

Baron, D. (2010). Morally motivated self-regulation. *American Economic Review*, *100*(4), 1299–1329.

Bartle, I., & Vass, P. (2007). Self-regulation within the regulatory State: Towards a new regulatory paradigm? *Public Administration*, *85*(4), 885–905.

Charaudeau, P. (2011). Las emociones como efectos de discurso. *Revista Versión*, *26*, 97–118.

Colliac, S. (2005). Monnais parallèles provincials et federalism budgétaire en Argentine. *Revue d´Économie Financière*, *81*, 251–269.

Di Stefano, R., Sábato, H., Romero, L., & Moreno, J. (2002). *De las cofradías a las organizaciones de la sociedad civil. Historia de la iniciativa asociativa en Argentina (1776–1990)* (1st ed.). Buenos Aires: Edilab.

Dinerstein, A. (2003). ¡Que se vayan todos! Popular insurrection and the asambleas barriales in Argentina. *Bulletin of Latin American Research*, *22*(2), 187–200.

Easton, D. (1965). *A systems analysis of political life*. New York, NY: Wiley.

Fradkin, R. (2002). *Cosecharás tu siembra: Notas sobre la rebelión popular argentina* (1st ed.). Buenos Aires: Prometeo.

González Bernaldo, P. (2008). *Civilidad y política en los orígenes de la nación argentina. Las sociabilidades en Buenos Aires, 1829–1862* (1st ed.). Buenos Aires: Fondo de Cultura Económica.

King, R. (2007). *The regulatory state in an age of governance: Soft words and big sticks*. New York, NY: Palgrave Macmillan.

La Nación. (2001, November 26). Las estrictas reglas del Club del Trueque. *La Nación*. Retrieved from http://www.lanacion.com.ar/354367-las-estrictas-reglas-del-club-del-trueque

Levey, C., Ozarow, D., & Wylde, C. (2014). *Argentina since the 2001 crisis. Recovering the past, reclaiming the future* (1st ed.). New York, NY: Palgrave Macmillan.

Lewkowicz, I. (2004). *Pensar sin Estado. La subjetividad en la era de la fluidez* (1st ed.). Buenos Aires: Paidós.

Nora, P. (2008). *Pierre Nora en lieux de mémoire* (1st ed.). Montevideo: Ed. Trilce.

Novaro, M. (2006). *Historia de la Argentina contemporánea, de Perón a Kirchner* (1st ed.). Buenos Aires: Edahsa.

Ogus, A. (1995). Rethinking self-regulation. *Oxford Journal of Legal Studies*, *1*, 97–108.

Ogus, A. (2004). *Regulation: Legal form and economic theory*. Oxford and Portland, OR: Hart Publishing.

Página 12. (2012, April 14). Asambleas barriales, pero para hablar de política. *Página 12*. Retrieved from https://www.pagina12.com.ar/diario/sociedad/3-3981-2002-04-14.html

Palti, E. (2014). The "theoretical revolution" in intelectual history: From the history of political ideas to the history of political languages. *History and Theory*, *53*, 387–405.

Pearson, R. (2003). Argentina's barter network: New currency for new times? *Bulletin of Latin American Research*, *22*(2), 214–230.

Quiroga, H. (2004). *El tiempo del proceso. Conflictos y coincidencias entre políticos y militares (1976–1983)* (2nd ed.). Rosario: Homo-Sapiens.

Rein, R. (2015). *La cancha peronista. Fútbol y política (1946–1955)* (1st ed.). San Martín: UNSAM EDITA.

Romero, L., & de Privitellio, L. (2005). Organizaciones de la sociedad civil, tradiciones cívicas y cultura política democrática: El caso de Buenos Aires, 1912–1976. *Revista de Historia*, *1*, 1–34.

Sábato, H. (2004). *La política en las calles. Entre el voto y la movilización, Buenos Aires, 1862–1880* (1st ed.). Bernal: Universidad Nacional de Quilmes.

Stillman, P. (1974). The concept of legitimacy. *Polity*, *1*(7), 32–56.

Svampa, M. (2005). *La sociedad excluyente. La Argentina bajo el signo del Neoliberalismo* (1st ed.). Buenos Aires: Taurus.

Veigel, K. (2009). *Dictatorship, democracy and globalization: Argentina and the cost of paralysis, 1973–2001* (1st ed.). Philadelphia, PA: Pennsylvania University Press.

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COGITATIO

Politics and Governance (ISSN: 2183–2463)
2017, Volume 5, Issue 1, Pages 42–53
DOI: 10.17645/pag.v5i1.790

Article

American Better Business Bureaus, the Truth-in-Advertising Movement, and the Complexities of Legitimizing Business Self-Regulation over the Long Term

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Submitted: 30 September 2016 | Accepted: 10 November 2016 | Published: 15 March 2017

Abstract
This essay considers the question of how strategies of legitimatizing private regulatory governance evolve over the long term. It focuses on the century-long history of the American Better Business Bureau (BBB) network, a linked set of business-funded non-governmental organizations devoted to promoting truthful marketing. The BBBs took on important roles in standard-setting, monitoring, public education, and enforcement, despite never enjoying explicit delegation of authority from Congress or state legislatures. This effort depended on building legitimacy with three separate groups with very different perspectives and interests—the business community, a fractured American state, and the American public, in their roles as consumers and investors. The BBBs initially managed to build a strong reputation with each constituency during its founding period, from 1912 to 1933. The Bureaus then in many ways adapted successfully to the emergence of a more assertive regulatory state from the New Deal through the mid 1970s. Eventually, however, the resurgence of conservative politics in the United States exposed the challenges of satisfying such divergent stakeholders, and led the BBBs to focus resolutely on shoring up its support from the business establishment. That choice, over time, undercut the Bureaus standing with other stakeholders, and especially the wider public. This history illustrates: the salience of generational amnesia within private regulatory institutions; the profound impact that the shifting nature of public faith in government can have on the strategies and reputation of private regulatory bodies; and the extent to which private regulators face long-term trade-offs among strategies to sustain legitimacy with different audiences. It also suggests a rich set of research questions for longer-term histories of other private regulatory institutions, in the United States, other societies, and at the international level.

Keywords
anti-fraud regulation; Better Business Bureaus; ethnography of regulatory governance; history of self-regulation; institutional reputation; legitimization trade-offs

Issue
This article is part of the issue “Legitimization of Private and Public Regulation: Past and Present”, edited by Klaus Dieter Wolf (Peace Research Institute Frankfurt, Germany), Peter Collin (Max Planck Institute for European Legal History, Germany) and Melanie Coni-Zimmer (Peace Research Institute Frankfurt, Germany).

1. Introduction

Modern self-regulatory bodies—that is, non-governmental institutions associated with the business community that set regulatory standards, engage in public education about those rules, monitor how firms live up to them, and even sanction those enterprises that violate their requirements—operate against a backdrop of skepticism. Such institutions, of course, have a very long history, substantially pre-dating the emergence of technocratic public regulatory agencies. For centuries, European guilds and professional societies set the terms of market activity in specific sectors (De Moor, 2008). As countries industrialized in the nineteenth- and early twentieth-centuries, leaders in many economic sectors invented new forms of self-regulation. In some

cases, as with the creation of stock and commodity exchanges, the goal was to coordinate market activity; in others, the objective was to respond to problems associated with industrialization, like the difficulties of ensuring pure milk for urban consumers or the "smoke nuisance" that bedeviled so many fast-growing cities. (Adams, 1908; Uekotter, 1999). But as concepts of democratic sovereignty began to spread in the wake of the American and French Revolutions, self-regulatory organizations faced new and growing challenges to their legitimacy that have only intensified over the past century.

Business-owners and managers sometimes, and perhaps often, view private regulatory organizations as busybodies that are almost as intrusive as governmental regulators. Upstart firms in particular tend to equate self-regulatory efforts schemes with anti-competitive measures to shore up the market position of established firms. Legislators, state regulatory agencies, and the judiciary may all see self-regulatory bodies as threats to their own authority. Social activists and the broader public, meantime, frequently presume that private modes of regulation serve primarily to deflect pressures for more stringent governmental responses to economic or social problems. By contrast, defenders of self-regulation often argue that such institutional modes of governance can often address complicated regulatory problems more effectively than public regulation, and at lower cost. Such arguments often have particularly strong force when regulatory policy-making concerns highly technical questions in which corporations and industry insiders possess extensive expertise (Balleisen, 2010; Balleisen & Eisner, 2009). Disputes over legitimacy, then, tend to swirl around private regulatory governance, raising interlinked questions about competence, effectiveness, and the appropriate sources of regulatory decision-making within democratic societies.

Scholars across the social sciences have come to understand these contested tropes about self-regulation. So too have policy-makers. From at least the early twentieth-century, state official in industrialized democracies have periodically fashioned strategies of co-regulation, in the hopes of gaining the benefits of self-regulation while limiting its costs. With co-regulation, the state delegates significant regulatory functions to self-regulatory bodies, but retains supervisory authority over them. This complex approach to regulatory design has come to characterize such policy domains as: securities regulation, which across the world relies on accountants, corporate attorneys, and stock exchanges, as well as national regulatory bodies (Carson, 2011; McCraw, 1982); workplace safety regulation, in which governments often rely on work councils made up of union and company representatives to construct operational plans, which governmental officials audit (Gunningham & Johnstone, 1999); and food safety regulation, in which national regulatory agencies increasingly rely on self-regulatory plans and implementation mechanisms created by corporations that process and distribute food products (Havinga, 2006; Sharma, Teret, & Brownell, 2010).

For the most part, social science research into how private regulators try to legitimate their authority takes the form of intensive case studies of a given regulatory institution over a fairly short period of time. Often, those case studies also only investigate issues of legitimation indirectly or as part of a wider consideration of the origins and impacts of self-regulation in a given context.[1] This essay takes a much longer view, exploring the evolution of American Better Business Bureaus (BBBs) over more than a century. Such macro-historical perspective allows us to see how strategies to secure the institutional legitimacy of private regulation evolved in the face of new circumstances.

Dating from 1912, the BBBs began as local associations in American cities, run by volunteers within the American advertising sector who wished to root out deceptive marketing practices by consumer retailers, investment brokers, and the advertising firms on which they relied. Within fifteen years, BBB leaders had developed a national umbrella organization, raised funds from national corporations and local businesses to hire professional staff, lobbied to shape anti-fraud policies on the state and national levels, and built out institutional capacity around standard-setting, public education, and norm enforcement. They had also forged deep connections with print media editors and publishers, business leaders in the new domain of radio, trade associations throughout the economy, large-scale retail corporations, and state and federal officials responsible for regulating the truthfulness of commercial speech. In all of these activities, the BBBs articulated a cohesive philosophy of business self-regulation, predicated on the ethical demands of a businessmen's social movement for truth-in-advertising. Over the subsequent five decades, the BBBs adapted to a steadily more assertive regulatory state, always looking to carve out a substantial role for self-regulatory organizations, while accepting a more vigorous role for state regulatory oversight. From the 1970s onwards, however, the BBBs confronted new pressures from within the business community and the political world, as a resurgent conservativism threatened its funding base and encouraged a less cooperative stance toward state regulatory institutions.[2]

This organizational history offers several insights about the challenges that non-governmental regulatory institutions confront as they seek to establish and sustain niches within ecologies of regulatory governance. The BBBs had to worry about three different, if sometimes overlapping types of legitimation. First, they had

[1] For wide-ranging examples, see the extensive literature cited in Balleisen (2010).

[2] I give the institutional evolution of the BBBs close attention in a recent book (Balleisen, 2017). This essay draws heavily on the research for that volume, as well as a related 2009 article (Balleisen, 2009). Here I offer a more synoptic assessment of the BBBs' history in light of the core questions driving this comparative special issue.

to build and then maintain a base of support among the business community. The most important imperative here was to attract funding from a sufficient cohort of entrenched firms, but the Bureaus also needed to cultivate a reputation for trustworthiness among a wider set of enterprises. Second, the BBBs sought to gain the trust of legislators and regulatory officials, not only as an important stakeholder deserving of respect in policy discussions, but also as a partner in rule-making, dissemination of norms, and enforcement of those standards. Finally, the Bureaus wished to earn and keep the trust of consumers and investors as vital arbiters of fair dealing in the American marketplace. The strategies of legitimation fashioned by the BBBs varied depending on the audience. In addition, BBB approaches to the challenges of legitimation also shifted, sometimes quite dramatically, with transformations in the wider socioeconomic, political, and policy environment.

The history of the BBBs, then, has involved multifaceted, changing modes of legitimation. No doubt the tangled threads in this narrative reflect the distinctive characteristics of the BBB network. The work of these private regulatory bodies ranged across much of the economy (rather than involving just one industry or sector, as is the case for many self-regulatory entities), and did not occur on the basis of explicit delegation of authority from the state (unlike, for example, the National Association of Securities Dealers, now known as the Financial Industry Regulatory Authority). The BBB network also occurred mostly within the confines of a single nation (though some Bureaus operated in some Canadian cities as well as in the United States). Nonetheless, I suspect that this case study also has more general implications for understanding the dilemmas faced by modern self-regulatory bodies that seek to forge positive reputations, whether for competence, fairness, democratic character, or effectiveness. No matter how durable the legitimacy of a given regulatory institution may seem at a given moment with a given constituency, wider socio-economic, cultural, and political shifts can recast the pressures bearing down on that institution, and hence its strategies of legitimation. In addition, there often will be trade-offs among legitimation strategies targeted at separate constituencies with different interests and points of view. That is, a successful campaign of legitimation with one stakeholder may, over time, risk de-legitimation with other stakeholders.[3] By the same token, a private regulator that can lay claim to some effectiveness may, over time, lose sight of some of the sources of that regulatory success.

This essay first offers a brief sketch of the history of the BBB network, divided into three main periods—a founding era, from 1912 to 1933; a period of accommodation with a more assertive public sector, from 1933 through the early 1970s; and a period of reenergized conservatism, from the mid 1970s to the present. After this historical overview, the article considers the evolving strategies of legitimation adopted by this important institution of American business self-regulation. Leaders within all regulatory institutions, indeed leaders within all policy institutions, have to pay at least some attention to reputational considerations. But this imperative takes on distinctive dimensions for private regulatory institutions that lack the color of state authority.

2. Origins

The American Truth-in-Advertising movement represented, in part, a collective search for respectability and social standing. From the 1850s into the early twentieth century, advertising agencies, newspapers, and magazines had depended on patent medicine advertisements for a significant share of income, and those ads notoriously made outlandish claims of miraculous impacts (Young, 1961). Even when advertising agencies attracted business from a wider set of products, their advertisements often embraced manipulative or deceptive tactics. As a result, advertising executives confronted negative stereotypes that depicted them as shady operators who lacked scruples. At the same time, some upscale marketers concluded that the prevalence of misleading claims in advertising copy had generated widespread public skepticism about advertising in general, reducing its capacity to move consumers to buy.[4] For a cluster of advertising managers in more established agencies and corporate managers responsible for marketing, these concerns justified collective action to rein in the worst kinds of duplicity in the American marketplace.

The first efforts took place within Midwestern cities, beginning in Minneapolis, and then spread to urban centers around the country. In addition to organizing local "vigilance committees" devoted to an ideology of truthfulness in commercial speech, early leaders lobbied for new state laws that made false advertising a criminal misdemeanor. The biggest focus of these new urban organizations was on retail marketing practices. But in New York City, Boston, and other large eastern cities, the BBB (as they came to be called by the early 1920s) also targeted sales of unlisted securities (that is, investment vehicles not listed on one of the country's established stock exchanges).[5]

From the outset, the most important strategy of the BBBs was to educate consumers and investors so that they could sidestep bad deals and outright scams. The Bureaus churned out educational pamphlets, deputized spokespersons to speak to community organizations and write articles for city newspapers, and placed cautionary ads all over urban America. Alongside this strategy of pre-

[3] For a magisterial example of how the organizational reputation of a regulatory body can shift over time, see Carpenter (2010).
[4] Scholars such as Fox (1984); Marchand (1986); Lears, (1994); and Stole (2006) have probed the cultural debates prompted by these developments, which included intensifying attacks against advertising for claims that were exaggerated, misleading, or false.
[5] For a wide-ranging history/memoir of the early Truth-in-Advertising movement, see Kenner (1936).

vention, BBBs established mechanisms to monitor marketing practices. Every BBB encouraged local residents to bring it complaints of unfair or unscrupulous sales tactics, and also surveyed local ads, and then sent out employees to see whether businesses lived up to their advertised promises. If a Bureau found evidence of deceptive selling, it would contact the business in question to seek redress. Should a firm refused to engage with BBB officials, they would publicize the incident in its publications (what scholars of business regulation would now call a strategy of "shaming") and even suggest that media outlets refuse its advertising business (a form of "shunning") (Gunningham & Rees, 1997; King & Lennox, 2000; Porter & Ronit, 2006).

Such ambitious self-regulatory efforts soon outstripped the capacity of volunteers, leading the BBBs to create full-time professional staffs within a few years of their creation, funded by membership dues from local businesses.[6] By the end of the 1920s, the BBB network had more employees than the United States Federal Trade Commission (FTC), which was responsible not only for regulating deceptive marketing in interstate commerce, but also the oversight of antitrust law. The Bureaus had also established a continental association, the National Better Business Bureau, to share intelligence and organizational strategies among local organizations.

3. The BBBs amid a Consolidating Regulatory State

During the 1910s and 1920s, the BBBs cultivated close relationships with the American state at every jurisdictional level. In addition to lobbying for tighter legal prohibitions against deceptive marketing, including state-level criminal prohibitions against false advertising, the Bureaus worked closely with trade associations and the FTC to draft sectoral "trade practice rules". These compilations laid out detailed standards for business communication in scores of specific industries. The BBBs further built strong links to local, state, and federal prosecutors. If established businesses engaged in duplicitous marketing and ignored BBB efforts to convince them to change their ways, or if firms embraced outright swindles, BBB officials did not hesitate to refer cases to the criminal justice system. Such referrals occurred roughly once for every one hundred BBB investigations. In this initial phase, the BBBs more often than not defined the course of anti-fraud policies (Balleisen, 2009).

The emergence of New Deal policies and institutions as responses to the Great Depression, and then the extension of consumer-protection measures in the post-World War II decades, moved American anti-fraud policies away from the nineteenth-century preference for a logic of *caveat emptor* (let the buyer beware), and toward a logic of *caveat venditor* (let the seller beware.) In the process, these policies curbed the Bureaus' capacity to influence the broad direction of anti-deception regulation. Confronting far more vigorous regulatory muscle-flexing by American governments from the 1930s to the 1970s, Bureau leaders mostly adopted a stance of accommodation. That is, they accepted the general trend, while attempting to shape its specific implications.

In the policing of fraudulent investments and deceptive marketing or trading of securities, the BBBs gave way before a new regulatory complex that was centered on the new national Securities & Exchange Commission, but also incorporated a panoply of other self-regulatory bodies (stock exchanges, professional organizations of auditors and accountants, and the new National Association of Securities Dealers). In other domains, like deceptive retail marketing, the BBBs looked to deepen their engagement with public authorities. Scores of BBB officials participated in the sectoral code authorities established by the Roosevelt Administration's short-lived National Recovery Administration, helping to define and enforce public instantiations of trade practice rules (Chicago Tribune, 1933; New York City Better Business Bureau, 1933). For a quarter century after the Supreme Court struck down the NRA as unconstitutional, BBB leaders continued to collaborate with trade associations and the FTC. Together, business associations, the BBBs, and FTC officials convened sectoral trade practice conferences and drafted voluntary sectoral fair practice standards, which despite their voluntary nature guided FTC enforcement of its general prohibitions against deceptive business practices in interstate trade (FTC, 1958, 1959; The Yale Law Journal, 1953).

From the late 1950s through the middle 1970s, state and local governments increasingly challenged BBBs as champions of consumer protection in local markets. Across the country, city councils, metropolitan counties, and state legislatures passed a raft of ordinances and law that tightened restrictions on deceptive or fraudulent marketing. State and local authorities further created new consumer protection agencies that had responsibilities like those of the BBBs. That is, the new consumer protection bureaus invested heavily in public education, monitored marketplaces, served as complaint clearinghouses, and engaged in informal mediation between disgruntled consumers and retail firms.[7]

Even though these state bodies directly competed with BBBs for the attention and loyalty of urban consumers, most BBB officials settled on a strategy of cooperation, viewing any other stance as asking for public condemnation in an era of growing consumer activism. These leaders had begun their BBB careers during the Great Depression or in World War II. While they retained a fervent belief in the importance of business self-regulation, they had grown accustomed to more expansive state efforts at investor and consumer protection, and saw little value in challenging the direction of public

[6] An early annual report from the Boston Better Business Commission (as the local BBB branch initially called itself) offers a particularly extensive overview of early BBB philosophy and strategy (The Boston Better Business Commission, 1922).

[7] For a concise overview of these developments, see Bruns (1974).

policy.[8] Indeed, toward the end of this period, the BBBs sometimes emulated public consumer-protection institutions, nowhere more so than in the decision of many Bureaus during the late 1960s and early 1970s to create branch offices in inner city neighborhoods, bringing BBB education initiatives and consumer services to previously ignored communities.

4. A Conservative Pivot

Beginning in the mid-1960s, however, a growing number of younger BBB officials, especially from Sun Belt cities like Atlanta, Houston, and Phoenix, chafed under the longstanding BBB stance of accommodation. These individuals were influenced by experiences in corporate America and their region's renewed conservatism, rather than decades-long acculturation with the realities of expanded regulatory power. Aligning themselves with the growing critics of regulatory overreach, they voiced opposition to frequent, cozy interactions between BBB officials and public regulators. As one Atlanta BBB leader put it in 1965:

> We in Atlanta have long ago decided that our local problems can be best be handled on a local basis and without the assistance of the FTC, SEC,…Food and Drug Administration, or whatever….We do not receive one dime from the government and don't want any of their money. By the same token, we don't want any of their publicity. We are supposed to speak for business….Our conversations should be business conversations, and our files should be business files, and our information should be business information, and our reports should be business reports, and our standards should be business standards….If we are to play cops and robbers, then I think we should change the misnomer we call a slogan, "Private Enterprise In the Public's Interest", to "Business Supported Agencies for the Purpose of Squealing on Business".

In addition to calling for reinvigorated connections to corporate America, the conservatives also argued that the BBBs needed to develop a more sustainable business plan. The latter stance included support for allowing individual businesses that joined a local BBB to advertise that fact, something that the Bureaus had refused to do for more than a half-century.[9]

As economic stagnation in the 1970s gave a boost to conservative politics and policies, such views gained more purchase within the BBBs. Over the course of the 1980s and 1990s, the BBBs invested far less in public education, though they did build out an early presence on the internet. In the early 1980s, the national umbrella organization declared that local BBBs could allow businesses to communicate their membership through a BBB symbol on storefronts and via advertisements. Local BBBs also became far less likely to refer businesses to regulatory agencies or criminal prosecutors. During the 1990s and 2000s and at the behest of retailers who wanted a means of deflecting consumer complaints, most BBBs began to offer formal arbitration as a means of settling consumer disputes. The Bureaus further instituted a grading system for businesses (from A to F, as with marks in American education), a move that has occasioned allegations that the BBBs offer excellent grades to members regardless of their business practices, and give poor marks to many non-member businesses, again regardless of their record of complaints and adjustments (Ambrose, 2009; Belkin, 1984; Los Angeles Sentinel, 1979; Oldenburg, 1997). On the whole, the BBB network moved closer in its mission and organizational culture to the interests of those businesses who provided it with funding.

5. Patterns of Legitimization and De-Legitimization

This historical overview provides essential context for any attempt to reflect on shifting practices of legitimation during the more than one hundred years that the BBBs have been a part of anti-deception regulation in the United States. Since its inception, the BBB movement has been obsessed with questions of legitimacy. But one must take care to distinguish three separate constituencies through which BBB leaders have sought to establish and sustain reputation and authority: the business community; the state; and the wider investing and consuming public. The balance of concern for these stakeholders has shifted greatly across the past century, as have the strategies and tactics that BBB officials have pursued in either creating or sustaining their legitimacy with one or another of the three groups.

In the BBB's founding era, organizational leaders wished to improve the standing of marketers in general, and advertising agencies in particular. This goal required that they convince a critical mass of the business community to accept the principles of "truth in advertising", not just in the abstract, but through financial contributions that would support a robust bureaucratic infrastructure and through acceptance of BBB authority to determine what counted as deceptive marketing. In part, early BBB officials gained traction within the business community through sustained efforts at moral suasion. Drawing on the culture and values of evangelical Protestant Christianity, BBB leaders exhorted corporate executives and small business-owners to live up to a higher creed than the relentless pursuit of short-term profit. Rituals and good fellowship at local meetings and national conferences proved to be crucial elements of these efforts at

[8] W. Dan Bell, the head of the Denver Better Business Bureau for more than two decades after World War II, exemplified BBB professionalism. See his extensive papers at the Denver Public Library.

[9] James Stephens to Dan Berry, Jr., August 26, 1965; Dan Berry, Jr., "There Are Termites in the Basement," August 30, 1965, both in W. Dan Bell Papers, Denver Public Library.

community organizing. So too did arguments that even the best-intentioned firms could benefit from checks and balances on their day to day practices. Some department store executives welcomed the development of BBB ad monitoring, on the grounds that it would curb any deceptive or manipulative selling practices that might be fostered by commission-based compensation frameworks (Accuracy, 1925; Balleisen, 2009).

The BBBs further appealed to the aversion that many businessmen had to expansive exercise of state power, a key theme in scholarly accounts of the circumstances that foster the creation of self-regulatory institutions (Balleisen & Eisner, 2009). BBB standard-setting, monitoring, and informal modes of enforcement—all conceptualized as business "home rule"—offered the prospect of staving off the expansion of more intrusive state-based investor and consumer protection regulations. This line of argument was also attractive to Republican elected officials such as Presidents Calvin Coolidge and Herbert Hoover, who shared a strong skepticism of expansive state bureaucracy, preferring public coordination of self-regulatory organizations (Accuracy, 1926; Hawley, 1981; New York Times, 1930).

A further source of legitimacy for the early BBB network involved perceived regulatory effectiveness, which mattered not only to businesses, but also to public officials, investors, and consumers. Through the 1920s, the BBBs took every opportunity to burnish their credentials as inveterate opponents of marketplace deceptions and as institutions with technocratic expertise in rooting them out. In addition to developing vigorous campaigns of public education, BBB leaders pushed their activities into the public spotlight at every opportunity, relying heavily on close relationships with urban newspapers and national magazines. In hundreds of articles published across the country, the consistent message was that the BBBs had quickly learned how to: convene standard-setting deliberations about fair business practices within specific sectors; build out monitoring mechanisms for urban marketplaces (which depended on corps of female shoppers who would check on whether firms lived up to their promises in advertisements); and deftly mediate complaints that consumers and investors had against retail firms. All of this expertise, moreover, ostensibly rested on the capacity of BBBs to act quickly, informally, and at much lower cost than governmental agencies.[10]

A 1937 cartoon that appeared in the *Cleveland Plain Dealer* (Figure 1) nicely conveys the BBB's the message of effectiveness. The artist depicts the organization as a beneficent sun, which disinfects the urban marketplace through its powerful rays of actionable information about business practices. Recognizing how difficult the city's environment has become for deceptive salesmanship, a "Business Faker", sweating profusely from the power of anti-fraud light and heat, turns tail and heads elsewhere in search of easier marks.

Figure 1. Depicting the ostensible impact of BBB anti-fraud work. Source: Cleveland Plain Dealer (1937).

There were scattered dissenters to such rosy depictions of BBB regulatory undertakings. Retailers and stock promoters whose business practices received condemnations from the BBBs lambasted them as unelected busybodies whose surveillance methods and coercive threats of public shaming lacked a shred of legitimacy, especially in a society that valued fairness and due process. For these critics, the BBBs constituted a protection racket, extracting membership dues from businesses as the price of not facing BBB ire, and insulating entrenched firms from competition. Indeed, some businesses on the receiving of negative publicity from a Bureau went so far as to sue the organization for libel (Justia, 2016; Riegel, 1931; O'Sullivan, 1933; The Lance, 1933).

Despite such criticisms and occasional legal attacks, urban populations and governing elites both quickly came to see the BBBs as valuable institutions. By the late 1920s, BBBs annually attracted tens of thousands of inquiries and complaints from consumers and investors who wanted information about a business or assistance with a grievance. The network enjoyed financial support from the largest department stores, smaller retailers, and the nation's investment banks. They had forged close links to urban district attorneys, some state attorneys general, and federal officials at the FTC. The BBB network had, in other words, gained significant institutional legitimacy. Outcomes in defamation suits against local Bureaus reflected this level of esteem, as state and federal courts routinely ruled in their favor (The Boston BBB Bulletin, 1929).

[10] Kenner's *The Fight for Truth in Advertising* discusses each of these features of BBB strategy and tactics at great length.

During the New Deal, World War II, and post-World War II decades, the BBBs confronted a series of new political, legal, and economic realities that encouraged reorientation of its strategies of legitimation. The organization continued to stress the efficiencies of its self-regulatory practices, as well as the extent to which most businesses accorded them respect. But it added new twists, such as a more sustained linkage of its activities and ethos to American anti-communism. BBB leaders additionally emphasized, more so than in their first two decades, that they possessed a degree of independence from the corporations, partnerships, and proprietorships that floated their operations. They described themselves as the "umpires of American business advertising", likening themselves to dispassionate sports referees who ensured a level playing field for vigorous capitalist competition.[11]

The mid-century BBBs, moreover, had to cope with a much more assertive regulatory state. Where possible, BBB leaders looked for ways to meld their own operations with those of regulatory agencies, as with the short-lived code authorities of the Depression-era National Recovery Administration, or the FTC's prioritization of regulatory campaigns against bait and switch advertising and fictitious pricing tactics in the late 1950s. Where necessary, they ceded ground, as with securities regulation, which the BBBs left to the SEC and financial industry self-regulatory bodies. At all points, they worked to sustain operational integration with regulatory institutions at every jurisdictional level of government. That goal depended on the cultivation of ongoing relationships with regulatory officials, whether through discussions about rule-making and priorities for enforcement activities, or through information sharing.[12]

On the whole, the BBBs retained considerable standing throughout these decades. Amid remarkable postwar prosperity, businesses continued to fund BBB operations. Indeed, the BBBs expanded coverage not only to more than a score of new cities in the 1950s and 1960s, but also to suburban neighborhoods through the opening of new branch offices. The urban public continued to rely on BBB services, with annual inquiries and complaints reaching into the millions. National political leaders, including every President from Roosevelt through Nixon, publicly commended the BBBs as a vital element in the nation's anti-fraud/deception infrastructure.[13]

Moreover, the BBBs in this era were at least occasionally willing to scrutinize the marketing practices of larger corporations as well as smaller firms. From 1966 through 1968, for example, BBBs around the country coordinated a multi-year investigation of bait and switch tactics at many Sears department stores, one of the country's most powerful corporations. After consumers were lured into Sears stores by ads detailing low prices for durable consumer goods like vacuum cleaners, salespersons would try to convince them to purchase a more expensive product. BBB officials around the country consistently brought such behavior to the attention of Sears' executives in their communities, who repeatedly apologized, offered to adjust the concerns of any disgruntled customers, and pledged to clamp down on such selling practices.[14]

Nonetheless, challenges to BBB legitimacy intensified from the 1950s onwards. Although many national corporations and entrenched local businesses remained committed to BBB work during this era, a growing number of firms issued complaints about the lack of due process in BBB enforcement efforts. This concern had emerged as early as the 1920s, when the New York City department store Macy's faced a BBB demand that it drop its claim that it offered the lowest prices in the city, since its goods periodically were undercut by competitors. After a long negotiation, Macy's resigned from BBB membership rather than cede a degree of control over its marketing (The New York Better Business Bureau, 1926). During the post-World War II decades, worries about procedural fairness were sharpened by legal reforms in public regulation. Most notably, the 1946 Administrative Procedure Act (APA), enacted at the behest of business interests, imposed far more stringent standards of procedural fairness in administrative enforcement actions undertaken by federal regulatory agencies (Grisinger, 2012).

Several BBBs responded to the new focus on due process by emulating aspects of the APA. These Bureaus established local review boards that would entertain appeals from businesses who objected to BBB determinations that their advertising or other business practices were deceptive. These boards would hold hearings in which firms would enjoy many procedural rights, such as the right to be represented by an attorney, and the right to see evidence compiled against them. In the early 1970s, the national BBB followed suit, creating a review board related to its monitoring of nationwide broadcast and magazine advertising. But these efforts at solidifying legitimacy with some businesses came with costs. To the extent that procedural protections delayed quick regulatory action (such as publicizing BBB determinations of deceptive practices), it limited regulatory effectiveness. In addition, the Federal Trade Commission ruled that the BBBs had to be careful in structuring any ap-

[11] Kenneth Barnard to Clyde Kemery, March 23, 1960, Box 6, Folder 1, Better Business Bureau of Metropolitan Chicago Records, Chicago History Museum.

[12] The records of the Chicago Better Business Bureau, held by the Chicago History Museum, furnish especially detailed evidence about the degree of cooperation between BBB representatives and regulatory officials in the states and federal government. See for example the letters, pamphlets, and internal memos in Box 15, Folder 2, concerning relations between the Chicago BBB and the new Illinois Consumer Fraud Bureau in the early 1960s.

[13] For an overview of post-World War II growth in BBBs, as well as the endorsements provided by Presidents Truman, Eisenhower, and Kennedy, see *Facts You Should Know about Your Better Business Bureau: Public Service of Private Business in the Public Interest* (circa early 1960s), Box 9, Folder 2, BBB of Metropolitan Chicago Records, Chicago History Museum; Changing Times (1965).

[14] See the set of letters and memos on the Sears investigation in Box 209, Folder 4, Better Business Bureau of Metropolitan of Chicago; and correspondence among BBB officials across the country about the Sears issue in Box 1, W. Dan Bell Papers, Denver Public Library.

peals processes and enforcement actions, since compulsory sanctions would violate the FTC's regulatory jurisdiction (Albuquerque Journal, 1966; FTC, 1966; Van Cise, 1966; Zanot, 1979).

The BBB network also came under increasing fire during the late 1960s and early 1970s for not sufficiently expanding capacity to be able to keep track of the consumer marketplace, or to handle a crush of complaints encouraged by the growth of organized consumerism. Staff at individual bureaus struggled to keep files about local businesses up-to-date; they even struggled to answer the unending stream of phone calls that bombarded BBB offices. The urban riots of the 1960s further placed a media spotlight on pervasive consumer frauds and rip-offs in poor urban neighborhoods, which the BBBs had largely ignored. All of these critiques received a thorough airing through an investigative report commissioned by a New York City congressman, Benjamin Rosenthal, in the early 1970s (Congressional Record, 1971).

Institutional responses to erosion in popular legitimacy took two opposing tacks. Some local BBBs, such as the one in New York City, calculated that they had to make further concessions to the consumer movement, and looked to hire new leaders from its ranks, as well as to invest more heavily in consumer outreach (Cerra, 1978). But especially in the Sun Belt, BBBs tilted toward the preferences of the more conservative, business-focused leaders who had begun to assume positions of authority. Their concern rested more on the need to retain legitimacy in the eyes of the corporations and local enterprises who supplied the fees that allows the BBBs to function. Even in a city like Chicago, leadership transitions could dampen ardor for taking on the big boys. Despite the extensive evidence that the Chicago BBB compiled about the deceptive selling techniques of Sears' employees, the Bureau shied away from publicly challenging Sears; sterner action against bait and switch selling at the retailer only occurred some years later, in 1976, when the Federal Trade Commission publicly cited the firm for deceptive selling practices (Wall Street Journal, 1976).[15]

As noted above, the inclination to reestablish tighter relations with the business establishment became more and more powerful in the subsequent four decades. This impulse drove the decisions to allow firms to display their BBB membership, to shy away from close cooperation with government consumer protection officials, and then to issue public grades of businesses as a means to bolster their supposed good reputation. Confronting a resurgent conservativism in large swaths of the business community, and a wider political turn toward deregulation and the older ethos of *caveat emptor*, the BBBs worried less about their standing with government officials and consumers, and more about their standing with private sector funders. The imperatives of epistemic legitimacy (showing government agencies and citizens that BBBs had expertise in keeping abreast of prevalent frauds and assisting public regulators in constraining them) accordingly diminished. So too did concern about the demonstration of professional autonomy. By contrast, attention to procedural legitimacy within local business communities expanded, as signified by the heavy investment that BBBs put into arbitration services.

Public reputation ebbed as a result of these intersecting shifts. As late as the 1960s, the BBB network could lay claim to considerable legitimacy from each of its three main constituencies (business leaders, government regulators, and the wider public, particularly in urban America, where they established their operations). Most Americans who lived in metropolitan areas knew about the BBB network; indeed a Roper public opinion survey in 1967 found that 81% of Americans were familiar with it, despite its thin reach into small towns and rural areas (National Better Business Bureau Bulletin, 1967). Governmental regulators also mostly continued to view the BBBs as key partners in regulating the truthfulness of commercial speech. Even as late as 1975, one could encounter an editorial cartoon in a major newspaper like the *Chicago Tribune* that implicitly characterized the BBBs as effective policemen of the advertising world. In this case (figure 2), a surgeon coming out of an operating theatre sees a headline suggesting that the longstanding prohibition on advertising by doctors might be coming to an end. His response, that he has no intention to "mess with the Better Business Bureau", communicated that the BBBs still enjoyed a reputation as powerful monitors whom businesses were bound to respect.

By the 2000s, however, far fewer Americans had a clear sense of the BBBs purpose or impact, and there was much less confidence that it would assist in mediating consumer complaints. Indeed, the BBBs began to confront regular, stinging criticism from a slew of consumer websites, as well as negative press coverage. The most recent critiques allege that the organization operates less as a regulatory institution and more as a means of bucking up the reputation of businesses that engage in the sort of commercial behavior that prompted creation of the BBBs more than a century ago.[16] In these accounts, the BBBs had chosen to emulate the common tropes of self-regulatory organization as smoke screen or window dressing, as a means of appearing to rein in business, without actually doing so (Coombs & Holladay, 2011).

The evolution of American BBBs suggests the analytical pay-off of tracing modes of private regulatory governance over the long term. Whether those modes involve industry associations, third-party Non-Governmental Organizations and private auditors, or self-regulatory units within businesses themselves, the challenges of legitimatizing regulatory authority almost always involve multiple constituencies. Private regulatory institutions may view those constituencies as equally important or of varying importance; they may adopt strategies of legitimation that cut across these groups, or tailor strate-

[15] Report on Sears, Roebuck, October 1974, Box 209, Folder 5, Records of the Better Business Bureau of Metropolitan Chicago.
[16] See for example, Roos (2008); Tuttle (2013).

Figure 2. The BBB as still powerful advertising gatekeeper. Source: Chicago Tribune (1975).

gies to specific ones. And their calculations invariably change with shifting political fortunes, economic pressures, and socio-cultural realities. One potential dynamic worth keeping in mind is institutional amnesia, especially over generational time frames. The early BBBs fostered extensive professionalization among its leaders, as well as an *esprit de corps* that insulated it at least partly from the views and preferences of its corporate and smaller business sponsors. As those early cohorts of officialdom retired, however, the organizations proved more amenable to a redirection of purpose, along with an associated redirection of legitimation strategies.

The long-term history of the American Truth-in-Advertising movement also suggests that the individuals responsible for directing non-governmental modes of regulation remain attuned to wider currents of trust (or skepticism) in the organs of state power. As popular faith in American government waxed during the middle third of the twentieth century, the BBBs adopted strategies and public justifications predicated more on co-regulation than self-regulation, with greater acceptance of policy direction from the state. As popular faith in American government waned during the final quarter of the twentieth-century, the BBB network's practice, ethos, and presentation rejected co-regulation as the most appropriate frame for regulating candor in the marketplace.

A third implication of this organizational history concerns the potential for, and perhaps the likelihood of, trade-offs in the pursuit of institutional reputation. For roughly a half-century after their founding, the BBBs managed to build legitimacy with each of their major stakeholders—the business community, the state, and the wider public. But as differences in the perspective and interests of these constituencies widened in the 1970s, BBB leaders found that steps to sustain or deepen standing with one of these groups risked undermining legitimacy with others. Thus the turn to curry favor with businesses in the 1980s and 1990s eventually undercut popular faith in BBB's independence and commitment to consumer interests.

One can only discern such patterns and turning points by taking the long view—that is, by reconstructing the historical evolution of private regulatory bodies. An obvious next step would be to compare the dynamics of legitimation at the BBBs with other longstanding self-regulatory entities, to assess how much the BBB story reflects a common trajectory for modern self-regulatory institutions. In the American case, some obvious points of comparison would be stock and commodity exchanges, accrediting bodies for the professions, Underwriters' Laboratory, which sets safety standards for consumer products, and sectoral organizations such as the Institute of Nuclear Power Operators and the Motion Picture Association.[17] There are, of course, numerous analogues in other societies, as well as international self-regulatory bodies. Many of the former, like European Chambers of Commerce, have much longer histories than the BBBs (Bennett, 2011). Some of the latter, like the International Standards Organization, have existed for roughly the same amount of time. (Murphy & Yates, 2009). Others are more recent creations. The intensification of globalization over the last four decades has encouraged the creation of myriad international third-party mechanisms of regulatory governance, especially within the domains of environmental and labor standards, though many of these bodies have staked out ground that emphasizes

[17] For an overview of many of these institutions, along with citations to a wide social science literature on them, see Balleisen (2014).
[18] For entry points into a voluminous scholarship, see: Bartley (2007); Vogel (2010).

a lack of dependence on businesses and trade associations.[18] A collection of historical case studies, both within and across national boundaries, will be crucial to identify more general patterns in attempts to legitimate private regulation, as well as the impacts and ironies of those efforts.

Acknowledgements

The author would like to thank research assistants Caroline Wang and Anna Johns for their help with preparing this essay. I have received excellent feedback on earlier drafts from two anonymous peer reviewers and the participants in the workshop on "The Legitimization of Private and Public–Private Regulation: Past and Present" at the Max Planck Institute for European Legal History. The research underpinning my analysis has been supported by the American Council of Learned Societies, the National Humanities Center, the Tobin Project, Harvard Business School, and Duke University.

Conflict of Interests

The author declares no conflict of interests.

References

Accuracy. (1925, September). Department store has accuracy meeting. *Accuracy*, p. 1.

Accuracy. (1926, November). President Coolidge on truth-in advertising. *Accuracy*, p. 7.

Adams, S. A. (1908). The solving of the milk problem: How Copenhagen has established the feasibility of a pure and healthful supply. *McClure's*, *32*, 200–207.

Albuquerque Journal. (1966, January 6). Ad club group studies forming review board. *Albuquerque Journal*.

Ambrose, E. (2009, March 10). BBB starts using letter grades. *Baltimore Sun*.

Balleisen, E. (2009). Private cops on the fraud beat: The limits of American business self-regulation, 1895–1932. *Business History Review*, *83*(1), 113–160.

Balleisen, E. (2010). The prospects for effective coregulation in the United States: A historian's view from the early twenty-first century. In E. Balleisen & D. Moss (Eds.), *Government and markets: Toward a new theory of regulation* (pp. 443–481). New York, NY: Cambridge University Press.

Balleisen, E. (2014). Rights of way, red flags, and safety valves: Regulated business self-regulation in the America, 1850–1940. In P. Collin, G. Bender, S. Ruppert, M. Seckelmann, & M. Stolleis (Eds.), *Regulierte selbstregulierung in der weslichen welt des späten 19. und frühen 20. Jahrhunderts/Regulated self-regulation in the western world in the late 19th and early 20th century* (pp. 75–127). Frankfurt: Vittorio Klostermann.

Balleisen, E. (2017). *Fraud: An American history from Barnum to Madoff*. Princeton, NJ: Princeton University Press.

Balleisen, E., & Eisner, M. (2009). The promise and pitfalls of co-regulation: How governments can draw on private governance for public purpose. In D. Moss & J. Cisternino (Eds.), *New perspectives on regulation* (pp. 127–150). Cambridge: The Tobin Project.

Bartley, T. (2007). Institutional emergence in an era of globalization: The rise of transnational private regulation of labor and environmental conditions. *American Journal of Sociology*, *113*(2), 297–351.

Belkin, L. (1984, May 31). Arbitration plan gains. *New York Times*.

Bennett, R. J. (2011). *Local business voice: The history of chambers of commerce in Britain, Ireland, and revolutionary America, 1760–2011*. Oxford: Oxford University Press.

Boston Better Business Commission. (1922). *The Boston Better Business Commission*. Boston: Boston Better Business Commission.

Bruns, W. (1974). The role of state and local consumer protection agencies in advertising regulation. In F. Stuart (Ed.), *Consumer protection from deceptive advertising* (pp. 26–40). Hempstead, NY: Hofstra University Press.

Carpenter, D. (2010). *Reputation and power: Organizational image and pharmaceutical regulation at the FDA*. Princeton, NJ: Princeton University Press.

Carson, J. W. (2011). *Self-regulation in securities markets* (Working Paper no. 5542). Washington, DC: World Bank.

Cerra, F. (1978, January 8). New Better Business Bureau chief is consumer oriented. *New York Times*.

Changing Times. (1965, October). What is a Better Business Bureau anyhow? *Changing Times*, pp. 17–19.

Chicago Tribune. (1933, December 4). Better Business Bureau will act as NRA meditator. *Chicago Tribune*.

Congressional Record. (1971, December). Report on the Better Business Bureaus. *Congressional Record*, *111*, 47781–47795.

Coombs, T., & Holladay, S. (2011). Self-regulatory discourse: Corrective or quiescent? *Management Communication Quarterly*, *25*, 494–510.

De Moor, T. (2008). The silent revolution: A new perspective on the emergence of commons, guilds, and other forms of corporate collective action in Western Europe. *International Review of Social History*, *53*(16), 179–212.

Federal Trade Commission. (1958). *Guide against deceptive pricing*. Washington, DC: Federal Trade Commission.

Federal Trade Commission. (1959). *Guide against bait advertising*. Washington, DC: Federal Trade Commission.

Federal Trade Commission. (1966). *Press release*.

Fox, S. (1984). *The mirror makers: A history of advertising and its creators*. New York, NY: Morrow.

Grisinger, J. (2012). *The unwieldy American state: Administrative politics since the new deal*. New York, NY: Cambridge University Press.

Gunningham, N., & Johnstone, R. (1999). *Regulating*

workplace safety: Systems and sanctions. Oxford: Oxford University Press.

Gunningham, N., & Rees, J. (1997). Industry self-regulation: An institutional perspective. *Law & Policy*, *19*(4), 363–414.

Havinga, T. (2006). Private regulation of food safety by supermarkets. *Law & Policy*, *28*(4), 515–533.

Hawley, E. (1981). Three facets of Hooverian associationalism: Lumber, aviation, and movies, 1921–1930. In T. McCraw (Ed.), *Regulation in perspective: Historical essays* (pp. 95–123). Cambridge, MA: Harvard University Press.

Justia. (2016). McCann v. New York Stock Exchange, 107 F.2d 908 (2d Cir. 1939). *Justia*. Retrieved from http://law.justia.com/cases/federal/appellate-courts/F2/107/908/1495396

Kenner, H. J. (1936). *The fight for truth in advertising*. New York, NY: Round Table Press.

King, A., & Lennox, M. (2000). Industry self-regulation without sanctions: The chemical industry's response to responsible care. *Academy of Management Journal*, *43*(4), 701–704.

Lears, J. (1994). *Fables of abundance: A cultural history of advertising in America*. New York, NY: Basic Books.

Los Angeles Sentinel. (1979, October 11). BBB arbitrates repair disputes. *Los Angeles Sentinel*.

Marchand, R. (1986). *Advertising the American dream*. Berkeley, CA: University of California Press.

McCraw, T. K. (1982). With consent of the governed: SEC's formative years. *Journal of Policy Analysis and Management*, *1*(3), 346–370.

Murphy, C., & Yates, J. (2009). *The international organization for standardization (ISO): Global governance through voluntary consensus*. New York, NY: Routledge.

National Better Business Bureau Bulletin. (1967, May). Public awareness of NBBB at high level. *National Better Business Bureau Bulletin*.

New York City Better Business Bureau. (1933). *Helping business and the NRA*. New York, NY: New York City Better Business Bureau.

New York Times. (1930, November 11). President defines sound advertising. *New York Times*.

O'Sullivan, D. (1933). *Rackets: An expose of the methods and practices of the Better Business Bureaus*. Chicago: O'Sullivan Publishing House.

Oldenburg, D. (1997, June 7). BBB new online seal. *Fort Lauderdale Sun Sentinel*.

Porter, T., & Ronit, K. (2006). Self-regulation as policy process: The multiple and criss-crossing stages of private rule-making. *Policy Science*, *39*(1), 59–61.

Riegel, E. (1931). *The indictment of the Better Business Bureau conspiracy*. New York.

Roos, D. (2008). Criticism of Better Business Bureaus. *HowStuffWorks.com*. Retrieved from http://money.howstuffworks.com/better-business-bureau5.htm

Sharma, L. L., Teret, S. P., & Brownell, K. D. (2010). The food industry and self-regulation: Standards to promote success and to avoid public health failures. *American Journal of Public Health*, *100*(2), 240–246.

Stole, I. (2006). *Advertising on trial: Consumer activism and corporate public relations in the 1930s*. Urbana, IL: University of Illinois Press.

The Boston Better Business Commission. (1922). *Annual report*. Boston: The Boston Better Business Commission.

The Boston Better Business Bureau Bulletin. (1929, November 7). No libel action lost. *The Boston Better Business Bureau*.

The Lance. (1933, June). Shoppers as snoopers. *The Lance*, pp. 1, 8.

The New York Better Business Bureau. (1926). *The Record recounting the advertising price claims of R. H. Macy & Company, Inc., and the position of the Better Business Bureau of the New York City, in respect thereto*. New York, NY: The New York Better Business Bureau.

The Yale Law Journal. (1953). Trade rules and trade conferences: The FTC and business attack deceptive practices, unfair competition, and antitrust violations. *Yale Law Journal*, *62*(21), 912–953.

Tuttle, B. (2013). Why the Better Business Bureau should give itself a bad grade. *Time*. Retrieved from http://business.time.com/2013/03/19/why-the-better-business-bureau-should-give-itself-a-bad-grade

Uekoetter, F. (1999). Divergent responses to identical problems: Businessmen and the smoke nuisance in Germany and the United States, 1880–1917. *The Business History Review*, *73*(4), 641–676.

Van Cise, J. (1966). Regulation—By business or government. *Harvard Business Review*, *44*(2), 53–63.

Vogel, D. (2010). The private regulation of global corporate conduct: Achievements and limitations. *Business & Society*, *49*(1), 68–87.

Wall Street Journal. (1976, October). Sears Roebuck consents to order by FTC barring "bait-and-switch" sales tactics. *Wall Street Journal*.

Young, J. H. (1961). *The toadstool millionaires: A social history of patent medicines before federal regulation*. Princeton, NJ: Princeton University Press.

Zanot, E. (1979). *The National Advertising Review Board*. Lexington, KY: Association for Education in Journalism.

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COGITATIO

Politics and Governance (ISSN: 2183–2463)
2017, Volume 5, Issue 1, Pages 54–62
DOI: 10.17645/pag.v5i1.773

Article

Legitimizing Private Actors in Global Governance: From Performance to Performativity

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Submitted: 19 September 2016 | Accepted: 9 December 2016 | Published: 15 March 2017

Abstract
Global governance is frequently criticised because of major legitimacy deficits, including lack of public accountability and democratic control. Within this context, questions about the legitimacy of non-state governance actors, such as non-governmental organizations, transnational corporations and private security companies, are neither an exception nor a surprise. Many actors have, therefore, turned to the measurement of performance, defined as publicly beneficial outcomes, in order to gain legitimacy. However, the rise of performance assessments as legitimizing practice is not without problems. Taking global security and health interventions as examples, this article contends that the immaterial, socially constructed and inherently contested nature of such public goods presents major obstacles for the assessment of performance in terms of observable, measurable and attributable outcomes. Performance is therefore frequently replaced by performativity, i.e. a focus on the repetitive enactment of specific forms of behaviour and capabilities, which are simply equated with the intended results. The implications for how global public goods are conceptualized and, ultimately, implemented are profound.

Keywords
global governance; legitimacy; performance; performance measurement; performativity

Issue
This article is part of the issue "Legitimization of Private and Public Regulation: Past and Present", edited by Klaus Dieter Wolf (Peace Research Institute Frankfurt, Germany), Peter Collin (Max Planck Institute for European Legal History, Germany) and Melanie Coni-Zimmer (Peace Research Institute Frankfurt, Germany).

1. Introduction

Critiques of a legitimacy deficit in global governance have increased in recent years. Not only governments but also non-state actors engaged in global governance have been accused of insufficient public accountability and control (e.g. *Review of International Political Economy*, 2011). Specifically, the delegation of global governance to private actors, such as non-governmental organizations (NGOs), transnational corporations and Private Security Companies (PSCs), has raised questions over the legitimacy of these actors and their growing roles (e.g. Lister, 2003; Østensen, 2011). Private governance actors frequently lack so-called 'input' legitimacy due to their limited accountability, transparency and public participation in organizational decision-making. Many have therefore turned to the measurement of performance, defined as publicly beneficial outcomes, to gain 'output' legitimacy. In fact, performance assessments have emerged as a key standard for legitimacy among state and non-state actors (e.g. Fowler, 1996; Martin & Kettner, 1997; Radin, 2007).

However, the rise of performance measurement as legitimizing practice is not without problems. This article contends that the immaterial, socially constructed and inherently contested nature of some public goods, such as security, health or development, presents major obstacles for performance assessment in terms of observable, measurable and attributable outcomes. Performance is therefore frequently replaced by performativity, i.e. the repetitive enactment of specific forms of behaviour and capabilities, which are simply equated with the intended

outcomes. The implications of this development are considerable. They affect not only the legitimacy but also the conceptualization, implementation and local experiences of global governance interventions. In contrast to other studies which have investigated the use and success of legitimization strategies (Joachim & Schneiker, 2012; Østensen, 2011), this article focuses on the potential consequences (see also Lewis, 2015). Specifically, the following analysis seeks to understand the way in which the performative turn in performance measurement shapes how public goods are conceptualized, and accordingly implemented, in global governance.

While performance assessments are applied across a wide range of global governance actors and fields, this article looks at two examples in particular: security and health. Using the recent international intervention in Afghanistan as an illustration, it observes that private actors have become key agents of global governance. In the field of security governance, the US Department of Defense (DoD) has hired Private Security Companies to support the international peace and stability operation in the country. In the field of health governance, NGOs have received funds from the World Bank, the European Union (EU) and the United States Agency for International Development (USAID) to increase the health of the Afghan population. In both fields, governments and international organizations have employed performance-based contracting and performance measurements to legitimize the delegation of (public) service functions to non-state actors vis-à-vis the Afghan government and population, their own constituencies and donors, or national and international public opinion. They have argued that performance standards help to demonstrate effectiveness, ensure public accountability and generate legitimacy (Sondorp, Palmer, Strong, & Wali, 2009, p. 141). This article aims to show that, despite vast differences between security and health governance, we can observe a shift from performance outcomes to performative acts in both fields—with comparable detrimental consequences for how these public goods are conceptualized and implemented.

2. Legitimacy and Performance Measurement

Legitimacy refers to the generalized perception or assumption that an entity or the actions of an entity are desirable, proper or appropriate within some socially constructed system of norms, values, beliefs and definitions (Suchman, 1995, p. 574). Since legitimacy is frequently contested it is better understood as a social process in which social actors use various strategies to gain, maintain and repair legitimacy (Johnson, Dowd, & Ridgeway, 2006; Suchman, 1995). Legitimization strategies can build on a plethora of measures and resources, including status, authority, participatory institutions, norms, habit and outputs (Johnson et al., 2006; Scharpf, 1998). The theoretical differentiation between input and output legitimacy is important for understanding the popularity of performance assessments.[1]

Fritz Scharpf was the first to make the distinction between input legitimacy and output legitimacy with regard to public policy making. According to Scharpf (1998, p. 2), input legitimacy derives from 'government by the people' meaning that 'collectively binding decisions should originate from the authentic expression of the preferences of the constituency in question'. Output legitimacy, in contrast, results from 'government for the people', i.e. the notion that 'collectively binding decisions should serve the common interest of the constituency' (Scharpf, 1998, p. 2). Since the common interest is difficult to define output legitimacy has been frequently associated with the effectiveness and performance of policies, rules and regulations (Scharpf, 2009, p. 177).

The contemporary popularity of output legitimacy and performance measurements as key standards for global governance can be linked to two historical developments. The first development being the proliferation of transnational policy concerns and the associated functional expansion of international organizations and global governance interventions which frequently lack input legitimacy from local constituencies. It was in the context of European Union studies that Fritz Scharpf proposed his distinction between input and output legitimacy, arguing that the EU should concentrate on output legitimacy because its ability to gain input legitimacy from democratic participation in decision-making was limited by the absence of a united European identity and populace. Demands for improved legitimacy and public accountability have also affected other international organizations, such as the United Nations (UN), the International Monetary Fund, the World Bank and the World Trade Organization (Glenn, 2008; Take, 2012). Not even NGOs have been exempt from critical questions regarding the legitimacy, accountability and transparency of their governance contributions (Lister, 2003). Although some attempts have been made by international organizations to improve their input legitimacy by reforming their voting systems, the decision-making structures of many global governance actors remain biased in favour of a small number of Western member states or donors (Glenn, 2008).

The second development has been the ascent of Neoliberalism and New Public Management (NPM) as international economic and political ideologies. These ideologies have advocated the 'small state' and public outsourcing, arguing that the legitimacy of governmental and non-governmental actors can be best demonstrated by means of regular performance assessments. Jenny

[1] Since legitimacy is a concern in many disciplines there exists no uniform terminology. The terms 'procedural' or 'throughput' legitimacy are sometimes used instead of or as components of input legitimacy, whereas 'substantive' or 'pragmatic' legitimacy also denote output legitimacy (see e.g. Suchman, 1995, p. 579; Wallner, 2008, p. 424). Moral legitimacy which 'reflects a positive normative evaluation of the organization and its activities' (Suchman, 1995, p. 579) is sometimes separated from these forms, while other authors argue that normative assessments are inherent in definitions of input and output legitimacy.

Lewis (2015) traces the politics and consequences of the emergence of performance measurements in detail. She writes, 'Since the 1970s, interest in measuring performance has increased, alongside concerns about public sector expenditure and the advent of NPM. Performance measurement is high on the agenda of governments in many nations, as they seek to demonstrate that the organisations and individuals that they fund and manage, even at one or more steps removed, are doing what they are mandated to do' (Lewis, 2015, p.1)

Over the past three decades, many national, international and non-state actors, including the US government, the World Bank and a multitude of international humanitarian organizations, have thus adopted performance-based contracting and implemented performance measurement systems to provide legitimacy for themselves and for the delegation of governance activities to private actors, such as NGOs and PSCs (Lynch-Cerullo & Cooney, 2011; Radin, 2007; Spar & Dail, 2002). These actors initially defined performance as the cost-efficient provision of public services (Martin & Kettner, 1997, p. 17). However, cost-efficiency has proven difficult to assess and obtain. Since the 1990s, performance measurement has therefore focussed on outcomes as a key measure, rather than cost-efficiency. Common to these systems is the assertion that performance should be assessed in terms of publicly beneficial results, i.e. 'outcomes', and not merely the supply of services, i.e. 'outputs'. In the US, the *Government Performance and Results Act* (1993) was instrumental in introducing results-based performance assessment for US government agencies and contractors. Successive American governments have continued and expanded this practice, including the *Government Performance and Results Modernization Act* (2010) of the Obama administration. Similarly, the World Health Organization ([WHO] 2008, p. 2) states that 'performance measurement seeks to monitor, evaluate and communicate the extent to which various aspects of the health system meet their key objectives….Health relates both to the health outcomes secured after treatment and to the broader health status of the population'.

Despite the popularity of performance measurements across a multitude of governance sectors, ranging from health, development and finance to security, the assessment of results faces many problems and pitfalls. Alan Fowler (1996, pp. 58–59) identifies five problems for results-based performance measurement. Firstly, the greater the number of actors that are interested or involved in the provision of a service, the greater the diversity of views on what is needed and how a service should be supplied. Secondly, external influences and factors distort service outcomes in such a way that results cannot be directly and exclusively attributed to the provision and provider of specific services. Thirdly, 'the time scales over which results can be seen or measured tend to increase when moving from outputs to outcomes and then to impacts' (Fowler, 1996, p. 59). Fourthly, whether a service is relevant and suitable for attaining specific results often rests on general assumptions about linear causal relationships between service inputs and outcomes which contradict the complexity of many issues (Fowler, 1996). Finally, the further one moves from tangible service out*puts* towards out*comes* the greater the role of intangible intervening factors. In sum, the selection and definition of performance targets and indicators is neither simple nor clear.

3. Measuring Security and Health

The problems of performance measurement are exacerbated by the intangible, socially constructed and contested nature of the intended outcomes in many fields of global governance. How do we define and measure security, health or development? Security, for example, can be conceptualized in different ways. The most common understanding of security is as a condition involving a 'low probability of damage' (Baldwin, 1997, p. 13). Another definition of security refers to subjective perceptions of safety or the emotional state of freedom from anxiety (Rothschild, 1995, p. 61).

Each definition suggests different security outcomes and each faces distinct assessment problems. The statistical measurement of security as low probability of harm or damage is the most problematic, despite appearing to be closest to a definition of security as outcome. Probabilities can only be established over a long period, which may go beyond individual contracts. In addition, it appears unrealistic to demand that service providers achieve pre-defined probabilities of damage when many extraneous factors influence the level of security which are not under their control. For the same reason, it is difficult to attribute security outcomes to specific actors. If the frequency of harm decreases, it may be as much due to the interventions of a security provider as an attacker's change of strategy.

The definition and assessment of security in terms of popular perceptions seems to be able to overcome some of these performance assessment problems. It appears possible to measure and set specific targets for public security perceptions, which providers should achieve within the timeframe of their contracts. A government or international organization could, for instance, require that 80% of the local citizens feel safe. To attribute lower levels of anxiety to the provider citizens could also be asked whether and to what degree they believe specific security services, such as guarding and security checks at airports, are effective. The main problem with this definition and measure is that perceptions may vary independently of both security provision and probability of harm. The increased presence of security guards may contribute to feelings of insecurity, instead of alleviating them. Canvassing public opinions on security provider performance can thus lead to assessments that directly contradict those based on a definition of security as low probability of damage.

Similar problems can be observed with regard to the definition and measurement of public health. What is health and how can it be assessed? The WHO has used two divergent conceptualizations of health which mirror those of security (Mathers, Salomon, Murray, & Lopez, 2003; Salomon et al., 2003). One conceptualizes health as average disability adjusted life years (DALYs). Based on statistical data, DALYs define health, or rather the burden of bad health, in terms of 'the sum of the Years of Life Lost (YLL) due to premature mortality in the population and the Years Lost due to Disability (YLD) for people living with the health condition or its consequences' (Mathers et al., 2003, p. 320; WHO, 2016). The second concept defines health in terms of aggregate perceptions of personal 'states or conditions of functioning of the human body and mind', including but not necessarily limited to domains such as vision, hearing, affect, pain, sexual functioning, mobility, dexterity, cognition, digestion, skin and disfigurement, etc. (Salomon et al., 2003, pp. 303, 309). Moreover, the same problems with timeliness, attribution and measurability affect the assessment of health as an outcome of governance interventions, as seen in the case of security. This includes the questions of whether specific health services are indeed effective, whether subjective perceptions of health are supported or undermined by specific interventions and whether general improvements in health are indeed due to the provision of specific health services.

The conceptualization of security and health as activities, capabilities and interventions avoids these problems. These indicators can be immediately observed, quantitatively or qualitatively measured, and exclusively attributed to a single service provider. The literature on security, for instance, has defined security in terms of activities, such as prevention, deterrence, protection, resilience, pre-emption and avoidance (Krahmann, 2008, p. 383, 2011, pp. 368-371). Similarly, the World Bank (2002, p. 5) denotes public health as interventions designed to control and prevent disease, including 'surveillance and control of risks and damages in public health; Management of communicable and non-communicable diseases; Health promotion; Behavior change interventions for disease prevention and control; Social participation and empowerment of citizens in health; Reducing the impact of emergencies and disasters on health'.

To be sure, the definition and assessment of security and health in terms of activities, capabilities and interventions leads to clear and seemingly objective targets. Security and health interventions can easily be specified, e.g. 'carry out security patrols every hour' or 'vaccinate 80% of the population'. However, these tasks represent *outputs* and not *outcomes*. As the next section will argue, they implicitly assume causal connections between activities, capabilities and interventions and the intended outcomes which are socially constructed and vary among socio-cultural contexts. Patrols can sometimes deter threats, while at other times they only displace them in space or time. Vaccination can have unintended side effects or encourage populations to engage in more risky behaviour. In short, the focus on activities, capabilities and interventions replaces 'outcomes' with 'performative acts'.

4. From Performance to Performativity

The notion of 'performativity' and associated 'performative acts' has been developed, among others, by Judith Butler in her analysis of sex and gender. Butler (1988, 1990) argues that gender identities are constituted through repetitive performative acts and not biological or social conditioning. Such repetitive acts range from the daily wearing of corsets in Victorian times to mannerisms. Performative acts shape the material body of the performer so that it conforms to shared ideas of gender and influences the perceptions of the audience with regards to the performer's gender identity. Performative acts do not only create gender, they are also fundamental to the social construction and production of other concepts and entities, such as air space (Williams, 2011). Several authors have analysed how performativity underpins security (e.g. Bialasiewicz et al., 2007; Brassett & Vaughn-Williams, 2015).

The most comprehensive application of the concept of performativity to security can be found in Higate and Henry's (2009, 2010) analysis of UN peacekeeping. Their research illustrates that performative acts produce security outcomes. However, whether and how performative acts influence levels of harm or subjective perceptions of security is by no means pre-determined. Higate and Henry observe two components which influence the 'success' of performative acts in creating perceptions and experiences of security. The first component is the 'choreographed drama' and theatre-like performances, based on the repetitive re-enactment of specific activities (Higate & Henry, 2010, p. 42). Higate and Henry (2009, p. 99) write that 'audiences express perceptions of security and insecurity as they appraise the credibility of security performance played out before them'. The persuasiveness of these performances in the eyes of clients, the public or potential attackers rests on the repetitive enactment of military expertise and prowess in the form of security practices such as drills, patrols and security checks (Higate & Henry, 2009, p. 99).

The second component of security as a performative act is the presentation and use of certain capabilities as 'props' to lend persuasiveness and legitimacy to a security performance (Higate & Henry, 2009, p. 114). In the UN peacekeeping mission in Liberia, Higate and Henry (2009, p. 114—italics in the original) observed that 'equipment was often used as *the* key criterion for security performance and, in turn, the creation of safe space'.

Zaiotti (2011, p. 543) adds a third condition for the productive capabilities of performative acts by arguing that cultural and historical practices influence which activities are associated with certain identities, materialities and experiences. Audiences interpret practices as

contributing to security only if they conform to pre-existing socio-cultural ideas of 'security', activities and capabilities. Performativity works within ideational and normative contexts that 'precede, constrain, and exceed the performer' (Butler, as cited in Zaiotti, 2011, p. 543).

The theory of performativity contributes in two ways to our understanding of what happens when performance measurement focusses on performative acts. Firstly, it suggests that activities, capabilities and interventions are not only selected as performance measures because they are more easily observed and attributed to service providers than the actual outcomes of these performative acts. Rather, it contends that the definition of security and health as performative acts represents a distinct conceptualization which assumes that activities, capabilities and interventions are already what they seek to achieve. As Butler (1990, p. 25) writes "There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results". According to a performative definition, deterrence and protection *mean* security; vaccination and consultations *represent* health. These definitions are not only embraced for practical reasons but also connote a different understanding of security and health as 'outcomes'. Actors who make performative definitions of security and health the basis of their performance assessments thus fail to see the contingent and socially constructed relationship between repetitive performative acts and its material and immaterial effects on security and health.

Secondly and related to the above, the observation that performative acts operate (only) within pre-existing ideas and norms about 'appropriate' security activities or health interventions suggests the possibility of a problematic disconnect between the global governance actors who define performance tasks and the local populations who are the intended beneficiaries of these interventions. The global governance administrators and providers who select specific activities, capabilities and interventions to promote security and health may have little understanding of how these will be interpreted and understood within foreign contexts with serious implications for their effectiveness and legitimacy. Importantly, this observation goes beyond the argument that security and health interventions may have unintended consequences (e.g. Fowler, 1996, p. 59). It highlights instead the socially constructed nature of performance indicators *as well* as the socially constructed nature of local reactions to global security and health interventions. The next two sections illustrate the move from performance to performativity in the cases of private security contracting and NGO health service provision during the global governance intervention in Afghanistan.

5. Private Security Contractors in Afghanistan

Performance arguments have played a central role in justifying the outsourcing of military and security services in global governance to private contractors (Krahmann, 2010; Stanger, 2009). This outsourcing has so far been the most pronounced during the intervention in Afghanistan. Between 2008 and 2012, the number of private security guards contracted with the US DoD increased more than tenfold from 2,745 to 28,686 (CENTCOM, 2014). Disconcertingly, about 90% of security contractors were armed (Schwartz, 2011, p. 2). The DoD has sought to legitimize the outsourcing of security by means of performance targets and measures. The US *Army Handbook Developing a Performance Work Statement* [PWS] *in a Deployed Environment* (US Army, 2009, p. 4; hereafter PWS Handbook) thus praises the benefits of performance measurements, arguing that they ensure that the 'government pays for results, not activity'.

However, the intervention in Afghanistan demonstrates that DoD contracts and assessments usually define security outcomes in terms of performative activities and capabilities. In the minds of contracting officials, these performative acts comply with the 'increased focus on intended results, not processes' because they are equated with outcomes (US Army, 2009, p. 9). Moreover, these performative acts can be assessed in terms of visible, quantifiable and attributable performance indicators. The PWS Handbook (US Army, 2009, p. 22), thus, instructs contracting units to develop performance tasks which meet the SMART test, i.e. they must be specific, measurable, attainable, relevant and timely. In addition, the PWS Handbook (US Army, 2009, p. 26) identifies five methods for monitoring: random sampling, periodic sampling, one hundred percent inspection, trend analysis, and customer feedback. Repetitive performative acts, capabilities or interventions fit all but the last of these methods.

That a performative definition of security is not merely a matter of convenience, but of conviction is illustrated by the way in which the DoD formulates performance tasks for security contractors in Afghanistan. The PWS for Private Security Services at Camp Bravo, Forward Operating Base Heredia in Afghanistan, for example, defines performance tasks either as actions, e.g. 'searching personnel and vehicles' and 'periodic checking of interior perimeter' or as capabilities and equipment, e.g. 'ammunition' and 'AK-47' (CENTCOM, 2012, p. 2). Similarly, the PWS for Counter-Narcoterrorism (CNT) states: 'The Contractor shall provide security and related services in support of CNT and CNT related missions to include, but not limited to, intelligence, medical, logistics, canine services, surveillance, counter surveillance, aerial over watch, security advisory etc'. (DoD, 2007, p. 19). Occasional references to the purpose of performative acts such as to 'deny the introduction of unauthorized weapons or contraband, to prevent theft of US Government Property and to ensure only authorized personnel gain access' imply that the specified tasks refer to results, even if these are not measured by performance assessments (CENTCOM, 2012, p. 2). The demand for a repetitive re-enactment of these security activities and capabilities is

another characteristic of DoD performance tasks which denotes their performative nature. A CENTCOM (2009) solicitation for 'Armed Security Guards/Private Security Providers' in Afghanistan thus requires that 'Contractor(s) must be available 24 hours a day, 7 days a week'.

US Army criteria for evaluating the performance of security contractors serve as further illustrations of the shift from performance outcomes to performative acts (Government Accountability Office [GAO], 2006, p. 25). These criteria measure performance in terms of: 1) activities, such as 'denying access', 'appropriate conduct', 'response to incidents of employee misconduct', 'working with the Army organization', 2) capabilities, such as 'required level of guard coverage' and 'ability to respond to duty changes', and 3) the characteristics of contractors, such as 'responsiveness, alertness, physical fitness, courtesy' and 'proper appearance' (GAO, 2006, p. 25). They refer to only a single result, namely that contractors should contribute to the 'positive image' of the armed forces. Yet, the formulation of these criteria and the use of verbs such as; 'achieve', 'maintain', 'manage' and 'control', suggests that they are believed to represent security outcomes (GAO, 2006, p. 25).

The implications of defining security in terms of performative acts are considerable. Firstly, this definition prevents a critical assessment of the socially constructed effects of performative security acts. Such an assessment includes, but should not be limited to, investigations of whether the activities and capabilities of private security contractors contribute to lowering probabilities of harm or increasing perceptions of security among mission personnel and the local Afghan population. It must be noted that how an audience interprets and reacts to performative acts depends on pre-existing socio-cultural ideas. Actions and contractor characteristics, which in some social situations and environments contribute to lower levels of harm or subjective feelings of security, can lead to increased violence or perceptions of insecurity in others.

Secondly, the definition of security in terms of specific, attainable, measurable, attributable and observable performative acts determines in a very particular way how PSCs have operated in Afghanistan. The Statement of Work for the private security contractor at Camp Bravo (CENTCOM, 2012), for example, stipulates exactly who should be employed ('indigenous personnel'), what kinds of weapons must be used ('M9, M4, M16, or equivalent'), what equipment the contractor must carry (e.g. 'protective body armor, helmets, uniforms, secure communications') and what activities they must carry out (e.g. 'Searching personnel and vehicles entering and leaving the installations', 'Manning Guard Towers, Checkpoints and other static positions 24 hours a day, 7-days a week', 'checking of the interior perimeter defenses'). DoD notions of suitable security performances, thus, shape which activities and capabilities are provided and which are excluded from contracts, performance measurements and implementation strategies, despite potentially beneficial effects for the security perceptions, risk levels and relationships of the mission and host societies.

6. NGOs and Public Heath Care in Afghanistan

Performance measurements have also become important for legitimizing the activities of NGOs in global governance, including the delivery of public health services (Fowler, 1996; Lynch-Cerullo & Clooney, 2011; Spar & Dail, 2002). When in 2002 the new Afghan Ministry of Public Health (MoPH) and major international donors, such as the European Union, USAID and the World Bank, decided to outsource essential health care to NGOs the World Bank emerged as a leading advocate of performance-based contracting to demonstrate effectiveness, ensure public accountability and obtain legitimacy (Sondorp et al., 2009, p. 141). The World Bank argued that performance rather than input-based contracting would give NGOs the 'freedom to reach their targets using creative solutions adapted to local situations while keeping efficiency and effectiveness in mind' (World Bank, 2013).

In practice, however, the World Bank's collaboration with NGOs has been characterized by a focus on performative acts. For example, the targets within the 'Basic Package of Health Services' (BPHS) set by the MoPH on the advice of the WHO adopted a performative definition of health which equated interventions with outcomes (MoPH, 2003, 2005). The observation that Afghanistan 'faced some of the worst health statistics ever recorded worldwide, including an infant mortality rate of 165 per 1,000 live births and 1,600 maternal deaths for every 100,000 live births' thus resulted in performance tasks defined by comprehensive list of services (MoPH, 2005, p. 1; see also Cashin et al., 2015, p. 9). Although the MoPH (2005, p. 4) asserted that the BPHS would consider the question 'Do the services proposed have an impact on the major health problems?' the contingent and variable relationship between the performance of health services and health outcomes was not reconsidered once these lists had been drawn up.

Since 2003, the World Bank has extended its performative conception of health to NGOs contracted to implement the BPHS in up to 31 out of 34 Afghan provinces.[2] The 'Balanced Scorecard', developed by the World Bank in collaboration with the MoPH, Johns Hopkins University and the Indian Institute of Health Management Research, has assessed performance 'results' in terms of: (1) capabilities, e.g. facilities, number of female staff, equipment, availability of laboratory tests and drugs, (2) administration, e.g. record taking and training plans, and (3) interventions, e.g. number of household

[2] Due to the streamlining of funding for health care through the System Enhancement for Health Action in Transition program from 2013–2018, the performance-based contracting approach was expanded to include funds from other donors, who had previously managed their own contracts with NGOs. See http://www.worldbank.org/en/news/feature/2015/12/22/afghanistan-builds-capacity-meet-healthcare-challenges

visits, consultations, vaccinations, and antenatal care (Cashin et al., 2015, Annex 1). NGOs have received additional 'results-based' payments if the aggregate number of health interventions exceeded those of the previous year by more than 10% (Cashin et al., 2015, p. 11). Public health outcomes, such as the services' impact on DALYs or subjective perceptions of health and health service quality, have not been monitored, despite extensive and costly verification measures which, amongst other performance criteria, cross-checked the number of reported interventions through household surveys (Cashin et al., 2015, p. 10).

As in the case of security, two main consequences have emerged from the performative approach to health care in Afghanistan. One has been a shift of focus away from public health outcomes. A national mortality survey carried out in 2010 did indeed report improvements in public health indicators, including life expectancy, infant mortality and maternity deaths (MoPH, 2011). However, the performative approach to health adopted by the World Bank has precluded a critical assessment of the services supplied through the BPHS and their socially-mediated effects on these and other health outcomes. The observation that 'service utilization had plateaued and in some cases decreased in 2009', including vaccination rates, raises questions over whether the performative health services provided by NGOs in Afghanistan have met the socially constructed notions of suitable and relevant health interventions for the Afghan population (Cashin et al., 2015, p. 11).

The analysis further problematizes the dominant role played by international donors and organizations in the definition of 'appropriate' performative acts in the field of public health. Several NGOs, including Médecins Sans Frontières, Médecins du Monde and the International Committee of the Red Cross, decided to opt out of the bidding process for health service provision because they felt that the objectives adopted by the donors were 'contradictory to their neutrality and independence mandates' (Bousquet, 2005, p. 16). Although the Afghan MoPH agreed to and implemented the performative approach to health care, its policies were largely shaped by the interests and health care conceptions of international donors, organizations and consultants and not those of the Afghan population (MoPH, 2003, 2005).

7. Conclusion

Output legitimacy, derived from performance assessments and performance-based contracting, is an important standard for global governance. The outsourcing of global governance to private actors such as NGOs, PSCs and transnational corporations has drawn specifically on this strategy to gain legitimacy and public approval. However, in many cases, the attainment of publicly desired outcomes as a measure of performance has been replaced with a focus on performative acts, i.e. the specification and assessment of contractors' capabilities, characteristics and repetitive enactments of specific activities and interventions.

This article has sought to provide a theoretical explanation and an empirical illustration of the shift from performance to performativity through the examples of security and health care provision. It has been argued that the implications of this shift for the conceptualization, and implementation, of global governance interventions are considerable. As illustrated by the example of the global security and health governance interventions in Afghanistan, two consequences stand out. First, a performative definition of public services which equates performative acts with outcomes precludes a critical assessment of the actual effects of these interventions. Second, since international rather than local actors determine the definition of what constitutes 'suitable' performative acts, this conceptualization leads to a systematic disregard for the socially constructed nature of performative acts. Performative acts only 'work', i.e. achieve desired outcomes, if they conform to existing social expectations.

In conclusion, the preceding developments logically undermine the attempts to legitimize private actors in global governance through performance-based contracting and performance assessments because these measures neither examine outcomes nor consider their social desirability and acceptance. It follows that we need to look at performance assessments through new eyes, not only in security and health but also within other fields of global governance. Further research will be necessary to investigate the local and international consequences of this development for global security and health interventions in more detail and to establish whether and under what circumstances its findings also apply to other global governance actors and sectors.

Acknowledgements

The author would like to thank the organisers and participants of the conference 'The Legitimization of Private and Public–Private Regulation: Past and Present' held at the Max Planck Institute for European Legal History in Frankfurt as well as the anonymous reviewers for their comments and suggestions.

Conflict of Interests

The author declares no conflict of interests.

References

Baldwin, D. A. (1997). The concept of security. *Review of International Studies*, *23*(1), 5–26.

Bialasiewicz, L., Campbell, D., Elden, S., Graham, S., Jeffrey, A., & Williams, A. J. (2007). Performing security: The imaginative geographies of current US strategies. *Political Geography*, *26*(4), 405–422.

Bousquet, C. (2005). *Performance-based contracting for*

health service delivery in post-conflict Afghanistan: Is there still a case for debate? Paris: Group URD. Retrieved from www.urd.org/IMG/pdf/PPA_is_there_still_case_for_debate.pdf

Brassett, J., & Vaughan-Williams, N. (2015). Security and the performative politics of resilience: Critical infrastructure protection and humanitarian emergency preparedness. *Security Dialogue*, *46*(1), 32–50.

Butler, J. (1988). Performative actors and gender constitution: An essay in phenomenology and feminist theory. *Theatre Journal*, *40*(4), 519–531.

Butler, J. (1990). *Gender trouble: Feminism and the subversion of identity*. New York, NY: Routledge.

Cashin, C., Fleisher, L., & Hashemi, T. (2015). *Verification of performance in results-based financing (RBF): The case of Afghanistan*. Washington, DC: World Bank.

CENTCOM. (2009). Armed security guards/private security provider, solicitation. *Federal Business Opportunities*. Retrieved from www.fbo.gov/index?s=opportunity&mode=form&id=623e06f2f116f482f948e758aef72ad5

CENTCOM. (2012). Private security contractor, Camp Bravo—FOB Heredia, statement of work. *Federal Business Opportunities*. Retrieved from www.fbo.gov/index?s=opportunity&mode=form&id=8a79f17d1cfe0563a2da2c04b7092b9b&tab=core&_cview=1

CENTCOM. (2014). Quarterly contractor census reports. *Office of the Assistant Secretary of Defense for Logistics & Materiel Readiness*. Retrieved from www.acq.osd.mil/log/PS/CENTCOM_reports.html

Department of Defense. (2007). *Performance work statement (PWS) for DoD counter narcoterrorism technology office (CNTPO) program and operations support* (SW-ZZ-09-06).

Fowler, A. (1996). Demonstrating NGO performance: Problems and possibilities. *Development in Practice*, *6*(1), 58–65.

Glenn, J. (2008). Global governance and the democratic deficit: Stifling the voice of the south. *Third World Quarterly*, *29*(2), 217–238.

Government Accountability Office. (2006). *Contract security guards: Army's guard program requires greater oversight and reassessment of acquisitions approach* (GAO-06-284). Washington, DC: Government Accountability Office.

Higate, P., & Henry, M. (2009). *Insecure spaces: Peacekeeping, power and performance in Haiti, Kosovo and Liberia*. London: Zedbooks.

Higate, P., & Henry, M. (2010). Space, performance and everyday security in the peacekeeping context. *International Peacekeeping*, *17*(1), 32–48.

Joachim, J., & Schneiker, A. (2012). New humanitarians? Frame appropriation through private military and security companies. *Millennium—Journal of International Studies*, *40*(2), 365–388.

Johnson, C., Dowd, T. J., & Ridgeway, C. L. (2006). Legitimacy as social process. *Annual Review of Sociology*, *32*, 53–78.

Krahmann, E. (2008). Security: Collective good or commodity? *European Journal of International Relations*, *14*(3), 379–404.

Krahmann, E. (2010). *States, citizens and the privatization of security*. Cambridge: Cambridge University Press.

Krahmann, E. (2011). Beck and beyond: Selling security in the world risk society. *Review of International Studies*, *37*(1), 349–372.

Lewis, J. (2015). The politics and consequences of performance measurement. *Policy and Society*, *34*(1), 1–12.

Lister, S. (2003). NGO legitimacy: Technical issue or social construct? *Critique of Anthropology*, *23*(2), 175–192.

Lynch-Cerullo, K., & Clooney, K. (2011). Moving from outputs to outcomes: A review of the evolution of performance measurement in the human service nonprofit sector. *Administration in Social Work*, *35*(4), 364–388.

Martin, L. L., & Kettner, P. M. (1997). Performance measurement. *Administration in Social Work*, *21*(1), 17–29.

Mathers, C. D., Salomon, J. A., Murray, C. J. L., & Lopez, A. D. (2003). Alternative summary measures of average population health. In C. J. L. Murray & D. B. Evans (Eds.), *Health systems performance assessment: Debates, methods and empiricism* (pp. 319–334). Geneva: World Health Organization.

Ministry of Public Health. (2003). *A basic package of health services for Afghanistan*. Kabul: Ministry of Public Health.

Ministry of Public Health. (2005). *A basic package of health services for Afghanistan, 2005/1384*. Kabul: Ministry of Public Health.

Ministry of Public Health. (2011). *Afghanistan mortality survey 2010*. Kabul: Ministry of Public Health.

Østensen, Å. (2011). In from the cold? Self-legitimating the market for private security. *Global Change, Peace & Security*, *23*(3), 369–385.

Radin, B. A. (2007). Performance measurement and global governance: The experience of the World Bank. *Global Governance*, *13*(1), 25–33.

Rothschild, E. (1995). What is security? *Daedalus*, *124*(3), 53–98.

Salomon, J. A., Mathers, C. D., Chatterji, S., Sadana, R., Üstün, T. B., & Murray, C. J. L. (2003). Quantifying individual levels of health: Definitions, concepts, and measurement issues. In C. J. L. Murray & D. B. Evans (Eds.), *Health systems performance assessment: Debates, methods and empiricism* (pp. 301–318). Geneva: World Health Organization.

Scharpf, F. W. (1998). *Interdependence and democratic legitimation* (MPIfG Working Paper 98/2). Cologne: Max Planck Institute.

Scharpf, F. W. (2009). Legitimacy in the multilevel European polity. *European Political Science Review*, *1*(2), 173–204.

Schwartz, M. (2011). *The Department of Defense's use of private security contractors in Iraq and Afghanistan:*

Background, analysis, and options for Congress. Washington, DC: Congressional Research Service.

Sondorp, E., Palmer, N., Strong, L., & Wali, A. (2009). Afghanistan: Paying NGOs for performance in a post-conflict setting. In R. Eichler & R. Levine (Eds.), *Performance incentives for global health: Potential and pitfalls* (pp. 139–164). Washington, DC: Brookings Institution Press.

Spar, D., & Dail, J. (2002). Of measurement and mission: Accounting for performance in non-governmental organizations. *Chicago Journal of International Law*, *3*(1), 171–181.

Stanger, A. (2009). *One nation under contract: The outsourcing of American power and the future of foreign policy*. New Haven, CT: Yale University Press.

Suchman, M. C. (1995). Managing legitimacy: Strategic and institutional approaches. *Academy of Management Review*, *20*(3), 571–610.

Take, I. (2012). Legitimacy in global governance: International, transnational and private institutions compared. *Swiss Political Science Review*, *18*(2), 220–248.

US Army. (2009). *Developing a performance work statement in a deployed environment* (Handbook 09-48). Retrieved from http://usacac.army.mil/sites/default/files/publications/09-48.pdf

Wallner, J. (2008). Legitimacy and public policy: Seeing beyond effectiveness, efficiency, and performance. *The Policy Studies Journal*, *36*(3), 421–443.

Williams, A. J. (2011). Reconceptualising spaces of the air: Performing the multiple spatialities of UK military air spaces. *Transactions of the Institute of British Geographers*, *36*(2), 253–267.

World Bank. (2002). *Public health and World Bank operations*. Washington, DC: World Bank. Retrieved from siteresources.worldbank.org/HEALTHNUTRITIONANDPOPULATION/Resources/Peer-Reviewed-Publications/PHOperations.pdf

World Bank. (2013). Afghanistan: Better health outcomes for women, children, and the poor. *World Bank*. Retrieved from www.worldbank.org/en/results/2013/04/18/afghanistan-better-health-outcomes-women-children-poor

World Health Organization. (2008). *Performance measurement for health system improvement: Experiences, challenges and prospects*. Geneva: World Health Organization. Retrieved from www.who.int/management/district/performance/PerformanceMeasurementHealthSystemImprovement2.pdf

World Health Organization. (2016). Metrics: Disability-adjusted life year (DALY). *World Health Organization*. Retrieved from www.who.int/healthinfo/global_burden_disease/metrics_daly/en/

Zaiotti, R. (2011). Performing Schengen: Myths, rituals and the making of European territoriality beyond Europe. *Review of International Studies*, *37*(2), 537–556.

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Politics and Governance (ISSN: 2183–2463)
2017, Volume 5, Issue 1, Pages 63–74
DOI: 10.17645/pag.v5i1.835

Article

Patterns of Legitimation in Hybrid Transnational Regimes: The Controversy Surrounding the *Lex Sportiva*

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Submitted: 6 December 2016 | Accepted: 9 January 2017 | Published: 15 March 2017

Abstract
This article addresses concerns that the growth in global governance may be bringing with it a decline in the significance of democratic sources of political legitimacy. One approach in evaluating such concerns is to ask whether the respective patterns of legitimation for private and public authority differ or whether they refer to a similar set of normative standards. Private transnational governance regimes provide useful contexts in which to assess the presumed democratic erosion. They seem, almost of themselves, to make the case for such a decline: in them regulatory authority is exercised by non-state actors who, by their very nature, lack the kind of authorization afforded by the democratic procedures that legitimize state-based regulation; in addition, they are intrinsically linked to the notion of politics as a form of problem-solving rather than as the exercise of power. Given these characteristics, when governance arrangements of this kind are subjected to criticism, one would expect justificatory responses to relate primarily to performance, with normative criteria such as fundamental individual rights and the imperative for democratic procedure playing only a minor role. On the basis of a qualitative content analysis, the study tests three ideal-type patterns of legitimation for plausibility. The case selected for examination is the recent controversy surrounding the hybrid governance regime that operates to prevent the use of performance-enhancing drugs in sport. The debate offers the possibility of a 'nutshell' comparison of the respective patterns of legitimation used in criticizing and justifying state and non-state regulatory authority. This comparison yields two findings. The first is that the values used to appraise the state-based components of the sporting world's hybrid regulatory regime do not differ systematically from those used to appraise the private elements: contestation and justification in both cases are founded on normative criteria relating to fundamental individual rights and democratic procedure and not just on performance-related considerations. The second finding is that justificatory grounds of the first type do not appear to be diminishing in importance vis-à-vis those of the second.

Keywords
global governance; hybrid transnational regimes; legitimacy patterns; public–private authority

Issue
This article is part of the issue "Legitimization of Private and Public Regulation: Past and Present", edited by Klaus Dieter Wolf (Peace Research Institute Frankfurt, Germany), Peter Collin (Max Planck Institute for European Legal History, Germany) and Melanie Coni-Zimmer (Peace Research Institute Frankfurt, Germany).

1. Introduction

Global governance is characterized by the increasing exercise of regulatory authority by private actors. These actors participate directly in the formulation and implementation of rules governing international affairs (see Cutler, Haufler, & Porter, 1999; Hall & Biersteker, 2002; Wolf, 2008). This omnipresent regulatory plurality is a challenge for anyone attempting to assess the legitimacy of authority beyond the state (Wolf, 2006). One of its effects is to put state actors' traditional legitimatory repertoires under pressure and concerns have begun to be expressed that the rise in governance beyond the state may be bringing with it a decline in the significance of democratic sources of political legitimacy (Papadopoulos, 2010; Zuern, 2011). The present article explores

these concerns, specifically by asking whether the emergence of private forms of regulation in the transnational sphere has been accompanied by a shift in the normative standards by which the legitimacy of regulatory authority is judged, or whether, instead, the respective ways in which private and state-based regulation are legitimized are grounded in similar values.[1]

Transnational private governance regimes are useful contexts in which to assess the presumed decline of democratic sources of legitimation in the trans-state realm. They seem, almost of themselves, to make the case for such a decline: in them regulatory authority is exercised by non-state actors who, by their very nature, lack the kind of authorization afforded by the democratic procedures that legitimize state-based regulation; in addition, they are intrinsically linked to the notion of politics as a means of problem-solving rather than as the (democratically controlled) exercise of power. Given these characteristics, when governance arrangements of this kind are subject to criticism, one would expect justificatory responses to relate primarily to performance, with normative criteria such as fundamental individual rights and the imperative for democratic procedure playing only a minor role.

There is a wealth of literature listing the normative criteria that transnational private self-regulatory regimes should adhere to and then working out, through case studies, how far they actually do so.[2] By contrast, relatively little is known about which of these normative criteria assume actuality in real-life controversies about the legitimacy of the regulatory authority exercised by private actors. By including participant perspectives on what is legitimate and why, we will have a more comprehensive picture on which to base any assessment of the decline in significance which democratic legitimation of regulatory authority has allegedly undergone with the rise in private regulation.

The present investigation begins by identifying three ideal-type arguments regarding the legitimatory demands associated with private self-regulation. These are extracted from the relevant literature and represent three distinct patterns of legitimation (Section 2). From this theoretical material, a set of keywords is derived to serve as a guide for content analysis of actual controversies relating to the legitimacy of regulatory authority. Section 3 outlines the particular case selected to test the plausibility of the theoretical conjectures and identifies the data-sources used for the empirical analysis. The case selected for a comparison of the respective grounds on which the state-based and private self-regulatory elements of this regime are legitimized or criticized is that of the hybrid governance regime that operates to prevent the use of performance-enhancing drugs in sport. 'The crisis of confidence in the governance of sport', remarked one athletes' representative recently, 'has justifiably reached new levels' (Schwab, 2015). It is a crisis reflected in widespread debate about the lack of legitimacy of transnational private self-regulation and the need for state involvement to make up for this. Focusing on the example of recent national anti-doping legislation in Germany—introduced in response to the presumed shortcomings of existing transnational private arrangements—Section 4 offers a qualitative content analysis of a case that is particularly apt to our purpose since it allows the pros and cons of state-based and non-state regulation to be compared, as it were, 'in a nutshell'.

The study yields two key findings. The first is that the value patterns used to appraise the state-based components of the sporting world's hybrid regulatory regime do not differ systematically from those used to appraise the private elements: in both cases contestation[3] and justification are founded on normative criteria relating to fundamental individual rights and democratic procedure as well as on performance-related considerations. The second finding is that justificatory grounds of the first type do not appear to be diminishing in importance vis-à-vis those of the second.

2. Approaches to the Legitimation of Private Self-Regulation

The ideal-type arguments described here are drawn from different strands of the literature on the legitimation of private self-regulation. On the basis of these arguments, categories are identified which are then used to structure the empirical analysis relating to potential differences in patterns of legitimation for public and private authority.

2.1. Private Regulatory Authority Neither Needs nor Is Amenable to Democratic Legitimation

This first approach, although it has a long history as a fundamental principle of political liberalism in the Tocquevillean tradition (Gutmann, 1998), tends—undeservedly, given its heuristic value—to fall victim to dichotomized debates as to whether output or input requirements take precedence when it comes to legitimacy.[4] It casts doubt on the notion that private self-regulation requires any further legitimation at all, given its prior justification in freedom of association. Associational freedom safeguards a person's right to join a group and to take collective action in pursuance of the interests of that group.

[1] Bernstein (2011) poses a similar question.

[2] See, among many others, Cashore (2002), Wolf (2002), Keohane and Nye (2003), Pattberg (2005), Boerzel and Risse (2005), Held and Koenig-Archibugi (2005), Bernstein and Cashore (2007), Dingwerth (2007), Flohr, Rieth, Schwindenhammer and Wolf (2010), Scholte (2011), and Bodansky (2013).

[3] Contestation is here taken to mean a questioning of the grounds on which certain regulatory arrangements claim legitimacy. For an excellent overview of the literature on norm contestation in general, see Wolff and Zimmermann (2016).

[4] 'Output' and 'input' here refer respectively to acceptance created by effective problem-solving that serves the public interest and acceptance created by democratic procedures (see Scharpf, 1999).

As a constitutionally enshrined expression of civil liberty, this fundamental right is founded on each individual's capacity for self-determination and self-governance and has no need to justify itself further. In particular, it has no need to demonstrate the democratic legitimacy of the internal structures and decision-making processes through which it is exercised. On the contrary, as long as it does not violate the law, it is entitled to look to the state, in its capacity as a guarantor, to ensure its protection (Schiedermair, 2012).

To quote corroborative voices from another quarter: legal scholars assert that private norm-setting that takes place within the framework of voluntary self-commitment falls below the threshold of the kind of legislative and executive power exercised by a state (see Michael, 2005, pp. 434–435). Consequently—and in contrast to the position with collectively binding decision-making that follows from the mandatory exercise of sovereign authority—private authority is exempted from any requirement to justify itself, just so long as there continues to be scope for regulatory influence by the state or a community of states (Abbott & Snidal, 2009; Wolf, 2014, p. 287). According to this ideal-type argument, any legitimacy-related dispute about transnational private self-regulatory regimes will concern not the performance or internal democratic structure of the regime but the justification for any state interference with civil liberty.

2.2. Private Regulatory Authority Must Meet Output-Related Criteria for Legitimacy

In this second line of reasoning, the premise of a decline in democratic legitimation when regulatory authority is transferred to private actors can be traced back to a shift of focus in political science towards policy research, new modes of governance, and new forms of public management (Héritier, 2002; Pierre, 2000; Pollitt & Bouckaert, 2000; see also Krahmann, 2017). The perception that there is a crisis in the regulatory state in general and that 'traditional public command-and-control' in particular has its limitations as a means of governance (Kooiman, 2000, p. 139) has shifted output-related normative considerations centre-stage. The thinking here is that governments, keen to enhance their capacity to provide common goods, have pinned their hopes on achieving the 'modernization' of state and society by directly involving former addressees of public regulation in the governance process (Mayntz, 2002). This move, it is argued, has not been motivated primarily by a democratic concern to increase participation; rather it is driven by the idea that problem-solving effectiveness can be enhanced by utilizing hitherto untapped resources. The growth in private-governance involvement in both the domestic and transnational sphere is thus intrinsically linked to a notion of politics as a form of problem-solving rather than as the exercise of power (Benz & Papadopoulos, 2006, p. 7; Ronit & Schneider, 2000). As potential partners in governance, private regulators need to be invested with epistemic authority that draws on expertise and problem-solving capacity as sources of legitimation (see Simmerl & Zuern, 2016; Zagzebski, 2012). This line of argument would lead one to expect that controversies about private-governance involvement—at both domestic and transnational level—will be primarily performance-related and that democratically rooted requirements in regard to legitimacy will continue to figure only in relation to the political authority exercised by states.

2.3. Private Regulatory Authority Must Meet Input-Related Criteria for Legitimacy

The third ideal-type argument asserts that 'the fundamental division between public power and private freedom' which forms the basis of the first argument 'cannot be maintained in the case of private standard-setters who utilize a putative freedom to exercise power' (Michael, 2005, p. 44). This view also extends beyond the second argument, in which self-regulation is seen not as the exercise of power but as a contribution to the provision of common goods. This extended perspective on the 'democratic deficits' of transnational private self-regulation is the subject of a burgeoning body of literature[5] and the requirements to which it gives rise are reflected in the design of many transnational self-regulatory arrangements—the Forest Stewardship Council often being cited as an example (see, among many others, Pattberg, 2005, 2006). One of the key observations of the 'politicization' hypothesis (Zuern, 2014; Zuern, Binder, & Ecker-Ehrhardt, 2012) is that international institutions are increasingly being criticized for not matching their 'new, authority-generating quality' (Zuern, 2012, p. 409)—backed up by coercive compliance-mechanisms and often at odds with state-based regulatory activities—with appropriate levels of accountability. Although the politicization hypothesis was originally formulated with reference to intergovernmental institutions and the changes occurring in these, it is equally applicable to private transnational self-regulatory regimes, which often assume quasi-state regulatory authority—including legislative, executive, and judicial functions. If the politicization mooted by Zuern and others has been matched by an increasing insistence on input-related standards for the justification of private contributions to transnational governance, then the proliferation of transnational private regulatory authority need not necessarily result in a diminution in the significance of democratic sources of legitimacy.

3. The *Lex Sportiva*: Case Selection and Data Sources

3.1. Case Selection

The case selected as the basis for probing the plausibility of these theoretical positions is that of sports law—*lex*

[5] See, among others, Cashore (2002), Bernstein and Cashore (2007), Dingwerth (2007) and Flohr et al. (2010).

sportiva—more precisely, the transnational regulatory regime that operates to prevent the use of performance-enhancing substances in sport. So-called 'doping' is one of the major regulatory problems facing the world of sports.[6] In 1999, in an attempt to tackle this issue, the World Anti-Doping Agency (WADA) was set up. Its World Anti-Doping Code (WADC) represents a self-regulatory attempt by sports organizations to co-ordinate anti-doping measures worldwide. The Code is founded on regulatory authority exercised by private actors operating in non-state institutions. The first version of it came into force in 2004; the second, fully revised version has been effective since January 2015 (WADA, 2014).

The core, standardized component of this regime is essentially private in nature. Supplementing it is a fragmented, unsystematized public component consisting of: a variety of national anti-doping laws; two intergovernmental conventions (the Anti-Doping Convention of the Council of Europe and UNESCO's International Convention against Doping in Sport); and one international declaration (the Copenhagen Declaration on Anti-Doping in Sport). In its Anti-Doping Convention, dating from as far back as 1989, the Council of Europe declared that 'public authorities and the voluntary sports organisations have complementary responsibilities to combat doping in sport' (Council of Europe, 1989). The document thus acts as a 'big stick' in the background, ensuring public 'shadowing' of sporting self-regulation and, at least indirectly, threatening the imposition of regulatory measures by the state where private arrangements fail (Art. 10, Anti-Doping Convention of the Council of Europe).

The WADC was first recognized by the world of states in the Copenhagen Declaration on Anti-Doping in Sport, which was adopted in 2003 and was subsequently ratified by virtually every state in the world. By means of this declaration, the ratifying states affirmed their commitment to the provisions of the WADC. Sporting organizations that 'are not in compliance with the Code or applicable anti-doping rules adopted pursuant to the Code' (World Conference on Doping in Sport, 2003) lose all or part of their state funding. The second of the conventions mentioned—UNESCO's International Convention against Doping in Sport—was adopted in 2005 (UNESCO, 2005). It is largely based on the version of WADC current at that time, supplementing it with a further commitment by the signatory states to institute suitable legal or other anti-doping measures within their own areas of jurisdiction (Art. 9). With the state parties agreeing to incorporate private standards into international agreements and national legislation, the public 'shadowing' of transnational private regulation was now matched by a remarkable private 'counter-shadowing' of the state (see Héritier & Lehmkuhl, 2008).[7] Via the UNESCO Convention and the Copenhagen Declaration, the signatory governments undertake to support the provisions of the privately instituted WADC and bring all other state-instituted anti-doping measures into line with it.

The *lex sportiva* is a good candidate for investigation on several counts. Firstly, the transnational self-regulation engaged in by sports organizations is characterized by a particularly high degree of legislative, executive, and judicial authority. Within the autonomous bodies of the sports world, state functions are fulfilled by non-state actors who have the power to lay down binding rules and to impose sanctions where these are violated. Private regulation, bolstered by its anti-doping code, is viewed as the international police-force of high-level sports; but more than this—it gives the appearance of sitting astride all (sporting) sectors and functioning as a private law-maker and judge. In addition, it seeks to achieve compliance primarily through sanctions and only secondarily through 'softer' forms of governance. Given this broad range of functions, the regulatory authority exercised by private self-regulators in the sports world is amenable to politicization. This means that, at least in principle, this authority is open to contestation and justification by reference to the same norms that are recognized as playing a constitutive legitimating role in the case of mandatory rule-making and rule-enforcement by the state.

Secondly, selection of the *lex sportiva* for study is based on its general character as a 'regulatory hybrid' (Siekmann, 2012, p. 314). Its overlapping public and private governance arrangements constitute a particularly impressive example of this hybridity. This make-up allows direct, 'in-case' comparison of patterns of legitimation for state and non-state regulation. Thus, the controversy surrounding the German anti-doping legislation that came into force in December 2015 enabled us to view these patterns 'in a nutshell'. Additional anecdotal evidence was drawn from the debates about the limits to sport's capacity for self-healing which were triggered, at about the same time, by the exposure of state-sponsored doping in Russia—and threw a different light on state involvement in the fight against corruption in sport.

3.2. Data Sources

The underlying research for this study took the form of a qualitative content analysis of written statements made by political decision-makers and by representatives of both athletes and sports associations. The data was drawn from a variety of textual sources, the core material being culled from records of debates held by the lower chamber of the German parliament (the Bundestag) on 22 May and 13 November 2015 and the rest from records of court and tribunal proceedings, quality national and international newspapers, the sports media, and the websites of political parties and of rele-

[6] The brief description given here draws on a more detailed account in Wolf (2014).

[7] This shadowing and counter-shadowing emerges particularly clearly in Art. 22 of the WADC ('Involvement of Governments'), which invites governments to commit to the Code by acceding to relevant intergovernmental agreements.

vant national and international sports associations.[8] The textual data was coded using basic keywords assigned to the three patterns of legitimation outlined above:[9] (1) freedom of association, autonomy of the societal sphere, self-government, primacy of politics; (2) effectiveness, achievement of regulatory objectives; (3) procedural requirements, protection of basic rights, accountability, rule of law, impartial judicial proceedings. This coding was used to identify patterns of legitimation employed, respectively, for the state and non-state components of the hybrid national-cum-transnational/private-cum-public anti-doping regime. For the sake of user-friendliness, only sample quotations are included within the text; others making essentially the same point appear in the footnotes.

4. Comparison of Patterns of Legitimation

The empirical plausibility probe that follows here aims to establish whether the three patterns of legitimation previously outlined are actually used to evaluate the legitimacy of authority and, if so, to what extent. Do the normative criteria by which the state-based components of the sporting world's hybrid regulatory regime differ from those that are invoked in regard to its private elements? More specifically, is it the case that when private authority is being evaluated, justificatory grounds relating to fundamental individual rights and the need for democratic procedure take a back seat?

4.1. Arguments Relating to Freedom of Association and Autonomy

4.1.1. Freedom of Association

Consistent with the first pattern of legitimation, the large number of statements in favour of self-regulation and against state intervention—from participants in the parliamentary debates, from representatives of sports associations, and in the national and international media—were primarily outward-looking in their references to associational freedom and self-determination. Their chief concern was not performance or the degree to which decision-making processes guaranteed internal self-determination. The underlying premise in all of them was that 'only the Olympic family itself had the right to decide which governance was good and which was bad' (Andersen, 2015). On this view, what legitimates the sporting world's autonomy is freedom of association, which imposes clear limits on state intervention. Thomas Bach, president of the International Olympic Committee (IOC) and a member of the executive board of the German Olympic Sports Confederation (Deutscher Olympischer Sportbund, DOSB), argued that it was incumbent on politicians to respect this autonomy (Financial Times, 2014). The same sentiment was expressed by the IOC's chief ethics and compliance officer, Girard Zapelli: 'Governments must respect the right of the citizens to work together in associations no matter if the citizens are sports people, coin collectors, environmentalists, rabbit breeders or high school students' (Andersen, 2015). The Olympic Charter was quoted in support of the notion that autonomy is a fundamental principle of sport: 'Recognizing that sport occurs within the framework of society, sports organizations within the Olympic Movement shall have the rights and obligations of autonomy, which include freely establishing and controlling the rules of sport, determining the structure and governance of their organizations, enjoying the right of elections free from any outside influence and the responsibility for ensuring that principles of good governance be applied' (WADA, 2015, p. 71).

State involvement was deemed appropriate only where there was corrupt external interference. Whereas game-manipulation was considered to fall under this head, doping was viewed as an 'internal attack' on the system which, as such, should be dealt with by sport's own sanctions-system (Becker, 2015a). Those drafting criminal law should, it was felt, confine themselves to protecting the basic values of social life. Fairness and integrity in sport did not count as such and were therefore not issues for criminal law. This manifest and well-founded division must not be meddled with by anti-doping legislation (Adolphsen & Kauerhof, 2013).

4.1.2. Autonomy

Sporting autonomy also featured prominently in the opposing arguments—in favour of state-based anti-doping legislation—but the main focus here was on its limits. Although sport, like all other sectors of society, should continue to have its private autonomy and other relevant fundamental rights protected by the state, this did not mean, so it was argued, that sport could operate outside the legal order (Krings, 2015). The advent of commercialization, corruption, and organized crime on the sporting scene, it was felt, had put paid to the notion that any defence of freedom of association in sport was a defence of the freedom of all members of society. The reason the German legislator deemed action impinging on the autonomy of sports federations to be necessary was precisely because it promised to preserve the integrity of this part of the societal sphere, not damage it. In January 2016, co-founder and former president of WADA Richard

[8] Specifically: the European Court of Justice (ECJ) and the International Sports Tribunal (CAS), Frankfurter Allgemeine Zeitung, Guardian, Legal Tribune, Los Angeles Times, The National, Neue Zürcher Zeitung, Das Parlament, Der Spiegel, Sports Inquirer, Süddeutsche Zeitung, Tagesspiegel, The Telegraph, Die Welt, Deutschlandfunk, Deutschlandradio, Eurosport, Norddeutscher Rundfunk, German Olympic Sports Confederation, leichtathletik.de, playthegame.org, Spox.com and World Anti-Doping Agency.

[9] In order to allow for comparison with the findings of the other contributions to this issue, we also took account of the common framework suggested by the editors in making our selection (see Coni-Zimmer, Wolf, & Collin, 2017). In addition to these pre-selected categories, inductive category-development took place during the research process, with additional, more specific terms being included.

W. Pound called the autonomy of sport 'an outdated relic from an earlier era' which had degenerated into 'a shield behind which too many sports organisations at the international and national level have become greenhouses for corruption and crime….This notion of autonomy is not invented so corrupt people can hide behind it' (Andersen, 2015).

As the German minister of the interior Lothar de Maizière put it: 'What we are talking about here is criminal law and federal legislation. Political considerations take priority here, not the autonomy of sport' (Hungermann, 2015). DOSB honorary president Manfred von Richthofen endorsed this view, insisting that: 'If the sporting world asks the state for help in an area where crime is involved, this does not undermine the independence of sport' (Adolphsen & Kauerhof, 2013). With regard to commercialization, it was argued that the principle of autonomy 'allows for all sport to govern itself as long as it is association based. When sport becomes business, it must abstain from the privileges enjoyed as an association' (Andersen 2015).[10]

4.2. Output-Related Patterns of Legitimation: Effective Achievement of Regulatory Objectives

Those advancing performance-related arguments in support of sport's right to regulate itself asserted that 'there was one thing sport could do better than the state and that was to mete out immediate, hard-hitting penalties on the [offending] athlete' (Vesper, 2014). Sports tribunals, it was pointed out, could suspend an athlete just on suspicion of an offence; normal courts could not (Kauerhof, 2007, p. 73).[11] Furthermore, athletes who tested positive for illicit substances could be given a ban of up to four years by a sports tribunal, which was much more of a deterrent than the sorts of penalties that could be expected at the end of cumbersome legal proceedings in a criminal court (Spox.com, 2015). With these factors in mind, representatives of sports associations repeatedly argued that the introduction of criminal legislation would weaken sport's own regulatory authority: 'The system of sanctions provided for in sporting law would suffer a loss of legitimacy if the penalties imposed by sport differed completely from those imposed by the state' (Vesper, 2014; see also Hungermann, 2015). Echoing these concerns, a sceptical German Bar Association warned against succumbing to the illusion that the detection-rates for doping would be any better under the state and described the new German anti-doping legislation as no more than symbolic politics (Bouhs & Kempe, 2015).

At the same time, performance-oriented observers who were critical of self-regulation maintained that sanctions could not be effective without input from the state. Thus, supporters of national anti-doping legislation, whilst not denying the ability of sports tribunals to deliver swift, appropriate, sports-specific, consistent (and therefore equitable) rulings, pointed out that such tribunals lacked the evidential reach of the courts. They highlighted sport's lack of appropriate investigative tools and argued that criminal legislation was needed not only for general preventative purposes but also to deal with repression (Krings, 2015). 'The punitive options open to sport should', they urged, 'be complemented by the more far-reaching tools available to the investigative authorities of the state….This is a question of 'effective parallel engagement, not of one side competing with the other' (Freitag, 2015). The legal powers and detection facilities of the state were needed in order, for example, to be able to summon witnesses, conduct searches, tap phones, and confiscate drugs (Haas, 2004). Again, only the state, it was argued, could ensure that those who had cheated were actually brought to book (Norddeutscher Rundfunk, 2015). An overall conclusion drawn from all this was that both institutions were needed—'sporting regulation and, as a last resort, for the really difficult cases, criminal justice' (Krings, 2015).[12]

The way in which the WADC focused on individual athletes as the addressees of regulation was identified as part of the reason why the Code had failed not only to halt the growth in the use of, and trade in, banned substances but also to counteract the increasing involvement of organized crime in this market. Again, whilst the WADC provided for the imposition of sanctions on athletes who breached its rules, it made no provision for the compensation of disadvantaged co-competitors. Self-regulation, it was conceded, could prevent and punish 'dirty victories' by imposing suspensions and voiding results for specific events where anti-doping rules were breached. Effective sanctioning of 'dirty money', by contrast, was felt not to be possible without the involvement of the state—the only actor that could reach beyond the immediate sporting sphere to protect or punish affected outsiders (Kauerhof, 2007, p. 75). Coaches, agents, and physiotherapists whose athletes had tested positive for banned substances were beyond WADA's punitory reach: only national anti-doping laws had the power—as WADA president John Fahey put it—'to catch the cheats behind the cheats' (Majendie, 2013).[13]

Athletes—the people directly affected by the actions of cheating fellow competitors—joined with sports officials in accusing sports federations of not taking the fight against doping seriously enough and called upon them to play a more active role in this area (Reinsch, 2015). Addressing allegations of systematic doping in Russian athletics, an independent commission chaired by former

[10] In a similar vein, Michael Hershman, a former member of FIFA's Independent Governance Committee (IGC) argued that 'sport needs to be regulated and treated for what it is: big business' and that 'every single governing body in the sports world…needs to agree to modern standards of transparency and accountability' (Toman-Miller, 2015).

[11] This naturally raises worries about rule-of-law deficits being a downside of greater effectiveness.

[12] See also Engelmeier (2015).

[13] See also Haas (2004).

WADA president Richard Pound expressed similar criticism, accusing WADA of 'having been too soft on enforcing compliance with its code' (Rumsby, 2015; WADA, 2015). The state, it was argued, must step in to control negative externalities whose effects reached far beyond the sporting domain—into areas such as public health and the economic interests of those disadvantaged by others' use of banned substances. Even current WADA director-general David Howman conceded that the regulatory problem was 'getting too big for sport to manage' and made explicit reference to global organized crime.[14] 'Unless we make something mandatory', he observed, people won't do it' (Gibson, 2013).

Although state involvement was considered a necessary condition for the improved achievement of sport's own regulatory objectives, the fact that the state could also be part of the problem did not pass unnoticed: the independent WADA report on doping in Russian athletics stated that 'it would be naïve in the extreme to conclude that activities on the scale discovered could have occurred without the explicit or tact approval of Russian governmental authorities' (WADA, 2015, p. 48).

4.3. Input-Related Patterns of Legitimation

4.3.1. Protection of Individual Rights

One of the major demands in relation to public regulation was that it should monitor private norm-setting and norm-enforcement for possible abuse. The same normative criteria, relating to fundamental rights and procedural requirements, were used to judge the structures and rulings of sporting bodies and the state-based elements of the *lex sportiva*. Apart from the invocation of the right to associational freedom and self-government, which was aimed at defending sporting autonomy (see 4.1.), most arguments based on the protection of fundamental rights and procedural requirements targeted weaknesses in private self-regulation and sought to bolster the case for public legislation. There was one interesting exception, however: the DOSB argued that, as part of the fundamental right to self-determination, even the right to self-destructiveness must be preserved. If the state restricted this 'right to self-harm' by imposing, as it were, a duty to follow a healthy life-style, then this could not be confined to sporting activities: it must also apply, for example, to alcohol and tobacco consumption (Becker, 2015b). On these grounds, it was said, national anti-doping legislation constituted exceptional criminal legislation that could not be justified (Künast, 2015). Those in favour of the legal prohibition of doping were challenged to explain 'why top-level athletes should not have the same right as all other people involved in sport, or all other people in general, to put their health at risk' (Mutlu, 2015).

The view of organized athletes, however, was that autonomy had primarily been used as a shield behind which to 'remove the fundamental rights of athletes as professional working people' (Schwab, 2015). In evidence, they cited the fact that, prior to any Olympic Games, the IOC, the various national sports associations, and all the individual athletes are required to give undertakings that, should relevant circumstances arise, they will not use any means of legal redress other than those provided 'in-house'. Sport's private arbitration system thus compels athletes to sign agreements with their respective national sporting associations waiving their basic civil right to seek redress from national courts. Fundamental rights and their violation also attracted public attention when the European Court of Justice dealt with a number of individual lawsuits against sporting associations. Thus, in what has come to be known as the Bosman Ruling—under which football players in the European Union may now change clubs at the end of their contract without a transfer-fee being paid—the court concluded that 'the abolition as between Member States of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law' (ECJ, 1995).

Because of the monopoly status of sports associations, the allegedly voluntary nature of individual consent to a sporting association's rules is not regarded as a real counter to the imbalance between, on the one hand, the opportunities open to the regulatory subjects to influence the rules that apply to them and, on the other, the grave consequences of decisions made on the basis of those rules, or even simply of a refusal to submit oneself to the relevant regulatory regime. Against this background, lawyers have described the *lex sportiva* as a form of 'authoritarian rule by monopolistic associations' (Reuter, 1996, as cited by Röthel, 2007, p. 758).

4.3.2. Rule of Law and Equal Treatment Before Courts

The assurance of equal treatment before sports tribunals was repeatedly cited as proof of the legitimacy of sport's own procedures. Pointing to current 'harmonisation for all sports and all countries' and the 'huge achievement' this represented, WADA director-general David Howman warned against a shift to national anti-doping legislation. Such a move, he said, 'would result in athletes in different sports or from different countries receiving different bans for the same offences, and even worse athletes from the same sport receiving different penalties depending on the country they competed for' (Telegraph, 2012).

Given this gloomy prospect of piecemeal national solutions, duplicate competencies, and varying legal standards, the Court of Arbitration for Sport (CAS) was seen as the only mechanism offering international scope and consistency in the resolution of anti-doping disputes. The CAS itself pointed out that with involvement by national courts, 'the risk of contradictory decisions would [be]

[14] Speaking of the UK, Howman stated: 'If you think the mafia and underworld aren't involved in this country in sport, you're in fairyland' (Gibson, 2013).

higher with athletes being able to compete in certain countries but not in others' (CAS, 2015).[15] The DOSB's Athletes' Commission argued along the same lines: 'Having standard judicial procedures for sport is the only way to ensure that all sportswomen and sportsmen, and all infringements of the rules, are treated equally' (DOSB, 2015). When it came to other matters, however—namely, rule of law, impartiality, independence, and transparency—grave doubts were raised about the CAS. These issues loomed large, for example, in the case brought by German skater Claudia Pechstein against the International Skating Union. The Higher Regional Court in Munich, to which the skater had appealed, concluded that sports associations were abusing their 'market dominance' because they had major influence in determining who was appointed to the CAS's board of arbitrators (Becker, 2015b). National legislation was advocated as a necessary means of controlling the private abuse of regulatory authority—which, in the case just described, meant ensuring that the rule of law prevailed in regard to the neutrality of sports tribunals. An increased focus on the principle of the presumption of innocence was also broadly supported. Athletes' protection should be enhanced by making it a requirement that prosecutors prove possession of performance-enhancing substances for doping purposes (de Maizière, 2015).[16]

4.3.3. Accountability Mechanisms

Arguments relating to inadequate democratic procedure were voiced mainly in regard to the private elements of the *lex sportiva*. The poor extent to which the regulatory authority exercised by sports organizations was subject to oversight and control was regarded as denting the legitimacy of sporting self-regulation. It was pointed out that most of the 35 international Olympic sports federations lacked an institutional design that would '[allow] their constituents to monitor and sanction decision-making body members' (Geeraert, 2015, pp. 9–10). Transparency International, in its 2016 Global Corruption Report, described the corporate structures of sport as archaic and claimed that sports organizations had actually 'chosen not to adapt in order to protect certain self-interests, including high salaries, bonuses and virtually limitless tenures' (Transparency International, 2016, p. xix).[17] From the perspective of athletes, 'sports are structured as cartels, they warrant not special treatment and protection but enhanced scrutiny and accountability' (Schwab, 2015).

Again, in the wake of the previously mentioned Pound report on Russian doping, the head of Australian athletics is reported to have pointed to the absence of a robust, overarching IAAF governance structure and clear lines of accountability at the International Association of Athletics Federations (IAFF), claiming that this had 'enabled practices that have compromised the integrity of the whole sport of athletics' (Sports Inquirer, 2016). Pound himself talked of 'a complete breakdown of governance structures and lack of accountability' at the IAAF and claimed the organization was guilty of 'an evident lack of political appetite…to confront Russia with the full extent of its known and suspected doping activities' (The National, 2016). It had, said Pound, failed to tackle the nepotism that had made possible one of the most corrupt regimes ever seen in sport (Rumsby, 2016). Criminologist Dieter Roessner suggests the prosecution of specific cases of doping by sports authorities is essentially a tactic to distract attention from a systemic problem by individualizing it (Bouhs & Kempe, 2015).

5. Conclusion

Amidst reports that democratic sources of political legitimacy are undergoing a decline, this study tackles the issue by asking whether the emergence of private forms of regulation in the transnational sphere has brought with it a shift in the normative standards used to judge regulatory authority or whether the legitimation of private self-regulation and state-based regulation are grounded in similar values. Three ideal-type patterns of legitimation were tested for plausibility on the basis of a content analysis of actual controversies about the legitimacy of regulatory authority in the sporting domain—specifically, the hybrid governance-regime relating to the use of performance-enhancing substances in sports.

Comparison of patterns of legitimation for the public and private elements of the regime revealed that there was no systematic difference between the values on which the two kinds of elements were judged. Arguments drawing on democratic sources of political legitimacy were remarkably present in the debates about self-regulation in sport and were, in fact, utilized by both sides to justify their positions. The plausibility test did not support the notion that the spread of private self-regulation has resulted in a decline in the importance of input-related factors in legitimation. These include, for example, accountability, impartiality in regulatory proceedings, and the protection of fundamental rights such as the democratic right to self-determination and to the oversight and control of power.

Generalizations on the basis of a single-country, single-sector plausibility-test—albeit supplemented by anecdotal evidence from other sources—must, of course, be approached with care. A collation of insights from various case-studies could form the basis of a more systematic comparative investigation. These studies should include reviews of regulatory regimes that are not such ready candidates for politicization: one reason for the

[15] See also de Maizière (2015).

[16] The WADA report on systematic doping in Russia, released on 9 November 2015, also addressed 'major concerns about RUSADA's [Russian Anti-Doping Agency] functioning as an impartial institution' (WADA, 2015, p. 16). See also Bouhs and Kempe (2015).

[17] See also Alvad (2016).

wide range of patterns of legitimation proffered in the debates about the hybrid regime's private core may lie in the comprehensiveness of the political authority the regime has acquired and the legitimatory requirements that follow from this. Important additional insights could also be gained by taking possible cross-sector differences into account. Whether regulatory authority is wielded by a business corporation or by civil society, for example, is likely to be of some significance.

Acknowledgments

This article emerged from the collaboration of the Peace Research Institute Frankfurt and the Max Planck Institute for European Legal History in the Frankfurt Cluster of Excellence 'The Formation of Normative Orders'. The author wishes to thank all participating institutions for their support.

Conflict of Interests

The author declares no conflict of interests.

References

Abbott, K. W., & Snidal, D. (2009). The governance triangle: Regulatory standards institutions and the shadow of the state. In W. Mattli & N. Woods (Eds.), *The politics of global regulation* (pp. 44–88). Princeton, NJ: Princeton University Press.

Adolphsen, J., & Kauerhof, R. (2013). Überfällige Sanktionierung oder unzulässige Einmischung? *Legal Tribune Online*. Retrieved from http://www.lto.de/recht/hintergruende/h/anti-doping-gesetz-pro-contra

Alvad, S. (2016). Report examines corruption in sport. *Playthegame*. Retrieved from http://www.playthegame.org/news/news-articles/2016/0148_report-examines-corruption-in-sport

Andersen, J. S. (2015). Comment. *Playthegame*. Retrieved from http://www.playthegame.org/news/comments/2015/021_the-year-that-killed-the-autonomy-of-sport

Becker, C. (2015a). Attacke vom DOSB auf die Regierung. *Faz.net*. Retrieved from http://www.faz.net/aktuell/sport/sportpolitik/anti-doping-gesetz-dosb-attackiert-regierung-13419045.html

Becker, C. (2015b). Versuchte Kernschmelze. *Faz.net*. Retrieved from http://www.faz.net/aktuell/sport/sportpolitik/anti-doping-gesetz-dosb-widerspricht-regierung-13419049.html

Benz, A., & Papadopoulos, Y. (2006). Introduction. Governance and democracy: Concepts and key issues. In A. Benz & Y. Papadopoulos (Eds.), *Governance and democracy* (pp. 1–26). London and New York, NY: Routledge.

Bernstein, S. (2011). Legitimacy in intergovernmental and non-state global governance. *Review of International Political Economy*, *18*(1), 17–51.

Bernstein, S., & Cashore, B. (2007). Can non-state global governance be legitimate? An analytical framework. *Regulation and Governance*, *1*(4), 347–371.

Bodansky, D. (2013). Legitimacy in international law and international relations. In J. L. Dunoff & M. A. Pollack (Eds.), *Interdisciplinary perspectives on international law and international relations: The state of the art* (pp. 321–342). Cambridge: Cambridge University Press.

Boerzel, T., & Risse, T. (2005). Public-private partnerships: Effective and legitimate tools of international governance? In E. Grande & L. W. Pauly (Eds.), *Complex sovereignty. Reconstituting political authority in the twenty-first century* (pp. 195–216). Toronto: University of Toronto Press.

Bouhs, D., & Kempe, R. (2015). Hoffnung auf einen sauberen Sport. *Deutschlandfunk*. Retrieved from http://www.deutschlandfunk.de/anti-doping-gesetz-hoffnung-auf-einen-sauberen-sport.724.de.html?dram:article_id=340958

Cashore, B. (2002). Legitimacy and the privatization of environmental governance: How non state market-driven (NSMD) governance systems gain rule making authority. *Governance*, *15*(4), 503–529.

Coni-Zimmer, M., Wolf, K. D., & Collin, P. (2017). Editorial to the issue on legitimization of private and public regulation: Past and present. *Politics and Governance*, *5*(1), 1–5.

Council of Europe. (1989). *Anti-doping convention*. Retrieved from http://conventions.coe.int/Treaty/en/Treaties/Html/135.htm

Court of Arbitration for Sport. (2015). Statement of the Court of Arbitration for Sport (CAS) on the decision made by the Oberlandesgericht München in the case between Claudia Pechstein and the International Skating Union (ISU). Retrieved from http://www.tas-cas.org/fileadmin/user_upload/CAS_statement_ENGLISH.pdf

Cutler, A. C., Haufler, V., & Porter, T. (Eds.). (1999). *Private authority and international affairs*. Albany, NY: SUNY Press.

de Maizière, T. (2015). Dieser Gesetzentwurf ist kurz, klar, hart und wirksam. *Cducsu*. Retrieved from https://www.cducsu.de/themen/innen-recht-sport-und-ehrenamt/dieser-gesetzentwurf-ist-kurz-klar-hart-und-wirksam

Dingwerth, K. (2007). *The new transnationalism: Transnational governance and democratic legitimacy*. Basingstoke: Palgrave Macmillan.

Deutscher Olympischer Sportbund. (2015). Declaration of the DOSB athletes' commission. Retrieved from https://www.dosb.de/de/leistungssport/anti-doping/news/detail/news/dosb_athletenkommission_zum_anti_doping_gesetz

Engelmeier, M. (2015). *Es wird ungemütlich für Doper—das Anti-Doping-Gesetz stärkt den Sport*. Retrieved from http://www.michaela-engelmeier.de/archiv/es-wird-ungemuetlich-fuer-doper-das-anti-doping-gesetz-staerkt-den-sport.html

European Court of Justice. (1995). Judgment of the Court of 15 December 1995. Case C-415/93. *European Court Reports*. Retrieved from http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX:61993CJ0415

Financial Times. (2014). International sport should not be a law unto itself. *Financial Times*. Retrieved from http://www.ft.com/cms/s/0/3a78e04c-7baa-11e4-a695-00144feabdc0.html#axzz42VtMU9Mb

Flohr, A., Rieth, L., Schwindenhammer, S., & Wolf, K. D. (2010). *The role of business in global governance*. Basingstoke: Palgrave Macmillan.

Freitag, D. (2015). Interview: Dagmar Freitag begrüßt das Gesetz gegen Doping. *Deutscher Bundestag*. Retrieved from http://www.bundestag.de/dokumente/textarchiv/2015/kw47-interview-freitag/395596

Geeraert, A. (2015). *Sports governance observer 2015. The legitimacy crisis in international sports governance* (Report). Copenhagen: Danish Institute for Sports Studies.

Gibson, O. (2013). Drugs in sport: WADA says doping and organised crime 'too big to manage'. *The Guardian*. Retrieved from https://www.theguardian.com/sport/2013/feb/15/drugs-wada-organised-crime

Gutmann, A. (Ed.). (1998). *Freedom of association*. Princeton, NJ: Princeton University Press.

Haas, U. (2004). Effektive Dopingbekämpfung ist ohne Staat nicht möglich. *Faz.net*. Retrieved from http://www.faz.net/aktuell/sport/sportpolitik/dopinggesetzgebung-effektive-dopingbekaempfung-ist-ohne-staat-nicht-moeglich-1146943.html

Hall, R. B., & Biersteker, T. J. (2002). The emergence of private authority in the international system. In R. B. Hall & T. J. Biersteker (Eds.), *The emergence of private authority in global governance* (pp. 3–22). Cambridge: Cambridge University Press.

Held, D., & Koenig-Archibugi, M. (2005). *Global governance and public accountability*. Oxford: Blackwell Publishing.

Héritier, A. (Ed.). (2002). *Common goods. Reinventing European and international governance*. Lanham, MD: Rowman and Littlefield.

Héritier, A., & Lehmkuhl, D. (2008). Introduction: The shadow of hierarchy and new modes of governance. *Journal of Public Policy*, *28*(1), 1–17.

Hungermann, J. (2015). Neues Antidopinggesetz sieht Haftstrafen vor. *Welt*. Retrieved from http://www.welt.de/sport/article138747683/Neues-Antidopinggesetz-sieht-Haftstrafen-vor.html

Kauerhof, R. (2007). Ein Anti-Doping-Gesetz als Garant für den sauberen Sport? *HRRS. Onlinezeitschrift für Höchstrichterliche Rechtsprechung im Strafrecht*, *2*(8), 71–75. Retrieved from http://hrr-strafrecht.de

Keohane, R. O., & Nye, J. S. (2003). Redefining accountability for global governance. In H. Kahler & D. A. Lake (Eds.), *Globalizing authority* (pp. 386–411). Princeton, NJ: Princeton University Press.

Kooiman, J. (2000). Societal governance: Levels, modes, and orders of social–political interaction. In J. Pierre (Ed.), *Debating governance* (pp. 138–164). Oxford: Oxford University Press.

Krahmann, E. (2017). Legitimizing private actors in global governance: From performance to performativity. *Politics and Governance*, *5*(1), 54–62.

Krings, G. (2015). *Betrug und Unfairness wollen wir im Sport nicht*. Retrieved from https://www.cducsu.de/themen/innen-recht-sport-und-ehrenamt/betrug-und-unfairness-wollen-wir-im-sport-nicht

Künast, R. (2015). Doping im Sport. *Gruene-bundestag*. Retrieved from https://www.gruene-bundestag.de/?id=4395524

Majendie, M. (2013). Exclusive: Wada chief John Fahey to target the cheats behind the drug cheats. *Independent*. Retrieved from http://www.independent.co.uk/sport/general/athletics/exclusive-wada-chief-john-fahey-to-target-the-cheats-behind-the-drug-cheats-8729058.html

Mayntz, R. (2002). Common goods and governance. In A. Héritier (Ed.), *Common goods: Reinventing European and international governance* (pp. 15–27). Lanham, MD: Rowman & Littlefield.

Michael, L. (2005). Private Standardsetter und demokratisch legitimierte Rechtsetzung. In H. Bauer, P. M. Huber, & K.-P. Sommermann (Eds.), *Demokratie in Europa* (pp. 431–456). Tübingen: Mohr Siebeck.

Mutlu, Ö. (2015). Doping im Sport. *Gruene-bundestag*. Retrieved from https://www.gruene-bundestag.de/?id=4395523

Norddeutscher Rundfunk. (2015). Maas setzt grosse Hoffnung in Anti-Doping-Gesetz. *NDR.de*. Retrieved from http://www.ndr.de/sport/mehr_sport/Maas-setzt-grosse-Hoffnung-in-Anti-Doping-Gesetz,heikomaas108.html

Papadopoulos, Y. (2010). Accountability and multi-level governance: More accountability, less democracy? *West European Politics*, *33*(5), 1030–1049.

Pattberg, P. (2005). The Forest Stewardship Council: Risk and potential of private forest governance. *Journal of Environment Development*, *14*(3), 356–374.

Pattberg, P. (2006). Private governance and the South: Lessons from global forest politics. *Third World Quarterly*, *27*(4), 579–593.

Pierre, J. (2000). (Ed.). *Debating governance* (pp. 138–164). Oxford: Oxford University Press.

Pollitt, C., & Bouckaert, G. (2000). *Public management reform: A comparative analysis*. Oxford: Oxford University Press.

Reinsch. M. (2015). Cookson: 'Strafrecht für Doper eine gute Idee'. *Faz.net*. Retrieved from http://www.faz.net/aktuell/sport/sportpolitik/doping/anti-doping-gesetz-cookson-strafrecht-fuer-doper-eine-gute-idee-13572097.html

Reuter, D. (1996). Das selbstgeschaffene Recht des internationalen Sports im Konflikt mit dem Geltungsanspruch des nationalen Rechts. *Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht*, *6*(1), 1–9.

Ronit, K., & Schneider, V. (2000). Private organizations and their contribution to problem-solving in the global arena. In K. Ronit & V. Schneider (Eds.), *Private organizations in global politics* (pp. 1–33). London: Routledge.

Röthel, A. (2007). Lex mercatoria, lex sportiva, lex technica—Private Rechtsetzung jenseits des Nationalstaates? *JuristenZeitung*, *62*(15/16), 755–763.

Rumsby, B. (2015). Russia cannot send athletics team to Rio Olympic Games if it fails to fix drugs scandal, says Wada chief. *Telegraph*. Retrieved from http://www.telegraph.co.uk/sport/othersports/athletics/11997521/Russia-cannot-send-athletics-team-to-Rio-Olympic-Games-if-it-fails-to-fix-drugs-scandal-says-Wada-chief.html

Rumsby, B. (2016). Lord Coe admits to failings as doping scandal deepens following Wada doping report. *Telegraph*. Retrieved from http://www.telegraph.co.uk/sport/othersports/athletics/12099794/Lord-Coe-under-intense-pressure-after-damning-WADA-doping-report.html

Scharpf, F. (1999). *Governing in Europe: Effective and democratic?* Oxford and New York, NY: Oxford University Press.

Schiedermair, S. (2012). *Der Schutz des Privaten im Völkerrecht*. Tübingen: Mohr Siebeck.

Scholte, J. A. (2011). *Building global democracy? Civil society and accountable global governance*. Cambridge: Cambridge University Press.

Schwab. B. (2015). *Organised athletes: A critical voice in sports governance*. Retrieved from http://blog.transparency.org/2015/09/11/organised-athletes-a-critical-voice-in-sports-governance

Siekmann, R. C. R. (2012). Anti-doping law in sport: The hybrid character of WADA and the human rights of athletes in doping cases (proportionality principle). In R. C. R. Siekmann (Ed.), *Introduction to international and European sports law* (pp. 313–333). The Hague: Springer.

Simmerl, G., & Zuern, M. (2016). Internationale Autorität. *Zeitschrift für Internationale Beziehungen*, *23*(1), 38–70.

Sports Inquirer. (2016). *Athletics: Australia backs embattled Coe after WADA report*. Retrieved from http://sports.inquirer.net/203564/athletics-australia-backs-embattled-coe-after-wada-report

Spox.com. (2015). *Gegenwind für Anti-Doping-Gesetz*. Retrieved from http://www.spox.com/de/sport/mehrsport/1506/News/anti-doping-gesetz-gegenwind-bundestag-robert-harting.html

Telegraph. (2012). London 2012 Olympics: World Anti-Doping Agency hit back after Daley Thompson attack. *Telegraph*. Retrieved from http://www.telegraph.co.uk/sport/olympics/news/9123182/London-2012-Olympics-World-Anti-Doping-Agency-hit-back-after-Daley-Thompson-attack.html

The National. (2016). Corruption 'embedded' at IAAF, claims Wada report. *The National*. Retrieved from http://www.thenational.ae/sport/other/corruption-embedded-at-iaaf-claims-wada-report

Toman-Miller, M. A. (2015). U.S. soccer official says he saw no FIFA corruption but felt growing 'discomfort'. *Los Angeles Times*. Retrieved from http://www.latimes.com/nation/la-na-us-soccer-congress-20150715-story.html

Transparency International. (2016). *Global corruption report. Sport*. Retrieved from http://www.transparency.org/news/feature/sport_integrity

UNESCO. (2005, October 19). International Convention against doping in sport 2005. *UNESCO*. Retrieved from http://portal.unesco.org/en/ev.php-URL_ID=31037&URL_DO=DO_TOPIC&URL_SECTION=201.html

Vesper, M. (2014). Für hartes Anti-Doping-Gesetz und durchgreifende Sportgerichte. *DOSB*. Retrieved from http://www.dosb.de/de/leistungssport/anti-doping/news/detail/news/fuer_hartes_anti_doping_gesetz_und_durchgreifende_sportgerichte

Wolf, K. D. (2002). Contextualizing normative standards for legitimate governance beyond the state. In J. R. Grote & B. Gbikpi (Eds.), *Participatory governance* (pp. 35–50). Opladen: Leske & Budrich.

Wolf, K. D. (2006). Private actors and the legitimacy of governance beyond the state: Conceptional outlines and empirical explorations. In A. Benz & Y. Papadopoulos (Eds.), *Governance and democracy* (pp. 200–227). London and New York, NY: Routledge.

Wolf, K. D. (2008). Emerging patterns of global governance: The new interplay between the state, business and civil society. In A. G. Scherer & G. Palazzo (Eds.), *Handbook of research on global corporate citizenship* (pp. 225–248). Cheltenham: Edward Elgar.

Wolf, K. D. (2014). The non-existence of private self-regulation in the transnational sphere and its implications for the responsibility to procure legitimacy: The case of the lex sportiva. *Global Constitutionalism*, *3*(3), 275–309.

Wolff, J., & Zimmermann, L. (2016). Between banyans and battle scenes: Liberal norms, contestation, and the limits of critique. *Review of International Studies*, *42*(3), 513–534.

World Anti-Doping Agency. (2014). *World anti-doping code 2015*. Retrieved from https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf

Word Anti-Doping Agency. (2015, November 9). *The Independent Commission report#1. Final report*. Retrieved from https://www.documentcloud.org/documents/2509901-wada-independent-commission-report-1-en.html

World Conference on Doping in Sport. (2003). *Copenhagen Declaration on Anti-Doping in sport 2003*. Retrieved from https://www.wada-ama.org/en/resources/world-anti-doping-program/copenhagen-declaration

Zagzebski, L. (2012). *Epistemic authority: A theory of trust, authority, and autonomy in belief*. Oxford: Oxford University Press.

Zuern, M. (2011). Perspektiven des demokratischen Regierens und die Rolle der Politikwissenschaft im 21. Jahrhundert. *Politische Vierteljahresschrift*, *52*(4), 603–635.

Zuern, M. (2012). Globalization and global governance. In W. Carlsnaes, T. Risse, & B. A. Simmons (Eds.), *Handbook of international relations* (pp. 401–425). London: Sage.

Zuern, M. (2014). The politicization of world politics and its effects: Eight propositions. *European Political Science Review*, *6*(1), 47–71.

Zuern, M., Binder, M., & Ecker-Ehrhardt, M. (2012). International authority and its politicization. *International Theory*, *4*(1), 69–106.

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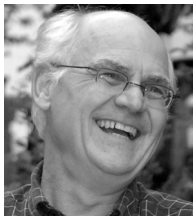

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COGITATIO

Politics and Governance (ISSN: 2183–2463)
2017, Volume 5, Issue 1, Pages 75–84
DOI: 10.17645/pag.v5i1.794

Article

Field Recognition and the State Prerogative: Why Democratic Legitimation Recedes in Private Transnational Sustainability Regulation

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Submitted: 4 October 2016 | Accepted: 25 October 2016 | Published: 15 March 2017

Abstract
Like any regulatory effort, private transnational standard-setters need to legitimate themselves to the audiences from which they seek support or obedience. While early scholarship on private transnational governance has emphasized the centrality of *democratic* legitimation narratives in rendering private governance socially acceptable, evidence from more recent standard-setting schemes suggests a declining relevance of that narrative over time. In my analysis of private sustainability regulation, I identify a combination of two factors that jointly contribute to this diminished role of democratic legitimation. First, private transnational governance has become a pervasive phenomenon. This means that new entrants to the field no longer face the same liability of newness that required first movers to make an extra effort in legitimation. Second, private standard-setting has moved from areas characterized by 'governance gaps' to areas in which meaningful intergovernmental regulation already exists. In these areas, however, the 'state prerogative' in legitimating governance holds. As a result, transnational standard-setters rely not so much on stressing their democratic credentials, but instead emphasize their contribution to achieving internationally agreed goals.

Keywords
democracy; global governance; legitimacy; private regulation; sustainability standards

Issue
This article is part of the issue "Legitimization of Private and Public Regulation: Past and Present", edited by Klaus Dieter Wolf (Peace Research Institute Frankfurt, Germany), Peter Collin (Max Planck Institute for European Legal History, Germany) and Melanie Coni-Zimmer (Peace Research Institute Frankfurt, Germany).

1. Introduction

In the 1990s, private transnational regulation was the proverbial new kid on the block. Observers saw world politics at a 'bifurcation', as the state-centric world of world politics was increasingly complemented, if not replaced, by a 'multi-centric' world of world politics in which private actors carved out spheres of authority for often very specific issues (Biersteker & Hall, 2002; Cutler, Haufler, & Porter, 1999; Haufler, 1993; Rosenau, 1990, 1995; Wapner, 1995).

In the field of sustainability governance, the proliferation of private transnational governance was particularly pronounced. While the CERES Principles set a code for the environmental conduct of companies, the Global Reporting Initiative (GRI) developed criteria geared to harmonize corporate reporting on environmental performance. Elsewhere, the Forest Stewardship Council (FSC) set standards for sustainable management of forests—an approach which the Marine Stewardship Council (MSC) soon copied for fisheries—and the World Commission on Dams (WCD) developed social and environmental guidelines for the international financing of large dams (Auld, 2014; Cashore, Auld, & Newsom, 2004; Dingwerth, 2007; Gulbrandsen, 2010; Pattberg, 2007). Beyond the sustainability field, Fairtrade Labelling Organizations International and Utz Certified established fair trade standards while a wealth of initiatives developed and promoted fair labour standards for the textiles industry. Finally, in the new field of Internet governance,

a private organization like the Internet Corporation for Assigned Names and Numbers became a key regulator; and even in international security, private companies offering security and military services had come to engage in meaningful self-regulation across borders (Krahmann, 2017).

Taken together, these developments suggested that private transnational regulation had moved significantly beyond its traditional confines of the transnational merchant rules—the *lex mercatoria*—and global sports governance—the *lex sportiva* (Wolf, 2017)—to become a key part of 'global governance' (Dingwerth & Pattberg, 2006; Rosenau, 1995; Whitman, 2009). But how had it been possible for private regulators to gain—and subsequently maintain—the legitimacy they required to 'govern through markets' (Cashore et al., 2004)? Early scholarship had argued that, in the absence of a formal mandate to regulate 'for the rest of us' (Lipschutz & Fogel, 2002), private regulators primarily relied on a democratic narrative (Bernstein & Cashore, 2007; Dingwerth, 2007). Regulators argued that, in developing new regulation, all relevant stakeholders had been included in transparent and open decision-making processes.

In this article, I argue that the democratic narrative has lost some of its centrality in the legitimation of transnational governance over time. I define *legitimation* as a discursive practice in which actors exchange arguments to justify their support of, or challenge to, an institution or its activities. *Democratic legitimation* then constitutes the justification or critique of institutions based on values that are commonly associated with the democratic process. Based on my own previous work (Dingwerth, 2007, pp. 12–36), I take the latter to include the values of inclusiveness, participation, representation and responsiveness (*participatory dimension*); transparency and accountability (*democratic control dimension*); as well as the values of sincere deliberation and discursive openness (*deliberative dimension*). Taken together, the observation that democratic legitimation has declined in relevance in private transnational self-regulation stands in marked contrast to the rise of democratic norms in *intergovernmental* governance (Grigorescu, 2015). To account for the relative decline of the democratic legitimation narrative, I focus on two contributing factors.

First, a closer look at the legitimation of transnational governance reveals that the choice of legitimation strategies is closely linked to the presence or absence of state regulation. In fields characterized by 'governance gaps', private regulators strongly rely on democratic legitimation narratives. Where intergovernmental regulation exists, private regulators primarily seek to show how their work contributes to the goals set by public regulation. As a result, democratic legitimation is less central.

Second, even in fields with low levels of intergovernmental regulation, late entrants to the field face lower legitimation pressures than the first private regulators in the 1990s. Given the 'liability of newness' (Hannan & Freeman, 1984), the latter had to make an extra effort to legitimate themselves, and they largely answered this need by stressing their democratic credentials. Once private regulation had become more widely recognized as a legitimate field of global governance and once its role within the broader landscape of global governance largely was taken for granted, legitimation pressures weakened and democratic legitimation became less central.

2. Legitimating Transnational Regulation

In the following, I reconstruct the legitimation of private rule-making in the field of global sustainability governance in three steps. I distinguish between an early phase in which private regulation was a relatively novel phenomenon ('Emergence'), a second stage in which it had become widely recognized as an increasingly 'normal' element of global sustainability governance ('Evolution'), and a third phase in which it reached out to neighbouring issue areas ('Expansion'). Democratic legitimation frames, I argue, have played a major role in the first phase, but not necessarily in the second and third.

2.1. Emergence

In global sustainability governance, transnational standard systems have initially emerged in the 1970s, diversified in the 1990s and spread ever since then (Green, 2014, pp. 78–103). They now cover a variety of resources as well as cross-cutting issues such as environmental reporting, environmental management systems or social accountability. The FSC thus defines what counts as sustainable wood, the MSC provides the same service for wild-catch fish, Bonsucro for sustainable sugarcane, and the Roundtable for Sustainable Palm Oil (RSPO), the Roundtable for Responsible Soy (RTRS) and many others for additional renewable and non-renewable resources. Add a number of standards on greenhouse gas accounting, offsetting and management, on fair trade, on mining or on corporate conduct in the textiles industry and you will still only get a very rough idea about the breadth, depth and diversity in contemporary transnational regulation.

So what role do democratic norms play in the legitimation of transnational standard schemes in this issue area? The short answer is that they constitute one important legitimation resource along with the *rule of law*, *continued progress* and a *contribution to problem-solving*. The long answer is more complex. It points to different roles democratic norms and values play in relation to the distinct tasks of *gaining* and *maintaining* the legitimacy of transnational organizations, to the institutional embedding of transnational regulation in intergovernmental regimes, and to the influence the legitimation cultures prevailing in different policy fields may exert on the strength of democratic values.

Let us look at the short answer first. Here, the notion that a contribution to problem-solving—or *effective-*

ness—is a necessary ingredient for successful claims to legitimacy is straightforward. At least in the environmental sustainability field, many transnational governance schemes thus emerged in the 1990s and 2000s on issues which governments had either sought but failed to regulate or not even sought to regulate in the first place. Set against this background, the fact that a transnational governance organization achieved at least something could be seen—and sold—as a success. The argument is thus one of responding to 'governance gaps'. Its common form would be that, if more and more companies procured wood or wood products and wild catch fish from sources certified as sustainable by the FSC and MSC, some trees and some fish stocks will be saved and some harm will therefore be prevented in comparison to a counterfactual world in which the FSC or MSC did not exist. Similarly, if the GRI manages to lure firms into regularly disclosing information about their environmental and human rights footprints, pressures to minimize such footprints are assumed to mount in the future, whether through consumer demands or investors' choices; and if decisions about large dams follow the guidelines developed by the WCD and include, for instance, sound impact assessments as well as the prior informed consent of indigenous groups affected by a project, we can continue to promote hydropower without repeating the mistakes made in the past.

Yet if effectiveness were the exclusive source of legitimation, most transnational governance schemes would stand on shaky ground. On the one hand, their actual contribution to problem-solving may either be unknown or—more likely—remain fairly modest. It may thus be true that the FSC or the GRI embody 'good ideas'. But if the FSC cannot help to significantly slow-down or even halt deforestation and if the GRI cannot help to make businesses truly environment-friendly and socially responsible, the organizations become open to a 'fig-leaf' critique according to which the commitment to transnational governance schemes simply allows firms or entire industries to 'greenwash' while continuing business as usual. As a result, *continued progress* becomes an important legitimation resource; it shows up in the growth rates which transnational schemes routinely stress in their annual reports, but also in concerns that further progress may be difficult to achieve once the 'low-hanging fruit' has been harvested. As the umbrella organization of the sustainability standards movement, the ISEAL Alliance, for instance, organized its 2012 Annual Conference under the label 'Beyond the 10 Percent', pointing to what many of its member organizations at the time perceived as a ceiling for their world market shares.

On the other hand, even if their effectiveness remains low, transnational governance schemes constitute regulatory interventions in markets. They publicly recognize and reward—sometimes in the form of a label, sometimes in other forms—the efforts of some market actors, but not of others. As they create value in this way, *legal certainty* becomes another relevant legitimation resource: firms that are not rewarded must be able to know why and firms that are awarded must be shown to be in compliance with the rules laid down by a transnational governance scheme. The effect of this demand is an institutionalization and a legalization of transnational governance schemes which encompasses decision-making as well as implementation. The former includes the legislative function of establishing or amending the principles and criteria according to which the scheme distinguishes between those who are rewarded and those who are not, and the constitutional function of establishing or amending the rules of procedure for the governance scheme as a whole. What usually results then, are more or less full-fledged 'private regimes' (Haufler, 1993) that are, in important ways, modelled on the form and function of intergovernmental regimes.

Finally, the legislative function which transnational governance schemes adopt by devising 'rules for the world' raises the question who has mandated them to do so. This, in turn, makes references to *democratic norms and values* a fourth pillar of legitimacy claims. In short, those representing the schemes thus tend to argue that their organizations are designed so as to maximize the inclusion of affected 'stakeholder groups', the transparency of the decision-making process and the possibility for mutual learning in deliberative forums. To lend credibility to such claims, many organizations formally or informally divide seats in executive boards along the lines of pre-defined stakeholder groups, establish consultative stakeholder forums and allow for public comments periods when proposing new or amending existing regulations (Bernstein & Cashore, 2007; Brassett, Richardson, & Smith, 2012; Dingwerth, 2007; Dingwerth & Pattberg, 2009).

Yet the reasons for adding this fourth pillar may be less obvious than for the first three legitimacy claims and hence require some further elaboration. Should a 'governance gap'—either alone or in combination with evidence for continued progress in addressing it and legal certainty for those who comply with a standard—not be a sufficiently powerful source of legitimation that renders the need for democratic legitimation less urgent, if not altogether obsolete; and if it is not, where does the demand for democratic legitimation arise from? I argue that it emerges for two reasons. First, even where a 'governance gap' is successfully constructed, it often remains contested. Industrialized nations may have argued for an international forest agreement; but the nations on whose territories much of the world's remaining forests are located identify the issue as being firmly within the boundaries of their national sovereignty. As a result, they reject the argument that a 'governance gap' actually exists (van Dam, 2002). Second, even if all or most relevant players were to agree that an issue demands regulation across borders, it may be far from clear who ought to regulate; and since the eventual choice of a regulator is likely to benefit some while putting others at a disadvantage, it will normally be contested (Benvenisti & Downs, 2007).

In response to both objections—is there really a governance gap, and if so, why should we allow this specific organization to respond to it?—, a solid response to the question why a specific organization is selected as a regulator becomes a central legitimation challenge. This is even more important where private transnational regulators are self-mandated.

While listing the four pillars might suggest a fairly simple and coherent legitimation process in which the ability to credibly make and defend four distinct claims is all one needs to be able to regulate, a closer look—as usual—reveals that the actual dynamics are a bit more complex.

As a first context, *gaining* and *maintaining* legitimacy are thus distinct tasks transnational governance organizations confront, and democratic norms tend to matter differently at each stage. The argument I presented above is thus primarily linked to the need to *gain* legitimacy. Organizations like the FSC or the WCD constituted civil society organizations (CSOs) of a new kind (Wapner, 1995). They neither advocated for new intergovernmental norms, nor did they monitor compliance with existing rules. Instead, they sought to *create new rules*, hence embodying what Jessica Green (2014) has termed 'entrepreneurial' rather than 'delegated authority'. Yet to the extent that they engaged in this function—that they sought to 'regulate for the rest of us' (Lipschutz & Fogel, 2002)—it seemed only fair to demand that they conform to democratic principles. In contrast, had they limited their operations to the more traditional CSO turf, the same demand would have been much less compelling. Meeting the 'traditional' standards for advocacy NGOs would have been sufficient in this case (van Rooy, 2004).

But since organizations like the FSC were of a new kind and since they described the need for their emergence as resulting from the failure of intergovernmental agreements to halt deforestation, they needed a basis on which to claim legitimacy. Copying standard features of international institutions was one part of the solution. The FSC thus defined membership rules and categories, designated the general assembly of members as the highest decision-making body and designed the *Principles and Criteria* on which certification in a way that resembled an international legal document. In addition, the democratic quality of the decision-making process featured prominently in statements that sought to justify the license to regulate which FSC members had arrogated to themselves.

In addition to strategy, identity was relevant, too. In the FSC case, founding members thus had a background as grassroots environmentalists, and many of them valued democratic norms not only as a strategic resource but also saw them as appropriate from a normative point of view. At the same time, organizations that emerged *after the FSC* faced strong incentives to follow the same path whether or not they shared the same persuasions. On the one hand, funding for new initiatives was easier to obtain if one could argue to build on the FSC model that was field-tested and widely seen as a success (Bartley, 2007). On the other hand, the WWF became a major partner in several initiatives, thereby facilitating isomorphism within an emerging organizational field.

Over time, as more and more standard-setters followed the FSC template, a standard model from which others could deviate only at their own risk evolved (Bernstein & Cashore, 2007; Dingwerth & Pattberg, 2009). With the establishment of the ISEAL Alliance as an umbrella organization of transnational standard-setters in 2002 and the Alliance's adoption of the *Code of Good Practice for Setting Social and Environmental Standards* in 2004, this standard model was eventually codified. As Table 1 shows, it included a number of criteria that are closely linked to democratic values. Besides their functional role and their perception as 'appropriate' by some of the initiatives themselves, the inclusion of these criteria was also promoted by international trade law where the World Trade Organization Agreement on Technical Barriers to Trade stipulated criteria which 'international standards' had to fulfil in order to be compatible with world trade law (Bernstein, 2011, p. 38).

The adoption of the *Code of Good Practice for Setting Social and Environmental Standards* in 2004 signals the maturation of the organizational field. At the same time, it also marks an important change in the function democratic legitimation came to play as the field matured. While democratic legitimation had initially served to establish legitimacy for a new type of organization as such, its function now shifted to *distinction*, notably between the more and the less 'credible' actors in the field. The organizations that originally made up the field thus used the *Code of Good Practice* no longer to claim that transnational standard systems could be legitimate—that claim had been widely accepted in the meantime—but rather to draw a boundary between their own standard systems and competing initiatives which, they argued, did not (yet) deserve the same level of 'credibility'.

As the ISEAL Alliance expanded from the eight members which made up its ranks for most of the early years to twenty-two full members, it further expanded its instruments of distinction. Notably, it added an *Impacts Code* (in 2010) and an *Assurance Code* (in 2012) with which all members need to comply. The former requires members to systematically monitor and evaluate the short-term and long-term impacts of their standard systems. The latter formulates minimum requirements in areas such as rigor, consistency, competence, impartiality or transparency that member organizations need to meet in assuring compliance with social and environmental standards. Expanding the range of codes thus implies an extension of the list of legitimacy requirements to which ISEAL members are subjected. But at the same time, it also means that democratic decision-making is no longer an exclusive basis for legitimacy. Instead, it has become one among several normative frames that constitute the 'gold standard' of legitimate private regulation as formulated by the ISEAL Alliance.

Table 1. References to democratic decision-making norms in the ISEAL Code. Source: ISEAL (2014).

Clause	Requirement (or aspirational good practice)	Democratic value
4.1	Documented procedures for the process under which each standard is developed or revised shall: a) form the basis of the standard-setting process; and b) shall be made available to stakeholders, at a minimum through the organization's website.	Transparency Accountability
5.2.1	At the outset of a standards development or revision process, the standard-setting organisation shall develop or update lists of sectors that have an interest in the standard and key stakeholder groups within those sectors, based on the standard's scope and its social, environmental and economic outcomes.	Inclusiveness
5.2.2	The standard-setting organisation shall: a) seek to achieve representative participation in its standard-setting activities. (*aspirational good practice*)	Representation Participation
5.4.1	The public consultation phase for standards development or revision shall include at least one round of 60 days for comment submissions by stakeholders….For new standards development, a second round of consultation of at least 30 days shall be included.	Inclusiveness Transparency
5.4.2	The standard-setting organization shall ensure that participation in the consultation process: a) is open to all stakeholders; and b) aims to achieve a balance of interests in the subject matter and in the geographic scope to which the standard applies.	Inclusiveness
5.4.3	The standard-setting organisation shall provide stakeholders with appropriate opportunities to contribute to the development or revision of a standard.	Participation
5.4.4	The standard-setting organisation shall: a) identify stakeholder groups that are not adequately represented; and b) proactively seek their contributions. This shall include addressing constraints faced by disadvantaged stakeholders.	Representation Inclusiveness
5.4.6	The standard-setting organisation shall make original comments received during a consultation period publicly available. (*aspirational good practice*)	Transparency
5.6.1	Participation in governance bodies making decisions on the content of the standard shall: a) be open to all stakeholders; and b) shall be constituted by a reasonable balance of those stakeholders, including those that are directly affected.	Representation Inclusiveness
5.6.3	The standard-setting organisation shall: a) strive for consensus on decisions on the content of the standard; b) define criteria in advance to determine when alternative decision-making procedures should come into effect, in the event that consensus cannot be achieved; and c) define what the decision-making thresholds will be. Those thresholds shall ensure that no one stakeholder group or type can control decision-making.	Deliberation (Balanced) Representation Transparency Accountability

2.2. Evolution

In a way, the decline of democratic legitimation frames is thus a function of the maturity of the field. While first movers like the FSC needed to show how 'democratic' they were in order to be accepted as a new, but nonetheless legitimate form of global governance, their success in doing so means that private governance has, over the course of two decades, become a widely recognized 'pillar' of contemporary global governance. The implication is that existing regulators spend, relatively speaking, less effort on demonstrating their democratic quality. Moreover, new entrants to the field can be expected to also rely less on a democratic legitimation narrative and to emphasize performance and assurance instead.

In terms of new entrants, the RSPO, the RTRS, the Better Cotton Initiative (BCI) and Bonsucro can serve as examples. With the exception of the RTRS, all are members of the ISEAL Alliance. Moreover, all four engage in the certification of agricultural goods or food commodities, thus distinguishing the initiatives from other ISEAL members like Equitable Origin that certifies gas and oil exploration and production, the Golf Environment Organization that certifies sustainable golf courses or GoodWeave that offers a label for carpets and rugs free from exploitative production.

So what role does democratic legitimation play in the more recent initiatives? Existing studies of the RSPO and RTRS suggest that democratic legitimation is relevant in the sense that the organizations identify themselves as

'multi-stakeholder initiatives' that represent all relevant sectors in the supply chain for the respective commodity. At the same time, they show that both organizations have difficulties to become fully representative of the diversity of interests in their respective fields, thereby putting an inherent limit to the extent to which the organizations can use a democratic narrative as a basis for building their legitimacy (Schouten & Glasbergen, 2011; Schouten, Leroy, & Glasbergen, 2012). As a result, they seek to demonstrate their strength elsewhere, notably in the claim that the volumes of certification rise fast and steady. Moreover, since public contestation of the RSPO mainly revolves around the credibility of the environmental claims of certificate-holders, the organization also emphasizes credibility issues in its external communication (Nikoloyuk, Burns, & de Man, 2010, pp. 68–69).

Again, in particular the performance claim is one that *all* standard systems make, so the difference is primarily in the emphasis placed on either performance or procedures. Informing about the representative nature of the initiative, the RSPO website for instance simply states that it 'unites stakeholders from the 7 sectors of the palm oil industry' and that it counts 'more than 2,500 members worldwide who represent all links along the palm oil supply chain' (RSPO, 2016). Similarly, the BCI informs that 'to achieve [its] mission, BCI works with a diverse range of stakeholders across the cotton supply chain to promote measurable and continuing improvements for the environment, farming communities and the economies of cotton-producing areas' (BCI, 2016); and Bonsucro stipulates that it 'builds a platform to accelerate change for the largest agricultural commodity in the world—sugarcane' (Bonsucro, 2016). This is different from the stronger statement of the FSC, which claims that 'to make sure no one viewpoint dominates the others, our membership has three chambers—*environmental*, *social* and *economic*—that have equal rights in decision-making' (FSC, 2016a, emphasis in the original).

A very similar picture is obtained by examining the Public System Reports (PSR) that ISEAL members are asked to update and submit annually for each of the three ISEAL Codes. Looking at the *Standards Code*, the FSC report is not only significantly more detailed and more comprehensive; it also puts a stronger emphasis on the organization's identity as a representative 'membership organization' (FSC, 2016b). What is relatively easy to spot, thus, is that new entrants pay less attention to democratic legitimation than the 'first movers'. The second expectation which holds that the 'first movers' themselves will reduce the role that the democratic narrative plays in their efforts to claim legitimacy over time, is more difficult to ascertain based on the PSR documents published by the ISEAL Alliance. The MSC, for instance, reports more comprehensively about the inclusiveness of its decision-making procedures than many of the more recent initiatives (MSC, 2015). This might suggest that socialization into the norms of the (early) field is stronger than expected—an idea that warrants further scrutiny.

2.3. Expansion

The previous section has mainly dealt with the fact that private transnational governance has become a pervasive and hence more common phenomenon in the field of natural resource governance. Yet private regulation has also expanded beyond that field, most notably so in the area of climate governance. The data Jessica Green has gathered for her book *Rethinking Private Authority* is particularly telling in this regard. Having collected information on 119 private environmental regulations from 1950 to 2009, Green notes that 107 of these have emerged in the 1990s and 2000s. Organizing the initiatives along 16 different sectors, she further notes that 'the carbon sector, which is the youngest at only eleven years, has the largest number of certification schemes'. It accounts for a total of 24 initiatives, 'a full 3 standard deviations above the mean' (Green, 2014, p. 96).

What this tells us is that carbon standards—which roughly fall into carbon accounting, carbon reporting and disclosure, carbon performance and carbon offsetting—have been able to build on the success of private transnational governance in the field of sustainable resources and transfer some of the basic ideas, designs and experiences to a new sector (Abbott, 2012a; Andonova, Betsill, & Bulkeley, 2009; Dingwerth & Green, 2015). At the same time, the initiatives we find in the carbon sector differ in two important ways. First, they include the by far smallest share of *de novo* regulations among all sectors—17 per cent, while the share among all 119 initiatives is 53 per cent. *De novo* regulations, according to Green (2014, pp. 89–95), are 'entirely new' sets of rules while *amended* regulations 'appropriate some aspects' of existing regulations. Second, they tend to be geared towards contributing either to the broader goals set in the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol or to specific articles of these legal agreements.

In her qualitative reconstruction of the emergence of the Greenhouse Gas (GHG) Protocol, Green (2014, pp. 132–162) demonstrates how this regulation for carbon accounting was initiated by two private actors, the World Resources Institute (WRI) and the World Business Council for Sustainable Development (WBCSD). At the same time, it was strongly nested in the regulations of the Kyoto Protocol. The latter had made the prospect of a carbon-restricted world more likely and thereby raised the demand for carbon accounting at the national, the corporate and the project level. As Green (2014, p. 161) argues, the GHG Protocol became the focal institution for carbon accounting because there was a strong demand for its services and 'because at the time there was no organization—public or private—with the expertise to fulfil the same role'. Green acknowledges that 'the transparency of the rule-making process and the willingness by WRI and WBCSD to include all interested parties endowed the process and, eventually, the rules with a high level of legitimacy' (Green, 2014, p. 162). Yet the nest-

ing of the GHG Protocol in public intergovernmental regulation meant that legitimation itself was focused on expertise and technical know-how rather than on a democratic narrative. Private regulation did not face a need to legitimate its broader goals since these were, quite simply, meant to contribute to the goals that governments around the world had agreed upon.

A second case study of the Clean Development Mechanism (CDM) further illustrates how private transnational regulation is sometimes not as private as the label suggests and that 'delegated authority' is equally important as 'entrepreneurial authority'. In some instances, notably when an issue area is characterized by a strong focal organization, that focal organization—in the CDM case, this is the UNFCCC Secretariat—may find it useful to delegate the task of specifying standards that help to implement specific legal provisions to private actors (Green, 2008; see also Schleifer, 2013).

In sum, our comparison of transnational regulation on sustainable resource use and climate change illustrates that regulatory structure matters. Even fields that share a common issue area—environmental politics—may thus respond to different legitimation norms. While the transnational regulation of sustainable wood, fish, palm oil or soy occurs in the absence of intergovernmental framework regulations, transnational climate regulation is strongly influenced by the UNFCCC and the Kyoto Protocol. As the goals of private regulatory initiatives resonate with internationally agreed goals, principles or instruments, the need to justify the 'right to regulate' is a different one for transnational climate governance. We can call this the *state prerogative* in legitimating transboundary regulation. In short, the state prerogative implies that, where (inter-)state regulation is in place, private regulation primarily legitimates itself in relation to the goals, principles and instruments of public regulation. In contrast, where (inter-)state regulation is largely absent, a 'residual' right to regulate needs to be defended. In such cases, democratic legitimation norms become central.

To some extent, this observation can also help explain why the legitimation of transnational sustainability regulation differs from the legitimation of labour rights standards. In the former, international law is weaker so that the FSC and its allies can be seen as genuine *law-makers*; in the latter, international human rights law serves as a strong background, and standard-setters like the Fair Wear Foundation are seen not as making, but as *implementing law* by way of applying it to producers. Yet, relevant contexts include not only regulatory, but also normative structures in the policy field in question. The fair trade movement, for example, does not rely much on democratic legitimation, but rather on substantive arguments about the normative adequacy of its principles *even though it is not embedded in an intergovernmental regime from which it could more or less directly derive its goals or principles*. So field-specific legitimation cultures are likely to play a role, too. In this context, environmental governance is sometimes considered to have a more 'participatory' culture than other areas like financial or economic governance (Bernstein, 2011, p. 42), although issue-framing as 'technical' versus 'political' may cut across this simple division. For example, governing chemical substances or the safety of nuclear power plants can be seen as environmental policy issues that, compared to conservation governance, follow a relatively strong 'technical' framing. As a result, the legitimation of industry self-regulation cases like *Responsible Care* or the World Association of Nuclear Operators—both under a strong shadow of state regulation—relies almost entirely on technical expertise (Braithwaite & Drahos, 2000).

Existing research on private governance through rating agencies, accounting standards or information technology standards seems to confirm that the reliance on a strong democratic legitimation narrative is not a general, but rather a field-specific phenomenon (see e.g. Black, 2008; Botzem, 2012; Botzem & Dobusch, 2012; Dobusch & Quack, 2013; Kerwer, 2005). Norms of transparency and accountability also play a role in these areas, and the problem of defining stakeholder categories seems, at least occasionally, to also prompt organizations in 'technical' issue areas to justify their decisions not only in terms of expertise but also of (some variant of) the all-affected principle. But if we consider that even in the highly politicized areas of fair trade and labour standards, non-democratic criteria—notably just outcomes and respect for human rights—constitute the *primary* sources of legitimation, this lends support to the idea that field-specific cultures are central. In the end, our very rough survey thus suggests that, all else being equal, democratic legitimation narratives will be strongest where standard-setters operate in areas that are not already regulated by states, that are characterized by a 'participatory legitimation culture', and that are dominated by 'political frames'. In contrast, we should expect democratic legitimation narratives to be less central in fields where states provide a regulatory framework, where legitimation cultures are less participatory and where issues are framed mostly in 'technical' terms.

3. Conclusion

There are two take-home messages from this discussion. First, private transnational sustainability governance made its initial mark in global governance by successfully claiming that its decision-making procedures were based on 'democratic' or 'democracy-like' foundations—a claim that seems to have become less central as the field became more mature, more well-known, and more densely populated. This observation confirms the theoretical idea that organizational fields are dynamic and that some important lessons we may have learned about them in the past may have become outdated in the present. More precisely, private governance could initially only become legitimate if it could demonstrate its democratic credentials. But that does not necessarily mean that its democratic foundation remains as relevant in future develop-

ment stages of the organizational field. In contrast, the argument I have presented suggests that field recognition decreased the demand for democratic legitimation.

Second, private transnational sustainability governance has expanded from its 'ecological niche' (Abbott, Green, & Keohane, 2016) in areas in which states had long been unable to agree on substantive rules to areas in which intergovernmental rules are strong. In these areas, private transnational regulators function not as *lawmakers* but as *implementing agencies* that put international public law to work. But serving a different function also implies that the legitimation of private governance differs in these areas. This second observation essentially confirms what Edward Balleisen observes for the domestic context, namely that 'state strength' is a key variable for explaining the form private self-regulation takes as well as the legitimation norms such regulation tends to be founded upon (Balleisen, 2009). For the case I have discussed in this article, it means that the 'state prerogative' provides a second context in which the demand for democratic legitimation is reduced.

In the larger scheme of things, the normative implications of the observations I make in this article are difficult to judge. In one way, the rise of private transnational governance in the 1990s ushered in a period of 'democratic experimentalism', and the liability of newness that forced the first movers to make strong arguments about why they should be allowed to regulate 'for the rest of us' made exciting projects like the FSC and later the ISEAL Alliance possible. The institutionalization, professionalization and bureaucratization that came with the evolution of private governance into a more common and more widely recognized pillar of global governance took away some of this excitement. As a result, global democrats will need to think hard about whether private global governance is a project in which they wish to invest further hopes. In another way, however, the state prerogative could also be read as good news. It ensures that where governments—many of them democratically elected—can agree on substantive rules for which there is a strong demand, these rules are likely to guide the activities of the more experimental, more flexible and often also more innovative private regulators. This would suggest a division of labor along the lines of a 'principled pragmatism' (Ruggie, 2013; see also Abbott, 2012b) in which public regulators set the broad goals and private regulators seek diverse ways of making the achievement of these goals possible. Eventually, the 'shadow of hierarchy' (Héritier & Lehmkuhl, 2008) that such a division of labour allows for could even become a co-benefit for resolving a further normative challenge, namely the risk of greenwashing to which critics of private transnational self-regulation frequently point.

Acknowledgements

For funding that contributed to the research I report in this paper, I am indebted to the Emmy Noether Programme of the Deutsche Forschungsgemeinschaft (Grant No. DI1417/2-1) and to the Profile Area 'Global Democratic Governance' at the University of St. Gallen. For helpful comments on earlier versions of the manuscript, I am grateful to the participants of the workshop 'The Legitimization of Private and Public–Private Regulation: Past and Present' held at the Max Planck Institute for Legal History in Frankfurt (Main) in April 2016, to fellow participants at the 'Designing Legitimacy' workshop held at the European University Institute in Florence in June 2016, and to two anonymous reviewers. I also thank Ciarán O'Flynn for language editing.

Conflict of Interests

The author declares no conflict of interests.

References

Abbott, K. W. (2012a). The transnational regime complex for climate governance. *Environment and Planning C: Government and Policy*, *30*(4), 571–590.

Abbott, K. W. (2012b). Engaging the public and the private in global sustainability governance. *International Affairs*, *88*(3), 543–564.

Abbott, K. W., Green, J. F., & Keohane, R. O. (2016). Organizational ecology and institutional change in global governance. *International Organization*, *70*(2), 247–277.

Andonova, L., Betsill, M., & Bulkeley, H. (2009). Transnational climate governance. *Global Environmental Politics*, *9*(2), 52–73.

Auld, G. (2014). *Constructing private governance: The rise and evolution of forest, coffee and fisheries certification*. New Haven, CT: Yale University Press.

Balleisen, E. J. (2009). The prospects for effective coregulation in the United States: A historian's view from the early twenty-first century. In E. J. Balleisen & D. A. Moss (Eds.), *Government and markets: Toward a new theory of regulation* (pp. 443–481). Cambridge: Cambridge University Press

Bartley, T. (2007). How foundations shape social movements: The construction of an organizational field and the rise of forest certification. *Social Problems*, *54*(3), 229–155.

Benvenisti, E., & Downs, G. W. (2007). The empire's new clothes: Political economy and the fragmentation of international law. *Stanford Law Review*, *60*(2), 595–631.

Bernstein, S. (2011). Legitimacy in intergovernmental and non-state global governance. *Review of International Political Economy*, *18*(1), 17–51.

Bernstein, S., & Cashore, B. (2007). Can non-state global governance be legitimate? An analytical framework. *Regulation & Governance*, *1*(4), 1–25.

Better Cotton Initiative. (2016). *About BCI*. Retrieved from http://bettercotton.org/about-bci

Biersteker, T. J., & Hall, R. B. (Eds.). (2002). *The emer-*

gence of private authority in global governance. Cambridge: Cambridge University Press.

Black, J. (2008). Constructing and contesting legitimacy and accountability in polycentric regulatory regimes. *Regulation & Governance*, *2*(2), 137–164.

Bonsucro (2016). *Bonsucro—The industry platform for sugarcane*. Retrieved from http://www.bonsucro.com/site

Botzem, S. (2012). *The politics of accounting regulation: Organizing transnational standard setting in financial reporting*. Cheltenham: Edward Elgar.

Botzem, S., & Dobusch, L. (2012). Standardization cycles: A process perspective on the formation and diffusion of transnational standards. *Organization Studies*, *33*(5/6), 737–762.

Braithwaite, J., & Drahos, P. (2000). *Global business regulation*. Cambridge: Cambridge University Press.

Brassett, J., Richardson, B., & Smith, W. (2012). Private experiments in global governance: Primary commodity roundtables and the politics of deliberation. *International Theory*, *4*(3), 367–399.

Cashore, B. W., Auld, G., & Newsom, D. (2004). *Governing through markets: Forest certification and the emergence of non-state authority*. New Haven, CT: Yale University Press.

Cutler A. C., Haufler, V., & Porter, T. (Eds.). (1999). *Private authority and international affairs*. Albany, NY: SUNY Press.

Dingwerth, K. (2007). *The new transnationalism: Transnational governance and democratic legitimacy*. Basingstoke: Palgrave Macmillan.

Dingwerth, K., & Green, J. F. (2015). Transnationalism. In K. Bäckstrand & E. Lövgren (Eds.), *The research handbook on climate governance* (pp. 153–163). Cheltenham: Edward Elgar.

Dingwerth, K., & Pattberg, P. (2006). Global governance as a perspective on world politics. *Global Governance*, *12*(2), 185–203.

Dingwerth, K., & Pattberg, P. (2009). World politics and organizational fields: The case of transnational sustainability governance. *European Journal of International Relations*, *15*(4), 707–743.

Dobusch, L., & Quack, S. (2013). Framing standards, mobilizing users: Copyright versus fair use in transnational regulation. *Review of International Political Economy*, *20*(1), 52–88.

Forest Stewardship Council. (2016a). About us. *Forest Stewardship Council*. Retrieved from https://ic.fsc.org/en/about-fsc

Forest Stewardship Council. (2016b). *Standard setting in FSC* (Version 1-1, submitted on 30 June 2016). Retrieved from http://www.isealalliance.org/sites/default/files/private/FSC,%20Standard%20Setting%20Code,%20Public%20System%20Report,%20June%202016.pdf

Green, J. F. (2008). Delegation and accountability in the Clean Development Mechanism: The new authority of non-state actors. *Journal of International Law and International Relations*, *4*(2), 21–55.

Green, J. F. (2014). *Rethinking private authority: Agents and entrepreneurs in global environmental governance*. Princeton, NJ: Princeton University Press.

Grigorescu, A. (2015). *Democratic intergovernmental organizations? Normative pressures and decision-making rules*. Cambridge: Cambridge University Press.

Gulbrandsen, L. H. (2010). *Transnational environmental governance: The emergence and effects of the certification of forests and fisheries*. Cheltenham: Edward Elgar.

Hannan, M. T., & Freeman, J. (1984). Structural inertia and organizational change. *American Sociological Review*, *49*(2), 149–164.

Haufler, V. (1993). Crossing the boundary between public and private: International regimes and non-state actors. In V. Rittberger (Ed.), *Regime theory and international relations* (pp. 94–111). Oxford: Clarendon.

Héritier, A., & Lehmkuhl, D. (2008). Introduction: The shadow of hierarchy and new modes of governance. *Journal of Public Policy*, *28*(1), 1–17.

ISEAL Alliance. (2014). *Setting social and environmental standards: ISEAL Code of Good Practice* (Version 6.0, December 2014). London: ISEAL Alliance.

Kerwer, D. (2005). Rules that many use: Standards and global regulation. *Governance*, *18*(4), 611–632.

Krahmann, E. (2017). Legitimizing private actors in global governance: From performance to performativity. *Politics and Governance*, *5*(1), 54–62.

Lipschutz, R. D., & Fogel, C. (2002). "Regulation for the rest of us?" Global civil society and the privatization of transnational regulation. In R. B. Hall & T. J. Biersteker (Eds.), *The emergence of private authority in global governance* (pp. 115–140). Cambridge: Cambridge University Press.

Marine Stewardship Council. (2015, July 1). ISEAL compliance—Standard setting code v6.0 (MSC Self-Assessment Report). Retrieved from http://www.isealalliance.org/sites/default/files/private/MSC,%20Standard-Setting%20Code,%20Public%20System%20Report,%20July%202015.pdf

Nikoloyuk, J., Burns T. R., & de Man, R. (2010). The promise and limitations of partnered governance: The case of sustainable palm oil. *Corporate Governance: The International Journal of Business in Society*, *10*(1), 59–72.

Pattberg, P. (2007). *Private institutions and global governance: The new politics of environmental sustainability*. Cheltenham: Edward Elgar.

Rosenau, J. (1990). *Turbulence in world politics*. Princeton, NJ: Princeton University Press.

Rosenau, J. (1995). Governance in the twenty-first century. *Global Governance*, *1*(1), 13–43.

Roundtable for Sustainable Palm Oil. (2016). *About us*. Retrieved from http://www.rspo.org/about

Ruggie, J. G. (2013). *Just business: Multinational corporations and human rights*. New York, NY: W. W. Norton.

Schleifer, P. (2013). Orchestrating sustainability: The case of European Union biofuel governance. *Regulation & Governance*, *7*(4), 533–546.

van Dam, C. (2002). *La economía de la certificación forestal: Desarrollo para quién?* Paper presented at Congreso Iberoamericano de Desarrollo y Medio Ambiente 'Desafíos locales ante la globalización', Quito, Ecuador.

Van Rooy, A. (2004). *The legitimacy game: Civil society, globalization and protest*. Basingstoke: Palgrave Macmillan.

Wapner, P. (1995). Politics beyond the state: Environmental activism and world civic politics. *World Politics*, *47*(3), 311–340.

Whitman, J. (Ed.). (2009). *Palgrave advances in global governance*. Basingstoke: Palgrave Macmillan.

Wolf, K. D. (2017). Patterns of legitimation in hybrid transnational regimes: The controversy surrounding the lex sportiva. *Politics and Governance*, *5*(1), 63–74.

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