CHAPTER 4

GOVERNANCE WITHOUT GOVERNMENT: AN OVERVIEW

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Benito Mussolini once declared:

> "…for the Fascist, everything is in the State, and nothing human or spiritual exists, much less has value, outside the State. In this sense Fascism is totalitarian, and the Fascist State, the synthesis and unity of all values, interprets, develops and gives strength to the whole life of the people."[1]

This idea, shorn of its fascist ideology, remains both popular and foundational for the functioning of the state system and the international public-law frameworks which it supports.[2] That idea of the state continues to frame the way in which élites approach the issue of public authority, the privileged position of the state (operated through the apparatus of its government), and the theoretical starting-point for much discussion of law and governance.[3] The state remains at the centre of efforts to vest it with an ever expanding authority derived from some source or other - the people, some divine being, historical determinism or the like[4] - even as regulatory authority seeps outwards to international public and non-state actors. What lies beyond the state is not the stuff around which a government can be organised - its

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1 Benito Mussolini, "The Doctrine of Fascism", in: *Italian Encyclopaedia* of 1932, reproduced in Michael J Oakeshott, *The Social and Political Doctrines of Contemporary Europe*, (Cambridge, Cambridge University Press, 1939), pp 164-68; available at: http://www.constitution.org/tyr/mussolini.htm.

2 José E Alvarez, *International Organizations as Law-Makers*, (Oxford, Oxford University Press, 2005), pp 45-64.

3 Larry Catá Backer, "Reifying Law: Understanding Law Beyond the State", (2008) 26 *Pennsylvania State International Law Review*, p 521.

4 *Idem*, "Theocratic Constitutionalism: An Introduction to a New Legal Global Ordering, (2009) 16 *Indiana Journal of Global Legal Studies*, pp 85-172.

effects are merely felt as governance,[5] rather than pronounced authoritatively as law through government (the state). Positing the central concern of this chapter as governance without government, then, suggests an identity *between* government and the state, and a *hierarchical* relationship between governance and government.

This chapter examines the outer limits of extra-territoriality, of governance beyond the state. It suggests the contours of the projection of governance power from outside the territory of states, the possibility of governance without government, and the more radical notion that government itself can exist without the state, projecting its governance into states. The chapter posits that the *organization of governance* does not require a territory from which to project governance power beyond territorial boundaries. My thesis is that globalisation has made it possible to develop governance spaces outside of both states and public international organisations. Within these spaces, governance communities can produce their own constitutions, thereby exiting autonomously from the government of the state, international organizations, and their public law frameworks, albeit in communication with them. These spaces and that communication define a distinct form of extra-territoriality. The normative framework changes from one centred on the management, the legitimacy and the mechanics of projecting governance power by a state into the territory of another, or of resisting that projection, to one centered on a framework for the infiltration of governance power from non territorially-based governments into the territory of states and their government. In other words, for example, one moves from a discussion of the legitimacy or foundations of the authority of the United States to impose its legislation over chemicals in consumer products to Chinese manufacturers, to one in which the legitimacy and foundations of the authority of the global corporation Wal-Mart to impose its own stanbdards over the same regulatory subject (by determining the content of the products that it will order and sell) on both the United States and China moves to centre-stage.[6]

The chapter first provides an overview of the extent of contemporary reticence to embrace any "governance without government" framework that strays too far from the all-

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[5] See Commission on Global Governance: *Our Global Neighbourhood: The Report of the Commission on Global Governance*, (Oxford, Oxford University Press, 1995). See, also, J Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism and the Postwar Economic Order", (1982) 36 *International Organization*, pp 379-415.

[6] Larry Catá Backer, "On the Autonomous Regulatory Authority of Corporations in Global Private Markets, 'Law at the End of the Day'", (28 March 2011), available at: http://lcbackerblog.blogspot.com/2011/03/onthe-autonomous-regulatory-authority.html.

encompassing embrace of the state system and public power, that is, of the possibility that communities can come together and share a governance structure without the prior requirement of a state or of the government that serves as the incarnation of the state. Following Renate Mayntz, it understands governance as the constellation of institutionalised modes of social co-ordination that produces and implements collectively-binding rules, or collective goods.[7] The focus is on an examination of the strands of the conventional theoretical debate, and, more particularly, on representative work that is sympathetic to the project of governance without government. It very briefly outlines the conceptual framework for thinking about governance without government (that is, for thinking about binding rule systems made outside the process adopted by the governments of states).

This theoretical debate tends to suggest variations on a common theme: while non-governmental actors are, to an increasing extent, exercising governance power, defined in a variety of ways, none of these governance systems has achieved "escape velocity" from the orbit of the state. To some extent, conventional writing still suggests that these governance systems remain dependent on, and subordinate to, the legal orders of states or of the international bodies through which states exercise collective power. More pointedly, some make the case that efforts to theorise or produce evidence of the plausibility of any escape from the orbit of the state is neither necessary, feasible nor prudent.[8] For others, this search for autonomy is irrelevant. In a complex global legal order made up of intertwining governance regimes which re-constitute governance within a "mixed, public-private, dynamic norm creation process",[9] what is useful is recognition of the embededdness of norm-affecting governance mechanics outside the state. This section suggests that this conversation about the limits of government without governance can be usefully organised into five great currents: as illegitimate; as a species of devolution; as management; as mimicry; and as a component of a larger coherent regime producing something of a public-private transnational system. For all of its innovation, though, much in the academic literature still situates governance very

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[7] See Renate Mayntz, "Nuevos Desafíos De La Teoría De La Gobernanza", in: Agustí Cerrillo i Martínez, Ministerio de Administraciones Publicas (ed), *La Gobernanza Hoy: 10 Textos De Referencia. Estudios goberna,* (Madrid, Instituto Nacional De Administración Publica, 2005), pp 83-98, at 83-85, available at: http://www.scribd.com/doc/23477336/La-Gobernanza-hoy.

[8] See A von Bogdandy, P Dann & M Goldmann, "Developing The Publicness of Public International Law: towards a Legal Framework for Global Governance Activities", (2008) 9 *German Law Journal*, pp 1375-1400. See, also, O Lobel, "Big Box Benefits: The Targeting of Giants in a National Campaign to Raise Work Conditions", (2007) 39 *Connecticut Law Review*, p 1685.

[9] See Gralf-Peter Calliess & Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law*, (Oxford, Hart Publishing, 2010), p 277.

much "in the State"[10] or its instrumentalities, either directly, by affirming the supremacy of law (national or international, public or private) in some sort of ordering involving public and private actors, or indirectly by positing the transitional or facilitative character of non-state governance in the service of domestic legal orders. Whatever its form, the state is never far from the centre; the "state is nothing else but the mobile effect of a regime of multiple governmentalities".[11]

The chapter then proposes the possible contours of the constitution of such a governance framework beyond both government and state. Once the presumption of an identity between state and government is suspended, the possibility of the governmentalisation of non-state sectors become visible - not as some sort of appendage to the state, or even, perhaps, as a component of a complex weaving of regimes that produce norms, but as government in their own right. To illustrate the contours of what this governmentalization might look like, and the relationship of this governmentalized governance ot the state, the chapter looks to two non-state governance systems. The first looks to the self-regulating corporation,[12] both as an entity that chooses its aggregate regulatory environment by arranging the placement and character of its global operations, and as a governance source that regulates conduct, through regulatory contracts, outside of its own corporate "internal governance territory" through its supply and value chains. The second examines the constitution of a government for the regulation of the behaviour of corporations developed through governance principles and guidelines adopted by the Organisation for Economic Co-operation and Development (OECD).[13]

An analysis of these two forms of goverentalization suggests, in turn, that the functionally-differentiated regulatory communities through which governance is emerging do not reproduce the state.[14] Instead, they point to the power of individuals and groups to

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[10] See note 1 above.

[11] See Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-1979*. (Graham Burchell, trans. New York, Picador Palgrove Macmillan, 2008), p 77.

[12] See generally Gunther Teubner, "The Corporate Codes of Multinationals: Company Constitutions beyond Corporate Governance and Co-determination", in: Rainer Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, (Antwerp, Intersentia, 2010).

[13] Larry Catá Backer, 2009 Transnational Corporate Constitutionalism, Law at the End of the Day, http://lcbackerblog.blogspot.com/2009/09/transnational-corporate.html; Teubner, note 12 above.

[14] A Esmark, "The Functional Differentiation of Governance. Public Governance Beyond Hierarchy, Market and Networks", (2009) 87 *Public Administration*, pp 351-370, at 353-359.

consent to join together for jurisdictionally- or temporally-limited purposes, and to bind themselves to rules of their own creation to further their objectives. Where this joining together is to manage relations and behaviors over time, this suggests an institutionalisation of government with respect to which the state is absent. If this is, indeed, a reflecrtion of emerging realities, then it is also possible to imagine that as a consequence, the idea of the state can morph from a territorially-privileged totalitarian ideal, understood in its sense of the state as the ultimate repository of all authority, to a social system expressed through territory[15] and embedded in more complex co-ordinated governance. Alternatively, the idea of the state can shrink, to be understood as a political actor limited ultimately to what it can control within, or through, a connection to its territory,[16] including the control of the governance regimes of non-state actors. In either case, the issue of the extra-territorial effect of governance will also undergo a transformation - from one centred on the state and the projection of its law, to one de-centred from the state and concerned with the projection of governance rules of non-state actors into states and other non-state organs.

I. REACHING ESCAPE VELOCITY FROM THE STATE; IS IT POSSIBLE?

From the time of the Treaty of Augsburg in 1555, through the great French state builders of the Seventeenth-Nineteenth centuries, to the rise of the great panoptic states of the late Twentieth century, states transformed themselves into enterprises through which control to some set of ends, usually described as something like "the common good"[17] or the "general will",[18] could be asserted through a government over a defined physical territory. Territory, jurisdiction and competence were marked by the same borders. To go beyond physical boundaries was to extend competence beyond its "natural" limits among equals, or to assert necessary control over inferior competences (states).[19] To consider a government (or

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[15] P Flora, S Kuhnle & D Urwin, *State Formation, Nation-Building and Mass Politics in Europe: The Theory of Stein Rokkan*, (Oxford, Oxford University Press, 1999), p 104.

[16] See Gunther Teubner, "Global Bukowina: Global Pluralism in the World Society", in: *idem* (ed), *Global Law without a State,* (Aldershot, Ashgate-Dartmouth Publishing, 1997), pp 3-28.

[17] James Madison, No 57, in: Alexander Hamilton, James Madison & John Jay, *The Federalist Papers*, (Oxford, Oxford University Press, 2008), p 278.

[18] J-J Rousseau, *Discourse on Political Economy and, the Social Contract*, trans., Christopher Betts, (Oxford, Oxford University Press, 1994).

[19] WW Willoughby, *The Fundamental Concepts of Public Law*, (New York, MacMillan, 1924), pp 305-312.

governance) outside the state was incomprehensible within a global system founded on the state in which even civil society was state centred.[20]

The diffusion of state power in the wake of globalisation has revived the recognition of governance authority beyond the state and its formally constituted governance apparatus. In its most common emerging form, power diffusion and the rise of non-state governance sectors within a state has taken the form of "new governance".[21] In the form of new administration and bureaucratic theories, it suggests power-sharing under the ultimate, albeit remote, control of elected state officials.[22]

But governance has become a still more protean concept,[23] and the idea of both territory and the extra-territorial has acquired additional dimensions. R.A.W. Rhodes noted that:

> "[t]here are at least six separate uses of governance: as the minimal state, as corporate governance, as the *new* public management, as 'good governance', as a socio-cybernetic system, [and] as self-organizing networks."[24]

These efforts to re-constitute public governance frameworks beyond the state, or, beyond the direct involvement of elected officials within the state, has generated both significant academic interest and the development of a host of theoretical approaches to this phenomenon. Together, these transformations suggest the possibility of extra-territoriality beyond the state and has suggested a question: if one takes the state and its territory as the starting-point for analysis, is it possible to conceive of competence beyond territory, and an

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[20] See, for example, J Habermas, "Further Reflections on the Public Sphere", Craig Calhoun (ed), *Habermas and the Public Sphere*, (Cambridge MA, The MIT Press, 1999), pp 421-461.

[21] G de Búrca & J Scott, "Introduction: New Governance, Law and Constitutionalism", in: *idem*, *Law and New Governance in the EU and the US*, (Oxford-Portland OR, Hart Publishing, 2006). See, also, O Lobel, "The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought", (2004) 89 *Minnesota Law Review*, p 342.

[22] BG Peters & J Pierre, "Governance without Government? Rethinking Public Administration", (1998) 8 *Journal of Public Administration Research and Theory*, p 223.

[23] See JN Rosenau, "Governance, Order, and Change in World Politics", in: *idem* & Ernst-Otto Czempiel, *Governance without Government: Order and Change in World Politics*, (Cambridge, Cambridge University Press, 1992). See, also, Peer Zumbansen, "The Conundrum of Order: The Concept of Governance from an Interdisciplinary Perspective", in: David Levi-Fleur (ed), *The Oxford Handbook of Governance*, (Oxford, Oxford University Press, 2010).

[24] RAW Rhodes, "The New Governance: governing without Government", (1996) 44 *Political Studies*, pp 652-67. Reprinted in: S Osborne (ed), *Critical Perspectives in Public Management*, (London, Routledge, 2001), p 20.

extra-territoriality in which territory is not measured by the metes and bounds of political spaces?

The structures of globalisation may provide a source for an answer. Globalization has tended to drive governance as an extra-territorial force beyond the territorial limits of states, but with governance effects within them.[25] Globalisation has provided a governance framework environment marked by a fracturing and diffusing of power beyond traditional political actors.[26] Though the state remains very much alive and continues to be powerful within the ambit of its authority, its claim to a monopoly of governance power, either directly or through public organs at the supranational or infranational levels, is no longer plausible.[27] In the form of regional human rights frameworks, regional trade associations, international governance systems such as that of the International Criminal Court, and hybrid public-private entities such as the World Bank and the International Monetary Fund, the state plays a role, but no state dominates and no general political apparatus controls, at least not one that mimics a government.[28] This environment nurtures functionally-differentiated communities of actors who, together, form closed self-regulating and autonomous governing systems that are not centred on any state, although they are, perhaps, ultimately connected to states.[29]

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[25] "The *functional differentiation* of society means that the largest social system is internally differentiated into a plurality of subsystems, which perform different functions for society as a whole. Among the more readily identifiable subsystems are: the economic system, the legal system, the system of science, the religious system - and also the political system. The second innovation with respect to the past is that these functional subsystems of society are rigorously *autonomous*. They continually reproduce themselves according to their own specialized language with a particular grammar and vocabulary." (D Kerwer, "Governance in a world society: The perspective of systems theory", in: M Albert & L Hilkermeier (eds), *Observing International Relations: Niklas Luhman and World Politics*, (New York, Routledge, 2004), pp 260-274).

[26] States have fractured internally as they cede power upwards to supra-nationally constituted governance frameworks. The European Union serves as a significant example of a governance unit that has exhibited a tendency to centralise and fragment public power, and to be receptive to non-governmental centres of governance, all at the expense of the state. L Catá Backer, "Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union", (1998) 12 *Emory International Law Review*, p 1331.

[27] On arguments for a pertinent role of the state still in an era of globalisation, see, for example, S Sassen, *Losing control? Sovereignty in An Age of Globalization*, (New York, Columbia University Press, 1996), and A Aman jr., "The Limits of Globalization and the Future of Administrative Law: From Government to Governance", (2001) 8 *Indiana Journal of Global Legal Studies*, pp 379.

[28] I Venzke, "International Bureaucracies from a Political Science Perspective - Agency, Authority and International Institutional Law", (2008) 9 *German Law Journal*, p 1401. See, also, J Klabbers, "The Changing Image of International Organizations", in: J-M Coicaud & V Heiskane (eds), *The Legitimacy of International Organizations*, (Tokyo-New York-Paris, United Nations University Press, 2001).

[29] E Meidinger, "Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems", in: C Brütsch & D Lehmkuhl (eds), *Law and Legalization in Emerging Transnational Relations*, (New York, Routledge, 2007).

Understood within the presumptions of new governance, for example, Kenneth Abbott and Duncan Snidal speak of a "transnational new governance" to characterise non-state regulatory regimes, but insist that such new governance continues to requires orchestration by states and public international organisations.[30] Yet, this also suggests the projection of governance from outside the territory to within the state - effectively, extra-territoriality uncentred in the state. More significantly, these are governance systems at the heart of what Gunther Teubner describes as polycentric globalisation.[31] This development is not merely the sum of the privatisation of governmental functions, common in assessments of polycentricity within the European Union governance framework,[32] but the substitution/supplementing of state authority by private organs, self-contained and self referential, in which the state plays an incidental role.[33] Prominent among these are the internally-complete systems of operations of multi-national corporations and their suppliers. In an advanced form, these merge both public and private actors within a system that is neither, but in which an intimate and sustained interaction as equals produces something altogether different.[34] In a parallel development, international organisations are developing polycentric soft-law frameworks meant to project governance from outside territory into the legal orders of states that recognise the necessary partnership of states, international organisations and private entities in governance.[35] Governance authority has, indeed, leaked

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[30] KW Abbott & D Snidal, "Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit", (2009) 42 *Vanderbilt Journal of Transnational Law*, p 501.

[31] Teubner, "The Corporate Codes of Multinationals: Company Constitutions beyond Corporate Governance and Co-determination", note 12 above.

[32] Thus, it is not uncommon to "conceptualise the emerging field of European spatial policy discourse as an attempt to produce a new framework of spatialities - of regions within member states, transnational mega-regions, and the EU as a spatial entity - which disrupts the traditional territorial order, and destabilises spatialities within European member states. The new transnational orientation creates new territories of control, expressed through the new transnational spatial vision of polycentricity and mobility." Ole B Jensen & Tim Richardson, *Making European Space: Mobility, Power and Territorial Identity*, (London, Routledge, 2004), p 44. See, for example, S Davoudi, "Polycentricity in European Spatial Planning: From an Analytical Tool to a Normative Agenda", (2003) 11 *European Planning Studies*, pp 979-999, and Marlene Wind, "The European Union as a Polycentric Polity: Returning to a Neo-Medieval Europe?", in; JHH Weiler & *idem*, *European Constitutionalism beyond the State*, (Cambridge, Cambridge University Press, 2003), pp 103-134.

[33] L Catá Backer, "Multinational Corporations as Objects and Sources of Transnational Regulation", (2008) 14 *ILSA Journal of International & Comparative Law*, p 499. Wal-Mart has been a prominent example of this sort of activity. *Idem*, "Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator", (2007) 39 *University of Connecticut Law Review*, p 1739, and *idem*, "Law at the End of the Day", note 6 above.

[34] A Flohr, L Rieth, S Schwindenhammer & KD Wolf, *The Role of Business in Global Governance : Corporations as Norm-Entrepreneurs*, (Basingstoke, Palgrave MacMillan, 2010).

[35] Significant in this respect are the current United Nations sponsored efforts to "operationalize" a regulatory

beyond the confines of the authority of public organs and, now re-configured, includes actors *other* than states.

However, despite announcements of the challenge to territory as the basic organising principle of power expressed through law,[36] the state remains at the centre of most discussion of governance, and territory remains the starting-point for discussions of governance competence. Even if it is no longer necessarily the only source of authority, the state is not absent from even the most polycentric or state-rejecting system advocated as an overcoming of this enterprise,[37] by non-state actors entities eager to construct multi-lateral governance.[38] For the lawyer, the civil society actor and the politician, it is difficult to move far from the statist meaning of government, law and governance.[39] Some have suggested the inevitable difficulties of carving a space for governance without government in which the apparatus of the state or its manifestation in inter-governmental organisations do not serve as its source or referent.[40] This is so, even for Louis Henkin, who famously derided sovereignty as a bad word,[41] but not the connection of the state to democratic values and to the organisation and implementation of political power, even to that power derived from non-state sources. Likewise, the most advanced arguments of the so-called Yale School of International Law[42]

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framework imposing a direct obligation on multinational corporations to respect human rights, with public governance overtones, especially with respect to activity within conflict or weak governance zones. See J Ruggie, "Business and Human Rights: The Evolving International Agenda", (2007) 101 *American Journal of International Law*, p 819, and, contra, D Weissbrodt, "International Standard-Setting on the Human Rights Responsibilities of Businesses", (2008) 26 *Berkeley Journal of International Law*, p 373.

[36] See K Ohmae, *The End of the Nation State: The Rise of Regional Economies*, (New York, Free Press, 1996), and Jean Marie Guéhenno, *The End of the Nation State*, (St Paul MN, University of Minnesota Press, 2000).

[37] See Inger-Johanne Sand, "Polycontextuality as an Alternative to Constitutionalism", in: Christian Joerges, Inger-Johanne Sand & Gunther Teubner (eds), *Transnational Governance and Constitutionalism*, (Oxford-Portland OR, Hart Publishing, 2004), pp 41-65.

[38] See, for example, Amnesty International. Comments in Response to the UN Special Representative of the Secretary General on Transnational Corporations and Other Business Enterprises' Guiding Principles - Proposed Outline (October 2010).

[39] See GM Danilenko, *Law-Making in the International Community*, (Boston MA, Martinus Nijhoff, 1993), pp 14-17 & 69-74.

[40] See, for example, D Kennedy, *International Legal Structures*, (Baden-Baden, Nomos Verlag, 1987), and Bruno Simma & Andreas Paulus, "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View", (1999) 30 *American Journal of International Law*, p 302, at 306-07.

[41] See L Henkin, "International Law: Politics, Values and Functions", (1989) 216 *Recueil des Cours*, p 9, at 24.

[42] WM Reisman, "The View from the New Haven School of International Law", (1992) 86 *American School of International Law*, p 118. *Proceedings of the 86th Annual Meeting* 86:118.

retain a loyalty, if not nostalgia, for the state. Even governance without a state, we are told, tends to occur within the shadow of the state[43] or within international organisations.[44]

The literature about the limits of governance without government reflect both the power of the state paradigm in governance analysis *and* the recognition that the core assumptions of the paradigm may not reflect the whole of reality anymore. The literature might be usefully divided into five basic categories: as illegitimate; as a species of devolution; as management; as mimicry; and as a component of a larger coherent transnational system.[45]

The illegitimacy arguments are straightforward. They tend to apply assumptions that foreshadow their conclusion without much need for the development of argument. These include arguments that *only* formal law systems may be considered law.[46] Governance without government is impossible precisely because the absence of formal law making power is fatal in the absence of a conventional polity with the legitimate capacity for law-making,[47] and law enforcement.[48] Illegitimacy arguments also posit that governance without government serves to destabilise important values that are best protected in conventionally organised states through democratically-accountable governments. For example, the public law protections of important values - democracy, human rights, accountability and the like - are less well protected through private norm-systems, and this may reduce their potential legitimacy and value.[49]

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[43] TA Börzel & T Risse, "Governance without a state: Can it work?", (2010) 4 *Regulation & Governance*, pp 113-134.

[44] See, for example, C Chinkin, "Human Rights and the Politics of Representation: Is There a Role for International Law?", in: M Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law*, (Oxford, Oxford University Press, 2000), p 131.

[45] Others have considered different taxonomies that may also be useful in which the state provides the ordering principle. For example, Thomas Risse speaks of a division among governance by government, governance with government and governance without government. T Risse, "Governance Under Limited Sovereignty (Draft)", paper prepared for Marty Finnemore & Judith Goldstein (eds), *Back to Basics: Rethinking Power in the Contemporary World. Essays in Honor of Stephen D. Krasner*, (forthcoming).

[46] P Le Goff, "Global Law: A Legal Phenomenon Emerging from the Process of Globalization", (2007) 14 *Indiana Journal of Global Legal Studies*, p 119.

[47] Marc Amstutz, "Global (Non-)Law: The Perspective of Evolutionary Jurisprudence", (2008) 9 *German Law Journal*, p 465-476, at 474-76

[48] D Shelton, "Law, Non-Law and the Problem of 'Soft Law'", in: *idem* (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal Systems*, (Oxford, Oxford University Press, 2000).

[49] RG Teitel, "Humanity's Law: Rule of Law for the new Global Politics", (2002) 35 *Cornell International Law Journal*, p 355

Illegitimacy arguments have focused as well on the critical re-constitution of markets as institutionalised sites for governance. These have sometimes been judged as falling short of governance frameworks because they lack the self-consciousness and positivist bent of properly constituted governments and non-governmental institutions with pretensions of governance.[50] Most intriguing are arguments that governance beyond the state does not reference community and self-referencing norm-making so much as it evidences the effects of techniques and knowledge action that produces standardised practice based upon competing documents and actions.[51]

A theoretics of *devolution*, in contrast to arguments about illegitimacy, posit the possibility of non-state governance, but only at the instance of the state and only when it is borrowed. Its principal object is to theorise the legitimate limits of governance in the absence of the state, or better put, the extent of governance delegation that might be considered legitimate.[52] Devolution arguments suggest an essential role for the state in the organisation and enforcement of non-state governance systems.[53]

For some, devolution arguments presume that "'governance with(out) government' is mostly likely to be effective if a strong state looms in the background which sees to it that non-state actors contribute to the provision of collective goods".[54] Others have argued that emerging governance may occur uncontrolled by the state and traditional international organizations, rather than as an orderly devolution of authority.[55] In either case, power-sharing does not necessarily vest autonomous governance with power[56] because straying far

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[50] See OE Williamson, *The Mechanisms of Governance*, (Oxford, Oxford University Press, 1996), p 31; but see, also, A. Benz and Y.Papadopoulos, "Governance and Democracy: Concepts and Key Issues", in: A Benz & Y Papadopoulos (eds), *Governance and Democracy. Comparing National, European and International Experiences*, (London, Routledge, 2006), pp 1-26.

[51] See Annelise Riles, "The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State", (2008) 56 *American Journal of Comparative Law*, p 605.

[52] See E Benvenisti, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law", (2007) 60 *Stanford Law Review*, p 595.

[53] See RAW Rhodes, "The Hollowing Out of the State", (1994) 65 *Political Quarterly*, pp 138-51.

[54] Börzel & Risse, note 43 above, pp 113-114.

[55] Abbott & Snidal, note 30 above.

[56] JW Pitts III, "Business, Human Rights, & The Environment: The Role of the Lawyer in CSR & Ethical Globalization", (2008) 26 *Berkeley Journal of International Law*, pp 485-89.

from the controlling power of the state or their instrument is still conceptually and functionally infeasible.[57]

> "Such a 'shadow of hierarchy' provides a crucial incentive for both governments and non-state actors to engage in non-hierarchical rulemaking and service provision".[58]

Devolution arguments are sometimes clothed in the language of governance participation; the state shares authority over international institutions with non-state actors.[59] As it was recently expressed somewhat sardonically:

> "In the name of reinventing government, the state may be in the business of actively shedding governance authority to non-state or hybrid bodies."[60]

Related to the devolutionary perspective is another that is essentially concerned with *management*. The assumption here is either the need for, or the relationship between, governance outside the traditional domestic and international public orders and the state (or its international organization proxies). In this form, for example, one focus is on the ways in which non-state governance may be made more efficient.[61] Another focus is on ways in which states may devolve authority on non-state organisations that can "claim to be, perform as, and are recognized as legitimate by some larger public (that often includes states themselves) as authors of policies, of practices, of rules, and of norms".[62]

Management arguments are characterised by the substitution of public-private partnerships, in which the role of the state becomes more managerial and less regulatory, for devolution models.[63] The model is essentially similar to that of markets-based regulation of

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[57] See R Dijadj, "Panglossian Transnationalism", (2008) 44 *Stanford Journal of International Law*, p 253.

[58] Börzel & Risse, note 43 above, p 114.

[59] See D Gartner, "Beyond the Monopoly of States", (2010) 32 *University of Pennsylvania Journal of International Law*, p 595.

[60] See S Burris, M Kempa & C Shearing, "Changes in Governance: A Cross Disciplinary Review of Current Scholarship", (2008) 41 *Akron Law Review*, p 1-66, at 15. See, also, Colin Scott, "Accountability in the Regulatory State", (2000) 27 *Journal of Law and Society*, p 38.

[61] WH Reinicke, F Deng, JM Witte, T Benner, B Whittaker & J Gershman (eds), *Critical Choices: The United Nations, Networks, and the Future of Global Governance*, (Ottawa, International Development Research Center, 2000).

[62] See RB Hall & TJ Biersteker, "The Emergence of Private Authority in the International System", in: *idem*, *The Emergence of Private Authority in Global Governance*, (Cambridge, Cambridge University Press, 2002), p 4.

[63] See BG Peters, "Managing the Hollow State", in: K Eliassen & J Kooiman (eds), *Managing Public*

global business.[64] The state is thus an enabler, helping to establish and to sustain the institutions in society, including - crucially - markets, which make steering possible.[65] But management models posit the devolution of authority, whether through concession or more passively through a recognition of the realities of power shifting. As states cede direct governance power, they acquire new roles:

> "in particular, they have come to have the function of legitimating and supporting the authorities they have created by such grants of authority"[66]

Governance is not so much about the absence of government as about a shift in the manner of government to command - through law, regulation, and now through a series of non-governmental regulatory communities that privatise the work of the state but do not necessarily escape government. This, as well, is at the heart of William Tabb's examination of the governance effects of globalisation.[67] For him, the state retains governance power, but within the realities of a complex system of vertical hierarchy among states, with the United States taking pride of place as the global hegemon (at least at the beginning of the Twenty-first century). Global state economic governance institutes "are instrumentalities of an evolving global governance system and are projections of power by the strongest states, most especially the United States".[68] But these instrumentalities do not further just state interests. Rather, they "favor their most internationalized corporations and financiers, the most dominant sectors of contemporary world capitalism".[69] Governance without government in this aspect is like a dog on a leash, in that it can pretend to be free until the reality of control is invoked through a simple tug.

Organizations: Lessons fron Contemporary European Experience, (London: SAGE Publications, 1993).

64 See I Ayres & J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, (Oxford, Oxford University Press, 1992).

65 See Andrew Gamble, "Economic Governance", in: Jon Pierre (ed), *Debating Governance: Authority, Steering and Democracy*, (Oxford, Oxford University Press, 2000), p 110, at 110.

66 P Hirst & G Thompson, *Globalization in Question: The International Economy and the Possibilities of Governance*, (Cambridge, Polity Press, 1996), p 190.

67 See WK Tabb, "Humanity's Law: Rule of Law for the new Global Politics", (2002) 35 *Cornell International Law Journal*, p 355.

68 *Ibid*., pp 4-5.

69 *Ibid*., p 5.

> "A shadow of hierarchy is important for governance with(out) government because it generates important incentives for cooperation for non-state actors."[70]

Kenneth Abbot and Duncan Snidal would remove the shadow from the managerial function of the state.[71] Management, for them, involves the orchestration[72] of a universe of spontaneous and unplanned non-state governance regimes.[73] For them, orchestration provides the ultimate perverse benefit - "It could add the imprimatur of the state to schemes that meet such requirements".[74]

As a managerial issue for states and international organisations, governance is understood as a substitute for direct governmental regulation but not as a substitute for validation and oversight by the state either directly or indirectly through the organs of international organisations.[75] Governance is reduced to an issue of division of labour, and efficient privatisation for the benefit of the state system.[76] Within this division, the motives and integrity of those responsible for devolved governance are necessarily compromised and subject to abuse, necessiating monitoring from a greater and more legitimately neutral party.[77] Governance without government, and beyond the state, is recast to emphasise the importance of monitoring and transparency as a critical managerial technique to harmonise non-state systems within the normative structures that lend legitimacy to the regulatory projects of states through law. Christopher Bruner, for example, speaks to the issues of "public-private gatekeepers",[78] in which states seek to preserve managerial power, at a distance, over governance regimes through the mechanism of managed markets.

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[70] Börzel & Risse, note 43 above, p 116.

[71] Abbott & Snidal, note 30 above.

[72] *Ibid*., pp 558-576.

[73] *Ibid*., p 546.

[74] *Ibid*., p 558.

[75] See J Freeman, "Collaborative Governance in the Administrative State", (1997) 45 *UCLA Law Review*, p 1.

[76] See PL Lindseth, "Agents without Principals?: Delegation in an Age of Diffuse and Fragmented Governance", in: Fabrizio Cafaggi (ed), *Reframing Self-Regulation in European Private Law*, (Amsterdam, Kluwer Law International, 2006). See, also, L Catá Backer, "Monitor and Manage: MiFID and Power in the Regulation of EU Financial Markets", (2008) 27 *Yearbook of European Law*, pp 349-386, *idem*, "The Duty to Monitor: Emerging Obligations of Outside Lawyers and Auditors to Detect and Report Corporate Wrongdoing Beyond the Federal Securities Laws", (2003) 77 *St. John's Law Review*, p 919.

[77] KD Krawiec, "Cosmetic Compliance and the Failure of Negotiated Governance", (2003) 81 *Washington University Law Quarterly*, p 487.

[78] See C Bruner, "States, Markets, and Gatekeepers: Public-Private Regulatory Regimes in an Era of Economic Globalization", (2008) 30 *Michigan Journal of International Law*, p 125.

Management suggests the power of replication in the construction of non-state systems; one can re-construct the systems that one manages so that such systems become easier to work with. This movement towards replication tends to use the state system, or aspects of its governmental form, as the template through which non-governmental or international institutional systems are deployed. This is the literature of governance without government as *mimicry*. This approach is grounded in a belief that non-state governance elements acquire legitimacy only as and to the extent that these governance systems mimic the legitimacy-garnering forms of states.[79] At its foundation, the legitimacy of non-state governance requires the sort of accountability that is at the heart of the process-rights frameworks of states, rule of law and democratic accountability structures.[80] In a sense, one can consider the ambitious project of the Global Administrative Law (GAL) initiative as falling within this embedding of governance without government in mimicry.[81] GAL posits an increasingly discernible "global administrative space", in which the strict dichotomy between domestic and international has broken down. In that space, administrative functions are performed in complex relations between officials and institutions not organised in a single hierarchy. Lastly, that space recognises the effectiveness of regulation using non-binding forms.[82]

In contrast to other approaches, the administrative law model has roots in at least one strain of thinking about the character and function of the institutions of the European Union.[83] The model adds complexity to efforts to distinguish between a devolutionary and a managerial aspect of governance beyond the state. It also has a constitutional dimension that ties governance without government to the normative constraints that serve to legitimate the governance operations of states.[84] And it is subject, as a result, to similar issues of democratic deficit, which tend to attach to administrative systems without popular accountability:

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[79] See D O'Rourke, "Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring", (2003) 32 *Policy Studies Journal*, p 1-29.

[80] B Kingsbury, N Krisch & R B Stewart, "The Emergence of Global Administrative Law", (2005) 68 *Law & Contemporary Problems*, pp 15-61.

[81] *Ibid*.

[82] Institute for International Law & Justice n.d., Global Administrative Law Concept and Working Definition.

[83] Lindseth, "Agents without Principals?: Delegation in an Age of Diffuse and Fragmented Governance", note 76 above.

[84] See Dl Esty, "Good Governance at the Supranational Scale: Globalizing Administrative Law", (2006) 115 *Yale Law Journal*, p 1490.

> "Indeed, a great deal of contemporary global governance can be viewed as a field (or, more precisely, a series of partially overlapping fields) dominated by experts and expert systems without any real recourse to democratic process."[85]

There is an element of the transitory in some governance literature, guided, to some extent, by the notion that private governance is a step towards the absorption of private governance within the state system at the national or international level.[86] The failed effort to create a set of *international* corporate governance norms in the 2000s[87] was said to have foundered because many states strongly rejected the possibility of political governance by non-state entities, and particularly through multi-national corporations governing through "regulatory" contracts within a structure controlled by international organisations.[88]

More generally, mimicry underlies the strain of writing that speaks to the translation of constitutional principles from the state to other governance frameworks in the service of the construction of a global legal order.[89] This constitutionalisation project starts from a presumption that the organisation of the state serves as both source and form for all public governance. The problem of governance beyond the state, then, is treated merely as a matter of the appropriate organisation of non-state sectors. The object is to design systems of governance whose substantive and process frameworks replicate those that underlie the governance framework of states. Some focus on the functional aspects of governance, proposing the development of a global rules system that would organise, legitimate, and constrain the production of international law.[90] Others emphasise the judicialisation of

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[85] See W Boyd, "Climate Change, Fragmentation, and the Challenges of Global Environmental Law: Elements of a Post-Copenhagen Assemblage", (2010) 32 *University of Pennsylvania Journal of International Law*, p 457, at 515-516.

[86] See R Karmel, "The Hardening of Soft Law in Securities Regulation", (2009) 34 *Brooklyn Journal of International Law*, p 883. See, also, SD Murphy, "Taking Multinational Corporate Codes of Conduct to the Next Level", (2005) 43 *Columbia Journal of Transnational Law*, p 389, and DA Wirth, "Compliance with Non-Binding Norms of Trade and Finance", in: D Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal Systems*, (Oxford, Oxford University Press, 2000), p 330.

[87] See D Weissbrodt & M Kruger, "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights", (2003) 97 *American Journal of International Law*, p 901.

[88] Weissbrodt, "International Standard-Setting on the Human Rights Responsibilities of Businesses", note 35 above.

[89] See E de Wet, "The International Constitutional Order", (2006) 55 *International and Comparative Law Quarterly*, p 51.

[90] See J L Dunoff & J Trachtman, "A Functional Approach to International Constitutionalism", in: *idem*, *Ruling the World? Constitutionalism, International Law, and Global Governance*, (Cambridge, Cambridge University Press, 2009), pp 3-36.

governance beyond the state with an emphasis on human-rights regimes,[91] or on the naturalisation of core substantive constitutionalist principles to international governance grounded.[92] At its limit, these constitutionalist perspectives on governance tend towards the replication of the state at global level, for example, in proposals to fashion a global constitutional order under an identifiable constitutional text - the European Union model gone global.[93] This project moves us from governance to government, but one that remains tied to - and is legitimated by - its ability to support the primacy of the state system from which it derives and to which it remains connected.[94] It is the effort to replicate, to recapture this essence of government, that guides the constitutionalist turn in governance beyond the state. Gráinne de Búrca speaks to a "democratic-striving approach" that "would translate the principle of political equality into a requirement of fullest-possible participation in effective processes of decision-making by those concerned".[95]

Indeed, it is in the context of mimicry that the issue of constitutionalisation in governance without government becomes acute.[96] Of principal significance is the notion that constitutionalisation of private legal orders may be necessarily dependent on the state.[97] These notions suggest the broader indictment of governance without government - that ultimately the project fails in the face of the regulatory power of the government of the state. But the result, especially in the context of large corporations, can be ambiguous.[98] It has been

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[91] See, for example, E-U Petersmann, "De-Fragmentation of International Economic Law Through Constitutional Interpretation and Adjudication with due respect for Reasonable Disagreement", (2008) 6 *Loyola-Chicago International Law Review*, p 209, and, *idem* (eds), "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons From European Integration", (2002) 13 *European Journal of International Law*, p 621.

[92] See M Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", (2004) 15 *European Journal of International Law*, p 907.

[93] See B Fassbender, "Rediscovering a Forgotten Constitution: Notes on the Place of the U.N. Charter in the International Legal Order", in: Dunoff & Trachtman, *Ruling the World? Constitutionalism, International Law, and Global Governance*, note 90 above, pp 133-148.

[94] Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis", note 92 above, pp 915-916.

[95] See G de Búrca, "Developing Democracy Beyond the State", (2008) 46 *Columbia Journal of Transnational Law*, p 221, at 253.

[96] See G Teubner, "Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory", in: Joerges, Sand & Teubner (eds), *Transnational Governance and Constitutionalism*, note 37 above; see, also, C Engel, "A Constitutional Framework for Private Governance", (2004) 5 *German Law Journal*, p 197.

[97] Teubner, "The Corporate Codes of Multinationals: Company Constitutions beyond Corporate Governance and Co-determination", note 12 above.

[98] See A Fischer-Lescano & G Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", (2004) 25 *Michigan Journal of International Law*, p 999.

used both to suggest the dependence of non-state governance organs on the state,[99] and has served to re-inforce the bond between state, state apparatus, and territory as the fundamental amalgamation for governance through the privileged instrument of law,[100] including its territorial and government dimension.[101] When voluntary code systems interact with each other - internal voluntary corporate codes with public supranational voluntary codes - they can both invert the hierarchy of relationship between state law and private ordering, and create a constitutionalising space from within which state norms are essentially banished.[102] Government might be viewed as serving a distinct and more limited role - as a stakeholder within a governance community to which it is not a constituting element and over which the reach of the state is imperfect because of both the inherent limits of territorially-based jurisdiction and the resistance of the global community to institutionalised extra-territoriality.[103]

Lastly, governance without government can be understood as process, as a mechanics of norm-generation in which the state is a part, but not the only part. There is an intimate tie here with both the border-softening frameworks of globalisation and the inter-connectivity of individuals, entities and regulatory production. This is a world of regimes of command and of their co-ordination.[104] It is the product of a perceived need to co-ordinate governance regimes within the bodies of singular actors on which all of these norm-generating governance orders act:

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[99] Teubner, "The Corporate Codes of Multinationals: Company Constitutions beyond Corporate Governance and Co-determination", note 12 above.

[100] FC von Savigny, *Of the Vocation of Our Age for Legislation and Jurisprudence*, trans. Abraham Hayward, (London, Littlewood, 1831, reprinted in 2002).

[101] Paolo Grossi, *Mitologías jurídicas da modernidade*, (town, pub house, year); see, also Edward S Corwin, *The "Higher Law" Background of American Constitutional Law*, (Ithaca NY, Cornell University Press, 1955).

[102] G Teubner, "Self-Constituting TNCs? On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct", (2011) 18 *Indiana Journal of Global Legal Studies*, pp 617-638.

[103] See J Zerk, "A Report for the Harvard Corporate Social Responsibility Initiative to help inform the Mandate of the UNSG's Special Representative on Business and Human Rights". Corporate Social Responsibility Initiative Working Paper No. 59 (2010).

[104] AC Cutler, V Haufler & T Porter (eds), *Private Authority in International Affairs*, (Albany NY, State University of New York Press, 1999).

> "La globalización plantea otro problema teórico: el problem a de la coexistencia de muchos tipos diferentes de estructuras y de procesos, es decir, de diferentes modos de gobernanza."[105]

The dynamic element of governance without government, and its difficulties of communication, much less harmonisation across systems,[106] are brilliantly addressed in the form of the "rough consensus, running code" framework developed by Gralf-Peter Calliess and Peer Zumbansen.[107] The focus here is on the structural coupling: the communication and symbiosis of systems that together produce regimes of governance, which, in turn, produce a variegated corpus of rules that bind particular actors or resolve particular problems. An important focus is on norm creation itself - when and how norms are recognised as law.[108] They develop the notion of the hybrid nature of norm creation within the concept of transnational law regimes.

> "These are characterised by a combination and ... inseparability of the coordinative ('private') and regulatory ('public') dimensions in the *substantive* dimensions of law. In the *procedural* dimension of law, in turn, [they] observe a combination (inseparability) of 'private' (industry) and 'public' (states) as well as civil society actors involved in regulatory efforts of making and implementing what we call *transnational private law*."[109]

To resolve the tension between legality and legitimacy inherent in the authority/affectedness paradox, they put forward the concept of *rough consensus and running code* as a particular form of societal self-governance among the proliferating organs of regulatory enterprises. The end-product is a framework for the recognition of the framework in which law (understood in its Austinian sense) is produced.

II. A SPACE FOR GOVERNANCE WITHOUT GOVERNMENT, OR GOVERNMENT WITHOUT THE STATE.

The last section made a strong case against the plausibility of the possibility of an autonomous government beyond the state. But is it possible to point to systems of

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[105] Mayntz, note 7 above, p 94.
[106] Backer, note 6 above.
[107] Calliess & Zumbansen, note 9 above.
[108] *Ibid*., p 134.
[109] *Ibid.*, p 111.

government that have consequentially achieved escape velocity from the state (and law systems) or its proxies at international level, and which thus derive their normative structures and substance from a source other than the state (through its government)?

The ideological element inherent in the question, or perhaps the resistance to any positing of such systems, is deeply rooted.[110] The academic literature re-inforces loyalty to the state, and to governance that either flows *from* the state, *through* or *to* it. This is a structurally appealing stance.[111] The fidelity to the state and to law is an essential defining element of the profession and in preserving the profession's place within the social order.[112] Both lawyer and legal academic play an essential role in the social reproduction of this structure[113] and in the preservation of status within the fields into which law study feeds.[114] This produces a basic duty and necessity of a fidelity (*Bundestreue*)[115] to the constitution of the state and the preservation of a hierarchy of power grounded in the rule of law (eventually), whether constituted along traditional lines or as "countless, often competing, local tactics of education, persuasion, inducement, management, incitement, motivation and encouragement".[116] This constitutional fidelity to a statist foundation for law and governance is inseparable from a basic conventional understanding of the meaning of law and the law-state.[117] This attachment makes it difficult to imagine systems that do not need the state for either enforcement or legitimacy.

It follows that governance not only serves as a signifier[118] of a space that exists outside of the state-government master construct, but also in intimate connection with it.[119]

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[110] See LP Mair, *Primitive Government*, (London, Penguin Books, 1962), pp 14-16.

[111] See, for example, Pierre Bourdieu, *Homo Academicus*, (Paris, Les Éditions de Minuit, 1990).

[112] See Le Goff, note 46 above.

[113] R Harker, "Education and Cultural Capital", in: Richard Harker, Cheleen Mahar & Chris Wilkes (eds), *An Introduction to the Work of Pierre Bourdieu: The Practice of Theory*, (London, Macmillan Press, 1990).

[114] See P Bourdieu, *State Nobility: Elite Schools in the Face of Power*, (Cambridge, Polity Press, 1998).

[115] The principle of *Bundestreue* has been construed to supply the underlying character and animating spirit of German federalism through which federalism provisions of the Basic Law must be interpreted. It has also been extended to the obligation of the federal government when it acts within the EU. (N Foster & S Sule, *German Legal System and Laws*, (Oxford, Oxford University Press, 2002), p 179).

[116] N Rose & P Miller, "Political Power beyond the State: Problematics of Government", (2010) 61 suppl., *British Journal of Sociology*, p 271, at 273.

[117] See Amstutz, note 47 above.

[118] See, for example, Anne Wagner & Jan Broekman (eds), *Prospects of Legal Semiotics*, (Dordrecht, Springer, 2010).

[119] Rosenau, "Governance, Order, and Change in World Politics", note 23 above. See, also, BG Peters & J

Governance cannot presume a government because the territorial state has taken substantially the whole of the possibility of government, that is beyond the state government is not possible. This conceptual boundary parallels the way that, for example, Austin suggested that law can be defined as occupying the entire field of command, leaving custom, moral and ethical norm structures to be defined as by reference to the principle definition (for example, as not commands).[120] As such, the "distinction between state and government .... challenges the Hobbsian argument ... that without the state there can be no order".[121] This turns the question of governance from one of an authority to regulate to the possibility of sourcing a government, capable of governance, outside the state:

> "More meaningful than the distinction between government and governance is that between state and government."[122]

That distinction also suggests that norm-making machinery can exist outside the machinery of government (of states) and act upon it or in relation to it, and thus affect the aggregate rule-structures that serve to constitute the whole of those commands (law in the Austinian sense). This, then, serves as a government for governance that mimics the effect but does not displace the formal government attached to states.

> "[T]his is thus in a literal sense a rhetorical constitution: it constitutes a rhetorical community, working by rhetorical processes that it has established but can no longer control. It establishes a new conversation on a permanent basis."[123]

Globalization provides a foundation for an alternative ideology that embraces this alternative. The realities of globalisation have created a discursive space bounded by the

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Pierre, "Governance without Government? Rethinking Public Administration", (1998) 8 *Journal of Public Administration Research and Theory*, pp 223-243, Cutler, Haufler & Porter (eds), note 104 above, and E Grande & LW Pauly (eds), *Complex Sovereignty: Reconstructing Political Authority in the Twenty-first Century*, (Toronto, University of Toronto Press, 2005).

[120] See J Austin, *The Province of Jurisprudence Determined*, with Introduction by HLA Hart, (London, Weidenfeld and Nicolson, 1954), p 3 *et seq.*

[121] See J Hoffman, *Citizenship beyond the State*, (London, SAGE Publications, 2004), p 26.

[122] *Ibid.*

[123] By analogy to national Constitutions, see JB White, *When Words Lose their Meaning: Constitutions and Reconstitutions of Language, Characters and Community*, (Chicago IL, Chicago University Press, 1984), p 246; see, also, WD Coleman & S Wayland, "The Origins of Global Civil Society and Non-Territorial Governance: Some Empirical Reflections", in: *Globalization and Autonomy Online Compendium*, available at: http://www.globalautonomy.ca/global1/article.jsp?index=RA_Coleman_Origins.xml#Coleman.Origins.ColemanW2005.

framing principles of governance without government, as a "condition or assemblage of conditions under which the evolution of things proceeds"[124] cannot be ignored. Its elaboration does not necessarily depend on the reproduction of the state through proxies or agents.[125] Nor is it necessarily one of the operationalisations of norm-making within and among the affected persons and institutions. This space is defined by reference to the concept of the territorial state-government complex as that possibility of governance "without the presence of the formal state or interstate institutions".[126] These "boundaries of discourse"[127] represent new modes of norm creation binding on individuals and entities, that do not intrude on the authority of the territorially-bounded state to construct government.[128] But it also suggests that where the framing presumption posits an identity between state and government,[129] then the possibility of governance without government also implies the possibility of government without the state.

This governance framework is recognised in autonomous non-state governance communities.[130] It is grounded in those characteristics that are essential to government - autonomy, self-constitution, a defined scope of regulatory authority and a power to discipline members within the regulatory framework created. *Autonomy* pre-supposes an ability to distinguish the community from others, that is, to define the characteristics that mark the community as distinct in the sense of permitting the regulation of its members. Yet, this functional differentiation, as Ralf Michaels suggests, produces the possibility of governance hybridisation, permitting multiple governance regimes to operate within a particular territory or upon a particular individual,[131] but as a result of which the issue of autonomy is irrelevant.

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[124] F Pollock, "Law and Command", (1872) 1 *Law Magazine and Review*, p 189, quoted in: J Broekman, "Tyche in Law", (2011) 116 *Pennsylvania State Law Review*, forthcoming.

[125] See S Bernstein & B Cashore, "Non-State Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?", in: JJ Kirton & MJ Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance*, (Aldershot, Ashgate Publishing, 2004).

[126] See Hall & Biersteker, note **Error! Bookmark not defined.** above.

[127] Broekman, note 124 above.

[128] See, for example, PV Rosenau, *Public-Private Partnerships*, (Cambridge MA, The MIT Press, 2000), and A Héritier & D Lehmkuhl, "The Shadow of Hierarchy and New Modes of Governance", (2008) 28 *Journal of Public Policy*, Special Issue, p 1.

[129] See M Zürn, "Societal Denationalization and Positive Governance", in: M Ougaard & RA Higgott (eds), *Towards a Global Polity*, (London, Routledge, 2002), pp 78-104.

[130] See P Schiff Berman, "International Law to Law and Globalization", (2005) 43 *Columbia Journal of Transnational Law*, p 485.

[131] See R Michaels, "True Lex Mercatoria: Law beyond the State", (2007) 14 *Indiana Journal of Global Legal*

This is in line with notions of legal pluralism, which "sees plural forms of ordering as participation in the same social field".[132] The connection of global governance to the state, or its autonomy from the state is critical when governance regimes straddle territorial borders.[133] "Global governance is governing, without sovereign authority, relationships that transcend national frontiers. Global governance is doing internationally what governments do at home",[134] that is, global governance is government without a state.[135]

These governance communities function outside a territorially-based competence framework. Such governance communities can focus on standard setting,[136] especially on private systems for the regulation of products.[137] Prominent among these are programmes of forest certification, grounded in regulatory frameworks, compliance with which is a pre-requisite to obtaining the certification that companies suppose will produce positive economic outcomes. Benjamin Cashore,[138] for example, has argued that product and process certification programs evidence the norm-rule creation and enforcement power that mark a governmentalization of these non-state systems. Companies seeking the benefits of certification agree to comply with the substantive and verification rules required to maintain certification through contract, albeit contract disassociated with the domestic law of any state.[139] Effectively, Cashore suggests the contours of a government within which regulation is created, imposed and enforced upon the basis of a consensual relationship between the regulators and the objects of regulation.

System autonomy permits the constitution of communities as *self-referencing;* these communities can look to themselves to develop the governance framework of their

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Studies, p 447.

[132] See SE Merry, "Legal Pluralism", (1988) 22 *Law and Society Review*, p 869, at 873.

[133] See JN Rosenau, "Governance in the Twenty-First Century", (1995) 1 *Global Governance*, pp 13-43. See, also, LS Finkelstein, "What is Global Governance?", (1995) 1 *Global Governance*, pp 367-72.

[134] Finkelstein, note 133 above, p 369.

[135] *Ibid.*, p 370.

[136] CM Murphy & J Yates, *ISP, The International Organization for Standardization: Global Governance through Voluntary Consensus*, (London, Routledge, 2009).

[137] Hall & Biersteker, note **Error! Bookmark not defined.** above. See, also, B Cashore, G Auld & D Newsom, *Governing through Markets: Forest Certification and the Emergence of Non-State Authority*, (Yale CT, Yale University Press, 2004).

[138] See B Cashore, "Legitimacy and the Privatization of Environmental Governance: How Non-State Market-Driven (NSMD) Governance Systems [Eco-labelling Programmes] Gain Rule-Making Authority", (2002) 15 *Governance*, pp 503-529, at 506-509.

[139] *Ibid*., pp 510-515.

community. That is, these communities look to their own constituting norms to create and interpret the rules under which the community operates within the scope of its purpose. The authority to make rules from their own rules suggests a *regulatory authority* that when combined with autonomy creates the space for the governmentalization of non-state rule systems that operate outside of the territorial competences of states. The issue of "autonomy from the state", or even from international organisations can suggest either dependence of these governance frameworks on the state, or communication (structural coupling) among autonomous entities. Communication, is both a necessary element of autonomy and evidence of its constitution,[140] yet it is also a possible indication of the embeddedness of a governance system within another.[141] For some, this translates into a simple power transaction: trading autonomy for recognition and incorporation within the legal order of states.

By permitting multiple governance spaces, globalization ideology creates a space for the communicative and structural element of polycentricity. This is the essence of soft law systems. This result has ancient roots in the old public/private divide that segregated religious citizenship and the obligations thereof - governance to a great extent - from that of the territorially-bounded state.[142] Structural coupling has a political dimension as well. It suggests a process of recognition that adds legitimacy to the enterprise of norm structures beyond territory. The commodification of norms would substitute market mechanisms for popular sovereignty as the expression of a popular will, an approach that suggests a version of *lex mercatoria*, a "practice of powerful market participants developing a set of preferred regulations for their dealing, avoiding political interference as much as possible and then gaining state endorsement".[143]

Indeed, *lex mercatoria* is sometimes held up as an example of a system of governance without government, although the autonomy of its constitution remains contested. Though viewed through the lens of state ideology it might be understood as a private system dependent on the state, but from an ideology of globalization it might also be seen as an

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[140] Teubner, "The Corporate Codes of Multinationals: Company Constitutions beyond Corporate Governance and Co-determination", note 12 above.

[141] For example, on *lex mercatoria*, Michaels, note 131 above.

[142] See J Locke, "A Letter Concerning Toleration" (1689), available at: http://www.constitution.org/jl/tolerati.htm.

[143] Tabb, note 67 above.

independent system in which the state plays a role.[144] Hatzimihail reminds us of the broad range of judgements about the character and nature of *lex mercatoria*,.[145] But it is as a decentralised system of law - a system without hierarchy, and intensely structurally coupled with states through the vehicle of contract (incorporating norm system) and judicial vindication of rights thereunder that *lex mercatoria* has generated much excitement and confirmation of ambiguity.[146] Ralf Michaels may have put it best when he argued that the issue of character of lex mercatoria depended on the connection between its internal differentiation and that of either the political or economic system. [147] Michaels distinguished between the segmentary differentiation that mark the borders between states, and the functional differentiation that marks the boundaries "between different sectors of the economy, not those between different states. International trade has made the boundaries between states irrelevant - if not for the economy as such, then certainly for the definition of its subsystems".[148]

The characteristics of a new form of "conventional" system of governance without government/government without a state that is now emerging can be generalised within the common governance characteristics of the self-regulating corporation, and the corporation that can assert regulatory authority over internal systems of supply-chain governance created by large multinational enterprises.[149] The second focuses on the emerging system of governance under the OECD's Guidelines for Multinational Enterprises that serve to provide a basis for the self-constituting of economic organisations beyond the normative orders of states.

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[144] See HJ Berman & FJ Dasse, "The 'New?' Law Merchant and the 'Old': Sources, Content, Legitimacy", T Carbnneau (ed), *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant*, (Huntington NY: JurisNet, rev. ed. 1990), pp 53.

[145] NH Hatzimihail, "The many lives – and faces – of Lex Mercatoria: History as Genealogy in International Business Law", (2008) 71 *Summary of Law and Contemporary Problems*, p 169.

[146] R Cooter, "Structural Adjudication and the New Law Merchant: A Model of Decentralized Law", (1994) 14 *International Review of Law and Economics*, p 215.

[147] For example, on *lex mercatoria*, Michaels, note 131 above, pp 464-465.

[148] *Ibid*., p 465.

[149] See L Catá Backer, "Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator", (2007) 39 *University of Connecticut Law Review*, p 1739; T Bartley, "Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions", (2007) 113 *American Journal of Sociology*, p 297.

The self-regulating corporation evidences nicely the contours of governance without government, or government without the state.[150] In the usual case, this regulatory autonomy centres on the ability of firms to avoid regulatory systems distasteful to it. By carefully choosing the place, form and method of operation, it can effectively decide the manner in which it will be regulated. States may legislate, but the enterprise will submit to those regulations only to the extent that it is either unavoidable or desirable (profitable). The recent example of the change of domicile of the American corporation, *Halliburton*, from Texas to Dubai, provides a telling example.[151] From the perspective of the self-regulating corporation, the role of states has changed. No longer the holders of a monopoly power to regulate enterprises, states are now understood as mere producers of an important good - regulation - that can be characterised as a cost of operations. These are understood to have "competitive consequences".[152] Markets, then, substitute for politics and the sovereign will is reduced to a factor in the production of regulation.

Corporate law is no stranger to the phenomenon of ideology, the greatest strength of which is the way in which it can fade into the background. What appears neutral may be little more than the expression of presumptions that constitute an ideological framework for understanding and managing reality. Corporate law, more than some other fields of law, seems strongly attached to the ideology of the state and state power. Consider a recent analysis of the use by European corporations of the new SE (*Societas Europaea*) form to avoid mandatory co-determination rules but not necessarily to shop for the most favourable national system of corporate law.[153] The analysis focused on what is commonly called legal arbitrage. In their review of the literature, the authors noted:

> "Legal arbitrage can be defined as taking advantage of differences between legal regimes governing the same economic activities (or close substitutes). ... Corporate

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[150] See L Catá Backer, "The Autonomous Global Corporation: On the Role of Organizational Law beyond Asset Partitioning and Legal Personality", (2006) 41 *Tulsa Law Review*, p 541.

[151] C Lagorio, "Halliburton's Dubai Move Sparks Outcry", CBS NEWS ONLINE, (12 March 2007).

[152] R Gilson, "Globalizing Corporate Governance: Convergence of Form or Function", (2001) 49 *American Journal of Comparative Law*, p 329, at 330.

[153] H Eidenmüller, A Engert & L Hornuf, "Incorporating Under European Law: The Societas Europaea as a Vehicle for Legal Arbitrage", (2009) 10 *European Business Organization Review*, pp 1-33.

> law arbitrage is a demand-side pre-condition for charter competition among jurisdictions."[154]

The description is accurate, but it also veils a set of ideological presumptions that it embraces and advances through its analytical framework. The first is that a single statutory framework governs corporations. The second is that there is an optimal statutory framework that is (usually) connected in some way to the site of an entity's centre of operations. The third is that statutory competition (arbitrage) reduces the power of the state to assert policy objectives. These assumptions are, in turn, based upon a more fundamental assumption - that states stand at the centre of the regulatory project as the privileged entity whose authority and autonomy (especially regulatory autonomy to impose its will on all of its subjects) ought to be protected against incursions from non-political actors operating within the territory of a given state. The focus of legal arbitrage is the state and its needs, rather than the corporation. The object of the study of corporate behaviour is to ascertain whether they are behaving in ways that preserve the regulatory privilege of the state within a rule system in which states have some measure of responsibility for providing a basis for permitting the enhancement of shareholder value.

But if one assumes away the privileged position of the state, it is possible to think about what is called legal arbitrage in a substantially different way. Corporations consume regulation like they consume labour, capital and other items necessary for their operation. Within this conceptual universe, regulatory markets can be understood to operate like other markets - labour, capital, consumer, *etc.*, - though subject to its own peculiarities. Legal arbitrage becomes something less odd, and focused on the corporation rather than the state.

> "Where a corporation can distribute its operations in a sufficiently complete way, it has turned the tables on the state. ... No longer holders of a monopoly power to regulate the enterprise, states are now mere producers of a good - regulation - that can be characterized as a cost of operations."[155]

Ideological lenses, especially those fixated on the superiority of the state system, its territorial principle, and presumption that, for every entity, there is a singular public regulatory home, can cause people to see the same thing in substantially different ways. In

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[154] *Ibid*., p 4.
[155] Backer, note 150 above.

the case of legal arbitrage or self-regulating corporations, the difference in vision is a function of the assumptions about the role of both states and the state system in their relation to corporations. The "problem" of legal arbitrage is important where the preservation of a law hierarchy grounded in the state system is implicitly embraced. The opportunity presented by the self-regulating corporation is important where the state is subsumed within a transnational regulatory space.

Corporations can also regulate others; with respect to the control of the global systems of supply chains, the rise of self-referential governance communities focused on the regulation of the forms of behaviour of multinational corporations and their suppliers can be understood to function like self-contained non-state regulatory environments in which the state plays a secondary role.[156] These are narrowly constructed functionally-differentiated communities. Within them, multinational corporations operate substantially like a state, though a state without a territory. The entity responds to the desires of its citizens, investors and consumers, through the production of policy and forms of behaviour designed to enhance shareholder value and consumer demand. Consider a recent report from the enterprise, *Marks & Spencer*, with respect to its innovative sustainability plan, in which the company explained how "our customers are prepared to take action on these issues if we make the solutions affordable and easy. Just as importantly, we've learned that improving our sustainability doesn't have to cost more".[157]

Shareholder desires are also affected by a normative framework exogenous to the multinational, one memorialised in binding and non-binding instruments of international and national law, as well as other normative standards, sometimes bound up in concepts of corporate social responsibility (CSR). These policies are effected within the entity and its supply chain through contract of a regulatory character. Compliance is enforced directly by the entity and also monitored by outsiders, principally civil society elements and, to a somewhat more remote extent, the state and other public actors. The threat of state intervention is also a disciplinary force. Civil society enforcement gains legitimacy in enforcement actions through relationships with the media - an organ that is at once both a producer of similar norms within its own enterprise and a producer of "sanctioned"

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[156] Backer, "Multinational Corporations as Objects and Sources of Transnational Regulation", note 33 above.

[157] Marks & Spencer. 2010. *Your M&S: How We Do Business Report: Plan A Do the Right Thing*. available at: http://corporate.marksandspencer.com/documents/publications/2010/how_we_do_business_report_2010, p 3.

information. Civil society also competes with corporations in the construction of investor/consumer tastes, and sometimes participates with corporations in the construction of supply-chain regulation. Taken together, what is produced is a complete governance framework which operates not only beyond the territory of the state but also within a very narrow governance space. The relationship of *Gap, Inc.* to its suppliers illustrates this sort of closed and self-referencing governance system in operation, in which "[c]ontract replaces law; networks of relationships replace a political community; interest replaces territory; the regulated becomes the regulator".[158] In lieu of political control through the state, "the regulating multinational enterprise is as much a prisoner of its own stakeholders (and principally its consumers and investors) as any state is to its citizens and residents".[159]

To some extent, then, the multinational corporation can be seen to sit at the centre of both a network of governance and a framework of government. It generates regulations that bind across its supply chain. It forms part of a system that suggests the institutionalisation of governance. It uses traditional forms of binding agreement, essentially private in origin, in new and more regulatory ways. Especially, there is a focus on contract as the form through which non-state regulatory efforts can be evidenced.[160] As Marc Amstutz explains:

> "Contract law today has the further task of providing for the areas of social autonomy from which 'civil society' is built up and in which, at the same time, the increasing social fragmentation can be overcome piecemeal."[161]

But it is possible to see in these emerging governance systems something that more resembles either the global administrative space described by Peter Lindseth with respect to the European Union,[162] or, more generally, that suggested by the Global Administrative Law (GAL) concept.[163] These systems could also be understood, not as autonomous, but as bound into governance regimes in which the state retains a significant role and in which the object is

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[158] Backer, "Multinational Corporations as Objects and Sources of Transnational Regulation", note 33 above, p 523.

[159] *Ibid.*

[160] Peer Zumbansen, "The Law of Society: Governance Through Contract", (2007) 14 *Indiana Journal of Global Legal Studies*, p 191; M Amstutz, A Abegg & V Karavas. "Civil Society Constitutionalism: The Power of Contract Law", (2007) 14 *Indiana Journal of Global Legal Studies*, p 235, at 236.

[161] Amstutz *et al*., note 160 above, p 236.

[162] Lindseth, note 76 above.

[163] Kingsbury *et al*., note 80 above.

legitimisation through the modalities of law.[164] The construction of governance systems, and of their government, might focus on the mimicry and dependence of soft law systems, using the forms of state law systems to craft governance beyond the state,[165] but are not necessarily unrelated to, or connected with, state law systems.[166] The second and third forms of non-state governance systems suggest these possibilities.

With respect to the second system of non-state governance, which serves as an example of governance without government, it is possible to suggest that a governance space is being constructed through networks of soft law systems through complex partnerships between states, international organisations which serve both them and global actors, and the global actors that form the core of the regulatory community that is "spaceless" in the sense that it is unconstrained by physical territory. These emerging governance frameworks appear to rebut the early conceptual critique of both governance beyond the state and its methodology in soft law, as less compelling because of its permissive character. "The underlying assumption is that behaviour, or forbearance from behaviour, in accordance with this preference will be directly beneficial to states."[167]

The clearest example is drawn from the recent work of the Organisation for Economic Co-operation and Development's (OECD) National Contact Point system for the enforcement of global soft-law frameworks that radiate out from the 2010 OECD's Guidelines for Multinational Corporations (GMC).[168] A set of recent decisions suggests both the autonomy of the governance enterprise, its relationship to "the state" yet independent from states, and the integration of networks of soft-law norms to construct a set of coherent governance standards for a functionally-differentiated group of actors - focused on the corporation and its stakeholders. But the GMC must be understood as one of a set of co-ordinated efforts at comprehensive corporate governance. The OECD has elaborated a set of three constituting sets of behaviour norms, the Principles of Corporate Governance (PCG),[169] the GMC, and the

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[164] Calliess & Zumbansen, note 9 above.

[165] A Di Robilant, "Genealogies of Soft Law", (2006) 54 *American Journal of Comparative Law*, p 499.

[166] S Picciotto, "Constitutionalizing Multi-Level Governance?", *I.CON: International Journal of Constitutional Law* 6/3&4 (2008), pp 457-479.

[167] J Gold, *Interpretation: The IMF and International Law*, (Boston MA, Kluwer Law International, 1996), p 301.

[168] OECD Guidelines for Multinational Enterprises 2000 rev. 2010. Available at: http://www.oecd.org/dataoecd/56/36/1922428.pdf.

[169] OECD Principles of Corporate Governance (2004), available at:

Guidelines on Corporate Governance of State-Owned Enterprises (GCGSOE).[170] The Principles of Corporate Governance are advanced as "an international benchmark for policy-makers, investors, corporations and other stakeholders worldwide".[171] The GMC provide voluntary principles of business behaviour which cover virtually every aspect of the operations of an economic enterprise. "Although many business codes of conduct are now available, the Guidelines are the only multilaterally endorsed and comprehensive code that governments are committed to promoting."[172] The GCGSOE are meant to be a supplement to the PCG appropriate for state-owned enterprises as they had developed in Europe after 1945.

Together, these provide a comprehensive set of principles for the governance of economic enterprises in the organisation of their government and in the rules limiting the range of their forms of behaviour with other actors. The critical aspect of these normative constructs is its independence from the state. Although the OECD principles are not purely the product of the entities which they purport to govern, neither are they products of a state. These frameworks draw their standards from multiple sources for the construction of an autonomous framework of governance that is made applicable to actors as a supplement to their obligations under the law-systems of states which assert territorial jurisdiction much like Ralf Michaels suggests for *lex mercatoria*.[173]

The frameworks for corporate regulation beyond the state suggest governance structures in which the state does not play a central role. One might understand the autonomy of such systems as being founded on a presumption that international organisations, though derived from states, are substantially independent of any single state, in the way that corporations may be "owned" by shareholders but are independent of any one or more of them (at least where no single shareholder controls the enterprise). Yet each of them can also be understood as being dependent on the state, at least to the extent that public international organisations are creatures of the community of states that support them. Neither of these systems, although sufficiently autonomous within their own limited jurisdictions, make for poor comparison with the state and its more overwhelming system of law-based governance.

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http://www.oecd.org/dataoecd/32/18/31557724.pdf.

[170] OECD Guidelines on Corporate Governance of State-Owned Industries (2005), available at: http://www.oecd.org/dataoecd/46/51/34803211.pdf.

[171] Principles of Corporate Governance, note 169 above, p 3.

[172] OECD, 2001, Policy Brief, The OECD Guidelines for Multinational Enterprises, available at: http://www.oecd.org/dataoecd/12/21/1903291.pdf.

[173] Michaels, note 131 above.

"Escape velocity", independence from the government of the state, still feels difficult to achieve.

But the notion of polycentric governance might supply that ingredient that helps to explain both the autonomy of even narrowly-limited regulatory non-state systems and the critical importance of communication with states in the preservation of autonomy.[174] State power is plenary, but remains limited to its territory. Functionally-differentiated governance units, non-state governance systems, have a limited scope of authority, but one that crosses territorial boundaries. State control is necessarily partial at best. But, at the same time, these are new and fragile systems, not fully developed, may change, and have their own sociology.[175] These ideas, grounded in notions of the abstract and under-developed nature of non-state governance, form the basis of the review of the insights proffered in the critical literature.[176]

But co-ordinated layers of functionally-differentiated governance systems might together provide sufficient "mass" to provide a space within which state law-systems may lose their central place in governance.[177] Together, these regimes of governance may begin to describe a government for the regulation of economic non-state actors. Thus, for example, although each of the three forms of non-state governance systems described here might be criticised as being incomplete, together they might describe a working networked system of governance that is substantially greater than its parts. The three forms of non-state systems, amalgamated, suggest that it is possible to see the construction of autonomous and self-referential social-norm systems that exist out of the shadow of the territorially-bound law-systems of states. The foundation is sometimes described in terms of social norms, in contra-distinction to political norms on which state-law systems are constructed.[178] This foundation has also acquired what might be understood as the beginnings of an institutional framework. But the results remain ambiguous.

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[174] Sand, note 37 above.

[175] A Aviram, "A Paradox of Spontaneous Formation: The Evolution of Private Legal Systems", (2004) 22 *Yale Law and Policy Review*, p 1.

[176] Weissbrodt, note 35 above; M Marcussen, "OECD Governance through Soft Law", in: Ulrika Mörth (ed), *Soft Law in Governance and Regulation*, (Northhampton MA, Edward Elgar Publishing, 2004); Gold, note 167 above.

[177] Teubner, note 102 above.

[178] See RC Ellickson, "Law and Economics Discovers Social Norms", (1998) 27 *Journal of Legal Studies*, p537; L Bernstein, "Opting Out of the Legal System", (1992) 21 *Journal of Legal Studies*, p115; Ruggie, note 5 above.

This is illustrated in the OECD's UK National Contact Point's decision in *Vendanta*.[179] The proceedings were brought under the OECD's GMC by a UK civil society actor, *Survival International*, purportedly representing the interests of indigenous people in Orissa Province, India, the Dongria Kondh, whose ancestral lands were to be developed for mining operations in a partnership between private multinational enterprises and the Indian State of Orissa. The action was brought in the United Kingdom against the parent of a subsidiary joint-venture participant which, in turn, had violated standards of consultation contained in an international convention that was said to reflect global consensus on the social norms binding on corporate entities.[180] *Vedanta* asserted that, because the mine project had been approved by the Supreme Court of India and the State of Orissa, the allegations, had no legal basis, especially since, for its judgment, the Supreme Court of India had considered the issues raised by *Survival International*.[181] Having considered these issues under Indian law, "the Supreme Court of India 'was satisfied that the local communities (of which the Dongria Kondh are a part) had been consulted appropriately'".[182]

In determining that *Vedanta* had breached its obligations, the UK-NCP first looked directly to international instruments for a standard against which to judge the adequacy and timeliness of *Vedanta*'s communications,[183] focusing particularly on Article 10 of the "Akwe: Kon Guidelines".[184] But the UK-NCP had to determine the effect of the subsequent action of the Indian Supreme Court and the role of the State of Orissa.[185] With respect to the former, the UK-NCP took it on itself to determine the legitimacy of the actions of the State of Orissa. The UK-NCP first discounted the State of Orissa's determinations.[186] It then distinguished the actions of the Supreme Court of India.[187] The UK-NCP determined that, even if the Indian Supreme Court's rulings were determinative of *Vedanta*'s obligations under Indian

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[179] Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International against Vedanta Resources plc, 25 September 2009, available at: http://www.business-humanrights.org/Links/Repository/266990/jump.

[180] *Ibid*., §8.

[181] *Ibid*., § 12(b).

[182] *Ibid*., § 12(d).

[183] *Ibid*., §§ 44-47.

[184] Secretariat of the Convention on Biological Diversity, Akwé: Kon Guidelines (2004).

[185] OECD Final Statement 2009, note 179 above, §§ 48-51.

[186] *Ibid*., § 49.

[187] *Ibid*., §§ 52-56.

law, they had no effect on a determination of *Vedanta*'s obligations under the GMC, and especially on the application of the GMC within the company's home jurisdiction.

> "The UK Government expects UK registered companies operating abroad to abide by the standards set out in the Guidelines as well as to obey the host country's laws."[188]

Vedanta is thus faced with the simultaneous application of two governance systems, the law-system of India and the social-norm system represented by the Guidelines.

To escape this application of potentially irreconcilable governance regimes, the UK-NCP builds in another layer of governance. It suggested the incorporation of a parallel soft-law framework, the UN's Protect-Respect-Remedy framework as a set of mediating principles,[189] which was subequently formally incorporated into the GMC framework.[190] *Vedanta* was urged to incorporate the basic human rights due diligence process of this framework of a kind described as a part of the principles based framework developed under the Protect-Respect-Remedy approach.[191] While *Vedanta* initially rejected the findings of the UK-NCP, the Indian national government eventually intervened to halt the project.

The effect was to re-inforce the notion of systemic autonomy for social-norm systems. The due diligence requirements applicable under the Multinational Guidelines are independent of compliance with the law or standards of any state, including the host state where the alleged misbehaviour occurs. It also suggests the growing integration of soft-law systems into a more coherent single web of obligations, principles and standards that can more easily stand alone. Effectively, as in the example of forest certification,[192] soft law plus soft law produces harder governance. That is, governance that is "soft" within the parameters of conventional state systems becomes "harder" within the parameters of non-state systems among the community of entities that form part of the governance community. This hardening of non-state governance is made possible through the institution of a government apparatus that defines the jurisdiction of the governance community, posits an autonomous set of obligations, produces regulation within that autonomous framework and

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[188] *Ibid*.
[189] *Ibid.,* §§ 75-78.
[190] GMC, note 168 above.
[191] OECD Final Statement, note 185 above, § 78.
[192] Cashore, "Legitimacy and the Privatization of Environmental Governance", note **Error! Bookmark not defined.** above.

institutionalises dispute-settlement procedures. Yet this might be better considered as a form of a global administrative space closely linked to the state. Ultimately, though, it may suggest the power of the analysis in which the interaction of governance regimes in the production of something that is treated effectively as "law"[193] is the better analytical pivot than the character and construction of the autonomy and government of the non-state participants in these governance regimes.

At least within the context of the multinational corporation, it is possible to speak of governance without government, where the latter term is meant to refer to the state. It is also possible to speak, to some extent, of government without a state as an element in the governance of multinational regulation. At the same time, polycentric governance tends to obscure the reality of emerging autonomous governance while contributing to its elaboration. Escape velocity? Perhaps, it is still too early to tell.

III. CONCLUSION

Nineteenth-century anthropologists could look out on a well-ordered world and state with some certainty that:

> "It may be here premised that all forms of government are reducible to two general plans ... The first, in the order of time, is founded upon persons, and upon relations purely personal, and may be distinguished as a society (*societas*)...The second is founded upon territory and upon property, and may be distinguished as a state (*civitas*)."[194]

Territory defined not only a governance space, but the forms within which governance could be asserted legitimately. Within it, sub-ordinating political order could act, through law,. To some extent, conventional wisdom among lawyers, academics, politicians and other élites continues to agree with Benito Mussolini that:

> "there is no concept of the State which is not fundamentally a concept of life: philosophy or intuition, a system of ideas which develops logically or is gathered up

[193] Calliess & Zumbansen, note 9 above.

[194] LH Morgan, *Ancient Society*, (New York, Holt, 1877).

> into a vision or into a faith, but which is always, at least virtually, an organic conception of the world."[195]

Indeed, at a time when the state appeared at the apex of its totalising power, Foucault suggested the intimate connection between governance and government:

> "What is important for our modernity ... is not then the state's takeover (*étatisation*) of society, so much as what I would call the 'governmentalization' of the state."[196]

Globalisation has begun to undo these pre-Twenty-first century verities. This chapter suggests the possibility not merely of governance without government, but also that this governance can be organized as government without a state. Thus organized, this governance necessarily reaches out beyond its borders into states and other governance entities.

This chapter proposes that what is important for our modernity is the governmentalisation of the non-state actors. The case of the multinational enterprise nicely contextualises the ambiguity of the "governance without government/government without a state" discussion. Here, the discussion favouring autonomy[197] is contrasted with that of the prior section, which suggests a necessary intermeshing between the multinational enterprise and the state.[198] In addition, the multiple layers of governance are considered. Multinational corporations may construct their own internally-coherent system of governance among their stakeholders and through their production chain, a governance system that is given enforcement effect under the OECD's voluntary governance frameworks. At the same time, the community of multinational corporations, as a functionally-differentiated community, may construct a self-referencing and autonomous regimes of governance, /albeit very narrowly focused, which is free of substantial interference by the state, except as a foreign body with which relations must be maintained.[199] In this sense, the old foundational notion of territoriality loses coherence as the marker *par excellence* of jurisdiction.[200] The territory of

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[195] Mussolini, "The Doctrine of Fascism", note 1 above.

[196] Michel Foucault, *Security, Territory, Population, Lectures at the Collège de France 1977-1978*, Graham Burchell, trans. (New York, Picador Palgrave Macmillan, 2007), p 109.

[197] See JP Robe, "Multinational Enterprises: The Constitution of a Pluralistic Legal Order", in: Gunther Teubner (ed), *Global Law without a State*, (Aldershot, Ashgate-Dartmouth Publishing, 1997).

[198] For discussion, see Teubner, "The Corporate Codes of Multinationals", note 12 above.

[199] C Cutler, "Private international regimes and interfirm cooperation", in: Hall & Biersteker (eds), note **Error! Bookmark not defined.** above).

[200] G Schuler, "Effective Governance Through Decentralized Soft Implementation: The OECD Guidelines For

norm creation and enforcement within and among corporations can be conceived as being bounded by the territory of the operations of that community. The extra-territorial is that which lies beyond the normative framework of corporate governance. But the prime referent is no longer geography, and therefore no longer the government of the territorial political state. It is in this sense that one understands the way in which the state recedes from governance.

This emerging governance framework to some extent displaces and supplements state power, in the sense of appropriating governance space beyond territory and projecting it back into territorially-defined competences. Within the spheres of their organisation and power, these communities can, at their most well-organised, constitute autonomous, self-referential spaces where governance is possible without the state and government is created for the effective governance of that community in accordance with its terms. Autonomy is constrained by other autonomous systems within a polycentric governance universe. Governance without government thus describes systems of regulation that have a source outside the state, it also describes a system of government without the state. Thus constituted, these systems can exist autonomously from states and in constant co-operation with states in order to produce regimes of rules that more effectively bind individuals within the territory of a state and across national territories - extra-territoriality for modern times!

Multinational Enterprises", (2008) 9 *German Law Journal*, p 1753.