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REVIEW


IN SEARCH OF CONSENSUS?

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Introduction

“Rough Consensus and Running Code – A Theory of Transnational Private Law” is the title of this ambitious book by Professors Calliess and Zumbansen. The aim of their work is to offer an “explanatory and constructive tool to describe, assess and further develop the different law-making regimes that can be observed in the transnational arena”. Starting from the the well known premise that the global scenario lacks an officially recognized authority for the making of globally valid law, they seek to explain the existence of numerous examples of legal normativity in the transnational space through what they describe as a methodological approach. In their words: “we understand transnational law above all to demarcate a methodological position rather than to identify a perfectly map-able doctrinal field”. This method is then confronted with two major case studies: consumer contracts and corporate governance.

It must be underlined how one of the most striking features of this work is its engagement with an impressive body of literature, from legal theory to sociology, economics and social sciences in general, in the attempt to embed the project in the broader debate of law in the global space. The result is an original, rich and highly complex book, which undoubtedly will, and in fact already is, stimulating debates and discussions over the nature and the making of transnational law (TL). This review briefly presents the structure and the major contents of the book and succinctly engages in a critique of some of its most controversial aspects.

Structure

Chapter I sets the scene and the programme of the project. Starting from Philip Jessup's idea of TL as a methodological position, the authors briefly describe law's “border crossing” tension in the literature, from Durkheim's “non-contractual conditions of contracts”, to Polanyi’s notion of “embeddedness”, all the way to the political legal theory of Legal Realism vis-à-vis the “proliferation of norm creation outside of the nation-

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2 A contentious assumption that will be further discussed in towards the end of the review.
3 GP Calliess and P Zumbansen (n 1) 6.
Against this background, the chapter presents the scopes of the work. After asserting that a theory of transnational private law is unimaginable without the help of other fields of study, and thus urges for a high if not extreme interdisciplinary approach, the authors clarify that they are not seeking to engage in the debate of the legal nature of transnational norms, as much as they propose an analysis of how these norms come to existence. In other words, the book "as much focuses on the ways by which norms of transnational law come into being as it hopes to further accentuate the challenges that arise from the question 'But is it law?'"5, thus suggesting an approach that doesn't separate 'form' and 'substance' of TL, being the processes and institutions involved in the making of transnational norms an integral and crucial element in assessing their legal nature. Now, in this perspective, the authors introduce the idea of 'Rough Consensus and Running Code' (RCRC), suggesting that "a dynamic process of consensus building and code evolution can adequately capture the interdisciplinary, intricate nature of contemporary transnational law-making"6.

Chapter II represents the heart of the book. It is structured in three parts, each one devoted to a specific task. A detailed account of all three will not be possible in a succinct review. In the first and the second parts of the chapter, the authors seek to situate their theoretical premises in the vast realm of cross-disciplinary contemporary projects dealing with law and globalization, and, as they put it themselves, "with such an orientation, the net is -admittedly- cast wide"7. Throughout the various sections, the chapter quite ambitiously attempts a comprehensive overview of an extended body of literature, from legal theory to legal sociology, law and economics, new institutional economics, systems theory and political theory. To put the debate in context, they use the example of lex mercatoria, which they define as "one of the most important laboratories to reflect on the elements of a legal order emerging at a critical distance from the state"8. The leading theme of a chapter that would be otherwise confusing due to its density and richness of references is the methodological approach. The authors look at lex mercatoria as a methodological problem which suggests a reflection on the possibility of law "which can be but need not be state-originating, which can be but need not be privately created or resulting from a complex interaction between official and unofficial norm-creation"9, thus implying a hybrid nature for the law which will be one of the structural pillars of their own theory as developed subsequently in the book. The authors' space between the public/private divide, the difference between co-ordinative (private law) and regulatory (public law) legal functions and, the substantive and procedural sides of the legal process10, and in doing so they suggest how all these features are declined in TL in a way that is unknown or at least partially unknown in the nation-state.

The core of Chapter II is its third section, dedicated to the proper elaboration of a theory of transnational private law (TPL). The idea of RCRC allows the authors to
“revisit the question 'Is it Law?' by binding the underlying substantive concern back into the procedural framework specific to transnational (private) law regimes.”\(^{11}\) RCRC represents a bottom-up approach of law-making which constitutes, in the authors' minds, the way to overcome the impasse of the nation-state-dependent traditional law-making process. To illustrate their theory, Calliess and Zumbansen refer to the paradigmatic examples of Internet Governance and Private Law Harmonization projects. In brief, synthetic, and somehow over-simplified terms, the argument goes as follows, as inspired by the so-called Request for Comments Procedure (RFC) in place in the Internet Governance. Two major phases are described through the illustration of three implications for each phase. The first phase, Rough Consensus, implies at a social dimension, the identification of a “fairly prevailing opinion”\(^{12}\) which on a substantial dimension points to the existence of a “common core”\(^{13}\) which in a temporal dimension “suggests an interim character with regard to potential future improvement (i.e. learning aptitude notwithstanding)”\(^{14}\). The Rough Consensus becomes a Running Code through a pilot phase in which the content of the consensus acts as a proposed standard, followed by a recognition phase in which the standard becomes recommended, and eventually a binding phase\(^{15}\). In light of this proposal, principles arising from private codifications, recommendations and codes of conduct “must build on a rough consensus if they are to become a running code which is to prevail not only in practice but also to meet the requirements of legitimacy”\(^{16}\) that the authors seem to link to the cosmopolitan democracy’s notion of affectedness.\(^{17}\)

Based on the theoretical framework built up in Chapter II, Chapters III and IV are dedicated to two case studies: transnational consumer contracts and transnational corporate governance. In these case studies, the authors seek to demonstrate how private ordering can act as an alternative to traditional law-making exercise in “cross-bordering economic exchanges in a situation of constitutional uncertainty”\(^{18}\) (consumer contracts), and the model of RCRC as described in Chapter II allows to “capture the particular dynamics of transnational corporate governance regulation through its structuring capacities of distinguishing between the substantive and procedural dimensions of contemporary norm-creation”\(^{19}\). In their concluding Chapter (V), Calliess and Zumbansen put their model of RCRC in the context of three concepts, namely Law and Social Norms, Soft Law and Customary International Law. They conclude that all these concepts are in great need of further development as they fail to comprehensively address the issue of TL, an issue that RCRC, as a mixed public-private dynamic norm-creation process, is better fit to confront. In their words, RCRC can be described as “a particular form of societal self-governance at a time where domestic and transnational public and private law-makers compete over regulatory competence and authority”\(^{20}\).

\(^{11}\) GP Calliess and P Zumbansen (n 1) 134.
\(^{12}\) GP Calliess and P Zumbansen (n 1) 135.
\(^{13}\) Ibid.
\(^{14}\) Ibid.
\(^{15}\) GP Calliess and P Zumbansen (n 1) 134-152.
\(^{16}\) GP Calliess and P Zumbansen (n 1) 143.
\(^{17}\) GP Calliess and P Zumbansen (n 1) 133-134.
\(^{18}\) GP Calliess and P Zumbansen (n 1) 179.
\(^{19}\) GP Calliess and P Zumbansen (n 1) 247.
\(^{20}\) GP Calliess and P Zumbansen (n 1) 277.
Critiques

After succinctly sketching the structure of the book and its major arguments, and in the spirit of engaging in a debate with the authors, there is room for a few critiques. And these can be summarized as follows: the book contains at the same time too much and too little.

Too much. As suggested along this review, the project engages with an impressive volume of literature in the attempt to cover all the major contemporary and parallel projects on law in the global space. In this perspective, two criticisms can be raised.

1) On the one hand, this effort towards comprehensiveness harms the originality of the venture, which basically results in a huge literature review that never truly engages in a debate with the relevant authors; it simply acknowledges generally accepted critiques, such as the non-normativity of systems theory, the insufficiently normative character and excessively neo-liberal orientation of reflexive law and the failure of new institutional economics to acknowledge the constitutive role of law. So, if there is no real new challenge, one would look for a different goal. As the authors have suggested, there may be a “pedagogical” value in bringing together such a wide array of projects and approaches. But then it is unclear to what extent the task is accomplished, as all their references are structured and presented in a way that makes them accessible only to an already learned community of experts in the field.

2) On the other hand, it is unclear to what extent such an effort serves the purpose of building the theory of RCRC, which is drawn from practical examples more than from previous or parallel theoretical constructions. As a matter of fact, there is an almost abrupt shift in the book between the thorough review of parallel projects through which the authors situate their own theory and the theory itself. All of the theories and projects the authors confront are characterized by different scopes, research questions and methodologies. Consequently there is a risk that, instead of situating the theory, the reader simply becomes lost. Moreover, while they attempt to meticulously “situate” their theory, the authors, in this reviewer’s opinion, somehow neglect a few critical issues that will be now briefly discussed.

Too little. Calliess and Z umbansen claim that they are not addressing the question of the legal nature of TPL, as they rely on “an impressive set of arguments in support of the legal nature of transnational norms.” Rather, they focus on the mechanisms of law-making in order to stimulate the debate around the question, “But is it Law?”, proposing an approach that combines 'form' and 'substance'. Two observations can be made. It is rather surprising that, while they engage in the above mentioned massive amount of literature, the authors chose to dismiss this issue explicitly. But it is even more surprising given that they do subsequently engage in the debate over the legal nature of

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21 As argued by Guilherme V. Vilaça in “Ruminations on Rough Consensus and Running Code”, presentation at the workshop Rough Consensus and Running Code, European University Institute, Law Department, 12 and 13 May 2011.
22 During their replies at the workshop Rough Consensus and Running Code (n 21).
23 GP Calliess and P Zumbansen (n 1) 20.
TL as they suggest themselves while they illustrate their ideas on form and substance. There seems to be a loop in the argument here.

Furthermore, the scope of the project is not entirely clear and neither is its methodology. The authors draw their theory from two phenomena, Internet Governance and Private Law Harmonization. They claim to be developing a methodological approach that would serve as an explanatory and constructive tool in the analysis of TL. What they mean by this is a little confusing. Methodologically, it is unclear whether the case studies serve as examples to demonstrate their theory's validity or if the theory is built-up to describe the case studies. Substantially, if the aim is explanatory and descriptive, the case studies they chose are a little surprising. As they put it themselves, in the field of consumer contracts, the mechanisms they describe have a rather low likelihood to become a Running Code. If the goal is to develop a theory that can better explain the case studies, there is room for disagreement that this is the case. If, on the other hand, the intent is normative (i.e. the theory is drawn from the recalled examples and proposed as model for the subsequent case studies), then it falls short of overtly confronting the issue of legitimacy. If the RFC procedure which is suggested as a paradigmatic example of the building of a Rough Consensus works in the specific architecture of internet governance, can that type of legitimacy simply be transposed to very different areas? While they refer to legitimacy as a necessary requirement for RCRC\textsuperscript{24}, they fail to properly develop and explain what legitimacy \textit{is} in their view, applied to their framework. On this perspective a clarification is needed. What is exactly, in the authors' minds, the role of law in the global space? The issue of legitimacy, as raised in this review, might appear traditional and to some extent “conservative”. However, it is a corollary of the impression the authors give, as they seem to maintain a rather traditional vision of the law and its role. If on the other hand RCRC is conceived as a tool to explore the law as a new phenomenon, not only in its making and application, but also at a conceptual level in its role, this should be clarified and developed.

On a related note a more general question can legitimately be raised. Without a proper conceptual elaboration on the role of law in the global space, and thus maintaining a traditional stand on the issue, given the specificity and the number of domains that are affected by the TPL phenomenon, is 'A [general and comprehensive] Theory of Transnational Private Law', be it descriptive or normative, even possible?

A final observation on the role of courts. Little is said about this topic in the development of the theoretical framework, and it is somehow raised only during the case studies. This undermines the descriptive value of the theory, and, from a normative perspective, it excludes a whole set of crucial agents that come into play when there is a Running Code. Is a code \textit{running} only after a court sanctions its validity? Is it 'law' independently? Can RCRC bring new elements to this debate?

\textsuperscript{24} GP Calliess and P Zumbansen (n 1) 144.
Conclusion

These issues above demonstrate some of the unanswered (or underdeveloped) questions that could provide a platform to inspire further research. The critiques raised are not intended to be misleading and must instead be read in a constructive way: RCRC has the potential to constitute a strong starting point to work towards a better understanding of the TL phenomenon, as it contains the germs of potentially far-reaching ideas with its model of bottom-up societal self-governance. It is the result of an impressive amount of work, and it provides a rare distillation of the debate on law in the global space. Its weaknesses, briefly explored above, leave rich ground for exploitation by other academics and by the authors themselves. Only by reading the book in its full length can one appreciate its true value, to which this review can hardly give justice. It is this reviewer’s opinion that RCRC is a must read for whomever wrestles in (or whomever seeks to enter) the rough arena of transnational law!