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Cotterrell, Roger

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International Economic Law and Transnational Law: A Socio-Legal Perspective

Roger COTTERRELL[1]

ABSTRACT

What relationships exist between international economic law (IEL) and emerging forms of transnational law? Would it be useful to reconsider IEL in relation to transnational economic networks that create their own regulatory expectations and practices? This would be to confront a 'top-down' law created by states, treaties, conventions and international institutions supported by states, with the more 'bottom-up' production of normative understandings in networks of community. This paper considers how such an approach may clarify the nature of law regulating transnational economic relations, and the bases of its authority and legitimacy. It draws on recent analyses of transnational private law and considers their relevance for IEL. Familiar dichotomies – 'public' and 'private', 'expert' and 'non-expert' input in regulation, 'top-down' and 'bottom-up' law-making – can be illuminated in such a perspective. The approach also emphasises a major problem for IEL – how to lessen the remoteness of regulators from the experience and aspirations of the regulated.

INTRODUCTION

The idea that law has 'spilled out' beyond the borders of the nation state is now commonplace. Merchant communities that operate across national borders make regulation that effectively binds them as law in their dealings with each other (e.g. through processes of international commercial arbitration or through establishment of industry-wide norms of trade practice). Europeans are now used to the idea that much of their law comes not from their own nation state sources but from Europe-wide institutions. International criminal justice increasingly claims to reach out to catch gross violators of human rights irrespective of the state they happen to be in or the place of their alleged crimes. Judges in different nations draw on each other's ideas in what are beginning to appear as transnational judicial communities. Conventions authorised by international law create rights and duties for people in cross-border relationships. Human rights instruments and agencies carry legal ideas

1 Anniversary Professor of Legal Theory, Queen Mary University of London, UK. Adapted from earlier work, this is the revised text of a paper given at Kobe University Graduate School of Law on April 9th 2015.

around the world, creating new expectations of rights and protections not limited by national borders. Transnational standard-setting bodies proliferate, producing codes that provide regulation and define 'best practice' in fields such as forestry management, advertising and food quality (e.g. Hachez and Wouters 2011; Meidinger 2006).

Many scholars have adopted a new term to indicate new legal relations, influences, controls, regimes, doctrines and systems that are not those of nation state (municipal) law, but, equally, are not fully grasped by extended definitions of the scope of international law. The new term is *transnational law*, widely invoked but rarely defined with much precision.

Often 'transnational law' refers to extensions of jurisdiction across nation state boundaries, so that people, organisations and corporations are addressed or directly affected by regulation that originates outside the territorial jurisdiction of the nation state in which they are situated, or is interpreted or validated by authorities external to it. Sometimes it refers to regulation guaranteed neither by nation state agencies, nor by international legal institutions, treaties or conventions. Sometimes it signals a space for regulation not yet (fully) existing but for which a need is felt in cross-border interactions.

International law builds from a heritage of thought that focuses on nation states as legal actors, and on treaties and conventions as key instruments of legal regulation. A concept of *transnational* law might, however, leave open, or put into contention, the question of the dominant sources of creation, interpretation and enforcement of law – noting that these are sometimes national sources, sometimes international and sometimes only indeterminately connected with the 'national' as a category, reflecting a complex mix of regulatory authority and of political and cultural legitimacy. The idea of the transnational insists only that regulatory reach (and regulated social relations) can stretch beyond national boundaries (Jessup 1956). The broadest conceptions of *international economic law* (hereafter IEL) already encompass the diversity of kinds of regulation that this suggests (Tietje and Nowrot 2006; Charnovitz 2011). But they leave open vast questions: What counts as 'law' in this field? What is the nature of the social relations this law should regulate?

These questions are too large to address directly here. But they can be commented on indirectly, from a particular perspective, by considering a third question which is this paper's focus: *What follows if we think of IEL as existing ultimately to satisfy the regulatory needs of transnational economic networks of community*?[2] This would

2 The idea of transnational communities as sources of regulation has attracted valuable analysis in Djelic and Quack (eds) 2010. But 'community' is seen in this literature as an *object* (a social group united by a common project or identity) and difficult questions arise as to how communities are to be identified and where their boundaries lie. By contrast, 'community' indicates, in this paper, relatively stable trust-based social relations, with different types of these being combined in often

be to consider IEL in relation to social networks that create their own regulatory expectations and practices. It would be to confront a 'top-down' idea of law created by states, treaties, conventions and international institutions supported by states, with a more 'bottom-up' production of normative understandings and aspirations in many diverse networks of community.

IEL might indeed be seen as *ultimately* existing to address the transnational economic relations of private actors. This law is often seen as mainly concerned with large-scale regulatory structures linking nations in their economic relations and validated by the high authority of states, but it might also be seen in more radical terms as needing to find ultimate justification for its existence in its contribution to the welfare of *individuals* and specifically in the quality of their everyday economic interactions. If its form is public, its arena of ultimate effect is private. As with all law, it can be argued that what matters most is what it contributes to the life of people in their personal social relations with others.

An important strand of sociology of law has for a century developed a kind of *constructive subversion* in considering state law; today this can also be relevant to international economic law. Eugen Ehrlich's (1936) concept of living law[3] – that is, social norms that mirror or substitute in experience for the categories and functions of state law – was his vehicle for this constructive subversion. When he contrasted living law with the official juristic law of the state his aim was not to destroy the idea of law as lawyers understand it, but to illuminate and strengthen this law by bringing to light its permanent need for cultural as well as political relevance and grounding.

Ehrlich argues that, however powerful the modern nation state might be, the legitimacy of its law (that is, its active recognition as operational and authoritative) requires not only the support of political authority; it depends also on its relevance in what Ehrlich terms 'social associations'. In important respects, state law's social significance depends on its relation to living law. I think that a similar argument can be made that IEL needs to be rooted in the living law of transnational and national networks of economic relations.[4]

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fluid social networks. So, the issue is not to identify 'communities' but to study regulatory aspects of networks of communal relations. See Cotterrell 1995: 328-9; and for many illustrations and applications, Cotterrell 2006, and Cotterrell 2008: chap 2 and Part 4.

3 Ehrlich's concept, influential in Japan since the 1920s (see e.g. Murayama 2013), has not had the same general prominence in the Anglophone legal world and has had much less direct influence on the development and outlook of socio-legal research in Anglophone countries.

4 A concept of living law in relation to transnational regulation is invoked in Hellum et al (eds) 2010. But an analysis of different types of communal relations, with regard to their regulatory aspects, is needed to give precision to Ehrlich's sociologically vague idea.

THE 'PUBLIC' AND THE 'PRIVATE' IN REGULATION

Today, at least in Western countries, widespread popular ideas about economic regulation oscillate between opposing poles: on the one hand, the legitimacy and necessity of much of this regulation is often questioned as an 'interference' with private economic enterprise; on the other, in times of economic crisis sudden demands are made for regulatory security, oversight and retribution for perceived wrongdoing (exploitation, corruption) in fields thought to be insufficiently controlled in the public interest. And different political and socio-economic groups may tend naturally to gravitate to one or other of these poles of opinion.

International economic regulation seems powerful, firmly established and ever-expanding; yet also subject to ongoing debates about its legitimacy, proper scope and sources of recognition and support (e.g. Cohee 2008; Bachus 2004; Petersmann 2004: 588-93), its transparency, and its cultural acceptability and foundations (e.g. Picker 2011; Footer and Graber 2000; Hahn 2006). Perhaps, as international law addressing relations between states increasingly blends with transnational regulation addressing relations of individuals, organisations and groups (e.g. Berman 2005; Berman (ed.) 2006; Domingo 2011), the question of how far regulated populations are able to confer legitimacy on this law becomes steadily more pressing.

If transnational law is 'law which regulates actions or events that transcend national frontiers' (Jessup 1956: 45), much of this comes from nation state sources or from international agencies whose jurisdiction is ultimately guaranteed by states' approval. But some of it lacks the kinds of sources of public authority that municipal law relies on. How far can it find firm foundations by rooting itself in the aspirations and expectations of the populations whose general welfare it purports – directly or indirectly – to serve? For IEL these roots would surely have to be sought in interpersonal and intergroup economic relations (with corporations also included as especially important persons and members of groups for this purpose). These are, in orthodox legal terms, private relations and so it seems necessary to descend from the 'public' to the 'private' or, indeed, to query how useful the public-private distinction may ultimately be in looking for the foundations of IEL.

In fact it is in the area of what is now often called *transnational private law* (law governing the transnational relations of private actors) that legal scholarship on the law-creating potential of economic networks of community has progressed furthest. In what follows, the analysis of this law by Gralf-Peter Calliess and Peer Zumbansen (2010) will provide a basis for discussion. The relevant question is how far the character of transnational private law can be explained by reference to the nature of the networks of community it addresses.

The word 'private' is at first puzzling, as used by Calliess and Zumbansen, because

they insist that any conception of transnational private law must recognise vital public elements in it. State law and public international law often support or frame emerging transnational regulation and where private actors create this regulation it will necessarily have a public element that makes it more than a compromise of particular private interests; in fact, *any divide between private and public law is ultimately artificial*, merely historical and conventional (2010: 63-4, 73-6; see also e.g. Bartley 2011). For Calliess and Zumbansen the interplay of different kinds of current regulation of transnational consumer contracts and of transnational corporate governance illustrates this blurring (2010: chaps 3 & 4). But the focus on 'private' rather than 'public' signals that transnational private law imports a variable, shifting relationship between law and state, so that the nature of the involvement of state agencies in this kind of law in general cannot easily be theoretically specified.

Most fundamentally, 'private' in transnational private law indicates the *social sources* of the regulation under consideration. Private law in the national context addresses social relationships developed in civil society and the market, rather than those focused on citizenship, government, administrative bureaucracy and the state. Transnational private law gets its identity from the idea that, as transnational regulation, it has its social sources in those relationships that, in a national context, would be the focus of private law if they were legally regulated at all. In Calliess' and Zumbansen's account, the manner in which transnational private law can emerge is typified by the new *lex mercatoria*, by codes of corporate social responsibility (sometimes partly statute-based, but especially developed in corporate practice), by dispute resolution and norm generation in e-commerce (especially in business to consumer relations) and by standardisation processes, norm development and dispute resolution among internet providers, experts, technical developers and interest groups.

What is of most interest about their discussion is that it focuses directly on the two major issues about transnational economic regulation that are likely to occupy legal theory.

- First, *how is it possible to decide what is 'law' in transnational private law* (how can this law be convincingly distinguished – as clearly 'law' – from many other kinds of standards, guidelines, directives, codes, 'soft law', best practice recommendations, membership rules, collective normative understandings, etc. that also populate the realm of economic regulation)?
- Second, *how is the legal authority of transnational private law to be recognised and guaranteed* when neither states nor international law regimes do this adequately?

CONCEPTUALISING LAW BEYOND THE STATE

Calliess and Zumbansen address these two questions in a single analysis which enables us to see how they envisage regulation being, in a sense, 'distilled' out of social relations and acquiring legal character. It is necessary, they argue, to study transnational law *regimes* – that is, the whole procedure of creation, interpretation and enforcement of norms insofar as such a procedure exists for each variety of transnational private law (2010: 111). Thus, this regulation is seen as in an uneven, unsystematic, contingent process of formation – observed dynamically in stages of emergence in various contexts as it takes shape almost organically, not statically as a finished set of norms. In this process of development, norms emerge over time from communal understandings and gradually take on a degree of authoritativeness (i.e. are increasingly recognised as binding on participants). Stages in this progress towards law can be identified but will vary greatly for different kinds and circumstances of regulation.

Law as such is identified in *functional* terms. Following Niklas Luhmann, its general function seems to be seen as to stabilise normative expectations (Calliess and Renner 2009). Law is recognisable insofar as the carrying out of this function is observed. A relevant marker on the way to dispute processing becoming law is the 'verbalisation of conflict' in court-like procedures of some kind and the publishing of precedents of past decisions on disputes (a major step towards stabilising normative expectations by emphasising continuity and regularity in dealing with conflict cases). But no single process is always followed. Different kinds of 'economic governance' are appropriate to different kinds of transactions.

Calliess and Zumbansen identify a range of governance mechanisms (that is, mechanisms of regulation that can be invoked by private actors in private transactions) that are combinable to deal with specific kinds of socio-economic relations. They include legislation, courts, legal sanctions, social norms, social sanctions, arbitration, negotiation, and internal corporate norms. It seems that, again following Luhmann, there will be a 'thematisation threshold' when social communication becomes specifically *legal* – when the binary coding 'legal/non-legal' becomes appropriate and is used (Calliess and Zumbansen 2010: 51, 81-2).

The invocation of the binary legal coding as the mark of thematisation suffers, however, from admitted circularity: *legal* communications, for Luhmann, are those that mark out what is *legal* from what is not *legal*; his 'legal/non-legal' distinction has meaning only in terms of an already existing discourse of law. It would surely be more useful to think in terms of elements of doctrine (rules, principles, standards, guidelines, codes, directives, concepts) that can *potentially* amount to 'legal' communications, but at the same time to focus on how far these elements are themselves 'stabilised' as law through the actions of specific agencies. In

national legal systems, legislatures, courts, police and enforcement agencies fulfil this function. In international and transnational law the range of agencies, and their character, will be different.

I suggest that, to be usefully thought of as 'law', transnational economic regulation should be characterised by specific agencies or institutions tasked with creating, interpreting and/or enforcing doctrine. These could be of many different kinds and need not all be present in any particular regulatory regime. Instead of the Luhmannian 'all-or-nothing' approach (the thematisation threshold either has or has not been crossed) it is productive to see a regulatory continuum in which the legal character of regulation is a matter of *degree* (cf. Abbott et al 2000). Transnational economic regulation can be more or less legal depending on how far its doctrine (rules, principles, codes, guidelines, standards, etc.) has been *institutionalised* – that is, how far it is created, interpreted and enforced by specific agencies of some kind.[5]

This would be a genuinely legal pluralist approach. One does not expect to see legal regimes all of the same kind (they could be very diverse), and some regimes will be *more legal than others*. Transnational private law can be thought of as law insofar as it can be seen as *institutionalised doctrine*. It is 'doctrine' in the sense that – even if some of it may seem very unlike municipal or international law – it can be expounded, organised or interpreted in comparable ways; and it is 'institutionalised' by recognised agencies managing at least some (not necessarily all) aspects of its creation, interpretation or enforcement. To the extent that transnational private law takes this form, it may attract ('internal') authority over the members of the networks of community it purports to regulate and ('external') legitimacy in the eyes of those observing these networks (and seeking to influence them through IEL?).

INTERNET DEVELOPMENT: A MODEL FOR REGULATION?

However, a major question remains. How do transnational law regimes get sufficient stability, support and interest from their users to develop institutions and agencies to create, interpret and/or enforce their norms or standards? It is here that Calliess' and Zumbansen's discussion is most interesting. They use internet development as a model of an appropriate process for building legitimate and authoritative transnational regulation. In particular they focus on the long established 'Request For Comments' mechanism for developing standards of internet operation among service users and providers, technical experts, etc.

5 In international trade regulation, the creation of the dispute settlement system of the World Trade Organisation is a striking illustration of 'institutionalisation towards legalisation'. But, in transnational regulation, such institutionalisation will often be incremental, embryonic, relatively localised (perhaps to a particular kind of economic activity or industry) and much less politically visible.

Simplified for present purposes, this involves (i) appointment of a chair of a working group that forms itself to address a perceived technical problem or disagreement; then (ii) an invitation to all interested parties (with no membership criteria laid down) to engage in online discussion; later (iii), after a period of free discussion in the group, the formulation by the chair of a 'rough consensus' (not a majority view but a distillation of prevailing understandings), either on the issue as a whole or some intermediate aspect of it; (iv) discussion and experimentation with the solution now proposed; (v) further stages of tentative proposals and circulation of a 'draft standard'; ultimately (vi), if the participant community's prevailing views support this, the stating of a 'full standard'. The standard thus becomes established as (in internet jargon) 'running code'– practically effective and authoritative.

Is this a model for anything other than the operations of the very special network of internet developers to which it relates? The method of 'rough consensus' leading through many deliberative and experimental phases to the 'running code' of established doctrine could be claimed as a model of how to build the authority of norms 'from the bottom up', through negotiation, and without the need for any established hierarchy or political authority.

It may be easy to scorn the idea but Calliess, Zumbansen and others (e.g. Froomkin 2003) do, indeed, make this claim. What stands against it? First, the *rough consensus and running code* procedure (RCRC) addresses technical standards. Could it therefore be dismissed as irrelevant to the formation of law, which necessarily deals with policy matters, values and interests? But Calliess and Zumbansen (2010: 256-7) claim that the setting of technical standards is not ultimately a policy-free matter free of wider normative considerations.

This seems right. The most productive way to view 'bottom-up' creation of transnational regulation may be as a process capable of moving through many kinds or gradations of standardisation – from establishing basic cognitive understandings through to policy-definition, value-clarification and imposed compromise of interests through binding norms. What seems purely 'technical' can be governed by decisions as to what kinds of technology are to be sought and why. Even technical requirements of accounting or financial transfer can embody moral and political choices and policies as to how particular socio-economic relations (e.g. in banking and investment practice) are to be arranged, and how 'efficiency', 'progress' and 'success' are to be measured in communal networks[6] (Berman 2007: 1222-3). 'Pure' technique (or procedure) may ultimately be hard to isolate from its social uses.

A more fundamental critique, however, is surely that the network of community composed of internet technicians, experts, designers and enthusiasts is very different

6 I use this term synonymously with 'networks of community'.

in its aims from most kinds of business networks in which transnational private law has been developed (e.g. through commercial arbitration practices, or commercial and corporate codes). There is a strong collective interest among the network of internet developers and users in making the internet work effectively on a worldwide basis. It is in the interest of all users to have as much standardisation as possible and for the internet to be as inclusive and wide ranging in scope as it can be. To have to exclude potential parts of a relevant technical network from the internet would be an admission of collective failure, and at odds with its assumed purpose.

Thus, there is a strong incentive towards inclusiveness (of relevant participants) and comprehensive standardisation of internet processes and protocols. But business networks need no such comprehensiveness. Their instrumental aims are focused on individual profit-making and the convergent projects of members. They often benefit by excluding potential participants (e.g. through cartelisation, monopolisation, blacklisting, pricing out). Thus, the RCRC regulation process may be a special, limited case. The issue of where external coercive authority is to be found to police the production of internally-generated regulation is not one that Calliess and Zumbansen discuss; but for much transnational economic regulation, the problem of *co-ordinating* regulatory regimes, and co-ordinating the networks of community to which they relate, is very important, indeed.

The issue of external coercive authority is an aspect of the controlling, limiting function associated with the *voluntas* aspect of law – that is, law's coercive (as opposed to persuasive) authority. And while the discussion of RCRC in operation graphically depicts a process of developing *ratio* (reasoned principle) in regulatory doctrine through guided rough consensus and tentative drafting, there are surely questions to ask about the sources of *voluntas* in such a system if it is to be a model for law production (even if only of embryonic forms of law). In this connection, it is unfortunate that nothing is said in Calliess' and Zumbansen's discussion about power-relations in the RCRC process. Perhaps coercive authority plays no part in RCRC; but if so, this is a reason why it might not be a useful model for law-production in the rest of the world of communal networks. In most (if not all) such networks power and hierarchy are very important, and law-like regulation needs elements of coercive authority to guarantee it.

RCRC does at least illustrate how norms might arise in democratically organised networks of community.[7] In other networks, such as those of worldwide transnational industries (e.g. Snyder 1999), the most powerful players (usually major corporate groups) have special power to set the rules. RCRC shows an effort to avoid the dominance of particular power centres; but the communal network involved in

7 See also Hachez and Wouters 2011, emphasising accountability to the regulated population as a basis of regulatory legitimacy.

internet development may be structured as much by *shared ultimate values* (e.g. about the beneficial effects of the internet for knowledge diffusion and communication) as by common or convergent economic projects.

One useful aspect of the RCRC example is the idea of a gradual crystallization of norms, which illustrates the idea of transnational law regimes as *processes*. Above all it shows the importance of *mutual interpersonal trust* in the communal network which enables the seemingly easy flow of deliberation, debate, experimentation and consensus-emergence. At the same time, this trust is encouraged by transparency, open discussion and the sharing of knowledge in the network. The relationship may well be circular and cumulative – openness and knowledge-sharing inspire trust; trust encourages openness and flows of information.

MORAL DISTANCE AND 'SOULLESS' LAW

Ultimately the legal character of transnational economic regulation will be a *matter of degree*, to be judged by the extent of development of law-like *doctrine* (imperative standards, binding norms) and its *institutionalisation* by means of agencies dedicated to the creation, interpretation and/or enforcement of doctrine. A legal pluralist approach will expect to see many competing, overlapping, conflicting and mutually supporting regulatory regimes (Rosenau 2007), some more legal and more authoritative than others. The key to understanding the bases of their authority will lie in the nature of the networks of community they purport to serve and in which they have been created.

An analysis of transnational private law in terms of economic networks would suggest that its strength derives in large part from its rootedness in these networks. Many norms and regulatory practices of transnational private law are developed by analogy with those of the private or public law of nation states, which are embedded in those national contexts; when transferred to the transnational sphere, it is suggested, these norms and practices become 'disembedded', which establishes their autonomy as transnational private law (Calliess and Zumbansen 2010: 113, 123). Yet laws (like economic practices) acquire general acceptance by being seen as integrated with and an aspect of wider social relations. Law is part of the social – it exists as an aspect of networks of community, as part of their regulatory structure.

Even state law (often thought of as remote from social life) is rooted in the networks of community that make up the nation state, and reflects the power structures present in them and the interplay of intra-national, nationwide and transnational networks. Durkheim expressed this differently, but to broadly similar effect, by suggesting that law that has no firm ties to the moral bases of social life has lost its 'soul' and can even seem 'a dead letter' (Cotterrell 1999: 5, 54-5, 57-8). But state

law's 'embeddedness' is surely often obscured because it reflects very complex interrelations (and often conflicts) between communal networks within the national society, as well as being influenced by networks beyond it.

Can international law be even more 'soulless' insofar as its links to networks of community are more indirect and potentially contradictory even than those of national law? With its vast, but abstract, potentially world-wide jurisdictional reach and its – so to speak – 'high altitude' trajectory in 'thin legal air' far above most of social life, could international law appear 'twice removed' from the conditions of existence of regulated populations insofar as it regulates mainly the relations of states and their agencies *rather than* social relations among their populations? The issue is about *moral distance* between the regulators and the regulated – that is, about regulators' remoteness and isolation, and an inability (or unwillingness) to learn adequately about the conditions, expectations and motivations of the regulated; so that 'human scale' in regulation is in danger of getting lost.[8]

When the focus of analysis (as in Calliess' and Zumbansen's picture of transnational private law) is 'bottom-up' the emphasis is on how far and in what ways the regulated can influence the formulation of regulation, and how this input can interrelate with 'top-down' processes of legislation and decision-making by state and international agencies. Such an approach demands serious *sociological* inquiry about the kinds of regulatory needs that arise in communal relations. It requires a view of lawmaking as an endless process of observation, negotiation, compromise, influence and accommodation, rather than of policy formation, implementation and enforcement. This implies the need for very diverse sources of information about regulatory experience and aspirations in networks of community. How are lawmakers to acquire this information, to engage in communicative processes that can reveal it, to work within polycentric processes of law creation and application?

This complex project of creating what might be called 'embedded law' cannot treat abstract models of self-interested rational calculation as a satisfactory basis; such models are inadequate substitutes for inquiring into the real understandings of regulated populations (Engelen 2010). The process of regulating, even for primarily economic relations, has to take account of varied *types* of motivations that support social relations of community. These include not only instrumental cost-benefit calculations, but also emotional allegiances, rejections and resistances; as well as reliance on habit, customs, traditions and the attractions of the familiar, and also adherence to fundamental beliefs and ultimate values accepted for their own sake (Cotterrell 2006: chap 4; Cotterrell 2008: chap 2). How far these varied motivations are 'rational' or 'irrational' is a question that can be left aside.

8 On moral distance see Cotterrell 1995: 304-5, 330-1. I use the word 'moral' here in a Durkheimian sense to refer to the normative valuations and cognitive perceptions of the regulators and the regulated.

REASONED PRINCIPLE / COERCIVE AUTHORITY

Current thinking about international economic law engages a wide range of political and cultural as well as economic and social variables (e.g. Jackson 2007: 8-10). The international actors who shape IEL can be assumed to have a wide appreciation of such matters and of world economic patterns and forces. But their observations may risk being – even where extensive consultation processes take place (Marceau and Pedersen 1999) – snapshots from 'on high' of the experience of socio-economic life 'on the ground' among individual citizens. One might speculate that much moral distance between regulators and regulated exists, insofar as the regulated economic actors are individual citizens or small firms; less so if they are large corporations or NGOs with much lobbying power.

Insofar as the idea of community focuses attention first on the participants in communal networks and then on the structures of power, organisation and interaction which the participants (or some of them) build, it directs initial attention to the 'atoms' (persons) that make up a regulated environment. It requires a descent from high-level abstraction to low-level accountability, reflexivity and participation.

The element of *ratio* (reasoned principle) in the norms needs to reflect their meaningfulness as guides to the participants in the relevant networks of community. Insofar as many such (overlapping, intersecting, conflicting) networks are involved, the scope for uniformity will be restricted – the acceptance of regulatory diversity and of merely piecemeal, provisional co-ordination of doctrine will surely be as important as the search for overarching regulatory principles (Cottier *et al* 2011). The process has to be a dialogue between regulators seeking to understand typical regulatory problems of networks of comunity, and regulated populations asking how regulation can reflect their experience as members of such networks.

Sources of the *voluntas* (coercive authority) of transnational economic law are harder to identify in general terms than are those of *ratio*. Often they are 'external' to transnational networks of community – they lie in nation state law or international law providing ultimate guarantees of effectiveness in cases of otherwise irresolvable disputes or otherwise uncontrollable deviance. But no less important in practice may be organisational structures that economic networks produce for themselves – expressed through powers of blacklisting or exclusion from membership, insider-information control, management of members' reputations, and adjustment of trading conditions and privileges. Such structures inevitably reflect the power relations in networks of community (Snyder 1999; Djelic and Quack 2010).

How far might the methods by which nation states have acquired their political mandate to make, manage and enforce law be somehow paralleled in transnational spheres? For example, how far is *democratic* legitimation of transnational economic

law possible? The idea of democracy might seem inappropriate to many economic networks of community, in which elites of major players lay down rules for newcomers and less powerful members in the market or industry. Yet, if deliberation and consensus can produce *ratio*, the problem of the source of *voluntas* available to end disputes over *ratio* remains to be solved.

In the context of the nation state, democratic or social contract theory presents the political basis of law's authority and legitimacy as deriving from the assumed consent of the governed, expressed through representative institutions entrusted with governing. What analogies might exist in non-state contexts of economic networks? The most likely source of stable *voluntas* in transnational private law may lie, perhaps, in acceptance of *expertise* as the basis of a kind of authority to police and limit the proliferation of *ratio* produced through deliberation, negotiation and consensus. The numerous standard-setting agencies and authorities now coming into existence and flourishing in the transnational private law arena may depend ultimately for their claims to authority on perceptions of their expertise.

In this connection the *availability of knowledge*, referred to earlier for its significance in building mutual interpersonal trust, again assumes great importance. If the diffusion of knowledge may help the building of *ratio* out of a rough consensus in a network of community, its absence (perhaps impossibility) in many contexts reinforces the significance of *voluntas*. If people cannot know enough to contribute persuasively to debate, and if they cannot learn enough to be able to interpret other people's viewpoints and – assuming goodwill – to work towards consensus, the alternative is reliance on expertise (on the assumption that experts can close off debate by the superior authority of their knowledge).

Questions remain about the kind of expertise appropriate in transnational private law and how it is to be institutionalised (in the way that state legal systems institutionalise juristic expertise). Under what conditions is expertise recognised and accepted as authoritative; under what conditions will a 'social contract' to accept the expert's sovereign judgment be held to be in place? It is not obvious that in the case of transnational private law (and, indeed, of IEL) traditional *juristic* expertise is what is most required. The authority of the standard setter may come from claims to economic, managerial, political, technical, scientific or other expertise specifically related to the regulated field. The best hopes for legitimate and authoritative transnational regulation (and reliable processes for developing it) may lie in variable combinations of (i) the ostensible *egalitarianism* of 'rough consensus' coupled with (ii) the institutionalised and accepted *elitism* of a more or less benevolent regulatory expertise.

By such means transnational private law may develop the combination of *voluntas* and *ratio* that are the key to law's effectiveness, authority and legitimacy. As such it

can help to set in place building blocks for structures firmly grounded in networks of community yet capable of informing and meshing with the broadening legal doctrine of international economic law.[9]

INTERNATIONAL ECONOMIC LAW THROUGH A 'COMMUNITY LENS'

This paper has emphasised the 'transnational' alongside the 'international'. The focus on the transnational has been to highlight a 'bottom-up' approach to cross-national legal development that centres on networks of community, as well as the treaty-making and convention-signing activity of states. A 'community lens' applied to economic regulation across national borders raises issues rather than offering comprehensive theoretical formulations. But these issues are significant for the theoretical study of IEL.

- First is an issue of defining *the constituencies that IEL serves*. Who are the regulated and how far are they both sponsors and recipients of regulation? The idea of networks of community raises that issue. It refers to networks of social relations that are often fluctuating, overlapping, transient, variable in organisation or stability, tightly or loosely bonded, and almost always involving power-structures. Relations of community need stability of expectations, and that depends on mutual interpersonal trust among participants. Different kinds of communal bonds often overlap; so, even networks of community primarily structured by economic interests may also embrace other aspects of community – not just members' common or convergent projects, but also perhaps their shared beliefs, customs, traditions or emotional commitments. It is important to distinguish these different aspects or types of community which often present distinct regulatory needs and problems (Cotterrell 2006: 116-25, 153-8).

- Second, and following from the above, the community-focused approach indicates the need for *a sociological approach to IEL* to consider how IEL is and must be embedded in networks of community, and to examine their nature. The focus would be on the typical regulatory needs and problems of different types of communal relations – whether primarily instrumental (especially economic), based in shared beliefs or ultimate values, or founded on purely emotional allegiances or rejections, or in the mere fact of co-existence in a shared environment. A guiding principle here would be that networks of community cannot be expected to regulate themselves except to secure their own objectives. Constraints on them come from their interaction,

9 For an illustration of tensions between transnational private law and IEL regimes see Maher 2011.

conflict or overlap with or subordination to other such networks. Another guiding principle is that networks will seek to secure their objectives by trying to regulate beyond their own membership. Consequently, regulatory competition and conflict should be expected to be endemic and permanent in the transnational arena.

- Third, new issues are raised about the *legitimacy of IEL* (its general acceptability as a regime or set of legal regimes). Insofar as IEL's sources are in municipal and international law this may seem to raise no issues different from those that bear on any other kinds of international law – the issues are traced back to those that relate to nation state law and state sovereignty. But, insofar as studies show a practical intertwining of bottom-up creation of transnational regulation with top-down production of state law and IEL[10], it may be necessary to explore diverse sources of regulatory legitimacy – of international organisations and of transnational networks.

- Fourth, a 'community lens' highlights the issue of *moral distance* which Ehrlich saw (although the term is mine, not his) as a founding concern of sociology of law. For him, working at the remote eastern edge of the old Austro-Hungarian Empire, moral distance was also geographical distance: his implicit warnings were addressed to imperial lawmakers, far away, purporting to regulate his remote, ethnically diverse province. Today the moral distance which international law has to overcome (to address individuals and groups and not just states) might seem even greater. It is hard to know what democratic lawmaking could mean as applied to the rule-making powers of many international institutions such as the World Trade Organization, except in the formal sense that these institutions are authorised by states having, themselves, some democratic character (Bacchus 2004: 669-70; Shaffer 2004; cf. Bronckers 1999).

- Finally, the community approach warns of what might be called *regulatory hubris*. Few doubt the need for transnational economic co-ordination. The names of leading international economic institutions point to an ambition for 'world' regulation (the World Bank, the WTO). But ultimately economies exist for *local benefit* – for the well-being of individuals, mainly tied to particular environments, and increasingly affected by large forces labelled as globalisation. The main focus of IEL is on regulation of the economic policies and relations of states and, through that, the regulation of states' populations of economic actors. It presupposes as absolute virtues, economic growth (not just sustainability), formally uniform trading conditions, secure conditions for

10 See e.g. Levit 2008 on the Berne Union's 'private' regulation becoming a component of WTO regulation; Bartley 2011 on intersections of transnational regulation and state and international law.

commercial enterprise, the ongoing extension of markets, and legal freedom of trade (see e.g. Khor 2000; for a radically alternative vision see IUC Group 2009). But how this law can reflect the complexity and diversity of economic and other aspirations of its innumerable regulated populations is often unclear.

Indeed, it may be that the nature of these populations remains insufficiently studied in relation to economic regulation. They are sometimes represented in world trade literature only through such abstract, aggregating measures as 'citizen welfare', 'market infrastructure', 'people attributes', 'culture and its impact', 'societal stress', 'labour antagonism', 'environmental costs' and 'population changes'.[11] The textures of communal experience are hard to capture in such categories.

CONCLUSION

The message of living law in the context of transnational economic regulation is much the same as the message Ehrlich wished to convey by using this concept a century ago. His sociology of law, running against the main stream of socio-legal inquiry, warned against treating the state as an omnipotent legislator for which culture, like nature, presented no insurmountable obstacles to progress. Today, more precise and nuanced concepts than that of living law are needed, and the idea of types and networks of community with their regulatory needs and problems can serve this need. A community lens focused on international law might offer a warning to transnational lawmakers, comparable to Ehrlich's warning to the lawmakers of the imperial state. Like the Hapsburg Empire Ehrlich served, the current transnational realm is hardly to be seen as democratically structured. The realistic issue is not how to democratise economic regulation across national borders but how to maximise its responsiveness – its ability to recognise, reflect, organise and mediate between diverse communal demands through a continuum of regulatory responses: from facilitation or delegation, to guidance or advice, to prescription and enforcement.

Ehrlich thought that respect for cultural diversity, expressed in sensitive, flexible, carefully contextualised regulatory policies, might save the crumbling, unwieldy structure of the Austro-Hungarian state. Despite its ongoing crises, the international economic order is not crumbling. But its legitimacy needs strengthening in the face of political opposition to globalisation, perceptions of the remoteness of international regulatory processes, and suspicion about their character. A way to direct research to these issues is in part through a socio-legal focus on the nature of networks of community and their significance for IEL.

11 See e.g. Jackson 2007: 9-10, using all of these terms. On social research in the World Bank context see e.g. Fine 2008.

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