Re-ordering the World – Transnational Regulatory Governance and its Challenges

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Abstract: Taking transnational regulatory governance seriously, we treat it in this chapter as a dependent variable. Processes of emergence and stabilization are of particular interest. We emphasize the complex, step-by-step, sometimes bumpy and highly historical dimension of these processes. Regulatory change, as it characterizes our contemporary transnational world is generally associated with struggles, conflicts, resistance, negotiations and painful integration. It is often incremental and nevertheless potentially highly consequential, with a strong transformative impact. We propose that a contemporary frontier for social scientific research is to extend and reinvent our analytical tools in order to approach regulatory governance as a complex and fluid compound of activities bridging the global and the local and taking place at the same time within, between and across national boundaries. In order to characterize the dynamics of transnational regulatory governance, we revisit some key conceptual debates. A combination of perspectives allows us to better capture the multiple levels and dimensions of transnational regulatory governance in the making. We conclude the chapter with a brief discussion of the more recent challenges to transnational governance, particularly in a post-crisis world.

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The financial and economic crisis that has shaken the world since 2008 generated calls for more regulation and order at the transnational level (G20 2009; House of Commons Treasury Committee 2009; Bartley and Schneiberg 2010). The media, politicians and various analysts have often described this crisis as in part the consequence of the de-regulation that marked the last decades of the twentieth century (Obama 2008). This argument is not convincing, we argue, as this period was in reality "a golden era of regulation", characterized by intense transnational "regulatory activism" (Levi-Faur and Jordana 2005; Djelic and Sahlin-Andersson 2006; Graz and Nölke 2008; Mattli and Woods 2009). Instead, we choose, with others, to talk about a period of consequential re-regulation or re-ordering (Brunsson and Jacobsson 2000; Slaughter 2004).

This consequential re-ordering mostly came about through the proliferation of soft law, increasingly with a transnational reach (Mörth 2004; Brütch and Lehmkhul 2007; Tamm-Hallström and Boström 2010). Extensive elements of self-regulation (Ayres and Braithwaite 1992) were involved in the process but associated mechanisms of audit and control also deserve scrutiny (Power 1997; Boström and Garsten 2008). In turn, evaluation, accreditation, certification and ranking schemes helped stabilize and reinforce the impact of those mechanisms (Boli 2006; Wedlin 2006). Another striking characteristic of this intense re-regulation process has been that regulatory boundaries do not necessarily coincide, anymore, with national boundaries. Some of the new regulations stem from the initiative of states or intergovernmental bodies. But governance constellations that bridge the state/non-state divide proliferate at rapid pace (Djelic and Sahlin-Andersson 2006; Graz and Nölke 2008; Djelic and Quack 2010). National states remain involved in this redefined governance game but they increasingly have to compose and interact with many other actors.

In the meantime, the conceptual frameworks at our disposal for understanding processes of regulatory governance are mostly inadequate. They are often mere extensions of the conceptual frameworks originally developed to understand rule-making and monitoring in a Westphalian world – where sovereign nation-states with supreme jurisdiction over demarcated territorial areas functioned in an essentially anomic international arena (Martin

2005). As such, those frameworks have a tendency to marginalize processes of transnational regulatory governance (Cutler 2002; Kobrin 2002). We propose that a contemporary frontier for social scientific research is to extend and reinvent our analytical tools in order to approach regulatory governance as a complex compound of activities bridging the global and the local and taking place at the same time within, between and across national boundaries.

Taking transnational regulatory governance seriously, we propose in this chapter to treat it as a dependent variable. Processes of emergence and stabilization are of particular interest. We emphasize the complex, step-by-step, sometimes bumpy and highly historical dimension of these processes. Regulatory change, as it characterizes our contemporary transnational world is generally associated with struggles, conflicts, resistance, negotiations and painful integration. It is often incremental and nevertheless potentially highly consequential, with a strong transformative impact (Djelic and Quack 2003; Thelen and Streeck 2005).

In order to characterize the dynamics of transnational regulatory governance, we revisit some key conceptual debates. We begin this chapter with an exploration of the nature of actors involved and of the nature and dynamics of rules produced. Taken separately, these theoretical repertoires give, we claim, important but only partial insights into the dynamics at work. A combination of perspectives then allows us, in the following section, to better capture the multiple levels and dimensions of transnational regulatory governance in the making. We conclude the chapter with a brief discussion of the more recent challenges to transnational governance, particularly in a post-crisis world.

Key Elements of Contemporary Re-ordering – The Nature of Actors and Rules

In order to capture the multilevel complexity of transnational regulatory governance in the making, we need first to take into consideration some key constitutive elements. We build upon different debates and discussions across social science disciplines to characterize the situation with respect to the actors involved and the nature of rules produced. The consequential re-ordering of our world has meant the multiplication of actors but also their transformation. It has also come with a profound transformation of the nature of rules and compliance mechanisms.

The Actors of Transnational Governance

Traditionally, regulatory issues have been approached, in political science and in the International Relations literature, from a state-centered perspective. The idea that states are the central pillars of regulation within but also across national boundaries is still shaping quite a share of that literature (Martin 2005). Theories of governance emerged in reaction to the perspective that social control was mobilized by and confined in states (Keohane 1982; Baldwin 1993). The catch phrase "governance without government" (Rosenau and Czempiel 1992) was precisely coined to express this reaction and as such should not be taken literally.

Transnational regulatory governance suggests that territorial grounds and national autonomy or sovereignty cannot be taken for granted; it is increasingly difficult to separate what takes place within national boundaries from what takes place across and beyond nations (Sassen 2003). Although the term "transnational" does not imply the disappearance of nation-states, it suggests that states are only one type of actors amongst others (Katzenstein et al. 1999; Pierre 2000). As Hannerz (1996:6) put it "(i)n the transnational arena, the actors may now be individuals, groups, movements, business enterprises, and in no small part it is this diversity of organizations that we need to consider". This fits with our conviction, buttressed by the increasing availability of rich empirical evidence, that the exploration of a re-ordering world should neither neglect states nor treat them as the only or central mainsprings of the re-ordering process (Djelic and Sahlin-Andersson 2006; Graz and Nölke 2008; Mattli and Woods 2009; Djelic and Quack 2010). Kobrin (2002: 64) saw parallels between present transnational regulatory governance structures and the medieval situation, where "borders were diffuse, representing a projection of power rather than a limit of sovereignty". In that context, power and authority could not be based on mutual exclusive geography". Buildig on Ruggie (1983), Kobrin characterized such political structures as patchworks. "Patchwork" political structures mean interdependence and entanglement across fluid boundaries. As they pursue their interests, actors connect with others and hence have to compose in the process. Interdependence and entanglement drive changing patterns of regulatory governance. In turn, changing regulatory governance only deepens interdependence and entanglement.

The role of states and governments in contemporary processes of regulatory governance hence should not be taken for granted (Rose and Miller 1992; Kohler-Koch 1996; Moran 2002). Rather, it should become the object of serious scholarly scrutiny (eg. Zürn 2005). States have not withered away; still they may be changing, potentially quite significantly. As used by Majone (1996) and others (for a review see Moran 2002), the concept of "regulatory states" points indeed to a significant evolution of states and of the way they control or influence activities and actors. Regulatory states are not less influential or powerful but they

are increasingly embedded in complex constellations of actors and structures (ie. Higgott et al. 2000; O'Brien et al. 2000). Going one step further, Moran (2002) argues that the concept of "regulatory state" itself may be somewhat misleading as it sends the signal, still, of a central role for states in regulatory governance. Along the same line, Scott (2004) criticized a state-centered bias and introduced the idea of "post-regulatory states". The defining characteristic, here, is the blurring of the distinction between public and private actors, and the introduction of a much more de-centered view of regulation that relies on mechanisms not directly associated with state authority or sanctioning power (see also Risse this Handbook).

While research on regulatory governance needs to further document the changing nature and role of states, it also needs to capture the rising importance of new actors. Contributions on the widespread expansion of various forms of private authority are, in that respect, highly relevant (Cutler et al. 1999; Hall and Biersteker 2002; Cafaggi this Handbook). Since the 1980s already, mention was made in the International Relations literature of the importance of transnational social networks. Using the concept of "social network" in its descriptive and first level sense, Kees van der Pijl and the Amsterdam school explored the sociology and political economy of transnational class formation (Van der Pijl 1984, 1998). Haas (1989, 1992) also argued the importance of social networks as key mechanisms of governance crossing over state boundaries. He used the label of "epistemic communities" to describe increasingly transnational communities of expertise and practice, where individuals still retained some form of local or national embeddedness and authority (Haas 1992). More recent contributions identify "regulatory networks", underscoring the broad variety of public and private actors involved in transnational regulatory governance (eg. Schmidt 2004). Regulatory networks imply connected actors – individuals and organizations – but also common discursive patterns (Marcussen 2000). Knowledge claims and various forms of expertise shape the authority of governance actors and the legitimacy of their activities. In other words, networks and governance processes are all institutionally embedded. Hence, research on regulatory governance needs to be sensitive to this institutional contextualization (cf. Lynn et al. 2001; Johnston 2001).

The concept of "soft actors" captures quite well this idea of multiple identities in flux. With this concept, Meyer (1996) emphasized a view of actors – be they organizations, states or individuals – as culturally and institutionally constrained and dependent (see also March 1981). Hence, transnational regulatory governance should not be looked at only through the prism of network connections and nodes. Activities, relationships but also actors or the development of actorhood itself are constituted and shaped by more diffuse cultural and

institutional processes. John Meyer and colleagues have repeatedly documented the importance of integrating those processes, if we are to understand how organizations, states or individuals change. Studies within this tradition show that states remain important regulators but that they are embedded in, shaped and fashioned by a powerful world society and its associated templates (Meyer et al. 1997; Jacobsson 2006). These templates diffuse as global models along which states and other actors are benchmarked and possibly transformed (Finnemore 1993, 1996). The stateless but rational, organized, and universalist character of world society may in fact add to rather than detract from the speed of diffusion and the global pervasiveness of standardized models (Finnemore and Sikkink 1998).

A focus on the multiplicity of non-state actors in transnational processes of regulatory governance – working with, along or even without state actors – cannot but beg the question of the legitimacy of private authority (see also Zürn this Handbook). With a broadening set of rule-makers, the way of authorizing rules is likely to broaden as well. Coercive rules that rest on the monopoly of states over legal authority and physical violence or on citizens' habitual obedience come to represent only one among several forms of authorization.

From the Rule of Law to the Law of Rules

In parallel to the expansion of transnational regulatory governance, empirical studies and theories have multiplied (see Baldwin et al. 1998; Levi-Faur 2005). Different definitions and conceptions of regulation run through these studies. Rule-making has traditionally been associated, in a Westphalian world, with the coercive power of the nation-state. As such it has generally been expressed in “hard laws” and directives. In contemporary transnational regulatory governance, new legally non-binding “soft” rules (e.g. Mörth 2004) or norms (Karlsson this Handbook) – such as contractual arrangements, standards, rankings and monitoring frames – appear to be taking over and are, in fact, increasingly being used by states themselves (Hood et al. 1999).

Many new rules are voluntary. This means that those who are to comply should voluntarily follow the rules rather than be forced to do so. In the background to the multiplication of soft rules, we find the potential threat that states would come to issue harder rules – both more restrictive and less open to interpretation and adjustment by those following the rules. In fact soft rules can be either a way to buffer the field from harder forms of regulation or a first step towards harder forms of regulation. This suggests important dynamics where regulations develop and expand in response and reaction to each other. These dynamics clearly involve power relations and structures of authority, including when the latter

are hidden under the apparent neutrality of references to science and expertise (Drori et al. 2006).

While many rule-makers in transnational constellations do not have the type of regulatory authority traditionally associated with states, they can still develop mechanisms of social control that can be more or less coercive (see also Scott this Handbook). Compliance can be ensured through the connection between certain rules or standards and access to membership, resources or certifications. It can also rest on socialization, acculturation, or peer pressures, often through organizing, reference to expertise, or the linking of rules to each other (Jacobsson and Sahlin-Andersson 2006). Compliance needs to be verified and monitored, which means increasing demands for transparency and the deployment of various kinds of audit and control mechanisms. Regulation and rule-making, in their contemporary form, come together with intense organizing and monitoring activities that sustain and reproduce emerging rules as well as targeting adoption and implementation.

Even when they lean on the shoulders of potentially harder modes of control, soft rules are typically formed in general terms. They are open, as a consequence, to negotiations and translations by those they regulate, whether at the moment of elaboration or during monitoring (Kirton and Trebilcock 2004; Sahlin-Andersson 2004). Soft rules are generally associated with complex and costly procedures of self-presentation, self-reporting and self-monitoring. So, what could appear to be at first sight a “softening” of the rule system in fact fosters most of the time extended re-regulation and increased organizing and formalization (Brunsson and Jacobsson 2000). This certainly resonates with Power’s (1997) characterization of the audit society, where audits explode everywhere and operations and organizations are increasingly structured in ways that make them “auditable” (see also Strathern 2000; Shore and Wright 2000; Power 2008).

Explaining Supply and Demand – The Dynamics of Regulatory Governance

The rise of governance is not simply the consequence of weaker states or transformed economic orders. In fact, those latter trends could themselves be driven in part by the rise of governance on a transnational scale (Djelic and Quack 2003; Djelic and Sahlin-Andersson 2006). Combining the conceptual repertoires presented above, we outline some of the core dynamics of transnational regulatory activism.

A Spiral of Distrust

Power (1997, 2004), Hood et al. (1999) and Moran (2002) suggest that expanded monitoring and auditing activities generate spirals of distrust. Diffuse distrust prompts activities that reveal, make transparent, and set rules with a view to rebuilding trust. Those activities, however, may in turn reveal and suggest new problems. Hence, rather than building trust, they could be undermining it further, leading to still more requests for auditing, monitoring and regulation. This seems particularly true in the case of transnational regulatory governance, due to two specific features.

First, the absence of a formal and sovereign holder of legitimacy in the transnational arena entails the relative fragility of rules and monitoring activities. There is competition out there for claims to authority and the regulatory arena can be described as a regulatory market – where demand and supply stimulate and reinforce each other. Some of it may even have the feel of a regulatory bubble! In some of the new regulatory "markets", the incentives for following rules are essentially financial. The new market for CO₂ emissions rights is a good illustration (Engels 2006). In other regulatory "markets", reputation, trust or legitimacy will play the role of incentives. This is the case with accreditation and rankings of higher education (Hedmo et al. 2006), forestry certification schemes (McNichol 2006) or the UN global compact for corporate responsibility (Jacobsson and Sahlin-Andersson 2006; Wedlin et al. 2010).

Second, this "market-like" competition is reinforced by the trend towards deliberative and participative democracy so characteristic of transnational regulatory governance (Mörth 2006). Deliberative democracy means expanded claims to be involved and contribute in rule-making and rule-monitoring. Ultimately, this is bound to generate regulatory or governance "inflation" – where "your" regulation fosters "my" monitoring or counter-regulation, and so forth. Thus self-regulation tends to be replaced by or developed into regulated and framed if not controlled self-regulation (Ayres and Braithwaite 1992).

Hence, behind exploding governance activities and activism we find evidence of a distrust spiral. This distrust spiral reveals the problem of legitimate authority and is certainly a major challenge for transnational governance. It is vividly illustrated by the striking ambivalence, in the transnational governance context, to science and expertise. New modes of governance tend to be expert-based; they are often legitimized by references to science and translated into measurement scales (Power 2004; Wälti et al. 2004). A general societal trust in science and expertise is certainly a driving force behind transnational governance (Drori and Meyer 2006). In parallel, though, Hood et al. (1999) and Moran (2002) point to distrust in experts, expertise and measurement as one driver for extended governance. While science in

general is legitimate and legitimating, individual experts and individual pieces of expertise are often contested. For example, scandals around health, safety, environmental or other issues generate profound distrust and a demand for even more transparency and regulation as well as closer monitoring. This contemporary ambivalence towards expertise and science does not only stimulate denser governance activities. It also favors more universal types of rules as abstract expertise tends to be highly legitimate while practicing and individual experts often suggest distrust instead.

Responsibility and Control Spirals

This distrust spiral, which arguably is a powerful motor of contemporary governance, combines and articulates with two other “spirals” – a responsibility and a control spiral.

Governance and regulation are in part about allocation of responsibility. When rules are precise and focused, responsibilities tend to be clear. With the multiplication of regulatory and governance activities, with the increasing complexity of regulatory constellations, responsibilities get diffused and dispersed. The movement towards soft regulation has a tendency to reroute, furthermore, responsibility away from rule-setters and towards rule-followers. Voluntary rules that are open to translation mean that those who choose to follow the rules and to follow them in certain ways are held responsible. This double blurring of responsibilities may drive the need for regulation and governance still further and at the local level expanded soft regulation may foster a culture of defensiveness (see Power 2004). Organizational representatives then have to allocate resources not only to follow rules but also to explain why they choose to follow certain rules in particular ways or why they should not be held responsible.

A third mechanism feeding the governance activism is a spiral for control. We have pictured the transnational world as a world in motion, with unclear and shifting boundaries and organizations in flux. On the regulatory market, the way to reach control or to react to regulations that are not favorable to one's position and strategy is essentially to organize and drive a competing regulatory set-up. We can find examples of this in the field of management education (Hedmo et al. 2006). When European business schools realized that US accreditation and ranking systems increasingly shaped the norms for what counted as good management education, they reacted. Feeling marginalized within the existing governance frame, they structured and defined competing and complementary ranking and accreditation systems. Similar control spirals have emerged in many other areas, particularly with the development of the European Union. In a world where transnational regulation expands, the

way to seek control is not to avoid regulation but to be actively involved in the development of a satisfactory alternative scheme.

Processes of Institutional Stabilization

We are interested in this chapter in the genesis of transnational governance – why and how do new modes of governance, with a transnational scope and reach, come to impose themselves. But it is also important to explore the ways in which these modes of governance are stabilized and appropriated.

Czarniawska and Sevón (1996) propose that ideas and institutions do not flow or homogenize spontaneously but that the “travel of ideas” is an active social process of translation. Ideas are picked up by actors, packaged into objects, sent to other places than those where they emerged, and translated as they are embedded into new settings. Similar notions of activity are alluded to with terms such as hybridization, performative processes, editing or creolization (Sahlin-Andersson and Engwall 2002). The theoretical repertoire around the “travel of ideas” was originally developed to describe what happened to management ideas as they spread. We propose that this repertoire can easily be extended to other types of ideas and practices, in particular those shaping processes of regulatory governance. This makes all the more sense as there is an important direct connection between management ideas and transnational governance. We noted above that transnational governance largely builds upon soft law – standards, norms and guidelines. Many of those standards, norms or guidelines relate to organizational, administrative or management issues and quite a number in fact derive from popular management ideas (Brunsson and Jacobsson 2000, Beck and Walgenbach 2002). Ultimately, it is often not easy to distinguish between management ideas and soft regulation. As an illustration, the package of reforms known as New Public Management (NPM) started out as a “management idea” along which countries reformed their state administration (Hood 1995). After being appropriated by many countries and key international organizations, such as the OECD, the World Bank or the IMF, NPM turned into a standard (Sahlin-Andersson 2000). When ideas and practices associated with NPM became strict requirements that countries had to meet to receive IMF loans, a management idea had turned into a harder form of regulatory governance.

The above accounts of how management ideas translate into soft regulations show that contemporary governance does not start from scratch. Much transnational governance sets itself in reaction and relation to earlier, national, systems of rules and modes of governance

(Whitley 1999; Hall and Soskice 2001). However, in a world where transactions and interactions increasingly take on a transnational dimension, a conceptual framework that interprets action merely as the expression of national logics becomes too restrictive. Transnational pressures – the multiplication of multinational companies, the progress of Europeanization, the intensification of transnational competition, the increasing number of international organizations and institutions, and the explosion of transnational regulation – challenge national business systems and their systemic complementarities (Djelic and Quack 2003; Morgan et al. 2005). The multiple (“soft”) actors involved in transnational regulatory governance – corporations, state agencies, NGOs, civil society groups, professions and epistemic communities, standardizing bodies, international organizations – are themselves to various degrees associated with, embedded in or in close interaction with national regulatory traditions and institutional frames (Djelic and Quack 2003, Marcusen 2006). Those actors can mobilize bits and pieces of their national legacies in the negotiation around transnational governance. Some of them may even be purely and simply fighting for the transformation of a national regulatory set into a transnational one (Djelic and Kleiner 2006). In the process, though, of interaction, those actors that come in contact with each other – both those regulating and those regulated – are likely to develop shared identities and to become increasingly similar, at least to some extent (Djelic and Quack 2010). States have reformed to become more business like as they incorporate management tools and modes of organizing (e.g. Hood 1991). Non-profit and non-governmental organizations are also restructuring to become more business like (e.g. Powell et al. 2006). Corporations on the other hand are expected to act as “citizens” of global society (e.g. Zadek 2001) and to claim and assume a degree of political power and responsibility. Distinctions between public and private sectors are getting blurred and a clear tendency is for those various kinds of actors to be all defined, controlled and governed as organizations (Brunsson and Sahlin-Andersson 2000).

Concluding Remarks – The Fate of Transnational Governance in Times of Crisis

We argued, at the beginning of this chapter, that the re-ordering of our world is not new. It largely predates the recent financial and economic crisis. Still, it is fair to ask, in closing, how the recent crisis might come to reflect upon transnational regulatory governance and its dynamics as described here. We identify three main scenarii.

First, increasing calls for re-regulation today could bring us back to tighter forms of governance and oversight at the national level. A consequence would then be a return of

national states to the front stage when it comes to regulatory activity and governance. This, in turn, would probably imply the deployment of more coercive systems and processes. Such a scenario would impact quite significantly the types of dynamics described in this chapter. National hard regulatory oversight could represent a major challenge to transnational governance.

In a second scenario, calls for tighter governance and oversight would combine with the project to preserve the advantages of transnationalization. This would suggest the need for strong and centralized authority in matters of governance and would therefore imply the partial transfer of Westphalian state power to a number of international institutions – such as the United Nations, the World Trade Organization or even the International Monetary Fund. Those institutions would become, in the process, building blocks of a kind of “global state”. This scenario would require a serious collective political project between at least a number of nation-states. It would also call for an expressed and real will to delegate, at that level, resources, legitimacy and some tools for coercive control. The analysis we proposed above leads us to conclude that, this scenario is in fact not very plausible!

A third possible response to the crisis and to calls for extended regulatory oversight would be to build upon the existing architecture of transnational governance – as described above – but to overcome, as much as possible, its limitations and shortcomings. Those limitations are quite significant and the task, as a consequence, is not an easy one! First, there is a clear need to build up and solidify the legitimacy of transnational governance and transnational governance processes. Secondly, it appears necessary to create mechanisms that can make those governance processes more democratic and hence more socially acceptable. A third issue has to do with the need to find a balance between the elaboration of transnational rules and principles and the degree of local/national contextualization that might be necessary and would be acceptable. Last but not least, naturally, we find the question of implementation and control. There is a need to ensure that governance rules defined at a transnational level become more than a discourse and get translated and embedded into the everyday behavior of concerned actors.

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