

**Transnational Governance and its Legitimacy Problematics:  
The Examples of Standardization and Food Safety\***

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**I. Introduction**

As the title indicates, this paper will deal with two fields of transnational “social regulation”. My previous work in these fields has focused on the European Union. It has sought to analyse these in the broader framework of the “Regulating Europe”

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\* This is a brief paper on a topic on which I have been working for quite some time and will be working on for the foreseeable future – especially in the context of the Collaborative Research Center (*Sonderforschungsbereich*) 597 “Transformations of the State” at the University of Bremen - <http://www.staatlichkeit.uni-bremen.de/> - where I am, together with Josef Falke and Christine Godt, engaged in a project on “Social Regulation and World Trade” and in the related project on research on “Legal Patterns of Transnational Social Regulation” at the European University Institute in which I cooperate with Ernst-U. Petersmann. I am particularly indebted to Damian Chalmers, Reiner Nickel and Richard Stewart for their comments. But the paper presents still work in progress. Some issues are more thoroughly thought through than their presentation here reveals. But many others need to be studied in much more depth. There is, however, no short way to a definite version available. My European background and unfamiliarity with many American materials will cause additional problems.

debate initiated in Florence mainly by Giandomenico Majone<sup>1</sup>. Europe continues to be a fascinating laboratory. However, students of European regulatory law and policy increasingly have to turn their attention to the embeddedness of Europe in globalisation processes. In this respect, the examples of standardisation and food safety are particularly instructive. It took EU policy-makers years to understand why their market integration project required a Europeanization of standardisation and how they could respond to that insight; now, they underline the importance of international standardisation – and realise that this is the preference of international trade agreements, anyway. Food safety is an even more obvious example. One mad cow is identified in the State of Washington. “This one case of BSE does not mean that the U.S. food supply is any less safe”, explained the FDA in a press release of December 24, 2003.<sup>2</sup> But that one cow infected national and international markets and the FDA reacted promptly and with impressive energy.<sup>3</sup> More and worse things did already happen provoking anxieties and necessitating world-wide responses.<sup>4</sup> “No global markets without transnational governance” – the links between my examples and the “Globalisation and its Discontents”-project are obvious. For less obvious reasons, Europe’s experience with its *sui generis* post-national constellation may well be particularly instructive: the administering of this “more-than-an-international-

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<sup>1</sup> Ever since G. Majone, *Regulating Europe: Problems and Perspectives*, 3 *Jahrbuch zur Staats und Verwaltungswissenschaft*, 159-177 (1989) - and continuously so, see his *European Regulatory Agencies. The Dilemma of Delegation of Powers in the European Union*, contribution to the Workshop on “Good Governance in Supranational Market Regulation”, University of Bamberg, 16-17 January 2004.

<sup>2</sup> <http://www.fda.gov/bbs/topics/NEWS/2003/NEW00999.html>.

<sup>3</sup> Of course there are websites on which one can pursue the development of this story, e.g.,

<http://www.usda.gov/BSE/>; <http://www.abc.net.au/rural/> or simply

<http://www.google.com/newsalerts?q=bse&hl=en>; and, of course, the Europeans are very curious, see [http://europa.eu.int/comm/food/fs/rc/scfcah/biological/agenda12\\_en.pdf](http://europa.eu.int/comm/food/fs/rc/scfcah/biological/agenda12_en.pdf).

<sup>4</sup> The world wide concern over bird flu in East Asia is affecting the poultry industry of (by now, 30 January 2004) 10 countries; see

[http://www.nbr.co.nz/home/column\\_article.asp?id=8057&cid=5&cname=Asia](http://www.nbr.co.nz/home/column_article.asp?id=8057&cid=5&cname=Asia) and on the suspensions of import from Thailand by the European Commission

[http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=IP/04/95|0|RAPID&lg=EN&di](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/04/95|0|RAPID&lg=EN&display=)  
splay=

organisation-less-than-a-federation”<sup>5</sup> entity can, to take up Richard Stewart’s terms,<sup>6</sup> neither rely on a “transmission belt” nor on a “representation” model.<sup>7</sup>

The links are obvious. But I will not explore them in detail. My focus is on the European example.<sup>8</sup> Europe, so political-science integration research has been telling us for some years now, has to be understood as a “multi-level system of governance”, a heterarchy rather than a hierarchy, an only partially integrated polity without a government, which needs to ensure the co-operation of semi-autonomous political and administrative bodies. The responses Europe has found are instructive, although (or just because) its “modes of governance” are not really *sui generis*.

This is, indeed, the message of the first section. It describes the career of this concept in two disciplines, political and legal science, and explains why the turn to governance occurred at all levels, the international, the European and, last but not least, the national level.

Section 2 presents an overview over the European “modes of governance”. It is not just descriptive but it addresses and discusses the legitimacy problem, too. In its course I introduce a terminological distinction between a conflict of laws approach and the constitutionalization of transnational governance. This may sound idiosyncratic. But the distinction is present in many contributions to the transnational governance debate. The reference to the conflict of laws terminology is made in order to recall the (relative) autonomy of the polities which need to organise transnational governance. A conflict of law response to such needs is one that identifies the rule or principle which both polities can accept without subjecting themselves to a comprehensive regime. It is with respect to such governance arrangements that the tough questions are raised: To whom are the authors of these regimes accountable?

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<sup>5</sup> W. Wallace, ‘Less than a Federation. More than a Regime: The Community as a Political System’, in H. Wallace/W. Wallace (eds.), *Policy-Making in the European Community*, (Oxford: Oxford University Press, 1983), at 403-436.

<sup>6</sup> Summarised in Section II of his “U.S. Administrative Law: A Resource for Global Administrative Law?” (Jan. 2004).

<sup>7</sup> See on these terms R.Stewart, U.S. Administrative Law: A Resource for Global Administrative Law?, in section II (accessible at [http://www.law.nyu.edu/kingsburyb/spring04/globalization/stewart\\_012604.pdf](http://www.law.nyu.edu/kingsburyb/spring04/globalization/stewart_012604.pdf)).

<sup>8</sup> With an apology because the modes of governance in the EU look so kafkaesque. However, there are reasons for their emergence -- and for the emergence of functional equivalents at the international level (this is the core hypothesis of the projects cited in note \* supra. This is why it might be instructive for students of transnational governance to learn about the European example.

On what grounds can their claims to validity be justified?<sup>9</sup> Such questions I understand as a quest for “constitutionalization”.

They do not make sense if we restrict the use of this category to constitutional states. They make sense only if we realise that our inherited notions of legitimate governance have become insufficient even within our constitutional democracies, and cannot cope with the problematic of post-national constellations. But I do not, of course, promise a general solution. My answer will be sector-specific and counter-intuitive. I will restrict myself to standardisation<sup>10</sup> and food safety, and defend the proposition that the legitimacy of private governance in the world of standardisation is superior to that of the executive public governance which Europe is about to establish through its new Food Safety Authority.

## **II. The Turn to Governance**

It has become pretty difficult not to develop an allergy if you started the new millennium in Europe. Everybody seemed to talk and write about governance. It all started with the speech the President of the Commission delivered on 15 February 2000 in Strasbourg to the European Parliament.<sup>11</sup> At this occasion, Romano Prodi, still under the impression of Europe’s BSE crises and its impact on the reputation of the European “regulatory state”, announced far-reaching and ambitious reforms.

This was a message spoken in a new vocabulary, announcing a fresh agenda and a novel working method. Prodi envisaged a new division of labour between political actors and civil society, and a more democratic form of partnership between the layers of governance in Europe. It was a package of innovation launched strategically into a legally undefined space that is located somewhere between administrative<sup>12</sup> and constitutional reform.<sup>13</sup> The rhetoric of the speech was followed up by the

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<sup>9</sup> Cf., for example, R. Stewart, *loc. cit.*, text following note 19.

<sup>10</sup> “Standardisation” as practiced in Germany since ages and in Europe since the adoption of the “New Approach” (*infra* II.1) in the field of technical products, hence as a regulatory strategy relying on self-regulation and the involvement of non-governmental actors in the regulatory process.

<sup>11</sup> See

[http://europa.eu.int/rapid/start/cgi/guesten.ksh?p\\_action.gettxt=gt&doc=SPEECH/00/41|0|AGED&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/41|0|AGED&lg=EN).

<sup>12</sup> Cf., Reforming the Commission – A White Paper, COM(2000) 200 final of 1 March 2000; cf., [http://europa.eu.int/comm/reform/index\\_en.htm](http://europa.eu.int/comm/reform/index_en.htm).

<sup>13</sup> Which was set in motion by the EU Charter of Fundamental Rights, solemnly proclaimed at Nice on 7 Dec. 2000 (O.J. 2000, C 346/1 of 18 Dec. 2000), followed by the Laeken Conference of 14-15 Dec. 2001 with its concluding declaration on the future of the Union and the setting up of a constitutional convention, which took up its work in March 2002

([http://europeanconvention.eu.int/plen\\_sess.asp?lang=EN](http://europeanconvention.eu.int/plen_sess.asp?lang=EN)).

Commission. A “Governance Team”, composed of Commission officials under the leadership of Jérôme Vignon, the former director of the Forward Studies Unit, was entrusted with the task of elaborating the reform agenda.<sup>14</sup> It co-operated with eminent academics and experts. Very remarkable essays were produced.<sup>15</sup> A website disseminated the work to the outside world.<sup>16</sup> A White Paper was published in July of 2001.<sup>17</sup> However, it was not so well received in academic circles.<sup>18</sup> But “governance” retained its prominence. Both a *Network of Excellence* (organised by the EUI in Florence) and an *Integrated Project* (organised by the Centre for European Social Research in Mannheim) are supported under the Commissions 6<sup>th</sup> Framework Programme. American observers confirm the significance of the shift from government to governance, the move from regulatory reform to “new modes of governance”.<sup>19</sup> But how can you know it is governance when you see it? It depends where you look.

## 1. International Relations

Neither the European Union nor the American Federation invented the term. Its career began at international level and in IR theory, most prominently with James Rosenau’s seminal 1992 article.<sup>20</sup> What Rosenau brought to the attention of International Relations scholarship was the disjunction of governance from government, the delegation of governmental authority to non-governmental bodies. He substantiated: “To presume the presence of governance without government is to conceive of functions that have to be performed in any viable human system...”<sup>21</sup> This is a functional definition. It is not linked to the public/private dichotomy. But governance

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14 Enhancing democracy in the European Union. Working Programme, SEC (200) 1547, 7 final of 11.10.2000; <http://europa.eu.int/comm/governance/work/en.pdf>.

15 O. De Schutter, N. Lebessis and J. Paterson (eds.), *Governance in the European Union*, Luxembourg, 2001.

16 [Http://europa.eu.int/comm/governance/index\\_en.htm](http://europa.eu.int/comm/governance/index_en.htm).

17 European Governance. A White Paper, COM(2001) 428 final of 25 July 2001, O.J. 2001, C 287/5; [http://europa.eu.int/comm/governance/index\\_en.htm](http://europa.eu.int/comm/governance/index_en.htm)

18 Cf., Ch. Joerges, Y. Mény, H.H.H. Weiler (eds.) *Symposium: Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance*, Jean Monnet Working Paper No. 6/01, <http://www.jeanmonnetprogram.org/papers/01/010601.html>.

19 See, for example, the contributions to the *Workshop on the Open Method of Coordination and Economic Governance in the European Union*, organized by the European Union Center at the University of Wisconsin, Madison in April 2003. The contributions are available at <http://eucenter.wisc.edu/Calendar/Spring03/harvardomc.htm>.

20 J.N. Rosenau, *Governance, order, and change in world politics*, in: J.N. Rosenau/E.-O. Czempiel (eds.), *Governance without Government. Order and Change in World Politics*, (Cambridge/New York: Cambridge University Press, 1992), 1-29.

21 *Ibid*, at 3.

was at that time conceived as an intentional activity, a connotation which the German term *Regieren* still carries with it.<sup>22</sup> But attention seems to be shifting to the composition of the actor configurations which produce such activities. And then, unsurprisingly for lawyers, the debate extends ever more intensively to prescriptive queries about “good” governance.<sup>23</sup> But it has become difficult to identify any contours of the concept. Take the examples mentioned in the introduction: The reactions of the USDA to the BSE case in Washington State are an example of regulatory policy as we know it. But the *ensemble* of the actions taken by governmental and non-governmental bodies around the globe – and their impact on the USDA! – are of a different quality. The case of the East Asian poultry is even more drastic. We witness world-wide reactions by officials at all levels of governance and by non-governmental organisations. Then, consider the definition used by such prominent institution as the UN Commission on Global Governance: “Governance is the sum of many ways in which individuals and institutions, public and private, manage their common affairs...”<sup>24</sup> Philippe Schmitter concludes: The “use of the concept of governance has spread with astonishing rapidity and is being applied by both academics and practitioners in a very wide range of settings”.<sup>25</sup>

## 2. National Level

A brief remark on the national level. German administrative law scholarship is avoiding the term – public and private partnerships, however, is accepted –, but discusses the topic intensively.<sup>26</sup> Private law scholars are no less curious.<sup>27</sup> One, in my

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22 See M. Jachtenfuchs/B. Kohler-Koch, *Regieren und Institutionenbildung*, in: M. Jachtenfuchs/B. Kohler-Koch, (eds.) *Europäische Integration*, 2nd. ed., (Opladen: Leske + Budrich, 2003), 1-11-46 at 83-218.

23 See M. Jachtenfuchs/B. Kohler-Koch, *Governance in der Europäischen Union*, in: A. Benz (ed.), *Governance*, (Opladen: Leske + Budrich, forthcoming#).

24, Commission on Global Governance, *Our Global Neighbourhood*, (Oxford: Oxford University Press, 1995), at 2, and 4.

25 Ph.C. Schmitter, the World Bank has used the concept of good governance (?) when trying to improve the performance of politics in sub-Saharan Africa, Ph. Schmitter, “What is there to legitimize in the European Union... and how might this be accomplished?”, in Ch. Joerges, Y. Mény, J.H.H. Weiler (eds.) *Symposium* (note 18), 79 ff. at #

26 See, for example, H.-H. Trute, *Die Verwaltung und das Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung*, *Deutsches Verwaltungsblatt* 1966, 950-964, Schmitt-Aßmann#; Franzius#; V. Mehde, *Kooperatives Regierungshandeln*, *Archiv des öffentlichen Rechts* 127 (2002), 655-683.

27 Their focus is, of course, on the governance arrangements within the economy. See, for example, P. Zumbansen#: but see, for more general perspectives, G. Teubner: *Societal Constitutionalism: Alternatives to State-centered Constitutional theory?* (“Storrs Lectures 2003/04” at Yale Law School), forthcoming in: Ch. Joerges, I.-J. Sand, G. Teubner (eds.), *Constitutionalism and Transnational Governance*, (Oxford: Hart, 2004) and *id.*, *Coincidentia oppositorum: Networks and the Law Beyond*

view, particularly interesting contributor to the discussion in the U.S. is Jody Freeman.<sup>28</sup> She defines “governance” as a “set of negotiated relationships between public and private actors”.<sup>29</sup> These negotiations concern “policy-making, implementation and enforcement”.<sup>30</sup> Examples are manifold. She points to a broad variety of administrative contexts, including standard-setting, health care delivery, and prison management.<sup>31</sup> Some of them are clearly a public responsibility. Does this mean that any involvement of non-governmental actors is inconceivable? The reply to this objection is her most interesting point. To cite from her recent article in the *Harvard Law Review*:<sup>32</sup> Privatisation (the inclusion of private actors into governance arrangements) “might extend public values to private actors to reassure public law scholars that mechanisms exist for structuring public-private partnerships in democracy-enhancing ways”.<sup>33</sup>

### **3. Constituting Governance Arrangements: Bringing the 80s Back In**

Let me summarize and add one point: At international level, the term governance denotes “policy arrangements” which emerge outside the administrative system of a single nation state (government), but which, nevertheless, have a significant impact on a globally or regionally defined set of recipients. “Governance” is like “government” in so far as it stands for the regulation of the economy and social relations. It is distinct in so far as it relates European, international, transnational or global activities,

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Contract and Organization (“Storrs Lectures 2003/04” at Yale Law School). – A long time ago, I described the co-ordination between contract, consumer protection and anti-trust law which various stakeholders, administrators a specialised public and representatives of the judiciary achieve before courts deliver their assessments a “discovery procedure of practice” (see Ch. Joerges, *Relational Contracts Law in a Comparative Perspective: Tensions Between Contract and Anti-trust Law Principles*, 1985 *Wisconsin Law Review*, 581-613. Quality Regulation in Consumer Goods Markets: Theoretical Concepts and Practical Examples, in: T./G. Teubner (eds.), *Contract and Organization*, (Berlin: de Gruyter, 1986), 142-163; today, one could say governance.

28 See *The Private Role of Public Governance*, 75 *New York Univ. L. Rev.* 543 (2000).

29 *Loc. cit.*, 546.

30 *Loc. cit.*, 548.

31 *Loc. cit.*, 592, 581, 594.

32 Symposium: Public Values in an Era of Privatization: Extending Public Law Norms through Privatization, 116 *Harv. L. Rev.* 1285 (2003).

33 *Loc. Cit.*, 1290. One counter-intuitive example was already mentioned in the NYU article just cited: The “American correctional association” (ACA) is an association of correctional professional dating back to 1870. It sets standards for every aspect of prisons, including security and control, food service, sanitation, medical and health care, inmate rights, work programmes, *etc....* The ACA is widely regarded as a leading progressive standard-setting body in correctional policy, and, in the prison reform cases in the 1960s and 1970s, the ACA manual became an important resource for Federal Courts (footnote 183).

which are not exclusively public and involve experts and knowledge-pools. It is not hierarchical but heterarchical and typically “organised in networks”.<sup>34</sup>

At national level, governance arrangements typically respond to the need to integrate the expertise and organisational resources of non-governmental actors into the management of public affairs. Where this is the case, their achievements reach beyond what governmental actors and bureaucracies can accomplish. In this sense, “governance” could be called a productive activity.

It would be premature, at this point, to take a stand as to the legitimacy of these developments. It is important, however, to recall that the phenomena that we have to assess are not so new.<sup>35</sup> They have been on the agenda of legal theory ever since lawyers became aware of implementation problems and joined the critique of welfare state interventionism.<sup>36</sup> This happened very intensively in the early 80s. It was the broadly experienced disappointment with “purposive” legal programmes and a new sensitivity towards “intrusions into the life-world” through a juridification of social policy goals that triggered the search for models of legal rationality that would fill the gaps left open by formalist legal techniques, and, at the same time, cure the failures of the law’s grip on social reality on the basis of some “grand theory” (such as economic theories of law, systems theories or discourse theories).<sup>37</sup> Proceduralization and “reflexive law” were, at the same time, concerned with very practical matters, namely, the problems of implementation and compliance. Discrepancies between legal programmes – especially between “purposive” legislation designed to achieve specific objectives and the actual impact of such laws on society – were a core concern of legal sociology, of effectiveness and implementation research.<sup>38</sup> The normative and the pragmatic critique of purposive programmes and of command-and-control

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34 J. v. Bernstorff, ICANN as a Global Governance Network, forthcoming in: Ch. Joerges/I.-J. Sand/G. Teubner (eds.), *Constitutionalism and Transnational Governance*, (Oxford: Hart, 2004).

35 What follows draws upon Ch. Joerges, Compliance Research in Legal Perspectives, in M. Zürn/ Ch. Joerges (eds.), *Governance and Law in Post-National Constellations. Compliance in Europe and Beyond*, forthcoming with Cambridge University Press, chapter 7.3.

36 For an elaboration of the following observations, see Ch. Joerges, Compliance Research in Legal Perspectives, forthcoming in: Ch. Joerges/ Michael Zürn, *Governance and Law in Post-National Constellations. Compliance in Europe and Beyond*, (Cambridge: Cambridge University Press, 2004).

37 See G. Teubner, ‘Substantive and Reflexive Elements in Modern Law’, 17 *Law and Society Review*, at 239-285 (1983); R. Wiethölter, Proceduralisation of the Category of Law, in: Ch. Joerges/D.M. Trubek (eds.), *Critical Legal Thought: An American-German Debate*, (Baden-Baden: Nomos, 1989), at 501 *et seq.*

38 Famously summarised and analysed by G. Teubner, Juridification – Concepts, Aspects, Limits, Solutions, in: *id.* (ed.), *Juridification of Social Spheres*, (Berlin-New York: deGruyter, 1987), at 3 *et seq.*



regulation have motivated a search for alternatives such as self-regulation and soft law.

### III. The Case of the EU: New and not so New Modes of Governance

If such strategies proved to be successful domestically, why not make use of them at the European level? Why should governance not be the cure for both the Community's output deficiencies and its legitimacy malaise? An affirmative answer is not so easy. Europe's design did not foresee the administrative powers and resources that the administering of the European market project requires; indeed, "in the first thirty years after the Treaty of Rome, the common wisdom was that European administrative law did not exist".<sup>39</sup> This gap in administrative law coherently complements Europe's so-called democracy deficit and its "social deficit".<sup>40</sup> The malaise may be clear, but the cure is not. A broad variety of responses are conceivable.

- (1) Administrative powers should, in principle, remain national. This is what the German government suggested in its complaint against the Directive on General Product Safety.<sup>41</sup> This argument is unsurprising. It projects Germany's federalism, which reserves administrative powers to the *Länder*, onto the EU. That would be, so the ECJ has explained, unacceptable.<sup>42</sup>
- (2) Europe should shoulder its tasks and develop an equivalent to the US Administrative Procedure Act, not only in areas that are traditionally characterized as administrative law (such as foodstuffs regulation), but even in the legal structuring of standardisation. Unfortunately, one of my most successful Ph.D. students defends this position.<sup>43</sup>
- (3) Neither nor: The European Union is not a Federation; it can neither follow the German nor the US American model. Instead, the EU has to learn how to "administer" a multi-level system of governance in which the Member States

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39 Thus, F. Bignami in her Introduction to "The Shape of European Administration: Procedure, Legitimacy, and Law" (Duke University 2003), referring especially to Mario Chiti and Sabino Cassese.

<sup>40</sup> One more statement that would deserve substantiated explanations. Suffice it here to underline that the present EU is no longer the European Economic Community which could plausibly reject quests for "social" integration. For an elaboration of this argument cf. Ch. Joerges/F.Roedl, The "Soziale Marktwirtschaft" as a Model for Social Europe?, in: L. Magnusson/B. Stråth (eds.), *A European Social Citizenship? Preconditions for Future Policies in Historical Light*, forthcoming with P.I.E.-Peter Lang, Brussels.

41 Directive 92/59/EEC, (1992) OJ L 228/24.

42 See the rejection of Germany's argument by the ECJ in Case C-359/92, *Germany v Council (General Product Safety Directive)* [1994] ECR I-3676.

43 E. Vos, *Institutional Frameworks of Community Health & Safety Regulation- Committees, Agencies and Private Bodies*, (Oxford: Hart, 1999), at 281 *et seq.*, & 311 (#). But see C. Harlow, 'Codification of EC Administrative Procedures? Fitting the Foot to the Shoe or the Shoe to the Foot', *2 European Law Journal*, 3-25 (1996); R. Dehousse, 'Towards a Regulation of Transnational Governance? Citizen's Rights and the Reform of Comitology Procedures', in Ch. Joerges/E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics*, Oxford: Hart, 1999, at 109 *et seq.*

retain some autonomy while the Community has neither the competences nor the resources which a “good” administration would require.

This third position is the positive and normative background for my brief review of Europe’s modes of governance. It is positive background because the configuration of interests within the European polity can plausibly explain why the dynamics of market building and the hesitancy of the Member States to grant new competencies and finance their exercise have generated such a plethora of institutional innovations outside the legal frameworks of the EC Treaty. The normative aspects of these institutional innovations are inextricably linked to these processes, and the continuities within the various normative agendas are fascinating. Again and again, the proponents of European state-building have sought to strengthen supranational powers. Again and again, the intergovernmentalists have renewed their objections. There is much continuity in these complex and dynamic developments. And to be sure, the disputes over the *gestalt* of Europe were never purely aesthetic. They were always political contests as well, in which many stakeholders raised concerns and defended interests. I have presented my version of this story often enough<sup>44</sup> and will be brief:

### **1. The New Approach to Technical Harmonisation and Standards**

The so-called new approach which just celebrated its 20<sup>th</sup> birthday was an innovation which remains fascinating even until today. To recall briefly a well-known story:<sup>45</sup> In its efforts to build a common market, the EC found itself in a profound dilemma: market integration depended upon the “positive” harmonisation of countless regulatory provisions. Harmonisation was difficult to achieve even after the old unanimity rule of Article 100 EC Treaty was replaced by qualified-majority voting (Art. 100(a) as introduced by the Single European Act of 1987) and even after the legendary *Cassis de Dijon* decision of 1979<sup>46</sup> had reduced the burden of legislative action because the issues concerned were often politically and normatively sensitive,

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44 On governance, see Ch. Joerges, ‘Comitology and the European model?’ Towards a *Recht-Fertigungs-Recht* in the Europeanisation Process, in: E.O. Eriksen/Ch. Joerges/J. Neyer (eds.), *European Governance, Deliberation and the Quest for Democratisation*, EUI-RSCA/Arena (Arena Report 2/2003. Oslo), 501-540, and on constitutionalisation more generally, Ch. Joerges, ‘The Law in the Process of Constitutionalising Europe’, in: E.O. Eriksen/J.E. Fossum/A.J. Menéndez (eds.), *Constitution Making and Democratic Legitimacy*, Oslo (Arena Report No 5/2002), 13-48.

45 Ch. Joerges/J. Falke/H.-W. Micklitz/G. Brueggemeier, Product Safety, Internal Market Policy and the New Approach to Technical Harmonisation and Standards, EUI Working Papers Law Nos. 91/10-14 <http://www.iue.it/WP-Texte/Joerges91/>, especially Chapter 3.

46 Case 120/78 *Rewe Zentrale v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (*Cassis*

and the economic interests at stake were high. Furthermore, under the “traditional approach”, the Directives required a high level of technical detail and sophistication.<sup>47</sup> Somewhat paradoxically, self-regulation, a technique so widely used in Germany in particular, was by no means easier to live with. Voluntary product standards were “private” obstacles to trade which the Community legislature could not overcome by legislative fiat. How to get out of this *impasse*?

These were the answers of the New Approach:

- (1) European legislation confines itself to laying down “essential safety requirements”. Only products complying with these requirements may be placed on the market. If they do, they circulate freely in the Community.
- (2) The “concretisation” of the requirements is a task not for legislatures and/or public law, but for the experts working in European and national standardisation organisations. The standards that they elaborate are to be published in the Official Journal and transposed into national standards. Products complying with such standards are presumed to be safe.
- (3) Legally speaking, such compliance is voluntary. Manufacturers remain free to develop alternatives, which must, however, respect the mandatory essential requirements.
- (4) The “new” approach was hence to be complemented by the “global” approach which dealt with conformity assessment procedures.

Further refinements and complementary legislation were necessary, and important problems were never addressed. Harm Schepel cites a widely shared perception of the proponents of the New Approach:

“If the basic characteristics of the new approach had to be summed up in a single sentence, it could be said that this method, in fact, makes it possible better to distinguish between those aspects of Community harmonisation activities which fall within the province of the law, and those which fall within the province of technology, and to differentiate between matters which fall within the competence of public authorities and those which are the responsibility of manufacturers and importers.”<sup>48</sup>

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de Dijon).

47 For an admirably careful and thoughtful recent reconstruction, see H. Schepel, *The Constitution of Private Governance. Product Standards in the Regulation of Integrating Markets*, Ph.D. Thesis EHI Florence 2003, Chapter 2.4: Schepel points to Directive 84/438/EEC on the permissible sound power level of lawnmowers, (1984) OJ L 183/9, adopted six years after the Commission’s proposal, (1979) OJ C 86/9, and Directive 84/526/EEC on seamless, unalloyed aluminium and aluminium alloy gas cylinders, (1984) OJ L 300/20, adopted a full ten years after the Commission’s proposal, (1974) OJ C 104/75.

48 F. Nicolas, *Common Standards for Enterprises*, Luxembourg: Office of Official Publications 1995, at 94.

Neither a wonderful, nor a real world. This comment will be substantiated below.<sup>49</sup>

## **2. The Committee System and Comitology**

European committees were born out of a strong national desire to retain control over both the setting and the consequences of European regulatory standards. Thus they embody the functional and structural tensions, which characterise internal market regulation better. First, they hover between “technical” and “political” considerations, between functional needs and ethical/social criteria, which inform European regulation. Secondly, their often very fluid composition not only reflects upon the regulatory endeavour to balance the rationalisation of technical criteria against broader political concerns, but also forcefully highlights the schisms that exist among the political interests of those engaged in the process of internal market regulation. Even where they are explicitly established to support and oversee the implementing powers delegated to the Commission, committees are deeply involved in political processes and often resemble “mini-councils”, in that they are the forum in which the balancing of a European market-integrationist logic against a Member State interest, in terms of the substance and the costs of consumer protection and cohesive national economic development, has to be achieved.

## **3. Agencies**

The functional and compositional divergence between European agencies and committees seems striking. Charged with regulation on market entry and exit, or more general informal, and policy-informing, information-gathering duties, the new European agencies<sup>50</sup> meet a purely technical demand for market-corrective and sector-specific regulation. The most prominent proponents submit the type of arguments we have just heard: agencies perform primarily technocratic functions. This is what they accomplish best, and semi-autonomous status gives implicit voice to private market interests, and much credence to the lingering notion that internal market regulation has more to do with the “neutral” sustenance of individual economic enterprises than with the imposition of (collective) political/social direction. Their placement under the Commission’s institutional umbrella and the presence of national representatives within their management structures notwithstanding, agencies are largely shielded

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<sup>49</sup> Section III.

<sup>50</sup> For a recent overview, see E. Chiti, ‘On European Agencies’, in: E.O. Eriksen/Ch. Joerges/J. Neyer (eds.), *European Governance, Deliberation and the Quest for Democratisation*, EUI-RSCA/Arena

from explicitly political processes by their founding statutes (Council Directives and Regulations), permanent staff, organisational independence, varying degrees of budgetary autonomy, and direct networking with national administrators. The most recent creature in the line is the European Food and Safety Authority,<sup>51</sup> provisionally established in Brussels, a particularly important and instructive example, to which we will return.<sup>52</sup>

Agencies were the core institutions in Giandomenico Majone's design of the European "Regulatory State".<sup>53</sup> This design, however, was not implemented. What European agencies are, or will, become is controversial. That much is uncontested:<sup>54</sup> Agencies are emphatically not self-sufficient bureaucratic entities. They must cooperate with a web of national authorities in accomplishing the tasks laid down in European legislation, and, because of these relationships, it is virtually impossible to allocate responsibility for policy decisions to one set of civil servants or another. Decision-making is national, infranational, and supranational, all at the same time".<sup>55</sup>

#### **4. Mutual Recognition and Regulatory Competition à la européenne**

The idea that regulatory competition might become a substitute for political governance in the EU was once nurtured by the Commission's deliberate overinterpretation of the ECJ's *Cassis*-judgment.<sup>56</sup> The contrast between the expectations raised and the processes to be observed are again striking. The mutual observation of stakeholders in all the areas concerned and the processes of interaction between the legal systems are increasingly becoming intense. A conceptualisation of these developments in terms of a competitive search for efficiency as suggested by

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(Arena Report 2/2003. Oslo), at 271-322.

<sup>51</sup> See Regulation 178/2002, OJ 2002 L 31/1.

<sup>52</sup> See III.3 below.

<sup>53</sup> See G. Majone, *The Rise of the Regulatory State in Europe*, 17 *West European Politics* 77 (1994); in, *Regulating Europe*, (London: Routledge, 1996). But see more among his recent papers on European Regulatory Agencies. The Dilemma of Delegation of Powers in the European Union, Workshop on "Good Governance in Supranational Market Regulation", University of Bamberg, 16-17 January, 2004.

<sup>54</sup> For an analysis of the example at first sight closest to American examples, see J. Feick, *Regulatory Europeanization, National Autonomy and Regulatory Effectiveness: Marketing Authorization for Pharmaceuticals*. MPIfG Discussion Paper 02/6. Köln: Max-Planck-Institute for the Study of Societies 2002 and institutional de-politicisation - Market entry regulation for pharmaceuticals in the EU, contribution to the workshop 'Good Governance' in Supranational Market Regulation: How Do Regulatory Institutions Matter?, 16-17 January 2004, University of Bamberg.

<sup>55</sup> Francesca Bignami, in her conclusion of "Introduction to "The Shape of European Administration: Procedure, Legitimacy, and Law" Ms. 2003.

<sup>56</sup> See the Communication from the Commission in (1980) OJ C 256/2.

many must refer to very heroic assumptions.<sup>57</sup> Not even in the field of company law seems an interpretation of the ECJ's recent jurisprudence convincing. The freedoms which the ECJ allows the parties to exercise are not without limits. What the recent ECJ jurisprudence, at least in my benevolent interpretation,<sup>58</sup> has achieved is the opening of national legal systems for internal critique based on the viewpoints of other jurisdictions. National legislatures have to justify the wisdom of their laws. European law can be interpreted as initiating processes which the judiciary seeks to supervise – this could remain a search for a new balance between the opening of jurisdictions and legitimate regulatory concerns.

## 5. The Open Method of Co-ordination (OMC)

The Treaty of Amsterdam saw the insertion of a new Title (VIII) on employment as well as a novel mode of governance, namely, a national and Community co-ordination of employment strategies in Article 125. Then, the European Council in Lisbon in 2000 recommended “OMC” for this field as well as for social policy. It broke with the old “Community method” for three reasons: first, it permitted the taking of action even outside the area of competences that had been expressly transferred to the Community; second, it upgraded the Council; third, it renounced the conventional “juridification” of Community policies. OMC has become the object of intensive discussion and hopes. It is perceived as a chance to overcome Europe's “social deficit”. American political scientists, legal sociologists and economic historians are the most active proponents of this idea.<sup>59</sup> They have found followers in Europe, both among political scientists and lawyers.<sup>60</sup> The idea to “constitutionalize” OMC was taken up in pertinent working groups in the European Convention.<sup>61</sup> But even strong

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<sup>57</sup> The most thorough study I am aware of is by H. Tjong, *The Political Economy of Regulatory Competition*, Ph.D. Thesis Stanford, CA 2002. It concerns environmental legislation. For an analysis of the instrumentalisation of the European court system in the field of labour law, see S. Sciarra (ed.), *Labour Law in the Courts. National Judges and the European Court of Justice*, (Oxford-Portland-Oregon: Hart, 2002).

<sup>58</sup> See for an elaboration of this argument Ch. Joerges, *On the Legitimacy of Europeanising Private Law: Considerations on a Justice-making Law for the EU Multi-level System*, *Electronic Journal of Comparative Law* 7:3 (September 2003), <http://www.ejcl.org/73/art73-3.html>.

<sup>59</sup> See Ch.F. Sabel/J. Zeitlin, *Active Welfare, Experimental Governance, Pragmatic Constitutionalism: The New Transformation of Europe*, (Madison,WI/New York, 2003; J. Zeitlin/D.M.Trubek (eds.), *Governing Work and Welfare in a New Economy: European and American Experiments*. (Oxford: Oxford University Press, 2003).

<sup>60</sup> B. Eberlein/D. Kerwer, *Theorising the New Modes of EU Governance*, *European Integration Online Papers (EIoP)* 6 (2002) 5, <http://eiop.or.at/eiop/texte/2002-005a.htm>.

<sup>61</sup> See G. de Búrca/J. Zeitlin, *Constitutionalising the Open Method of Co-ordination. A Note for the Convention*, Madison/WI-Florence 2003.

OMC proponents can only point to weak or ambivalent empirical evidence.<sup>62</sup> So far, the effects of OMC have not been easy to grasp in any of the fields in which it has been tried, and this is particularly true in the field of employment policy. It is difficult to find reliable information on the mechanisms that define it: is the autonomy the member states enjoy in their search for the means to achieve the agreed upon targets really being used innovatively? Have criteria been discovered and defined which enable “bench-marking” which competitors will find convincing? Do political and societal actors really expose themselves to learning processes that they then convert without further pressure? Or does OMC erode core principles of constitutionalism, such as the regulative idea that governance should adhere to legal principles and the rule of law? Whether this risk comes to pass depends on how the Member States synchronize their actions, and whether they find principles and rules to distinguish such co-ordination from pure political competition.

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There are more variants. What they have in common is, indeed, the establishment of European wide governance arrangements in the sense defined above. “Governance” rather than “government and administration”: this is the new European praxis – but it is also the problem. Political scientists may content themselves with developing phenomenologies, explanations of their generation, analyses of their effectiveness. Lawyers are not well-equipped to deal with the complexities of the normative dimension of the new modes of governance, but they cannot avoid them, even if they seek to stick to their doctrinal categories.

#### **IV. Law-mediated Legitimacy in Europe and Beyond?**

The problem that I am seeking to address and the thesis I want to submit concerns transnational, not European governance. But this section will take a further detour and look at Europe once more. What are the specifics of the European case, what is *sui*

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62 This is of course a point the skeptics underline. “We now have extensive analysis of the functioning and potential system, and have generalized it to a mode of constitutional order. This is a classic example of subjective evidence, Commission hype, and wishful thinking about the future taking precedence over concrete empirical analysis of current policy outputs. When we focus on the latter, it is clear that the system has, to date, generated few if any measurable policy outputs, and has little realistic hope of doing so. Still, there are 2x more articles on this topic in recent journals than on either the CAP or the common external trade policy, both policies with a massive impact on regional and global welfare”, thus A. Moravcsik, in a seminar presentation at NYU Law School on “Interests Power, Delegation: The Deep Structure of the EU Politics” (January 2004); skepticism not only as to the effectiveness but also as to the normative quality of the recommended tools in D. Chalmers/M. Lodge, The Open Method of Co-ordination and the European Welfare State, ESRC Centre for Analysis of Risk

*generic/s??* about Europe's post-national constellation? What lessons can we draw from the European experiments with new modes of governance for a chartering of transnational governance arrangements?

## **1. Two Qualifications: Methodological Nationalism and the Importance of Arguing**

The qualification of Europe as a “multi-level system of governance” has become widely accepted.<sup>63</sup> In order to link this characterisation to the globalisation debate, I would like to add two further, albeit not so widely accepted, qualifications.

(1) The first is primarily analytical and originated in international relations theory. International relations theorist Michael Zürn<sup>64</sup> uses as key concepts “denationalisation” and “methodological nationalism” in his analyses of globalisation.<sup>65</sup> Three dimensions of statehood, so Zürn argues, which the nation state had integrated, are presently dis-integrating:

- Nation states are no longer autonomous in determining political priorities but needs to co-ordinate their policies within international institutions;
- national political actors have to strive for recognition not just by their national constituencies; their practices are increasingly exposed to evaluation at international level;
- the nation state retains significant resources, which are indispensable, for the implementation of internationally agreed upon policies.

This scheme has been designed for the analysis of globalization processes. But it is illuminating at all levels of governance. Take the controversy over the compliance with the Maastricht criteria of fiscal policy. The nation states demonstrated their powers and are, nevertheless, under stress – even though the reasonableness of the Maastricht rules seem highly questionable.<sup>66</sup>

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and Regulation, Discussion Paper 11, London 2003.

<sup>63</sup> See notes 17 and 18 *supra* and for an instructive, see F.W. Scharpf, Notes toward a Theory of Multilevel Governing in Europe, 24 *Scandinavian Political Studies* 1 (2001).

<sup>64</sup> M. Zürn, ‚Politik in der postnationalen Konstellation‘, in Ch. Landfried (ed.), *Politik in einer entgrenzten Welt*, (Köln: #, 2001, at 181-204.

<sup>65</sup> Not just his. A Workshop on Methodological Nationalism organized at the LSE in June 2002 by Ulrich Becke *et al* documents a broad debate. (# Grande, Mannheim).

<sup>66</sup> I rely on B. Eichengreen, Institutions for Fiscal Stability (May 2003), available at <http://emlab.berkeley.edu/users/eichengr/new.html> and After the Stability Pact (November 2003), available at <http://emlab.berkeley.edu/users/eichengr/reviews/die-zeitnov20-03.pdf>.



(2) My second qualification is from the world of lower politics, even from the underworld, as Joseph Weiler has put it so nicely.<sup>67</sup> There, we can observe the strength of arguing. To generalise: just because of the non-hierarchical network character of the European system; just because powers and also, to some degree, the resources for political action, are located at various and relatively autonomous levels, governance, in order to be successful, will have to organise communication between actors who are genuinely competent in their various domains. This is what, at least, some political scientists can accept, albeit in limited fields.<sup>68</sup>

And what kind of law might bring about such miracles in this type of polity? Two types of law, I have repeatedly argued elsewhere,<sup>69</sup> in my defence of the idea of “Deliberative Supranationalism”: law should seek to respond to the inter-dependence of semi-autonomous polities by identifying rules and principles that can organise their inter-dependence (“Deliberative Supranationalism I”). It should also cope with the apparently irresistible transformation of institutionalised government into under-legalised governance arrangements.<sup>70</sup> It should do this by substantiating the conditions under which such arrangements “deserve recognition”<sup>71</sup> (“Deliberative Supranationalism II”).

## 2. Avoidable Conflicts

My terminology is more idiosyncratic than my argument: “Deliberative Supranationalism” is a critique of, and an alternative to, orthodox notions of supranationalism, which have underlined the autonomy of European law and its supremacy over national law. It is a response to economic interpenetration and interdependency, to the unavoidability of extra-territorial effects of the decisions and omissions of democratic polities, to the irrefutable insight that nation states cannot act

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67 Epilogue: “Comitology” as Revolution – Infranationalism, Constitutionalism and Democracy, in Ch. Joerges/E. Vos (eds.), *EU Committees*, Oxford: Hart 1999, 339-350.

68 J. Neyer, Discourse and Order in the EU: A Deliberative Approach to Multi-Level Governance, *Journal of Common Market Studies* 41 (2003), 687 *et seq.*; see, also, his recent ‘Explaining the Unexpected: Efficiency and Effectiveness in European Decision-Making’, contribution to the workshop ‘Good Governance’ in *Supranational Market Regulation: How Do Regulatory Institutions Matter?*, 16-17 January 2004, University of Bamberg.

69 See note 38 above and *Deliberative Supranationalism- Two Defences*, 8 *European Law Journal* 133 (2002).

70 Cf., V. Mehde, *loc. cit.*, at 683.

71 This one term would require extensive explanations. All I can do here is refer to J. Habermas, J. Habermas, Remarks on Legitimation through Human Rights, in: *id.*, *The Postnational Constellation*, (Cambridge: Polity, 2001), at 113 *et seq.*, 113 and Ch. Jetzlsperger, Legitimacy through Jurisprudence? The Impact of the European Court of Justice on the Legitimacy of the European Union, EUI Working

democratically. “Deliberative” supranationalism is supranational in that it invokes principles and rules that ensure the respect of “foreign” concerns, and imposes the obligation on formerly sovereign states to search for mutually acceptable answers in cases of conflict.

The authority of such answers need not be deduced from some principled supremacy of European law. European law should rather be understood as “conflicts law”. This term has a well-defined meaning in the discipline of private international law. There it denotes rules prescribing which legal order should be applied where a “case” touches more than one legal system. My use of the term is different in that I use it for conflicts within national legal systems, and do not restrict conflicts law to the choice of a given law.<sup>72</sup> Quite to the contrary: the resolution of the conflict will require productive answers – hence, my resort to “deliberation”.

To summarize: the normative core message of Deliberative Supranationalism is that Europe, through its supranational rules and principles, should give voice to “foreign” concerns and should insist that Member States mutually “recognise” their laws (that they “apply” foreign law) and refrain from insisting on their *lex fori* and domestic interests. This is the principle. The discipline imposed on a Member State’s political autonomy is limited. The principle and its limitations can be discovered and studied best in the jurisprudence of the ECJ on Article 28 [ex 30]. This jurisprudence has, again and again, documented how mediation between differences in regulatory policies and the diverse interests of the concerned jurisdictions can be accomplished.<sup>73</sup> These examples, I argue, represent a truly European law of conflict of laws. It is “deliberative” in that it does not content itself with appealing to the supremacy of European law; it is “European” because it seeks to identify principles and rules which make differing laws in the EU compatible.

The Committee system takes goes a step further. It establishes a framework within which the implementation of secondary legislation can be ensured. It is the nature of the tasks, which the implementation needs to accomplish, that distinguish the

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Paper Law 12/2003.

<sup>72</sup> For a related view, see G. Teubner, ‘After Privatisation? The Many Autonomies of Private Law’. In: Thomas Wilhelmsson und Samuli Hurri (eds.) *From Dissonance to Sense: Welfare State Expectations, Privatisation and Private Law*. (Dartmouth: Aldershot, 1999), at 51-82, also in 51 *Current Legal Problems* at 393 (1998).

<sup>73</sup> Cf., Ch. Joerges, *The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective*, *European Law Journal* 3 (1997), 378 *et seq.*

comitology process from adjudication. The positive characterisation of these activities is a more delicate task. I am, however, particularly hesitant with the use of the label “administration” for three interdependent reasons: First, the traditional European, especially the continental, understanding of this term is hardly compatible with the creative problem-solving activities that the “administration” of the European market. Second, the networks of national and European actors organising the “implementation” of European legislative frameworks do not have the degree of unity which an administrative machinery presupposes even.<sup>74</sup> Last but not least, the European multi-level system is not the type of hierarchy, constitutional theorists presuppose when they seek to reconcile the ideals of constitutional democracies with the emergence of the administrative state<sup>75</sup> Be that as it may, as long as the comitology process can be understood as the search for answers that the concerned polities can accept, it represents a conflict of laws regime – and the defenders of democratic governance need not be alarmed.

## **2. Constitutionalizing Transnational Governance**

The committee system could not retain this innocence. It produced hybrid transnational governance arrangements, structured neither in purely private law terms nor in purely public law terms, neither nationally nor European, neither purely governmental nor non-governmental, in which societal and governmental actors adapt to a transnational reality which is no longer nationally “controllable”. Transnational governance arrangements do not just mediate between different given policies and law, but are to elaborate genuinely transnational responses to transnational problem constellations. This type of governance cannot be rejected as being outright illegal or illegitimate, not only because of its factual importance, but also because of its normative potential. The term “political administration (*politische Verwaltung*)”, an oxymoron in the German understanding, may convey the problematics quite well.<sup>76</sup>

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<sup>74</sup> See J.P. Olsen Towards a European Administrative Space, 10 *Journal of European Public Policy*, 506-531 (2003).

<sup>75</sup> See Ch. Joerges, The Law’s Problems with the Governance of the European Market, in: Ch Joerges/ Renaud Dehousse, *Good Governance in Europe’s Integrated Market*, (Oxford: Oxford University Press 2002), at 3-31; K.-H. Ladeur, Conflict and Cooperation between European Law and the General Administrative Law of the Member States, in *id.* (ed.), *The Europeanisation of Administrative Law. Transforming national decision-making procedures*, Aldershot: Dartmouth/Ashgate 2002, 1-14.

<sup>76</sup> The term was coined by Rudolf Wiethölter in a polemic on the obstruction of an implementation of purposive salutatory provisions, through the application of “classic” private law legislation. Cf. Wiethölter, *Wirtschaftsrecht*, in A. Görnitz (ed.), *Handlexikon zur Rechtswissenschaft*, Muenchen: Ehrenwirth 1972, 531, at 532. On the pros and cons of its use in the EU cf. Ch. Joerges, ‘Good

Is a constitutionalization of such a hybrid at all conceivable? One may of course mobilise what seems so convincing: More transparency, more pluralism, opening to broader public debates, a gradual juridification of procedures, links to broader public debates, exit options in cases of legitimate normative and ethical concerns, regular and focused parliamentary oversight, and a separation from distinct regimes dealing with distributive implications – such topics need to be addressed and they can only be addressed in radically procedural perspectives.

### **3. *Exempla trahunt***

Rather than further examining these very abstract perspectives further, I will return to my two examples.

#### 3.1 The Problematics of European Agencies and the Virtues of Standardisation

##### *The Example of the European Food Authority*

In its White Paper on Governance,<sup>77</sup> the Commission had announced that it would seek to establish new EU agencies in the future, entrusted with autonomous powers on the basis of a clearly defined mandate. The agencies' mandate should remain restricted to individual decisions which involve neither "political discretion nor complex economic assessments".<sup>78</sup> Such powers should remain the province of the Commission, which, thanks to the new agencies, will be able to focus more on its "core tasks". I have criticised all this<sup>79</sup> but I did not take these announcements too seriously. How can the Commission portray itself as the top of an "administration" of the internal market, as though it were carrying out the will of a European sovereign, as if, to put it in the metaphorical language of American administrative law, it were acting as a mere "transmission belt"<sup>80</sup> in a "unitary polity"? How can it believe that

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Governance' Through Comitology?, in Ch. Joerges/E. Vos (eds.), *EU Committees: Social Regulation, Law and Politics*, Oxford: Hart, 1999, 311-338. Similarly and more elaborated M. Everson, A 'Political' Administration? Executive 'Deliberation' in 'Regulatory' Agencies\*, contribution to the Workshop on "Good Governance in Supranational Market Regulation", University of Bamberg, 16-17 January 2004.

<sup>77</sup> Note 7 above.

<sup>78</sup> *Ibid.*, 46. These are the formula used in the age old Meroni judgments, Case 9/56, *Meroni & Co. Industrie Metallurgiche S.p.A. v High Authority of the ECSC* [1958] ECR 133, Case 10/56, *Meroni & Co. Industrie Metallurgiche S.p.A. v. High Authority of the ECSC* [1958] ECR 157.

<sup>79</sup> "Economic order" – "technical realization" – "the hour of the executive": some legal historical observations on the Commission White Paper on European governance, in Ch. Joerges/Y. Mény/J.H.H. Weiler (eds.), *Mountain or Molehill?* (note 13); <http://www.jeanmonnetprogram.org/papers/01/010601.html>.

<sup>80</sup> Stewart, 'The Reformation of American Administrative Law', (1975) 88 *Harv. L. Rev.* 1671, 1674 *et seq.*

the “executive agency” will act as a sort of assistant, subject to strict control by the Commission?

I was wrong. The first really important new body, namely, the European Food Safety Authority (EFSA),<sup>81</sup> is supposed to be nothing more than a body collecting and distributing expert knowledge on food safety.

But the theory of new regulation is valid only on paper. Let us wait to see what happens. The first commentators see a strong persistence of the old committee structure (and strong Member State powers), even though the Commission may have strengthened the role of expertise.<sup>82</sup> Damien Chalmers comments:

With regard to the Authority’s institutional make-up, it is impossible to locate it along any conventional national-supranational continuum. It is rather a transnational governance regime which cuts across national/supranational and public/private distinctions, and which both guides and is accountable to scientific communities, national food authorities and civic society. As these networks inform its constitution, it cannot be seen as something starkly autonomous from them, but something that both contributes to their constitution and is constituted by them.<sup>83</sup>

The design of the White Paper is a pure fantasy: this agency cannot but reach out into normative and political issues with distributional implications.

### *Standardisation Again*

As underlined above,<sup>84</sup> standardisation as institutionalised under the “New Approach” is the most “private” form of transnational governance.

The paradox is, however, that “private transnationalism” – standardisation – is far more “regulated” than public transnationalism. I now simply cite from Harm Schepel’s Ph.D. thesis,<sup>85</sup> which summarises many years of research in the following way:

“Standardisation procedures have developed into a remarkably consistent set of truly global principles of “internal administrative law”. Partly influenced by legal instruments, partly by the ethics of the engineering and other professions and structured by an extensive process of global reciprocal normative borrowing

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<sup>81</sup> Regulation 178/2002, OJ 2002, L 31/1.

<sup>82</sup> Thus, S. Krapohl, Risk Regulation in the EU between Interests and Expertise: The Case of BSE, 10 *Journal of European Public Policy* (2003), at 189-207.

<sup>83</sup> D. Chalmers, “‘Food for Thought’: Reconciling European Risks and Traditional Ways of Life”, 66 *Modern Law Review* 532 (2003) (at#).

<sup>84</sup> Section II.1.

<sup>85</sup> Note 40 above.

between the public and private spheres at various levels, these procedures provide at a minimum for:

1. Elaboration of draft standards in technical committees with a balance of represented interests (manufacturers, consumers, social partners, public authorities).
2. A requirement of consensus on the committee before the draft goes to.
3. A round of public notice and comment, with the obligation on the committee to take received comments into account.
4. A ratification vote, again with the requirement of consensus rather than a mere majority, among the constituency of the standards body.
5. The obligation to review standards periodically”.<sup>86</sup>

A further reason is the non-unitary network character of standardisation in the EU, which ensures that national delegations will bring in their positions, mobilise national expertise and, so it seems, provoke meaningful discussions among interested circles on the national level, which are then “channelled” into the standardisation process on the international level. The mechanism is basically the same as in comitology. In addition, just as in comitology, public institutions, administrative bodies and courts remain present. Standardisation is operating in their shadow.

#### **4. Back to Government? A Counter-intuitive Conclusion**

Harm Schepel’s move towards (his version<sup>87</sup>) of “societal constitutionalism” is a move away from a famous the legal theory of a philosopher he appreciates highly:

“When faced with political decisions relevant to the whole of society, the state must be able to perceive, and if necessary assert, public interests as it has in the past. Even when it appears in the role of an intelligent adviser or supervisor who makes procedural law available, this kind of law-making must remain linked to legislative programmes in a transparent, comprehensible, and controllable way”.<sup>88</sup>

Good governance, as we observe it in standardisation, or arguably, in comitology, is not political rule through institutions as constitutional states has developed them. Instead, it is innovative practices of networks, horizontal forms of interaction, a method for dealing with political controversies in which the actors, political and non-political, arrive at mutually acceptable decisions by deliberating and negotiating with

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<sup>86</sup> *Ibid.*, Chapter 7.1.

<sup>87</sup> “Societal constitutionalism” is a term Gunther Teubner has borrowed from D. Sciulli, *Theory of Societal Constitutionalism* (Cambridge: Cambridge University Press, 1992; see G. Teubner, *Societal Constitutionalism: Alternatives to State-centred Constitutional Theory?*, forthcoming in: Ch. Joerges/I.-J. Sand/G. Teubner (eds.), *Constitutionalism and Transnational Governance*, (Oxford: Hart, 2004).

<sup>88</sup> J. Habermas, *Between Facts and Norms- Contributions to a Discourse Theory of Law and Democracy*, (Cambridge: Polity, 1995), at 441; see H. Schepels’s conclusions (Section 2).

each other.<sup>89</sup> If we retain these premises, governance cannot be made compatible with a deliberative notion of democracy, even though this version of democratic theory does not presuppose a *Volk*, not even a *demos* or a state.

The argument is theoretically well-founded. It is, however, reconcilable with what one can observe. It is apparent from the two examples that the defenders of government cannot come to grips with the conditions and merits of governance in the European post-national constellation. Here, “Private Transnationalism” scores better than a White Paper-style transnational administration. How can this be? Let me cite once more Harm Schepel who has invented this term:

“The paradox is, of course, that the mechanism through which to achieve this is, well, politics. Due process, transparency, openness, and balanced interest representation are norms for structuring meaningful social deliberation. They are not obviously the appropriate vehicles for revealing scientific ‘truth’ or for allowing room for the invisible hand”.<sup>90</sup>

This is a message with many theoretical premises and practical provisos. In my language: The modern economy and its markets are “politicised” in the sense that politically important processes are taking place there. The political system cannot reach into that sphere directly. These two steps of the argument claim some plausibility.<sup>91</sup> The third thesis is the critical one: There are constellations in which the political processes within society seem perfectly legitimate. Legitimate in what sense? There the proponents of societal constitutionalism accentuate different aspects. The type of legitimacy Juergen Neyer and I have claimed for (constitutionalized) comitology rests upon the epistemic and political potential of deliberative processes to achieve fair compromises between conflicting interests, to integrate a plurality of expert knowledge, to make use of the management capacities at different levels of governance and to remain open for revision where new insights are gained or new concerns are raised by politically accountable actors.<sup>92</sup> Constitutionalized comitology is a legalized (proceduralized) endeavour operating in the shadow of democratically legitimated institutions. Similarly, the legitimacy and autonomy Harm Schepel

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<sup>89</sup> See E.O. Eriksen/J.E. Fossum, ‘From Government to Governance?’, forthcoming in: Ch. Joerges/I.-J. Sand/G. Teubner (eds.), *Constitutionalism and Transnational Governance*, (Oxford: Hart, 2004), Chapter 10, Section II.

<sup>90</sup> H. Schepel, *op. cit.*, Chapter 6 and conclusion. Referring in particular to G. Teubner, ‘Breaking Frames: The Global Interplay of Legal and Social Systems’, (1997) 45 *American Journal of Comparative Law* 149, 159.

<sup>91</sup> Suffice it here to point to N. Stehr, *Wissenspolitik*, Frankfurt a.Nm

<sup>92</sup> Cf. Ch. Joerges/J. Neyer, Transforming strategic interaction into deliberative problem-solving: Euro-

ascribes to standardisation rests upon the compatibility of its institutionalization with the legal institutions surrounding it: It is not so surprising that standardisation organisations seek to establish procedure in which society as a whole can trust and that sufficiently self-critical law-makers and regulators realize they would not be able to substitute what standardization accomplishes.

Consider again the separation of politically accountable discretionary decision-making (through the European Commission) and the proliferation of objective expert advice (through an executive agency). That is a “public” alternative. And once more a return to the “classical” separation of legislative and administrative powers is unconceivable. And what we have to realize is that the model of public governance as we see it in the Official Journal is very uncomfortable.

## **5. Lessons for Transnational Governance?**

The two examples are not a sufficient basis for generalising conclusions, neither at the European nor the transnational level. But they are, nevertheless, instructive:

- (1) “Private Transnationalism” in the fields of standardisation operates in the shadow of law (delegation doctrines; tort law; anti-trust law). But its real basis is the internalisation of the principles and rules by non-governmental bodies. This observation is valid at the national, European and the international level of governance. It is the reason why international standards “deserve recognition”.<sup>93</sup>
- (2) Comitology is not an institution which can be copied at international level. CODEX standards cannot claim the kind legitimacy standardisation has achieved.<sup>94</sup>
- (3) This is one of the reasons why WTO dispute settlements on controversies in the field of risk regulation should not be understood as transnational law. The

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pean comitology in the foodstuffs sector, 4 (1997) *Journal of European Public Policy*, 609-625.

<sup>93</sup> H. Schepel, *op. cit.*, Chapter 6 and his reference to G. Teubner, ‘Breaking Frames: The Global Interplay of Legal and Social Systems’, (1997) 45 *American Journal of Comparative Law* 149, 159 in the concluding chapter.

<sup>94</sup> One basis for this statement is Alexia Herwig’s Ph.D. project at NYU and her article, ‘Transnational Governance Regimes for Foods Derived From Biotechnology and Their Legitimacy’, forthcoming in: Ch. Joerges/I.-J. Sand/G. Teubner (eds.), *Constitutionalism and Transnational Governance*, (Oxford: Hart, 2004), Chapter 11.



WTO framework is well equipped to realise “Deliberative Supranationalism I”. Beyond that is room for comity, and not more.<sup>95</sup>

The “lessons” are much too brief and too imprecise. All I want to suggest that it is worthwhile to elaborate them further.<sup>96</sup>

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<sup>95</sup> Ch. Joerges/Jürgen Neyer), Politics, risk management, World Trade Organisation governance and the limits of legalisation, 30 *Science and Public Policy*, at 219 (2003); see, previously, Ch. Joerges, ‘Law, Science and the Management of Risks to Health at the National, European and International Level – Stories on Baby Dummies, Mad Cows and Hormones in Beef’ – 7 *Columbia Journal of European Law* 1 (2001).

<sup>96</sup> See note \* *supra*.