

## Law, the State, and Evolutionary Theory: Introduction

*By Graf-Peter Calliess & Peer Zumbansen\**

### A. Introduction

The 2007 Annual International German Law Journal Conference, "LAW, THE STATE AND EVOLUTIONARY THEORY", was hosted by the Collaborative Research Center (CRC) "Transformations of the State" at the University of Bremen, Germany on 5 October 2007.<sup>1</sup> It brought together scholars from Switzerland, Germany, Italy, The Netherlands, Belgium and Canada for a full day of presentations on the influence of evolutionary theory in contemporary law and governance debates. The meeting's agenda ties closely into the ambitious research project of the CRC pursued at the University of Bremen. The CRC combines, in an interdisciplinary and international endeavor, a total of twenty projects from political science, law, and economics to explore changes of state-based and state-originating governance modes. The researchers in these projects are exploring two major transformations of political governance, which have been unfolding over the past decades. These transformations are marked by unprecedented processes of internationalization on the one hand and remarkable trends of privatization on the other, the latter concerning activities and functions that were traditionally performed by and ascribed to the democratic, constitutional and interventionist, twentieth-century nation-state. While the first research phase (2003-2006) had aimed at empirical

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<sup>1</sup> See [www.sfb597.uni-bremen.de](http://www.sfb597.uni-bremen.de).

descriptions of these internationalization and privatization processes, the current phase (2007-2010) is dedicated to explaining the observed changes in statehood.<sup>2</sup>

## B. The Transformation of the State is the Transformation of Society

At the centre of such a research program we find attempts from various perspectives to design theories of institutional change. In this context, the German Law Journal Conference brought such different approaches into sharper relief, focusing particularly on the role of evolutionary theory to explain the dramatic transformations in political and legal governance. The papers in this Symposium issue bring together a variety of different theoretical perspectives mainly from law, economics, sociology and legal theory. The 2007 Conference was the 5<sup>th</sup> time that the Editors of the German Law Journal invited scholars from around the world to address crucial themes in contemporary socio-legal debate.<sup>3</sup> The particular challenge of last year's conference had been materializing through an ever-heightening, transnational discussion concerning the emerging trajectories in governance transformation. The authors of our Symposium explore the consequences and challenges arising from the sociological account of state transformation so powerfully captured by Saskia Sassen as an erosion of state sovereignty both from 'below', brought about by processes of privatization and emerging forms of public-private governance on the one hand, and from 'above', through processes of transnationalization of collaborative, regulatory governance, on the other.<sup>4</sup> Wherein, then, exactly lies this challenge?

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<sup>2</sup> The results of the different projects are summed up in two edited volumes: *TRANSFORMATIONS OF THE STATE?* (Stephan Leibfried and Michael Zürn eds., 2005) and *TRANSFORMING THE GOLDEN AGE NATION STATE* (Achim Hurrelmann, Stephan Leibfried, Kerstin Martens and Peter Mayer eds., 2007).

<sup>3</sup> Previous German Law Journal Special Symposium Issues include "European Constitutionalism" (September 2001); "The Future of Public International Law in Light of the Events of September 11<sup>th</sup>" (October 2001); "The War on Terror - One Year On" (September 2002); "The New Transatlantic Tensions and the Kagan Phenomenon" (September 2003); "Security, Democracy and the Future of Freedom" (May 2004); "Transnational Human Rights Litigation" (December 2004); "A Special Dedication to Jacques Derrida" (January 2005) and two issues on European History and Integration (2006, 2007). In Summer 2008, the German Law Journal will publish a Special Issue dedicated to the English-language publication of Jürgen Habermas' "The Divided West". In the Winter of 2008/2009, a Special issue will be produced in collaboration with the Maastricht Journal for European & Comparative Law dedicated to the Correlation between Legal Education Reform and the Evolving Transnational Legal Profession.

<sup>4</sup> Saskia Sassen, *The State and Economic Globalization: Any Implications for International Law?*, 1 CHI. J. INT'L L. 109 (2000); see also HARM SCHEPEL, *THE CONSTITUTION OF PRIVATE GOVERNANCE. PRODUCT STANDARDS IN THE REGULATION OF INTEGRATING MARKETS* (2005), 19-23; Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 GOVERNMENT AND OPPOSITION 159 (2004)

'We are all Realists Now', resounded the cry many years ago<sup>5</sup>, but today a more appropriate formulation would be the recognition that, in fact, 'We are all economists' now. The underlying conundrum is that of the trajectories of institutional change. According to the representatives of the New Institutional Economics, which are frequently referenced and discussed in the following Symposium contributions, governance structures are best described as institutions, which themselves comprise "both informal constraints (sanctions, taboos, customs, traditions, and codes of conduct), and formal rules (constitutions, laws, property rights)."<sup>6</sup> Changes in institutional design occur "incrementally, connecting the past with the present with the future; history in consequence is largely a story of institutional evolution in which the historical performance of economies can only be understood as part of a sequential story."<sup>7</sup> This however persuasive narrative suggests – for the lawyer – a dramatic relativization of law and the state within this tableau of historical evolution of societal governance. But, as the debate unfolds – both within<sup>8</sup> and outside<sup>9</sup> of the economists' camp –, more questions arise as to the appropriateness of the applied perspectives, tools and instruments. As is evidenced by the contributions to this issue, the tension between law and economics or, between law and non-law, as it has for a long time been apprehended in different domestic regulatory areas<sup>10</sup>, becomes only more exacerbated in the transnational arena where reference points to established institutions and processes of conflict resolution are largely absent. As the utopia of transnational governance continues to unfold, either as the Wild West of unrestrained individual liberty, the struggle over recognition, civil society<sup>11</sup> and solidarity<sup>12</sup> or fragmented world society<sup>13</sup>, the

<sup>5</sup> For the debate today, see Brian Leiter, *Legal Realism*, in: A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261 (Dennis Patterson ed., 1996); and: [http://leiterlawschool.typepad.com/leiter/2006/06/the\\_socalled\\_ne.html](http://leiterlawschool.typepad.com/leiter/2006/06/the_socalled_ne.html)

<sup>6</sup> Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97 (1991), at 97

<sup>7</sup> *Id.*

<sup>8</sup> Paul A. David, *Why Are Institutions the 'Carriers of History'? Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 STRUCTURAL CHANGE AND ECONOMIC DYNAMICS 205 (1994)

<sup>9</sup> Marc Amstutz, *Global (Non-)Law: The Perspective of Evolutionary Jurisprudence*, 9 GERMAN L. J. (2008) [in this issue]; PAUL PIERSON, *POLITICS IN TIME. HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* (2004), 133 (stressing the importance of keeping an eye on the long-term development trajectories of institutions rather than stressing 'change')

<sup>10</sup> E.g., for contract law, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000), 148; see also the Symposium Issue "GOVERNING CONTRACTS: PUBLIC AND PRIVATE DIMENSIONS", 14 IND. J. GLOB. LEG. STUD. (2007).

<sup>11</sup> MARY KALDOR, *GLOBAL CIVIL SOCIETY: AN ANSWER TO WAR* (2003)

<sup>12</sup> HAUKE BRUNKHORST, *SOLIDARITÄT. VON DER BÜRGERFREUNDSCHAFT ZUR GLOBALEN RECHTSGENOSSENSCHAFT* (2002)

'law has lost its lieu'<sup>14</sup> – or, has it? Is the 'Global Bukowina'<sup>15</sup> a realm of law, of social norms or of economic liberties? What are we to make of these distinctions, after all? To sustain them as paradoxes means to recognize that they are always part of the same problem and cannot properly be disentangled without unduly prioritizing one over the other.<sup>16</sup> Yet, this process does not continue in a quiet state of contentment and wonder, but rather in surprise, happenstance and terror. While it is true, that "[t]oday's problems are determined by the fact that the fundamental structural change of functional differentiation has destroyed the Old European semantics without residue, and that even the most hectic post-modern *polysémies* can be understood only as a restless search for socially adequate self-descriptions", catastrophes and the change in social structures lead to a ruining of semantics.<sup>17</sup> Communication, then, the semantics of the particular observing systems such as law, politics, economics and others, is respectively *thrown back onto itself*. The legal system must – and will – process the change in its environment by relying on its very own available operations. The same holds true for other social systems as well, but that only further dramatizes the impression of a world falling apart, of reference systems eroding.

### C. Norms and the Law: Opposition or Complementarity?

It is in this disturbing landscape of frustrated illusions of welfare state utopias<sup>18</sup> and devastated hopes for governance design as evidenced by the now unfolding calamity of the financial markets that institutional economics and, as a variation thereof, 'social norms theory'<sup>19</sup> offer themselves as more appropriate forms of regulation, close to the ground, problem-oriented and interest-driven, undeterred

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<sup>13</sup> Niklas Luhmann, *The World Society as a Social System*, 8 INT. J. GENERAL SYSTEMS 131 (1982)

<sup>14</sup> Amstutz, in this issue

<sup>15</sup> Gunther Teubner, 'Global Bukowina': *Legal Pluralism in the World Society*, in: GLOBAL LAW WITHOUT A STATE 3 (Teubner Ed. 1997)

<sup>16</sup> Peer Zumbansen, *Sustaining Paradox Boundaries: Perspectives on the Internal Affairs in Domestic and International Law*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW [EJIL] 197 (2004a)

<sup>17</sup> Gunther Teubner, *Dealing With Paradoxes: Luhmann, Wiethölter, Derrida*, in: PARADOXES AND INCONSISTENCIES IN LAW 41 (Perez/Teubner Ed. 2006), at 52, with reference to NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (Klaus Ziegert et al. eds., 2004), 459

<sup>18</sup> Jürgen Habermas, *The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies [1985]*, in: THE NEW CONSERVATISM. CULTURAL CRITICISM AND THE HISTORIANS' DEBATE [ed. and transl. by Shierry Weber NicholSEN] 48 (Habermas Ed. 1989)

<sup>19</sup> E. POSNER, *supra* note 10; JOHN DROBEK (ED.), NORMS AND THE LAW, 2006

by interventions from ideological policy makers or incompetent judges. This attitude has prominently been pronounced in contract law: Parties are here described as generally wanting to abstain from (over-) burdening courts, which they anyway hold to be incompetent.<sup>20</sup> Furthermore, social norms theorists point to the parties' willingness to engage with the other in a way that is efficient for both sides, involving "reputation, ethnic and family connections and other elements of non-legal regulation"<sup>21</sup>, because "[t]he Chance of winning a contract suit is pretty much random."<sup>22</sup>

This sometimes overly polemic turn to 'norms' and the arguments in its support suggest an ambiguous move *away from 'law'*, which has significant consequences for an assessment of the connections and complementarities between law and norms. Attacks on 'welfarist' legislation or adjudication, for example in the area of consumer protection, do in fact little service for a much-needed understanding of the political economy embedded in which the correlation between law/norms and law/non-law has always been and will be evolving. It is here where legal and sociological scholarship is already making very fruitful advances in translating state-oriented assessments developed within the nation-state into much more sophisticated conceptualizations of institutionalized governance in a global knowledge society.<sup>23</sup>

Following Paul Pierson's suggestion to explore institutional trajectories with an emphasis on the forces driving or halting, but in any way *shaping* their development<sup>24</sup>, the question arises how to account for the messy regulatory mixture of the early 19<sup>th</sup> century interventionist and the mid-20<sup>th</sup> century welfare state out of which the currently dominant position seems to have emerged, which argues for radical constraints on regulatory adjudication or legislation. A number of emerging analytical discourses are at present competing to render an adequate description of this complex environment: legal pluralism, appearing in various shades and

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<sup>20</sup> E. POSNER, *supra* note 10, at 152: "Courts have trouble understanding the simplest of business relationships."

<sup>21</sup> *Id.*, at 153

<sup>22</sup> *Id.*

<sup>23</sup> See only Erich Schanze, *International Standards: Functions and Links to Law*, in: LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS 166 (Christian Brüttsch and Dirk Lehmkuhl eds., 2007); HELMUT WILLKE, SMART GOVERNANCE. GOVERNING THE GLOBAL KNOWLEDGE SOCIETY (2007)

<sup>24</sup> PIERSON, POLITICS IN TIME, *supra*, at 133

colours<sup>25</sup>, is complemented by a rich debate about path-dependency<sup>26</sup>, 'varieties of capitalism'<sup>27</sup> and the embeddedness of market systems.<sup>28</sup> At the core of the present contestation of 'law's governance', however, lies not only the continuation of an ideological contest that has long been unfolding within<sup>29</sup> and beyond the nation-state.<sup>30</sup> In that sense, the struggle over rights-generation within 'law & development'<sup>31</sup>, while accentuating most powerfully the opposing approaches to legal reform and development goals that govern West-East and North-South legal transplants, continues to linger between 'crisis' and 'critique'<sup>32</sup>, still awaiting to be understood and recognized as either an unforeseen catastrophic event or as an emancipatory challenge. What continues to drive the fierce confrontation between law and norms is, first, the realization that economic rationality is and will remain

<sup>25</sup> Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOCIETY REVIEW 869 (1988); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007)

<sup>26</sup> Jonathan Zysman, *How institutions create historically rooted trajectories of growth*, 3 INDUSTRIAL AND CORPORATE CHANGE 243 (1994); Lucian Ayre Bebchuk/Mark J. Roe, *A Theory of Path Dependence in Corporate Governance and Ownership*, 52 STANFORD LAW REVIEW 127 (1999); Amir N. Licht, *The Mother of all Path-Dependencies: Towards a Cross-Cultural Theory of Corporate Governance Systems*, 26 DELAWARE JOURNAL OF CORPORATE LAW 147 (2001); Richard Deeg, *Institutional Change and the Uses and Limits of Path Dependency: The Case of German Finance*, MAX-PLANCK-INSTITUT FÜR GESELLSCHAFTSFORSCHUNG, MPIFG DISCUSSION PAPER 01/6 (2001)

<sup>27</sup> Geoffrey Hodgson, *Varieties of capitalism and varieties of economic theory*, 3 REVIEW OF INTERNATIONAL POLITICAL ECONOMY 380 (1996); David Soskice, *Divergent Production Regimes: Coordinated and Uncoordinated Market Economies in the 1980's and 1990's*, in: CONTINUITY AND CHANGE IN CONTEMPORARY CAPITALISM 101 (Kitschelt/Lange/Marks/Stephens Ed. 1999); Peter A. Hall/David Soskice, *An Introduction to Varieties of Capitalism*, in: VARIETIES OF CAPITALISM. THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1 (Hall/Soskice Ed. 2001)

<sup>28</sup> See Jens Beckert, *The Great Transformation of Embeddedness. Karl Polanyi and the New Economic Sociology*, MAX-PLANCK-INSTITUT FÜR GESELLSCHAFTSFORSCHUNG/MAX-PLANCK-INSTITUTE FOR THE STUDY OF SOCIETIES, MPIFG DISCUSSION PAPER 07/1 (2007); Peer Zumbansen/Daniel Saam, *The ECJ, Volkswagen and European Corporate Law: Reshaping the European Varieties of Capitalism*, 8 GERMAN L.J. 1027 (2007) [available [here](#) and on [SSRN](#)]

<sup>29</sup> Ernst-Joachim Mestmäcker, *Die Wiederkehr der bürgerlichen Gesellschaft und ihres Rechts*, 10 RECHTSHISTORISCHES JOURNAL 177 (1991); ROBERT D. COOTER/THOMAS ULEN, LAW & ECONOMICS (4th ed., 2004), 3-7

<sup>30</sup> For a discussion of how anti-regulatory politics are recurring in the transnational arena, see e.g. Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUR. L. J. 400 (2002a).

<sup>31</sup> See only the brilliant papers by Alvaro Santos, *The World Bank's Uses of the 'Rule of Law' Promise in Economic Development*, in: THE NEW LAW AND ECONOMIC DEVELOPMENT. A CRITICAL APPRAISAL 253 (Trubek/Santos Ed. 2006), and by Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICHIGAN J. INT'L L. 199 (2004).

<sup>32</sup> REINHART KOSELLECK, CRITIQUE AND CRISIS. ENLIGHTENMENT AND THE PATHOGENESIS OF MODERN SOCIETY [1959] (1988), at 158

the dominant and, thus, dominating, hegemonic and imperialist rationality among the social systems and, secondly, that the regulatory challenges, which present themselves at the beginning of the 21<sup>st</sup> century as a result of the nation-state's regulatory transformation towards an 'enabling' state<sup>33</sup> on the one hand and of the transnational arena's unrulyness on the other, are likely to outrun conceptual approaches<sup>34</sup> as well as normative ones that aim at the reconstruction of the nation-state's once determinative categories of 'government' and 'legitimacy'.<sup>35</sup>

#### D. Law & Evolution

Against this background the contributors to the conference reflect on evolutionary approaches to explaining institutional change from different perspectives. *Martina Eckardt* introduces an 'evolutionary economics'-perspective to explain legal change. She starts examining statutory and judge-made legal change as mechanisms that are inherent to the law in order to broaden the perspective to the co-evolution of law and technology. *Wolfgang Kerber* in his contribution on institutional change in globalization examines transnational commercial law from an evolutionary economics perspective. He starts with the recent discussion of inter-jurisdictional or regulatory competition in the context of globalization. While such competition is usually conceptualized as taking place between different states, Kerber suggests to include as well private solutions for the governance of contracts in order to explain their evolution in relation to public solutions. He stresses the importance of meta-rules such as choice-of-law in determining the evolutionary path of private and public solutions between competition and cooperation. *Marc Amstutz* in his contribution on 'Global (Non-)Law' unfolds a perspective of evolutionary jurisprudence. Reflecting on Hayek he argues that rational choice institutionalism is inadequate for explaining the genesis and evolution of legal norms, since it is not able to distinguish between legal and non-legal norms. Because methodological individualism misses the collective logic behind the genesis and evolution of systems of legal norms, he explores the analytical usefulness of systems theory and modern evolution theory as a means of resolving the issue. He suggests 'rules on rules' and 'textuality' as two reflexive criteria. *Bart Du Laing* in turn suggests that in explaining institutional change we should draw more attention to the original source, i.e. to *biological* evolutionary theory. The behavioural approach of 'dual

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<sup>33</sup> Kerry Rittich, *Functionalism and Formalism: Their latest Incarnations in Contemporary Development and Governance Debates*, 55 UTLJ 853 (2005)

<sup>34</sup> NIKLAS LUHMANN, OBSERVATIONS ON MODERNITY [1992] (William Whobrey transl., 1998), 2 (regarding Skinner and Koselleck)

<sup>35</sup> MARTIN HERBERG, GLOBALISIERUNG UND POLITISCHE SELBSTREGULIERUNG (2007), at 231

inheritance theory', he argues, might prevent legal theory - especially that informed by systems theory - from losing sight of what is happening at lower levels of organization like the behavioral one, including human socio-cultural behavior.

While this more theoretical debate implies that 'evolutionary economics' and 'systems theory' are two incommensurate approaches, *Graf-Peter Callies, Jörg Freiling, and Moritz Renner* try to show in their contribution, how these different perspectives might complement each other in an interdisciplinary endeavour to explaining institutional change in the governance of cross-border commercial transactions. Similarly *Jan Smits* in his paper explores the feasibility of applying evolutionary concepts to the explanation of change in transnational and European private law. He concludes that the concepts of path dependency, adaptation, and co-existence (diversity) are particularly helpful. *Mauro Zamboni*, however, remains quite sceptical towards evolutionary explanations of legal change. He argues that the main obstacle to acceptance of evolutionary theory in legal discourse is its obvious lack of an explicit normative side, where lawyers, law-makers and judges can retrieve "ought" criteria to be used for deciding in which directions future law-making should proceed. He suggests that the evolutionary approach can reach a higher degree of accuracy in its predictions by becoming a 'legal evolutionary theory', that is by offering also normative criteria law-makers may use in taking future decisions.

As diverse as the presentations and the discussions at the conference may have been, the value of this conference volume lies not only in giving an up-to-date overview over different evolutionary approaches to institutional and legal change. The distinctive feature of this volume is that all authors agreed to apply their theoretical approaches to the same issue area, and that is to the governance of international commercial transactions. Thus, we believe that the volume does not only make the different approaches comparable in revealing their specific advantages and disadvantages when applied to institutional change, but the volume also contributes to the broader discussion on the issue of trans-border commerce and its institutional organization.