

itself. A legal system made only of standards of protection, without entitlements (only *lex*, as opposed to *ius*), would lack the political, strategic and symbolic elements just mentioned. Chadwick's dismissal of human rights 'as a means to remedy injustice on a deeper, structural level' (at 176) implies that these various functions of human rights are negligible or maybe even damaging, and this dismissal risks playing into the hands of even more 'neo-liberal' market-fetishist legal trends mentioned above.

Let us return to the overall thrust of this well-written, well-researched and provocative book, namely that the international law responses to hunger are either too weak or counterproductive. Not even hard-line legalists would deem law to be the problem solver number one. And actually, Anna Chadwick, too, despite all her scepticism about the benign effects of the operation of the legal system, ascribes a lot of power to what she calls 'constitutive law'. Clearly, the law is only one mode of governance among others, such as economic power and military force. It is probably the weakest of these three. However, even if the law cannot in itself bring about social change and bring to an end social evil, it seems to be a *conditio sine qua non* for change. In our fully regulated life, it cannot be otherwise. The law is not only a hollow hope but can be made a force for good – or for bad. For sure, it is a 'greater task . . . to challenge the law systematically' (cf. at 198), by means of revolution even. But this is beyond writing books and book reviews!

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Rebecca Schmidt. **Regulatory Integration Across Borders: Public–Private Cooperation in Transnational Regulation**. Cambridge: Cambridge University Press, 2018. Pp 258. £85.00. ISBN: 9781108426787

The world of global regulatory governance is a rhizomatic maze.<sup>1</sup> Regulatory actors are scattered across new spatial, functional and temporal constellations. Their alliances are fluid and unstable, their modes of governance experimental and deformalized. In

<sup>1</sup> The concept of 'rhizome' refers to the idea of a horizontal, heterogeneous, non-hierarchical and permanently evolving structure of growth. See G. Deleuze and F. Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia* (B. Massumi, trans., University of Minnesota Press, 1987), at 3–26. Schmidt's book refers to the 'myriad paths' (at 34) and 'complex mosaic' (at 50) of global governance. The rhizomatic quality of transnational legal theorizing is signalled by Somek in his reply to Kingsbury's article 'The Concept of "Law" in Global Administrative Law', 20 *European Journal of International Law (EJIL)* (2009) 23. See A. Somek, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury', 20 *EJIL* (2009) 985, at 986.

this world of a thousand plateaus,<sup>2</sup> the classic repertoire of public international lawyers – with its archaic divisions between the public and the private, the territorial and the extra-territorial, the state and its subjects – is hopelessly obsolete. Centres of rule have splintered, altering law's coding and leaving power to now circulate more freely through relational networks of transnational governance.<sup>3</sup> If we wish to understand the 'global legal and political order' (at 71) today, we need to revisit our concepts of law (at 14–23), authority (at 37–47) and the state (at 11ff., 49, 56, 83). This is, at least, the picture that is painted by Rebecca Schmidt in her eloquent, empirically rich, theoretically sophisticated and ambitious book.

As a conceptual compass in this world of chaos, Schmidt focuses on the regulatory co-operation between international organizations and private actors. These co-operative 'networks' – emerging from the exchange of authority 'resources' (at 57–70) – provide structure and stabilization to global regulatory governance. In an argumentative thread that mobilizes Weber and Foucault in service of functionalist political science theory, three essential authority resources are described in the book: power, expertise and legitimacy. These are the assets regulatory actors collect when striving for influence and recognition in a global setting, and it is in their exchange that stable networks with 'constitutionalisation effects' (at 72) emerge. In tracing these network formations, the aim of the book is explanatory: 'to provide a better account of regulatory interactions in the transnational context' (at 3). At the heart of this account is a detailed empirical engagement with two examples of transnational regulatory cooperation: the development of social responsibility standards (ISO 26000) by the International Organization for Standardization (ISO) (chapter 4), and the emergence of environmental norms and regulations in the context of the Olympic Movement and the International Olympic Committee (IOC) (chapter 5). Yet, the book does not merely seek to unearth unknown patterns or practices of transnational regulation and co-operation: from the empirical inquiry in these chapters, it also aims to develop a 'comprehensive understanding of interactions and their impact on the political, legal and . . . structural settings of the transnational realm' and, doing so, ambitiously labours towards a 'conceptual integration of global regulatory developments' (at 20, 23). It is through the prism of public–private co-operation, in short, that the book seeks to develop a new and holistic theoretical framework for transnational governance. It speaks to the quality of Schmidt's research and writing that this highly ambitious goal never appears out of reach.

This novel framework is neatly distinguished from both universalist (at 76–79) and pluralist (at 80–83) interpretations of contemporary international legal order (although there is noticeably more intellectual affinity with the latter strands of

<sup>2</sup> Deleuze and Guattari, *supra* note 1. The image of the plateau aligns nicely with the claim by Krisch, affirmingly cited by Schmidt, that 'the post-national polycentric context' (Schmidt's words) is characterized by different 'layers of law and politics' (at 81). The reference is to N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010), at 69.

<sup>3</sup> In its introduction, the book argues that 'networks' are key to 'understand[ing] the global legal order' (at 3).

scholarship).<sup>4</sup> The transnational sphere, Schmidt argues, is not hierarchically integrated (be it institutionally or axiologically), nor radically anarchic. Instead, we encounter networks of co-operation that 'stabiliz[e] normative expectations' without ever crystalizing into homogenous, hierarchial structures. Invoking Slaughter, the book notes that 'networks are indeed the foundations of a new world order', and that this 'network concept can best describe the fluid and relational character of transnational authority' (at 85).<sup>5</sup> In two illuminating and deeply researched case studies, these regulatory networks are rendered visible in the formulation of ISO 26000 (a voluntary guidance standard for social responsibility developed by ISO) and in the creation of environmental standards by the Olympic Movement. While the first case study reveals the role of the International Labour Organisation, the UN Global Compact and the Organisation for Economic Co-operation and Development in ISO's social responsibility standard-setting process, the second focuses on co-operation between the IOC and the United Nations Environment Programme in the development of environmental protection and sustainability standards in the world of sports. Through this careful analysis of the myriad formal agreements, memoranda of understanding, institutional practices and informal expert interventions that tie these regulatory networks together, the book provides a significant – empirical and conceptual – contribution to our understanding of transnational legal ordering in these policy domains. What emerges is an image of law unmoored from traditional sites of sovereignty – an image of order that gradually crystalizes from the interactions, alliances or exchanges between public and private players in the market for regulatory power. The centres of order and authority that surface in the sphere of the transnational, the book sets out to show, do not figure as expressions of a global *nomos* but as focal points in fragile regulatory networks marked by learning and adaptation.

While the analysis of the book eloquently engages with a variety of theoretical perspectives (from assemblage theories to global constitutionalism, from Saskia Sassen to Mattias Kumm<sup>6</sup>), it is clear that 'neo-institutional' rational choice theory provides the analytical anchor for the argument. '[N]ormative notions of authority, which ask whether there is a right to rule' (at 34), are dismissed and traded for a 'transactional' (at 25ff., 33, 207ff.) account of authority in which regulatory actors 'maximiz[e] preferences based on the resources available' (at 93). It is precisely because these actors are considered to find themselves in the 'market' (at 53, 87) for 'authority' and 'legitimacy' – products that need to be 'managed' (at 45) and 'certified' (at 70) – that cooperative 'networks' emerge: on this transnational 'market', regulatory actors exchange 'resources' to reconsolidate centres of power in the scattered landscape of

<sup>4</sup> Throughout the book, Nico Krisch, Poul Kjaer and Gunther Teubner are essential reference points. The account of the repositioning of the state is also informed by the work of Saskia Sassen, although, as I explore below, the progressive politics underlying Sassen's agenda do not resonate in the functionalist orientation of the book.

<sup>5</sup> The reference is to A-M. Slaughter, *A New World Order* (2005).

<sup>6</sup> Reference is made, for example, to S. Sassen, *Territory, Authority, Rights – From Medieval to Global Assemblages* (2006) and M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law', 20 *Indiana Journal of Global Legal Studies* (2013) 605.

post-national governance (as argued in chapter 2). In analogy to the formation of corporate coalitions and cartels,<sup>7</sup> this iterative resource exchange gradually coagulates in regulatory formations where preferences are temporarily aligned, and expectations stabilized (as argued in chapter 3). ‘Thus, like [in] a market environment’, it is observed, ‘different actors exchange goods (in this case regulatory resources) which allow them to better perform . . . in their respective areas’ (at 87). The ‘global legal and political order’ described by Schmidt is a trading platform for players across the public–private spectrum who transactionally build their way towards regulatory rule.

Adopting this analytical position inevitably places the book in wider debates in legal scholarship and political theory. While some have lamented the erosion of the international legal order (and the associated professional sensibilities and mindsets) under the pressure of deformed and outcome-oriented governance schemes,<sup>8</sup> Schmidt gives an alternative, affirmative account of emerging regulatory settlements where questions of formal pedigree and legal normativity are displaced by assertions of liquid authority and sociological legitimacy.<sup>9</sup> There is, of course, nothing inherently problematic about this claim. The book serves as a sharply articulated enactment of a familiar jurisprudential position.<sup>10</sup> Yet, there is something disconcerting about the way in which the claim consistently invokes changing material conditions to formulate (or invalidate) assertions about the foundational tenets of juridical ordering. ‘Economic globalization’ as well as ‘technical advancement’, the book argues, would demand a ‘dynamic’ understanding of ‘authority’ as ‘fluid’ and ‘relative’ (at 12ff.). This is juxtaposed with ‘traditional’ views on legal order that are ‘statist’, ‘hierarchical’ and therefore ill-equipped to account for the splintered conditions of global life (at 36).<sup>11</sup> The concept of law adopted in the book, consequently, does not hinge on the presence of rights-based legal relations or constituent communities,<sup>12</sup> but entails the alignment of regulatory schemes with naturally emerging transnational issue areas. To the extent that the book thereby aims at a different ideal of ‘global legal and political order’ (which confronts purportedly outdated accounts of international law), I see problems on both the jurisprudential and the political level.

First, I have hesitations about the concept of law articulated in the book and its juxtaposition with the pre-existing ‘Westphalian’ legal paradigm (which is occasionally portrayed more as strawman than as the complex and evolving tradition

<sup>7</sup> In making its argument (at 86), the book refers to R. Coase, ‘The Nature of the Firm’, 4 *Economica* (1937) 386.

<sup>8</sup> We can think of F. Kratochwil, *The Status of Law in World Society: Meditations on the Role and the Rule of Law* (2014); Koskeniemi, ‘The Fate of Public International Law: Between Technique and Politics’, 70 *Modern Law Review* (2007) 1. More broadly, beyond the domain of international law, this critique also resonates in the work by Nancy Fraser on the need for a retrieval of the public sphere in the context of globalization and transnational executive governance. See N. Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (2009).

<sup>9</sup> Reference is made to Kirsch, ‘Liquid Authority in Global Governance’, 9 *International Theory* (2017) 237.

<sup>10</sup> The book links its account with key aspects of both sociological jurisprudence and global administrative law.

<sup>11</sup> The book draws on G. Teubner, *Constitutional Fragments: Societal Constitutional and Globalization* (2012).

<sup>12</sup> I am deliberately using the language of Somek here in reference to his arguments in *supra* note 1. See A. Somek, *The Legal Relation: Legal Theory After Legal Positivism* (2017).

that international legal positivism in reality harbours).<sup>13</sup> For those committed to a pedigree-based, positivist theory of sources, the assertion that private actors exercise informal authority will carry little jurisprudential weight.<sup>14</sup> This is, of course, not a categorical issue: it is only natural that new empirical realities test theoretical commitments. Yet the bridge between material events (the emergence of new regulatory formations in the transnational domain) and jurisprudential claims (on transformations of the global legal order) cannot be built merely on factual assertions. The key question here is what makes these functional regulatory formations legal in the first place (as opposed to, say, constituting merely informal influence or decentralized managerial coordination).<sup>15</sup> As a result of the 'neo-institutionalist' orientation of the book, this type of jurisprudential reflection is bypassed: what matters is the capacity of regulatory market players to obtain 'recognition' (at 39) and nudge their addressees into compliance. As legal authority is translated into 'manageable' legitimacy, and citizenship thereby reduced to vague avenues of 'participation' (at 65ff.),<sup>16</sup> what emerges is a concept of law incapable of differentiating between enforceable rights and fluid forms of transnational standard-setting.<sup>17</sup> This will not convince those committed to the jurisprudential tenets of the 'Westphalian' paradigm (or anyone striving to keep the differentiation between law and management intact).<sup>18</sup>

This jurisprudential ambiguity feeds into a second, political concern about the argument of the book. In its diagnostic mode (at 7–33), the book reproduces several common tropes of the call for 'better' (experimental, decentralized and risk-based) regulation that have become prominent in the past decades: in response to 'complexity' and 'globalization' – culminating in the diagnosis of 'functional differentiation'<sup>19</sup> – the

<sup>13</sup> Similar observations have been made in d'Aspremont, 'The Politics of Deformalization in International Law', 3 *Göttingen Journal of International Law* (2011) 503.

<sup>14</sup> Loughlin, in this sense, helpfully distinguishes between *potentia* and *potestas* (power and authority), claiming that the former does not necessarily translate into the latter. In *Regulatory Integration Across Borders*, however, the two are explicitly interlinked (at 37–40), which leads to a notion of legal authority that is indistinguishable from the material capacity of managerial or regulatory formations to generate (behavioural or institutional) effects in their cooperative interaction. See Loughlin, 'Constitutional Pluralism: An Oxymoron?', 3 *Global Constitutionalism* (2014) 9, at 11–12. I have made a similar observation regarding the effect-based understanding of legal normativity in the work of Alvarez in Van Den Meerssche, 'Scholars in Self-Estrangement (Again): Rethinking the Law of International Organisations', 5 *London Review of International Law* (2017) 455. See J. Alvarez, *The Impact of International Organizations on International Law* (2017).

<sup>15</sup> Cf. Somek, *supra* note 1, at 987.

<sup>16</sup> The book envisages various modes of legitimacy management: the 'inclusion of stakeholders, accountability by proxy, or forms of spontaneous ex post accountability' (at 56).

<sup>17</sup> For a critique on such limited, compliance-based concepts of law emerging from political science scholarship, see also Rajkovic, 'Rules, Lawyering, and the Politics of Legality: Critical Sociology and International Law's Rule', 27 *Leiden Journal of International Law* (2014) 331.

<sup>18</sup> Cf. Somek, *supra* note 1, at 994 ('Where all work towards the accomplishment of a common objective without anyone making authoritative determinations a legal relationship does not exist').

<sup>19</sup> The book's diagnostic outlook links neatly with Teubner's variation on Luhmann's systems theory. A central reference is G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012). Luhmann is central to Schmidt's account of constitutionalization as the stabilization of normative expectations (at 73). Cf. N. Luhmann, *Law as a Social System* (2004).

state can no longer be perceived as privileged site of authority, law-making and regulation.<sup>20</sup> Indeed, Schmidt clearly states: ‘there is little distinction between traditional public actors originating from the nation state and other types of [regulatory] actors’ (at 83). In this transnational space, where both the state and the legal relation between centres and subjects of power have been displaced, the status of the governed is that of passive receivership (mediated, at best, through managerial forms of ‘participation’ or ‘deliberative processes’ (at 67)).<sup>21</sup> Animating this argument is a thoroughly transactional view on authority and legitimacy in which recognition and compliance are shaped by the different ways through which resources of power, expertise or strategic legitimacy are ‘maintained and used as currency’ (at 57). The ‘global legal and political order’ depicted here is a secondary market in social contracts, where citizenship has been traded for regulatory consumerism. This assertion might have explanatory power but its unproblematized reproduction as both diagnostic and legitimation of contemporary regulatory practices strikes me as dubious.<sup>22</sup> In the accounts inspired by systems theory with which Schmidt shares her empirical outlook, this political problem is countered by ideals of ‘societal constitutionalism’: the endogenous constitutionalization of functional regimes as dialectic antithesis to the economic rationality of functional differentiation and expansion. Yet, such a countermove is missing in this book: the ‘basic’ notion of ‘constitutionalisation’ adopted here merely points to the ‘stabilization effects’ of co-operative ‘networks’ among different regulatory actors.<sup>23</sup> This constitutional ideal is not oriented towards political praxis but always and only towards functional (re-)alignment. It is a restatement of Teubner’s societal constitutionalism, in other words, only without the Polanyian double movement.<sup>24</sup> In more straightforward terms, the adopted constitutional language is void of political promise or normative bite: the ‘constitutionalisation’ process observed and applauded in the book does not signal the empowerment of those subject to transnational expert rule but merely signals the ‘stabilization of expectations’ between these centres of governance. Without new ‘constitutional arenas’ (as put forward in

<sup>20</sup> The book argues that in the sphere of transnational regulation, ‘[t]he state . . . is one player among others’ and that ‘seeing (at least political) authority as being synonymous with state-based authority is problematic’ (at 48). While Schmidt extensively refers to Julia Black’s work, Black’s critical appraisal of these changes does not resonate in the book. See, for example, Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ 2 *Regulation & Governance* (2008) 137.

<sup>21</sup> The book directly dismisses these political concerns: arguing that as ‘a global *demos* which could confer simply does not exist’, ‘enhanced global democracy does not serve as an answer to pending legitimacy questions’ (at 66). Instead, ‘participatory aspects have become increasingly important’ (*ibid.*).

<sup>22</sup> Especially when placed in contrast with accounts on transnational governance that share similar empirical observations but develop a critical, political counter-agenda. See, e.g., Riles, ‘The Politics of Expertise in Transnational Economic Governance: Breaking the Cycle’, in B. Kingsbury et al. (eds), *Megaregulation Contested: Global Economic Ordering after TPP* (2019) 103; Beckers, ‘Towards a Regulatory Private Law Approach for CSR Self-Regulation? The Effect of Private Law on Corporate CSR Strategies’, 27 *European Review of Private Law* (2019) 221. On a general level of political critique, see Fraser, *supra* note 8.

<sup>23</sup> The book links this with Luhmann’s analysis of law’s stabilization effects (at 73). See Luhmann, *supra* note 19.

<sup>24</sup> Cf. Teubner, *supra* note 11, at 78; K. Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944).

Teubner's account of functional differentiation),<sup>25</sup> recourse to societal complexity as justification for fluid, expert-oriented governance formations verges on the celebration of the post-political. If this is, indeed, the state of the current 'global legal and political order', it is rather grim.<sup>26</sup> Of course, the grimness of the world can hardly be seen as a flaw of the observer. Yet, in my view, the book goes beyond mere description and does a lot – in both its adoption and promotion of a transactional, functionalist perspective on law and authority – to promote this post-political legal imaginary.<sup>27</sup> Its affirmative account, I believe, is less about the transformation of the political than it is about its erosion. This connects with the jurisprudential concerns expressed above: it is precisely in providing a language for collective self-empowerment and subjectivity that the distinct social technique of law should remain intact – also, and especially, in this globalized era.

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<sup>25</sup> Teubner, *supra* note 11, at 88ff.

<sup>26</sup> It corresponds quite closely with the dire diagnosis by Koskeniemi on the politics of functional differentiation:

Lauterpacht [was] right to assume that statehood would be slowly overcome by the economic and technical laws of a globalizing modernity. This is what functional differentiation in both of its forms – fragmentation and deformalization – has done. But [he was] wrong to believe that this would lead into a cosmopolitan federation. When the floor of statehood fell from under our feet, we did not collapse into a realm of global authenticity to encounter each other as free possessors of inalienable rights. Instead, we fell into watertight boxes of functional specialisation, to be managed and governed by reading our freedom as the realisation of our interest. As our feet hit the ground, we found no Kantian federation but the naturalism of Pufendorf and Hobbes.

See Koskeniemi 2007, *supra* note 8, at 13–14. See also R. Urueña, *No Citizens Here: Global Subjects and Participation in International Law* (2012).

<sup>27</sup> Concerns about regulatory capture and complexity at the end of the book (at 206–208) remain phrased in purely functionalist, neo-institutional terms. Yet, at the same time, the political concerns that emerge from the analysis are acknowledged: at the end of chapter 4, for example, the book wonders 'whether a private entity such as the ISO is the correct location for the development of a social responsibility standard which extends significantly into the public policy domain' (at 153). This seems like a pivotal question, yet it remains unanswered.