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Global Citizenship: Corporate Activity in Context

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Many formulations of contemporary globalization suggest that citizenship is being radically transformed by processes of transnationalism. And the business world is reacting to this sense of change by firms claiming to be 'global corporate citizens'. But what exactly does global corporate citizenship mean and what are its implications? In this paper a preliminary response is made to these questions by situating corporate citizenship within the wider framework of constitutional debates about private economic law and the juridicalization of the international sphere more generally. The paper poses the issue of whether there is a quasi-constitutionalization of the international corporate sphere underway and the possible governance consequences of this process.

1. Introduction

'Global citizenship' is a category on the move. As the general discourse of globalization has gathered pace this is often viewed as part of a political response to the economic processes that are argued to be undermining the continued pertinence of nation-state economic governance. Associated with the notion of an emergent global civic sphere, global citizenship expresses the way agents caught in trans-national or trans-border relationships are increasingly thinking and acting outside of their traditional territorially bounded contexts of political and social action (e.g. Walzer 1998; Bosniak 2000; Sassen 2003; Hanasz 2006). They are claiming to be -- and being addressed as -- 'global citizens': constructing and using a global citizenry status to advance their objectives, projects and agendas in an increasingly interdependent and globalized international system. Or so it seems.

For some years I have been intrigued by the idea of 'corporate citizenship' (Thompson 2005, 2006, 2008a, 2008c). Corporate citizenship is the particular manner in which the business world has absorbed the terminology of civic virtue and public duty into its day to day functions and longer-term operational characteristics. Although allied to the idea of corporate social responsibility (CSR) the argument advanced below is that corporate citizenship is a distinct category with its own modalities and dynamic. The intriguing question is why companies are either adopting the terminology of corporate citizenship, or being addressed through the language of corporate citizenship? Many MNCs are overtly claiming to be 'good global corporate citizens' as they expand

their international activities and put corporate social responsibility commitments at the centre of those business activities. The UNs *Global Compact* explicitly addresses its signatories as 'citizens' and the World Economic Forum has had a long standing programme of corporate citizenship (Schwab 2008; WEF 2002, 2008). What is more, countries are also adopting the language of citizenship to describe themselves, e.g. the Australian Prime Minister's recent claim that the country's foreign policy would be guided by the principle of 'good global citizenship' (Rudd 2007).

These claims and forms of address are, I suggest, connected to a larger set of governance moves in the international system which will be outlined in a moment. In part this is a response to the widely perceived undermining of the traditional system of nation-based governance as global and transnational forces are argued to have swept aside the possibility of continued sovereign state interactions forming the core of 'global governance' (e.g. in the form of multilateralism or inter-governmentalism). Rather, in this 'post-Westphalian world' a new cosmopolitan order is in the process of being constructed where the axis of identity and politics will be decidedly 'above' or 'beyond' the nation state. Never mind the actual reality of 'globalization' being far from the mythical version of its characterizations (Hirst, Thompson and Bromley 2008), the idea of globalization is so firmly entrenched that it has become the taken for granted commonsense of the current international system by almost all academics, politicians and political commentators alike. This itself is also intriguing. Quite why this terminology has become so effective and ubiquitous in its embrace when any serious examination of the evidence about its claims shows these to be at best ambiguous but more often simply wrong, is a complex issue and something that cannot be addressed here. But the strong perception of globalization persists nonetheless.

However, in this paper, far from engaging in another round of utopian calls for a new global covenant (Jackson 2000; Held 2006), global democracy (Falk 2000; Hanasz 2006) or other wishful thinking about a new enlightened cosmopolitanism as the responses to these supposed forces of globalization, I examine the actual practices of governance that are immanent and already embodied in the nature of the 'international disorder' that typifies this field (Thompson 2007). To do this I first set up the idea of global corporate citizenship to ask why companies might be prepared to adopt this terminology since it has many dangers attached to it for them (as well as potential benefits, of course). I then go on to argue that there is a connection between the adoption of the language of 'citizenship' and that of 'constitutionalism' and suggest that there is a shadowy 'quasi-

constitutionalization' of the international system underway for which the terminology of global (corporate) citizenship forms an important part (Joerges, Sand and Teubner 2004; Schepel 2005). In turn, this connects to various senses of the juridicalization of international affairs, where new or revitalized types of law are increasingly being brought into play as the mechanisms for resolving disputes or organizing governance. Various claims as to the nature of the constitutionalization process are then investigated, one of which I try to mine for an appropriate terminological resource to discuss the legitimization of the emerging international system as I see it. Finally, I sum up on the troubled nature of these deliberations, since my argument is that this leaves us with several unpalatable implications and dilemmas that will not be easy to resolve.

2. The Extent of International Corporate Citizenship

According to UNCTAD in 2006 there were upwards of 77,000 MNCs (UNCTAD 2006, p.10). Of these, some 57,000 were from the developed countries. In all, these MNCs involved about 770,000 foreign affiliates. The rise of the MNC is often associated with the development of globalization – indeed it is taken to be one of its prime indicators. However, quite whether these MNCs are truly 'global' is another matter. In fact most of them are confined to a home base with only one or two operations abroad. And even the largest MNCs tend to be supra-nationally regional in their activities rather than global (Rugman 2005). They still mainly operate on their home territories, with key foreign activities confined to close regional markets and sources. Nevertheless, the development of internationalized companies poses new problems for both their internal corporate governance and their external regulation.

Classifying Companies in Respect to Global Corporate Citizenship (GCC)

Of course, not all companies claim the title of 'global citizens'. This is a minority. Surveying company annual reports available on the internet in 2008 revealed just under 120 companies that explicitly mentioned 'global corporate citizenship' in their annual reports, and many of these only mentioned it in passing. Even fewer actually produced a report entitled Corporate Citizenship (31 from approximately 500 companies surveyed). A lot more companies issue CSR reports of course and the terminology of 'Sustainability Reports' is also popular. For 2007 Corporate Register recorded over 2,600 companies producing CSR reports of one form or another (up from only 26 in

1992), and ‘sustainability’ shows the faster growing sub-category in this group (from virtually nothing in 1996 to 40% in 2007: < www.CorporateRegister.com > -- accessed 2 June 2008).

Thus one thing to bear strongly in mind as the following analysis proceeds is that GCC/CSR companies are in a decided minority in relation to domestic or even international companies as a whole. But these tend to be the large and important companies. In terms of capitalization and brand image their importance belies their low absolute number (see Thompson 2008e). So we need a way of preliminarily classifying companies in respect to their attitudes towards GCC values and practices. Broadly speaking it is those companies that readily promote the idea of GCC that also fall into the category of claiming this as citizenly activity. A way of classifying *all* companies in respect to their attitudes towards GCC is shown in Figure 1.

Companies can be divided into those that think social, environmental and ethical values (se&ev) are central for their business activity and those who think these are irrelevant. This is shown along the horizontal axis. On the other hand there is the business and financial rewards dimension to company activity. Do they think that a commitment to se&ev enhances their financial bottom line or is irrelevant to it, or -- perhaps put slightly differently -- would the market reward these business for their commitment, or otherwise, to se&ev? This dimension is shown on the vertical axis.

We could begin to place different companies in the four cells marked out by figure 1, and what is shown here is a preliminary classification. It contains some headings, some sector affiliation and some possible named companies. None of this distribution is meant to be rigorous. It is for illustrative purposes only: it is a heuristic device[i]. The ‘Bottom Feeders’ would be those that felt a commitment to se&ev to be irrelevant, and that it would have, or has, no impact on their financial and business rewards or performance. At the other extreme are those companies that felt se&ev to be vital to their business and that it would have, and indeed does have, a very significant impact on their financial and business performance. These are designated the ‘Enthusiasts’. Most of these

[i] This diagram was originally developed as a teaching aid. But as it stands it still rather lacks analytical rigour and extensive empirical content. One difficulty is that several companies that might fall into the ‘Bottom Feeder’ box issue variants of a CSR report (e.g Halliburton issues a Sustainability Report dealing with its environmental impact**)**. It is only on a close scrutiny of these reports and other commentary in the public domain that companies can be allocated to the various cells in Figure 1 (in the case of Halliburton, it is a fine judgement between the Bottom Feeder box and the Cynics box, but the general reputation of this company encouraged me to finally allocate it to the former).

companies can be found from the FTSE4Good index on which the leading socially responsible companies are listed (see:

< http://www.ftse.com/Indices/FTSE4Good_Index_Series/index.jsp>)[ii]

, or those companies appearing to commit to the ten principles of the UNs Global Compact. (see < http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html >)[iii].

[ii] The FTSE4Good, along with the Dow Jones Sustainability Index, are the main stock exchange based scrutiny mechanism for CSR companies. As of April 2004 there were 869 companies listed on the set of FTSE4Good indices (the 'full constituent list'). This list can be supplemented by the companies reporting to the Global Reporting Initiative (GRI), which is probably the most widely supported CSR reporting framework. For all these bodies firms are required to meet extensive business financial, environmental and social reporting requirements. These are comprehensive and transparent, and they are policed in several ways (Thompson 2008e). As of October 2006 there were 821 companies registers with the GRI, not all of which were MNCs. (There is considerable overlap between the companies appearing on these various indexes and lists). Of course, there is much dispute over the validity of these indexes as an accurate reflection of a commitment to -- or measure of -- se&ev (Porter & Kramer 2006; Chatterji & Levine 2006; O'Rourke 2003).

[iii] As of August 2008 there were 5,800 participants in the *Global Compact*, of which 4,300 were companies. What this footnote and the previous one demonstrate, however, is that those companies that take GCC/CSR seriously are in a minority (as stated above, there were approximately 77,000 MNCs alone that were recognized by the UN in 2007).

Figure 1: Company Attitudes Towards GCC

COMMITTMENT TO SOCIAL, ENVIRONMENTAL AND ETHICAL VALUES IN BUSINESS

FINANCIAL AND BUSINESS RETURNS		**Irrelevant**	**Essential**
	Strong	**'CYNICS'** **Energy Co's, Extractive Industries, Wal-Mart, McDonalds**	**'ENTHUSIASTS'** **Novo Nordisk, Lefarge, BP, GlaxoSmithKline**
	Weak	**'BOTTOM FEEDERS'** **Ryanair, Private Equity, News Corporation, Halliburton, Monsanto**	**'ETHICAL PRODUCERS'** **Fair Trade Co's, Organic producers, Small Co-op Banks**

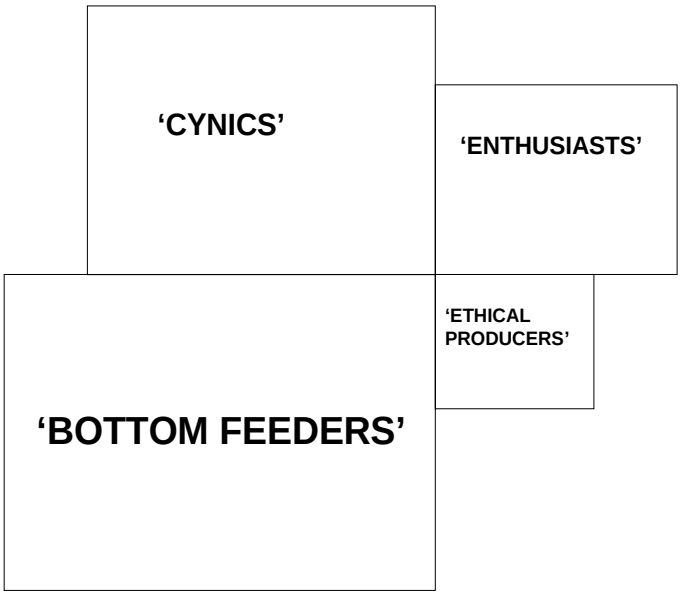
Between these two cells lie to 'Cynics' on the one hand and the 'Ethical Producers' on the other. The former represent those companies who might think that se&ev are basically irrelevant, but that recognize a pragmatic commitment to these is a sensible (if sometimes unfortunate) necessity because it does provide financial and business rewards and benefits. Often these are the companies that have experienced a public campaign against their activities (or who wish to ensure against one), and who want to present a more appropriate public image as a result. From the point of view of those committed to se&ev in business, or who advocate for this, moving companies from this cell to the top right hand side one is the main objective. This is what the CSR movement is committed to.

Finally, there are the 'Ethical Producers' who are fully committed to se&ev but who reap a thin reward from it. In part this would be because the importance of se&ev to their business outcomes is not yet fully recognized by customers or the market in these cases. Alternatively, it could be because these companies are small and often inefficiently run[iv].

As mentioned above the relative importance of these different categories of company in terms of their capitalization or brand image is likely to vary. A way of illustrating this is provided by Figure 2, in which the relative size of the boxes varies according to number and significance of the companies and their commitments. The Bottom Feeders remain by far the largest group; there are a lot of 'vicious companies' in the market place, trading on the 'savage consumer' (Thompson 2005). Many of the companies in this group are largely anonymous; being intermediary supplies in long production chains where they can hide their business practices, and who have a low brand image at the final consumer level as a result. The Cynics are also likely to be a large group, made up as they are of those companies that rather play it 'fast and loose' with the CRS/GCC agenda. And while the Enthusiast may be small in number they are very important in terms of brand image and market capitalization, comprising some of the largest and most important internationally recognized companies. Their symbolic significance is also important: as the leading advocates of GCC they provide an example for others to follow (Ruggie 2004; McIntosh, *et.al*.2004; Kell 2005; Porter & Kramer 2006).

[iv] It should be noted that this figure pertains to the possible effects on performance and bottom line financial considerations of attitudes towards se&sv only. It does not illustrate the overall financial performance of companies. For instance Ryanair is a highly profitable company despite it appearing as a 'bottom feeder' here.

Figure 2: Relative Importance of GCC Categories



4. Why Are Companies Claiming to be Global Corporate Citizens?

The above discussion has served to identify several features of GCC; how companies have reacted to the process and the extent of their involvement with it. In this section I concentrate on *why* many companies are adopting this terminology.

The main point is that it reveals a basic *vulnerability* that companies perceive in terms of their general business position. Companies – even the very largest companies -- feel increasingly threatened by developments in the international financial system in particular and in respect to their business environment more generally. Companies have always been subject to the normal dictates of stock market discipline, involving the market for corporate control or the possibility that new and innovative competitors will arise with an invention that can quickly undermine even the most carefully crafted business model. But new ubiquitous threats are arising, this time from hedge funds, private equity funds and sovereign wealth funds. These have such extensive resources available (estimated at up to US$12,000bn for sovereign wealth funds alone) that they can stalk and takeover even the largest of companies. Often these funds are allied with 'activist shareholders', so targeted companies can now be subject to a level of harassment that they find difficult to combat or resist. In the wake of the 2007/08 credit crunch – when liquidity from the investment banking system dried up -- private equity has begun to tap into the resources offered by sovereign wealth funds as a way of by-passing the banks of Wall Street and the City of London.

What private equity does is to take companies out of public floatation, 'restructure' them to extract 'shareholder value' and then to re-float them once they are supposedly 'slimmer and fitter'. Thus effectively private equity 'privatizes' the public limited liability company, at least for a time, so that it is subject to neither the minimal transparency requirements and supervisory oversight of stock exchanges, nor the operation of internal corporate governance. If this mechanism were to expand (which it is likely to do after the 2007/08 credit crisis subsides) it could herald the demise of the robust public company in the Anglo-American economies where it is most active (but also in other economies, where this mechanism is likely to take hold as global financialization advances)[v]. It

[v] Of course, there is some debate as to whether private equity has a viable long-term business strategy, and therefore that it is such a threat to the publicly floated company as suggested here (see Cheffins & Armour 2007).

could leave only a rump of out-of-favour or terminally weak companies floated on stock exchanges, and hollowed out companies that are re-floated in the wake of their private equity experience.

So what are vulnerable companies doing in the light of these developments? The suggestion here is that they are re-branding themselves 'corporate citizens'. However tentatively, cautiously and hesitantly at times, as a response to these pervasive threats leading companies are trying to shore up their position *politically* by claiming to be 'corporate citizens' and 'corporately socially responsible' in one way or another. The hypothesis is that this is a definite political tactic on their part, if also a potentially dangerous one from their point of view. Corporate citizenship represents a claim by companies for recognition that they too have rights, that they perform civic duties, that they are public spirited, that they are ethical agents in one way or another, and so they should be treated like every other citizen and be subject to the same protections. But of course, if companies claim a deserving citizenship in this way, they also open themselves up for a different – and possibly intrusive – kind of scrutiny. They must be accountable and transparent to a wider audience, and above all they must be responsible agents (Thompson 2008b).

Of course this idea of citizenship also goes along with a new found fondness of these companies not only to both care for the environment and act in a socially responsible manner, but also to become an active 'partner' with governments and NGOs in meeting the UNs Millennium Development Goals (WEF 2008). The language of MDGs has invaded this area, with companies seemingly willing to take on more and more of the tasks associated with these goals. But this could tend to overwhelm them of course, and undermine any longer-term commitment to more limited CSR objectives (Thompson 2008e).

Additionally, there are the marketing opportunities associated with being socially responsible and an active corporate citizen. This is part of the re-branding of the leading companies, who argue that to integrate citizenly activities within their core business operations – and not to see it just as an 'add-on' – is a way to ensure customer loyalty as and when things get tough with the purely financial bottom line.

So what we have is a package of reasons why companies might want to sign-up to a citizenship language. But I would stress the political nature of this on the part of companies. It is part of their

response to a feeling that they should become more overtly 'political animals' in a transparent manner, so as to be able to try to publicly shore up their positions. Of course, companies have always played a very active political role – they are adept at lobbying and contributing to political causes – but this has tended to be done, at the international level at least, 'behind the scenes' as it were. For instance, companies learned a lot from the various WTO negotiating rounds: they felt frustrated by the fact that they could not lobby overtly in these arenas, but have had to do so via their governments, and this frustration has increased as the Doha Round ground to a halt with governments seeming unable to reach agreements. A citizenly language – justified in terms of public mindedness and civic virtue – provides a potential way forward for companies in the context of this dilemma.

Table 1 shows what companies can at present claim and not claim in respect to citizenship rights that are analogous to those rights afforded to 'natural persons' (in the USA – but this is largely paralleled elsewhere). Companies are collective agents (sometimes expressed as 'artificial' or 'virtual' persons), so there is a debate about the appropriateness in the use of the terminology of citizenship analogously between so called 'natural persons' (who are far from 'natural' of course – these are legal categories) and 'corporate persons', but I leave this aside here (see Thompson 2008a and 2008d) [vi].

[vi] There may be some partial exceptions to the norm that only 'natural persons' can vote and make a claim on citizenship in this manner. For instance, the City of London has an unusual governmental structure made up of the Lord Mayor and The Court of Common Council which comprises Aldermen who are in part elected by City corporate businesses and commercial partnerships not just by resident individuals. (see <http://www.cityoflondon.gov.uk/Corporation/about_us/governing.htm >). In addition, Hong Kong, has special representatives of certain commercial interests who can vote in the legislature, who are not exactly elected by individual voters, but, in effect, appointed from 'functional constituencies' (see:< http://en.wikipedia.org/wiki/Legislative_Council_of_Hong_Kong>). In both cases 'citizen voters' are not necessarily natural persons. However, these tend to be marginal cases, ones either of an historical anomaly with little real power, or arrangements designed to deal with limited and unusual situations.

Table 1: CORPORATIONS CLAIMS ON FORMAL 'LEGAL CITIZENSHIP' (USA)

They can claim the following:

a) equality of protection and treatment
b) trial by jury
c) protection from unreasonable searches and seizures (e.g. of property)
d) no takings without compensation
e) the exercise of due process
f) non-discrimination.

They cannot claim the following:

a) protection against self-incrimination (i.e. the prevention of a witness from testifying against him-self or her-self);
b) that corporations and their officers are the same 'persons' (thus corporations are separate from their officers -- whereas there is no analogously similar claim that can be made by 'natural person)
c) claim certain protections whilst abroad
d) they cannot command a vote, or exercise any of the political consequences that follow from this capacity.

Source: Compiled from Aligada (2006).

The features illustrated in Table 1 pertain to a particular country: they are written into US constitutional practice or are a consequence of judgements made in the courts there – but are similarly enacted in other countries. So the protections they offer relate formally to that jurisdiction only. An obvious question is whether they can be extended into the international arena, so that citizenship rights for companies along these lines might also be afforded to MNCs. Clearly, extending these kinds of features – and formal citizenship into this arena -- is doubly difficult: there is no obvious polity to which companies can be held accountable or that could legitimate their 'citizenship'. Jurisdictions, in the main, still remain tethered to definite territories (there are some extra-territorial jurisdictional competences claimed and exercised by some countries, but not formally in this area of company law as far as I can judge[vii]). However, companies are claiming citizenship in the manner discussed above nevertheless. And they are organizing this along the lines illustrated by the features laid out in Table 2.

[vii] A slight counter-example that comes to mind is the Alien Tort Claims Act (ATCA) in the USA. The ATCA was passed by the first US Congress in 1789 and was initially designed to tackle piracy on the high seas. Formally it still gives US federal courts jurisdiction over "any civil action for a tort only, committed in violation of the law of nations or a treaty of the United States". It can be read as giving US courts jurisdiction over non-criminal abuses that occur anywhere in the world, so long as the alleged wrong would violate international law (A-M. Slaughter & D.L. Bosco 'Alternative Justice' < http://www.globalpolicy.org/intljustice/atca/2001/altjust.htm >). As of 2006 there had been 36 corporate ATCA cases initiated in the US mostly over alleged human rights abuses by companies. But not a single one of these had by then been formally adjudicated on. (Baue, B. 'Win or Lose in Court' < http://www.globalpolicy.org/intljustice/atca/2006/06winlose.pdf >).

Table 2: **CHARACTERISTICS OF TWO TYPES OF CITIZENSHIP**

1: 'Acts' Citizenship

a) Act in a way that invokes a civic virtue
b) Stresses active engagement or involvement in public affairs and in the public sphere
c) Voluntaristic
d) Behavioural
e) Represents a 'claim' only

2: 'Status' Citizenship

a) Rights and obligations determined within the context of a definite polity
b) These embodied in a clear legal form
c) Involves the democratic exercise of membership duties and obligations
d) Obligations thrust upon citizens in a 'take it all' manner.

This table divides citizenship into two basic forms: 'acts' and 'status'. This is not altogether satisfactory since clearly they are both aspects of a single category – the real issue is the relationship between these two sets of elements. But it is useful to retain the distinction for analytical purposes[viii].

Companies that claim citizenship do so largely on the basis of their 'acts' (Crane, *et.al.* 2008). It is a voluntary activity, associated with their behaviour in taking responsibility for the sv&ev aspects of their business operations. Their public mindedness is driven by the 'softer' elements included under this acts heading. Clearly, in an international context in particular, the 'harder' elements included under the heading of status citizenship cannot be fully realized, for the reasons just outlined. But perhaps what the earlier discussion of company citizenship demonstrates is that companies are beginning to think about claiming several of the aspects included under the status heading? They certainly want a clearer status recognition to be associated with their citizenship.

5. International Juridicalization and Constitutionalization

The rest of this article develops this point by situating global corporate citizenship within a wider set of suggestions about what is going on in the international arena in respect to its jurdicalization and constitutionalization. The motive for this discussion is the way citizenship, the law and constitutionalism have traditionally been closely linked together, both in political theory and in jurisprudential analysis and practice. There are two main elements to this discussion. The first is to draw attention to the emergence of new forms of legal scrutiny and adjudication in the international arena, especially those associated with commercial activity. Here the argument will be that we see not only an increase in the pertinence of international law proper, but also – and perhaps more importantly – of private law, of customary law and of regulatory and administrative law. A lot of this is well known and not all of these forms of law can be dealt with in the detail they deserve. I concentrate on the most pertinent aspects for the purposes of outlining why companies might be choosing to adopt the language of citizenship in this context. Though perhaps, in part as a

[viii] Of course there are various other ways to discuss 'citizenship' : not only citizenship as a legal status or system of rights but also as a form of political activity, or as a form of identity and solidarity (see Bosniak 2000). But for the time being, however, I confine the categorization to the two aspects discussed here. For a preliminary analysis of how acts and status citizenship capacities might be related through a consideration of Hans Kelsen's positive approach to law see Thompson 2006. In addition, I would suggest that the category of 'identity' as deployed by Cane, *et.al.* (2008) in their analysis of corporate citizenship is one that attempts to bridge this division.

consequence, the nature of 'law' itself is also being recast in this context. The second main aspect is to develop an argument about what is termed here the 'quasi-constitutionalization' of the international arena. I begin by outlining this aspect but both of these -- juridicalization (the subjecting of an increasing range of matters governmental to legal forms of scrutiny and adjudication) and constitutionalization (involving a distribution of powers) -- are closely linked.

Customary, private and administrative forms of law are often considered together and they overlap in terms of their embrace. Supposing we define 'the law' as little more than 'official rule making' (a liberal definition indeed!), then these forms of law emerge rather easily as a consequence. Customary law is as it seems: those rules and norms that arise through customary practices in various arenas, that serve to condition, organize and legitimate the routines of expected behaviours in those situations and under particular circumstances, but which have no necessary 'legislative' moment or formal judicial character (Perreau-Saussine & Murphy 2007). Private law is a rather more formal affair but one that also arises in a kind of spontaneous manner as a result of 'customary practice', if in respect to overtly private commercial matters in distinction to those in the public realm (which are covered by public or civil law). However, these forms of private law are subject to formal procedures of adjudication taking place in tribunals, arbitration bodies, and sometimes in privately constituted and administered courts (Weinrib 1995; Crane 2005). And analogously administrative law (or regulatory law as it is sometimes termed) can be considered as those mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision, and legality, and by providing effective review of the rules and decisions made in the light of these mechanisms (Dyzenhaus 2005; Kingsbury *et al* 2005; Salzman 2005; Stewart 2005; Zaring 1998)[ix]. In the global context of commercial activity it is mainly private law and administrative law that are brought into focus. And these forms of law display complex relationships to international law proper and 'the rule of law', key aspects of which are explored in a moment.

[ix] There is a complex relationship between law, legislation and the courts in the case of administrative law (and indeed, in respect of all law). But it is important not to reduce 'law' to either legislation or court activity, though they are clearly closely related in various ways. Legislation produces laws and the courts adjudicate on them but neither of these are the law as such. Rather the law operates 'between these' as it were; it is the forms of administrative procedures that are initiated and legitimated by legislation, and which are adjudicated on by the courts. Clearly, this conception of the role of law – as one of procedural rules – nicely meets the protocols of administrative law as defined here. Indeed, at one level - given this definition -- *all law* is simply sanctioned administrative rules and procedures of one kind or another.

Constitutions are relatively modern instruments of rule, and are closely associated with the formation of national states from the 18th Century onwards. But there has been a proliferation of these as written documents since the Second Word War as decolonization gathered pace. Traditionally constitutions do two basic things: they allocate powers and they determine rights and responsibilities. One of the issues associated with the writing of constitutions is where exactly to place these two aspects. The first aspect has to do with 'order' broadly speaking: it constitutes the institutions of the state and governance and their respective powers and relationships, distributing powers between these and -- very importantly -- limiting them in various ways. The second aspect has to do with the establishment of the civil rights, obligations and responsibilities of the parties to the constitution, not just of citizens but also of the other institutions of state. Broadly speaking the evolution of constitution making has seen the move of the issues associated with 'order/powers' from the front of these documents, with the question of 'rights/obligations' being tucked away at the back, to the reverse; rights and responsibilities now occupy the bulk of the documents at the front while questions of institutions and powers appear at the back (a classic example of this can be seen in the case of the 1871, 1919 and 1949 German Constitutional documents). Most modern, post Second World War, constitutions now follow this latter pattern. As a slight aside here, this is not unconnected to the way Liberalism has itself been recast over this period. The original issue for Liberalism in the wake of the 17th Century European religious wars was one of establishing a certain 'liberal order'(both domestically and internationally), from which it was expected rights, justices and fairness would follow. Modern – particularly post Rawlsian -- Liberalism reverses this direction of expectations: justices, fairnesses and rights come first, which will in turn secure the order necessary for social cohesion (c.f. Fraser 2005). And this pattern of expectations is mirrored in a whole host of other institutional contexts that deal with social governance: witness the UN system as a conspicuous example -- human rights are paramount (cf. Campbell, *et.al.* 2001).

My argument is that companies are tapping into this trend. They want to have their rights and obligations more clearly articulate and formally recognized like everyone else. They want recognition for the civic duties and social obligations being thrust upon them or for which they are voluntarily taking responsibility. They want to become more openly political, to operate more transparently as public actors and be recognized as such. They are tentatively moving in this direction, quietly exploring the implications of claims to the capacity of citizenship that these moves entail, but at the same time opening themselves to a different type of scrutiny.

In addition, I would stress three further issues that might be behind these moves which are part of several larger trends underway in the international system.

The first of these is the growth of private forms of self-regulation and governance. This is part of what has been termed elsewhere the 'second phase of globalization' (Hirst, Thompson & Bromley 2008): a move from the emphasis on the flows of resources over space, territories and borders to the setting of global standards that do not involve flows of resources over space to secure 'global integration'. This second phase has seen the proliferation of such standard setting activity associated with a huge range of commercial activities. It involves sometimes the delegation, sometimes the devolution but often the simple seizure of the capacity to set these standards by quasi-private or totally private bodies. These now both claim and exercise the public powers associated with the governance of activities involved with these maters.

A second trend is the one alluded to above: the growth of juridicalization of international matters involving legal forms of deliberation, adjudication and judgement. This is something that does no just affect commercial activity of course. A growing number of areas are affected by a similar trend: human rights, environmental protection, conflict and wars. All of these are increasingly being subject to legal forms of international regulation and governance. Indeed, this looks to be a ubiquitous trend, and an un-stoppable one (Campbell, *et al*., 2001).

Finally, of course there is the surrogate process of constitutionalization; itself not a coherent 'programme' or set of rounded outcomes but full of contradictory half-finished currents and projects: an 'assemblage' of many disparate advances and often directionless probing. But a process nonetheless: it is building norms of conduct, rule making, and a distribution of powers in a 'global polity' that is itself in the making by this very process. Or that is the argument of its proponents.

Specifying and understanding this process of constitutionalization is made doubly difficult by the fact that there is no single stable conception of what it means or how it operates (Cass 2005). There are various forms or conceptions, though certain common characteristics can be discerned if it is to be described as a constitution: first, it must involve some notion of a *political community* in respect to which the constitution is established or which it addresses; second, it must feature a *participatory process of deliberative law making*, though, given the discussion above about the definition of the

law this leaves quite a wide opening for the kinds of deliberation and laws that are involved in this part of the process; thirdly, it (re-)arranges or *realigns relationships of power* amongst the parties to the constitution, specifying their respective domains of authority and the limits to these; fourthly, it must command at least some minimal level of *social acceptance and legitimacy*, not only amongst the parties immediately involved but also in the eyes of those outside of the process; fifth, constitutions usually involve the establishment of a *new fundamental norm (Grundnorm)*, which founds the system, underpins it operational characteristics and establishes its typical functional style[x]; and finally, the overall point of any constitution is to establish *behavioural constraints* of parties, to establish a kind of 'order'.

Given these typical characteristics there is an added difficulty that they can in principle be made manifest in various contexts or under various forms. First there is 'constitutionalization' arising in the context of *institutionalized managerialism and rule making*, which is probably the most straightforward and least demanding of its manifestation in terms of formal structure building. Then there is an approach organized around *rights based constitutionalization*, something alluded to above when discussing human rights. The ubiquitous nature of human rights discourses in relation to international matters makes this approach a highly significant one in current debates. Thirdly, there is an approach which stresses *judicial norm generation* as the key to the constitutionalization process, so that it is judgements made by courts that constitute the main axis around which such constitutions are built and supervised. And finally, as we will see in a moment, there is a lively debate as to whether *transnational and transformational constitutionalization* is an emergent approach, dependent upon the undermining of the national arena as the main focus for constitutional matters and citizenship, and the refocusing of these at a global level.

The point of this brief summary of the issues around which the current constitutionalization debate is located is to indicate its complex and many facetted nature. None of the above characteristics or approaches are entirely separated or isolated. Instead we have a cross-cutting and overlapping matrix of elements all of which poses many difficult and controversial issue, some of which will be explored in a moment. And companies are caught up in these wider processes: the idea of corporate citizenship and global corporate citizenship finds a convenient home amongst these linked

[x] This could be in the form of a Treaty, a formal constitutional document, a Bill or Rights, etc., that is the basis of law. The ambiguity in what the *Grundnorm* involves – indeed, whether it can exist at all -- is the subject of much debate which cannot be rehearsed here, but see Thompson 2006.

processes. In the next section I outline several takes on the idea of transnational constitutionalization -- or 'quasi-constitutionalization' as I prefer to call it – which focuses on its commercial aspects. As we will see, this involves many of the features outlined above in this section, but also falls short on many of them (which presents a problem of evaluation as to the adequacy of any of their claims to a constitutional character – can all these be legitimately claimed as 'constitutions'?).

6. Characterizing the New International Constitutionalism

There are several stands of constitutionalist debate in relation to commercial activity that are outlined here. I discuss these in turn, though again they are often overlapping and partly fused together.

The *first* of these is the Neo-liberal stand (Jayasuriya 2001; Gerber 1994). This very much welcomes the developments discussed so far, which it sees as a form of *economic constitutionalization without politics* at the international level: the final vindication of the 'law and economics' school's long quest for such an outcome at the domestic level. From this perspective constitutions are viewed as a decision making tool, based upon rational calculation and an organicsist invisible hand. The history of the present celebration of this position can be traced to the German Order-liberal tradition closely associated with Freiberg School theorists such Böhn and Euken in the 1940s (and also closely associated with von Hayek), who fought so hard to have this position embodied in the German constitution of 1949 (in which they were partly successful --- see Gerber 1994; Grossekettler 1996; Nörr 1996).

A *second strand* is that typified by Gunter Teubner's use of a Luhmannesque framework of system and subsystem communicative action to characterize the constitutionalization of the international sphere (despite the well known differences between Teubner and Luhmann). Teubner is an inventive and prolific writer and exponent of this position, which views the current international commercial system as a vindication of the basic intellectual architecture of Luhmann's approach (e.g. Tuebner 1997, 2002, 2004, etc.). For Teubner these developments are a key indicator of a wider radical transformation of the international system wrought by the forces of 'globalization'. In Teubner's new world globalization finally breaks the link connecting the law to democratically

constituted political discourses and practices. It produces a double fragmentation; cultural polycentrism and functional differentiation. New 'linkage institutions' create a new law directly by transjurisdictional operations without being translated into formal political issues. They escape and evade regulatory claims of both national and international law and practice, and form a legal sovereignty of their own (for instance a new *Lex Mercatoria* and *Lex Informatica*).

This global law has no legislation, no political constitution, no politically ordered hierarchy of norms. It is a 'polycontextual' law; law with multiple sources displaying no unifying perspective, produced by different mutually exclusive discourses of society. Such a system of recursive legal operations works in terms of more than one code, combining conjunctural and disjunctural operations, connected through transjurisdictional operational networks. It displays a heterarchical multitude of legal orders rather than a clear and traditional differentiation into legislation and adjudication; a plurality of law production comprising a patchwork of ethnic and religious minority laws, rules of standardization, variable professional disciplines, contracting, intra- and inter-governmental rule making, etc. (Walker 2002). Curbing the abuses of power – by the rule of law in the traditional sense – will not help in civilizing this many headed hydra. Indeed, we must face the impossibility of constitutionalizing this legal multiplicity in the language of legal restraint or the arbitrariness of the sovereign. In the final analysis, there is no sovereign power left.

From a constitutional point of view, however, this imagery is complex and somewhat ambiguous. For Nikolas Luhmann -- the spiritual father of this position -- the social order is made up of a series of (relatively?) autonomous spheres of meaning, displaying different 'logics of observation'. These systems may be economic, political, or legal systems, organizational entities or even individuals. Each of these systems orients itself according to its own distinctions, its own constructions of reality, and its own observational codes. Here the global system is characterized by overlapping relatively enclosed systems which poses the problem of their macro-level coordination and governance. Thus at one level, at least, there can be no formal 'global constitution'. The constitutive differentiation of society into (sub)systems means that they all operate according to their own distinctions, thereby continually reproducing new differences as they abut and collide with one another. The best that can be expected from this is loose couplings between different subsystems (of which the law is a key one). This frustrates any attempt at overall coordination or governance by a competent authority. Only 'self-governance' is possible driven by the enclosed

inner logic of each (sub)system. One consequence is that new perturbations, differentiations, irritations, provocations and unexpected events continually arise in the world. This enables Tuebner to align it with an understanding of the global as a radically differentiated 'polycontextual' space, where territories and national sovereignties are broken apart as contingent events produce a 'global law without a state': a transnational legal order for global markets that has developed outside of national and international law strictly speaking (Teubner 2004a and 2004b).

What to make of this vision? The problem is that it may be little more than an interestingly imaginative flight of fancy. Even Teubner recognizes that such law – if it exists in a stable and significant form – is always judged against and according to existing legal orders. Indeed, the strong trend in the contexts that Teubner celebrates is towards the Anglo-Americanization of such law (Teubner 1997, p.782; Kelemen, & Sibbitt 2004; Levi- Faur 2005; Applebaum, *et al* 2001, Part 4; IJGL 2007). It is being driven by international legal firms and MNCs who all still have their own strong national organizational patterns and routines. The older and traditional trans-European network of constitutional lawyers and arbitration judges, who found and cultivated a specialist niche in the ICC and Hague Conference arbitration panels, are being displaced by new aggressive transnational legal firms under Anglo-American and German legal dominance (though see Kagan 2007). What is more, the empirical evidence suggests that the appeal to such transjurisdictional law is highly limited and marginal, and may even be declining, as MNCs and others seek judicial redress in national courts (Dasser 2001). Gessner, *et al* (2001) thus conclude: "The *lex mercatoria*, at least at the present time, seems to have far greater significance in the minds of legal scholars and sociologists of law than it does for merchants themselves" (p.18).

A *third strand* in this debate would be concerned with the political legitimation of this emergent constitutional regime (if it exists as such), and is associated with a reflection on a lively debate in the UK about the nature of the British Constitution (in the following paragraphs I draw liberally on: Loughlin 2005, 2006, 2008a, 2008b; Cane 2005; Law 1995; Tomkins 2005, amongst many others). This does not start with any preconceived 'model' of a constitution, or of an emergent order (as does Teubner, or the Freiberg School, for instance) but, rather, is based upon British pragmatism and an investigation of the immanent practices of the British constitution. Although this might seem a parochial concern, I will argue that it offers a rich language and conceptual resource for investigating the international sphere in this regard.

The debate in the UK is orientated around two different conceptions of the British Constitution (BC): a 'Republican' notion that argues there is already in place a semi-written and republican constitution based upon documents initiated after the Civil War in the 1640s-1670s; and secondly a 'Common Law' version that maintains the constitution is not a written one, but rather a result of a continually evolving set of acts and decisions made in a court led environment. For the purposes of my remarks I take the Common Law version. Why? I will argue that the nature of the BC is very much like the international quasi-constitutional process discussed so far: it is an assemblage of practices rather than a set of fundamental laws; it is a political constitution, based upon an evolving political compromise, rather than a legal constitutional settlement based upon a firm written document; it involves a combination and coordination of public and private rule making designed so as to preserve both the social autonomy and the public interest; it represents a structural coupling between diverse and fragmented social discourses. Is this not a reasonable description of the international arena as well?

The British debate is most concerned with the nature and fate of the Rule of Law (RoL) in this context. It is not quite so ready to give up a strong notion of the RoL as many are in the context of the 'global constitution' making discussed so far: here there is a tendency to concede the RoL, first to a notion of the 'rule *by* laws' (which is not the same thing as Rule *of* Law)[xi]; second to the rule by lawyers and law firms (who are in part making the rules as they go along in the international arena – which might be described as a new 'Guild of Lawyers': a self-perpetuating and self administrating club of craft professionals who are subject to little external monitoring); and thirdly (and perhaps most controversially) to a rule by aging law professors who are the ones populating the various institutions of private law making and networks of rule making that is substituting for the RoL in the international domain (and one that might be described as a new 'Clerisy of Law Professors': a ruling elite who operate rather like the clergy in Medieval times, subject to their own self-contained rules, procedures and ideological presuppositions that are difficult to challenge).

[xi] This distinction is important in the case of those countries – often authoritarian in character – that are typified by a codified legal structure but that do not practice the basic distinctions associated with what is traditionally considered to be the RoL in Western liberal democracies. For a consideration of the distinctions associated with the RoL in different cultural and political context see Peerenboom 2004. For a most informative discussion of the role of the rule by law and rule of law (though it does not explicitly draw this distinction) in the case of China see Bracker 2006.

Many might suggest that this is all very worthy, but how can these sentiments be rendered into principles that ensure the legitimacy of this British evolving system? Here the 'Diplock Principles' are appealed to (named after Lord Chief Justice Diplock who laid these out in the 1980s). These principles are designed to guide (public) authorities in the conduct of the business of administration so as to provide a minimum of account and transparency to their proceedings. In principle there seems no reason why they should not be extended into the private sphere as well. I mention just the four main ones of these:

1) *Proportionality*: the idea that actions should be proportional to the offence, harm done, or possible consequences and outcomes. This is also a criteria that is invoked in the case of armed conflict. It ensures a modicum of restraint on the part of those responsible for administrative (or any other) action.
2) *Reasonableness*: the idea that there should be good reasons for things, and that the authorities should not act without good cause. This is sometimes termed a 'rationality' criteria. It requires authorities to exercise judgement commensurate with an appropriateness to the circumstances.
3) *Procedural fairness*: this idea is most pertinent in the context of administrative and regulatory law. It speaks against injustice on the part of the authorities. But is has nothing necessarily to do with *participatory* fairness, though it is often confused with this. The criteria does not address who should be consulted or participate.
4) *Due process*: this is the idea that there is a 'duty to hear the other side' and thereby allow disputation. It serves to open up administrative matters to a transparent procedural framework where formal challenge is allowed and rectification sought.

All these criteria are argued to allow discretionary decision making but also to constitute ethical ideals as to the virtuous conducts of the courts, policing, statute making and the state's affairs; they create a prudential moral force for the control of public affairs. I would like to suggest that they could offer an effective set of criteria to be imported into the arena of quasi-constitutionalization so as to open up a discussion of the legitimacy of that rule making and power distribution system (a somewhat similar set of criteria/principles is suggested by Stewart 2005 though from a different institutional context). More on this in a moment.

But first there is a *fourth and final strand* in this debate, which, whilst it is sensitive to the language of constitutionalization in this area and deploys certain of its terminology, I would suggest has a basically different underlying position. This is to argue that fundamentally we should give up on the language of 'constitutionalization' and, instead adopt the language of 'governance' (e.g. Cohen & Sable 2006; Zaring 2005). In Cohen and Sable's formulation -- very much drawing on a reflection from the EU and its governance practices -- this position stresses the role of multilevel governance, open methods of coordination, expert committees, and the like. Given the well known difficulty of the EU in developing a formal constitution of its own, the idea is to give up on this altogether and go for a different conceptual language. Constitutionalism is a language of state making in particular, it is therefore unsuited for the new ear of globalization. The EU is not a state: at best it is a form of 'confederal public power', and this should be the model for the wider international/global system. The idea would be to 'scale up' what is thought to be the distinctive aspects of EU governance and administrative action so as to address these to a wider global arena.

One obvious problem with this approach is that the EU is already a deeply specified public legal order, but this is not the case with the global arena. The RoL already operates effectively in the case of the EU so its administrative laws and procedures are subject to this constraint and have to operate within this rule. At a more general level much of the analysis of global administrative law and the globalization of the RoL itself is couched in terms of its compatibility with or complementarity to existing international law (e.g. Dyzenhaus 2005; Salzman 2005; Zaring 1998; Zifcak 2005). But this is not the main problem. The issues highlighted here is one where there is no competent international public law (unlike in the case of the EU): how do we ensure at least some elementary conformity to the RoL in a system where there is no competent authority with the means to enforce whatever quasi-constitutionalized 'administrative law' there may be in the making?

7. Where Does this Leave Us?

Nothing argued above should lead us to feel comfortable about the way the international system is evolving in terms of its governance or quasi- constitutionalization. The RoL is effectively being given away here and there seems little that can be done to stop it. At best some *procedural* principles of democracy are still in play but *substantive* concerns are necessarily on the back foot. In this environment to defend a strong version of democracy, citizenship or constitutional practice is

difficult. In addition, there remains an evaluative issue as to whether a good deal of the strands of commercial constitutionalization that are being discussed in the literature amount to proper constitutionalization anyway. The characteristics and features of constitutionalization outlined above do not always seem to the ones appealed to in those concrete analyses deployed in the cases of trend developments in the international economy discussed earlier. There is a danger that boundaries of the category 'constitution' are so expanded that it becomes almost meaningless as a way of characterizing contemporary governance practices. Nevertheless, in my view there is sufficient evidence that a process of quasi-constitutionalization is actually going on despite these reservations.

But it might be possible to invoke several criteria of governance to provide for some legitimacy in this arena, and here I have argued that the 'Diplock Principles' of British constitutional practice might serve as a language to think about this problem. These principles suit the decentralized nature of the current environment, even as it escalates beyond a clearly defined or controllable process.

My summary of the governance implication of this discussion can be found in Figure 3, which I term governance regimes for global legal order because I still remain concerned that there is some grounding of the international commercial sphere in a public legal order.

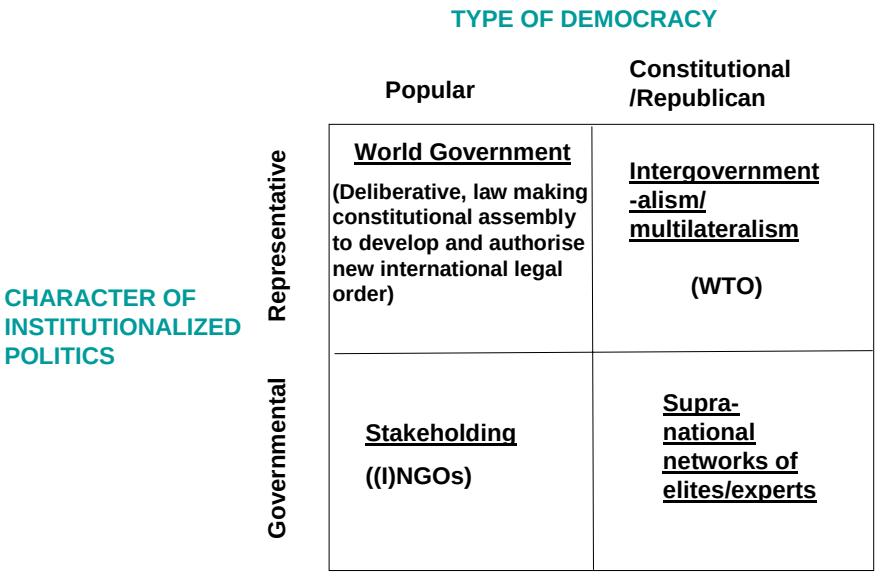


Figure 3: Governance regimes for Global Legal Order.

There are two dimensions in play here. Along the horizontal axis are 'types of democracy': 'popular' refers to a situation typified by political parties and direct engagement; 'constitutional/republican' to a more procedural emphasis on the division of powers proper and a space for various collective 'civil actors' to affect outcomes. Along the vertical axis are institutional characteristics of politics: the 'representative' form invokes parliamentarianism; while the 'governmental' emphasises the role of interest groups and social partners. Within the cells marked out by this matrix several forms of legal governmental orders can be found. We could all have our particular favourites amongst these. For fairly obvious reasons associated with the analysis undertaken above mine is that characterized by the inter-governmentalism/multilateralism option (of which the WTO represents an example). Unfortunately this is the poor cousin of governance modes in the debate about 'global governance', because it is thought to be increasingly redundant in an age of transnational, transterritorial and transformational relationships. But for all its shortcomings it remains one which at least gives some semblance of feasible democratic control. However I would suggest that collectively these all mark out the range of possibilities that are still open at the international level, though some are obviously more practically likely (and normatively more acceptable) than others. And thinking just the of the EU in respect to this matrix shows that elements of all four remain present there: the EU has a parliamentary arena of deliberation of sorts; it is an instance of inter-governmentalism/multilateralism; it pays particular attention to NGO type bodies who have access to decision making via the open methods of coordination and 'commitology'; and it combines all this with a reliance on networks and experts..

I would describe the possibilities laid out in Figure 3 as an 'agonal public space': a space of 'unity-in-diversity' or 'unity-in-disagreement'. This might make it a *durable disorder* of sorts (rather than a non-durable disorder – a decidedly uncomfortable prospect – Thompson, 2007, 2008d). But this hints at the source of my residual disquiet and anxiety for this area.

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