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1

Introduction

Globalization is currently considered to be one of the most important challenges to the state and international systems, driving structural changes in both. Yet globalization is not entirely new; scholars have distinguished various phases of it, beginning with the rise and interaction of the first empires (Held et al. 2003: 415–35). Furthermore, the term “globalization” lacks a precise definition, despite numerous academic publications shedding light on the phenomenon, although obviously there are a number of processes that mark the contemporary period of globalization, beginning after World War II and accelerating following the fall of communism. Such processes affect the whole planet and almost every aspect of life.

Economic interactions between states have increased and intensified as previously secluded markets have become more and more accessible over the last two decades. Globalization is generally a positive experience for those living in the northern hemisphere who have advantages such as spending their vacations in remote countries, eating at the local McDonald’s there if they get homesick or cannot take the local food, and buying exotic produce at their local supermarket after returning home in order to relive their foreign experiences. In general, globalization is marked by high mobility – of individuals, workforce, capital, goods, information, and ideas. However, this mobility has severe repercussions that pose grave dangers to human life and the entire planet. Some of these problems were concealed by the Cold War, while others have emerged only recently.

Highly interwoven markets and the mobility of goods, services, and workforces characterize economic globalization. One benefit is the worldwide availability of virtually everything, everywhere. However, globalization has also resulted in complications, for example, by

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aggravating the asymmetries in economic wealth between member countries of the Organisation for Economic Co-Operation and Development (OECD) and the rest of the world. Events like the 1997 East Asian financial crisis or the 2008 global financial crisis triggered by the subprime mortgage crisis demonstrate the instability of the world economic system and the potential for future economic disaster. The proliferation of weapons of mass destruction and the launching of the asymmetrical war on terror are by-products of military globalization and reveal the vulnerability of individual states in the current post-Cold War era. The high degree of mobility also impacts upon sanitation, since pathogens, such as the Human Immunodeficiency Virus and the Severe Acute Respiratory Syndrome virus, can now travel the world as quickly and easily as any airplane passenger. Finally, many global environmental problems have emerged in the wake of globalization. Environmental pollutants, such as chlorofluorocarbons (CFCs), disperse around the globe via ocean or air currents, with grave consequences for the world environment.¹

Such examples give rise to the question of how the problematic aspects of globalization can be overcome. This issue concerns, in particular, the role of the state. One of the key objectives in governing a complex, modern society is the guarantee of both internal and external security, that is, the prevention of harmful events through stabilizing or preserving measures like peacemaking or environmental protection. In the pursuit of such objectives, the state holds the supreme authority and acts as the central institution, determining, issuing, and enforcing regulations from the top down, in a strict hierarchical order (Zürn 1998: 41; 169). Carrying out this type of governance, *governance by government*, is increasingly difficult for individual states as the example of complex, global environmental problems shows. Even 40 or 50 years ago, a polluter's effects were usually limited to his own immediate vicinity; transboundary pollution generally negatively impacted only upstream and downstream neighbours. In such cases, it was much easier for the state to meet its duty to protect its citizens from harm through specific domestic regulatory measures or through bilateral or trilateral negotiations.

The increased mobility caused by globalization has shifted the concept of vicinity, so the prevention and mitigation of environmental risks are much more difficult. Such phenomena as the depletion of

¹ For details on the dimensions of globalization see Kjær 2004: 65–77; Held et al 2003: 387–412.

stratospheric ozone or anthropogenic global warming pose risks that are indeed worldwide. Because of their mobility and ubiquity, the problematic aspects of globalization can evade regulatory control by individual states.

The adverse effects of globalization are felt globally, while their cause often remains nebulous. According to Beck, this gives rise to a “world risk society” collectively affected by these risks (Beck 1997: 79; 2005: 22–9).

With the instruments it has at its disposal, the individual state cannot protect its citizens from global risks (Zürn 1998: 114–15). The enforcement of national law and the powers of an administration are generally limited to the state’s territorial boundary. In view of the magnitude and complexity of global environmental problems and their harmful impacts on a population, the state is not able to perform adequately the key task of ensuring the security and welfare of its citizens. Therefore, globalization also entails the deterritorialization or transnationalization of regulatory areas (Beck 1997: 44–5; Hobe 1999b: 256; Hingst 2001: 112ff.).

Nevertheless, how can global risks be regulated and who is responsible for protecting the world risk society from the adverse effects of globalization given that there is no world government with the overarching authority to occupy these regulatory gaps and protect and preserve the welfare of the world population?

This gives rise to the question of what alternatives might be available to organize governance on a global scale (Rosenau 1992: 3). Political scientists have introduced the concept of global governance as a way of addressing global problems cooperatively. Global governance takes a universal approach to the resolution of global problems, aiming to reshape both institutional organizations and the attitudes of key actors; these include more or less anyone and anything able to contribute to a solution. While this approach might seem arbitrary, it is based on the idea that individual states and the traditional, state-based international order are not capable of tackling these issues on their own. Scholars emphasize here that the model of state-based governance is not exclusive; the implementation of other approaches is certainly conceivable (Id.: 4–5). This position recognizes that governance does not necessarily have to be backed up by a monopoly on the legitimate use of physical force, and that it is not always the state alone who acts for the common welfare.² Accordingly, the Commission on Global Governance defined

² Cf. Zürn 1998: 167–8 for several examples.

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governance as:

...the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest. (Commission on Global Governance 1995: 2)

Governance is disassociated from the state. The state may seek cooperative ways and exercise governance with civil society actors, *governance with the state*. Alternatively, civil society actors may act alone as a form of self-regulation, *governance without the state*, sometimes also described as *private governance* (Zürn 1998: 170f.). Global governance relies on governance contributions from a large variety of actors or coalitions of actors, allowing for several courses for action in order to address global problems.

As a result of the constraints that globalization imposes on a state's problem-solving capacities, the state is ultimately forced to relocate its governance resources to the transnational level (Scharpf 1991: 622). In order to work towards solving global problems, the state enters into "hybrid, multiparty, collaborative governance arrangements that pool and recombine the resources of a variety of state and non-state actors." These governance arrangements disaggregate and reassign powers that are usually exclusive to the sovereign state, pooling them with the powers, resources, and competences of other actors (Karkainen 2002: 206–7). Because of their informal nature, these governance arrangements are aptly described as "transnational public governance." The use of the prefix "trans-" implies that these arrangements are concluded, and powers assigned, beyond the sphere of the nation-state, further distinguishing them from the highly formalized international domain.

As regards the institutional component of transnational public governance, bureaucracy networks have recently come to the attention of international lawyers (Slaughter 1997; Zaring 1998). These networks emerged as a result of transnational relationships between government officials, which have been observed since the 1970s (Keohane and Nye 1974; Tietje 2001). Closely connected to the emergence of networks is the role of law as an instrument of governance. Ostensibly, these networks are also involved in the creation of norms. In contexts of private

governance, scholars have observed the emergence of transnational law. The primary example here is *lex mercatoria*, the private rules governing worldwide trade. These rules can overlap – sometimes even becoming substitutes for state-based law – a process described as *legal pluralism*: the coexistence of legal orders of different provenances governing similar subjects. Scholarly interpretations of this phenomenon are divergent. Some consider it to be a sign of the growing irreconcilable differences between legal orders (Fischer-Lescano and Teubner 2004); others view it as a globally linked system of legal rules – a system of *interlegality* (Sousa Santos 2002). Here, the question is whether similar rules are also created in the context of transnational public governance and if and to what extent transnational bureaucracy networks contribute to the creation of a public version of transnational law.

Transnational public governance is not concerned only with institutions and instruments set up to solve global problems. It also must deal with problems stemming from its transnational and informal character. Scholars point out several problematic aspects of this type of governance, in particular, the “crisis of democracy” provoked by globalization (Scholte 2002: 289). The main reason for this crisis is the disassociation of the level where decisions are made and the level where they are implemented and individuals are affected. Traditionally, citizens elect a state government that then determines and implements particular measures that eventually bear upon the citizens. Global governance means that the measures affecting a constituency do not stem directly from the elected government, originating instead from institutional arrangements in which their government is one of many participants. The result is that decision-makers are not identifiable to the public, a circumstance that blurs accountability (Zürn 2004: 260). Consequently, territorially rooted mechanisms of democratic legitimacy do not effectively restrain transboundary governmental activities (Scholte 2002: 290). It is unclear in such cases whether governments are still clearly responsible for such developments (Kaiser 1998: 4).

Transnational public governance thus raises two kinds of questions. The first concerns its exact features. It has already been pointed out that bureaucracy networks and transnational law could be considered as possible institutions and instruments of transnational public governance. While the internationalization of national administrations and bureaucracy networks has already been subjects of several studies, an investigation of the legal implications is still missing. Transnational law not originating from private actors has also not yet been examined sufficiently. To address properly the question of legitimacy, it is

important to determine how bureaucracy networks and transnational law are formed and operate and how they are interconnected with the formal legal order, and this makes the study of certain policy areas necessary.

Only once these insights have been gleaned from the practice of transnational public governance can the second set of questions concerning the legitimacy of bureaucracy networks and transnational law be tackled. This requires an assessment of the networks' actual significance, as well as of their possible interference with national legislation. On the basis of this knowledge, the question of legitimacy, as it arises in the context of transnational public governance, can be studied.

This book will attempt to address the legal aspects of transnational public governance and certain issues of legitimacy. To do this, it is necessary to first provide a general idea of the role of the state in the age of globalization. Some authors consider the growing role of non-state actors and the apparent impotence of the state as a sign of its diminishing role (Hobe 1999b: 269). Others take a radically different stance on the state's role, asserting that its powerlessness is a "myth," as globalization does not only constrain, but also empowers the state and its institutions (Weiss 1997; 1998: 188ff.; 2003a: 15ff.). The state has sufficient room to maneuver if it makes intelligent use of its assets. One possible means for the state to regain its effectiveness is through close interaction with other actors, such as other states or societal actors (Weiss 2003b: 298, 308–9). Part I will examine the role of the state and lay the groundwork for the rest of the study by outlining the current discussion on the ability of the state and the state-based system of international organizations (IOs) and international law to address global problems. It will focus on the current research on informal structures and governance in transnational settings. Of particular interest here are the recent findings concerning the structure of transnational networks of administrative bodies and the impact of transnational law.

Part II will explore public governance structures by examining a specific policy area in which the above-mentioned problems are prevalent: global efforts in the field of chemical safety. Chemicals pose a global problem; the usefulness of examining this case here lies in the facts that this has not yet been fully investigated and that few formal structures, such as international treaties, currently exist in this area. Part II will identify the relevant actors and the applied instruments, focusing on informal structures and rules. Further insights will be gained through the methodical analysis of relevant documents, such as memoranda of understanding (MoUs), terms of reference (ToRs),

manuals, and other agreements, which will be supplemented by legal and toxicological literature. Since there are few documents concerning informal legal structures, information supplied in interviews will be relied upon to complete the overall picture. A legal sociologist and the author held guideline-based interviews with experts (*leitfadengestützte Experteninterviews*). Approaching the interviewees with an open set of guidelines instead of a fixed set of questions ensured that rich and relevant material could be collected (Meuser and Nagel 1991; 2006). The interviewees were officials in government agencies or IOs and scientists in private research institutions. They actively participated in these structures as delegates from national agencies, IOs, or scientific institutions and thus could provide deep insights into actual practices, which in some cases might deviate from the written rules laid down in the official documents. As the experts only agreed to be interviewed on condition of anonymity, no details regarding their occupation or employer can be provided.³

Part II will provide an overview of the factual situation on institutional and instrumental arrangements in the field of global chemical safety. The empirical findings will then be analysed and evaluated in Part III. The aim is to obtain a clearer picture of transnational public governance. From this analysis, it will be possible to identify the role of the state in international governance and the significance and problem-solving capacity of the state-based system, which involves IOs, public administration, and legal governance instruments.

Once a clearer picture of transnational public governance has emerged, the matter of its legitimacy can be addressed. If transnational public governance is a viable and practical method of solving global problems, the challenge will be to identify factors that can contribute to its legitimacy.

Weber has remarked that the bureaucracy is technically superior to other forms of organization because of its “precision, speed, unambiguity, knowledge of files, continuity, discretion, unity, strict subordination, reduction of friction and of material and personal costs.” This does not mean that state bureaucracies do not occasionally pursue their own power interests; however, “in principle a system of rationally debatable ‘reasons’ stands behind every act of bureaucratic organization” (Weber 1978a: 973–9). Thus, it is generally assumed that administrative actions are based on “good” reasoning. But what criteria are

³ On the interviewees’ occupations and backgrounds, cf. the overview in the annex.

acceptable for justifying this reasoning if the administration operates in a transnational context? Part IV will attempt to determine such factors and investigate their application in transnational public governance arrangements.

This book will make extensive reference to the German legal system, particularly in the areas of constitutional and administrative law. Germany's constitution – the *Grundgesetz* – is relatively modern and has served as a model for the constitutions of other countries. An examination of the *Grundgesetz* may be of a broader international interest; however, the main purpose for using it here is its explicit mention of how the state is to conduct foreign affairs, a subject of several rulings of the Federal Constitutional Court. Collectively, the material on Germany's international relations, the transfer of sovereign rights to supranational organizations, and the exercise of authority in settings beyond the state is quite rich, especially since Germany's foreign policy has undergone several changes since the late 1980s. Therefore, despite the fact that this book relies in part on the distinctive characteristics of the German legal system and particular matters discussed here, such as the relationship between domestic and international legal orders, the exercise of foreign relations and the legitimacy of state activities exist in all Western states, and it will be possible to draw several general conclusions that are applicable to most Western legal orders. Occasional references to US constitutional and administrative law will also be made to illustrate certain crucial points.

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