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## Introduction

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# Symposium

## Reifying Law—Rule of Law, Government, the State, and Transnational Governance

### Introduction

Larry Catá Backer\*

The idea for this symposium grew out of a problem that has become more acute in the discourse of contemporary globalization: what are the basic assumptions from which regulatory systems are elaborated? Globalization may be shaking the foundations of contemporary systems, centered on a hierarchy of power in which the political community, organized as states, stood at the top. Government may both have a monopoly on formal lawmaking, yet official lawmaking may no longer describe the extent of formal governance in a world in which States no longer necessarily sit at the top of the pyramid of recognized power relationships and contract may serve as law in a new form.<sup>1</sup> Law,

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1. See Yuval Shany, *Notes and Comments: Contract Claims Versus Treaty Claims:*

government, the State, the community of States, and the individual (natural and juridical) serve as the basic building blocks of contemporary communal orders. Each is a set of animating ideas that used to be confined to notions of constitutionalism once confined to the territory of states,<sup>2</sup> and is now important beyond the state.<sup>3</sup> But each is also a set of methodologies through which that idea becomes manifested in communities of individuals.<sup>4</sup> Yet the meaning of these terms has proven elusive, either as ideas or as manifestations of ideas. Equally elusive is the way each of those building blocks of communal order interacts with each other in a world of people and not of ideas, though a world in which ideas can be felt as fatally as concrete falling from a scaffold. Most elusive, perhaps, is the way in which law (understood broadly) is judged good (legitimate, authoritative, civilized, and the like) or bad (illegitimate, arbitrary, savage, and the like).<sup>5</sup>

Within this complex of concepts and manifestations, law appears always to have a primary place. Despite this conceptual dynamism, the last century has been consistent in its desire to be “ruled” by law as the basic parameter of the construction of systems of government, states, communities of states and individuals. “Rule of law” both as a set of normative principles and as methods of governance, has assumed important institutional global dimensions since the establishment of the contemporary world order after 1945.<sup>6</sup> As a set of normative principles, “rule of law” has exploded from an understanding of the relationship of law, government, and the individuals who act in the name of either within political States to a search for a universal set of principles that govern the constitution of States.<sup>7</sup> “Rule of law” is now said to serve an

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*Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INT’L L. 835 (2005).

2. See, e.g., A.V. DICEY, INTRODUCTION TO THE STUDY OF LAW OF THE CONSTITUTION 107-23 (Liberty Classics 1982) (1885).

3. See Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFF. (Mar.-Apr. 1998), at 95-96.

4. See Harold Honhju Koh, Luncheon Address, reprinted in *The American Law Institute Remarks and Addresses at the 83<sup>rd</sup> Annual Meeting*, 83 A.L.I. PROC. 70 (May 17, 2006), at 65-89.

5. Compare WESTEL W. WILLOUGHBY, THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW 29-31, 35-39, 312-15 (New York, Macmillan 1924) (traditional value judgments before 1945) with Sigmund Timburg, *International Combines and National Sovereigns*, 95 U. PA L. REV. 575, 577 (1947) and Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT’L L. 783 (2006).

6. See Spencer Zifcak, *Globalizing the Rule of Law: Rethinking Values and Reforming Institutions*, in GLOBALISATION AND THE RULE OF LAW 32-65 (Spencer Zifcak ed., 2005).

7. See Larry Catá Backer, *God(s) Over Constitutions: International and Religious Transnational Constitutionalism in the 21<sup>st</sup> Century*, 26 MISS. C. L. REV. (forthcoming 2007); Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in

ideology of constitutionalism.<sup>8</sup> But it is also central to the methodologies of the construction of “legitimate” government—that is a government with respect to which there is no just reason against which to rebel.<sup>9</sup> These legitimacy principles can be reduced to methods of constructing a legal state:

“[1] the predominance of regular law so that the government has no arbitrary authority over the citizen . . . [2] all citizens are equally subject to the ordinary law administered by the ordinary courts . . . [3] the citizen’s personal freedoms are formulated and protected by the ordinary law. . . .”<sup>10</sup>

The focus is on the translation of principle to lived reality among the people most directly affected. Rule of law, as concept and method, has become a concern of States whatever their foundational ideology,<sup>11</sup> and has become part of the discourse of the behavior of non-governmental entities, especially multinational corporations.<sup>12</sup> And, its principles have begun to seep into the construction of hard and soft systems of international law, governance and behavior.<sup>13</sup> Contract regimes overseen by supra-national entities may engage the same rule of law issues, as

CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3-25 (Douglas Greenberg et al. eds., 1993).

8. See Louis Henkin, *A New Birth Of Constitutionalism: Genetic Influences And Genetic Defects*, in CONSTITUTIONALISM, IDENTITY, DIFFERENCE, AND LEGITIMACY THEORETICAL PERSPECTIVES (Michel Rosenfeld ed., London, Duke U. Press Durham 1994). On its application in context, see, e.g., Herman Schwartz, *Building Blocks for a Constitution*, 9(1) ISSUES OF DEMOCRACY: CONSTITUTIONALISM AND EMERGING DEMOCRACIES (Mar. 2004). For a critique of constitutionalism as ideology, see EDWARD MCWHINNEY, *CONSTITUTION-MAKING: PRINCIPLES, PROCESS, PRACTICE* (U. of Toronto Press 1981).

9. See, e.g., JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 41 (Harvard U. Press 2001) (political power is legitimate only when it is exercised in accordance with a constitution (written or unwritten), the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason. This is the liberal principle of legitimacy). See also Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307 (2001).

10. ANWAR IBRAHIM, *THE ASIAN RENAISSANCE* 63 (Singapore, Times Editions 1996); see also Randall Peerenboom, *Varieties of Rule of Law: An Introduction and Provisional Conclusion*, in THEORIES AND IMPLEMENTATION OF RULE OF LAW IN TWELVE ASIAN COUNTRIES, FRANCE AND THE U.S. 1, 4 (Randall Peerenboom ed., 2004).

11. See Larry Catá Backer, *The Rule of Law, The Chinese Communist Party, and Ideological Campaigns: Sange Daibiao (the “Three Represents”)*, *Socialist Rule of Law, and Modern Chinese Constitutionalism*, 16(1) J. TRANSNAT’L L. & CONTEMP. PROBS. 29 (2006).

12. See Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation’s Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 COLUM. HUM. RTS. L. REV. 287 (2006).

13. See THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1997).

founding or legitimating ideologies, as traditional nation states.<sup>14</sup>

Still, for all the agreement about the rule of law, the essential ideas and constructions remain highly contested. Law is either something inherent in communities of people or can spring only from an assertion of their will. That assertion of will might be manifested by societal action or only through the apparatus of government. That government might represent the entire sovereign capacity of the people or merely serve as a fiduciary of that power. The sovereign capacity of a people might be unlimited or it might be exercised only within the constraints of rules to which all peoples are subject. All peoples may be subject to global and thus universal constraints, or to the universal constraints of a divinely ordained system. Law, may, indeed, be limited to rules applicable to the establishment of political communities, or systems of such communities, but not of non-political systems. Or, law may be understood as an expression by any group through action or conscious design. Depending on the basic assumptions embraced (about how law “works”), the resulting ideas, jurisprudence and conceptual limits of discourse about law, communities, government, and individuals, follow. But, what follows is neither inevitable nor indisputable from out of reason, rather than from a faith in the “truth” of the core assumptions embraced.

Understood in its contemporary form as a debate about “rule of law,” the roots of this debate about the meaning and practice of law, government, State, and public officials are ancient. Its political, social and religious expressions are bound up in Bracton’s notions of *gubernaculum* (government) and *jurisdictio* (jurisdiction),<sup>15</sup> which together define the character, scope and authority of coercive systems of governance, both public and private. And Bracton is a useful beginning for a consideration of the problem. He stands at the beginning of the transformation of medieval conceptions of both to the very different conceptual understandings of law and the State. Those debates remain current, but under a constantly changing contextual landscape. Since the sixteenth century, debates about the meaning of both have gone hand in hand with the almost simultaneous construction of both the most advanced democratic constitutional States and the most authoritarian States of the twentieth century. Contemporaneously, they serve as the building blocks of both political and economic regulatory networks at the supra-national level.

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14. See, e.g., Parthapratim Chanda, *The Effectiveness of The World Bank’s Anti-Corruption Efforts: Current Legal and Structural Obstacles and Uncertainties*, 32 DENV. J. INT’L L. & POL’Y 315 (2004).

15. See CHARLES MCILWAIN, *CONSTITUTIONALISM, ANCIENT AND MODERN* (Ithaca, N.Y., Cornell U. Press, rev. ed. 1947).

Those debates have taken on greater meaning with the advent of globalization and the elaboration of transnational systems of governance. *Gubernaculum* and *jurisdictio* serve as the basis for both making an object of law distinct from its origins and for understanding the parameters of its “rule.” Law as an object can be transported, adopted, moved, and negotiated detached from any particular government or individual can serve as a powerful transnational force and also a limit on the power of individuals or institutions to subvert it. As evidence of governmental will, however, it may be far more parochial. These differences become critical as the world moves toward systems of coercive global law, understood either as common law binding on States, as the precursor to global governance institutions like the International Criminal Court,<sup>16</sup> or global private law systems based on contracts with public law characteristics.<sup>17</sup> But its jurisprudential expression, especially since the mania for positivism in the construction of political “constitutional” societies took hold in the nineteenth century,<sup>18</sup> produced a certain amnesia of sorts of the ancient, and often violent, contests over the nature of law and the relationship of law to government.<sup>19</sup>

This symposium explores these dynamic aspects of the relationship of law, State, and government in a national, international comparative, and transnational context. Contributors examine the issues from a variety of perspectives. These perspectives range from theoretical to applied frameworks—that is, from a set of concepts to methods of implementation. Law and governance now appear in new forms, and old forms take on new meanings within theory and as applied. The goal is to develop a more complex and realistic structure for understanding law and regulation in a globalized environment in which the traditional nation-state no longer can claim a monopoly of formal or informal power to create or enforce norms. The “idea” of law acquires distinct meanings in a global system in which multiple sources of law—States, corporations, religious institutions, and other non-governmental communities—

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16. See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9<sup>th</sup> (July 12, 1999).

17. See, e.g., Errol Meidinger, *Multi-Interest Self Governance Through Global Product Certification Programs* (Legal Studies Research Paper Series, Paper No. 2006-016, U. of Buffalo Law School Baldy Center for Law and Social Policy), available at <http://ssrn.com/abstract=917956> (last visited Jan. 16, 2008).

18. See PHILIP ALCOTT, *THE HEALTH OF NATIONS: SOCIETY AND LAW BEYOND THE STATE* 47 (Cambridge, Cambridge U. Press 2002) (on English positivism); William P. LaPiana, *Swift v. Tyson and the Brooding Omnipresence in the Sky: An Investigation of the Idea of Law in Antebellum America*, 20 SUFFOLK U. L. REV. 775-76 (1986).

19. On both the medieval forbearers of pre-Enlightenment conceptions of law and the legal order, the relationships between public and private law, see PAOLO GROSSI, *MITOLOGIAS JURÍDICAS DA MODERNIDADE* (Florianópolis, Brasil, Fundação Boiteux 2004).

compete for authority and in which neither the state, nor its government can always command a privileged position.

The contributors have chosen to explore these complex interactions from the perspectives of both theory and practice. They have approached the issues from its roots in national as well as international governance. Together, they provide a glimpse of the complexities of modern jurisprudence in its transnational context. My contribution to this symposium seeks to confront the issue of the character of law and its ramifications for the power of the State.<sup>20</sup> The Article interrogates that discourse in modern terms. Using the *gubernaculum* and *jurisdictio* distinction in Bracton, the Article focuses on Francis Bacon's defense of James I/VI's instrumentalist view of law and Edward Coke's organic view of law as the embodiment of the normative values of the political community that serves to bind and limit its government. These opposing visions of law are then explored in the context of the jurisprudential oppositions of nineteenth and twentieth century political theory. Then, more broadly, the Article examines the Bacon-Coke opposition in post-modern and global terms. The Article suggests the way in which the constitutional deadlock of seventeenth century England, now broadened and freed of the artificial boundaries between public and private law, reproduces itself on a global level in the twenty-first century. To that end the Article explores the way in which the contested understanding of law as object or subject becomes a critical element in the management of networks of power at the international global level and in the reconstitution of legal reification in global common law and private transnational legal systems. The analysis ends with an exploration of the implications of these theories in the construction of modern transnational constitutionalism, both secular and theocratic.

Gunnar Beck<sup>21</sup> examines another aspect of law and its relationship to government. He argues that customary common law, or ethically or religiously grounded models of the individual, ultimately provides a more convincing framework for restraining *gubernaculum*. In the absence of such a firm ethical or religious foundation, judicial law-making lacks foundational solidity. For Beck, it is unclear whether such a foundation can still be provided in the absence of a unifying normative or social framework or whether, ultimately, in modern times the only credible reason for dividing law-making authority between different agencies is merely functional. But a privileging of separation and

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20. Larry Catá Backer, *Reifying Law: Understanding Law Beyond the State*, 26 PENN ST. INT'L L. REV. 521 (Winter 2008).

21. Gunnar Beck, *Legimation Crisis, Reifying Human Rights and the Norm-Creating Power of the Factual*, 26 PENN ST. INT'L L. REV. 565 (Winter 2008).

diffusion of power principles in the absence of a consensus-based understanding of organizational first principles also poses a legitimation problem. This legitimation problem becomes more acute with respect to first principles expressing communal values. These effects produce consequences that are at once significant but also partial. Their effects cannot be appreciated apart from the concentration of power in private hands, which is not subject to institutional checks and balances. Beck also interrogates the way in which law is redefining itself in the post-national context. What is clear is that in this international system the usual explanatory devices, such as the rule of recognition, no longer provide adequate means for analyzing the sources of the specific forms of authority. Neither do they serve as a useful basis for analyzing issues of legitimacy that law lends to politics, nor for understanding the scope, source and limits of legal power. But here one meets a problem of source. Law tied to the apparatus of any state, for all its defects, has the benefit of clearly defined lines of authority. In a world of diffuse and private lawmaking, the problem of legitimacy and authority becomes the central issue for law. Consequentially, it becomes difficult to define the manner in which private *gubernaculum* is or can still be restrained through *jurisdictio*. Perhaps, Beck suggests, there are no answers except that the term “Business Law” will acquire a new and all-embracing importance.

Mark Modak-Truran’s contribution<sup>22</sup> begins bridging theory and implementation. His context is the relationship of state and law in China. Modak-Truran asks:

Is it meaningful to continue talking about the rule of law? Does legal indeterminacy and the ontological gap mean that law is primarily guided by local social norms and customs rather than universal rules and principles? Do different cultural circumstances in the West and the East warrant different conceptions of the rule of law? If so, can a normative theory of law legitimate these culturally sensitive conceptions without devolving into cultural relativism?<sup>23</sup>

He applies the post-modern normative theory of law based on the Process Philosophy of Alfred North Whitehead and the Radical Empiricism of William James to address these issues. The result is a “process theory of natural law” that he argues provides a novel theory of natural law that eliminates the perceived illegitimacy arising from legal indeterminacy, and closes the ontological gap between legal theory and practice. He also argues that a process theory of natural law mediates

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22. Mark Modak-Truran, *A Process Theory of Natural Law and the Rule of Law in China*, 26 PENN ST. INT’L L. REV. 607 (Winter 2008).

23. *Id.* at 610.

many of the cultural differences between the East and the West through the telos of beauty (unity-in-diversity), which entails maximizing both an Eastern aesthetic sense of order (emergent harmony or spontaneous order) and a Western rational sense of order (complexity arising from diverse individual orderings). This conception of the rule of law allows for important cultural differences to be reflected in the interpretation of democracy and formal legality and in the instantiation of individual rights in the law. From this he concludes that the ideal rule of law may look different in the United States and China, and may continue to evolve in our constantly changing, pluralistic, and multicultural world.

Jose Gabilondo<sup>24</sup> directly confronts the implementation issues raised in Backer and Beck's contributions. He examines a legal and policy discourse about the need to reduce the transaction costs of worker remittances. The issue has become more important as labor migration has led to surges of remittance flows, which have become a source of hard currency foreign financing to developing countries on par with official aid and foreign direct investment. He argues that the current discourse on the question reflects a convergence of economic interests of three constituencies: labor-exporting countries, labor-importing countries, and international financial organizations, like the World Bank and the Inter-American Development Bank. The conflict between these constituencies and the interests of diaspora workers themselves illustrates one of the governance dilemmas about conflict and renegotiation of the relationship between ethnos, law, and the State raised by Backer and Beck.

Mae Kuykendall<sup>25</sup> approaches the issue from the opposite end of the analytic spectrum. She focuses on the corporation as a site of regulation. The corporation is a fluid entity dominated by the logic of investment, a logic disjoined from the human stories that exist within corporations and which are rendered irrelevant to the subject of corporate law by the dominant persona of the corporate entity. It is not clear that this feature of the corporation, which naturally arises from the logic of financial markets, displaces law so much as, with growth of global capital, it makes less accessible to political understanding more sectors of human experience in which law might seek a role. The corporation is a site, not of *jurisdictio* or *gubernaculum*, but of fleeting interconnections based on exchange, all embedded in a whirlwind of words, and defying reification. Hence, it may be possible to suggest that law itself may not be contained.

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24. José Gabilondo, *Monetizing Diaspora: Liquid Sovereigns and the Interest Convergence Around Worker Remittances*, 26 PENN ST. INT'L L. REV. 653 (Winter 2008).

25. Mae Kuykendall, *The Ship of State and the Abandoned Yacht*, 26 PENN ST. INT'L L. REV. 673 (Winter 2008).

As such, no community of actors seeking to assert regulatory authority can assert a monopoly of power. Though the state, for example, may wrest a monopoly for formal law making power from diverse regulatory communities (religion, social groups, economic organizations and the like), it is unlikely to be able to control all regulatory authority. The contemporary world in general, and globalization in particular, may best be characterized by a diffusion of power, and thus of law. This is especially the case in the contemporary world, where soft law and non-political governance frameworks have become an important part of the network of systems regulating individual and collective conduct. For regulatory institutions—like States and corporations—this suggests a limit to the resort to law to effect change, or control.

Carolina Pancotto Bohrer Munhoz<sup>26</sup> ends the dialogue with an examination of law detached from its moorings in the state and its governance apparatus. She interrogates the complexity of corruption and the search for definition and methodological consensus at the transnational level. The specific objective is to identify the notion of corruption adopted by the World Bank in an attempt to demonstrate in what way this notion affects the actions of the institution in its fight against corruption and in the promotion of its primary objectives. In order to reach this objective, the adopted concept of corruption is analyzed in different contexts, both national and international. The Article discusses the concept of corruption adopted by the World Bank, and the implication of this for the actions of the institution. The Article analyzes the relationship that the preponderant role of the fight against corruption as an instrument of promoting development has with the paradigm of development adopted by the World Bank today, known as the Comprehensive Development Framework. However, this interest does not translate into a consensus on a single definition of corruption, or about the phenomena that it entails. In fact, there is no universally accepted concept of corruption. Because of this, practices understood or interpreted as being corrupt in one jurisdiction might not be judged corrupt in another.

Taken together, these Articles suggest the realities of a world political, economic and social order in which the only stable element is the use of the same set of words to hide a multitude of ideas, desires, normative and institutional frameworks. Yet the Articles also suggest a fairly narrow range within which the great debates over communal orderings are taking place. The Articles further suggest that those

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26. Carolina Pancotto Bohrer Munhoz, *Corruption In the Eyes of The World Bank: Implications for the Institution's Policies and Developing Countries*, 26 PENN ST. INT'L L. REV. 691 (Winter 2008).

debates are no longer the sole province of traditional, politically constituted states, or even of political entities, but have become the common thread in the rush to institutionalize governance at the level of the firm, the political party, the state and the community of States. Law is a protean concept: it is at its most useful when it can serve as the object of desire of those who wish to use it. It has served totalitarian States as well as multinational corporations. It has been as much the creature of customary law in England as it has been instrumental in the ordering of systems of customary law at the international level. Law is both synonymous with the State, and the only means by which the State can be contained. It is a tool of political governance and the framework through which the state can be overcome. The “rule” of law is thus reduced to a highly technical meaning—the means through which arbitrary governance is contained—or it can be understood in a broader sense to encompass the institutionalization of governance at any level of autonomous, self-contained governance systems.<sup>27</sup> Yet, the result is not that the term “rule of law” loses all meaning, but that it serves as the vessel through which the commonalities of governance systems can be understood, compared, and tested for their authority and legitimacy in the context of their creation and operation. As international public and private law systems are broadened and deepened in this century, an understanding of the meaning and application of law in these senses will serve as a foundation for analysis and judgment of the value of the resulting systems of law.

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27. Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 3-28 (Christian Joerges, Inger-Johane Sand and Gunther Teubner eds., Oxford & Portland, Oregon, Hart Publishing 2004).