

# Facilitating Transfers

## Regulatory Governance Frameworks as 'Rites of Passage'

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*Document Version*

Accepted author manuscript

*Published in:*

Contemporary Politics

*DOI:*

[10.1080/13569775.2018.1452105](https://doi.org/10.1080/13569775.2018.1452105)

*Publication date:*

2018

*License*

Unspecified

*Citation for published version (APA):*

Kjær, P. F. (2018). Facilitating Transfers: Regulatory Governance Frameworks as 'Rites of Passage'. *Contemporary Politics*, 24(5), 507-523. <https://doi.org/10.1080/13569775.2018.1452105>

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Download date: 18. Jun. 2025



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Journal article (Accepted manuscript\*)

**Please cite this article as:**

Kjær, P. F. (2018). Facilitating Transfers: Regulatory Governance Frameworks as 'Rites of Passage'. *Contemporary Politics*, 24(5), 507-523. DOI: 10.1080/13569775.2018.1452105

This is an Accepted Manuscript of an article published by Taylor & Francis in *Contemporary Politics* on 15 Mar 2018, available online:

DOI: <http://www.tandfonline.com/10.1080/13569775.2018.1452105>

\* This version of the article has been accepted for publication and undergone full peer review but has not been through the copyediting, typesetting, pagination and proofreading process, which may lead to differences between this version and the publisher's final version AKA Version of Record.

Uploaded to [CBS Research Portal](#): July 2019

FACILITATING TRANSFERS:  
REGULATORY GOVERNANCE FRAMEWORKS AS  
“RITES OF PASSAGE”

Poul F. Kjaer

*Contemporary Politics*, 24, 5, 2018

<https://doi.org/10.1080/13569775.2018.1452105>

**ABSTRACT**

*Departing from the paradox that globalisation has implied an increase, rather than a decrease, in contextual diversity, this paper re-assesses the function, normative purpose and location of Regulatory Governance Frameworks in world society. Drawing on insights from sociology of law and world society studies, the argument advanced is that Regulatory Governance Frameworks are oriented towards facilitating transfers of condensed social components, such as economic capital and products, legal acts, political decisions and scientific knowledge, from one legally-constituted normative order, i.e., contextual setting, to another. Against this background, it is suggested that Regulatory Governance Frameworks can be understood as schemes which act as “rites of passage” aimed at providing legal stabilisation to social processes characterised by liminality, i.e ambiguity, hybridity and in-betweenness.*

**Keywords**

Globalisation; Regulatory Governance; Transfer; Global Law; World Society; Rites of Passage

**INTRODUCTION**

Paradoxically, intensified globalisation has implied an increase, rather than a decrease, in contextual diversity, in so far as the breakdown of the euro-centric world in the first half of the twentieth century and the increased challenge to the Western-centric world since de-

colonisation has increased rather than de-creased the pluralistic structural set-up of contemporary world society. As we will return to, this increase is primarily reflected in a multiplication of the number of legally constituted normative orders with the category legally-constituted normative orders being understood as including but also going beyond the category of statehood. The consequence is that the contemporary world is, at the same time, a community with a common destiny, and a world which consists of many worlds, in so far as the globe is characterised by a multiplicity of normative orders in the form of societies, communities and regimes, with some of them being state-based and some of them falling outside the category of statehood.<sup>1</sup> This development, it is argued, provides the central structural driving force for the emergence of Regulatory Governance Frameworks.

As the concept of (regulatory) governance has mutated into an all-embracing buzz-word characterised by a low degree of conceptual precision and empirical focus, this paper suggests a narrower and more precise understanding of both governance and the regulatory function that it fulfils by advancing the argument that the essential functional and normative purpose of Regulatory Governance Frameworks is to facilitate, stabilise and justify the transfer of condensed social components, such as economic capital and products, political decisions, legal judgments, religious doctrines and scientific knowledge from one legally-structured normative order to another. Such transfers involve both the extraction of social components from the departing context and the incorporation of these social components into the receiving context. The triangular schema of extraction, transfer and incorporation furthermore implies that the components transferred are undergoing a fundamental transformation in terms of the meaning and status ascribed to them as they move from extraction to incorporation. As such, Regulatory Governance Frameworks can also be understood as relationally constituted schemes which are given form through legal structuring, and through which social components are transferred and fundamentally altered through the act of transfer. In this particular sense, Regulatory Governance Frameworks can also be understood as “rites of passage” through which the status and meaning of a given social component is changed, at the same time as such frameworks are specifically aimed at handling the kind of liminality, *i.e.*, ambiguity, hybridity and in-betweenness, which the moments of extraction, transfer and incorporation imply. The term “*rites of passage*” was coined by the ethnographer Arnold van Gennep to describe the process through which an individual leaves one world and joins another through, for example, birth, confirmation,

marriage or death. A process which he saw as being based upon three stages: separation, liminality, and incorporation, with liminality describing the moment of in-betweenness in which the individual has left one group but has not yet arrived in the other (van Gennep, [1909] 1960). In the context of this paper, a broader more up to date understanding of the objects of transfer is however used referring to generalised social components, *i.e.* components of knowledge and symbols, which might but do not necessarily imply a transfer of individuals. The term “*rites of passage*” should in other words be seen as pointing to similarities in the act of transfers with similar implications as those described by van Gennep while being used in relation to substantial different social contexts and processes. One implication of this is that the functions of types of rites and rituals in the settings described by van Gennep in regulatory governance settings tend to be fulfilled by procedures and rules.

The paper starts out by examining the paradox that poly-contextual globalisation leads to increased, rather than diminished, diversity. In a second step, the broader category of normative orders, rather than the category of states, is conceptualised as the basic point of departure from where explorations into the emergence of Regulatory Governance Frameworks has to depart. States is only one category of normative orders besides, *i.e.* ingenious peoples and functionally delineated regimes. Against this background, Regulatory Governance Frameworks are, in a third step, conceptualised as schemes which are oriented towards the handling transfers of social components between normative orders. Fourthly, the argument is advanced that Regulatory Governance Frameworks tend to be organised in a network form which reflects their location *in-between* normative orders. Finally, and fifthly, the issue of conflicts and the question of how responsibility is allocated within Regulatory Governance Frameworks characterised by in-betweenness and ambiguity is touched upon. As a *caveat*, it should be noted that the focus of the paper is on developing a conceptual framework. Although the paper remains empirically informed throughout, it nonetheless does not attempt to provide a fully-fledged empirical mapping and interpretation.<sup>2</sup>

### **THE PARADOX OF POLY-CONTEXTUAL GLOBALISATION**

According to Carl Schmitt, writing in the 1950s, the world in which we live came into being on the 22 April 1884. On that day, the United States government unilaterally recognised the Congo Free State as a sovereign state. With this act, the United States broke out of its self-confined sphere of interest as expressed through the Monroe Doctrine of 1823 and became a global actor. The 22 April 1884 was therefore the day in which the euro-centric world order,

originally laid down with the Treaty of Tordesillas of 1494, broke down (Schmitt, 1950, p. 200). The rest is history in so far as the history of global developments from that moment forth has very much been the history of consecutive rounds of the de-centring of the euro-centric and, later on, the western centric world, as epitomised through the two world wars, the progressive shift from the dominance of the European great powers to the dual US/Soviet hegemony (the events upon which Schmitt focused), the subsequent de-colonisation process, and the emergence of an increasingly global multipolar order at the beginning of twenty-first century (Kjaer, 2014, p. 17ff).

However, behind this focus on “triggering events”, more fundamental structural transformations can be detected (Sewell Jr, 2005), which were accompanied by - or, more adequately, driven forward through, - the consecutive rounds of globalisation from the late fifteenth century onwards (Stichweh, 2005). The gradual emergence of the modern state system in Europe emerged hand in hand with the establishment of a transnational colonial-based order, which reached its peak in the decades after the 1884/85 Berlin Conference. This transnational framework of global ordering first broke down in the aftermath of WWII, and led to a “replacement” of colonialism with what today is labelled “transnational” or “global” governance, which consists of a plethora of regimes situated around public and private international organisations as well as business-based contractual governance (Calliess and Zumbansen, 2010). This type of global governance started to emerge in the mid-nineteenth century with the establishment of the first public and private international organisations and the emergence of the modern versions of international public and private law, and experienced its final breakthrough as the dominant form of transnational ordering in the decades following de-colonisation.<sup>3</sup>

This progressive process of de-centring might be regarded as the central problem-constellation with which the majority of scholarship on international, transnational and global affairs, explicitly or implicitly, is dealing. A process which has provided the structural possibility for the emergence of normative cosmopolitan ideals of an essential Kantian origin concerning the spread of human rights, democracy and the rule of law, at the same time as one might argue that the profound structural and conceptual changes instigated by the breakdown of the euro-centric world has not yet been sufficiently understood (Brunkhorst, 2010, p. 85; more general: Brunkhorst, 2014).

From the perspective of the systems-theoretical variant of general and descriptive theories of society, this transformation can also be conceptualised as a transformation in the relative centrality of the different principles of differentiation through which society is constituted (Luhmann, 1997, p. 595ff).

From this perspective, five principles can be distinguished (Kjaer, 2014, p. 20ff):

First, segmentary differentiation, characterised by the principle of the *equality* of multiple social systems, such as tribes, villages, clans or families, which are typically demarcated upon the basis of blood relations or physical location;

Second, stratificatory differentiation, which expresses an outright *subordination* of one segment under another upon the basis of rank, as, for example, is known from the relationship between the nobility and the non-nobility in early modern Europe.

Third, territorial differentiation, implying a construction of a limited and *coherent social space* which is symbolically demarcated from other social spaces through reference to geographical borders, as is known from modern nation states characterised by a duplication of symbolic references to territory, i.e. by a situation where several systemic processes related to different functional areas and in particular law and politics, refer to the same geographically reflected symbolic boundaries.<sup>4</sup>

Fourth, centre/periphery differentiation constituted upon the basis of *asymmetric relations* between different social spheres, for example, between cities and rural areas, or between states and their colonial possessions.

Fifth, functional differentiation, which is characterised by the principle of the *equality of different societal spheres* as reflected in the distinction between social spheres such as art, the economy, education, health, law, politics, and science, with each of them possessing a different quality which cannot be reproduced by the other spheres.

Against this background, it is possible to argue that the world is increasingly characterised by a structural dominance of functional differentiation, which is again seen as the central feature of modernity (Luhmann, 1997, p. 743), the consequence being that the world of today is characterised by a surprisingly high level of homogeneity, in so far as the global frameworks which are in place span the vast majority of the world. The global economy, for example, relies on the worldwide use of the medium of money, the logic of profit, and institutions such as private property rights, competition and free price formation.

Institutionalised politics have also been globalised through the carving up of the planet into states which all subscribe to the concept of sovereignty, territorial integrity and mutual recognition through UN membership, and at least a formal subscription to the modern forms of constitutions and the formal delegation of power upon the basis of formal bureaucratic organisation and law. Similar developments can be observed in relation to areas such as education, science, the mass media, sports, and health (Boli et al, 1997; Luhmann, 2008; Stichweh 2000; Stichweh 2008).

This development does not exclude the continued existence of stratification or centre/periphery differentiation, but such dimensions are seen as organising principles which are increasingly both internal to and subordinated to functionally-differentiated frameworks. The global political system, mainly constituted through the global state system, is, for example, characterised by considerable difference in the strategic location of the United States and states such as Bhutan or Tonga (Viola, 2013). In a similar vein, Oxbridge and the Ivy League enjoy, compared to most other universities, a strategic position in the centre of global higher education, which enables them to have considerable leverage in the definition of global standards and norms for higher education providing them with leverage to define patterns of transfer for scientific knowledge and related individuals (Stichweh, 1998).

Substantial deficiencies can, however, be detected within the above system-theoretical perspective which prevent it from capturing the emergence and functioning of regulatory governance. Implicitly, the theory emphasises the increased “flatness” of the world. Since the late-nineteenth century, it has indeed been possible to speak of the existence of a singular world society (Beckert, 2014; Osterhammel, 2014), in so far as all the major social processes that have unfolded since then have operated within each other’s horizons in a manner which, at least potentially, allows for both their interconnection and mutually re-inforcing processes of social exchange (Luhmann, [1975] 2009). The notion of world society, however, remains under-determined (Amstutz & Karavas, 2009). The world society literature tends to under-emphasise the central paradox of globalisation, namely, that the increased global integration of diverse social processes has not implied the emergence of a singular world order or even a relative decrease in diversity. On the contrary, the move towards a singular world has unfolded through a double movement in which the increased standardisation and uniformity



of social processes across the globe has been accompanied by increased contextual diversity. This development has unfolded in several ways:

First, a multiplication of statehood: modern territorial, differentiated statehood emerged in a gradual and protracted process in (Western) Europe from the twelfth century onwards. Modern statehood, however, only became a global phenomenon after the de-colonisation process of the 1960s. In fact, the largest multiplication of statehood has occurred within the last 60 years (with currently 193 member states of the UN and two with observer status) and the number keeps increasing and is likely to continue to do so. As such, the number of state-based legal orders is larger than ever, thereby increasing the level of complexity as well as the intensity of the negative and positive externalities produced by state-based legal orders *vis-à-vis* other (including other state-based) legal orders.

Second, the emergence of modern statehood implied, as was highlighted in Ferdinand Tönnies' famous distinction, an increased eradication of "communities" (*Gemeinschaften*) based upon segmentary differentiation and their increased replacement with "societies" of a functionally-differentiated nature (F. Tönnies, [1887] 2005; E. Weber, 1976; É. Durkheim, ([1893] 2011). A defining, maybe *the* most defining, feature of the history of modern states in Europe and beyond was the sustained attempt of the emerging political centres to eradicate localistic forms of ordering in order to establish singular state-centric societies capable of withstanding centrifugal forces (Neumann, [1933] 1996). The central focus of the emerging modern states was to restructure society in their own image through the breakdown or the domestication of alternative sources of authority and power, as manifested in, for example, clans, religious movements, ethnic communities, guilds, and nobility-based networks (Kjaer, 2015a). In most of Western Europe, this Hegelian codification of society in its entirety, through the state, which aimed to turn "peasants into Frenchmen" (Weber, 1976), did, however, not materialise "on the ground" before in the first half of the twentieth century. Although similar attempts of societal rationalisation through the state can be observed throughout the world (Thornhill 2015; Thornhill 2016a), the vast majority of the world remains, as is also highlighted by both classical and contemporary legal pluralism (e.g. Teubner 1997), marked by the continued existence of vibrant community-based orders, for example but not only in relation to the normative orders of indigenous peoples, operating "beneath" the state, factually serving as alternatives to state-based processes of material reproduction, as well as norm creation and enactment. Although increased modernisation

(industrialisation, secularisation, urbanisation, *etc.*) might lead to an increased re-structuring of societies in the “emerging world” in the long term as well, the increased economic and political centrality of the non-OECD world has implied that the segments of the globe characterised by the continued existence of vibrant communities operating “beneath” the state has – at least temporarily - gained increasing importance and centrality in recent decades. This increased strategic importance of community-based structures is, for example, reflected in the emergence of global frameworks of Corporate Social Responsibility (CSR) since they, to a large extent, are aimed at establishing compatibility between the activities of multinational companies (MNCs) and local communities in societal contexts which are, albeit only to a limited degree, structured by norms developed and imposed by states (Amstutz, 2009).

Third, increased modernisation has implied a move to increased functional differentiation both within and above state-based frameworks. Internally, states are increasingly disaggregated (Slaughter, 2004, p. 12) just as the transnational sphere of today is marked by the existence of a whole range of functionally-delineated sectorial, public, private or hybrid regimes in relation to issues as diverse as CSR, the environment, health, human rights, international trade, investment protection, the mass media, and security. The Yearbook on International Organizations now counts 68,000 active or dormant public and private international organisations covering essentially all segments of social interaction upon the basis of mainly functional/sectorial lines.<sup>5</sup> In spite of normative claims concerning the supremacy of a unitary body of international law, the transnational sphere is factually marked by deep-seated and legally-entrenched fragmentation. Transnational regimes related to issues as diverse as accounting standards, developing aid, human rights, fair trade, food safety, investment protection, and product standards are now in place with no single regime capable of constituting unity for the world as a whole (Fischer-Lescano & Teubner, 2004; Teubner, 2012; Koskeniemi, 2009).

This tri-partition of the globe between communities, states and functionally-differentiated regimes can also be conceptualised as a question of the vertical *layering* of local, national and transnational forms of social structure reproduction which operates in an interwoven, but nonetheless distinct manner, upon the basis of different organisational frameworks, and, upon the basis of the different types of local, national and transnational

legal frameworks. From this perspective, the term “global law” would therefore mean the sum of three distinct forms of societal ordering through law (Haliday & Shaffer, 2015).

In sum, and in contrast to the pessimistic view on statehood advanced by the late Schmitt, the central global transformation of the last 60 years since de-colonisation seems to be linked to the *dual and simultaneous* globalisation of statehood and the increased substitution of centre/periphery-based colonialism with a new type of sectorial and functionally-delineated transnational governance. This indicates that the relationship between state-based legal orders and functionally-differentiated transnational regimes, from the Global Accounting Alliance to FIFA, are *not* based upon a zero-sum game with the transitional legal ordering substituting state-based ordering. In contrast to the perspective advanced by Fischer-Lescano and Teubner (Fischer-Lescano 2004), the two forms of ordering are *not* functional equivalents, as they fulfil different functions, just as they have a different location within world society (Amstutz & Karavas, 2009). Increased globalisation has therefore *not* decreased, but instead *increased* the degree of pluralism in world society, in so far as contextual diversity has been expanding, rather than diminishing.

## **MULTIPLE WORLDS**

The consequence of poly-contextual globalisation is that world society, at the same time, is a singular world, in which mutual interdependencies exist, and a world which consists of many worlds. Thus, the broader category of legally-constituted normative orders, rather than states, being one specific type of normative orders, can fruitfully be regarded as the basic unit of study, in so far as this “disorder of normative orders” (Walker, 2008) is the structural point of departure from which the emergence and function of Regulatory Governance Frameworks must be understood. A multitude of legally-based normative orders, some community-based, some state-based, and some with a transnational character, operate side by side in an overlapping, sometimes complementary and sometimes conflictual, manner.

In order to speak of normative orders, a number of core characteristics may be considered as crucial. A (non-exhaustive) list would probably include the following:

First, normative orders rely on a “doubling of reality” between facticity and normativity, in so far as their foundational distinction is the distinction between the factual existing order and the internally-produced, equally real, contra-factual idea concerning what the order in question ought to look like (Habermas, 1992; Luhmann, 1996). As social developments are in a constant flux, such orders are not fixed in time. Both the factual set-up and the normative

guiding-points change over time, at the same time as norms tend to change at a slower pace than factual developments. A time gap exists between the two dimensions, which can also be conceptualised as a gap between social developments and the second order norm-based institutional stabilisation of such processes. Handling this time gap might also be seen as the central contribution of law to societal development (Kjaer, 2014, 76ff.).

Second, and related to the first point, reflexive and institutionalised teleologies must be observable, in so far as normative objectives are transformed into guiding principles for practical policy. From its establishment until post-unification, the German Federal Republic was, for example, guided by an overall normative objective of *Westbindung*, the (re-) integration of Germany into the Western world (Habermas, 1987). A similar striving for inclusion into the West as the principle, overall guiding policy might also be observed in relation to the Central and Eastern states seeking inclusion into Western organisations and institutions in the decades following the collapse of Communism. The French state and the United States might, moreover, be seen as being based upon self-understandings relating to the implementation of the values associated with the American and French Revolutions upon a worldwide basis. Furthermore, in the transnational sphere, the EU relies on a contra-factual logic of an “ever closer Union”, just as the WTO might be seen as being based upon the contra-factual idea of non-discriminatory global free trade. In a similar vein, the Holy See and some Islamist groups are guided by the desire to convert the entire planet into members of their respective congregations (Kjaer, 2014, 146ff.).

Third, for a social entity to qualify as a normative order, it must possess a potential for self-governing based upon a *claim* to supremacy over (or at least a claim to monopoly concerning) the reproduction of certain social functions in relation to either the entire world or a specific segment of the world delineated upon the basis of, for example, blood relations (clans), territory (states) or functions (such as food safety, international investment arbitration, standard-setting for products, or the interpretation of human rights within international organisations and regimes). In other word, a system of norms-based collective organisations possessing a relatively high degree of unity and cohesiveness must be in place (Talcott, 1971). Thus, it must produce collective-decisions which it can *claim* are binding for a given segment of the world. The term *claim* is essential here in so far as the factual control over, or impact on, a given segment of the world seems to be a secondary issue. The French

state, typically considered the modern state *par excellence*, claimed supremacy over its territory from the fifteenth century onwards without factually obtaining it before the late-nineteenth century (E. Weber, 1976); the Church of Rome has claimed supremacy over all worldly powers since medieval times without any possibility of the factual realisation of this claim, just as the European Court of Justice on behalf of what is now called the EU has claimed the supremacy of EU law over Member State law since the early 1960s without this claim ever being fully realised.

Fourth, a normative order must articulate and *publicly present* its claim to autonomy and supremacy for the segment of the world to which it directs its decision(s). Thus, a normative order must publically delineate its boundaries and seek to reproduce institutional mechanisms aimed at boundary-maintenance. Boundaries, here, are to be understood in phenomenological terms as boundaries of meaning which might or might not obtain a symbolic manifestation in geographical borders (Luhmann, 1971). The Islamic Ummah and much stakeholder-based governance do not, for example, rely on references to geography, just as the EU, as pointed out by Alain Supiot, refers to itself as an Area (or space) of Freedom, Security and Justice, and does so in a manner which deliberately avoids all reference to geographically-manifested territorial borders. An avoidance which also allows for global promotion of the legally enshrined values associated with the EU's Area of Freedom, Security and Justice and a flexible interpretation of the territorial reach of jurisdictions (Supiot, 2009).

Fifth, normative orders are *legal orders*. Legal instruments are the central mechanisms through which the condensation of "inner worlds" into normative orders unfold. Law, however, is not external to such worlds, but instead tends to emerge from *within* the social processes in question. Modern states, for example, were characterised by an evolutionary trajectory in which the emerging centres of political power gradually developed a legal framing of their own. Modern law and modern state-based political power emerged in a co-evolutionary process which implied that law gradually became differentiated from political power, gaining its own logic. At the same time, it was through the reliance on legal mechanisms and concepts that states became constituted in the first place. Internally, *vis-à-vis* the rest of society, this primarily happened through the emergence of political, economic and social rights, which served as filters between the political system and the rest of society (Thornhill, 2016b). Externally, the concepts of sovereignty and mutual recognition were the constitutive instruments through which states gained form and became distinct social entities.

Thus, law is a self-reflexive form through which a social process gives itself structure and delineates its boundaries, thereby constituting *itself* (Brunkhorst, 2014). Similar processes as those observable in relation to the emergence of modern states can be observed within transnational regimes from the Holy See, the EU, to the Olympic Committee. From the eleventh century onwards, the Catholic Church gradually gave itself a legal form, thereby transforming it into the legal entity of the Holy See (Brunkhorst, 2014, p. 83ff). In a similar vein, the EU started out as an international organisation but gradually gained the quality of a polity of its own (albeit a very weak one) through its progressive establishment of its own legal order. The Olympic Committee, oriented towards the social activity of sports, has also progressively given itself a legal form, culminating in the establishment of an increasingly independent *Tribunal arbitral du sport*. Thus, the central evolutionary trajectory through which autonomous normative orders are established is a process in which a given social activity is being condensed and structured through legal mechanisms which emerge from within the social activity itself. From the Holy See, to modern states, the EU and the Olympic Committee, the central trajectory is a dual movement, which *simultaneously* implies both an institutional separation from *and* a re-connection of the legal dimension with its object, which (when and if completed) provides the basis for a self-reflexive self-constitution of a normative order through law.

Against this background, it becomes possible to argue that a vast host of different types of legally-constituted normative orders exists in the world, although some are more evolved and autonomous than others. From the account above, the EU would probably qualify as an autonomous normative order, but the WTO would be a “not fully evolved” order, while a vast host of other public and private organisations and regimes such as Fair Trade International and ICANN can also be viewed as partially-evolved normative orders in their own right. Multi-national companies, on the other hand, rarely make public claims to supremacy, and tend to take a position in the shadows, acting – somewhat contradictorily – as informal normative orders.

#### **THE FUNCTION OF REGULATORY GOVERNANCE: TRANSFER, EXTRACTION AND IMPLANTATION**

Against the above background, it becomes possible to develop an understanding of the function, normative purpose and location of Regulatory Governance Frameworks in world

society upon the basis of the triangular scheme between extraction, transfer and incorporation.

Transfer:

It is against the background of the multiplicity of normative orders that Regulatory Governance Frameworks have emerged, in so far as they can be understood as institutional mechanisms which act as intermediaries operating *in-between* normative orders with the purpose of handling the transfer and implantation of condensed social components (*Sinnkomponente*) from one legally-structured context to another. The transfer of condensed social components, as, for example, known from the literature on legal transfers has at least five characteristics:

First, the focus is on the transfer of compact and distilled units of meaning, such as political/bureaucratic decisions, legal judgments, economic products, economic capital, and scientific or technological knowledge, all of which are clearly demarcated and possess a clear functional orientation.

Second, an act of transfer implies that the transferred unit(s) possess significant information value which is likely to be both recognisable and able to produce an impact in the receiving context.

Third, transfer implies boundary crossings, in so far as the units are despatched from one normative order to another in a manner which is conceived of as a boundary crossing between normative orders by both the dispatching and the receiving order.

Fourth, transfer implies distance, either spatially or in terms of time.

Fifth, a certain permanency needs to be observable, typically based upon a *repetition* of the processes of the dispatch and receipt of social components which are similar, or at least recognisable as similar, over a longer time span (Stichweh, 2005).<sup>6</sup>

Armed with this framework, one might observe a whole range of different processes of transfers unfolding within the global realm: supply-change management of multi-national companies; knowledge transfers between firms or between mother-firms and their subsidiaries or between research institutions and firms; fair-trade schemes; the “experimental” Open Method of Co-ordination (OMC) schemes within the EU, and the OECD and (in relation to firms) the UN Global Compact, which are aimed at transferring best practices from one context to another; the diffusion of scientific and educational

knowledge by the UNESCO; or the diffusion of human-rights norms and standards by international courts and NGOs. Thus, one might argue that the “core business” of transnationally-oriented Regulatory Governance Frameworks is the production, maintenance and facilitation of transfers between legally-structured normative orders.

#### Extraction:

Substantially, transfers can, however, take different forms. One is extraction, the reaping of resources in one context and their transfer to another context. Historically, this was a central dimension of colonial frameworks, serving as the first globally-operating form of transnational ordering. Today, natural resource extraction remains a central element, but it is complemented with the central issue of supply management, which is typically associated with moving products or the components of products up the value chain while transgressing both the boundaries of the normative orders providing the societal contexts for extraction, as well as the boundaries of the legally-structured formal organisations serving as the agents of transfer in the process (Backer, 2007; Baars 2016). In addition, the tables have been turned in so far as MNCs based in emerging markets, often with state backing, increasingly buy up companies in more developed parts of the world in order to gain access to, extract, and transfer knowledge to their point of origin.

#### Implantation:

Implantation, on the other hand, implies the transfer, diffusion and incorporation of the social components produced in one segment into the social *praxis* of a different normative order. In relation to business, the issue of “market access”, which has been central to transnational regulatory frameworks from colonial gunboat diplomacy to international trade negotiations, is a central case. But implantation through norm diffusion and incorporation has also been closely-linked to value-based endeavours from Christian missions, “the white man’s burden”, to contemporary human-rights activism. Analytically, one can distinguish between extraction and implantation, but factually they have often, or maybe even typically, acted as two sides of the same coin from the conquistadores and missionaries to contemporary MNCs and the activities of NGOs.



## THE ORGANISATION AND LOCATION OF REGULATORY GOVERNANCE FRAMEWORKS

### Organisation:

Modern normative orders are centred on legally-structured formal organisations. This is the case for state-based as well international regimes which (typically) have a formal organisation (such as the WTO, the IMF, the World Bank, the International Accounting Standards Board and International Courts) at their centre. Although organisations based upon delegation of competences have limited autonomy, delegation is, however, always more than “just delegation”, in so far as even the tightest attempt at control implies a minimum of discretion. As such, all these organisations have at least a grain of autonomy, just as the very reliance on formal organisation implies a level of internal hierarchy.<sup>7</sup> In this context, the term “governance” might be deployed to denote the heterarchical frameworks which surround such formal organisations and which are aimed at transgressing the boundaries of the normative order in question. The EU, although a somewhat special case, has, for example, a hierarchical organisational core made up by the Council, the Commission and the Parliament, while, at the same time, it runs a range of heterarchical stakeholder schemes in relation to, for example, Comitology (the *circa* 1,000 committees which function as channels through which legal acts are transposed from the EU legal order to the legal orders of the Member States), the Open Method of Co-ordination and the various advisory committees which serve as frameworks of transfers from the rest of society, including the Member States, and into the EU legal order and *vice versa* (Kjaer, 2010). Similar, although less elaborate, schemes of transfer and diffusion surround most international organisations from the OECD to the IMF and the World Bank, just as internal hierarchy remains a central characteristic of MNCs.

Thus, an analytical distinction can be made between hierarchical governing and heterarchical governance. Whereas the Weberian classical formal organisation remains a central trademark of most transnationally-operating organisations, the central organisational dimension of externally-oriented heterarchical governance frameworks is its network form. From inter-governmental networks, networks between state organisations and international organisations to business-to-business networks and relations between firms and NGOs, heterarchical networks are the central organisational trademark, and, as such, networks might be seen as the central organisational object of regulatory governance. This again marks a profound transformation in the function of networks. Historically speaking, the function of networks has been one of exclusion. This was the case from feudal nobility networks and guilds to confederations of guilds such as the Hanseatic League. In contrast, contemporary

governance networks might be seen as primarily oriented towards openness and inclusion. They not only serve as channels of transfer, but also as channels of observation aimed at increasing the cognitive capacities of the organisations in question. As such, the function of networks has been turned upside-down when one compares pre- and late-modern networks (Kjaer, 2009).

However, a special case emerges when normative orders centred on formal organisation engage with normative orders without formal organisation at their core. CSR or NGO activities aimed at engagement with “local communities”, for example, often lack formally organised counterparts. This issue represents a clash between legal cultures, in so far as entities constituted by formal law often lack the ability to engage with “customary law”-based normative orders not relying on similar formal set-ups. This again tends to lead to activist attempts by formal organisations aimed at constructing such formal counterparts, counterparts which might well appear as “phony”, given that they lack substance and representability, and factually lack a connection to the very communities that they are intended to represent.

#### Location:

Regulatory Governance Frameworks are located *in-between* normative orders. They are the *no man's land* located between different, legally-regulated normative orders. As such, a central issue here is that of “ownership”. The EU and its Member States have, for example, been engaged in a decade-long battle concerning who “owns” the Comitology committees. As pointed out by Joseph Weiler, both parties seem to believe that they are in control, while the reality is that neither of them are in control (Weiler, 1999). “Organised hypocrisy” tends to become a central characteristic of Regulatory Governance Frameworks, in so far as all parties formally tend either to claim control or at least equal standing while in liminal settings they are factually engaging in lateral relations characterised by grey-zones and lack of clarity. Another version of hypocrisy emerges in situations characterised by strong factual asymmetries, as is often the case between MNCs and their suppliers, or between developing aid suppliers and their receivers. Maintaining the functionality of working relations here is typically conditioned by the maintenance of the *illusion of equality* and the formal insistence on equality, although the reality is quite different.

## THE EXTERNAL EFFECTS OF REGULATORY GOVERNANCE: CONFLICT AND THE ALLOCATION OF RESPONSIBILITY

### Conflict:

The organised hypocrisy of Regulatory Governance Frameworks is a reflection of one of the central added values which such networks aim to produce, namely, the defusing of conflicts (understood as situations of mutually recognised dissonance). Normative orders produce external effects in the form of positive and negative externalities *vis-à-vis* each other, just as they tend to collide like billiard balls on a constant basis. Such external effects are furthermore observed from a different position and hence tend to be evaluated and understood differently by the producers of such effects and those experiencing the impact thereby providing a potential for conflict. The successful defusing of such (potential) conflicts necessitates a move to pragmatism and the institutional stabilisation of relations between different normative orders in a manner which allows for the different orders to operate as parallel worlds (Amstutz, 2005). This is what the Comitology committees of the EU are all about (Kjaer, 2010). Thus, Regulatory Governance Frameworks are substantially oriented towards the handling of interactive processes of mutual and constant accommodation, adjustment and learning in order to minimise the possibility of open conflicts. In situations in which stable and institutionally strong frameworks achieve this, occasional conflicts might be observable, but are not a constant element. In short, Regulatory Governance Frameworks tend to have a built-in “bias” in favour of substituting open conflict with pragmatic co-operation. Enforcement of decisions emerging from within or transferred through Regulatory Governance Frameworks therefore remains a precarious issue as a trade-off between enforcement and conflict emerges. Persuasion and normative desirability thereby gains a central role for the practical feasibility of enforcement (Joerges & Neyer 1997).

### Allocation of Responsibility:

The nature of Regulatory Governance Frameworks, as expressed through their “in-between worlds” status, organised hypocrisy and a striving towards pragmatic collaboration instead of conflict paves the way for intriguing questions regarding the allocation of responsibility within frameworks which are “in-between”.<sup>8</sup> Is it the Commission, the ECB, the IMF or the Eurozone states, that are responsible for the effects produced by the *Troika*? A central problem here is that traditional doctrines of delegation are insufficient, in so far as the components entering the “black box” of Regulatory Governance Frameworks look different when they come out at the other end. What was dispatched is not identical to what is

received. Thus, Regulatory Governance Frameworks produce *autonomous effects* which cannot be traced back to the initiating parties in a one-to-one manner. Another reason for this is that the “products” of Regulatory Governance Frameworks are, in practice, not dispatched from one site and received at another. Rather, the “products” are assembled in the process of transfer itself. Different components arriving from different stakeholders are brought together, dismantled and re-assembled. Thus, Regulatory Governance Frameworks are social entities in their own right, producing autonomous effects on the world external to them. This again paves the way for a functional need for justification, in so far as those affected will potentially claim that the effects are justified (Kjaer, 2015b). As such, traditional legal concepts of accountability, liability and obligations are in the need of re-formulation. But this is not just a matter of external effects. Internally, the normative quality of regulatory governance differs from setting to setting, as, for example, is expressed in some settings having stakeholder configurations with – in terms of resources and standing - highly asymmetric capacities, while others operate on a more equal footing. Thus, a functional need to develop equivalents to many of the principles and standards known from administrative law (standards of rule-making, due process, judicial review, *etc.*) can be detected as well (Harlow, 2006).

#### **PERSPECTIVES: REGULATORY GOVERNANCE FRAMEWORKS AS “RITES OF PASSAGE” - OPENING THE “BLACK BOX” OF REGULATORY GOVERNANCE PRACTICES**

As mentioned above, the ethnographer Arnold van Gennep coined the term *rites of passage* to describe the process through which an individual leaves one world and joins another, through, for example, birth, confirmation, marriage or death (van Gennep [1909] 1960). Regulatory Governance Frameworks can also be understood as rites of passage, as they are institutionalised moments of transfer in which a given social component is in the process of leaving one world and being incorporated into another world, while being fundamentally transformed in the moment of transfer, a moment which is governed by a logic and institutional norm-based framework of its own, and which cannot be captured in full by either the departing or the receiving world.

This points to substantial deficiencies in our scholarly vocabulary, since our standard social scientific and legal conceptual toolboxes are ill-equipped to handle systematic ambiguity and fluidity, and social phenomena’s which might only last for short, but nonetheless decisive, moments. Regulatory Governance Theory remains “black box theory”

(Easton, 1965) in which something comes in and something different comes out with little knowledge of what has happened in the act of transfer. This is being increasingly acknowledged, as is also expressed in the sociological and ethnographic turn towards a focus on the “everyday practice” of governance (Adler-Nissen 2016). More knowledge concerning how governance schemes operate as an ongoing “hands on” activity is needed. In a similar vein, lawyers are faced with the challenge of coming to terms with an important part of social reality which is not easily categorised. Regulating rites of passage have, however, always been an important part of law, just as the dual task of both facilitating and stabilising social exchanges and transfers might be seen as a central function of law as such (Kjaer 2014, p. 65ff.). The structural set-up of contemporary world society however makes this task even more daunting. A new sub-species of law – the law of “in-between worlds” – capable of conceptually re-working both the internal structure and the external effects of Regulatory Governance Frameworks seems to be needed (Amstutz, 2005).

#### Acknowledgments

I would like to thank two anonymous reviewers for very useful comments on an earlier draft.

#### Disclosure statement

No potential conflict of interest was reported by the author.

#### Notes on contributor

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<sup>1</sup> For the distinction between world society and world community, see Herborth and Kessler 2016.

<sup>2</sup> For relevant empirical studies following a long a similar line, see, however, Backer, 2007; Ponte & Sturgeon, 2014 and the other contributions to this special issue.

<sup>3</sup> For a detailed account on this see Kjaer 2014.

<sup>4</sup> The category of territorial differentiation used here differs from the categories deployed by Niklas Luhmann.

<sup>5</sup> <http://www.uia.org/yearbook>. See, also, Kjaer 2014.

<sup>6</sup> On the implications of repetitions and reiterations on social processes, see ....

<sup>7</sup> See the contribution of Eugénia da Conceição-Heldt to this special issue.

<sup>8</sup> For more on this, see the contributions of Andre Nollkaemper and Antje Vetterlein in this special issue.