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Introduction: Democracy and the Transnational Private Sector

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Symposium Introduction: Democracy and the Transnational Private Sector

CHRISTIANA OCHOA*

The old solution, the old way, was to think that public money alone could end [our] problems. But we have learned that is not so. . .

-GEORGE H.W. BUSH¹

Each year the *Indiana Journal of Global Legal Studies* gathers together an interdisciplinary group of scholars to discuss a notable characteristic or salient example of the trend toward increasing globalization. In April 2007, this annual event focused on the intersection of the private and public sectors in relation to democracy.

Our common understanding of democracy has historically, if not philosophically, been tied to states. We are accustomed to defining democracy by reference to governments – for instance, by viewing democracy as engendered by the ability of citizens to vote in free and fair elections for representatives of their political will. Even more complex visions of democracy tend to present governments both as the recipients of democratic activity and as the media through which citizens engage with political issues. Democratic governments have therefore enjoyed perceptions of legitimacy (as distinct from righteousness, however) as they have gone about the project of governing – the work of making and enforcing the law, for example, or of providing security, welfare or humanitarian aid.

The goal of this symposium is to re-examine our understanding of democracy in light of one particular characteristic of globalization: the emergence of transnational private actors, whose economic and/or political power vis-à-vis governments is shifting, often increasing. The articles that follow explore the activities of these private actors, tracing their growing participation in functions that were once deemed the exclusive domain of states. The question of particular interest to the participants in this symposium is whether these actors influence, displace, or even replace government involvement in activities that we are accustomed

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1. George H.W. Bush, Inaugural Address, Jan. 20, 1989.

to understanding as state functions, such as policymaking, lawmaking and law enforcement, and the provision of crucial services. If so, an issue of critical importance arises: the effect of this phenomenon on the substantive norms of democracy, as well as on our current conceptions of and experience with genuine democratic process. Is democracy fundamentally at odds with ascendant private power? Are democratic process and accountability possible through private channels? What effects might emergent non-state power have on the substantive content of democratic norms, and on the content of the law more broadly? These questions are at the heart of the articles that follow.

The first group of contributions initiates these inquiries by asking who makes international law. My contribution, *The Relationship of Participatory Democracy to Participatory Law Formation*, explores the role of individuals in making law, calling this activity “participatory law formation,” and asks what relationship this activity has to concepts of participatory democracy. In *Customary Transnational Law: Attacking the Last Resort of State Sovereignty*, Till Müller argues that, contrary to standard accounts of customary international law doctrine, private actors necessarily inform the development of modern customary international law, which, as a result, may be better conceived of as “customary transnational law.” The next two articles then identify particular instances of private-party participation in international or transnational lawmaking. Janet Koven Levit, in *Bottom-Up Lawmaking: The Private Origins of Transnational Law*, uses the example of the Berne Union’s regulation of export credit insurance to illustrate private sector participation in international lawmaking and to examine the normative effects of this participation. Katharyne Mitchell and Katherine Beckett, in *Securing the Global City: Crime, Consulting, Risk, and Ratings in the Production of Urban Space*, consider other private players in the finance arena – bond-rating agencies and global security firms – and analyze their growing impact on urban social conditions.

The second group of contributions to the symposium explores the changing face of economic activity in relation to lawmaking. It begins with Larry Catá Backer’s article on *Global Panopticism: States, Corporations, and the Governance Effects of Monitoring Regimes*, which analyzes surveillance of financial activities not only as a technique of governance, but as a substitute for governance. Blake Puckett, in *The Foreign Corrupt Practices Act, OPIC, and the Retreat from Transparency*, addresses ways in which investment projects are being structured to bypass anticorruption regulation and inquires whether heightened transparency might improve the international investment framework. In her article on *Democratization: The Contribution of Fair Trade and Ethical Trading Movements*, Janet

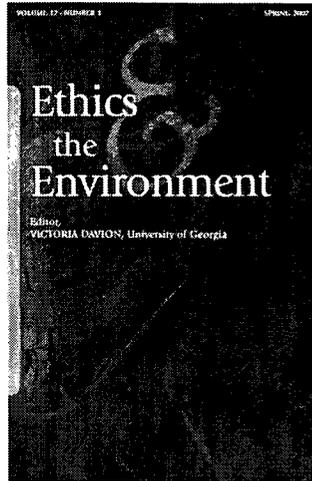
Dine notes the threat that corruption poses to the potential for equitable growth among members of the global market community, and argues that addressing the insidious problem of corruption requires adoption of the norms espoused by the Fair Trade and Ethical Trading movements. Concluding this section, Purnima Bose, in *From Agitation to Institutionalization: The Student Anti-Sweatshop Movement in the New Millennium*, provides an example of a global private sector movement designed to spread the benefits of globalization to workers by improving the conditions for those producing university-licensed apparel.

The remaining contributions turn more generally to the effects of transnational activity by private actors on global political processes, and to the implications of that activity for our understanding of democracy today. Marc Abélès, in *Rethinking NGOs: The Economy of Survival and Global Governance*, uses the concept of “global politics” to explore the rise of non-state actors, examining the points of confrontation between NGOs and traditional government and arguing for a new understanding of politics and political action. David Fidler, in *A Theory of Open-Source Anarchy*, then uses the concept of anarchy – understood here as a system that lacks a clear superior authority or a hierarchy of authorities – to theorize the powerful role of non-state actors in global politics. In *Privatization and Public Law Values: A View From France*, Manuel Tirard uses a comparative analysis to explore possible limitations of private activity in order to safeguard public law norms. Finally, Jan Aart Scholte’s article on *Reconstructing Contemporary Democracy* identifies some of the profound transformations of community and governance that have affected contemporary society, and then presents a reconceptualized notion of democracy itself.

Globalization has in many ways blurred traditional distinctions between public and private law, public and private norms, and public and private action. As a result, it has complicated the role of the nation-state, and thereby complicated the commonly-held vision of democracy as defined by nation-states alone. Adjusting that vision, and developing a more robust understanding of the democratic norms and democratic processes that reflect the shift toward transnational private actors in economic regulation, global politics and governance activities, are two of the most important challenges for scholars of globalization today. We hope that the following articles will contribute to that work.

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