

## **Governance, Normativity And Legitimacy In The Post-Political Context**

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### **Abstract:**

This recent shifts in theoretical understanding of law and governance compel us to (re)consider the links between the categories of the State, institutional and normative legitimacy, law-making, governance and political authority, while at the same time calling on us to chart the possible ways and obstacles through which a future along these trajectories could be envisioned. In this regard, this paper aims to highlight that despite the dispersal of governance and normative agency to supranational, sub national and private spheres, the State still holds a key position within the equation due to its link with political legitimacy and public interest, among other factors. This importance, however, creates another caveat which implies that a weakening of these facets may undermine the entire role and the rationality of the State. The paper will argue that the era of dispersed governance, paradoxically, increases both the importance of the State as well as avenues and the possibilities of its increased legitimacy and greater accountability. Using insights from the fields of governance and legal pluralism, the paper will discuss how the dispersal of governance and law-making raises questions about the legitimacy of authority to formulate law and policies, particularly when imagined through the category of the 'post-political'. In addition, the paper will provide some key aspects which are to be considered if we are to find an effective way to understand the linkage between law, governance and the state in this post-political era.

### **INTRODUCTION**

The (re)turn towards populism in different countries across the globe has been framed as a struggle against globalisation as well as a reaction born of discontent with traditional politics.<sup>(1)</sup> At the heart of these populist movements is the State-centric narrative – the calls for greater sovereignty, protectionist trade policies, securitisation and strengthening of borders, controls on immigration, and reinstating the importance of the State in the interest of peace and security. The rhetoric that announced the foreseeable end of the nation-state at the peak of globalisation's ascendancy now stands challenged.<sup>(2)</sup> The State is re-asserting itself and announcing that the reports of its demise were greatly exaggerated.

But, regardless of the reclamations of the borders and strengthening of authority, the State has already been decentred, at least in the theoretical understanding of governance and law-making. The vertical and horizontal shifts in loci of management and control, the move from government to the broader category of governance, the increasing importance of multilateral institutions as well as local networks and organisations in creation and enforcement of norms – these phenomena imply that governance, at least in its link with the idea of management, has found other avenues to actualise itself. It could perhaps be argued that even though this was always the case in terms of empirical reality – that law and governance always had other avenues available to materialise them, with the State being the most dominant one – now however the theoretical study has caught up with this understanding as well.

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(1) Michael A. Peters (2017) 'The end of neoliberal globalisation and the rise of authoritarian populism', *Educational Philosophy and Theory*, DOI: 10.1080/00131857.2017.1305720/.

(2) For useful insights on the key trends visible at this time of ascendant globalisation, see Ian R. Douglas (1997) 'Globalisation and the end of the state?' *New Political Economy* 2 (1) 165-177; Michael Reisman (1997) 'Designing and Managing the Future of the State' *European Journal of International Law* 8(3) 409-420-

One of the most important implications of this decentring of the State manifests itself in the way that governance and law-making, and their essential link with State and legitimacy, were understood in legal-political theory as well as legal practice. The significance of the vertical and horizontal shifts in governance lies not just in the act of rule-enforcement or rule-following but also in the act of norm-creation, formulation of policies, setting of standards and strategies as well as management of public affairs. The literature within the paradigm of legal pluralism has been the traditional flagbearer for both highlighting as well as advocating for the decentring of the State from the normative terrain. But now the contemporary governance literature, despite initially being focussed on a positivist and State-centric starting point, and despite some of the key perspectives not making any normative claims,<sup>(3)</sup> has brought the notion of the dispersal of governance and law-making to the fore more forcefully.<sup>(4)</sup>

This recent shift in theoretical understanding of law and governance, on the one hand, compels us to (re)consider the links between the categories of the State, institutional and normative legitimacy, law-making, governance and political authority; while on the other hand, it calls us to chart the possible ways and obstacles, through which a future along the lines of these trajectories could be envisioned. This paper aims to present an understanding in that direction. It will highlight that despite the dispersal of governance and normative agency to supranational, subnational and private spheres, the State still holds a key position within the equation due to its link with political legitimacy and public interest, among other factors. This

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(3) Cameron Holley and Clifford Shearing (2017) 'A nodal perspective of governance: Advances in nodal governance thinking' in Peter Drahos (ed.) *Regulatory Theory: Foundations and Applications* (Acton ACT: Australian National University Press) 172.

(4) The Systems Theory of Law may be an outlier within this realm.

importance, however, creates another caveat, which is that if it is the political legitimacy and public interest dimension that distinguishes the State from other actors, a weakening of these facets undermine the entire role and the rationality of the State. The era of dispersed governance then, paradoxically, increases both the importance of the State as well as avenues and the possibilities of its legitimacy and greater accountability.

The paper will convey this argument in four parts. Part one presents the insights offered by recent literature on governance, and highlights how the governance discourse conceptualises the decentring of the State. Part two presents some insights from the literature on legal pluralism and argues that some of the attributes of this shift were discussed within socio-legal studies in the examination of engagement between State law and other normative orderings, particularly in the so-called 'traditional' societies. It will highlight how some perspectives from legal pluralism, for instance the idea of norms operating in and emerging through semi-autonomous social fields, add value to understanding the shifts in governance in the modern era. The third part will discuss how this dispersal of governance and law-making raises issues of legitimacy as well as questions about the authority to formulate law and policies. This primarily comes from the distance between political legitimacy and governance mechanisms, both local and transnational. Law and governance, in this light, raise questions which are difficult for us to answer conclusively. This will be discussed in the context of the category of the 'post-political'. In part four, the paper will provide some key aspects which are to be considered if we are to find an effective way to understand the linkage between law, governance and the state in this post-political era. This will be followed by a conclusion.

## GOVERNANCE AND ITS DISPERSAL

Governance has become a widely used term in contemporary discussions on political theory, the role and responsibilities of states, international relations, law, public policy, as well as other associated disciplines.<sup>(5)</sup> But despite the ubiquity of this concept, there is no consensus on what this umbrella concept actually entails. Paul Hirst, for instance, presents five different usages of the concept of governance in the contemporary era, which are briefly discussed below.<sup>(6)</sup>

### 1. Good Governance

This is perhaps the most commonly understood manifestation of governance at present. Developed and advocated primarily by multilateral organisations, with the World Bank being the foremost among them, 'good governance' is increasingly understood in the sense of 'effective economic modernisation'.<sup>(7)</sup> The dominant understanding of good governance is focussed on the creation and operation of efficient and free markets, which are taken as the key to economic growth and development. Hirst argues that in the context of good governance, democracy and political legitimacy of the state is only 'valuable...if it provides legitimation for good governance.'<sup>(8)</sup>

There are some key aspects that are widely considered to be central to the conventional notion of good governance. First, while states are advocated to accept good governance strategies, this paradigm paradoxically attempts to limit the scope of the State. The assumption here is that effective governance requires a restriction on the State's overreach

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(5) Laura S. Jensen (2008) 'Government, the State, and Governance' *Polity* 40(3) 379-381, 385-

(6) Hirst, P (2002) 'Democracy and Governance' in Jon Pierre (ed.) *Debating Governance* (Oxford: Oxford University Press)

(7) *Ibid* 14

(8) *Ibid* 14

and that State's limitation of its role and responsibilities is itself the key aspect of governing effectively. Second, the evaluation of 'good' is linked directly with the operations of the market – what is good for the market is good for governance. Third, this aspect is directly linked with a particular imagination of the State authority, and is aimed at the creation of liberal economies, particularly in the developing world, regardless of their particular socio-economic situation, and historical and political trajectories.

### **2. Transnational Governance**

This conceptualisation of governance operates 'in the field of international institutions and regimes.'<sup>(9)</sup> The world as it exists today is faced with a variety of different problems which are common to the international community and which are beyond the ability and reach of any individual state to resolve on their own. While the recent spate of refugee crises that have affected Europe, Middle East, South Asia, Australia, Africa and North America to varying degrees is an apt example in this regard, the impending issues pertaining to global warming and climate justice also affect the global community in the same vein. This may also include the recent discussions around regulation of multinational corporations, international financial markets as well as control of global crime and illicit goods networks.

### **3. Corporate Governance**

This is one of the notions more directly understood within the Anglo-Saxon context, although it is increasingly becoming widespread within various geographic and regulatory communities.<sup>(10)</sup> Hirst argues that this is mainly a concern that emerges from 'highly dispersed shareholdings

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(9) Hirst, P (2002) 'Democracy and Governance' in Jon Pierre (ed.) *Debating Governance* (Oxford: Oxford University Press) 15

(10) *Ibid* 17

and an active stock market, on the one hand, and a permanent professional management on the other', which is a trend more visible in British and North American companies.<sup>(11)</sup>

In this sense, governance is primarily concerned with reforms within the internal structures of the companies as well as how companies engage with their stakeholders. Corporate governance is therefore more focussed on increasing the transparency of decision making, improving accountability measures to keep the management in check, as well as aspects pertaining to safeguarding the interests of investors and shareholders. There is an increasing debate on whether other stakeholders, such as communities where the companies or their assets are located, may be included through policies of corporate social responsibility, although this does not feature in the conventional understanding of corporate governance.

#### **4. Governance as Governing Strategies**

This strand of governance is not linked with any particular policy outcomes, but rather it focusses on the effective governance strategies which can be transplanted within State policies and the public sector. Hirst argues that this trend has been in ascendancy since the 1980s, as made evident by New Public Management and other related paradigms.<sup>(12)</sup>

There are a few different facets linked to the idea of transplantation of private governance strategies within the public sphere. First, it emphasises the privatisation and self-regulation of companies and roles previously associated with State provision, as there is an underlying assumption of effective delivery associated with private providers. Second, and more significantly, it introduces a

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(11)Ibid

(12)Hirst, P (2002) 'Democracy and Governance' in Jon Pierre (ed.) Debating Governance (Oxford: Oxford University Press) 18

new set of practices within the public sphere which moves away, on the one hand, from the hierarchical mode of governance and provision with the State at the top and, on the other hand, from engaging with citizens as citizens and rather reconfigures them as customers of various services provided by the State and other institutions.

### **5. Networked Governance**

This approach to governance highlights the various networks of State institutions, civil society organisations, community groupings, international and sub-national organisations, private actors including individuals and corporations, as well as a host of different partnership and collaborative webs. These networks come together to deliberate, advocate and implement policies in a variety of different areas ranging from concerns of individual communities to transnational policies affecting a range of different territorial regimes. Existent both as transient as well as in more permanent manifestations, these networks of governance are ‘growing in salience’ built on ‘the ruins of the more centralised and hierarchical corporatist representation of the period up to the 1970s.’<sup>(13)</sup>

As an intellectual proposition of considerable note, Hirst’s classification of governance provides a useful conceptual schema to make sense of governance in the contemporary era. Kersbergen and Waarden (2004), based on their extensive review of multidisciplinary literature, provide another notable conceptualisation that builds on Hirst’s categorisation of governance. Kersbergen and Waarden, however, elaborated and expand the schema to include nine categories.<sup>(14)</sup> These include:

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(13) Hirst, P (2002) ‘Democracy and Governance’ in Jon Pierre (ed.) *Debating Governance* (Oxford: Oxford University Press) 1819-

(14) Kersbergen, Kees van, and Frans van Waarden (2004) “‘Governance’ as A Bridge Between Disciplines: Cross-Disciplinary Inspiration Regarding Shifts in Governance and Problems of Governability, Accountability and Legitimacy” *European Journal of Political Research* 43 (2) 143171-.



1. Good governance – reduction in wasteful public spending, reform of systems of taxation, and so on
2. Governance without government: International relations – governance of international matters through negotiation between states, multilateral institutions and international organisations
3. Governance without government: Self organisation – dealing with self-organisation of communities and societies, addressing matters such as fishing quotas and local community issues
4. Economic governance – focussing on creation and maintenance of markets
5. Good governance in the private sector: Corporate governance – reform of internal structures of companies and their engagement with shareholders and beneficiaries
6. Good governance in the public sector: New Public Management – transplantation of good governance strategies, borrowed from the private sphere, to the public realm
7. Network governance I: Governance in and by networks – ‘pluricentric’ governance networks of private organisations as well as public-private partnerships
8. Network governance II: Multilevel Governance – the situation of State within different supra and sub-national levels, such as the European Union
9. Network governance III: Private – negotiation and collaboration between different private sector firms and organisations for attaining mutual aims, such as research and development within a particular field<sup>(15)</sup>

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(15) Ibid.

There are various other conceptualisations which provide classifications and categorisations of the idea of governance along similar lines, differing mainly in the application of the schema rather than the core issues. One of the key ideas that sheds new light on how contemporary governance paradigm operates is the theory of ‘nodal governance’ proposed by Burris, Drahos and Shearing.<sup>(16)</sup> This perspective looks at the variety of different governance loci – termed as ‘nodes’ – which operate within a given policy sphere. These may include the institutions associated with the State, but also a variety of different actors and other institutions. The overall governance regime and normative outputs in that area emerge from a combination and interplay of these different nodes.<sup>(17)</sup> But these nodes (actors and institutions) carry their own priorities and individual standards which they attempt to implement or supplement. In order to do this, the nodes try to ‘enrol’ the other nodes to achieve their ends, and in doing so, interact with other nodes in a constant dialectical struggle. As will be highlighted later, this account is similar to the idea of semi-autonomous social fields presented within legal pluralism, but it is a significant elaboration of it in the context of governance literature.

An overview of the contemporary literature on governance highlights that, within the various different narratives of governance, there is significant definitional ambiguity. Governance encompasses everything from policies emerging from states’ interaction within the United Nations Security Council, to village level discussions in a particular locality within the state. It also incorporates numerous different actors, deliberating countless different concerns, based

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(16) Scott Burris, Peter Drahos and Clifford Shearing (2005) ‘Nodal Governance’, *Australian Journal of Legal Philosophy* [30] 3058-

(17) Cameron Holley and Clifford Shearing (2017) ‘A nodal perspective of governance: Advances in nodal governance thinking’ in Peter Drahos (ed.) *Regulatory Theory: Foundations and Applications* (Acton ACT: Australian National University Press)

on a variety of different reasons. Through this, governance becomes this meta-concept that can be applied to any series of negotiations, with the analysts left none the wiser on which concept of governance they are negotiating on.

However, despite the absence of this consensus on what governance actually refers to, there are some key facets that emerge from an analysis of contemporary governance literature. First, governance is considered to be distinct from government and consequently the State. Traditionally, government was a term that was based on the idea of 'steering' or 'rule', and was employed in a multitude of ways to refer to self-rule, divine authority as well as government by a monarch or feudal ruler. As a term that precedes the emergence of the modern nation-state, it later became associated with the rule of the State and acts as the main entity that wields the rights, responsibilities and power of the State. Governance, however, is taken as a set of processes that included government by the State, but is not limited to that. Jensen, for instance, writes that 'where 'government' signifies the structure and function of public institutions, their authority to make binding decisions, and their authoritative implementation of those decisions and allocation of values through politics, policy, and administration, 'governance' embraces all actors, organizations, and institutions, public and non-public, involved in structuring politics and their relationships, whether within sovereign nation-states or without.'<sup>(18)</sup>

Second, linked with the previous facet, is the idea that governance is focussed on processes and not institutions.<sup>(19)</sup> While there is a multitude of different actors – public and private; national, transnational and subnational – governance

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(18) Laura S. Jensen (2008) 'Government, the State, and Governance' *Polity* 40(3) 379-381, 385-

(19) Kersbergen, Kees van, and Frans van Waarden (2004) "'Governance' as A Bridge Between Disciplines: Cross-Disciplinary Inspiration Regarding Shifts in Governance and Problems of Governability, Accountability and Legitimacy" *European Journal of Political Research* 43 (2) 143-152-

as a concept emphasises the interaction between these actors in the attempt to gain a certain outcome, rather than on one individual or collective actor. In this sense, governance reflects the ‘restless, kinetic character of both states and stateness, and signifies that both are constituted dynamically... [highlighting] activity and temporality, the term governance thus accommodates a larger array of empirical realities, and historically and geographically situated developments and transformations, than does government or state alone.’<sup>(20)</sup>

Third, governance is conceptualised as pluricentric and dispersed between different actors of divergent resources, powers, rights and legitimacy. There is no one locus of governance anymore, as the traditional idea of government conveyed. Rather, dependent on a particular area of consideration, different actors, processes and communications result in a particular outcome.

Fourth, consequent to the three points above but directly linked with the third, governance is now considered to be beyond the sole prerogative and responsibility of the State. As Eising and Kohler-Koch argue, ‘the “state” is vertically and horizontally segmented and its role has changed from authoritative allocation “from above” to the role of “activator”.’<sup>(21)</sup> This is primarily what is meant by the decentring of the State in contemporary literature, as discussed previously.

The dispersal of governance to various other actors, its dissemination along a spectrum of different processes and communications, as well as decentring of the State gives rise to significant questions about political legitimacy,

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(20) Laura S. Jensen (2008) ‘Government, the State, and Governance’ *Polity* 40(3) 379-381, 385-

(21) Rainer Eising and Beate Kohler-Koch (2000) ‘Introduction: Network governance in the European Union’ in Beate Kohler-Koch and Rainer Eising (eds.) *The transformation of governance in the European Union* (London/New York: Routledge) 5

authority, accountability, and public interest. These issues will be discussed in the subsequent sections of this paper. At this juncture, it is important to turn towards the ideas of legal pluralism which have been discussing some of the same questions in the realm of law for over four decades, although for different political and empirical reasons.

## **NORMATIVE PLURALITY**

The normative plurality highlighted in recent studies on governance has been raised and discussed at length in the literature on legal pluralism in the last four decades. Legal pluralism emerged primarily from the empirical study of post-colonial and the so-termed traditional societies by sociologists, anthropologists and law & development scholars. Despite the concerns of modernity and legal modernisation, the scholars studying non-western jurisdictions in the second half of the twentieth century realised that these societies followed normative codes that were an intermix of state or posited law, traditional and customary norms, religious codes and, in some cases, international law. Santos for instance argues that the basis of legal pluralism is concerned with ‘the idea that more than one legal system operate in a polity.’<sup>(22)</sup>

From the 1970s onward, as the world turned towards deconstruction and post-modernism and the rejection of grand narratives, some sections of socio-legal scholarship turned towards challenging the dominance and the ‘hegemonic ambition’<sup>(23)</sup> of state law. They enquired about the reasons behind the legitimacy and authority of state law – characteristics that were not afforded to other normative systems – as well as the potentiality of overreach present

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(22) Boaventura De Sousa Santos (2002) *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworths LexisNexis) 89

(23) Jacques Vanderlinden (1989) ‘Return to Legal Pluralism: Twenty Years Later’ *Journal of Legal Pluralism* [28] 149, 153

within the posited law. At the heart of this enquiry lay the idea that state law is a part of, but does not formulate the entirety of, the constellation of normative orders that exist within a society. Based on this empirical understanding, at the core of legal pluralism is the 'very basic idea that law is much more than state law.'<sup>(24)</sup>

John Griffiths, in his pioneering work on legal pluralism, argued that legal pluralism is a reflection on the characteristics of a society rather than purely a concern with its legal aspects. He wrote that 'Legal pluralism is a concomitant of social pluralism: the legal organization of society is congruent with its social organization. "Legal Pluralism" refers to the normative heterogeneity attendant upon the fact that social action always takes place in a context of multiple, overlapping "semi-autonomous social fields", which, it may be added, is in practise a dynamic condition.'<sup>(25)</sup>

Thus, in a manner similar to the evidence relied on by contemporary discourses on governance, legal pluralism centred its arguments on the empirical realities of societies under consideration. Another similarity borne between legal pluralism and governance literature, apart from the focus on normative plurality, is the issue of conceptual ambiguity. There are a variety of different propositions that attempted to conceptualise the pluralism of laws and norms in various contrasting manners.

For instance, Werner Menski, a renowned scholar of this field, suggests that law is a terrain that is shaped by the encounter between several different gravitational points.<sup>(26)</sup> Employing the analogy of a 'kite', he argues that

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(24) Baudoin Dupret (2007) 'Legal Pluralism, Plurality of Laws, and Legal Practices: Theories, Critiques, and Praxiological Re-specification.' *European Journal of Legal Studies* [1], 1

(25) John Griffiths (1986) 'What is Legal Pluralism?' *Journal of Legal Pluralism and Unofficial Law* [24] 138 ,5-

(26) See, for instance, Werner Menski, (2006) *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, Cambridge)

the normative system of a particular society is shaped by at least four different vertices – in a manner similar to the 4 vertices that form a diamond-shaped kite. The normative systems or vertices of state law, international law, customary or religious orderings and religious law formulate the perimeter and law is the field, the terrain, or the area encompassed and formulated by their mutual interaction. The vertices have varying gravitational powers and influences in any given society and are constantly interact and conflict with one another to shape the societal normative terrain.<sup>(27)</sup>

A contrasting approach is presented by Boaventura De Sousa Santos, who argues that the various normative orders that exist within a given society overlap and interact with each other not just in a single dimension but in a multi-dimensional and multi-layered space.<sup>(28)</sup> He puts forth a ‘conception of socio-legal fields operating in multi-layered time-spaces’, which he terms *interlegality*.<sup>(29)</sup> This is the essential space that governs our existence as subjects and the individual’s interaction with the various normative systems. Interlegality recognises the dynamism between the divergent and contesting normative orderings, which coexist as well as encounter and conflict with each other. Within the contact zones between these legal spheres, ‘rival normative ideas, knowledges, power forms, symbolic universes and agencies meet in unequal conditions and resist, reject, assimilate, imitate, subvert each other, giving rise to hybrid legal and political constellations.’<sup>(30)</sup>

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(27) Werner Menski (2010) ‘Flying kites in Pakistan: Turbulences in theory and practice’ *Journal of Law and Social Research* 1(1), 41, 43

(28) Boaventura De Sousa Santos (2002) *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (London: Butterworths LexisNexis) 8997-

(29) *Ibid*

(30) *Ibid*.

In the same vein, Sally Falk Moore in what is perhaps the most widely acknowledged account of legal pluralism, presented the concept of semi-autonomous social fields, which she termed a reality for both 'tribal' as well as modern and complex societies.<sup>(31)</sup> Moore argued against the narrow conception of law as merely a means of social engineering, and found the locus of law within society. She writes that in any society, there exist multiple semi-autonomous social fields 'to which the individual belongs'.<sup>(32)</sup> These normative systems are social because of their inherent and dialectical engagement with the society; semi-autonomous because they regulate their own internal normative spaces although they are not closed off from external influence or from influencing external actors.<sup>(33)</sup>

The nature and boundaries of these social fields are not defined by their structure, but through the 'processual characteristics' of producing rules and ensuring compliance to them. These social fields 'have their own customs and rules and the means of coercing or inducing compliance' – a 'legal order' in the Weberian sense. The boundaries of these social fields may be aligned with corporates (groups of individuals), or a complex 'unending' chain of corporates, which are connected, interdependent, as well as open to influences from the wider society. The interdependence of these social fields, as well as their openness to the larger societal setting, determines their relative possibilities and degrees of autonomy. Moore recognises the centrality of state in the modern legal order, and concedes that as 'the law of the sovereign states is hierarchical in form, no social field within a modern polity could be absolutely autonomous

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(31) Sally Falk Moore (1973) 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study', *Law and Society Review* 7(4), 719-746.

(32) *Ibid* 721

(33) Similar to the normatively open and cognitively closed account of legal systems presented by the Systems Theory of Law



from a legal point of view.’ However, she maintains that state law is just one among several factors that guide the normative outcomes of any society.

Critics such as Tamanaha and others have argued that the problem with legal pluralism is primarily one of labelling – when everything is termed to be law, then the term loses its essential meaning. This is strikingly similar to the definitional accounts of governance discussed above. While a valid critique in its own right, a discussion on this is beyond the ambit of this paper. What is significant for the purposes of the current discussion is that what legal pluralism has been historically trying to achieve, and has faced significant opposition in the process, is to make a case for the recognition of decentring of the state within the wider legal system. Because of this, Santos argues that legal pluralism is essentially a political project.

But this political project and the insights of legal pluralism go much further than the idea of bringing law and law-making closer to the ‘level of the people’. The idea that law exists as an interlegal space marked by various semi-autonomous social and normative fields is what is visible when we look at the new governance paradigm in the world.

## **POLITICAL LEGITIMACY AND THE QUESTION OF POST-POLITICS**

In the same vein as the insights offered by Menski, Moore, Santos and others in the context of legal pluralism, the contemporary governance discourse suggests that governance and normative control is not controlled by just one institutional actor but is dispersed within a multitude of different entities. The traditional legal pluralist accounts argued for the recognition of other normative structures in addition

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to state law – for instance, traditional and customary laws, which exist both at the international level as well as at the local and sub-national scale; religious law, especially for societies where religious law is more pervasive (such as present-day Islamic countries). The contemporary governance paradigm, on the other hand, suggests a more holistic understanding of various regimes of international, national and subnational law, which emerge through treaties between states, the actions of multilateral and multinational organisations, as well as public and private actors that occupy various interlegal strata.

Governance and normativity that emerges from this nexus follows different trajectories, different standards and different modes of enforcement. The centrality of the State as the main ‘source’ of law and governance has been replaced by the place of the state as the ‘activator’ of other spaces and modes of governance,<sup>(34)</sup> even if it is still the main sphere of enforcement (and, on occasion, coercion) with regards to the rest of the systems. Theories of legal pluralism and contemporary governance discourse are justified in pointing towards decentring of the state as the ‘sole’ governance mechanism, and portray the existence and interplay of the various different nodes, fields or spheres of governance affecting a given society. This, however, raises further and more significant questions about notions of political legitimacy, and authority to formulate and enforce law.

The traditional accounts of political authority, state, government and governance link political legitimacy of the State – gained through a notional social contract, electoral representation or divinely ordained hereditary power – to the authority to formulate norms, enforce law as well as management and governance of different spheres of individual

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(34) Rainer Eising and Beate Kohler-Koch (2000) ‘Introduction: Network governance in the European Union’ in Beate Kohler-Koch and Rainer Eising (eds.) *The transformation of governance in the European Union* (London/New York: Routledge) 5

and public life. The State being a collective representative of its populace has both the authority and the legitimacy to direct private individuals in what is permissible and what is prohibited in the interest of the society at large.<sup>(35)</sup> In this light, the State is therefore seen as the key entity within this normative realm.

The same, however, cannot be said for the multifarious governance networks, private sector organisations, multilateral institutions and transnational organisations. It is true, more evidently in the realm of public international law, that entities such as the United Nations are formed through an express agreement of sovereign states, or through an assumption of obligations on their part as customary law or peremptory norms. But it is also true that once these entities are created, they have an agency of their own – the collective agency of the individual state entities and other representative bodies vests in these institutions a certain individual agency of their own, through which they become distinct from the constituent components. The sum of the parts, even if not greater, is different from the individual parts. This is even more evident in the case of institutions such as the United Nations, European Union, World Trade Organisation, International Monetary Fund and the World Bank. While these institutions were created through multilateral deliberations and agreements, they have agency and authority of their own and, in some cases, even have the power to hold member or signatory states accountable in the interest of the wider international community. The matter of public interest and legitimacy becomes even more complex when it is applied to the categories of network governance which bring into the equation a plethora of private sector firms and organisations as well as disparate transnational and local networks.

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(35) ChandranKukathas (2014) 'A Definition of the State' *University of Queensland Law Journal* 33(2), 357; Stephen Krasner (1984) 'Approaches to the State: Alternative Conceptions and Historical Dynamics' *Comparative Politics* 16(2), 223

If these assorted networks and various entities have the power to actualise their outcomes and affect policies, as well as the capability to hold states to account and direct their agendas through effective law-making, how this addresses the question of legitimacy and accountability remains unanswered. Even if it is assumed that their legitimacy is an 'affect' of the legitimacy of the states which 'activate' these governance networks, this gives rise to other questions. Traditional governance and law-making authorities are considered to be legitimate partly because they can be, at least theoretically, held accountable by their constituents – by people through parliamentary representatives, periodic elections, and political and legal channels (or even by calls to divine authority in the cases of religious polities).<sup>(36)</sup> In the case of diffused governance networks and multilateral institutions, the possibility of this accountability does not exist that effectively or evidently. The case of Brexit as a reaction against the impossibility for the local British electorate to hold the European Parliament to account is a pertinent example in this regard.

It must also be noted that it is assumed that for a public authority like a state or its subsidiaries, it is the interest of its people (notionally) that is to reign supreme and guide their policies. If public authorities are supposedly constituted by the abstract category of the 'public', there is at least the potentiality of the public holding them to account, even if that is not always the case in reality. The same however cannot be said for diverse networks and multilateral institutions. Multilateral institutions are setup for specific purposes, and they should not be expected to look out for the 'wider public interest'. For instance, the World Trade Organisation

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(36) ChandranKukathas (2014) 'A Definition of the State' *University of Queensland Law Journal* 33(2), 357; Martin Loughlin (2013) 'The Concept of Constituent Power' *Critical Analysis of Law Workshop*, University of Toronto, available at [http://www.law.utoronto.ca/utfl\\_file/count/users/mdubber/CAL/1213-/Loughlin-Paper-Constituent%20Power.pdf](http://www.law.utoronto.ca/utfl_file/count/users/mdubber/CAL/1213-/Loughlin-Paper-Constituent%20Power.pdf)

is mandated to create and regulate the possibilities of free and effective trade between state parties across the world, remove barriers to trade and ensure that the policy pledges and agreements are adhered to; it cannot be asked to address world poverty. The World Bank is tasked with addressing issues of global poverty and underdevelopment; it cannot set the monetary policy across the world, which is the realm of the International Monetary Fund.<sup>(37)</sup> Moreover, these institutions are prone to be influenced by the agendas of those states that are the main contributors to these organisations in terms of budgets and financial resources, enforcement mechanisms, or policy inputs.<sup>(38)</sup> Once again, this issue becomes far more pronounced when applied to multilevel governance networks, where it is even difficult to pinpoint individual actors and their respective agendas.

This shift of governance, norm-making and norm-enforcement towards a diffused set of actors and processes beyond the reach of traditional political authority is why the contemporary era has been termed as 'post-political' by some commentators. Paul Hirst, for instance, argues persuasively about the difficulties and pitfalls of governance in the post-political era. He suggests that traditionally, the main threat for the society was perceived to be from a totalitarian state, which would break down the state-civil society relationship completely.<sup>(39)</sup> In the contemporary era of dispersed governance and law-making, however, the fragmentation of the State means that even the theoretical possibility of democratic control of various governance mechanisms and actors is kept beyond the reach of the public and the civil society.

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(37) Babb, S & B Carruthers (2008) 'Conditionality: Forms, Function and History' *Annual Review of Law and Social Sciences* [4] 1329-

(38) Tan, C (2011) 'The New Biopower: Poverty Reduction Strategy Papers and the obfuscation of international collective responsibility' *Third World Quarterly* 32(6), 10391056-

(39) Hirst, P (2002) 'Democracy and Governance' in Jon Pierre (ed.) *Debating Governance* (Oxford: Oxford University Press) 18

This idea of the 'post-political' emerges from the work of Chantal Mouffe.<sup>(40)</sup> Mouffe envisions politics as a site of contestation, where competing interest, different identities and varied agendas are negotiated, deliberated and often come into conflict. In the contemporary era of politics dominated by technocratic solutions and diffused governance networks, the assumption is that all parties engaged in deliberation and negotiation are working towards the same goal. This notional possibility of 'win-win politics' shuns the potential for disagreement and ignores differences based on identities, interests, inequalities and other societal contradictions.<sup>(41)</sup>

In this sense, 'the political – understood as a space of contestation and agonistic engagement – is increasingly colonised by politics – understood as technocratic mechanisms and consensual procedures that operate within an unquestioned framework of representative democracy, free market economics, and cosmopolitan liberalism.'<sup>(42)</sup> The political problems are seen as policy issues, which are best resolved by experts and technocrats, whereas people are increasingly reconceptualised as consumers and purveyors of such solutions.<sup>(43)</sup> The post-political is therefore not 'post' in the sense of a temporal 'after' politics, but is marked by the diffusion of dissensus and antagonism that was considered to be characteristic of democratic politics.

For Mouffe and others, the post-political is directly linked to the dominance of the neoliberal and capitalist socio-economic system, under which the public authorities are

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(40) Chantal Mouffe (2000) *The Democratic Paradox* (London: Verso)

(41) Christina Garsten and Kerstin Jacobsson (2011) 'Post-Political Regulation: Soft-Power and Post-Political Visions in Global Governance', *Critical Sociology* 39(3) 421-423, 437-

(42) Japhy Wilson and Erik Swyngedouw (2014) 'Seeds of Dystopia: Post-Politics and the Return of the Political' in Japhy Wilson and Erik Swyngedouw (eds.) *The Post-Political and Its Discontents: Spaces of Depoliticisation, Spectres of Radical Politics* (Edinburgh: Edinburgh University Press) 6

(43) *Ibid.*

reconstructed with a particular view. This paper employs the idea of the post-political in a slightly different paradigm, connected with the notion of the new age of governance. Post-political, in this regard, means that in the contemporary era the individual actors and citizens have (implicitly) agreed to grant the capacity to govern and to formulate and enforce laws to a series of actors which are either outside the political sphere (and are purely regarded as technical actors or beings), or which are outside the political zone of accountability. The people who are affected by the policies of these networks and institutions have no 'political' say as such in how their policies are formulated, how the standards are set, how these organisations and institutions run, or indeed how these institutions are constituted in the first place. Politics, as traditionally understood, incorporated within it the notional idea of representation or responsibility, which brought with it the legitimacy for norm-making and norm-enforcement, as well as accountability if the norms were applied unevenly or served a section of the society over others. The post-politics, in the manner in which it is being used in this paper, means that these considerations have, largely, become a moot point.<sup>(44)</sup>

We still associate the State with authority of representation as well as the legitimacy to govern, the power of norm-creation and norm-enforcement and keep open the possibility of accountability, even if it is not actualised in all situations. However, with regards to other modes and 'nodes' of governance, there does not exist even the pretence of representation and accountability. It is this issue of the normative pluriverse and dispersed governance which raises the most significant challenge in the post-political era.

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(44) Japhy Wilson and Erik Swyngedouw (eds.) *The Post-Political and Its Discontents: Spaces of Depoliticisation, Spectres of Radical Politics* (Edinburgh: Edinburgh University Press)

## **The Continued Significance Of The State In The Era Of Post-Political Governance and Normativity**

Governance literature, legal pluralist accounts and contemporary research on law highlight that governance and law-making have moved away from being the sole jurisdiction of the state. There has been a horizontal shift between different institutions associated with or emergent from the state, as well as hierarchical shifts – down from the state to its sub-institutions, and to civil society organisations and networks; and up, towards multilateral institutions and international organisations.

There are some key questions that emerge from this: Is the aim simply to describe governance in the new era as something completely distinct and highlight that it is now multifaceted, dispersed and nodal? The normative accounts of this phenomenon, on the other hand, would consider whether this multifaceted and dispersed governance is a beneficial development or not. If it is not beneficial, it would imply that governance should be brought under the express control of a political authority. This position is based on the assumption that states themselves are accountable or that they are at least more legitimate than other actors and nodes working within the governance field. A different perspective maintains that dispersed governance is certainly desirable, either due to the unaccountability and the overreach of the state, or because it is beyond the capacity of the state to manage all aspects of governance given its limited resources.

Is it possible to navigate a crafted position through this myriad of different approaches and ideological positions? Can we reach a point where we are able to appreciate the



limitations of the state, as well the central role it plays in safeguarding the rights of its constituents? Can we argue a case where the excesses of the state are balanced against it being the only or one of the only legitimate organisations which can claim to represent the wider public interest? The advocacy of a minimalist state in all situations leaves out those citizens and constituents who are substantially unequal and have lost out on the natural lottery. The proposition of an expansive state, on the other hand, assumes a benevolent entity that caters to all without harming any citizen's legitimate interests. There is no easy answer or conclusion that can be reached readily. This paper advocates, however, that there certainly are some facets which need to be taken into consideration in any attempt to reach a viable answer to the problems of governance and normativity in the post-political era. These facets are briefly discussed below.

### **Governance as control and Governance as management**

It is important to distinguish between two different aspects related to governance. Regardless of the definitional ambiguity and various different classifications associated with the idea of governance or legal plurality, there is a fundamental difference between the two mentioned concepts of the concept of governance as it is linked with law and the State. First is the concept of governance as rule or control. To govern means to exercise control over certain people or certain territory, enforcement of certain normative structures and proscription and prescription of behaviour. Governance in this sense of the word is inherently connected with the idea of authority. Whether this authority is gained from social contract or is taken up through political conquest does not affect this conceptual category. The key idea to note is that there is a figurehead of authority (state, king, ruler, governor) who governs the

population and the territory associated with it.

The other concept links governance with management. Governance in this sense of the word is connected with managing public affairs, allocation of resources, taking policy level decisions and supervision of public needs. Management of water sources and basic amenities, employment, budgets, energy, human resources and so on, are linked with this idea of management. It is important to note that there is an inherent difference between the two mentioned uses of governance. While the responsibility of governance as management can be assumed by several different actors and institutions, the prior concept of governance as control can only be performed by 'legitimate' authorities.

### **Legitimacy through right and legitimacy through efficacy**

As with the previous facet, the issue of political legitimacy also poses a similar paradox. There is a difference in terms of how legitimacy is gained in order to exercise the power to create or enforce norms and policy decisions. Efficacy can certainly be a useful tool to grant legitimacy. For instance, if an organisation that has been granted the power to perform public duties performs them well, it can gain a certain legitimacy in the eyes of its stakeholders. However, efficacy is not the only avenue to gain legitimacy in, and the key facet associated with political legitimacy is the idea of right. For instance, in some violent and post-colonial societies,<sup>(45)</sup> there are other avenues of creating and enforcing 'order' that crop up. Mafias and organised crime networks are pertinent examples in this regard. But even if a criminal organisation is able to keep order within a certain space through coercion, it does not automatically acquire the legitimate authority to act as the law-creating or law-

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(45) See, for instance, Jenny Pearce (2010) 'Perverse state formation and securitized democracy in Latin America' > *Democratization* 17(2), 286

enforcing organisation within that particular jurisdiction.

A similar problem is present in terms of contemporary governance structures and normative networks. If governance networks, multilateral organisations or sub-national or civil society organisations are able to perform their functions well, their efficacy might grant them a certain legitimacy. But legitimacy as of right 'still' emerges from the State, as our current political setup is structured. It is the State that agrees to be bound by the rules of multilateral organisations, and implicitly or explicitly agrees to the normative agency of sub-national or civil society organisations. The simple assertion of paradigms such as New Public Management, which claim that private organisations are more effective in performing certain roles, does not entail an inherent normative connotation within it.

### **Responsibility towards a paradigm or duty towards people**

Another key aspect of difference between the different actors associated with the new disaggregated governance paradigm is the idea of responsibility. What is the key responsibility of the actor concerned and who are its stakeholders is a point that needs considerable attention in any given resolution of the topic. As discussed previously, multilateral organisations have their individual roles and responsibilities associated with them. IMF is responsible for dealing with balance of payments problems between different states, as well as to keep inflation and monetary policies in check. The World Bank is constituted to deal with issues of development and poverty, even if it over-emphasises infrastructure development. Multinational corporations are primarily geared towards their own products and maximising profits for the shareholders, even when we consider the contemporary discussions around corporate social responsibility. These institutions

and organisations are not responsible for furthering the interests of 'the wider public', with the people employed here as an abstract category. As constituents and clients of the political organisation which we commonly recognise as the state, they look toward the State to look after their interests.

If people are the main source of power for the State, theoretically, it is the State's responsibility to look after them as well as their individual and collective interests. This includes internal and external security, but also socio-economic development, social welfare and problems of inequality and uneven development. Welfare policies, regulation of markets, projects such as universal services provisions are all aspects that emerge from this understanding. When analysed from this light, it is apparent that different actors operating within the fields of governance and law-making take decisions based on their internal logics and their core responsibilities. IMF decisions may be geared towards increasing market efficiency and productivity of the economy, but if these policies increase unemployment or fail to address substantive inequalities, this is something that goes beyond the ambit or the possible decision making capacities of the IMF. It is then the responsibility of another actor to look into these 'externalities', and it is generally assumed that States are responsible for that side of the equation.

What is evident from this distinction is that different actors and institutions part of the dispersed governance exercise are bound to approach a particular question from diverse standpoints. The internal logic of some networks and institutions is unable to afford them the possibility of moving beyond technocratic answers. The State and its associated political institutions are the only entities, at present, whose internal logic includes the categories of public interest, legitimacy and political accountability.

## CONCLUDING REMARKS

This paper began by discussing how the contemporary governance discourse has brought to fore the decentring of the State. Different classifications and conceptualisation of the notion of governance include different groups of actors, networks and institutions, with divergent interests, as part of the overall mechanisms of governance. The facets that are common in the general discourse on governance, however, are the ideas of dispersed governance, the decentring of the State as well as a focus on processes rather than institutions. This is quite similar to the intellectual paradigm presented by legal pluralism in the past four decades.

However, the diffused governance networks and a variety of different stakeholders and agendas creates the issue of political legitimacy and technocratic dominance, which scholars have termed the 'post-political' problem. In this post-political era, governance and norm-creation have increasingly moved beyond the reach of individual constituents, and have replaced the political realm of dissensus and negotiation with the politics of artificial consensus.

It has been argued in this paper that in any potential solutions of this post-political predicament, there are some key facets that need to be taken into consideration. These have been highlighted as the difference between governance as control and governance as management; legitimacy as of right and legitimacy through efficacy; and, responsibility towards a particular paradigm or responsibility towards the wider public interest.

It is acknowledged that it is not possible to reach a ready conclusion to this complex socio-economic and political

problem, but that these key aspects should be considered in attempts to find possible avenues to address it. The contemporary governance discourses and the traditional legal pluralist accounts both emerge from an understanding of the problems associated with the overreaching and excesses of State law and authority. However, it is important also to acknowledge that the State is perhaps the only actor within the diffused governance networks that has a semblance of political legitimacy and notional accountability. The task that is focussed on increased accountability and representativeness of the State is certainly important. But even if these tasks remain incomplete and aspirational, the overall governance and normative mechanisms that surround us today raise a myriad of other problems which highlight the importance and the significance of the State. The decentring of the State, paradoxically, is also the symptom of its need and importance in the contemporary post-political era.

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