governance across borders
transnational fields and transversal themes

Edited by
Leonhard Dobusch,
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a blogbook

Governance across Borders: Transnational Fields and Transversal Themes

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Berlin and Cologne, April 2013
Leonhard Dobusch, Philip Mader and Sigrid Quack

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About the Blog

What?

This research blog deals with governing and institution building across borders. It provides a platform for discussions about the possibilities and problems of regulation in a world in which economic, social and political developments in one place increasingly impact on those elsewhere. The research blog is an invitation to reflect on participation, democracy and legitimacy in transnational governance.

Who?

Most of the authors are members and affiliates of the research group 'Institution Building Across Borders' at the Max Planck Institute for the Study of Societies in Cologne. As some of the members of the group have taken the next steps in their careers as researchers, they have moved on to other institutions, such as the Freie Universität Berlin, ESSEC Paris and Technical University Munich. The research blog continues to provide a forum for sharing and discussing ideas across geographical distances and borders. It is also a platform for contributions from invited guest bloggers.

Why?

Several reasons: *First*, we love our work and like to write about it and discuss it. *Second*, we often meet people in the field or at conferences who are interested in our work. The blog and its feed make it easier to follow. *Third*, a lot of interesting stuff doesn't make it into journals – it is or appears too speculative, too small a contribution, too practical, too theoretical, too special. But still, it may be helpful and interesting for someone, which brings us to the last question:

For whom?

First of all, for ourselves. We believe Weick is right when he says 'people *know* what they *think* when they see what they say'. So, blogging can help us think. Second, for anybody interested in (discussing) our work on institution building and governance across borders.

About the Book

What?

The book assembles a selection of articles previously published at the research blog 'governance across borders' between 2009 and 2012. Only minimally edited, the articles have been thematically (re-)grouped into chapters, which are opened with short introductory remarks.

Who?

The contributions in this volume come from a group of fourteen scholars, all working on issues in global and transnational governance, and representing a diversity of disciplinary and geographical backgrounds. They are sociologists, political scientists, organisational and management scholars; they come from France, Germany, Ghana, Great Britain, India, Russia, Slovenia and the US. Selecting, editing and grouping was conducted by the editors of the governance across borders blog, Leonhard Dobusch, Philip Mader and Sigrid Quack.

Why?

Blogging follows a chronological logic and is mostly inspired by current developments. Specifically, a blog run by an interdisciplinary and international group of researchers delivers a sequence of highly diverse articles. By selecting and thematically grouping the articles into an edited volume, we make it easier for potential readers to grasp lines of arguments and common themes that span single blog posts. We've found that many of our posts have a more lasting effect than expected, being sought out months or years after their publication, and evidently supplying information and insights worth preserving in a more structured format. This form of presentation also highlights the continuities and changes over time that cannot be grasped in an individual blog post, or in the thematic potpourri which our blog chronology may sometimes resemble. It is a way of tracing our topical and intellectual development over time, providing more coherent answers to the questions we grapple with day-to-day.

For whom?

The contributions in this volume address both a general *and* an academic audience. While we have received a lot of positive feedback to our blogging over the past three years, we have also recognised that the format is still alien to a substantial part of our potential audience. By combining the traditional book format – produced with print-on-demand technology – with the possibilities of the modern digital format of an ebook, we hope to make our writing more easily available to readers not yet familiar with subscribing to RSS feeds or not willing to follow a blog on a daily basis. The Blogbook, as our research blog, aims at disseminating the results of scholarly work to a broad audience under the open-access paradigm, in line with the Berlin Declaration on Open Access[1], launched by the Max Planck Society in 2003.

1 Max Planck Society (2003): Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities. Berlin. **http://oa.mpg.de/berlin-prozess/berliner-erklarung/**

Introduction

Leonhard Dobusch, Philip Mader and Sigrid Quack

In a world in which economic, social and political developments in one place are increasingly affected by developments in others; in a world where opportunities and threats to people are no longer exclusively the responsibility – if they ever were – of governments of sovereign nation-states; where deregulation and liberalisation at a global level often seem to undermine the capacity of local and national actors to govern the economy in ways beneficial to the broader public; in a world where nevertheless local and national actors and developments still matter to how globalisation unfolds; in such a world as we now live in, there are more reasons than ever to reflect critically on the various ways in which actors from different backgrounds and locales engage in attempts at governance across borders.

Why is it that in a digital world where the Internet seems to connect people boundlessly, rules for "fair use" of content are still shaped by national jurisdictions? Why might a country's decision to favour imports of products that have been harvested or produced under socially favourable conditions, governed by fair trade, labour or environmental certification, potentially conflict with the rules of the World Trade Organisation? What are the strengths and pitfalls of attempts by civil, business and state actors to develop and implement rules that should govern economic exchange and production across borders? What happens when flows of money are channeled by international organisations and profit-oriented financial institutions into developing countries, to the poorest of the poor in slums, yet without any serious regulation of the conditions of lending and recapitalisation?

About the contributions to this volume

These and similar questions, which all-too-evidently evade an analysis constrained by national borders and thematic boundaries, are addressed by the contributions to this volume. The volume represents a collection of articles published on the research blog "governance across borders" which, following its launch in January 2009, has become a lively forum for contributions and discussions among a set of authors from diverse disciplinary backgrounds – from sociology and political science to business and law – working on issues of cross-border governance in a range of transnational fields, and engaging with a multiplicity of transversal themes. For all their diversity, the

contributions to this volume nonetheless converge towards a common understanding of the "transnational sphere" and transnational institution building respectively. As opposed to notions of "international" or "global", the transnational sphere is built neither upon nor beyond national institutional frameworks. Rather, the transnational transcends national borders while at the same time being entangled in historically contingent institutions and shaped by actors rooted in locally and nationally diverse contexts, and therefore – we believe – captures best the social and political reality of the spheres we study.

While the articles in this volume often address rather specific, up-to-date and topical political issues at the time of writing, they also share a common intellectual interest in gaining a better understanding of how rules and institutions evolve beyond and across borders. They deal with settings in which there is often no clear hierarchy of rule-setting powers and frequent uncertainty about what can be expected from other actors. They deal with settings where often it is not even clear who should be allowed to make rules, and what the basis of actors' legitimacy is or should be. Hence, many articles deal in one way or the other with the question of how social and political struggles between actors with culturally and institutionally differently-shaped perceptions, aims and strategies influence the direction and outcomes of transnational institution building. This leads to questions such as: Do the powerful always get what they want in a global world? Alternatively, when fixed preferences or power relations do not sufficiently predict institutional outcomes: How can the study of processes of cross-border collective mobilisation and organising increase our explanatory leverage?

Another common thread that runs through the volume is a concern with how transnational rules are implemented on the ground, how they are monitored by civil and public actors, and whether there is any learning from local experiences going on, or not. As Peter Evans once stated in an influential article[2], there is a danger that belief in "one-model-for-all" will lead to "institutional monocropping", particularly when the transfer of models from the Global North to the Global South is involved. Many of the contributions in this book touch upon the interactions between transnational rules and norms on the one hand, and local practices on the other hand, pointing to the fact that in the end it is the implementation on the ground that matters. Particular examples here are the differences between environmental certification schemes in theory and practice, and the divergence between the dreams and aspirations of microfinance, contrasted with the realities on the ground.

The chapters in this volume cover a wide range of transnational fields and transversal themes. Following Djelic and Sahlin-Andersson[3],

2 Evans, Peter (2004): Development as Institutional Change: The Pitfalls of Mono-Cropping and the Potentials of Deliberation. In: *Studies in Comparative International Development*, 4: 30–52.

3 Djelic, Marie-Laure, Sahlin-Andersson, Kerstin (eds.) (2006): *Transnational Governance*. Cambridge: Cambridge University Press.

transnational governance fields constitute spatial and relational topographies that evolve around issues considered as problematic and requiring some kind of regulation, yet they are also battlefields in the same way as Bourdieu's social fields. And they are fields in which broader forces of a global nature – such as marketisation, financialisation and scientisation – may be at work. In this volume, by assembling contributions dealing with a broad range of governance fields, including accounting, labour and development, environment, copyright and (micro)finance, we are able to illustrate how and why institutions and institution building within these fields differ substantially. Taken together, this diversity underscores the overall point that there is no one global, but rather a complex and overlapping multiplicity of *transnational* governance fields that shape the macropolitical and macroeconomic orders we live in, as well as our everyday lives.

Comparing the different fields covered in this volume, we found variation along several governance dimensions, which form transversal themes in this book:

First, fields differ in terms of their perceived complexity and need for expertise. While accounting and copyright, for example, are generally perceived as technically complex regulatory fields requiring specific expertise, labour and environmental government are typically seen as less technical and more open to civil participation. Yet these attributes are not static over time. As the contributions on transnational struggles over copyright in this volume show, the inclusion and mobilisation of non-experts became more and more important over time, as new forms of private regulation such as Creative Commons licenses emerged in addition to extant international and national law.

Second, this is linked to the diversity of actor constellations across different transnational fields. Requiring less expertise than accounting or copyright, transnational fields such as forest certification and labour standards include broader sets of actors. In these fields – and to an increasing degree in the copyright field – the chapters point to the power of framing strategies of less well-resourced civil society actors in shaping the directions of transnational governance.

Third, the transnational fields investigated in this volume differ in their mix of governance forms. The most prominent theories tend to draw a sharp distinction between international law, national law, private standards and the absence of regulation. More often than not, however, regulation in transnational fields is complicated by overlaps of partly complementary and partly conflicting modes of governance. While this can be seen in all the fields covered in this book, two fields stand out as extreme opposites on a continuum, and therefore are given particular attention: copyright and microfinance.

On the one hand, in the field of copyright regulation, a long-standing and constantly extended nexus of international and national laws is complemented by conflicting efforts to enforce (e.g. Digital Rights Management standards) or offset (e.g. open copyright licenses such as Creative Commons) these legislative developments. Critical copyright lawyers, civil society actor coalitions, even newly founded pirate

parties have entered the contest regarding how to regulate ownership of and access to content in the Internet. On the other hand, the field of microfinance is devoid of international hard regulation, showing only a few recent private efforts (without any teeth), also evidenced by the existing transnational standard-setting organisations acting more as think tanks and promotion agencies rather than working to create binding and reliable standards to ensure microfinance's effectiveness. Rather, microfinance represents a global narrative, materialising in the form of local business models connected – and governed – largely via similarly global financial markets.

Looking at transnational fields in terms of complexity, actor constellations, and mixes of governance forms may suggest a notion of stability. This, however, is misleading. Not only is there a lot of variance between transnational fields, they also evolve internally over time. Such changes can open up transnational fields to more participation by the public: for example, copyright issues that were formerly considered highly technical have become the object of a broad civic and political mobilisation. Socially negative dynamics, however, are also evident, particularly in situations of crisis, as exemplified by the microfinance crisis in Andhra Pradesh. It is with respect to these dynamics that the reader might possibly feel the greatest benefit from reading a sequence of blog articles in retrospect rather than individually: when looking at them as a series of snapshots of a process, or as highlighting moments of intense debate or crisis, the articles provide a sense of the dynamics inherent in transnational governance, of openness at historical points in time, and the sometimes unexpected direction of subsequent developments.

On editing a book based on a blog

Now, before inviting you to engage with the contributions sketched out so far, let us mention some peculiarities of this volume. As said above, we have grouped blog posts published between 2009 and 2012 thematically. In total, we selected 127 out of 214 posts published on the "governance across borders" blog during this period. However, sadly we were not able to include hundreds of insightful comments that these posts received from our fellow blog readers. Some blog articles have generated discussion far exceeding the length and depth of the original article. There are limitations to the process of transforming a blog into an edited volume – and having to drop the interactivity of the blog format is clearly one of the most painful ones. However, to provide access to these comments in the most convenient way possible – and to invite readers of this volume to join the debate – each article still carries a link to the original blog post in its heading.

Although we deem a comparative perspective on the different governance fields presented in this volume particularly promising, we also see this book as an invitation to selective reading. Every article in this volume can stand on its own, and so can the chapters into which we have grouped the articles. Readers particularly interested in transnational copyright will find contributions dealing with issues ranging from

international treaties, such as ACTA, and legal reforms in various countries, to the technical enforcement of copyright by technical means, private open-content licenses, copyright collectives, open access and pirate parties. Readers in search of information on the pros and cons of microfinance as a development instrument can draw on a rich collection of contributions dealing with a variety of aspects, ranging from microcredit myths to the use of microfinance for water infrastructure, the Andhra Pradesh crisis, and the microfinance community.

Finally, we would like to end this introduction by sharing some more background information on the blog "governance across borders", upon which this volume is based. Over the nearly four years of blogging prior to publishing this edited volume, we have counted about 80,000 visitors. The average number of monthly visitors increased from less than 1,000 in the first year to between 3,000 and 4,000 currently. Including trackbacks (i.e. links from other blog posts), each blog post received 2.4 responses on average. The blog features posts by 16 different authors, five of whom have contributed more than five different articles. In 2010, "governance across borders" was the "Featured Blog" of the Society for the Advancement of Socio-Economics (SASE).

We started the research blog "governance across borders" as a real experiment. Now, nearly four years later, we see benefits of maintaining a research blog that we could never have imagined when starting. One of the major benefits is that writing on a research blog on a continuous basis allows academics to explore what Michael Gibbons and Helga Nowotny[4] call the potential of transdisciplinarity: over the last nearly four years, we have received a tremendously rich set of comments and feedback from practitioners and civil society activists, from citizens experts and expert experts in the fields that we are blogging about. This, in turn, has invigorated our academic work. We have been developing ideas experimentally on the research blog, which ultimately made their way into our academic work but might never have done so without the research blog. Finally, the blog has also become a substantial informational resource base for ourselves as much as for others, carrying momentary thoughts, insights and analyses across time and space; making accessible what otherwise could have been only a private reflection on a certain issue; and keeping accessible what would otherwise have been forgotten. Now, we are curious to find out what the next experiment, a blogbook, will bring.

If you wish to share your experiences while reading this volume, please post your comments on *http://www.governancexborders.com/blogbook/*.

4 Gibbons, Michael, Nowotny, Helga (2000): The Potential of Transdisciplinarity. In: Thompson Klein, Julie et al. (eds): *Transdisciplinarity: Joint Problem Solving among Science, Technology, and Society*. Basel: Birkhäuser Verlag, 67–80.

Transnational Studies and Governance

Sabrina Zajak

Governance across borders or transnational governance looks at rule making, standard setting and institution building across borders. Empirically, one can see a variety of patterns of regulatory governance emerging. But transnational regulations are only one aspect of a whole field of transnational phenomena. Social life has always crossed, connected or transformed borders and boundaries. Social processes were transborder even before the spread of the nation-state system, and states were also shaped transnationally. Hirst and Thompson[5], for example, analyze different historical forms of transnational markets existing long before the rise of the nation state.

Other transnational processes include transnational social movements, migration, communities and citizenship, but also religions or various cultural practices. In Europe, progress has been made specifically with regard to transnational phenomena within the European Union, in debates about European governance, a European public sphere or a collective identity (see also the newly established European Journal of Transnational Studies[6], for example).

5 Hirst, Paul, Thompson, Grahame (1996): *Globalisation in Question: The International Economy and the Possibilities of Governance*. Cambridge: Polity Press.

6 European Journal of Transnational Studies. **http://www.transnational-journal.eu/**

As yet there is no real discipline of transnational studies, but merely a fragmented body of scholarship across sub-fields of sociology and other social science disciplines. To engage in dialogue with and learn from the insights of some of these studies, some general questions on transnationalism should be raised here, in a new series on transnational studies: What does an analysis of the global, national and local through transnational lenses imply for different approaches? What phenomena are identified as transnational, and how and why? How are those phenomena analysed, how can flows or identities that cross certain spaces be captured? How do theories of transnational institution building connect to conven-

tional theories? And finally, what do all these different perspectives, including governance research, have in common, and where are the biggest differences and what can they learn from each other? These are only some of the questions that I consider important to discuss in order to gain a better understanding of transboundary social processes.

Cosmopolitan Sociology or Why the Global Is Local

Sabrina Zajak, 2009/10/12

The major critique of empirical research in social sciences made by cosmopolitan sociology is its methodological nationalism. Methodological nationalism means that most studies define (explicitly or implicitly) the nation-state as the container of social processes. Thus, the nation-state unit is the key order for studying major social, economic and political processes. One of the major critics of such a perspective, Ulrich Beck, argues that it is wrongly based on the assumption that political, cultural and social borders are congruent. The nation-state perspective does not capture transnational links, structures or identities.

But how can transnational phenomena be analysed empirically? One fundamental problem of research on transnationalism is that most data sets and strategies of social inquiry are bound to the nation-state. That makes inferences about transnational phenomena difficult or impossible. This methodological problem is fundamentally linked, therefore, to sociological concept formation, which is – from a cosmopolitan perspective – bound to the nation-state and thus unable to capture the multi-dimensional process of change. Or, as Beck and Sznaider put it:

> *The decisive point is that national organisation as a structuring principle of societal and political action can no longer serve as the orienting reference point for the social scientific observer. (Beck and Sznaider 2006: 4)*[7]

7 Beck, Ulrich, Sznaider, Natan (2006): Unpacking Cosmopolitanism for the Social Sciences: A Research Agenda. In: *The British Journal of Sociology*, 57 (1): 1–23.

According to Beck, methodological cosmopolitanism is one attempt to overcome these limitations: while globalisation discourse is concerned usually with the relations between or beyond states, cosmopolitanism focuses on changes to the inner quality of the social and political themselves. Beck attempted with this concept to turn the philosophical idea of cosmopolitanism into an empirical research agenda:

the idea is not to look for general, universal patterns but for global variability, global interconnectedness, and global intercommunication.

The global can be researched locally within this framework – as the process of cosmopolitanisation takes place "from within" – by looking at global social structures that cross different boundaries. These structures create simultaneously localised and transnational spheres of experience and expectation.

The key aim of methodological cosmopolitanism is to overcome, conceptually and empirically, the major dualities that dominate our way of thinking: the global and the local, the national and the international, us and them. Political dynamics and conflicts are part of globalised social worlds and an expression of transnationality *inside nation-states*, even if the people themselves may know that they have been affected by rules established elsewhere.

So far, the full implications of this for the actual analysis are not completely clear. The cosmopolitan methodological perspective is still in the making and many open questions remain: What does global interconnectivity mean? How can the transnational research unit be defined? How can these units be compared? Cosmopolitan researchers try to answer these questions by conceptualising, for example, transnational regimes of politics, global risk regimes or transnational spaces and cultures of memory. These are the first attempts to turn something that still sounds very challenging into practice:

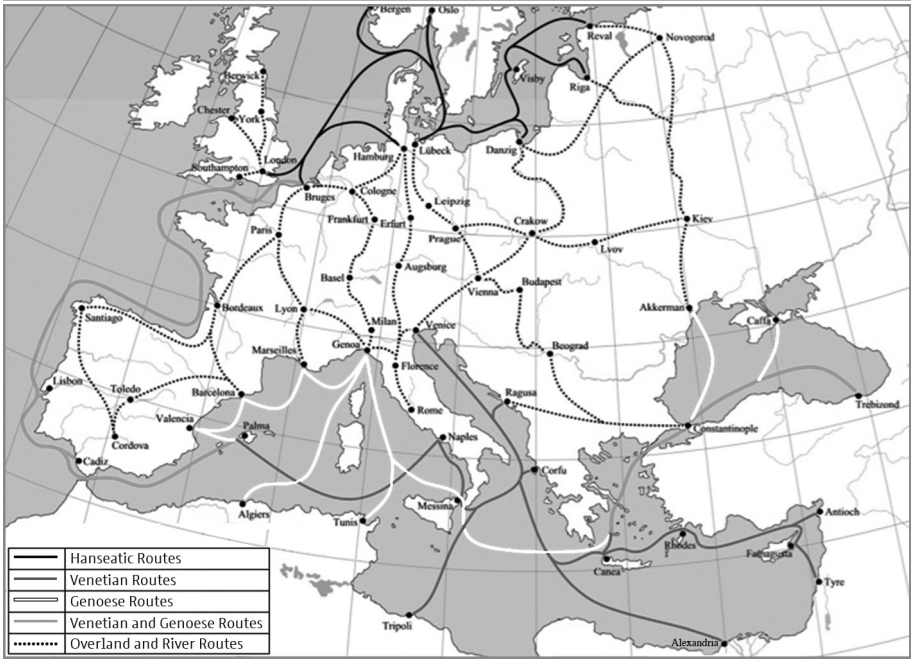
> *It [methodological cosmopolitanism] can and must observe and investigate the boundary-transcending and boundary-effacing multi-perspectivalism of social and political agents through very different 'lenses'. A single phenomenon, transnationality, for example, can, perhaps even must, be analysed both locally and nationally and transnationally and trans-locally and globally. (Beck and Sznaider 2006: 18)*

Studies on 'Global' Markets in History

***Sigrid Quack*, 2010/01/04**

Many believe that global markets are a new phenomenon, but that is not the case. Not only had the late 19th century already reached a level of global trade and financial flows approaching that of today, there were long-distance trading circuits across jurisdictions and continents dating back as far as mediaeval times. In the 12th and 13th centuries, the Italian city states of Venice and Genoa maintained long-distance trading networks that extended as far as North Africa and Central Asia, providing the basis for 'global' markets for luxury goods, such as spices and silk. In the north, the Hanseatic League formed a federation of trading cities along the coastlines of the North and Baltic Seas, generating cross-border markets for bulk goods such as fish, salt, grain and wood.

Late Mediaeval Trade Routes



Source: "Late_Medieval_Trade_Routes", Wikipedia. Available online: http://en.wikipedia.org/wiki/File:Late_Medieval_Trade_Routes.jpg

These markets were transnational in the sense that they interconnected economic actors from multiple political jurisdictions (i.e. kingdoms and city states) across the world, forming a multilayered system of rules and regulations that governed their exchange relationships.

Economic historians have produced a rich literature on these markets, which is also instructive for economic sociologists studying the governance of contemporary 'global' markets. In a recently published article[8], I combine both approaches to analyze how key coordination problems were resolved within mediaeval long-distance trading systems.

8 Quack, Sigrid (2009): 'Global' Markets in Theory and History: Towards a Comparative Analysis. In: *Kölner Zeitschrift für Soziologie und Sozialpsychologie*, Special Issue, 49: 126–142. **http://governancexborders.files.wordpress.com/2009/01/quack2009global-markets_preprint.pdf**

Coordination problems in transnational markets

The new economic sociology draws our attention to the fact that markets are socially and politically constructed and that exchange relations rely on institutionalised and cultural rules. How could market actors otherwise engage in highly uncertain exchanges without knowing the likely value and quality of goods and the kind of rules that market participants can expect each other to follow with respect to competition and cooperation? Economic sociologist Jens Beckert identifies three key coordination problems[9]: a) how are goods valued and classified by the market actors, enabling them to trade?, b) how is competition between market participants regulated to create an even playing field or any organised playing field at all?, and c) how do institutions create a minimum of cooperation among market participants?

9 Beckert, Jens (2009): The Social Order of Markets. In: *Theory and Society*, 38: 245–269.

Such problems of uncertainty and coordination were especially pronounced in mediaeval long-distance trade: merchants had to invest in building and equipping ships for what were often month-long journeys; their goods could easily be lost through accidents and pirate attacks; distant trading partners might not fulfil their obligations, and conflicts over contracts might arise.

Economic historians on mediaeval transjurisdictional markets in Europe

In *Civilisation and Capitalism*[10], French historian Fernand Braudel provides a detailed, comprehensive account of how the revitalisation of trade between different cities and regions in Europe from the eleventh to the fourteenth centuries was accompanied by an expansion of exchange with other continents. Major trade routes extended from the Mediterranean through Persia to China, India and South East Asia, as well as into North Africa, and from the Baltic Sea into Northern Europe and Russia. Voyages such as those of the Venetian mer-

10 Braudel, Fernand (1992) [1979]: *Civilisation and Capitalism*. Berkeley: University of California Press. For a book review, see Yee, Danny (1995): Civilisation and Capitalism 15th–18th Century. A Book Review. **http://dannyreviews.com/h/Civilisation_and_Capitalism.html**

chant Polo to Persia and China (1271–295) were not, as anthropologist Eric Wolf explains in his book *Europe and the People Without History*[11], just isolated events; they actually reveal how Europe entered into more extensive relationships with other continents. These long-distance exchanges led to a European world economy, as Braudel calls it, and the first pan-European markets on which prices 'were fluctuating in unison' by the 12th century. The key actors involved in governing these markets were merchant guilds, city-states, feudal rulers and the populations of merchant cities, as well as producers and trading merchants in distant parts of the world.

11 Wolf, Eric R. (1997) [1982]: *Europe and the People Without History*. Berkeley: University of California Press.

Long-distance trade in late mediaeval times was based to a large extent on merchant communities, which were organised according to their places of origin, kinship and ethnicity. Such communities, like the Maghrebis, Venetians, Genoese or the merchants of the Hanseatic League, typically concentrated on trade in certain products on specific trading routes. Economic historian Avner Greif has analysed the self-organisation of these trading networks from the viewpoint of how networks generated incentives for self-interested cooperation among merchants. However, he also highlights the role of the public authorities and the law in generating a broader institutional framework that supported merchant communities[12]. According to Greif, inter-community trade between merchants of the same city of origin constituted a primary layer of long-distance exchange, while cross-border exchange between different communities was organised on central marketplaces in leading merchant cities such as Venice, Genoa or Lübeck.

12 Greif, Arvner (2006): *Institutions and the Path to the Modern Economy: Lessons from Mediaeval Trade*. Cambridge: Cambridge University Press.

The initial role of merchant guilds was that of self-organising associations, while over time they became influential actors in the public administration of the Italian city states. The guilds were particularly important in

- providing security for members trading abroad
- establishing and evaluating norms regarding product quality and the value of goods
- working out the terms of trade
- extending the rules of their town of origin to foreign trade posts by means of extraterritorial, self-enforcing validation
- limiting competition from traders from other places of origin.

The self-organisation and governance of the guilds, however, was embedded in a wider public order, within which the public authorities and feudal rulers provided

- military, political and diplomatic intervention on behalf of their trading guilds abroad

- inter-city agreements and agreements with foreign rulers about the rights of their merchants abroad.

The involvement of the populations of merchant cities on transjurisdictional markets varied along with power and social structures. Economic historian Yadira González De Lara attributes the relative success of Venice over Genoa to the further developed public-order sanctioning of the Venetian city-state and the broader participation of Venetian citizens of different ranks (noble and non-noble) in financial investments in trading missions[13]. In turn, a wider section of the Venetian population was able to reap returns from the city's long-distance trade. Nevertheless, one-third of the Venetian labour force consisted of unorganised workers and the so-called 'proletariat of the sea' hired as seamen to work on Venetian galleys during their trade journeys.

13 González De Lara, Yadira (2008): The Secret of Venetian Success: A Public-Order, Reputation-Based Institution. In: *European Review of Economic History*, 12 (3): 247–285.

The roles of the population, thus, were those of

- investors in future merchant travels (investments in ships, ventures, goods)
- consumers of luxury goods
- labourers organised in guilds providing the local infrastructure for long-distance trade
- unorganised workers and seaman, e.g. working in the shipyards and on the ships during their journeys abroad.

Much less is known about the conditions of production under which the goods entering these trading networks were produced in Asia and the Far East or, as far as the Hansa was concerned, in the Baltic and Scandinavian countries; all these aspects require much further exploration.

Comparing the governance of mediaeval and contemporary 'global' markets

Clearly, there are many differences between contemporary and mediaeval 'global' markets:

- Among them is, first of all, the rise of the nation-state as a powerful and resourceful actor in the 19th century and the creation of international organisations, such as the World Trade Organisation and financial institutions, and supranational regimes, in particular the European Union, in the second half of the 20th century. All this has added a thick layer of national, international and supranational rules governing 'global' markets.
- A second and related distinguishing feature of the contemporary period of globalisation is the expansion of multinational enterprises which have 'internalised'

a significant amount of international exchange as intra-firm trade at the same time as they have sourced many semi-manufactured goods from global production chains. As a result, contemporary 'global' markets are populated by resourceful and powerful organisations rather than associations, and ethnic or family networks of merchants.

Apart from such differences, however, the analysis also points to intriguing similarities. In particular, some of the institutional features of transjurisdictional mediaeval markets are highly topical for transnational markets in the post-nation-state period.

- The role of communities in regulating transnational business relations seems to be a pervading phenomenon in history, though the nature of the communities, their relative influence and their functions have changed over time. Nowadays, new types of transnational communities of professions, practice and discourse are participating in the regulation of 'global markets'.
- The historical evidence shows that, just as communities and guilds were essential for the governance of long-distance markets, their informal and self-reinforcing rules interacted in various ways with public authorities and legal systems which, while originating from specific political jurisdictions, were influential beyond their domain. In contemporary transnational markets, a similar blurring of the nature of agents and governance processes can be observed: so-called 'public' international organisations like the UN increasingly engage in market activities by sub-contracting welfare services, while so-called 'private' business associations like the International Council for Toy Industries engage in the production of regulations for the public good such as product, safety and health standards.
- Extraterritorial application of national law is another very familiar phenomenon of contemporary 'global' trade regulation that parallels mediaeval regulation. From this there follows a need to reflect on the usefulness of the dichotomous categories of 'private' and 'public' in any analysis of institutional arrangements in contemporary transnational markets.

All in all, historical comparisons of the governance of transnational markets reveal the various ways in which human societies and cultures have always been and continue to be interconnected across borders, disclosing their interdependencies. Such studies can also provide a better understanding of the mechanisms through which markets come into being, are maintained and may dwindle over time, thereby adding a historical dimension to the study of markets in economic sociology.

Transnational Studies and Culture in Motion

Peggy Levitt, 2010/07/25

Methodological nationalism is the tendency to accept the nation-state and its boundaries as a given in social analysis. Because many social science theories equate society with the boundaries of a particular nation-state, researchers often take rootedness and incorporation in the nation as the norm, and social identities and practices enacted across state boundaries as the exception. But while nation-states are still extremely important, social life does not obey national boundaries. Social and religious movements, criminal and professional networks, and governance regimes, to name just a few, regularly operate across borders.

In a 2004 article[14], Nina Glick Schiller and I proposed the notion of society based on the concept of the *social field* and drew a distinction between *ways of being* and *ways of belonging*. Social fields are multi-dimensional and encompass structured interactions of differing forms, depth, and breadth that are differentiated in social theory by terms like "organisation," "institution," "networks," and "social movement". National social fields are those that remain within national boundaries, while transnational social fields connect actors, through direct and indirect relations, across borders. Neither domain automatically takes precedence; determining the relative importance of nationally restricted and transnational social fields is an empirical question.

14 Levitt, Peggy, Glick Schiller, Nina (2004): Conceptualising Simultaneity: A Transnational Social Field Perspective on Society. In: *International Migration Review*, 38 (3): 1002–1039.

The concept of social fields is a powerful tool for conceptualising the social relations linking those who move and those who stay in one place. It takes us beyond the direct experience of movement into domains of interaction, where individuals who do not move have social ties with people who do. For example, because of these relationships, both non-migrants in a sending country or the children of immigrants in a receiving country can be influenced regularly by people, ideas, and material objects from far away. NGO staff who have never travelled or attended an international training workshop learn of ideas and practices from their co-workers who do. They gain the skills and know-how to participate in these social fields and they can access their social networks. Therefore, people with more direct social ties are not automatically more transnationally active than people with weaker connections. Nor can we assume that people with few direct cross-border ties are uninfluenced by the field's dynamics.

In 2007, Sanjeev Khagram and I outlined a transnational optic for capturing social life across borders[15]. A transnational lens begins with a world that is boundaryless and borderless and then asks what kinds of borders arise in particular socio-historical contexts, and why, and then explores how these interact with unbounded spaces. It does not take the relevant space of inquiry as given, but asks instead what the geography is actually like, in which the subject of interest is embedded. It tries to avoid privileging the global or the local, or the sending and receiving, but to keep these sites and layers of social experience, and everything else in between, in conversation with one another. In other words, it sees the global, the national, the regional, and the local as potentially transnationally constituted. It stresses how each of these layers of social experiences are constructed through continuous, iterative interactions.

A transnational optic helps identify the different actors, ideas, and objects circulating within social fields, or what I call cultural carriers. It calls our attention to the real and imagined, past and present geographies through which cultural products travel and the pathways and networks that constitute them. It brings into sharper focus how other ideologies and interests circulating within these fields intersect with them and shape their trajectories. Finally, it produces a clearer picture of how and why assemblages are created – the impact and outcomes of these encounters. When cultural elements (be they ideas, objects, rituals, or organising strategies) comes to ground, how and why do they cluster as they do? How do the cultural elements circulating at other levels of the social field influence the shape, strength, and durability of this convergence?

Mapping and categorising transnational phenomena and dynamics requires new kinds of data and new methods for collecting them. Most existing data sets, historiographies, and ethnographies make transnational analyses difficult if not impossible because they are based on national-state units and are designed to make comparisons between countries. They do not capture flows, linkages, or identities that cross or supersede other spatial units or the phenomena and dynamics within them.

Transnational scholarship requires that data be collected on multiple units, scales and scopes of analysis. In an ideal world, this would mean actually following a particular cultural product and seeing how it lands against different meta-cultural backdrops. But when this is not possible, transnational dynamics can also be investigated by asking respondents to map the cross-border aspects of their identities, beliefs, and activities and the people they are connected to.

15 The theoretical foundations of this perspective are laid out in greater detail in Khagram, Sanjeev and Levitt, Peggy (2008): Constructing Transnational Studies. In: Khagram, Sanjeev, Levitt, Peggy (eds.): *The Transnational Studies Reader*. New York: Routledge. See also Levitt, Peggy (forthcoming): Religion on the Move: Mapping Global Cultural Production and Consumption. In: Bender, Courtney, Cadge, Wendy, Levitt, Peggy, Smilde, David (eds.): *Religion on the Edge: De-Centering and Re-Centering the Sociology of Religion*. Oxford: Oxford University Press. Although I use religion as an empirical case in the latter article, many of my ideas apply to other cultural products and flows as well.

Current Debates on Transnational Governance Research

Sabrina Zajak, 2011/02/14

Over the last decades, new forms of regulation beyond borders have been proliferating, many of them involving private and civil but not necessarily state actors. Scholars are approaching the role of private and civil actors, including multinational companies, non-governmental organisations and social movements in transnational governance from a variety of theoretical and empirical angles. A shared language and common understanding has not yet fully emerged; all too often, scholars are not aware of research and discussions from adjoining disciplines. However, transnational governance is a field in which different disciplines like sociology, political science, law and economics can cooperate fruitfully.

Interdisciplinary workshops are always a good opportunity to discuss and exchange different and common perspectives on a specific empirical research field. The workshop "Transnational private regulation in the areas of environment, security, social and labour rights: theoretical approaches and empirical studies" organised by Nicole Helmerich, Olga Malets, and Sabrina Zajak at the Freie Universität Berlin in January 2011 brought together researchers from different disciplinary backgrounds including sociology, international relations, industrial relations, organisational studies and political science. The aim was to discuss global developments in the field of transnational private governance and their implications in different localities with a particular focus on three empirical fields: labour standards, environmental standards and security issues.

Among the many topics discussed at the workshop, three stood out particularly and therefore will be presented in this article.

A) Variety of theoretical approaches: Combining different strands of research

How do different strands of research conceptualise the changing role of multinational companies as actors in the changing global governance landscape? What can they learn from other disciplines analysing the role of the firm in societies, including economic managerial theories, economic and organisational sociology, political economy and industrial relations and vice versa? It became clear that despite the huge amount of literature on the political and regulatory role of multinational companies in the era of globalisation, research fields still lack integration and combinations of different approaches are only starting to emerge. Interdisciplinary re-integration is further complicated by approaching transnational governance from different angles: while

"top-down" perspectives start from "the global" and explore how global norms and rules become localised, "bottom-up" approaches put stronger emphasis on how local actors influence global developments. The challenge still remains to integrate both perspectives[16].

16 For an introduction to these issues, see: Djelic, Marie-Laure, Quack, Sigrid (2008): Institutions and Transnationalisation. In: Greenwood, Royston, Oliver, Christine, Suddaby, Roy, Sahlin, Kerstin (eds): *The SAGE Handbook of Organisational Institutionalism*. London: Sage, 299–324. And Halliday, Terence C., Osinsky, Pavel (2006): Globalisation of Law. In: *Annual Review of Sociology*, 32 (4): 447–470.

B) Global dynamics of contention

While some scholars perceive the emergence and development of transnational governance arrangements as a response to existing coordination problems, and hence emphasize functional explanations, it seems equally if not even more important to trace the (historic) developments, processes and discursive and contentious interactions which led to the evolution of these volatile transnational governance arrangements. Various actors including private and public ones shape the meaning and practice of governance concepts. For example, the United Nations contributed to the diffusion of the idea of multi-stakeholder initiatives in the private sector; conversely, business actors influenced how the concept of risks became framed in debates in the intergovernmental field of climate change. Furthermore, cycles of negotiation between business and labour unions at various levels shape what is considered the right way to govern and what should be governed at all in the field of labour standards. Overall, current research suggests that discursive and contentious interactions contribute more to the proliferation of certain forms of transnational governance than commonly perceived and hence should be given more attention in future research[17].

17 Bartley, Tim (2007): Institutional Emergence in an Era of Globalisation: The Rise of Transnational Private Regulation of Labour and Environmental Conditions. In: *American Journal of Sociology*, 113 (2): 297–235. Or Pattberg, Phillip (2005): The Institutionalisation of Private Governance: How Business and Nonprofit Organisations Agree on Transnational Rules. In: *Governance. An International Journal of Policy and Administration*, 18 (4): 589–610.

C) The politics of implementation

While there is a rich body of research on rule-setting at the global and transnational level, relatively little is known so far about the implementation of rules. Empirical evidence suggests that implementation problems are widespread. They seem to be the rule rather than the exception. Recently published case studies by Olga Malets on transnational forest regulation in Russia[18] and Tim Bartley on labour and sustainable forestry standards in Indonesia[19] show how domestic contexts in some countries interact with and restrict the impact of transnational regulation. The reasons for

18 Malets, Olga (2011): From Transnational Voluntary Standards to Local Practices: A Case Study of Forest Certification in Russia. MPIfG Discussion Paper 11/7. Cologne: Max-Planck Institute for the Studies of Societies. **http://www.mpifg.de/pu/mpifg_dp/dp11-7.pdf**

19 Bartley, Tim (2010): Transnational Private Regulation in Practice: The Limits of Forest and Labour Standards Certification in Indonesia. In: *Business and Politics*, 12 (3): Article 7.

this are manifold: national regulation can undermine transnational regulatory efforts; coordination and networking across borders is often problematic and insufficient; there may be power (im-)balances between actors. We still do not know enough about the conditions which make governance beyond borders more or less effective. There is also a need to explore the levels (from the local to the global) at which struggles over implementation take place. So far, there is no agreement between researchers on how to define and measure "effectiveness," and how to detect compliance or non-compliance in research sites often characterised by highly ambiguous and uncertain environments.

Moreover, transnational regulation may not only affect those it regulates but also other societal actors and local power relationships. Future analysis should take into account unintended or unforeseen consequences of transnational governance arrangements. Future research should give more consideration to the complexity of multi-level regulatory dynamics. There is a need for further empirical studies as well as theoretical conceptualisations that help to make these processes more understandable across issues, fields and countries.

Accounting across Borders: Fairness, Fair Value and Financial Markets

Sigrid Quack

Among the transnational governance fields covered in this book, accounting and finance stand out for several reasons: firstly, they were the arena in which the myth of efficient self-regulating markets was most prevalent in the years prior to the financial crisis. Secondly, and relatedly, governance across borders in these fields has often taken the form of private rule-setting, undertaken by professionals, managers and corporations. This does not mean that public actors have been totally absent; actually, international organisations, governments and regulatory agencies have played a key role in delegating governance to and accepting rule-setting by private actors, or have abstained from taking their own initiatives. Thirdly, accounting and finance are paradigmatic fields when it comes to the ways that experts and their use of highly specialised professional and technical knowledge can generate a dynamic of cross-border governance that makes it difficult for civil society actors and the general public to monitor what is going on and to shape the direction of institution building so that the concerns of consumers and citizens are taken into account sufficiently.

Some of these characteristics of transnational governance in accounting and finance were, as the following contributions indicate, seriously challenged by the financial crisis in 2007/8. The collapse of financial markets and the potentially pro-cyclical effects of accounting standards that exacerbated the crisis undermined the belief in self-regulating markets. What was previously accepted as market-defined 'fair value' became an issue of societal fairness and justice. International accounting standards, previously considered a rather technical matter, were seen increasingly as a political issue: not only was the societal importance of how economic performance, assets and the liabilities of companies are measured rediscovered; it also became clear how the data on financial markets required for more effective regulation depends on the definition of accounting standards. The following contributions show how the crisis opened a policy space in which sometimes surprising co-

alitions of actors emerged to demand regulatory reforms. However, there were also countervailing forces, reforms were of a gradual nature, and the outcome of these political and social struggles over financial market regulation is still open – not least because of the European sovereign debt crisis that followed the financial crisis.

This section collects articles which focus on critical debates over international accounting standards in the course of the financial and sovereign debt crises; on the connections between accounting standards and some of the determinants of the financial crisis, such as shadow banking and the trade in over-the-counter (OTC) derivatives; and the question why, despite the critiques raised after the crisis, there is still such strong insistence that developing countries, particularly on the African continent, should adopt international accounting standards even in the absence of well-functioning financial markets.

Fair Value Accounting in Retreat?

Sigrid Quack, 2009/03/25

The financial crisis is turning many things upside down. Nevertheless, it is amazing to see how the positions of key market actors with respect to financial reporting standards have changed since the crisis started. While investment banks, accounting firms, regulators and governments stood firmly together in unanimous and unfettered support of fair value accounting in the heyday of financial market capitalism, this front has been collapsing recently.

In April 2008, the Neue Züricher Zeitung[20] reported Claude Bébéar, president of the French Insurance Group Axa, as saying that mark-to-market rules, which require firms to value assets according to (hypothetical) market prices, had contributed to the financial crisis. Henri de Castries, CEO of the same group, was quoted as referring to a "conceptual mistake", which had forced companies and banks to write down billions of assets. In September 2008, Newt Gingrich commented on Forbes.com[21] "Suspend Mark-to-Market Now!", quoting Brian S. Webury, chief economist at First Trust Portfolios of Chicago:

> *It is true that the root of this crisis is bad mortgage loan, but probably 70 % of the real crisis that we face today is caused by mark-to-market accounting in an illiquid market.*

20 Uhlig, Andreas (2008): Zunehmende Kritik an 'Mark to Market'-Regel. In: *Neue Züricher Zeitung*. April 2, 2008. **http://www.nzz.ch/aktuell/startseite/zunehmende-kritik-an-mark-to-market-regel-1.699112**

21 Gingrich, Newt (2008): Suspend Mark-to-Market Now! *Forbes.com*, September 29, 2008. **http://www.forbes.com/2008/09/29/mark-to-market-oped-cx_ng_0929gingrich.html**

With the financial crisis lingering on, and politicians, regulators and banks still searching for solutions, debates on the pros and cons of mark-to-market accounting have perked up again during the last weeks.

On March 11, 2009, investor Warren Buffet admitted in a CNBC television interview[22] that mark-to-market had been "gasoline on the fire", while maintaining remarkably equivocally that

> *the best way to handle that (the crisis) ... is to have the mark-to-market figures but not have the regulator say we are going to force you to put up more capital based on these mark-to-market figures.*

Others have been more straightforward in their demands to suspend mark-to-market. On March 17, 2009 Edward L. Yingling, on behalf of the American Bankers Association, stated in his testimony[23] before the Committee on Financial Services of the United States House of Representatives that

> *For months, we have specifically asked FASB to address the problem of marking assets to markets that were dysfunctional. ... We hope that FASB and SEC will take the significant action that is needed and not merely tinker with the current rules. (Yingling 2009: 8)*

Subcommittee chairman, Republican Paul E. Kanjorski, according to CCH Financial Crisis News Center[24], warned that if regulators and standard setters "do not act now to improve the standards the Congress will have no other option but to act itself".

From a European perspective, these are pretty strong words, given that the US was long seen as the bastion of fair value accounting rules, with the SEC and the national standard setter FASB spreading its mark-to-market gospel to Europe and other continents. So what does this mean for the future development of the International Financial Reporting Standards produced by the London-based International Accounting Standards Board, adopted by the European Union on January 1st, 2005?

Prior to the implementation of IFRS by the European Union, the IASB had undertaken so-called comparability and improvements projects which, according to its crit-

22 Mark-to-Market Debate (2009): Warren Buffet on CNBC Comments on Mark-to-Market. *youtube.com*. March 11, 2009. **http://www.youtube.com/watch?v=xyKH19tWXn0**

23 Yingling Edward L. (2009): *Testimony*. On Behalf of the American Bankers Association. Washington, D.C., March 17, 2009. **http://www.aba.com/Issues/Documents/7499ea58b5b34215856e1 dda48a27f24March17EdYinglingFinancialRegulationTestimonyFINAL.pdf**

24 Borchersen-Keto, Sarah (2009): FASB Pledges Guidance on Mark-to-Market Rules Shortly. CCH Washington News Bureau. March 13, 2009. **http://financialreform.wolterskluwerlb.com/2009/03/fasb-pledges-guidance-on-mark-to-market-rules-shortly.html**

ics, moved the standards much closer to fair value accounting. Pro-cyclical and unintended consequences of mark-to-market accounting have been a long-standing concern in continental Europe and Asia, and some of them have been surveyed by Yuri Biondi and Tomo Suzuki in a special issue on the socio-economic impacts of IFRS on different stakeholders[25].

25 Biondi, Yuri, Suzuki, Tomo (2007): Socio-Economic Impacts of International Accounting Standards: An Introduction. In: *Socio-Economic Review*, 5 (4): 585–602.

Ironically, then, one of the beneficial side effects of the crisis could be that it is alerting the international community of experts and politicians involved in financial market and accounting regulation to a long overdue need to reform accounting standards. As the High-Level Group on Financial Supervision in the EU, chaired by Jacques de Larosière, states in unequivocal terms in its report[26]: "accounting standards should not bias business models, promote pro-cyclical behaviour or discourage long-term investment".

26 High-Level Group on Financial Supervision in the EU (2009): The High-Level Group on Financial Supervision. Report presented in Brussels. February 25, 2009. **http://ec.europa.eu/internal_market/finances/docs/ de_larosiere_report_en.pdf**

One should be careful, however, not to accept the current outcry by banks, regulators and politicians at face value. The same rhetoric can conceal very different interests, motivations and positions: insolvent banks lobbying the US congress for the suspension of mark-to-market reporting; US politicians aiming to discontinue or modify accounting standards in an instrumental way in order to write off toxic assets and return to normality once the crisis is over; regulators in charge of financial reporting standards, such as the US Financial Accounting Standards Board in the US and the International Accounting Standards Board in London, trying to get themselves out of the line of fire while still defending the merits of fair value in "normal times"; Angela Merkel and Peer Steinbrück following their US colleagues to free banks from fair value for the period of the crisis.

A short-sighted repeal of current standards for the purely instrumental purposes of writing off toxic assets, however, does not seem the right way to prepare the ground for the necessary far-reaching reforms. Interestingly enough, the Turner Review[27] of the UK Financial Services Authority published in 2009, does indeed seek to solve the financial crisis with more promising means.

27 Financial Service Authority (2009): The Turner Review: A Regulatory Response to the Global Banking Crisis. Report published in March 2009. **http://www.fsa.gov.uk/pubs/other/turner_review.pdf**

Taking a critical stance on the public outcry to write off toxic assets by means of suspending fair value, therefore, does not mean sharing the conservative view of the leading accounting firms, which seem to be more concerned to avoid any liabilities for ambiguities in their interpretation of reporting rules than worrying about how to bring the crisis to an end. On the contrary, I would say that the real test for a

far-reaching reform of financial reporting standards, aiming towards rules that support economically sustainable development, is still to come.

To work towards such a financial reporting system will, as suggested by the Larosière report, require opening up the standard-setting process of the FASB and IASB and including a variety of regulatory, supervisory and business communities. One might even go further and demand the inclusion of representatives of various stakeholder and civil society groups affected by accounting standards. This might not only prevent "group think" of the kind that we have seen enough of in the past, it could also improve crisis management and lead the way to a substantially revised set of financial reporting standards that are neutral, non-cyclical and sustainable.

Accounting at the G20 London Summit: Watering Down or Walking the Talk?

Sigrid Quack, 2009/04/04

It doesn't happen very often that technical matters like accounting standards make it into the final declaration of a G20 summit, agreed by the heads of government of the world's leading nations. Nevertheless, yesterday it happened. After deliberating in the City of London for two days about the appropriate means to cure the most severe worldwide financial crisis since 1929, the leaders of the G20 stated in their declaration[28] on strengthening the financial system:

> *We have agreed that the accounting standard setters should improve standards for the valuation of financial instruments based on their liquidity and investors' holding horizons. ... We also welcome the FSF recommendations on procyclicality that address accounting issues. We have agreed that accounting standard setters should take action by the end of 2009. (G20 2009: 5)*

Why did something so mundane make it to the agenda of world politics? While it was certainly a merit of Nicolas Sarkozy's populist threat to walk demonstratively out of the summit that made bloggers and newspaper writers such as Iain Martin wonder whether accounting standards could save the G20, the reasons for the G20 leaders dealing with "fair value" and "dynamic provision" are certainly more

28 G20 (2009): Declaration on Strengthening the Financial System. London Summit. April 2, 2009. **http://www.g20.utoronto.ca/2009/2009ifi.pdf**

complex[29]. Some, like David Zaring, also wonder whether the G20 summit produced more than just rhetoric[30].

Certainly the declaration of the summit, like all declarations of this kind, includes a significant dose of political grandstanding, which different political leaders will use to satisfy their domestic electorates. Nevertheless, behind the usual rhetoric there is a level of detail that gives reason to believe that a substantial revision of the content and governance of banking and accounting standard setting might be conceivable in the near future.

To understand the current political attention to banking and accounting standards, one has to dig into the reasons for the current crises. As Martin Hellwig of the Max Planck Institute for Research on Collective Goods points out in his discussion paper[31] on the subprime-mortgage financial crisis, Basel capital adequacy and fair value accounting standards – together with a malfunctioning of the market for over-the-counter derivatives and other securitised financial products – were significant factors behind the spread of the sub-prime mortgage crisis from the US across the world financial system.

29 Iain, Martin (2009): Can Accounting Standards Save the G20? *Accountancy Age*. April 2, 2009. **http://www.accountancyage.com/aa/analysis/1775159/can-accounting-standards-save-g20**

30 Zaring, David (2009): G20: The FS Forum Is Dead, Long Live the FS Board! *The Conglomerate*. April 2, 2009. **http://www.theconglomerate.org/2009/04/g20-the-fsforum-is-dead-long-life-the-fsboard.html**

31 Hellwig, Martin (2008): Systemic Risk in the Financial Sector: An Analysis of the Subprime-Mortgage Financial Crisis. Preprints 2008/43. Bonn: Max Planck Institute for Research on Collective Goods. **http://www.coll.mpg.de/pdf_dat/2008_43online.pdf**

An accounting history of the crisis

The crisis had first-order and second-order causes. The first-order causes are located in macroeconomic developments such as huge imbalances in world trade, abundant liquidity and continuously low interest rates, as well as excessive maturity transformation in mortgage securitisation in the US. The mortgage crisis rapidly translated into downward pressures on securities prices. The second-order causes, in turn, led to a self-enforcing downward spiral, which spread systemic risk from mortgages to other parts of the financial system and from the US across the globe.

One of these secondary causes was fair value accounting, which had been introduced to US banking as a reaction to the Savings and Loans crisis in the 1980s. At that time, fair value accounting was thought of as a remedy to cure the overestimation of banks' assets accounted for at historical costs but devalued in a changing environment. In the current crisis, however, fair value had exactly the opposite effect. As banks incurred losses from mortgages, they had to write off their assets at rapidly declining market prices.

As the crisis unfolded there was often no market price any more, as markets simply stopped functioning. Accounting rules forced banks to write off their assets, and

as they did so, capital adequacy standards required that they either take additional capital in, or retrench their overall lending. As more banks had to write off assets they entered a vicious cycle of failure that was reinforced by the fact that banks worldwide had been economising on equity capital since the 1990s and therefore did not have sufficient capital buffers to soften the effects of the crisis.

Martin Hellwig concludes that it was not too little regulation or too little supervision that went wrong. Instead, he states that

> *the regulation we currently have may actually have exacerbated the crisis. (Hellwig 2008: 61)*

Since the publication of Hellwig's study, the need for reforms to prevent unintended and undesirable pro-cyclical effects of prudential banking regulation and fair value accounting standards has been broadly recognised in academic and public debates.

A plethora of studies and reports converging on the need for reform

A remarkable number of analytical reports and policy recommendations have been published which tackle the problems of and remedies for the financial crisis from various perspectives. It seems worthwhile to browse through them quickly to see what their conclusions are for future accounting and prudential regulation, without any claim to completeness.

In March 2008, when the secondary effects of the subprime mortgage crisis were still unfolding, the US President's Working Group on Financial Markets stated in its Policy Statement on Financial Market Developments[32] that

> *Authorities should encourage FASB (the American accounting standard setter) to evaluate the role of accounting standards in the current market turmoil. (US President's Working Group 2008: 6)*

32 US President's Working Group (2008): Policy Statement on Financial Market Developments. Washington, D.C., March 13, 2008. **http://www.treasury.gov/resource-centre/fin-mkts/Documents/pwgpolicystatemktturmoil_03122008.pdf**

The Washington Action Plan[33], agreed by the G20 during their summit on November 15, 2008, suggested that global accounting standard-setting bodies should enhance guidance for the evaluation of securities on illiquid markets, advance their work to address weaknesses in accounting, and enhance the disclosure of complex financial instruments. In addition, financial standard setters were asked to strengthen capital requirements for banks' credit and securitisation activities.

33 G20 (2008): Declaration: Summit on Financial Markets and the World Economy. Washington, D.C., November 15, 2008. **http://www.g20.utoronto.ca/2008/2008declaration1115.html**

A report[34] by the Group of Thirty, under the leadership of Paul A. Volcker, issued two months later, criticised the too-rigid application of fair value accounting rules and pointed to an underlying tension between the business purposes of financial institutions – particularly the intermediation of credit and liquidity risk – and the interest of investors and creditors in having the best current information on the immediate market value of assets and liabilities. While the report maintained that mark-to-market accounting is the preferred method for trading activities, it suggested that

> *Fair value accounting principles and standards should be re-evaluated with a view to developing more realistic guidelines for dealing with less-liquid instruments and distressed markets.*

34 The Group of Thirty (2009): Financial Reform. A Framework for Financial Stability. Report published in Washington, D.C., January 15, 2009. **http://www.group30.org/images/PDF/Financial_Reform-A_Framework_for_Financial_Stability.pdf**

The High-Level Group on Financial Supervision in the EU, chaired by Jacques de Larosière, went much further in reviewing the weaknesses of a mark-to-market principle as applied to the financial system. The authors of this report[35] not only highlighted that

> *It is particularly important that banks can retain the possibility to keep assets, accounted for amortised cost at historical or original fair value (corrected, of course, for future impairments), over a long period in the banking book. ... Regarding the issue of pro-cyclicality, as a matter of principle, the accounting system should be neutral and not allowed to change business models – which it has been doing in the past by "incentivising" banks to act short term. (High-Level Group on Financial Supervision in the EU 2009: 20)*

35 High-Level Group on Financial Supervision in the EU (2009): Report. Published in Brussels. February 25, 2009. **http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf**

In order to reduce pro-cyclical effects, the Larosière report also suggested that prudential regulation should be revised, so that banks can create counter-cyclical capital buffers. In their assessment of risk "through the cycle" banks should follow the method of "dynamic provisioning" introduced by the Bank of Spain in 2000. Furthermore, the report broached the issue of the so-far relatively encapsulated world of highly technical private standard setting in which, as studies by Sebastian Botzem and Carlos Ramirez show[36], representatives of the world's largest accounting firms play a leading role:

36 Botzem, Sebastian (2010): Standards der Globalisierung. Die grenzüberschreitende Regulierung der Unternehmensrechnungslegung als Pfadgestaltung. Dissertationen Online. Freie Universität Berlin: Berlin. **http://www.diss.fu-berlin.de/diss/servlets/MCRFileNodeServlet/FUDISS_derivate_ 000000007292/Botzem_2010_Standards_der_Globalisierung.pdf**. See also Botzem, Sebastian (2012): *The Politics of Accounting Regulation*. Cheltenham, Edward Elgar. Ramirez, Carlos (2010): Promoting Transnational Professionalism: Forays of the "Big Firm" Accounting Community in France. In: Djelic, Marie-Laure, Quack, Sigrid (eds.): *Transnational Communities*. Cambridge: Cambridge University Press, 174–196.

> *It should be the role of the International Accounting Standard Board (IASB) to foster the emergence of a consensus as to where and how the mark-to-market principle should apply – and where it should not. The IASB must, to this end, open itself up more to the views of the regulatory, supervisory and business communities. This should be coupled with developing a far more responsive, open, accountable and balanced governance structure. If such a consensus does not emerge, it should be the role of the international community to set limits to the application of the mark-to-market principle. (High-Level Group 2009: 21)*

Counter-cyclical approaches for reforms of prudential financial and accounting regulation also figured very highly on the agenda of the Turner review[37] of the UK Financial Services Authority, published in March 2009. The report recommended a combination of "through the cycle" risk estimates (instead of "point-in-time" estimates), the creation of counter-cyclical capital buffers, and transparent reporting of counter-cyclical buffers in published accounts as an "economic cycle reserve". Again, the Spanish experience with "dynamic provisioning" featured as a positive benchmark for future financial and accounting regulation.

37 Financial Services Authority (2009): The Turner Review. A Regulatory Response to the Global Banking Crisis. Report published in London, March 2009. **http://www.fsa.gov.uk/pubs/other/turner_review.pdf**

So-called statistical or dynamic provisioning is a solvency provision for financial institutions that captures dynamically their capital provisions for expected losses over the business cycle. Thanks to the mechanism of the statistical provision, the burden of credit risk on the profits of banking institutions is spread better over the cycle. In terms of accounting, these provisions are considered value adjustments and will be deducted from the book value of the credit items that produce it in the published accounts.

Prospects for reform in the G20 group: Watering down or walking the talk?

It is a well-known fact that major politics work along their own dynamics. The more global a summit is, the higher the likelihood of a policy recommendation's dilution. How do the results, then, compare to the problem analysis and policy recommendations that were available from the above reports prior to the summit? While an overall evaluation would lead too far here, a reading of the final declaration on prudential regulation and accounting standards raises hopes that concrete steps will follow in the next months:

> *Prudential regulatory standards should be strengthened. Buffers above regulatory minima should be increased and the quality of capital should be enhanced. Guidelines for harmonisation of the definition of capital should be produced by end of 2009. ...*

> *The FSB, BCBS, and CFGS, working with accounting standards setters, should take forward, with a deadline of end 2009, implementation of the recommendations published today to mitigate procyclicality, including a requirement for banks to build buffers of resources in good times that they can draw down when conditions deteriorate. ...*
>
> *We will amend our regulatory systems to ensure authorities are able to identify and take account of macro-prudential risks across the financial system including in the case of regulated banks, shadow banks, and private pools of capital to limit the build-up of systemic risk. (G20 2009: 2–3)*

At the same time, the G20 declarations about the direction of a necessary reform of accounting standards for the financial sector remain somewhat vague in comparison to the level of sophistication of some of the reports reviewed above. Particularly, it seems disputable whether the suggestions made for the improvement of standards to overcome counter-cyclical effects can be achieved "while reaffirming the framework of fair value accounting", as stated in the final declaration.

However, the Report[38] of the Financial Stability Forum (FSF) on Addressing Pro-Cyclicality in the Financial System, published on the day of the summit, strikes a more radical tone: the FSF recommends that standard setters give due consideration to alternative approaches to recognising and measuring loan losses that incorporate a broader range of available credit information, including a fair value model, an expected loss model, and dynamic provisioning.

Given that the G20 decided to re-establish the FSF with enhanced capacity and a broadened mandate as a Financial Stability Board (FSB), effective as of April 2, 2009, the organisation has the potential to overcome the reservations that representatives of the FASB and IASB have articulated so far regarding a substantial reconsideration of fair value accounting.

38 Financial Stability Forum (2009): Report of the Financial Stability Forum on Addressing Procyclicality in the Financial System. April 2, 2009. **http://www.financialstabilityboard.org/publications/r_0904a.pdf**

Fair Value Accounting and the 'Inactivity' of Markets

Sebastian Botzem, 2009/06/04

Fair value accounting has been identified as one of the causes of the current global financial crisis (see p. 38 *"Fair Value Accounting in Retreat?"* in this volume). While it would be unfair to bookkeepers, accountants, auditors and academics to make them solely responsible for the loss of wealth and jobs, the present twists and quirks with regard to accounting policy are remarkable and merit closer attention.

A good example to show that the logic of accounting is being questioned is Germany's "bad bank" solution: in principle, there seems to be agreement on purging balance sheets of heavily impaired assets in order to free up capital and cut the risk of further writedowns. How that should be done, however, remains a big question. One of the great unknowns, of course, is how to determine the price for the assets to be transferred. Also, it needs to be determined how and to what degree the German taxpayers will eventually be burdened with liabilities, not just for years but for decades. The legal construction is also interesting: Germany's "bad banks" are supposed to be set up as Special Purpose Entities (SPE). Günther Merl, former speaker of Germany's public banking rescue fund Soffin (Sonderfonds Finanzmarktstabilisierung, in English: Financial Market Stabilisation Fund), recently argued in the German quality daily Süddeutsche Zeitung that the government should exempt the proposed "bad banks" from the usual regulation that applies to financial institutions[39]. The intention of such a move is to allow for accounting provisions that treat "bad banks" as something other than banks. The creation of Special Purpose Entities – one cause of much of the turmoil on financial markets – to rescue financial institutions indicates the dire straits that market advocates are in.

39 Merl, Günther (2009): Entrümpeln per Gesetz. In: *Süddeutsche Zeitung*. May 30, 2009: 2.

This episode points to a general trend in accounting at the time of crisis: principles and logic seem to be much less important than indicated by accounting text books and the usual free market sermon. Now, fair value accounting is making life quite difficult for the advocates of mark-to-market and mark-to-model accounting. The greatest challenge is how to argue in favour of markets at a time when they are collapsing. The inner circle of global accounting experts have found their own interpretation[40]: currently, markets are merely "inactive". Assets are supposed to retain their value, the markets just do not show it. The

40 International Accounting Standards Board (2008): IASB Provides an Update on Applying Fair Value on Inactive Markets. Published in London. October 14, 2008. **http://www.ifrs.org/News/Press-Releases/Documents/PR_FairValue102008.pdf**

irony of it all: more conservative value estimations such as historical costs have been criticised and subsequently marginalised for not being market values.

The current crisis, however, puts the fair value debate into a different light. What lies behind the fact that those who once argued that only the market shows the true value now cannot admit that the value of a financial instrument is zero when there is no buyer? How can the softening of once crystal clear pro-market ideologies be explained? One possible interpretation of the current intellectual flexibility of many free-market advocates could be that they were less interested in fair values and more in raising values.

A look back at what has happened over the last years is quite illuminating: there is no doubt that fair value accounting is pro-cyclical. This means that in times of growth, rising values reinforce each other. Rising shares and bonds are usually beneficial for the value of financial instruments such as asset-backed securities. Their increase in value contributes to, among other things, increasing share prices which are interpreted as stronger performance by companies. This improves ratings and frees up more capital for further activities. And the beauty of it all is that managers benefit from good performance indicators and dividends are high. Even more important: the profit distribution does not depend on realised gains. It is derived from a firm's fair value. Gains can be distributed via dividends and stock options before there has been an effective money transfer.

In times of crises, as we have seen over the last months, this virtuous circle turns vicious: Falling prices lead to writedowns and reduce balance sheet values. Assets are going down in price and the markets for financial instruments go down or collapse. Here is the interesting twist: now, all of a sudden, markets do not seem to indicate fair values any longer. No one seemed to have a problem with paying out dividends and manager compensation from unrealised gains. The collapse of entire markets, on the contrary, is interpreted as the "inactivity" of markets.

There should be no mistake: my argument is not to hold on to fair value accounting no matter what. Rather, I argue for a review of the principal in general and not just for interrupting its application in a time of crisis. Accounting academics and practitioners will have to examine the crisis carefully and provide answers to the contrasting norms applied during good times on the one hand and bad times on the other. One impression they need to counter is that accounting logic and principals play less of a role than the material interest of mangers, shareholders, consultants, analysts and auditors.

Of course, this debate is far less novel than one might think. Berthold Brecht, Germany's famous poet, playwright and director, raised one of the big questions with regard to the business of finance decades ago. In his famous Threepenny Opera dating from the late 1920s, he asks: "What is breaking into a bank compared to founding a bank?" The invention of "bad banks" and of "inactive" markets certainly has not made it easier for us to arrive at an answer.

Regulating Over-the-Counter Derivatives: Is Global Agreement Possible?[41]

Glenn Morgan, 2010/01/12

The last few weeks have seen a number of news stories indicating that the broad agreement reached by the G20 in early 2009 regarding the regulation of over-the-counter (OTC) derivatives is breaking down. On January 5th 2010, for example, the Financial Times published an article entitled 'Cracks in transatlantic derivatives rules'[42]. In the UK, the Financial Services Authority and the Treasury published a report[43] on the regulation of these markets in December 2009, which, whilst couched in supportive language, made a number of criticisms of the Commission of the European Communities document[44] on this topic published in October 2009.

Meanwhile, in the US, the US Treasury is aiming to achieve legislation on this topic; in Congress, the House has agreed a draft bill which differs again in some respects from both the UK and the EU, and the Senate is due to consider the issue this month. Most recently, non-financial companies in the EU, under the aegis of the European Association of Corporate Treasurers, have protested strongly about some of the existing proposals in a letter[45] addressed to the EU Commission on the grounds that they will penalise them financially.

The result is a somewhat confusing situation, in which the danger is that regulation will not be coherent across the main financial markets and regulatory arbitrage will emerge, potentially paving the way for a further destabilisation of the global economy. Many of these debates and differences appear very technical, but as I have sought to show in a recent article[46] on 'Legitimacy in financial markets: credit default swaps in

41 Since this blog was written, negotiations between the various parties on the issues described here have continued. Some of these developments are discussed in my more recent papers – for details, see below in Morgan (2012).

42 Grant, Jeremy, Braithwaite, Tom, van Duyn, Aline (2010): Cracks in Transatlantic Derivatives Rules. *Financial Times Online*. January 5, 2010.

43 Financial Service Authority (FSA) and HM Treasury (2009): Reforming OTC. Derivative Markets. A UK Perspective. Report published December 2009. **http://www.fsa.gov.uk/pubs/other/reform_otc_derivatives.pdf**

44 Commission of the European Communities (2009): Ensuring Efficient, Safe and Sound Derivatives markets. Paper presented in Brussels. October 2009. **http://ec.europa.eu/internal_market/financial-markets/docs/derivatives/report_en.pdf**

45 European Association of Corporate Treasurers (2009): Corporate Concerns about OTC Derivative regulation. September 2009. **www.treasurers.org/system/files/otccorporateconcerns0909.pdf**

46 Morgan, Glenn (2010): Legitimacy in Financial Markets: Credit Default Swaps in the Current Crisis. In: *Socio-Economic Review*, 8 (1): 17–45.

the current crisis' in Socio-Economic Review, there are major issues of politics and power underlying them.

In the immediate aftermath of the Lehmann crash and the financial crisis that ensued, governments and regulators identified many features of the system which had contributed to the problems. The trading of over-the-counter (OTC) derivatives was seen as particularly important. Derivatives are complex financial instruments that, in theory, enable firms to trade the risk associated with a specific phenomenon, e.g. the potential for interest rate changes, for exchange rate changes, for changes in the value of particular baskets of equities, the potential default of a borrower etc. For non-financial firms, this is useful in that is enables them to fix future liabilities and therefore plan with more certainty.

For financial firms, however, OTC derivatives became a hugely profitable business. Whilst many areas of this trade were relatively commodified, it was the more exotic products which were really profitable. In particular, as borrowing increased with low interest rates and huge global imbalances between high and low saving economies, financial institutions established the securitisation solution to the continued expansion of credit. They packaged loans up and then sold them on to others, at the same time offering an insurance against default on these loans in the form of a credit default swap (CDS). The credit expansion of the period up to 2007 (which fuelled the asset inflation of the period, including house prices) was reflected in the scale of the CDOs (collateralised debt obligations) issued. The risk of CDOs was offset by taking out CDS contracts; under these contracts, if the CDOs lost value, the CDS buyer was entitled to claim that loss back from the CDS seller.

CDS contracts were negotiated bilaterally, over-the-counter. In a context where there was a general belief that the boom would continue – and therefore the asset prices on which the original loans were made would rise, ensuring that defaults would be limited – the issue of collateral (i.e. placing capital into an account to deal with a potential default) was treated with benign neglect. It was more likely to be present as a condition of the contract (in the sense that if a certain level of defaults occurred, then collateral demands would ratchet up quickly) than as a real constraint on trade. There were no regulators who had authority to insist on collateral. Both the UK (in the Financial Services Act, 1986) and the US (in the Commodity Futures Modernisation Act, 2000) had explicitly ruled out any state regulation of OTC derivatives markets. The industry itself, through its trade association, the International Swaps and Derivatives Association (ISDA) was left to establish and monitor collateral; unsurprisingly, this was kept relatively low and did not apply to all issuers of contracts.

When, therefore, asset prices fell and defaults increased, conditionality clauses in CDS contracts were activated and suddenly, contract providers had to find large sums of collateral. In many cases these calls were beyond their ability and the result was that they hovered on the brink of bankruptcy (e.g. AIG) until governments rescued them. As asset prices plummeted, it became clear that nobody knew who was

holding the 'toxic assets', how to price these assets in order to establish the size of the difficulty any firm holding them on its balance sheet was facing, who was insuring these asset values via CDS contracts, and how much these contract issuers might need to put into collateral or into compensating contract holders. Since the purchasers of the contracts were not confined to those holding the assets – anybody could buy a CDS on any securitised bond issue – the scale of the problem was magnified even further. In this context of uncertainty, banks stopped lending to each other and the financial system came close to complete collapse. It was only when governments reacted by guaranteeing banks and setting up various schemes to enable banks to borrow on the basis of toxic assets that the immediate crisis ended.

When governments moved on from this necessarily 'national' response to the crisis to thinking about how to prevent it occurring again, they identified the OTC CDS market as requiring significant regulation. The general consensus was to move to a system of Central Clearing Parties (CCP). In a CCP system, instead of there being a bilateral contract between two companies, there are two contracts. The seller sells a contract to the CCP; the buyer buys the contract from the CCP. In this way, if either party defaults, the risk falls to the CCP. The CCP is expected to demand appropriate collateral on each contract and to mark-to-market the collateral on a daily basis, thus varying the demands on the two participants as the value of the collateral itself moves and the value of the underlying assets changes. As a result, CCPs are expected to be able to have sufficient spare collateral, so that they can deal with defaults and thus stop problems spreading more widely. CCPs can also monitor the scale of contracts and the ways in which they are moving as they build up. In principle, therefore, they can provide information to regulators on the positions of particular institutions.

Whilst the CCP model may provide a framework for controlling the systemic effects of CDS contracts, it has a number of problems, and these problems have not yet been resolved in discussions between regulators.

Firstly, the CCP depends on the idea of a standardised contract. How much of current OTC CDS activity can be standardised? Since financial institutions are likely to make higher profits from non-standard contracts, they tend to favour more room for continued bilateral OTC contracts than most regulators. In this they are being supported increasingly by non-financial firms such as the 160 firms represented in the letter of the European Association of Corporate Treasurers mentioned earlier, who wrote to the European Commission requesting that any new regulation not require them to put down collateral.

Regulators in different national contexts are committed to the CCP model. They are discussing the creation of a financial incentive for institutions to move away from OTC and into CCPs, by making a higher reserve requirement under Basle rules for capital risked on the OTC markets than in the CCP. However, industry groups are lobbying strongly on this and there is no common line amongst regulators yet about issues such as the definition of 'standardisation', the expected extent of

non-standardised[47] business activity, and the degree to which participants in non-standardised contracts (i.e. the traditional OTC model) will be incentivised financially (by higher reserve and collateral requirements) to shift their business to CCPs. There is a danger that if these definitions differ substantially across different national contexts, the result will be a form of regulatory arbitrage.

Secondly, there are a number of potential CCPs emerging in both the US and the EU. There are no common standards yet as to how a CCP should work. Issues such as the scale of collateral, the nature of standardised trading, and the responsibility of members for maintaining the solvency of the CCP have yet to be resolved. The UK FSA is lobbying for a European directive that will standardize the CCP model, but there is no guarantee that this will fit the US model. Again, issues of regulatory arbitrage continue to loom large in contexts where uncertainty is high and differences appear substantial enough to have a significant impact on profitability.

These debates reflect the difficulty of coming to agreement across borders, even in situations where this appears essential in order to prevent the potential occurrence of a further financial crisis. Regulators engage in multiple networks of discussions and negotiations in order to seek to achieve some sort of consensus. The latest FSA paper, for example, lists twelve 'international regulatory workstreams' in Annex 2 associated with the issue of regulating OTC derivatives. These workstreams involve representatives of national governments, international organisations and industry organisations operating in a variety of arenas working on inter-related aspects of the problems at different time-scales. Solutions are likely to emerge only slowly from such environments.

47 Developments in this debate during late 2010 and 2011 are covered in the following papers: Morgan, Glenn (2012): Constructing Financial Markets: Reforming Over-the-Counter Derivatives Markets in the Aftermath of the Financial Crisis. In Grant, Wyn, Wilson, Graham K. (eds.) (2012): *The Consequences of the Global Financial Crisis: The Rhetoric of Reform and Regulation*. Oxford: Oxford University Press, 67–87. See also Morgan, Glenn (2012): Reforming OTC Markets: The Politics and Economics of Technical Fixes. In: *European Business Organisation Law Review*, 13: 391–412.

Securitisation Revisited #1: Inside the Shadow Banking System

Matthias Thiemann, 2011/12/15

This is the first part of a series on the regulation of securitisation before and after the crisis. Why were the banks so affected by the run on the shadow banking sector, which was formally off the balance sheet? How can we explain the lack of regulation in the shadow banking sector? How did governments promote an increase of credit supply via the shadow banking system?

Securitisation has enjoyed a very bad reputation in the press in recent years[48], due to being related to overly complex re-securitisations, which became impossible to value during the financial crisis of 2007/2008. Before that crisis, securitisation was *en vogue*, favoured by most financial economists as a way to spread credit risk from banks onto the financial markets, thereby increasing the resilience of the financial system as a whole (cf. Bhattacharya et al. 1998[49]). The idea was to liquefy credits, to turn them into tradable assets, generating deep secondary markets on which traders could constantly readjust the amount of risk they held in their portfolio. Banks could refinance the credits they gave and thereby increase their lending. Credit would become cheaper, as the demand increased for securitised assets generated from credit, raising the available supply of credit.

48 See, for example Albertazzi, Ugo et al. (2011): Securitization Is Not That Evil After All. *Working Paper* No. 341. Basel: *Bank of International Settlement (BIS)*. **http://www.bis.org/publ/work341.pdf**

49 Bhattacharya, Sudipto, Boot, Amoud W. A., Thakor, Anjan V. (1998): The Economics of Bank Regulation. In: *Journal of Money, Credit and Banking*, 30 (4): 745–770.

Turning credits into tradable assets requires the possible transfer of these assets into money instantaneously and with no loss of value. Otherwise, this negates the whole idea of readjusting one's portfolio to changing market circumstances, which is what underlies modern portfolio theory (the Black-Scholes formula also requires continuous adjustment of the trader's position, which is why trading in continuous time is a necessary assumption for the pricing to work). Credits on banking books, by contrast, are held on the bank's book at historical cost accounting (see p. 38 *"Fair Value Accounting in Retreat?"* in this volume); i.e. not changing their value from the contracted value the moment the contract is signed. Only if banks undertake corrections in value to account for expected losses does the value of these credits in the bank's books change.

In this blog I will look at the infrastructural preconditions to securitisation (special purpose entities, in the following SPEs) and the changes proposed ways to handle them at an international level, and how they were handled on a national level, both before and after the crisis. Before the crisis, there was pressure from the Committee of European Banking Supervisors not to force these SPEs onto the balance sheet of

banking groups (CEBS 2004). After the crisis, we have witnessed a 180 degree shift in the position of the financial stability board, which now states that it wants full prudential consolidation for sponsored SPEs. In my three blog entries I will take a look at the impact that these transnational recommendations had, before the crisis, on the actions of national governments, and I will speculate about the future fate of the current regulatory proposals.

Going beyond the common presentation of the credit crisis: Securitisation and the banks

As several sociological authors and economists have remarked, liquidity always bears with it the "other"[50] – illiquidity. Liquidity needs constant, continuous pricing of assets. As markets decrease the volatility of these pricing movements, the easier it becomes to handle these assets in a portfolio. The moment the pricing of securitised credits broke down, and markets ran dry, these assets were glued to the balance sheets at the point where they stood at that moment, requiring write-downs.

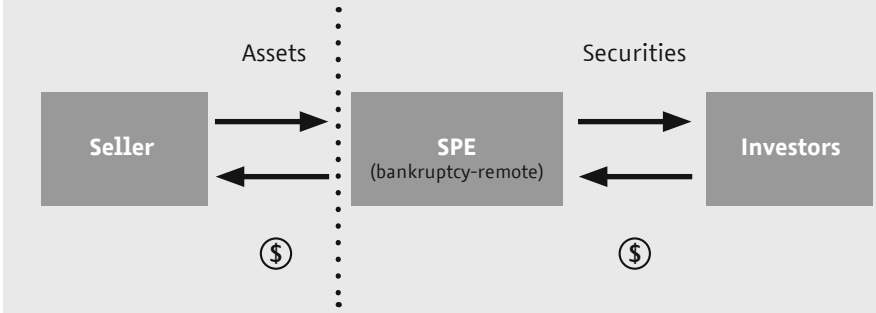
This provides a partial explanation of the reverberations of the rise in default rates in segments of the US market on global financial markets. The falling values of assets were hurting balance sheets, but the worst thing was that liquidity had come to a halt and central financial actors could not purge their balance sheets of these assets at an identifiable price, but instead had to hold them, so incurring incalculable losses. In the old system, the mortgage banks engaged in these credit segments, and possibly some of their biggest lenders would have been wiped out, but the crisis would have advanced at a slower pace, and would have been more contained.

50 See, for example, Langley, Peter (2010): Liquidity Lost: The Security Apparatus for Toxic Assets. Paper presented at the "7th Pan-European International Relations Conference" in Stockholm. September 2010. **http://stockholm.sgir.eu/uploads/Liquidity Lost SGIR Version Langley.pdf**. See also Carruthers, Bruce G. (2010): Knowledge and Liquidity: Institutional and Cognitive Foundations of the Subprime Crisis. In: Lounsbury, Michael, Hirsch, Paul M. (eds.): *Markets on Trial: The Economic Sociology of the U.S. Financial Crisis: Part A. Research in the Sociology of Organisations, Volume 30*. Bingley: Emerald. 157–182. Or Amato, Massimo, Fantacci, Luca (2011): *The End of Finance*. New York: John Wiley & Sons.

Focusing on the organisational infrastructure of securities markets

This is a legitimate story of the financial crisis and it points to the financial system's incapacity to handle increasingly complex products; it points to information asymmetry and moral hazard within an originate-to-distribute model. However, this story remains at the surface level of trading and thereby risks a failure to recognize the underlying infrastructure of the markets observed, which is indeed complicated (cf. first diagram below taken from the BCBS; second diagram with my additions to show the real link between banks and SPEs).

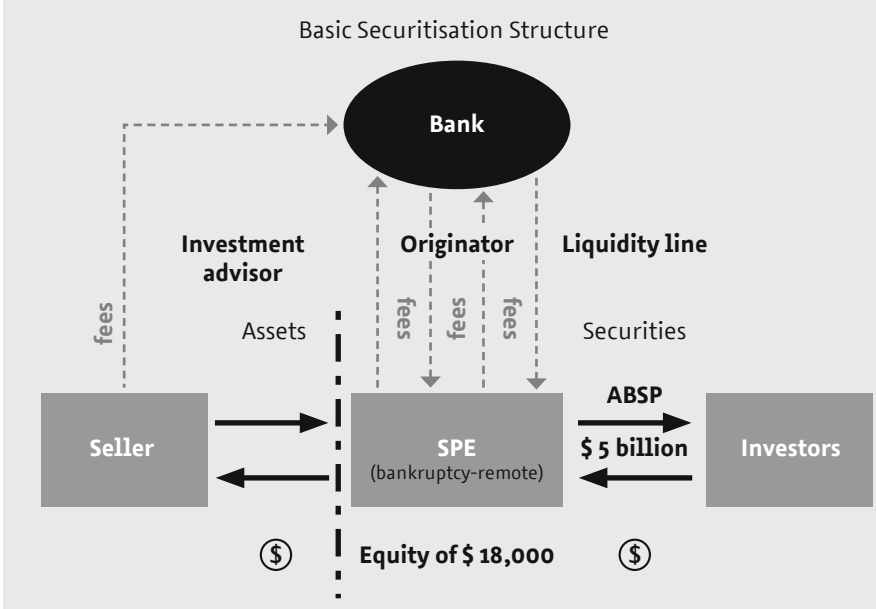
Basic Securitisation Structure



Source: Basel Committee on Banking Supervision (2009): The Joint Forum Report on Special Purpose Entities. Basel: Bank for International Settlements, p. 48, slightly modified by the author.

Bankers were not simply selling their credits to financial markets, but also to shell companies, which they had set up themselves and which they controlled in all but legal form, using them to generate extra fee-income. Paying attention to these shell companies, called special purpose entities (SPEs), will also allow us to explain better why banks were and remain at the centre of the financial crisis.

The Role of Banks in Securitisation



Source: Author's modified presentation based on Basel Committee on Banking Supervision (2009): The Joint Forum Report on Special Purpose Entities. Basel: Bank for International Settlements, p. 48, and Brinkhuis, D. and R. van Eldonk (2008): Still Going Strong: the Netherlands Remains the Jurisdiction of Choice for Structured Finance Transactions. In: Global Securitisation and Structured Finance, London: Globe White Page Ltd, pp. 215–220.

If the credit-risk transfer mechanisms had functioned as envisioned and all credit risk had been transferred from the banks' balance sheets, the largest losses ought to have materialised anywhere but within the banking system. However, this is where they actually arose[51], thus necessitating major bail-outs.

Besides the increased importance of the wholesale financing market for banking in the developed world (with UK banks financing 50 % of their operations via wholesale finance), which increased the vulnerability of the banking systems on those markets, the biggest reason for the major impact of the crisis in securitised credits was the close relationship that the banks had maintained with the assets they had securitised. These linkages led to the reappearance of large numbers of securitised asset credits on the balance sheets of banks; credits that had been sold previously to the shell companies. The most significant example in this respect is provided by Citibank, where $49 billion assets reappeared (cf. Acharya and Schnabl 2009, Acharya et al 2009[52]).

This reappearance, as well as the holding of securitised credits from other banks in the banking sector itself led to a concentration of losses in the banking sector. In addition, the reappearance cast wider doubt over the extent to which the banks had hidden further potential losses from their balance sheets, as assets appeared on the banks' balance sheets that had been deemed as sold to the market before. In this sense, the crisis was also very much a crisis of confidence in the banks' balance sheets, which explains the reluctance of banks and other lenders to lend to other banks.

But – to what extent did the balance sheets of banking groups represent the actual risks to which banks were exposed, and how much was lurking off the balance sheets?

In order to understand these legitimate concerns of investors, we need to pay attention to the infrastructural preconditions of securitisation. Doing so reveals how precarious this infrastructure is, and how much state aid was given in order to ensure that securitisation worked. Securitisation is linked inextricably with the shadow banking sector, and the way the crisis was resolved also points towards the power balance between banks and the shadow banking sector.

51 See, for example, International Monetary Fund (200): World Economic. Crisis and Recovery. April 2009. Washington, D.C. **http://www.imf.org/external/pubs/ft/weo/2009/01/pdf/text.pdf**

52 Acharya, Viral V., Schnabl, Philipp (2009): Do Global Banks Spread Global Imbalances? The Case of the Asset-Backed Commercial Paper During the Financial Crisis of 2007–2009. Paper presented at the "10th Jacques Polak Annual Research Conference", International Monetary Fund Washington, D.C., November 5–6, 2009. **http://www.imf.org/external/np/res/seminars/2009/arc/pdf/acharya.pdf**.
Acharya, Viral V., Schnabl, Philipp, Suarez, Gustavo (2009): Securitization Without Risk Transfer. March 2009. **http://richmondfed.org/conferences_and_events/research/2009/pdf/suarez_paper.pdf**

Securitisation, the transformation of credits in a bank's banking books into tradable assets in a bank's trading books or in those of other financial market agents, requires not only a contractual reconfiguration of the cash flow generated by these credits, giving value to the new assets, but also a change of ownership. In order for banks to be able to eliminate these credits from their balance sheets and to receive cash that they could reinvest in new credits, they had to sell them to a special purpose entity, which was remote from bankruptcy. This meant that the bank's creditors did not have any right to those assets in the case of the bank going bankrupt.

The special purpose entity, often taking the legal form of a trust, used those credits as assets, refinancing them by issuing debt instruments, to which they allocated the cash-flows from the credits. Thus, the transformation of contracts also required a transfer of ownership. What is remarkable about Special Purpose Entities (SPEs), by contrast to banks, is that they have almost no employees, make no important business decisions, and hold no equity to speak of. The actual decision-making is done beforehand by the bank initiating these trusts; it specifies in the contracts what the trust is allowed or not allowed to do, and also how much it needs to pay for the bank's ongoing services to the SPE. By transferring their assets to SPEs, the banks could achieve regulatory capital relief while at the same time generating fee income from the SPE.

Dutch Special Purpose Entities (SPEs) in the business of securitisation usually held 18,000 Euros as equity when the assets they held were worth 500,000,000 Euros. The equity to capital ratio was 0.000036 %. It is clear from this equation that the special purpose entity was incapable of withstanding even the slightest unexpected credit risk. This credit risk was contractually distributed, therefore, among the bond-holders. In case the rate of default increased above a certain trigger, the assets were to be liquidated immediately and the sum generated was to be paid out to bond-holders as the contracts specified.

Liquidity as the Achilles heel of the shadow banking system

This is how the issue of credit-risk was dealt with contractually. But this left the issue of liquidity risk, which became more central in the business model of special purpose entities the greater the maturity mismatch between assets and liabilities became. When Special Purpose Entities were used to refinance short term credit with short term debt, there was no maturity mismatch and the liquidity risk was almost zero. But when long term assets, such as mortgages, were refinanced with 60-day commercial papers, this meant that the maturity mismatch was huge and the liquidity risk was correspondingly immense.

At the same time, the greater the maturity mismatch, the greater the interest rate differential between assets and debt, and therefore the greater the profit to be had from undertaking this refinancing. But how was the liquidity risk dealt with? By asking banks to provide liquidity lines that could be used if refinancing on the mar-

kets proved impossible. These liquidity lines generated fees for banks, and given that banks could determine how much SPEs had to pay, banks could acquire approximately the full interest margin that SPEs generated.

Maturity mismatches were not regulated for special purpose entities (SPEs), and so the temptation was huge for banks to use these vehicles to engage in large-scale maturity transformation. At the same time, the bigger the maturity mismatch, the greater the probability that the liquidity line would be drawn and the bank would have to take up most of the debt instruments issued by the SPE.

However, before the crisis, liquidity on the markets for debt instruments was ever-increasing, making the probability of illiquidity seem highly unlikely. In this sense, banks were backing the non-occurrence of a tail-event, while selling insurance for it.

In this sense, banks were still maintaining some exposure to these assets, while officially transferring them from their balance sheets. Or as Gorton and Souleles (2007[53]) put it, they were exchanging their exposure to the assets for their exposure to the shell companies. This official status was important to the banks in order to reduce the capital requirements for their balance sheets, so that they opposed all accounting standards that might threaten the off balance sheet status of shell companies, like the SIC 12 of the IASB and its application nationally[54].

53 Gorton, Gary, Souleles, Nicholas (2007): Special Purpose Vehicles and Securitisation. In: Carey, Mark, Stulz, René M. (eds.): *The Risks of Financial Institutions*. Chicago: University of Chicago Press, 549–602.

54 See Larson, Robert K. (2008): Examination of Comment Letters Submitted to the IASC: Special Purpose Entities. In: *Research in Accounting Regulation*, 20: 27–47. Further discussion, see Thiemann, Matthias (2012): Out of the Shadows? Accounting for Special Purpose Entities in European Banking Systems. In: *Competition and Change*, 16 (1): 37–55. Thiemann, Matthias (2011): Regulating the Off-Balance Sheet Exposure of Banks Pre- and Post Crisis. *FEPS Working Paper*, 1–43.

Regulatory permissiveness in Europe in 2004

Interestingly, domestic finance ministries largely sided with the banks, arguing for light-touch regulation. But the Basel Committee for Banking Supervision, as well as the Committee for European Banking Supervisors also issued a non-binding proposal regarding prudential filters (cf. CEBS 2004[55]) and so aligned themselves with these interests. They were suggesting a prudential (!) filter that would remove the assets of SPEs from the banks' balance sheets for prudential regulation, even if they were forced onto the balance sheet of banking groups for financial accounting purposes. But why did they do this? On the one hand, one can say that they were simply expressing the spirit of the times, in which securitisation was seen as making the financial system more stable, so the more securitisation the better. In addition, an unequal global accounting framework meant that banks

55 Committee of European Banking Supervisors (CEBS) (2005): Guidelines on Prudential Filters for Regulatory Capital. January 2005. **www.frb.co.uk/cgi-bin/dmr5?access=&runprog=frb/frb_pages& mode=disp&fragment=2005_01_056**

under some legislation would have to withhold regulatory capital for these assets, while others did not. For instance, on the most significant market for securitisation, the United States of America, the rule for qualifying SPEs (FAS 140, in force since September 2000[56]) allowed all securitisation vehicles to be off the balance sheets, thus pursuing a prudential consolidation of SPEs without changing US accounting rules in accordance with IAS 27; SIC 12 would have imposed costs on European banks, but not on American ones. This competitive disadvantage might have convinced the Committee of European Banking Supervisors to favour this common exception rather than apply strict rules only to their banking groups. Banking groups in Europe were pointing out this disadvantage to their advisors repeatedly.

As I show in my forthcoming paper, these recommendations left considerable national policy freedom to European financial policy makers regarding whether they should pursue prudential consolidation of the SPEs or not. How this freedom was used, what effect it had on the national banking systems during the crisis, and what regulatory consequences were drawn on an international level after the crisis will be included in my next contribution.

56 Financial Accounting Standards Board (2000): Accounting for Transfers and Servicing of Financial Assets and Extinguishments of Liabilities. Statement of Financial Accounting Standards No. 140. September 2000. **http://www.gasb.org/cs/BlobServer?blobcol=urldata&blobtable=MungoBlobs&blobkey= id&blobwhere=1175820919404&blobheader=application%2Fpdf**

Securitisation Revisited #2: The States' Helping Hand

Matthias Thiemann, 2012/01/06

As explained above, securitisation required the transfer of credits from banks' banking books into shell companies, where the cash flows from these credits would be redirected to serve debt instruments that the shell company (or Special-Purpose Entity, SPE) emitted. The banks remained linked to the revenues and risks of these assets by providing liquidity lines to these shell companies in case the market ran dry.

When the crisis in the subprime mortgage market became evident, the buyers of debt instruments emitted by SPEs had assets whose cash flow was seen as deteriorating. Buyers on the market refused to take up the risk, as they could not price it and feared they would have to accept losses. At this moment, the liquidity lines of banks were drawn, and banks bought the papers from the SPEs they had initially set-up to get rid of these assets.

Now that they had ended up refinancing the assets they had sold to the SPE, they became the actual owners of these assets once again, which is why they reappeared on their balance sheets, but only at the worst of moments. The first SPEs to experience such a buyers' strike were those that did not even have a liquidity line, where the buyers were supposed to carry the entire credit risk themselves. Rather than imposing losses on their clients, many banks took the assets they had transferred onto the balance sheets of these SPEs (called Structured Investment Vehicles) back onto their own books for reputational reasons. Banks argued that they could cope better with the deteriorating value of these assets by holding them to maturity, and that imposing losses on their clients would endanger their future financing possibilities.

An important question for the impact of these developments on banking systems in Europe was how states dealt with the guidelines issued by the Committee of European Banking Supervisors in 2004, which recommended ignoring any financial accounting treatment of these shell companies that forced them onto the balance sheets of banking groups, as long as a true sale from banking group to SPE had been achieved. This meant in essence that banks had to withhold no capital to deal with unexpected losses emanating from these assets, and until the introduction of the Basel 2 requirements (by 2008 at the latest) they did not even have to hold any capital against the liquidity risks posed by the liquidity lines that banks had granted. In essence, if the banking regulators did not force regulatory actions upon their banks that contradicted the CEBS guidelines, their banking systems would be totally unprepared to deal with the shock.

Some European countries still forced banking groups to withhold regulatory capital for the assets of shell companies that were on their balance sheet, and in order to make this more effective they made financial accounting rules more stringent, gold-plating them (e.g. Spain or Portugal)[57]. In these two countries, no short-term securitisation developed, which reduced the immediate fall-out of the financial crisis in these countries. Other prudential supervisors struggled to install prudential consolidation and gave up their resistance to finance ministries and banks only later, by replacing prudential consolidation with other restrictions. This was the case of France, which – up until the end of 2005 – used prudential consolidation, i.e. applying regulatory capital charges to SPEs on the balance sheets of banks, only to switch under the pressure of their banks and the finance industry to the Basel rules on securitisation. Importantly, however, they moved capital charges for SPEs earlier, applying them from 2006 onwards. As a consequence, the shell companies of French banks were smaller and their impact during the financial crisis was relatively small.

57 See Thiemann, Matthias (2012): Out of the Shadows? Accounting for Special Purpose Entities in European Banking Systems. In: *Competition and Change*, 16 (1): 37–55. Thiemann, Matthias (2011): Regulating the Off-Balance Sheet Exposure of Banks Pre- and Post Crisis. *FEPS Working Paper, 1–43*.

Lastly, nations like Germany or Netherlands had no linkage between the financial regulator and the accounting standard setter, which led to the fact that financial supervisors were either not involved (Netherlands) or resisted moves aiming to force shell companies onto the balance sheets of banks (Germany). As a consequence of this lax regulation, in these two countries we find the largest markets for short-term Asset Backed Commercial Papers, which had the biggest impact during the crisis. The Netherlands got lucky, in that they developed a different measure, the liquidity coverage ratio, which forced banks to have the capital at hand to serve all liquidity needs in the next months, so that the fall-out was not so immediate. By contrast, German banks had set aside basically no capital to deal with the liquidity risks associated with their SPEs, which led to the direct collapse of two banks in the summer and fall of 2007 (IKB and Sachsen LB).

But securitisation in European countries had even more obstacles to overcome than their accounting and prudential treatments. All these shell companies are part of the shadow banking system, in that they don't fall under the same regulation as banks do, while engaging in maturity transformation just as banks do. But how come they were not regulated? Did the state not see these constructs and their usage? In short, are we dealing with a clueless state, outmanoeuvred by cunning financial engineers?

A closer look at state action before the crisis reveals the tacit acceptance of these organisations, and indeed their promotion by providing regulatory relief. The German finance ministry, for example, wholeheartedly followed the measures proposed by a study by the Boston Consulting Group in 2003 and eliminated regulatory hindrances to securitisation, going as far as categorising SPEs as microenterprises

and relieving them of business taxes (2003)[58] (for other dubious microenterprises engaging in financing on a smaller scale, but no less dangerous, see p. 279 *"Milking the Cow for what it's Worth"* in this volume). That is, a corporation with assets of up to 500 million Euros or more was counted as a microenterprise, due to its small equity.

Similar actions were taken with respect to financial regulation, excluding SPEs systematically from the perimeter of prudential regulation. The European banking directive specifies that in order to qualify as a credit institution, two cumulative criteria must be met: receiving deposits or other repayable funds from the public and granting credits for its own accounts[59].

SPEs might be seen to fulfill both criteria, as they are at least implicitly involved in the generation of credit. Instead, what we find is that countries decided to ignore the credit creating function of SPEs in order to avoid more stringent regulation, which would impose costs on SPEs and might therefore make securitisation unprofitable. This happened either explicitly or implicitly, such as in France, where there seems to have been a tacit agreement to not identify SPEs as credit institutions (see European Financial Markets Lawyers Group 2007: 28).

So, summarising this analysis of securitisation from an organisational perspective: banks were setting up shell companies to make securitisation possible. These shell companies were under the control of banks and were transferring the profits they generated in their operation as fees to the banks, now as service providers. States were not only well aware of these shell companies, they also engaged in their promotion in order to increase the credit supply in their domestic economies and strengthen their domestic financial marketplaces[60]. In an interesting twist, Basel 2 itself was providing the rationale for these state actions in the case of Germany. The new rules regarding the need for credit ratings to be taken into account by banks when providing credit to enterprises generated the fear of a credit crunch for small and medium sized enterprises, the backbone of the German economy. In order to counter this threat, Germany supported securitisation as a new way for SMEs to access the credit market.

Rather than financial engineering per se, securitisation involved legal and organisational engineering, and rather than having a clueless state overwhelmed by the ingenuity of financial actors, we might speak of the state as an accomplice try-

58 German Parliament (2002): Kleinunternehmerförderungsgesetz (KFG). Gesetz zur Förderung von Kleinunternehmern und zur Verbesserung der Unternehmensfinanzierung. *Br-Drs-447/03*. July 7, 2003. **http://www.securitisation.net/pdf/germanparliament_tradetax_11Jul03.pdf**

59 European Financial Markets Lawyers Group (2007): *Obstacles to Cross-Border Securitisation*. May 7, 2007. **http://www.efmlg.org/Docs/EFMLG_report%20on%20legal%20obstacles%20to%20cross-border%20securitisations%20in%20the%20EU_adopted%207%20May%202007.pdf**

60 See paradigmatically Asmussen, Jörg (2006): Verbriefungen aus Sicht des Bundesfinanzministeriums. In: *Zeitschrift für das gesamte Kreditwesen*, 19: 1016–1019.

ing to increase the capacity of its financial system in order to provide cheap credit to its economy. In these relationships it can be seen how the state not only allowed banks to create a false sense of security in their books, but also failed to regulate against what, with hindsight, should have been obvious risks.

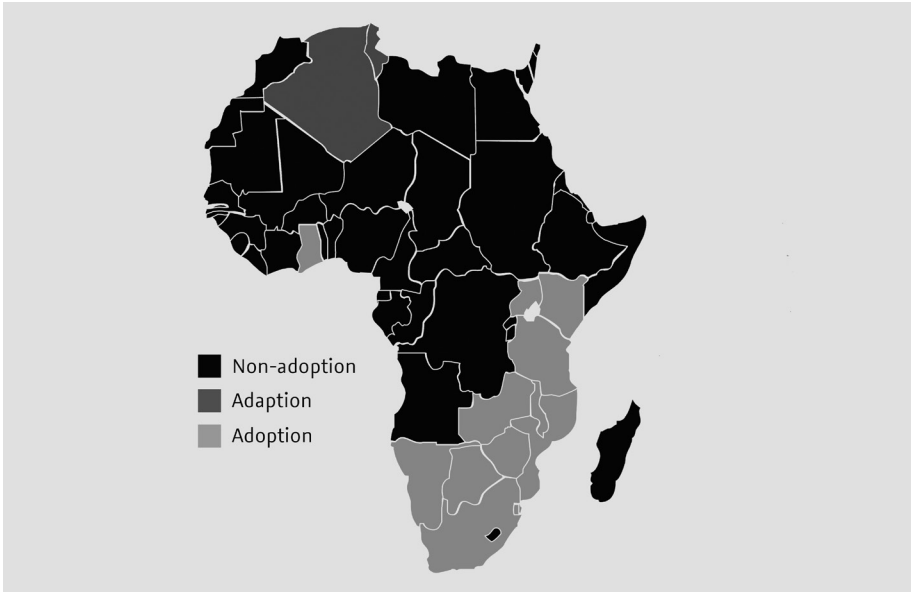
The State of IFRS in Africa: Is IFRS in Disarray?

Solomon Zori, 2012/01/11

Why should Africa adopt IFRS? Adoption is less of the story – not practising what you preach is the greater evil.

In the past decade an increase in the use of the International Financial Reporting Standards (IFRS) in many countries around the world has taken the wave to developing countries now considering adopting these standards. Factually, about 120 countries presently use IFRS across the globe. Out of this number, about 13 countries in Africa have already adopted (i.e. as issued by the IASB without any modification) or adapted (i.e. with modification to meet the local socio-economic needs of a particular accounting jurisdiction) the IFRS.

IFRS in Africa



Source: Author's map based on PwC (2012): IFRS adoption by country. Available online: http://www.pwc.com/us/en/issues/ifrs-reporting/country-adoption/index.jhtml

However, it is quite surprising that Africa as whole is considering adopting IFRS, given the chaotic nature of these standards on the international front and the often unseen justification given for the adoption of IFRS, particularly in Africa. Many international organisations like the World Bank, the World Trade Organisation, the U.S. Agency for International Development (USAID) and the United Nations Conference on Trade and Development (UNCTAD) have all been arguing for the adoption of IFRS in less developed countries. There are many reasons why Africa should not adopt IFRS. I will try to explain and to some extent justify this line of reasoning.

Politics over economics

First, the merits of IFRS often mentioned include improved comparability and uniformity of financial statements among companies and countries, resulting in a decrease in the equity cost of capital, improved transparency, a decline in information processing costs, and a reduction in the risk of international investment decisions, amongst others. Whilst these benefits look very desirable, it is also the case that such benefits cannot be achieved in every economy.

To be clear, IFRS were designed for developed and matured capital markets. The economics speak for themselves. It is an undeniable fact that financial statements assist investors in making critical investment decisions. As pointed out, in the general purpose of financial statements in the conceptual framework of the IASB, financial statements should aid users when valuing securities, when either buying or selling.

The argument for the use of IFRS in developed countries is plausible. However, what I find puzzling is the pressure towards IFRS adoption even in countries that have no stock markets or stock market listed companies. I do not deny that quality financial reporting should be present in economies where there are no capital markets. But I also submit that such countries have totally different financial reporting needs to industrialised countries. The accounting systems of any country are traditionally shaped by its socio-economic, cultural and political environment. Some economies are totally different from others and therefore we must recognize that differences in accounting needs must shape financial reporting.

The strong converge while the weak adopt

What is even more intriguing is the fact that the highly industrialised countries have all to some extent cherry-picked various parts of IFRS, i.e. converged to IFRS on their own terms, whilst edging less developed countries towards adopting them unreservedly without any modification. For example, we might think that the larger economies like Canada, the European Union, China, India, Russia, and Japan have all adopted IFRS. Nearly all these countries have modified IFRS to suit their economies' needs. In other words, they pick and choose which IFRS are relevant and which are

not. Unfortunately, many developing countries are adopting these standards without any thought to modification.

Accounting for double standards

Second, proponents of IFRS argue that once a country is developing rapidly, there is the need for a sound financial system to complement and consolidate this development process – the heavy focus of development efforts on microfinance discussed in other chapters of this volume is a case in point. Thus, it is a well-established argument that many African countries are experiencing huge economic growth and an increase in Foreign Direct Investment and, therefore, to attract investors there is a need for more transparent financial accounting systems like IFRS in addition to general capital market liberalisation.

However, many accounting scholars like Perera and Ole Hope argue that the decision of an investor to invest in a particular country is actually independent of that country's financial accounting system[61]. In fact, the reverse holds true. Countries that already have a sound accounting system together with strong investor protection laws are unlikely to adopt IFRS. I argue that IFRS are only adopted by countries where there is a weak financial regulatory system. The economic growth justification for the adoption of IFRS is further flawed in that the accounting standards in place were fundamentally different from IFRS at the time when these now highly industrialised countries were developing.

We may even consider whether, at the current stage of development in Africa, IFRS are not a solution at all, but on the contrary present real threats – a point I shall return to. A recent report[62] by the South African Institute of Chartered Accountants claimed that the IMF and UN have both projected that Africa will grow in GDP terms by 5 % in 2011; hence adopting IFRS is the only way forward. The report further iterated that for Africa to progress it is vital that the continent speak "one financial reporting language".

I view this as having some level of truth. However, speaking one financial language will not solve the many problems of the non-enforceability of regulations in Africa – enforceability of accounting standards is key. Nor does it eliminate the question of whether a complete adoption of IFRS will be more beneficial than IFRS with modification.

I would like to pause here to ask: why is it that the larger economies are not adopting IFRS as issued by the IASB? The world of accounting standards is clearly ruled by

61 Ole-Hope, Kristian, Jin, Justin Y., Kang, Tony (2006): Empirical Evidence on Jurisdictions That Adopt IFRS. In: *Journal of International Accounting Research*, 5 (2): 1–20.

62 Lorgat, Mohammed (2011): Africa Desk – It's Time for Africa in the International Financial Reporting Arena. *Accountancy South Africa (ASA)*. **http://www.accountancysa.org.za/resources/ShowItemArticle.asp? ArticleId=2224&Issue=1104**

double standards. For example, the United States of America is taking too much time to reach a final decision on whether all US companies should adopt IFRS at all. Even then, their decision is not to consider a complete adoption of IFRS, but to seek to converge with IFRS. The same is true of China, India, Japan, Australia, New Zealand, Canada and Russia. And yet, African countries often adopt IFRS as given.

What is good for the goose is good for the gander. Designing accounting standards that you have no intention of following fully should not be passed on to others to apply.

Uniformity for a diverse continent?

A third argument I would like to advance for the unsuitability of IFRS in Africa is the fact that there is great diversity in the socio-economic settings on that continent. In the European Union, (which happens to be the largest patron of IFRS), there are differences between member countries. But one thing sets them apart from the African Continent. The ability of the European Union to design regulations and directives that can be enforced by all member states makes it easier to adopt a uniform financial system. In Africa, even regional bodies such as ECOWAS and the AU are hardly able to agree on anything that can be enforced.

At a conference in South Africa, the outgoing chairman of the IASB, Sir David Tweedie, commented that the process of designing IFRS involves constituent continents from around the globe[63]. These continents speak with one voice and have the backing of representatives from the Institutes and Standard Setting Boards within the countries on those continents. When they speak, the IFAC (the International Federation of Accountants) and the IASB are obliged to listen. The other continents (excluding Africa) influence the development of the Standards to pay attention to circumstances on their continents. Africa is also there, but because the countries of this very diverse continent – 54 states! – do not have a united voice, they generally have minimal influence.

Even if African countries should adopt IFRS as given, it is unclear how the benefits of IFRS can be measured, as enforcement within the region will be left in the hands of individual countries. Apart from that, each country in Africa differs from the others economically. Thus, whilst some countries are clearly driven by natural resources, some countries are only tax based economies. That is, whereas some countries are much dominated by the public sector, other countries depend largely on the private sector. This makes their informational needs differ from each other; adopting IFRS in such economies, therefore, will not yield the desired goal of comparability of financial affairs.

63 Lorgat, Mohammed (2011): Africa Desk – It's Time for Africa in the International Financial Reporting Arena. *Accountancy South Africa (ASA)*. **http://www.accountancysa.org.za/resources/ShowItemArticle.asp?ArticleId=2224&Issue=1104**

Fairer valuation thanks to "fair value"?

Fourthly, during the recently ended, painful financial crisis, it was often held that the IFRS were part of the problem. Namely, the specter of so-called fair value accounting, as discussed in other contributions in this section! Whether IFRS was just the messenger[64], as often argued, or the fuel that fed the crisis: in some way IFRS was part of the problem.

64 See, for example, Magnan, Michel (2009): Fair Value Accounting and the Financial Crisis: Messenger or Contributor? *Cirano*, Scientific Series, 27. **http://www.cirano.qc.ca/pdf/publication/2009s-27.pdf**

Even as I write, there are huge problems in countries that currently apply IFRS. Take Greece and Portugal for instance. How valuable is the use of IFRS in such economies? Can we claim to have the same level of market efficiency in fair value terms in these countries? Now compare IFRS in Greece to a country that has no stock market, let alone an efficient and stable economy, like Somalia. How differently do investors view IFRS statements from Greece as opposed to the UK? This is open to different interpretations.

A recent report by the International Monetary Fund[65] indicated that African resilience throughout the global financial crisis owed much to sound economic policy, citing steady growth, low inflation, sustainable fiscal balances, rising foreign exchange reserves, and declining government debt. I argue that, if IFRS were part of the problem and the G20, the EU and individual governments managed to avert the situation via bailout packages, how would Africa have responded to the crisis? I leave this point open so that readers can think about it and send me their comments, if they would like to.

65 International Monetary Fund (2011): *World Economic Outlook* April 2011. Tensions from the Two-Speed Recovery. Washington, D.C. **http://www.imf.org/external/pubs/ft/weo/2011/01/pdf/text.pdf**

For small players, cost is the bigger issue

As accountants and users of financial statements, the concept of costs versus benefit analysis is nothing new to us. The idea of a switch to IFRS can be viewed on two cost dimensions. The first is that accounting standards are costly to design, let alone implement. That explains why most less-developed countries may simply fall upon already developed standards from industrialised countries; for example, Indonesia adopting US-GAAP and Ghana adopting IFRS. The second dimension is that the implementation of these standards is very costly to firms and imposes resultant costs on the adopting country.

The real benefits of IFRS are hard to quantify in monetary terms, but it may be easier to gauge the costs of implementation. Proponents of IFRS argue that, by adopting IFRS, an entity is likely to reduce its cost of capital. Unfortunately, there is simply no hard evidence that the cost of capital falls upon adopting IFRS. Unless a country

has a well-developed stock market with equity participants willing to pay a premium for high-quality financial reporting, the costs of IFRS implementation far exceed the benefits. As stated bluntly in an interview with Christian D. Migan, president of the the *Organisation pour l´Harmonisation en Afrique du Droit des Affairs (OHADA)*, "who will pay for the cost of implementing IFRS in countries such as Chad, Benin, Togo, Burkina Faso and all the OHADA regional countries which have no capital markets and where nearly 80 % of the companies are small scale entities?"

Big four audit firms are happy, but clients are in pain

The idea of adopting IFRS seems to be prompted by the big four audit firms. Literature documents their strong involvement in the setting of IFRS. The real issue in the case of Africa is that we lack the experts to foster a smooth transition to IFRS. What it means, therefore, is hiring the services of the big four audit firms. Auditors like change: change that clients have no idea how to handle – for example off balance sheet transactions (see p. 53 "Securitisation Revisited" in this volume). Why can't we see that auditors are always happy to advocate IFRS? They stand to gain in every way.

I think it is time for Africa to pause and take a serious look at possibilities for an accounting system that better reflects the needs of the continent and its individual countries. The question is, whether Africa is ready for IFRS as opposed to whether IFRS is ready for Africa?

What's the Problem? Reforms of 'Fair Value' Accounting Revisited

Sigrid Quack, 2012/09/05

More than three years after I wrote *"Fair Value Accounting in Retreat?"* (see p. 38 in this volume), it seems appropriate to take stock of the results of reform initiatives undertaken after the financial crisis. Just as a brief reminder: in the course of the financial crisis, International Financial Reporting Standards were suspected to have exacerbated the collapse of financial markets. Particularly, the use of "fair value accounting" for banks' financial assets was scrutinised for its contribution to downward spirals between devaluated market assets and banks' rising capital requirements. Previously considered as a purely technical matter, accounting principles suddenly became a matter of international politics. The G20, the Financial Stability Board, IOSCO and the two leading standard setters, IASB and the US-American FASB, all got involved in what appeared to be a busy beehive of reform debates. Three-and-a-half years later,

with the financial crisis followed and superseded by the European sovereign debt crisis, accounting principles seem to have returned to their status of "Sleeping Beauty". Yet this impression is misleading. Accounting principles continue to be a crucial link between the reporting of financial institutions and financial market regulation. All the more reason for reviewing two recent publications which analyze international accounting standards reform and harmonisation.

Did accounting standards exacerbate the financial crisis because the accounting of assets by their "fair value" in inactive and collapsing markets forced banks to increase their capital base unnecessarily? Were better buffers against market fluctuations necessary for more robust accounting that would provide financial market regulators with more fair and just figures on what was really happening in the banks? Was the "creative" use of accounting standards an enabling factor for the growth of the shadow banking sector? Debates about such issues perked up in the immediate months after the financial crisis. There was a lot of pressure from politicians, international regulatory bodies and the general public to investigate the role of accounting standards, and possibly to revise them. As is common with complex policy matters, publicity-seeking statements by politicians were soon replaced by less visible committee work, where a variety of different parties fought over gradual and incremental changes.

Problem-solving without a common problem-definition

In a paper[66] that Paul Lagneau-Ymonet and I recently published in Renate Mayntz' edited volume on 'Crisis and Control', we trace policy debates across a range of international and European arenas during the period from November 2007 to November 2011. While theories of the policy cycle typically assume agreement among actors on a common problem definition to start with, debates on accounting standard reform, interestingly enough, did not converge towards such an agreement. Reforms actually unfolded in a context in which controversial debates over competing problem diagnoses – arising from a transparency and prudential approach to accounting – continued. Problem definition changed over time but remained unsettled. Hand-in-hand with this went shifting and sometimes fairly counter-intuitive coalitions between actors, which ran across typical industry-regulator and private-public divides. While securities regulators tended to side with investment banks and the IASB's accountants in a plea for "fair value" and market transparency, banking regulators and business banks were more likely to support accounting reforms with the aim of rendering accounting figures more robust against crisis-driven market fluctuations.

66 Lagneau-Ymonet, Paul, Quack, Sigrid (2012): What's the Problem? Competing Diagnoses and Shifting Coalitions in the Reform of International Accounting Standards. In: Mayntz, Renate (ed.): *Crisis and Control. Institutional Change in Financial Market Regulation*. Frankfurt/Main: Campus, 213–246.

In sum, however, unsettled debates did not prevent reform altogether. Faced with pressure from politicians, international organisations and banking regulators, the IASB – in loose cooperation with its US-American counterpart FASB – started a review process of its international financial reporting standards in the light of the financial crisis. As a result, the IASB has undergone reforms at the organisational level and some IFRS have been modified. By November 2011, the most important changes were:

- *Improved accountability:* a Monitoring Board and Financial Crisis Advisory Group (FCAG) have been established, including representatives of public authorities. Overall, this has made the governance structure of the IASB more publicly accountable. However, while prudential regulators, demanding a stronger consideration of the stability of the financial system in designing accounting standards, have played some role in the FCAG, the Monitoring Board includes only representatives from security markets regulators, who (like the members of the IASB themselves) lean more towards market efficiency and transparency as the prior goals of accounting standards. The only exception is the European Commission, whose role in the Monitoring Board still remains to be seen.
- *More robust accounting standards:* the standards now provide clearer guidance on fair value measurement and a simplified classification of financial instruments (IFRS 9). The notion of "control" as the basis for the consolidation of entities (dealing with the problems arising from special purpose entities during the crisis) has been far more broadly defined than, for example, by the US-American standard setter FASB (see p. 53 *"Securitisation Revisited"* in this volume).

Problem-solving driving standard-setters apart rather than towards convergence?

Following the financial crisis, one key goal of politicians and regulators was to achieve greater harmonisation of accounting standards across the world. Yet the results are paradoxical. While policy-makers and international financial regulatory organisations have pushed for increased collabouration between the IASB and the US-American standard-setter FASB, this cooperation has only taken the form of a loose cooperation. As a result, both standard-setters have been pursuing similar topics with different time horizons and deadlines, engaging in exchanges with different stakeholder groups. By the end of 2011, the reform initiatives had produced a variety of different opinions and solutions in fields such as the measurement of financial instruments, impairment and consolidation. Part of the reform outputs, thus, seems to run counter to the goal of unified standards envisaged at the beginning of the process. This view is further supported by the content of the IASB-FASB Update Report[67] from April this year.

67 Hoogervorst, Hans, Seidman, Leslie F. (2012): IASB-FASB: Update Report to the FSB Plenary on Accounting Convergence. April 5, 2012. **http://www.fasb.org/cs/BlobServer?blobkey=id&blobwhere=11758238977918&blobheader=application%2Fpdf&blobcol=urldata&blobtable=MungoBlobs**

Standard-setting: Harmonisation at the cost of financial stability?

Attempts made by the IASB and FASB to achieve more convergence have been accompanied by the articulation of substantial differences in 'legacies', interests and responses of stakeholders between the two standard-setters and their constituencies. Progress on issues which were still open in November 2011 has been very slow and cumbersome. The boards of the two standard-setters are still working on solutions to issues such as numbers of classifications for measuring financial instruments, assets to be measured at fair value, recognition of fair value, impairment, hedge accounting, consolidation of entities, accounting of netting – to name the most important ones. In some areas standard-setters are struggling to agree on one version (classifications), in other areas they are defining meta-solutions (impairment). The developments since November 2011 support the argument that the overall global governance architecture has not been effective in initiating a convergence process, mainly because there has not been a clear enough mandate, goals of convergence have remained too ambiguous, and deadlines were not sufficiently coordinated.

Furthermore, these developments reinforce the impression that the IASB has been undertaking more substantive realignments of its standards in response to calls from prudential banking regulators and politicians (predominantly from Europe and international organisations such as the FSB and the Basel Committee) than the FASB has done or is willing to do. This is evidenced by the FASB's more gradual revisions in the framework of a narrow legalistic notion of control in the case of consolidation (as compared to the broad substantial definition of control introduced by the IASB) and its reluctance to account for long-held loans on the basis of amortised, rather than fair, value. Apart from historical legacies of accounting (increasingly highlighted by both standard-setters in recent publications), this outcome can be also traced to the different institutional environment that the FASB faces. In the US, the Securities and Exchange Commission, in charge of overseeing the American accounting standard setter, focuses more strongly – by definition of its institutional tasks – on capital market efficiency (and hence a transparency approach in accounting) than the Financial Stability Board and European prudential regulatory authorities have done after the crisis (leaning towards a more prudential approach).

Overall, problems of harmonisation have delayed the reforms of IFRS. In December 2011, the IASB announced that the mandatory date for the implementation of IFRS 9 had been deferred from 2013 to 2015 (voluntary adoption being possible before that date). This also implies that the EU, which has declared itself unwilling to endorse the standards before the whole package is completed, will postpone formal adoption. De facto, therefore, reforms are still waiting for implementation on the ground in one of the largest jurisdictions of IFRS adoption.

Governance reforms: Informal deliberation with regulators more effective than formal overseeing?

In terms of governance reforms the IFRS Foundation's Strategy Review of April 2012[68] and the Monitoring Board's Governance Review of February 2012[69] are of interest. The reports of both bodies provide evidence for strategies of justification and institutionalisation of a "moderately revised transparency approach" as compared to a "prudential approach". This can be illustrated by the self-definitions, claims and justifications presented for changes and continuities in governance, including those referring to the inclusion or exclusion of specific actors at different levels of decision-making and consultation.

68 IFRS Foundation (2012): IFRSs as the Global Standards: Setting a Strategy for the Foundation's Second Decade. Report of the Trustees' Strategy Review 2011. Report presented in London. February 2012. **http://www.ifrs.org/The-organisation/Governance-and-accountability/Strategy-Review/Documents/TrusteesStrategyReviewFeb2012.pdf**

69 The IFRS Foundation Monitoring Board (2012): Final Report on the Review of the IFRS Foundation's Governance. February 9, 2012. **http://www.iosco.org/monitoring_board/pdf/Final Report on the Review of the IFRS Foundation%27s Governance.pdf**

The most significant changes are:

- While transparency continues to be highlighted as the first priority, "sensitivity towards needs of others with responsibility for financial stability" is mentioned as well.
- Further "enhanced technical dialogue" with prudential supervisors and international organisations like IOSCO, the Basel Committee, FSB and IMF is considered necessary.
- Closer formal cooperation with national standard-setters and securities regulators is seen as urgent for providing a solid factual and legitimacy basis for the implementation of IFRS.
- An Emerging Economies Group is being established to enhance participation from emerging countries in the development of IFRS.
- Changes in the Due Process Handbook will incorporate practices which have developed in response to dealing with the crisis, such as regular meetings with prudential regulators. For example, the revision of the Due Process Handbook forthcoming in the second half of 2012 will include an acknowledgement of the responsibility of the IASB to communicate with securities and prudential regulators. There will be recognition of formal meetings as well.
- The IFRS Foundation is establishing a Working Group from the "international community" to discuss methodologies for field work and effect analyses (something requested for a long time by critics and practitioners).
- For the first time, the IASB will also specify protocols for how to deal with complaints about possible breaches of its Due Process. It remains to be seen to what

extent these protocols will involve binding rights and duties (as in the case of Due Process in US administrative law).

The most significant continuities are:

- The so-called "independence" of the standard-setter from any vested interest – private or public – is recognised by both the Monitoring Board and the Board of Trustees (and also not questioned in more general policy discourses, as far I can see). The notion "independence of the IASB as standard-setter within a framework of public accountability" seems to represent the new policy consensus – without detailed specification of what "public accountability" actually means (this would require more in-depth tracing of other documents to establish how widely it is shared).
- After the introduction of the Monitoring Board and high level advisory groups (like the Financial Crisis Advisory Group, FCAG), this independence has been institutionalised (and further steps in this direction are recommended by the review reports) by means of a Memorandum of Understanding that clarifies the division of rights and responsibilities between the Board of Trustees, Monitoring Board and the IASB as standard-setter.
- As part of this institutionalisation, the Monitoring Board is clearly defined as a "Monitoring Board for Overseeing – not Operation". The rights of the Monitoring Board to influence broader directions of standard setting are very narrowly defined – at least on paper.
- It is significant that both reports come to the conclusion that the Monitoring Board should be confined to representation of those authorities that are in charge of financial reporting standards and the overseeing of capital markets – not mentioning banking and prudential regulators or other stakeholders like investors. Actually, the reports explicitly reject suggestions for broader representation during the consultation phase on the grounds that they represent "a misunderstanding" of the function of the Monitoring Board. Thus, we see a new insider elite (consisting predominantly of capital market regulators who have predominantly have taken a capital market efficiency and transparency stance during the crisis) claiming to be in a position to define the function of the overseeing board.
- It is also in continuity with the IASB's expert model of standard-setting and output-based claims for legitimacy that both the Monitoring and Trustee Board see the consultation procedure as the arena for the broader participation of other stakeholders.

My overall assessment of changes and continuities in the governance of the IASB is that this organisation is developing into an international regulatory body, woven into intergovernmental agency networks in a similar way to IOSCO, and integrating public regulators of securities markets at the international and national levels

for both legitimacy and implementation purposes. Yet the core of the standard-setting process is dominated by accountants – now under the supervision of branches of securities regulators often also staffed by accountants –, whose continued claims to have the monopoly of technical expertise to produce high-quality standards serve the exclusion of other types of technical expertise (like that of prudential banking regulators) from the formal decision-making process. It is interesting, however, that communication channels with prudential regulators are now recognised and formalised as "enhanced technical dialogue". Based on the evidence presented in the article on the influence of the FCAG in pushing problems of pro-cyclicality on the IASB's reform agenda (under the pressure of the crisis), it seems worthwhile to keep an eye on these interactions in the future. This is because (in the best-case scenario) they might turn out to be more effective at opening the IASB's accounting standard-setting to broader policy concerns through recurrent technical deliberation among experts rather than through the overseeing of a Monitoring Board alone.

Labour and Development: Standardising Progress?

Sabrina Zajak

In comparison to other transnational governance fields covered in this volume, labour still counts as being regulated predominantly domestically by tripartite industrial relations between the state, business and trade unions. This tripartite system has also formed the core of the earliest – and for a long time only – international organisation governing working conditions across borders: the International Labour Organisation (ILO). However, the rise of global production networks and the outsourcing of labour-intensive production from advanced economies to newly industrialising countries have brought about significant changes over the last decades.

New forms of transnational labour governance have emerged, with three major features discussed in the following contributions: first, new actors and new forms of labour rights activism have taken to the stage. Trade unions are no longer the only organisations claiming to represent workers; they have been joined by labour-oriented NGOs that develop campaigns and other actions to foster better working conditions in labour-intensive industries in developing countries where unionisation is often weak or absent. In some cases NGOs and trade unions cooperate in joint transnational campaigns, in other cases they act separately or even compete with each other. Several of the following contributions discuss how such transnational networking across countries, between trade unions and NGOs, takes place and what kind of responses or non-responses they trigger in the countries of production, i.e. in Asia and Africa, as well as in the countries of consumption, i.e. in Europe and the US.

A second feature of change addressed by the following contributions is the emergence of new forms of transnational private regulation. These operate predominantly without the direct involvement of the state and trade unions. They are often summarised under the label Corporate Social Responsibility. Yet, while private regulatory arrangements appear very standardised and, seen from the outside, indeed look very similar, the routes along which they have emerged and developed differ significantly between companies and industries. As will be discussed for the toy sector, specific ac-

tor constellations and relationships within industry specific governance fields shape the institutional form of the regulation and the degree of commitment.

A third, and interrelated, feature of change is that private regulation has introduced additional mechanisms for controlling and monitoring working conditions in global supply chains. Some of the following contributions discuss how monitoring works in practice and what problems arise on the ground. They also point to various types of interaction between transnational actors and local actors. While transnational actors, including labour activists, business associations and consulting companies, are becoming important in regulating working conditions in global supply chains potentially transforming local systems of labour relations in emerging economies, local development and the workers' own struggles on the ground nevertheless remain key to actual improvements in working conditions and payment. The following sections discuss the rise, development and local outcomes of labour rights activism and transnational labour governance arrangements with a focus on Asia and particularly on China as the most important sourcing country world-wide.

Expanding Private Labour Regulation: The International Toy Fair in Nuremberg

Sabrina Zajak, 2009/02/17

How can you convince small- and medium-sized companies to take responsibility for their suppliers in China? Each year, this topic is brought up at the international toy fair by civil society organisations and the International Toy Association.

The challenge seems tremendous: big companies that source in developing countries usually establish a whole department or CSR team, whereas smaller companies lack the capacity at home, as well as the buying power abroad to influence factory behaviour. Therefore it is even more surprising that the toy industry, with a high share of medium-sized enterprises, has established an international industry-wide approach. – But how do you get companies to join?

The industry is taking a special approach: increasingly, national associations make it compulsory for their members to join the so-called ICTI CARE process, an international programme introduced by the International Toy Association in 1998 to promote ethical manufacturing in Chinese toy factories. In Germany, it was decided in 2008 that all members of "Deutscher Verband der Spielwaren-Industrie e.V." should follow suit by the end of the year. But only deciding doesn't necessarily imply automatic compliance. This is why a coalition of various German NGOs "Aktion fair spielt", which is critically accompanying the ICTI Care process, produced a list of leaders and laggards, making it public at the toy fair. This list not only symboliz-

es a "naming and shaming" approach, but also forms the basis for further talks between the national and the international associations, and the missing firms at the fair. Usually, this direct engagement is seen as the best way to win over companies to participate. At the same time, "Aktion fair spielt" tries to keep track of whether announcements are turned into reality. However, joining the ICTI Care process doesn't guarantee feasibility for some smaller companies, as actual implementation might turn out to be difficult in an economic environment characterised by fierce time and pricing pressure.

Compliance in China: How to Become a Compliance Manager in One Day

Sabrina Zajak, 2009/05/02

Auditing has become an important business in labour supply chain management. Seminars and training courses are offered all over the world on how to become a successful auditor. But actually, it doesn't take you more than a day. It means having an eye open for obvious problems, which are often so similar that you don't even need to go into the factory to know about them.

Basically, you go around the factory and check: are there fire extinguishers? In fact, I have never seen any places with more fire extinguishers than this Chinese factory. This was also true of the emergency exit signs. But these fire extinguishers visualise what the well-known situation of double, triple etc. auditing means: yes, the extinguishers are there. Everywhere. That's because when buying brands don't cooperate (which at least some are trying to do more and more), there are different rules on where to put them. So the factory simply places them everywhere.

There are a couple more things to check, like the first aid box: maybe part of it is broken or stolen. The kitchen. And the bathrooms. Are they clean enough? Safety issues: are the workers wearing eye or ear protection, for example? Books are checked as well, but this is a completely different issue that I must return to later.

Then you make a list and tell the factory manager: clean this up, or put another light on this exit. Change can be achieved easily, without touching the broader supply system. And it is good for a company's record. But after a couple of years, there might be enough fire extinguishers. Some companies have realised this and have started to change their compliance management. Training becomes the hot issue. And again, a new business opportunity arises.

Sympathy for the Devil? The Diamond Trade Goes into Crisis

Philip Mader, 2009/07/30

The diamond trade hasn't exactly enjoyed a great reputation over the past years. Not least thanks to Hollywood movies like Blood Diamond, these gems are perceived as being covered with the blood spilt in civil wars all over Africa.

But diamonds are also a key export of many poor African nations.

Despite some initial progress being achieved by the Kimberly Process certification scheme, diamonds' persisting bloody reputation isn't exactly undeserved. Many still find their way onto the world market, dominated by De Beers, from appalling sources.

Groups like Amnesty International and One Sky have criticised the certification scheme as lacking impartial, obligatory monitoring. Global Witness, an NGO specialising on the link between natural resource exploitation and violence reported that the scheme was failing to address issues of non-compliance, smuggling, money laundering and human rights[70]: "The clock is running out on Kimberley Process credibility."

Other problems include the fact that diamonds from conflict-ridden Zimbabwe are still considered legitimate under the Kimberly Process; and the mind boggles as to what real effects the membership of countries like the Democratic Republic of Congo may have on the ground. Several civil wars are currently raging within the Congo's boundaries.

70 Centre du Commerce International pour le Développement (CECIDE) et al. (2009): Blood Diamonds – Time to Plug the Leaks. June 19, 2009. **http://www.pacweb.org/Documents/Press_releases/2009/Blood_Diamonds-time_to_plug_the_leaks-eng-2009-06-19.pdf**

Rise and fall of a dodgy trade

It seems that neither the movie, nor rising civil society awareness, nor the certification scheme have effectively dampened demand for this luxury commodity. Private consumers among the world's elite class, in fact, kept pushing up diamond prices throughout the boom years, with prices rising by 16 percent even in the crisis year of 2008[71]. And this was despite diamonds' industrial use increasingly being satisfied via synthetic diamonds.

Maybe diamond buyers are simply too callous to care about conditions in Africa and elsewhere?

71 Smith, David (2009): Shine Coming Off Diamond Trade Regulation. The Guardian Online. June 26, 2009. **http://www.guardian.co.uk/world/2009/jun/26/blood-diamonds-regulation**

If so, this is a case of failed industry self-regulation, because the much-trumpeted discerning consumers aren't doing their job of discerning.

Now, on comes the recession, and the plot thickens: less and less money to splurge on mineral jewellery, which often costs more than an African family's lifetime earnings. This month the BBC reported a dramatic fall in worldwide demand[72], and just last week, a fall in the profits of De Beers[73], the former world monopolist in the diamond trade, from 316 to just 3 million US Dollars.

72 Mark Senders reports on BBC Online (July 10, 2009): Antwerp Diamond Sales Lose Lustre. **http://news.bbc.co.uk/2/hi/business/8143901.stm**

73 BBC (2009): De Beers Profits Lose Their Gleam. *BBC Online*. July 24, 2009. **http://news.bbc.co.uk/ 2/hi/business/8166730.stm**

As a result of this, De Beers is now cutting back production in its mines in Namibia, Botswana and South Africa through "production holidays". Workers will be laid off next. Presumably, many unofficial and illegal producers and suppliers to De Beers are even harder-hit, having to absorb the full brunt of the shock.

Does this mean more hunger and poverty for many Africans? Certainly. Despite all its drawbacks, the diamond trade was feeding many miners, traders and their families, even if at miserable levels. Without having benefited significantly from decades of prosperity elsewhere, African countries are now amongst the hardest-hit by the economic slump. Does this mean that at least the violence and civil wars will stop? Probably not, for as the cake shrinks, struggles for its distribution will likely intensify.

Gloomy prospects. Yet as long as Africa depends on exporting raw materials via foreign corporations under conditions of exploitation, whereby the exporters keep most of the surplus, the grim picture is likely to remain.

Glimmers of hope in Zimbabwe

However, some very small signs of hope are visible in Africa, too; for instance in Zimbabwe, a country still suffering horribly under its colonial legacy from Rhodesia, which was a fascist state even by apartheid-era standards. Interestingly, Rhodesia was named after precisely that British imperialist, Cecil Rhodes, who founded De Beers. Zimbabwe is one of the world's major diamond exporters.

The BBC has recently been allowed into the country for the first time in almost a decade. It reports from a country slowly getting a grip on itself. Maybe the power-sharing agreement between Mugabe and Tsvangirai is allowing the most pressing problems to be addressed.

Transnational Connections: The US-China Labour Exchange

Sabrina Zajak, 2010/02/04

On January 23rd 2010, the US China labour exchange met for the 6th time. The China Labour Exchange group has been meeting for 2 ½ years now. It is a meeting between some US labour union members and individuals with close ties to the Chinese labour movement. Despite the absence of official Chinese union representatives, these meetings present an important opportunity for exchange and mutual learning about the labour movements in the US and China, as well as for discussing potentials for future collaboration. This is of particular importance in a context where high level union talks between the AFL-CIO (American Federation of Labour and Congress of Industrial Organisations) and the ACFTU (All-China Federation of Trade Unions) are not yet taking place.

What do Chinese and American workers have in common? Where are there potentials for cooperation? Before summarising the meeting, I will first give some background information about the US labour movement and China to make clear why such a meeting is rather unusual for the US context.

The US labour movement and China

The AFL-CIO has taken a prominent role in the debate on trade with China. Fearing job losses in manufacturing and an associated, further weakening of unions in the US, they opposed China's entry into the WTO as well as the establishment of permanent normal trade relations with the US. Since the 80s, China has had the status of a Most Favoured Nation (MFN), a special trade status for imports, which was regularly extended every year. In 2000 China entered Permanent Normal Trade Relations (PNTR) and in 2001 China became a member of the WTO with the support of the Clinton administration. Thus, the campaign of the AFL-CIO has failed. Nevertheless, it started a debate on the position towards "China" inside some parts of the movement.

Officially, the campaign should have reflected a shift in AFL-CIO's international strategy, away from their old, Cold War anti-communist policy towards focusing on corporate abuses and international enforcement mechanisms for labour rights: trade agreements with China should be conditioned on raising wages, improving working conditions, allowing unions and respecting human rights.

Others criticised this position as being a protectionist reaction. It harms the Chinese workers instead of supporting them. By using the rhetoric of the Chinese threat, unions encourage fears of Chinese workers stealing U.S. jobs and purposely under-

cutting U.S. standards. They feared that the campaign rather "fuels cold war politics, has resulted in racially offensive messages and has weakened the strong anti-corporate and international solidarity focus coming out of the anti-WTO protests in Seattle". This could lead away from discussing structural problems of the global economy[74].

74 For a detailed discussion, see Wong, Kent, Elaine, Bernard (2000): Labour's Mistaken in Anti-China Campaign. In: *New Labour Forum*. May 24, 2000: 19–23. **http://www.law.harvard.edu/programs/lwp/people/staffPapers/bernard/2000%20Debating%20China.pdf**

While officially there is still no dialogue between the AFL-CIO and the ACFTU, especially the critical voices towards the AFL-CIO position inside the US labour movement are calling for communication and exchange with China.

In this regard they are part of a broader international development, as unions worldwide try to define their positions towards the ACFTU. Internationally one can witness a slow opening towards the ACFTU, at various levels: the ITUC (International Trade Union Confederation) decided to open dialogue in December 2007. Sino-European exchanges on various levels have been taking place since 2001; and China has increased its presence constantly within the ILO over the last 20 years, despite China not having signed Conventions 87 (Freedom of Association) and 98 (Right to Organize and Collective Bargaining). However, such openings have not been without criticism in themselves.

Part of the problem is a lack of a clear understanding about the changing role of the ACFTU: on the one hand, it is a state union, serving Chinese authority's goals by prioritising the maintenance of social stability and the support of enterprises in their operation instead of representing workers. On the other hand, it is in the process of redefining its role as a labour organisation under capitalism. In this respect, ACFTU's first grassroots organising campaign of Wal-Mart workers in 2006 was considered an important step towards defining a new role and new voice that speaks for the workers. For some, it signaled change that reforms are underway, at least on the local level[75].

75 For a debate, see e.g. Chan, Anita (2006): Organising Wal-Mart: The Chinese Trade Union at a Crossroads. *Japan Focus*. September 8, 2006. **http://japanfocus.org/-Anita-Chan/2217**

The labour exchange meeting

To better understand the ongoing transformation process of the ACFTU, and the role of the state, business and the workers themselves, the US-labourLabour Exchange was called into existence in 2007. Driving forces behind this process were Elaine Bernard, Executive Director, Labour and Worklife Program at Harvard Law School, Tim Costello, long term labour activist and co-founder of Global Labour Strategies, Kent Wong from the UCLA Institute for Research on Labour and Employment, and Ellen Friedman, organiser for the Vermont teachers' union, vice-chair of the Progressive Party, and a teacher at Zhongshan University, Guangzhou.

Instead of talking about "the role of China" for the US job market, the Exchange is a place to talk about common problems and challenges in a global economy: What do Chinese workers really want? What do Chinese and U.S. workers have in common? How can one foster mutual goals and solidarity?

Ellen Friedman gave an interesting presentation of the latest news about workers' actions and the responses of Chinese institutions: law suits and arbitration are still rapidly increasing and doubled again in 2009; NGOs and citizen agents, usually former migrant workers who are now helping other workers with their legal claims, are still spreading. While some levels of the ACFTU consider these groups a threat, others are interested in learning from their labour support work, openly admitting the representation gap of the unions and discussing the need for reform.

The development of industrial relations in private enterprises in China is influenced by the relationship between labour NGOs or citizen agents and the ACFTU: on the one hand, the ACFTU uses similar tactics to the citizen agents by setting up legal aid centres, giving legal support and thereby operating within the framework of the regime's attempt to strengthen rule of law. On the other hand, such strategies can also be criticised from a union perspective, as guaranteeing individual rights by a court system that in itself faces inefficiencies and flaws could hardly replace collective agreements and collective bargaining. The following question came up: How can this development contribute to strengthening a real labour movement? One hope is that as workers learn more and more about their rights and get more confident about them, maybe they will press for union reforms from within in the future. Internal demands will finally cause the union to serve its members.

But members of other US unions also talked about their experiences of visits to China and discussed common problems of migrant workers in China and the US. Ding Xiaoqin, a representative from China and associate professor from the Marxism Research Institute Shanghai University, stressed that real communication is necessary for a mutual learning process. Ideas and strategies cannot simply be transferred from one setting to another. In this spirit, three major areas for potential cooperation were identified:

One possibility is further exchange on ideas and methods of organising. Identifying common problems and challenges is also a way of building trust. Another step could be involvement in international solidarity work, for example in the case of Columbia and Coca-Cola. One very specific option is cooperation on health and safety issues in the transport sector. Workers worldwide face similar health and safety challenges and some international union cooperation is already taking place. A first step could be the participation of ACFTU representatives at the international conference focusing on the health status of transportation workers organised by the New York City Transit Workers Union. As a long term perspective, participants envisioned a collective organising campaign against a transnational company. Such a campaign could offer a lot of space for mutual learning on both sides. Both sides face similar challenges in organising some international companies.

But there are still challenges ahead on both sides. Major changes within both union movements, the AFL-CIO and ACFTU, are necessary in order to be able to organize workers together along the supply chain. To date, the question of how to get beyond individual activist exchange and involve union leadership remains open. Labour exchange meetings are the first positive step in this direction.

Ipods, Ipads and Rising Discontent over Working Conditions in the World's Largest Factory

Sabrina Zajak, 2010/06/04

Last week consumers around the world learned about the place our mobile phones, ipods, iPads and PlayStations are produced: in production facilities in China, owned by a Taiwanese company called Foxconn, which produces for brands such as Apple, Hewlett-Packard, Samsung and Dell. Consumers learned that Foxconn is the biggest producer of electronic goods, employing over 400,000 workers in the Shenzhen province, where 11 workers committed suicide this year. Consumers also learned that the official annual suicide rate in China is 13 per 100,000 workers. And Terry Gou, the founder of Foxconn underlines that his factory lies below the official norm.

The rising protest inside China and abroad that followed these tragic incidents reveals a lot about the new dynamics in the fight for improvements in working conditions in Chinese factories: a dynamic that combines strong local critique, which does not leave the government untouched, and international outrage against the major customers.

The Chinese media is reporting about this incident in a highly critical way. China Daily, the biggest official English-language newspaper, reported repeatedly about the Foxconn case. Journalists quote Wang Tongxin, the vice-chairman of the Shenzhen Federation of Trade Unions, as stating that suicides are a reaction to the "quasi-military management system" of Foxconn[76]. The union demands better material benefits and mental care for employees from all companies, and the police is investigating the incident. Meanwhile, Foxconn is installing protection around windows to prevent workers from jumping off the building, company officials have brought in psychiatrists and Buddhist monks to talk to workers, and to have them sign a written confirmation that they are not going to commit suicide.

76 Hong, Chen (2010): Foxconn Urged to Take Better Care of Young Employees. *China Daily Online*. April 14, 2010. **http://www.chinadaily.com.cn/china/2010-04/14/content_9725475.htm**

The incident not only produced spontaneous local protest. Written statements were posted on the internet with clear demands made towards the national as well as local governments and the factory itself. Signatories were scientists from mainland China and Hong Kong, who called for the central government "to immediately end the model of development that has sacrificed people's basic dignity", and required the local government to protect migrant workers' housing, education, medical care and other social needs, and urged enterprises to increase migrant workers' pay and rights[77] .

77 Shen, Yuan et al. (2010): Address to the Problems of New Generations of Chinese Migrant Workers. End to Foxconn Tragedy Now. May 18, 2012. Translation by Kate Alexander. **http://sacom.hk/archives/644**

Labour advocates around the world are picking up on these demands and calling upon the major buying company Apple to intervene. They want a review on management methods, the formation of a trade union through democratic elections, and a change in purchasing practices which will allow for decent wages and less overtime work: issues they have raised repeatedly over the last years to all major companies sourcing their products from China.

This could turn into a public relations disaster for Apple, which has just become the world's largest technology company by market value, overtaking its greatest rival Microsoft. Apple is the main customer of Foxconn and also gets the lion's share of criticism. Next week Apple planned to unveil its newest iPhone. Chief Executive Steve Jobs commented that "the factory is not a sweatshop" and they will make their own investigations about the suicides (Reuters). As Foxconn is a major supplier, it is unlikely to lose business.

Despite international attention, the major force for change will come from the Chinese workers themselves: labour unrest is rapidly increasing and workers are openly showing their discontent over the income inequality and social injustice in the country: workers are still on strike in Chinese Honda factories, demanding higher wages; workers in Hyundai factories went on strike only shortly before that.

As a consequence, it is expected that wages will rise about 15–25 percent and local governments will raise the minimum wage as a response to public pressure. In the long run, recent developments may contribute to collective bargaining on wage issues inside factories and to strikes turning into a legitimate instrument for increasing workers' bargaining power. Yet this still seems to be a long way off as long as the state union and the government insist on "harmonious relations" between employers and employees.

Interregionalism: Transnationalisation without Representation? The Asia-Europe Meeting

***Sabrina Zajak*, 2010/10/11**

Interregionalism – multilateral meetings between different regions – has become an important aspect of governing global economic, financial and political issues. One such interregional exchange is the Asia-Europe Meeting, (ASEM). The 8th meeting recently took place in Brussels from 5th-6th October. The ASEM is an informal dialogue bringing together the heads of government of the 27 EU member states and 16 Asian countries, the European Commission, and the ASEAN Secretariat.

The first ASEM meeting took place in Bangkok in 1996, in order to foster economic development and counterbalance the US influence in the Asian region. While these meetings are informal and non-binding, they nevertheless aim towards strengthening economic and political relationships between countries. This year's summit was dominated by the financial and economic crisis. Under the heading "More Effective Global Economic Governance", European and Asian officials agreed upon closer economic cooperation as well as financial coordination, and stressed the importance of sustainable growth and climate protection goals.

Such meetings – like international trade politics in general – suffer from the lack of democratic participation and support of citizens. Negotiations take place behind closed doors, the negotiation processes are non-transparent and parliaments are largely shut out of such processes. Consultative bodies and advisory committees are dominated by business interests or business affiliated lobbying groups.

As a response to the lack of transparency and democratic checks and balances, unions and NGOs founded a counter-summit, the Asia-Europe People's Forum (ASEF), where labour unions and social movements across Asia and Europe expressed their concerns about marketisation and demanded a "social and market regulatory dimension" of trade negotiations.

But to what extent does challenging this global economic governance institution contribute to any kind of change?

At first sight it looks like a success story: labour, environmental and human rights issues play a prominent role in the final ASEM declaration and the ASEM leaders promised a people-to-people approach. But the disappointment over the discrepancies between words and actions is huge.

During the last couple of years, and partially driven by the EU's internal democratic deficit debate, ASEM leaders started to stress a people's to people's approach and integrated several "side events" into the official programme, The Asia-Europe Busi-

ness Forum (AEBF), the Asia-Europe People's Forum (ASEF) , the Asia-Europe Foundation conference (ASEF), a trade unions summit and the Asia-Europe Parliamentary Partnership. All these gatherings formulate their own statements and recommendations for the ASEM summit.

Yet it was only the business forum that could discuss its input directly with the ASEM governmental representatives in an official business brunch. So far, the unions have been unsuccessful in gaining the same status and access as the business forum. Since 2008, however, they have been invited to participate in the preparatory events for the labour and social ministerial meetings taking place within the ASEM framework.

The opportunities for civil society organisations to engage politicians have never been as good as during this year's meeting in Brussels. This was the result of the strong involvement of local unions and their good connections to the political system, which was not the case during the meeting in Beijing in 2008 (for China, the AEPF 7 was the biggest civil society meeting since the NGO Women's Conference in 1995) and Hanoi in 2006.

From 2nd to 5th October several hundred people met at the 8th Asia-Europe People's Forum (AEPF) in order to discuss issues of trade, investment, decent work, food sovereignty and climate change, and alternative paths to free trade agreements.

The goal of this meeting was to bring together representatives of European and Asian civil society to promote cooperation and enable them to voice their recommendations for the ASEM meeting.

After a day of discussions a list of demands was formulated, which was presented to the prime minster of Belgium, Yves Leterme, and in policy dialogues with representatives of the European Commission as well as in the European Parliament. The groups called for a re-regulation of businesses and better enforcement of existing rules and policies: "Despite the existing laws, regulations, standards and mechanisms, governments have failed to prioritize human rights, environmental security and labour rights over the profits of companies. There has been a lack of political will in implementing regulation and establishing redress mechanisms for companies operating in and beyond their territories"[78].

78 Asia-Europe People's Forum (2010): Recommendations to ASEM8. **http://www.aepf.info/news/ articles/55-recommendations-to-asem8-from-the-asia-europe-peoples-forum**

The propositions of the AEPF included the introduction of a financial transaction tax, a governance reform of international financial institutions, independent investigations and stakeholder consultations on the EU-Asia trade policies, legally binding instruments to define the legal responsibilities of international companies, and international legal redress mechanisms in case of violations of rights in global supply chains, and several issues/measures for food and water protection, climate justice and the promotion of decent work.

The policy dialogues with the European Commission's (EC) officials were lively and produced heated debates. In particular Asian unions and NGOs highlighted the

discrepancies between the official statements and promises and the actual realities they face every day. When an EC official stressed the EU's commitment to promoting decent work, a representative from Bangladesh answered: "We don't demand decent work. 'Decent' is something for your countries. We want the right to life. We demand a living wage." In debates with the European Parliament, Asian unions and NGOs learned that although the European Parliament has considerably more rights than most of their own national parliaments, its impact on the EU trade agenda is still very limited.

In the one hour dialogue with the Belgian prime minister, Yves Leterme, he welcomed the message from civil society and expressed support for the demands regarding the creation of decent jobs, social dialogue, and social protection: "I'm grateful for your strong message and for the signal it gives. It is important that your message will be put forward." And indeed, the AEPF was at least mentioned in the final declaration of the ASEM meeting, which also contained direct references to the decent work agenda, the importance of social dialogue and support for the Global Jobs Pact of the ILO.

Nevertheless, the distance to the popular field is huge. The impression of "participation without influence" is well-known to European civil society organisations within the EU framework. In some Asian countries, however, such participatory mechanisms are lacking completely.

Despite the lack of influence, this meeting was not considered to have been in vain. As Walden Bello put it in his speech: "ASEM's main benefit is that it created the opportunity for civil societies between Asia and Europe to form very solid links. The major reason to support the ASEM meeting is because it enables these civil societies to connect." It remains to be seen whether in the future such transnationalisation will result in more representation and whether these interregional networks can really contribute to the development of "multilateralism from below".

Innovative Transnational Collective Action: The People's Tribunal in Cambodia

***Sabria Zajak*, 2012/02/27**

The anti-sweatshop movement has been revitalising and exploring a new form of localised transnational collective action: a People's Tribunal on the Minimum Living Wage and Decent Working in Cambodia. The idea of people's tribunals is not new and originated in the human rights arena. Among the first international people's tribunals, which examine and provide judgments on violations of human rights was the Permanent People's Tribunal founded in Italy in 1976. Since then, people's tribunals have spread, as an action repertoire for human rights activists, throughout a range of countries in order to promote justice and mobilize the victims of human rights abuse independent of the state judiciary. Their goals have been about popularising the notion of justice; educating the public; encouraging debate on human rights issues, and democratising legal processes. The tribunal is a legalistic but soft instrument to provide justice in cases where the state has failed to do so.

The area of labour rights violations is a rather new one for the adoption of this instrument. In Cambodia it has been used to investigate the violation of labour rights, in particular the poverty payment. Its aim is to improve working conditions and raise the wage level in the Cambodian garment industry.

From 5–8 February 2012, a hearing was organised in Phnom Penh, in which over 200 garment workers testified regarding mass fainting, slum living conditions, malnutrition, debt, repeated short-term contracts and dismissals of 1000 union leaders after a sector-wide strike. International brands such as Adidas and Puma could present evidence about their role as buyers. Other brands such as H&M and Gap refused to attend the hearings.

The case of the Cambodian People's Tribunal can be understood as the result of effective organisation of a transnational collective among a range of different actors from a variety of countries.

It was organised by the International Asia Floor Wage Alliance and Asia Floor Wage Cambodia, a campaign alliance that aims to attain a decent minimum living wage for garment workers across Asia, founded in 2007.

In Cambodia the main organisation of the tribunal was arranged by Asia Floor Wage Cambodia, a coalition of several Cambodian unions and NGOs. Internationally, the tribunal is supported by the Clean Cloth Campaign Network, the biggest anti-sweatshop network in Europe.

After two days of hearings, five judges from different continents concluded that workers rights are being severely and systematically violated. They came to the ver-

dict that international supply chains should immediately address the issue of poverty wages[79].

Brands "should move beyond 'good intentions'" and "recognize and prioritize the need for human rights in the workplace in their pricing and procurement policies".

The AFW Alliance organised its first tribunal in Colombo, Sri Lanka (27.–30.3.2011), and plans to host additional ones in India and Indonesia on the "the right to a minimum living wage as a fundamental human right", which will provide a comprehensive picture of substandard working conditions and poverty wages in Asia. The tribunals provide a way to initiate national discussion about the underpayment of garment workers; internationally, they provide anti-sweatshop movements with further ammunition to pressure global corporations to take responsibility for their practices and to push for a redistributive corporate accountability agenda.

79 Clean Clothes Campaign (2012): Tribunal Verdict Finds Cambodia's Garment Workers Kept in Poverty. Press Release. *cleanclothes.org*. February 8, 2012. **http://www.cleanclothes.org/media-inquiries/press-releases/press-release-tribunal-verdict-finds-cambodias-garment-workers-kept-in-poverty**

Poverty Wages in the Asian Garment Industry: Reasons and Counter-Strategies

Sabrina Zajak 2012/09/14

Several contributions to this blog have discussed different forms of transnational labour rights activism, transnational modes of governing working conditions in global supply chains, and their local consequences. In all these contributions, the structural reasons for a core concern of workers – their low income ("poverty wages") have not been discussed. In a very recent paper, "Expanding repertoires of labour: multi-scalar counterstrategies in the Asian garment industry", presented at the Social Science Research Centre on 8th October 2012, Jeroen Merk and Sabrina Zajak discussed the reasons behind poverty wages across Asian countries, reasons which make multi-scalar strategies of labour necessary to counter these problems. A brief summary of this paper will now be given.

Most consumer goods such as textiles, clothing, toys, or electronics are produced in Asia, in countries such as China but also Cambodia, Vietnam, Bangladesh or India. While labour intensive production plays a major role in the economic growth in those countries, workers themselves very rarely profit from the economic upswing of their countries. Many labour rights abuses are highlighted continuously by international unions such as the International Union Confederation or transnational labour rights networks such as the Clean Clothes Network. Although there are several

country-specific differences, we argue that there are at least three commonly shared reasons for these problems.

First, while most Asian governments set minimum wages, these typically fail to provide enough income to maintain a family of four above the nationally defined poverty level. In order to attract investment, many governments set legal minimum wages below the subsistence level, with severe consequences for workers and their families, who often have to live below the poverty line (for a good overview of minimum wages by country, see *http://www.wageindicator.org/*).

Second, despite the existence of or rise in minimum wages, workers often do not receive them in actual payment. Wage defaulting has many faces: workers are being cheated with respect to their minimum wages; tricked over overtime pay; denied benefits like travel and food allowances; dismissed because the employer refuses to respect legal rights to maternity leave, or robbed of severance payments when plants shut down. There are several reasons why these domestic rights violations remain undetected: state inspections are rare; workers themselves don't know how to claim their rights; management finds different creative ways to deceive inspections, or the control and monitoring of global buyers.

Third, and probably most importantly, the level of unionisation is very low and there is a near absence of collective bargaining between workers and employers. Even if unions are widely present, as in Cambodia or Indonesia, they often lack the bargaining power to negotiate adequate wages and benefits. This lack of bargaining power is one of the core reasons for poverty wages.

We identify at least eight reasons for this lack of power, which can be found in the country-specific conditions as well as in the way garment production is organised globally. Country-specific reasons include legal restrictions, anti-union strategies of management or a lack of resources and experience among workers and their representatives. Global reasons include the spatial fragmentation of production, which makes the construction of transnational solidarity difficult and the economics of global supply chains, which raises the time and price pressure on production. It is important to keep these reasons in mind, as they help to explain the rise and forms of different multi-scalar strategies of labour. Transnational labour rights activism is often a response to these challenges, aiming to strengthen workers and their organisations domestically.

Governing Our Environment: Standardising across Borders

Olga Malets

In this chapter we focus on the recent developments in the field of transnational environmental governance. Whereas we emphasize the multiplicity of its forms and the actors involved, we focus in particular on the emergence and diffusion of transnational environmental standards as a new form of environmental governance. The focus on transnational standards enables us to not only gain insights into the process of institution-building in the era of globalisation, but also to trace the interactions between various forms of governance and actors – public, private and hybrid – and evaluate their impact on the dynamics of transnational environmental governance. We also emphasize the importance of the interactions between multiple levels within a transnational environmental governance system – transnational, national and local.

We pay particular attention to the questions of implementation and translation of transnational voluntary environmental standards developed and promoted by private actors (e.g. non-governmental organisations, social movements and industry). Questions of implementation and impact have received less attention in the existing literature than transnational standard-setting and diffusion. We seek to close this gap by highlighting the social processes constituting the translation of standards into practices and the interactions between human agency and structural constraints shaping the operation and impact of environmental governance in specific local settings.

Empirically, this chapter deals with a broad range of issues, including forest certification and transnational standards of good forest management, forest politics, environmental disasters and intergovernmental climate negotiations. We also seek to compare some developments with developments in the regulation of other fields, including gender politics, financial crises and hunger.

King, Queen, Self-Regulation

Olga Malets, 2009/04/06

Last week the German daily newspaper Die Tageszeitung reported the results of a seven-year study[80] on the effects of German companies' voluntary agreement to support employed women. Seeking to avoid governmental regulation, companies concluded the agreement in 2001. On behalf of the Federal Ministry of Family, Seniors, Women and Youth Affairs, the researchers of the German Institute for Economic Research monitored the proportion of women in leading positions in the private sector between 2001 and 2007. The results are not particularly surprising. The proportion of women in leading positions did not change significantly: it increased from 26 to 31 % between 2001 and 2006 but went down to 27 % in 2007. 98 % of positions on the managerial boards of Germany's 200 largest companies were still occupied by men in 2007. The proportion of women occupying positions on supervisory boards equaled 10 %. The researchers explain this as a result of pressure from work councils and trade unions.

80 Willms, Beate (2009): Frauen sollen Krise lösen. In: *Die Tageszeitung (TAZ)*. April 1, 2009. **http://www.taz.de/!32709/**

Although these findings are not directly relevant to the questions of cross-border governance, they made me think about several parallels to transnational private regulation. The findings raise the question of the effectiveness of business self-regulation, which has been one of the core issues in scholarly and policy debates on transnational private regulation. How effective are voluntary agreements and programmes and how can their effectiveness be improved? These are essentially empirical questions, and there are no straightforward answers.

In some cases, like international technical standards, self-regulation seems to be more successful than in others, such as environmental or labour standards. The explanations may range from the nature of the problem to incentive structures. In the case of technical standards, firms agree to bear certain constraints and costs because they also expect to benefit from them. In the case of environmental or labour standards, firms also accept constraints and costs but probably do not expect significant tangible benefits. They may therefore be less interested in going beyond rhetorical commitments.

Moreover, a lack of effective monitoring and control mechanisms and specific targets and sanctions may also reduce the impact of self-regulation. The Tageszeitung's report is a case at hand. Neither commitments nor sanctions were specified. No system of monitoring and control of companies' performance was introduced. As a result, despite companies' commitment to support employed women, the proportion of women in leading positions did not grow significantly. In contrast, voluntary certification systems of firms' environmental and social performance based on specific

standards and independent verification of compliance seem to have a stronger impact on corporate practices. Firms that seek to secure their position on the market and avoid conflicts with non-governmental organisations stick to the standards because if they don't they will lose their certificates and the advantages of being certified.

For example, studies on the effects of the forest certification programme run by the Forest Stewardship Council suggest that forest certification has a positive impact on biodiversity protection, worker safety and local community relations, among other things. The FSC stakeholders have emphasised that continuous improvement of the FSC's mechanisms of monitoring and control over certifiers and certificate holders' performance is necessary to maintain the FSC's credibility.

Finally, the context in which voluntary agreements and programmes are implemented also shapes their impact. Institutional and material infrastructures have to be in place to support voluntary commitments by firms. In the case of employed women, the DIW researchers propose that governments should create opportunities for women to combine career and family, e.g. by opening more preschool day-care facilities for children. In the case of environmental and labour standards, voluntary standards also work better when governments support private rule-makers and where an organisational infrastructure is already in place.

To sum up, it seems likely that introducing effective monitoring and control measures can help to improve the effectiveness of voluntary private agreements and programmes. At the same time, firms should have incentives to become subject to additional monitoring and control, such as reputation gains. Moreover, governments need to invest in the infrastructure that would help women to combine family and career. The researchers at DIW correctly call upon firms to accept more concrete and measurable commitments and encourage policy-makers to invest in the infrastructure that would help women remain active on the labour market.

Forest Stewardship Council Goes Fair Trade

Olga Malets, 2009/03/05

The Forest Stewardship Council (FSC) recently started a dual certified, timber pilot project with the Fairtrade Labelling Organizations International (FLO) and is now recruiting a manager for it. While this may seem to be mere routine, it is in fact an interesting and significant development for the FSC. It may help it to strengthen its credibility as an environmental certification organisation.

The FSC is an international, non-governmental organisation that seeks to promote the environmentally appropriate, socially beneficial and economically viable management of the world's forests through the certification of forest management and supply chains. In order to achieve this, forest certification uses conventional market channels. In contrast, fair-trade organisations challenge conventional market organisation by providing poor farmers and communities in developing countries with higher prices for their products by comparison to global market prices. The adherence of the FSC to conventional market logics has caused some concern among the FSC stakeholders. They argued that communities and small-scale forest operations, especially in the tropics, did not benefit from the FSC certification programme because they were excluded from global markets and because reforming their forest management practices would be too costly. By implementing fair-trade projects, the FSC is addressing these concerns.

Founded in 1993, the FSC developed 10 principles and 56 criteria of good forest management and created a system of third-party verification of compliance. In addition, Chain of Custody certification enables producers to trace certified timber though the supply chain. Firms whose compliance with the appropriate principles and criteria has been verified by independent certification bodies are granted an FSC certificate and can market their products as coming from well-managed forests. The idea is that demand for certified products would create an incentive for firms to bring their forest management into compliance with the FSC standards and to be certified.

To make forest certification attractive, the FSC and its supporters had to create a market demand for certified products to provide firms with an incentive to get certified. They convinced several large retailers, printers and industrial companies, including Hope Depot, IKEA, Lowes, B&Q, Random House, Tetra Pak and Stora Enso, to give preference to certified timber. In order to secure their position and improve their reputation, their suppliers certified their forest management and chains of custody. As a result, forest certification rapidly expanded. Certified forest areas have grown to over 100 million hectares in 79 countries. This equals 7% of the world's productive forests. Over 11,000 CoC certificates have been issued. The estimate of the FSC market share grew from 5 to 20 billion US dollars between 2005 and 2007.

Yet this focus on the largest industrial producers and retailers led to the exclusion of small-scale and community forest enterprises from the FSC programme. Large

industries sourced their timber mainly from large-scale industrial forest operations, mainly in the boreal and temperate forests of Europe and North America. Tropical timber also came from large-scale operations, mainly from industrial plantations and natural forests. Large industrial groups did not look for new suppliers among small-scale or community operations, since they would not be able to satisfy the demand of large industries. Small-scale and community enterprises thus remained excluded from international markets and could not benefit from the FSC programme. Moreover, contrary to early expectations, the price premium for certified timber did not emerge, and this made forest certification unattractive to many small-scale and community-based forestry enterprises in poorer countries. Since producers had to bear certification costs, without access to the market and a price premium, community and small-scale producers could not benefit from forest certification.

Some stakeholders of the FSC are concerned about this development of the certification programme. Although the FSC is a non-discriminatory programme open to all types of forest operations and all types of forests in every region of the world, large industrial forest groups and retailers benefit most from it. The FSC stakeholders have argued that the FSC, as an organisation seeking to promote sustainable forest management worldwide, should also address the needs of small-scale and community operations in tropical countries.

In contrast to the FSC certification, fair-trade initiatives explicitly seek to challenge the existing trade relations and conventional market logic in a global economy, and so promote the sustainable development of disadvantaged and excluded communities. Fair Trade in coffee sets prices, not on the basis of the interaction between aggregate supply and demand but at a level that exceeds global market prices. Since current market prices for coffee do not even cover the production costs, the fair-trade price should cover production costs and provide producers with the means to achieve an adequate standard of living and community development. Communities that wish to participate in fair trade have to fulfil a set of requirements. Among other things, they must be small-scale, democratically-governed associations (producer co-operatives) committed to high environmental and social standards.

In the Fair Trade certification system, consumers bear certification costs. They are aware that when they pay higher prices for coffee they provide producers' communities with livelihoods and support such values as global justice and sustainable development. Although Fair Trade in coffee has started working with major global players recently, including Starbucks Coffee Company, it remains committed to creating and fostering direct, personalised links between consumers and small-scale producers, otherwise invisible to consumers.

Now, in order to address stakeholder criticisms and further promote responsible forest management, the FSC is starting a pilot fair-trade project. I was unable to find any specific description of the project on the Internet. When I conducted interviews in the Forest Stewardship Council two years ago the project was no more than a vague idea floating in the air. I am not sure what this fair-trade project will be like

and what outcomes can be expected. I believe, however, that developing a fair-trade programme for certified timber is crucial to the development of forest certification and the FSC, as well as to the protection of tropical forests. It may allow consumers to distinguish between certified products that come from large-scale industrial operations and those that come from communities and small-scale operations. Consumers would then be able to support these operations directly. It may lead to the emergence of a "green premium" for community and small-scale enterprises that might make responsible forest management attractive for them and give them additional revenues for improving their livelihoods. Essentially, the ultimate cause of deforestation and forest degradation in the tropical countries is poverty and land conversion. Poor communities clear forests to convert them into agricultural land or to sell them to large industries that will turn them into plantations. If they are able to live from managing and protecting forests and not from destroying them, they may keep their forests and also contribute to global well-being in this way[81].

81 See also Taylor, Peter Leigh (2005): In the Market But Not of It: Fair Trade Coffee and Forest Stewardship Council Certification as a Market-Based Social Change. In: *World Development*, 33: 129–147.

The Lacey Act: Bringing Public Governance Back In

Olga Malets, 2009/06/17

On May 22, 2008 the U.S. Congress passed amendments to the Lacey Act of 1900 that make it unlawful to import, export, sell, purchase or transport in interstate or international commerce any plants or products made of plants harvested or traded in violation of domestic and international laws, including timber and timber products. These amendments may open a new era in the development of global forest governance.

For one thing, this is a U.S. law that not only bans domestic trade in goods that were produced in violation of domestic laws of the United States, U.S. States and foreign countries, but also attempts to indirectly regulate the production in foreign countries. At the same time, the Lacey Act itself does not violate international free-trade regulations. The Lacey Act therefore brings public forms of forest governance back into the transnational space. Another interesting thing about this is that public and private actors are reactivating an old piece of legislation to address a current issue. The case of the amended Lacey Act demonstrates that actors can export dormant or taken-for-granted rules effectively from one issue domain to another to achieve their goals. Finally, the Lacey Act opens up new opportunities for public-private co-operation: if public authorities recognize certificates issued by non-state certification

programmes similar to the Forest Stewardship Council forest certification as sufficient proof of the legality of timber, this may become an incentive for producers to certify their forest management. Non-state actors can therefore use the Lacey Act as leverage to promote better standards of forest management among producers or to reward those who are performing well.

The Lacey Act was enacted in 1900 to stop international trade in tropical birds, elephant ivory, tiger skins and similar products. In early 2008 the Lacey Act was amended to include a broader range of plants, including illegally harvested timber. Basically, the Lacey Act does three things. First, it bans the import of raw materials and products made of plants harvested or produced with violation of the domestic laws of exporting countries. It also bans domestic trade in raw materials and products produced with violation of U.S. laws and U.S. state laws. Second, the Lacey Act requires importers to declare the scientific name of any species used, its origin, the quantity and measure involved, and the value. It makes importers responsible for ensuring the legality of products and for complying with the Lacey Act. Third, it specifies penalties for the violation of the Act that include forfeiture of goods and vessels, fines and imprisonment. Since the U.S. is the world's largest consumer of timber and that illegally sourced wood is estimated at 10 % of the total wood supply, the Lacey Act could become a powerful tool in combating illegal logging in the U.S. and beyond. It could also strengthen the competitiveness of legally harvested timber and manufactured products undermined by cheaper illegal wood products.

The Lacey Act may also potentially mark an important turn in the development of the global forest governance regime. Since the late 1980s, a plethora of private initiatives has emerged to regulate the behaviour of firms in the forest sector, promote sustainable forest management, and combat deforestation and forest degradation. Forest certification is the most prominent example. Environmental activists created these initiatives in response to the failure of governments and international organisations to agree on legally binding instruments to solve forest problems, such as a global forest convention, and to individual countries' inability to ban the import of illegally harvested timber. Governments were cautious about implementing such measures as bans and tariffs, since they could be interpreted as non-technical barriers to trade prohibited by GATT (later WTO). This motivated environmental activists to create voluntary programmes to promote sustainable forest management and improve the condition of the world's forests.

Many environmentalists, however, perceived voluntary programmes and standards as a second-best option. Companies could exit programmes any time, monitoring and control was very costly, participation depended on market incentives that were difficult to construct, and programmes mainly reached companies that were already performing well, predominantly in developed countries. They felt that governmental regulation could address global forest problems better. They continued to lobby governments to strengthen the measures against illegal logging on a global scale. The Lacey Act has become the critical first step in this direction.

The Lacey Act is the world's first statute that prohibits trade in illegal wood but does not violate international free-trade regulations. In contrast to earlier bans that prohibited all imports of tropical timber as potentially illegal, the Lacey Act specifically bans imports of illegal wood and interstate trade in illegal wood. It identifies illegal wood, does not impose U.S. laws on foreign countries, requires importers and traders to prove the legality of wood, and specifies penalties. It provides a powerful incentive for importers to eliminate illegal wood from the consignments shipped to the U.S. and impose legality requirements on their suppliers in foreign countries. The Lacey Act, therefore, does not discriminate against timber from specific countries or regions, e.g. tropical timber, but bans illegal wood, which is consistent with WTO regulations. The Lacey Act has the potential to reshape long and complicated cross-border supply chains and provide benefits to legal forest operations and offers incentives to legalise their operations to illegal loggers beyond the U.S. borders. The Lacey Act thus brings public regulation back into the transnational arena.

Two other things are interesting about the Lacey Act. First, it demonstrates the ability of both private and public actors to cooperate and creatively seek clever solutions to common problems, such as illegal logging and international trade in illegal wood. The Environmental Investigation Agency nicely describes the history of the amended Lacey Act[82]:

82 Environmental Investigation Agency (2009): The U.S. Lacey Act. Version II. Published in London, January 2009. **http://www.eia-global.org/PDF/EIA_Lacey_FAQII.pdf**

> *For years, experts have pointed out that the absence of "plants" from the Lacey Act was a glaring omission. At the same time, the devastating impacts of illegal logging and associated trade for local communities, invaluable ecosystems and good governance in developing countries have been increasingly well documented. As it became clear that amending the Lacey Act would be an effective measure to address these issues, the legislation was proposed in the U.S. Congress by Representative Earl Blumenauer and Senator Ron Wyden, both of Oregon, in 2007. A precedent-setting coalition of environmental, industry, and labour groups backed these bills, recognising the need for the world's largest consumer market to take action at home to curb illegal wood and plant product imports (Environmental Investigation Agency 2009: 2).*

Second, the Lacey Act opens up new opportunities – and new markets – for various public and private initiatives. Since supply chains in the forest sector can be very complex and companies often cannot guarantee the legality of their sources, the Lacey Act makes use of the concept of "due care" to evaluate companies' efforts in securing legality. Although the Lacey Act is a fact-based law and no document presented by the company can guarantee the legality if the opposite can be verified by facts, companies can present evidence that they have taken due care. If companies can prove that they have practised due care in court, they are most likely be charged with a small fine,

instead of imprisonment or significant civil penalty fines. Internal company policies, tracing systems, systems of legality verification, certification, other similar programmes offered by external organisations, and other innovative private or public-private partnership programmes can serve as evidence of due care. This opens new avenues for cooperation between business and environmentalists and between public and private actors. For example, the Forest Stewardship Council announced that its programme of forest certification was a reliable tool for demonstrating legality[83].

83 Forest Stewardship Council United States (2008): US Amendment to Lacey Act Bans Illegal Wood Imports: FSC Provides the Tool for Supply Chain Legality. August 22, 2008. **https://us.fsc.org/newsroom.239.418.htm**

Private organisations – NGOs and business associations – supporting the Lacey Act:

> *Amazon Watch, American Forest and Paper Association, Center for International Environmental Law, Conservation International, Defenders of Wildlife, Dogwood Alliance, Environmental Investigation Agency, Forest Trends, ForestEthics, Friends of the Earth, Global Witness, Greenpeace, Hardwood Federation, International Brotherhood of Teamsters, National Wildlife Federation, Natural Resources Defense Council, Rainforest Action Network, Rainforest Alliance, Sierra Club, Society of American Foresters, Sustainable Furniture Council, The Nature Conservancy, Traffic – The Wildlife Trade Monitoring Network, Tropical Forest Fund, United Steelworkers, Wildlife Conservation Society, World Wildlife Fund (WWF).*

Drink Beer and Save Forests!

Olga Malets, 2009/07/06

Sounds ridiculous? Yet it is becoming possible: the Programme for Endorsement of Forest Certification Schemes (PEFC) announced last week that the Italian brewery Gino Perisutti is now offering two types of beer that carry a PEFC logo. PEFC offers certification services to forest operations practising responsible forest management in accordance with the PEFC principles and criteria of good forest management, as well as to producers using certified material in their final products. Its logo enables buyers and consumers to identify products coming from well-managed forests.

The two types of beer are brewed using ingredients coming from PEFC-certified forests: spruce bark, mountain pine buds and Scotch pine needles from PEFC-certified forests in north-eastern Italy. In addition to the PEFC-certified ingredients and traditional beer components, Gino Perisutti's beer also contains fair-trade species.

Although it may sound funny, such events may be interpreted as evidence of the increasing scope of forest certification as a form of governance and of the growing

market visibility of products that have been certified as meeting the standards of responsible management of natural resources. In turn, this growing visibility helps consumers identify and recognize more responsibly produced products and purchase them, thereby supporting systems of governance aiming at promoting the sustainable use of nature. No doubt as consumers, stakeholders and researchers we should also be aware of what is behind the logo, but even the very fact that such logos are becoming increasingly important on the market may become one of the crucial drops in the ocean of local and global nature politics.

Financial Markets, Environment and Hunger: A Crisis of Global Governance?

Olga Malets, 2009/11/25

The last few weeks have been extremely frustrating for many activists, international organisations and the general public. Several international summits have shown that the global governance system has been significantly damaged by the global financial crisis. The crisis created uncertainty about the future and made the governments of the world's leading economies careful about their commitments. After the meeting of parties of the UN Framework Convention on Climate Change in Barcelona from 2–4 November 2009, it became clear that the conference of parties to be held in Copenhagen in December was not likely to result in any legally binding arrangement to succeed the Kyoto Protocol. The World Summit on Food Security held from 16–18 November did not result in any significant binding commitments, either. Meanwhile, the Food and Agriculture Organisation of the UN reports that due to the global economic recession, the number of hungry people in the world will exceed one billion in 2009. In 2008, it was 850 million people. Only the G20 Summit in Pittsburgh in September 2009 can be seen as a success in terms of international regulatory efforts, at least to some extent. G8 was transformed into G20, and the general principles of the new global economic architecture were approved. One of these principles is tough regulation of financial markets.

The leaders of the world's 20 largest economies producing 85 % of the world output agreed to launch a Framework for Strong, Sustainable and Balanced Growth[84]. It outlines new principles of cooperation and coordination within the global economy. G20 also agreed to strengthen international standards for bank capital and to reduce incentives for excessive risk-taking (man-

84 G20 (2009): Leaders' Statement: The Pittsburgh Summit. A Framework for Strong, Sustainable, and Balanced Growth. G20 Information Centre. University of Toronto. **http://www.g20.utoronto.ca/2009/ 2009communique0925.html**

ager boni regulations). Beside these measures aimed at strengthening recovery and avoiding imbalances in the global economic system, the participants of the summit also agreed (1) to phase out inefficient fossil fuel subsidies to increase energy market transparency and to encourage energy efficiency and reduce greenhouse gas emissions, (2) to empower developing and transition countries by reforming major international institutions, including the World Bank, and (3) to support the world's poorest citizens. These are extremely ambitious measures that promise to alter the economic and social structure of the world and make it more stable and fair. The German delegation announced that the results of the G20 Summit were "better than expected"[85].

Yet many observers remain pessimistic[86]. They point out that the interests of state and non-state actors remain contradictory and conflicts will emerge when concrete measures specifying general principles upon which all agree are discussed. They emphasize that there is no global parliament and no global state apparatus that would impose rules, control their implementation and sanction non-compliance. The decisions in the G20 are consensus-based: a coalition of only a few states can block negotiations.

Moreover, the states are not rethinking the foundations of the global economic system dominated by the idea of strong and stable economic growth that can be achieved through a liberal market economy and free trade. Although economic growth is supposed to be sustainable, there is no consensus – neither scientific nor political – about what sustainability is and how it can be achieved. One thing is clear about sustainability within the current normative framework: without economic growth, there can be no sustainability. This, however, is not the only conceptualisation of the relationship between economic growth and sustainability. The classic *The Limits to Growth*[87] models the consequences of population growth, industrial production, pollution and resource depletion, and suggests that permanent growth at the present rate cannot be sustained in the long run. The ideas emphasising the need to restrict economic growth have not become a dominant framework for international policy-making. Instead, a norm complex that Steven Bernstein calls liberal environmentalism[88] emerged and was institutionalised at the Earth Summit in Rio de Janeiro in 1992, the central event in the history of international environmental politics. At the core of this complex is the idea that environmental protection and economic growth are compatible and mutually reinforcing. In order to have environmental protection

85 Woltersdorf, Adrienne (2009): Aus G8 werden G20. In: *Die Tageszeitung (TAZ)*. September 26, 2009. **http://www.taz.de/!41253/**

86 Metzger, Reiner (2009): 20 Lösungen für die Welt. In: *Die Tageszeitung (TAZ)*. September 25, 2009. **http://www.taz.de/!41269/**

87 Meadows, Donella H. et al. (1972): *The Limits to Growth*. New York: Universe Books.

88 Bernstein, Steven (2000): Ideas, Social Structure and the Compromise of Liberal Environmentalism. In: *European Journal of International Relations*, 6 (4): 464–512.

and sustainable use of resources, it is necessary to boost economic growth. The best way to achieve economic growth is to promote a liberal market economy and free trade. In turn, economic growth can be sustained if the environment is protected and resources are used responsibly.

I neither argue that one idea is better than the other, nor do I wish to claim that one idea is scientifically correct and the other is not. I do not argue that we should go back to the idea of limiting growth. I am only attempting to show that the leaders of the world's largest economies and international bureaucrats are not trying to rethink the fundamental relation between the economy, the environment and society. We are used to thinking of crises as turning points when new ideas can replace the old ones and become dominant. The interesting feature of this crisis is that we are sticking to the ideas that do not seem to have made the world a better place.

While the G20 Summit in Pittsburgh was a success and promises to restore the reputation of international public regulation after decades of deregulation and liberalisation, the meetings on hunger and the environment showed that governments have remained cautious as far as specific commitments are concerned.

The lack of any desire to make specific commitments at the World Summit on Food Security and the upcoming Copenhagen conference of parties of the UN Framework Convention on Climate Change demonstrates that governments are more willing to discuss broad principles than specific targets and timetables. Moreover, debates on overcoming economic recession and strengthening economic growth seem to be far more attractive than negotiations on hunger and greenhouse emissions. Except for the host Silvio Berlusconi, no G8 leaders were present in Rome at the World Summit on Food Security. At the summit, the elimination of hunger in the world was declared a strategic goal. Yet no concrete decisions on financial mechanisms, specific commitments and timetables were made. At the meeting in Barcelona prior to the Copenhagen conference, it became clear that no legally-binding agreement with specific targets and schedules would be signed. No regulations for technology transfer, financial aid and emission reduction targets were prepared. The advanced industrial countries insist that the developing countries should also commit to reducing their emissions. They do not want to make the first move, since they fear that they would damage their competitive advantage in the global economic system. The developing countries refuse any legally binding commitments, arguing that the industrial countries are responsible for climate change and should bear the costs of climate change. They also fear that climate related commitment would restrict their opportunities for economic growth and development. They expect financial aid and technology transfers. The arguments are as old as the climate change issue itself. The conference in Copenhagen is unlikely to deliver any solutions. Greenpeace Germany climate expert Karsten Smid calls this "the deepest crisis"[89] in the history of climate negotiations.

89 Reimer, Nick (2009): Die Hoffnungen schwinden. In: *Die Tageszeitung (TAZ)*. November 6, 2009. **http://www.taz.de/!43532/**

Is this also the deepest crisis of global governance? Clearly, the fact that the issues of economic stability, climate change and hunger are being discussed can make us optimistic about global governance in the long run. Yet it seems that during the last decades we haven't moved any further than accepting, defining and discussing problems. Working solutions are yet to be developed. The question is whether what is happening is two steps forward and one step back, or one step forward and two steps back.

The Importance of Being Implemented: From Transnational Standards to Local Practices

Olga Malets, 2010/03/10

In his recent article, Tim Bartley[90] argues that the implementation of transnational standards, particularly in developing countries, often remains a black box. He starts by showing that some scholars imply that local conditions do not matter, while others suggest that the effects can be read off programmes' principles and design. Using a case study of the certification of forests and labour conditions in Indonesia, Bartley convincingly shows that neither is the case. Motivated by his contribution, I would like to reflect on why it is important to open up the black box of implementation. I will focus on four aspects here: mechanisms, politics, the implementation gap, and local actors. In part, I will use forest certification as an example to illustrate how a study of the implementation of certification standards can enrich our knowledge of transnational governance.

90 Bartley, Tim (2010): Transnational Private Regulation in Practice: The Limits of Forest and Labor Standards Certification in Indonesia. In: *Business and Politics*, 12 (3): Article 7.

Certification is a procedure by which professional certification organisations assess company practices against a specific standard and give written assurance that practices conform to the standard. Since the early 1990s, non-state actors, i.e. firms, industries, NGOs, and professional associations, have initiated several dozens of transnational certification programmes aimed at promoting sustainable use of natural resources, decent labour conditions and respect for human rights. One of the pioneers of the "certification movement" is the Forest Stewardship Council (FSC), which launched the first forest certification programme in the mid-1990s.

The FSC developed global principles and criteria (P&C) of good forest management and a third-party system of verification of compliance. Independent certification organisations accredited by the FSC assess the compliance of forest operations with FSC's P&C. If compliance is verified, certification organisations issue FSC certificates, and certified operations can label their products as coming from well-managed forests. Several surveys show that almost every operation, regardless of its origin, size

and ownership, needs to change at least some of its practices[91]. Yet the application of certification standards in local conditions has received relatively little attention.

This research problem is important for at least four reasons. First, addressing this gap helps identify social mechanisms, i.e. "recurrent processes linking specified initial conditions and a specific outcome" (p. 241)[92], which connect structural factors facilitating (or impeding) certification and changes in on-the-ground practices. Scholars have identified firm-, industry- and country-specific factors that shape company preferences for forest certification: company characteristics, such as size and ownership, market and product characteristics, export dependence, associational structures, NGO pressure and the role of governments[93]. Typically, if companies export a significant portion of their products to countries where activists, media, governments and consumers perceive forest products as controversial, they are likely to certify their forest operations or to require their suppliers to certify in order to avoid controversies. Yet even when companies agree to implement FSC's global P&C to achieve certification, they can rarely translate them into local practices in a straightforward way.

Broad global standards have to be implemented in specific local settings far away from the international forums where they were designed. They have to be adjusted to local natural and socio-legal circumstances. It is unlikely that certification standards will be applied in a similar way in boreal and tropical forests, in privately and publicly owned forests, in countries with a strong or weak environmental movement, etc. Moreover, Schneiberg and Bartley (2008: 49–50)[94] suggest that when adjusted, standards can be reshaped and transformed in different ways. In the recent organisational and socio-legal literature, this process has often been referred to as *translation*[95]. To sum up, a study of implementation helps to identify the missing elements of the causal chain connecting initial local conditions and changes in on-the-ground practices.

Second, without examining how standards on paper are translated into standards on the ground we may be overlooking the fact that this is not only a technical

91 Newsom, Deanna, Hewitt, Daphne (2005): The Global Impacts of SmartWood Certification. *Rainforest Alliance*, TREES Program. June 9, 2005. **http://www.iatp.org/files/Global_Impacts_of_SmartWood_Certification_The.pdf**

92 Mayntz, Renate (2004): Mechanisms in the Analysis of Social Macro-Phenomena. In: *Philosophy of the Social Sciences*, 34 (2): 237–259.

93 Auld, Graeme, Gulbrandsen, Lars H., McDermott, Constance (2008): Certification Schemes and the Impacts on Forests and Forestry. In: *Annual Review of Environment and Resources*, 33: 187–211; Cashore, Benjamin, Auld, Graeme, Newsom, Deanna (2004): *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority*. New Haven: Yale University Press.

94 Schneiberg, Marc, Bartley, Tim (2008): Organisation, Regulation and Economic Behavior: Regulatory Dynamics and Forms from the 19th to 21st Century. In: *Annual Review of Law and Social Science*, 4: 31–61.

95 Campbell, John L. (2004): *Institutional Change and Globalisation*. Princeton: Princeton University Press; Czarniawska, Barbara, Sevon, Guje (eds.) (1996): *Translating Organisational Change*. Berlin: Walter de Gruyter.

but also a political process. Certification may empower some actors, e.g. NGOs, local communities and indigenous people, and challenge the authority or expertise of other actors, e.g. companies and governments. Since FSC requires reconciliation of economic, environmental, social and cultural interests, forest certification provides a window of opportunity to actors that have stakes in forests but have been previously excluded from global and local forestry politics. Forest certification offers a new arena where interests clash and are settled in order to successfully implement forest certification standards.

Third, implementation research suggests that the implementation gap can be overlooked easily without a careful examination of the ways in which laws or standards, more generally rules, are translated into specific practices. Actors responsible for the implementation of specific rules can use different strategies to avoid compliance, e.g. delay and symbolic or creative compliance[96]. In other words, even when actors agree to implement certain standards, it does not necessarily mean that the standards are adequately implemented and practices improve. This may challenge the thesis of the ratcheting-up of standards[97]. While environmental, labour and social standards may have been ratcheted up during the last decades, this does not automatically mean that on-the-ground practices have improved accordingly.

Finally, the role of local actors responsible for the implementation of standards has not been properly analysed in the existing literature on forest certification. Not only can they avoid implementing standards and thus create an implementation gap. They can also contribute to the reformulation of standards and the production of new knowledge. During implementation, local actors may detect inconsistencies and contradictions in standards. This may trigger additional rounds of standard-setting and reform at both national and transnational levels. This process is similar to what Halliday and Carruthers[98] call the recursivity of law. They suggest that contradictions in law, ambiguity of law and tensions between lawmaking and law-implementing actors trigger new cycles of national lawmaking. Moreover, implementation generates new knowledge, which actors moving horizontally between localities and vertically between governance system levels can transfer to new locations. New knowledge may also set off standard reforms and enable innovation across settings within one country and across borders. It is also possible that private standards may spill over into public standards.

96 Halliday, Terence C., Carruthers, Bruce G. (2009): *Bankrupt: Global Lawmaking and Systemic Financial Crisis*. Stanford: Stanford University Press.

97 Braithwaite, John, Drahos, Peter (1999): Ratcheting Up and Driving Down Global Regulatory Standards. In: *Development*, 42: 109–114; Fung, Archon, O'Rourke, Dara, Sabel, Charles (2000): *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace*. Discussion Paper No. 0011. Social Protection Discussion Paper Series. Washington, D.C.: The World Bank.

98 Halliday, Terence C., Carruthers, Bruce G. (2007): The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalisation of Corporate Insolvency Regimes. In: *American Journal of Sociology*, 112: 1135–1202.

Naturally, these four reasons – mechanisms, political aspects of implementation, the implementation gap and the role of local actors – are not exhaustive. Moreover, these are ideas that need to be turned into research questions or hypotheses and then be tested. Moreover, although current research has focused mainly on the top of what Tim Bartley calls the "governance chain" that connects global forums and local settings, it would be unfair to argue that no research has been done on the implementation, or translation of transnational public and private standards for human rights, environment and labour rights. There are a number of excellent studies focusing on the realisation of global norms in specific local settings. Many of them deal with the experience of the countries often referred to as developing or transition[99]. Yet more research in this direction is required if we want to shed light on broad issues of private regime effectiveness, including what private governance actually achieves, how the global interacts with the local, and what shapes the outcomes of this interaction.

99 See, for example, Merry, Sally Engle (2006): *Human Rights and Gender Violence: Translating International Law into Local Justice*. Chicago: The University of Chicago Press.

The Deepwater Horizon Disaster: The Beginning of a New Era for the Oil Industry?

Olga Malets, 2010/06/24

Environmental groups and the public worldwide are seriously concerned about the oil spill in the Gulf of Mexico after the explosion of BP's Deepwater Horizon oil-drilling rig. The disaster has turned into a catastrophe and is likely to affect the environmental, social and economic condition of the Gulf of Mexico's shore in years and decades to come. Neither BP nor the U.S. Government really knows what to do to stop the oil leak. The U.S. Government blames the oil multinational. BP seems to be unable to deal with the situation. Moreover, other oil companies do not seem to possess any adequate means to deal with similar situations. BP's stock price has gone down dramatically, and it has postponed dividend payments to its shareholders. Thousands of people, e.g. fishermen, have lost their source of income. What are people going to learn from this story? What are the probable scenarios of further developments and what are the likely consequences for the oil industry?

The most tragic and at the same time most cynical scenario is that many people may quickly forget the disaster and no substantial measures to avoid similar accidents in future will be taken. In this case, history will simply be repeating itself. Two similar catastrophes did not really lead to any serious reconsideration of the regulations concerning oil extraction and transportation. One was the Exxon Valdez oil spill

that occurred in Alaska in 1989. Exxon Valdez, an oil tanker, spilled ca. 250 thousand barrels of crude oil. Prof. Zygmunt Plater, a professor of law at Boston University and former head of the Exxon Valdez investigation committee, is frustrated to see that the recommendations that this committee elaborated have been almost completely ignored[100]. In 1990 Congress adopted the Oil Pollution Act, which prescribes a gradual shift to a double hull design for vessels, thus providing an additional layer between the oil tanks and the ocean. Yet the oil industry has been successful in convincing Congress to extend the deadline for upgrading its vessels. In Alaska, the current deadline is 2015, which will be twenty-six years after the Exxon Valdez catastrophe.

100 Hahn, Dorothea (2010): "Das System ist inzestuös", Interview with Prof. Zygmunt Plater. In: *Die Tageszeitung (TAZ)*. June 16, 2010. **http://www.taz.de/!54145**

The second catastrophe occurred in the Gulf of Mexico thirty-one years ago. The accident was almost identical to the Deepwater Horizon explosion. In June 1979 the oil-drilling rig Ixtoc I began to burn and sank in the Bay of Campeche, Gulf of Mexico. The oil started flowing into the ocean. The oil spill quickly reached Mexico and then Texas two months later: in all, 3.3 million barrels of oil were spilled. It took the operator of the Ixtoc I, the Mexican state oil company Pemex, nine and a half months to stop the oil blowout. Yet no significant measures to increase the safety of oil extraction have been taken since. Moreover, the catastrophe was soon forgotten. In Texas oil is one of the major sources of state revenue, so that the oil industry and the state government create a dangerous symbiosis. Ixtoc I belonged to Sedco, a firm owned by Bill Clemens, the governor of Texas at that time. Pemex rented Ixtoc I from Sedco. Furthermore, the public is not directly involved in decision-making concerning the oil industry. The majority of people in Texas seem to profit from offshore oil drilling and tend to see oil accidents in the same way as Rick Perry, today's governor of Texas: these things happen sometimes. It seems that a pessimistic scenario cannot be ruled out.

The more optimistic scenario is based on the conviction that it is unlikely that the public and particularly the environmental groups will soon forget such a disaster. Since April 20, 2010, the day of the Deepwater Horizon explosion, up to 3.5 million barrels of crude oil may have flowed into the ocean. The exact figures are still unavailable. All attempts to close the leak or at least slow down the oil flow have failed. It may take BP and the U.S. Government several more months to find a technical solution. BP is currently drilling two additional oil wells to reduce the pressure on the leaking well, but these wells will not be completed before August and will not solve the problem completely. They are only likely to reduce the leak. Moreover, other oil companies are not well prepared for similar accidents, either. "When these things happen, we are not well equipped to deal with them," admitted Rex Tillerson, head of ExxonMobil, in the U.S. Congress[101]. This is a chance for the public to get involved and change the situation. If the public

101 Hahn, Dorothea (2010): Zur Kooperation verdammt. In: Die *Tageszeitung (TAZ)*. June 17, 2010. **http://www.taz.de/1/archiv/archiv/?dig=2010/06/17/a0049**

does not ignore the Deepwater Horizon accident, it is likely that a new governance regime will emerge to deal with the environmental risks of oil extraction and transportation. This also offers a chance for renewable energy providers to strengthen their position on the market.

Environmental history suggests that such a scenario is not unlikely. Catastrophes like the Deepwater Horizon disaster have served previously as impulses to both public and private actors (e.g. governments, industries or NGOs) to set standards or make rules to avoid accidents and catastrophes in future. The Sandoz accident in 1986 accelerated the emergence of an international regime for the protection of the Rhine River. Millions of tons of contaminated water were dumped into the Rhine, killing fish and wildlife. The subsequent regime has been relatively successful. The Rhine that the environmentalists declared dead has become cleaner. European countries have been able to reduce significantly the amounts of hazardous substances dumped into the Rhine. Many fish species that had become extinct have returned to the Rhine. The explosion in a U.S.-owned chemical plant in Bhopal, India (1984), which killed hundreds of people, provided an impulse for the U.S. chemical industry to develop the Responsible Care Program aimed at raising the standards of occupational safely in chemical plants.

The question is, what form is the oil extraction and transportation regime likely to take, e.g. public or private, mandatory or voluntary? Currently, it seems probable that Obama's administration will initiate a stricter legal framework for the oil industry. It is, however, also clear that the oil industry is a powerful player in the U.S. economy and a strong lobbyist. In the liberal market economy, it will be difficult for the U.S. Government to impose any restrictions on the oil industry and thereby reduce its competitive advantage compared to other countries. If the U.S. Government is unable or unwilling to create a new regulatory framework, it is likely that either oil companies will develop safety standards for themselves (self-regulation), or that powerful civil actors like environmental groups will press the oil industry to engage in voluntary standard-setting through multi-stakeholder initiatives (e.g. certification programmes). Oil companies might seek certification in order to avoid negative publicity and strengthen their reputations.

Another question is whether the new regulatory framework for the oil industry is likely to become a "high-road" or a "low-road" regime. "Low-road" regimes are aimed at improving the reputation of industries without any substantial change in poor practices. Their goal is to preserve a status quo in environmental performance and provide better publicity at the same time. By contrast, "high-road" regimes usually aim at rewarding "good" companies by distinguishing them from "bad" companies and often require substantive change in corporate practices. Clearly, "high-road" regulatory solutions, e.g. FSC forest certification, are often more rigorous and costly and involve many different parties in decision-making (multi-stakeholder approach). It is unclear at this point which direction the new regime is likely to take.

It is too early yet to argue about what kind of regime may evolve after the Deepwater Horizon crisis and indeed whether one will evolve at all. However, it is obvi-

ous that the struggle for a new regulatory framework will be difficult, since the oil industry is a powerful player and oil remains the major source of energy for humanity's ever growing needs and desires. Two days ago, Martin Feldman, a district judge in Louisiana, blocked the freeze on offshore oil drilling that the U.S. Government had imposed after the Deepwater Horizon explosion. 32 oil companies challenged the freeze in court, arguing that it is threatening regional economic well-being and employment. The judge wrote in his ruling that the freeze could not be justified in the face of huge economic damage for the local economy and "the critical present-day aspect of the availability of domestic energy" in the U.S. The White House promised to appeal against the ruling: the struggle for a new regime has begun.

Theoretically, the case of the Deepwater Horizon oil leak is likely to shed light on the following questions: under what conditions does an environmental regime emerge and how, what shape does it take, and when does it become either a high- or low-road regime?

The Deepwater Horizon Crisis: No New Era for the Oil Industry

Olga Malets, 2011/04/20

About 10 months ago, I posted an entry on the "Deepwater Horizon Crisis" (see this volume) in the Gulf of Mexico, in which I outlined three scenarios that I thought were likely to occur after the Deepwater Horizon crisis. They can be summed up as no regulatory consequences, stronger public regulation, and new private regulation of safety in the oil drilling industry. Today, exactly one year after the explosion of BP's oil drilling rag in the Gulf of Mexico, killing eleven people, I have to admit that the Deepwater Horizon incident did not become the beginning of a new regulatory era for the oil industry. What has happened this year has been somewhere between no regulatory consequences and a small amount of stronger public regulation and control. The U.S. oil drilling safety regulations have been tightened somewhat, but many environmental experts do not consider these changes decisive. Despite this, the U.S. government cancelled its moratorium on offshore oil drilling in the Gulf of Mexico on October 10, 2010. Many U.S. politicians insist on accelerating the issue of drilling permits. The arguments in this context are all the same: jobs and state revenues.

Meanwhile, the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling published its final report[102] on January 11, 2011. It suggests that such a catastrophe could have

102 National Committee on the BP Deep Water Horizon Oil Spill and Offshore Drilling (2011): Deep Water – The Gulf Oil Disaster and the Future of Offshore Drilling. Final Report. Published in Washington, D.C., January 11, 2011. **http://www.oilspillcommission.gov/final-report**

been predicted and could also have been prevented. Whereas the Commission admits that "complex systems almost always fail in complex ways", its judgment is unambiguous[103]: "Both government and industry failed to anticipate and prevent this catastrophe, and failed again to be prepared to respond to it" (National Commission 2009: ix). So far, the Commission's report has generated neither a broad public discussion of offshore drilling regulations, nor a substantive reform of the "business as usual".

What might be the reason for this sad development? Clearly, it is difficult to produce any credible answer without an in-depth study of the events of the last year. Yet it seems that a structure of political opportunity was not in place to encourage a more serious reform of the offshore drilling regulations. The Republicans have the majority in the U.S. Congress and are well-known for their support of the oil industry and offshore oil drilling. President Obama has been occupied with the healthcare reform and could not really afford to have this second issue on his agenda. In face of the economic recession, arguments focusing on employment, profits and state revenues have a stronger appeal to the general public.

Yet whatever the reason, one thing seems clear now: not every disaster leads to the emergence or strengthening of an existing regulatory regime.

103 National Commission (on the BP Deepwater Horizon Oil Spill and Offshore Drilling) (2011): Deep Water. The Gulf Oil Disaster and the Future of Offshore Drilling. Report presented in Washington, D.C., January 2011. **http://www.oilspillcommission.gov/sites/default/files/documents/FinalReportIntro.pdf**

From Transnational Standards to Local Practices

Olga Malets, 2011/06/21

In late May, the Max Planck Institute for the Study of Societies published my paper[104] on the implementation of transnational voluntary forestry standards in Russia in its discussion paper series. In that paper, I attempt to deconstruct the process of implementation and suggest that current literature has paid little attention to two social processes that accompany – or even constitute – the implementation of transnational voluntary standards: collective learning and stakeholder interest negotiation. Basically, I argue that previous research carefully examines various factors that explain why certain companies in certain countries commit to voluntary environmental standards, but so far has mainly assumed that once standards are adopted, improvement in practices will occur (if there is a gap between standards and practice, which is most often the case, as some research shows).

104 Malets, Olga (2011): From Transnational Voluntary Standards to Local Practices. A Case Study of Forest Certification in Russia. *MPIfG Discussion Paper* 11/7. Cologne: Max Planck Institute for the Study of Societies. **http://www.mpifg.de/pu/mpifg_dp/ dp11-7.pdf**

Instead, I suggest that implementation should not be taken for granted and propose a framework for understanding how companies and activists translate transnational voluntary standards into on-the-ground practices, particularly in the difficult context of non-advanced industrial countries. Empirically, I apply this framework to an analysis of the implementation of the Forest Stewardship Council's forestry standards in Russian forest enterprises.

I start by identifying two problems that local advocates of transnational voluntary initiatives (FSC), and other implementing actors, e.g. companies, face when implementing broad global principles in a specific local context. On the one hand, when external actors question habitual ways of doing things and provide new rules, this may challenge the pre-existing structures of authority and question pre-existing knowledge, which may lead to conflicts. These conflicts need to be solved before the standards can be implemented. On the other hand, new rules set in distant transnational forums may appear alien to the implementing actors and/or contradict national laws and regulations. In other words, new rules do not always make sense to the implementing actors or pose a question about how to follow both transnational standards and national regulations at the same time. For them, figuring out what new rules mean and how they can be applied in a specific local context becomes a precondition to successful implementation. Local actors have to find ways to cope with these challenges, or in other words, to fix what people need to do in order to observe the rules. Theoretically, I draw on two bodies of literature: (1) translation literature in the organisational analysis emphasising collective learning and knowledge building, and (2) the sociology and anthropology of international law focusing on the politics of implementation of transnational norms in a national context.

Stakeholder interest negotiation and conflict settlement on the one hand, and collective learning and knowledge building on the other hand, occur in different settings – both formal and informal – and require the active involvement of skillful and knowledgeable intermediaries that possess sufficient capacities to navigate between the transnational and local levels and are able to bridge the gap between the two, thus promoting cooperation between groups with conflicting interests. In the case of forest certification, nongovernmental environmental organisations, both branches of international NGOs and "indigenous" NGOs – play the role of intermediaries. They mobilize stakeholders, persuade companies to become certified, mediate conflicts, support implementing actors in different ways (e.g. consulting), develop compliance guidelines, monitor compliance, educate company managers and auditors, and facilitate cooperation between different groups.

My paper also addresses the question of how new knowledge concerning the implementation of transnational standards is constructed. I emphasize the creative and knowledgeable character of implementing actors and suggest that new knowledge is constructed in many different ways. Local practices are reframed in order to make them consistent with global standards; external practices are transplanted from other settings, and new practices are invented for local use through experimentation.

Local actors commonly combine and recombine new transnational concepts and models with locally available concepts and practices, which helps them to achieve compliance with transnational standards and at the same time to legitimize their existing practices and follow national and local regulations.

Clearly, although I focus on the creative translation of transnational environmental standards and knowledge building in this paper, this does not necessarily mean that implementation is a harmonious process that leads to the best outcomes and significant improvements in forest management practice. What I show in this paper is how standards are implemented. The evaluation of translation outcomes is a separate matter, which I will address in another paper that I plan to present at the 23rd annual meeting of the Society for the Advancement of Socio-Economics in Madrid in June 2011.

Durban as a Case in Point? How International Summits Maintain the Field of Climate Policy

Elke Schüßler, 2011/12/20

The 17th climate summit in Durban has just concluded and the target of developing binding decisions for greenhouse gas emission caps post-2012, when the first commitment period of the Kyoto Protocol – the "only game in town", as it is often called inside the climate policy community – will end, has moved further away. The main outcome of a uniquely long and strenuous negotiation process in this South African city was to postpone the development of such a treaty to 2015.

Elsewhere, Leonhard Dobusch and I have analysed the role of music industry conferences as so-called "field configuring events", and the role they play in the contestation and possible innovation of copyright regulation[105]. Together with Bettina Wittneben (WiSE Institute) and Charles-Clemens Rüling (Grenoble Ecole de Management), I am conducting a similar analysis of the role of climate summits in the field of international climate change policy.

105 Dobusch, Leonhard, Schüßler, Elke (forthcoming): Copyright Reform and Business Model Innovation: Regulatory Propaganda at German Music Industry Conferences. In: *Technological Forecasting and Social Change*.

This field was established by the Rio Earth Summit in 1992, and has since been marked by a series of international policy conferences carrying forward the United Nation's climate change negotiation process: the annual 'Conference of the Parties' (COP), together with a series of mid-year 'Meetings of the Subsidiary Bodies' (SB) held in the context of the United Nation's Framework Convention on Climate Change (UNFCCC). Recent research has underlined the role of international conferences as "cata-

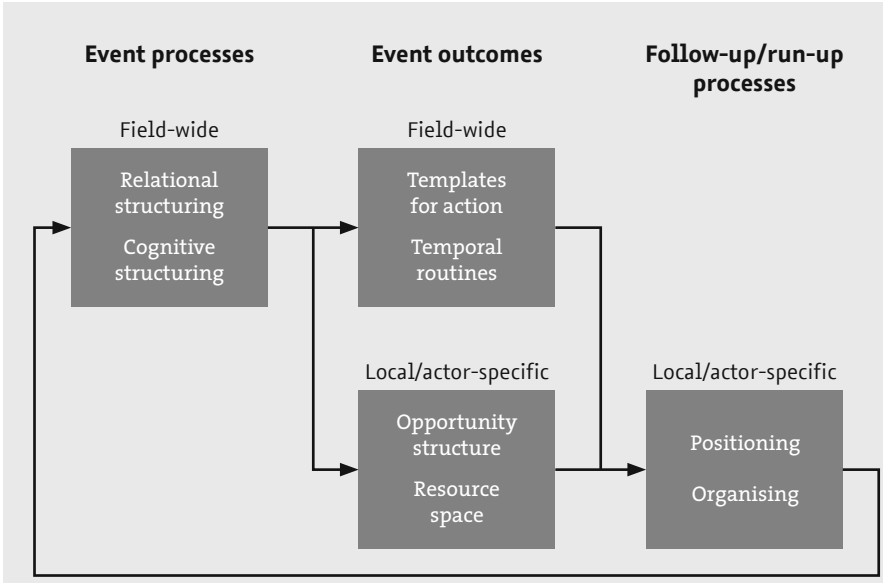
lysts of change, especially as organisations and governments struggle to develop global solutions to complex problems" (p. 1358)[106].

In our analysis of COP summits since the year 2000, we find that these events increasingly contribute to maintaining the field of international climate change policy – possibly at the expense of the momentum needed to advance institutional change. While early climate summits, most notably COP 3 in Kyoto, created important field-wide institutions such as the carbon-emission trading scheme, recent COPs, among which probably the most remembered was the much-hyped COP 15 in Copenhagen in 2009, are characterised by the absence of meaningful policy agreements. Instead, the focus seems to have shifted towards managing the more technical issues of the process of international policy making itself: postponing decisions, developing roadmaps, and scheduling further events[107].

106 Hardy, Cynthia, Maguire, Steve (2010): Discourse, Field-Configuring Events, and Change in Organizations and Institutional Fields: Narratives of DDT and the Stockholm Convention. In: *Academy of Management Journal*, 53 (6): 1365–1392.

107 See, for example, Drieschner, Frank (2011): Aufschub mit Ansage. In: *Die Zeit Online*. November 28, 2011. **http://www.zeit.de/2011/48/Klimakonferenz-Durban**

Field Maintenance through Recurrent Events



Source: Schüßler, Elke, Rüling, Charles-Clemens, Wittneben, Bettina F. (2012): Field Configuration and Maintenance in Organisational Fields: The Role of Recurrent Events. Paper presented at the Management of Organisation, Innovation and Technology (MOTI) Seminar, Grenoble Ecole de Management, February 3, 2012, p. 42, slightly modified by the author.

Nonetheless, the COPs attract a large number of participants each year, many of whom come from non-governmental "observer organisations". For those actors, the COPs play an important role, in that they provide a fixed reference point towards which their otherwise dispersed and unconnected activities are directed, and from which new activities result. We argue that recurrent events such as the COPs lead to field-wide templates for legitimate forms of action and provide temporal routines, while local-level outcomes include an actor-specific opportunity structure and resource space that depends on networks and relationships formed at events, as well as on individual actors' understanding of field-level issues. Event outcomes at both levels influence actors' organising and strategic positioning activities during both the follow-up to the COPs and the next run-up stages.

The COPs thus seem to play a field-maintaining rather than a field-configuring role over time[108]. However, effective field maintenance also implies the need to provide the field with opportunities for change and to balance continuity and momentum. As Durban has shown again, the COPs, organised by the UNFCCC Secretariat, seem to have a bias towards the former, so that the actors most in need of change seek alternative forums such as the Durban Group for Climate Justice or the World People's Conference on Climate Change and the Rights of Mother Earth.

While focusing on the *process* of international climate change policy is important, the UNFCCC Secretariat should, despite all the challenges inherent in international diplomacy, not forget about *content* if it wants to maintain its strong "field mandate"[109], i.e. on facilitating the development of binding solutions that make our planet a more climate-friendly place.

108 Schüßler, Elke, Rüling, Charles-Clemens, Wittneben, Bettina F. (2011): Field Maintaining Events: The Role of Conferences in Structuring the Field of Climate Policy. Paper presented at the Academy of Management Annual Meeting, San Antonio. August 12–16, 2011.

109 Lampel, Joseph, Meyer, Allen D. (2008): Guest Editors' Introduction: Field-Configuring Events as Structuring Mechanisms: How Conferences, Ceremonies, and Trade Shows Constitute New Technologies, Industries, and Markets. In: *Journal of Management Studies*, 45 (6): 1025–1035.

Between Abolitionism and ACTA: Transnational Copyright #1

Leonhard Dobusch

Mostly, the blog "governance across borders" and thus the articles in this volume deal with governance and regulation spearheaded by non-state actors. However, national and international institutions such as laws or treaties are still significant in the transnational realm – actually, this is why we prefer the term *"transnational"* rather than "global" or "international" in the context of cross-border governance.

As a case in point, the transnational field of copyright regulation evidences the fact that private rule-setting via standards might also happen where there is no lack of state regulation in the first place. Dating back into the 19th century, intellectual property in general and copyright in particular have been regulated by "hard law" in the form of state legislation and international treaties. In the course of digitisation and the rise of the Internet, this complex bundle of national and international rules came under pressure due to a sharp increase in online and thus inherently transnational practices relating to copyright regulation.

While many of the conflicting responses to this Internet challenge to copyright were led by private actors (see the next two sections on private enforcement and alternative licensing schemes), these were accompanied by criticism and change in national and international laws. The positions taken range from copyright abolitionism to expanding and strengthening copyright enforcement provisions, as in the case of the Anti-Counterfeiting Trade Agreement (ACTA). This section comprises those articles that deal with copyright reform efforts and respective discourse on the national and international level.

Reflections on Abolitionism: Copyright and Beyond

Leonhard Dobusch, 2010/02/17

While conventional discourse on global governance in general and copyright regulation in particular mainly discusses complementary or conflicting ways of regulation, abolitionist positions are mentioned only rarely.

The following reflection on the role – the potential virtues and deficiencies – of abolitionist reasoning is inspired by a recent blog post[110] by Stephan Kinsella. In his article the self-described "Austro-Anarchist Libertarian" and author of the book *Against Intellectual Property*[111] features works by cartoonist Nina Paley (see her video "All Creative Work Is Derivative"[112]). In an email to Kinsella, Paley describes herself as follows:

> *I'm now artist-in-residence at QuestionCopyright.org, and do what I can to promote alternatives to copyright. (Actually I'm a copyright abolitionist, but many find that identification unpalatable.)*

Why is being a copyright abolitionist so "unpalatable" that even outspokenly critical individuals such as Paley feel the need to hide it? Is it the threat they embody by proposing such a seemingly radical position? Or is it the lack of connectivity for further debate that leads to awkward moments and the self-perception of being unpalatable in the eyes of others?

In the field of copyright, abolitionism can also be found among economists, as is evidenced by Boldrin and Levine's volume *Against Intellectual Monopoly*[113]. Consistent with their theoretical claims, Boldrin, Levine and Kinsella have put the following "copyright notice" on their blog "Against Monopoly"[114]:

> *Copyright Notice: We don't think much of copyright, so you can do what you want with the content on this blog. Of course we are hungry for publicity, so we would be pleased if you avoided plagiarism and gave us credit for what we have written. We encourage you not to impose copyright restrictions on your "derivative" works, but*

110 Kinsella, Stephan (2010): Nina Paley's "All Creative Work is Derivative". February 15, 2010. **http://www.stephankinsella.com/2010/02/nina-paleys-all-creative-work-is-derivative/**

111 Kinsella, Stephan (2008): *Against Intellectual Property*. Auburn, AL: Ludwig von Mises Institute. **http://mises.org/books/against.pdf**

112 Question Copyright (2010): All Creative Work Is Derivative. *youtube.com*. February 9, 2010. **http://www.youtube.com/watch?v=jcvd-5JZkUXY**

113 Boldrin, Michele, Levine, David K. (2008): Against Intellectual Monopoly. Cambridge: Cambridge University Press. **http://www.dklevine.com/papers/imbookfinalall.pdf**

114 See "Against Monopoly" Homepage. **http://www.againstmonopoly.org/** (at the bottom of the page)

> *we won't try to stop you. For the legally or statist minded, you can consider yourself subject to a Creative Commons Attribution License.*

But regulatory abolitionism, of course, is neither a specialty of copyright or intellectual property, nor is it restricted to libertarians. Far-left organisations involved in the anti-globalisation movement also make regular calls for the "abolishment" or "dismantling" of existing regulatory institutions such as the WTO, the IMF and related treaties (see, for example, the Organic Consumers Association, socialism.com or "10 Reasons to Dismantle the WTO"[115]).

115 Mokhiber, Russel, Weissmann, Robert (1999): 10 Reasons to Dismantle the WTO. November 23, 1999. **http://lists.essential.org/corp-focus/msg00050.html**

Motives for the abolitionism of libertarians and socialists are completely oppositional, of course: while the latter see it as a first and to a certain extent dialectal step towards new and presumably better transnational institutions, the former do not seek to replace the existing regulations with any alternative.

For moderate critics of both copyright regulation and globalisation, abolitionist viewpoints and activism seem to be a two-edged sword: on the one hand, they are eager to distance themselves from abolitionists. Copyright critic Lawrence Lessig, for example, states in a Billboard Q&A[116]:

116 Bruno, Anthony (2009): The Billboard Q&A: Lawrence Lessig. Febraury 14, 2009. **http://www.law.stanford.edu/news/the-billboard-q-a-lawrence-lessig**

> *The first big mistake is that people confuse my work with the growing copyright abolitionist movement that is out there. I'm fundamentally not a copyright abolitionist. I believe copyright is an essential part of the creative industry and culture is richer both in the money sense and in the diversity sense with copyright than without it. My objective is to find ways to update copyright and make it make sense in a different technological context, and that should be an objective shared by people who are in the industry".*

On the other hand, this very distancing from "radical" abolitionists is what makes those critics "moderates" and thereby allows them, at the same time, to define and fill what could be called a "centrist" position. To put it bluntly: if there were no abolitionists, critics of copyright regulation or the WTO would even be tempted to "invent" them.

Whether the threat of being defamed as part of a quixotic camp of radical abolitionists is outweighed by the opportunities granted by playing the role of the "sensible" centrist is, of course, an empirical question. It depends not least upon the actual strength of abolitionist movements and on the success of moderates in differentiating themselves from those. In any case, looking at the reasons for and the role of abolitionists in transnational regulatory struggles seems to be a worthwhile endeavor.

No National Leeway? Copyright Reform Proposals in Brazil and the Czech Republic

Leonhard Dobusch, 2010/09/03

When discussing national copyright legislation with lawyers, most discussions end relatively quickly with reference to the inherent necessities of international treaties. Legalise non-commercial file-sharing? That would be in conflict with the Berne three-step test, which is included in the TRIPs Agreement, the WIPO Copyright Treaty, the EU Copyright Directive and the WIPO Performances and Phonograms Treaty (see also the Declaration on the Three-Step Test[117] by the Max Planck Institute for Intellectual Property in Munich). Introduce a so-called cultural flat-rate (see also p.170 *"Extending Private Copying Levies"* in this volume)? Not in line with the Three-Step Test, either. Shorten copyright terms below the 50-year threshold? Impossible, at least for WTO member states, which have to abide by the TRIPs Agreement, and for signatories of the Berne Convention.

And there is, of course, some truth in the prevailing view that most aspects of copyright legislation are already mapped out by international law, leaving national legislatures with only little room for manoeuvre. Nevertheless, two recent and very antagonistic examples of national copyright reform efforts show that this national leeway is not so small after all.

In sharp contrast to European tendencies to increase the scope and length of copyright protection, the Brazilian copyright reform proposal put forward by the governing Worker's Party includes wide exceptions for non-profit educational uses and a reduction of the copyright term from 70 to 50 years; it even flirts with the introduction of a cultural flat-rate[118]. One of the most striking clauses in the bill deals with the circumvention of copy protection measures (so-called "DRM"), as reported by Michael Geist[119]:

> *Not only does the proposal permit circumvention for fair dealing and public domain purposes, but it establishes equivalent penalties for hindering or preventing the users from exercising their fair dealing rights. In other words, the Brazilian proposals*

117 Geiger, Christophe et al. (2008): Declaration. A Balanced Interpretation of the "Three-Step Test" in Copyright Law. Munich: *Max Planck Institute for Intellectual Property*. **http://www.ip.mpg.de/files/pdf2/declaration_three_step_test_final_english1.pdf**

118 See Grassmuck, Volker (2010): Compartilhamento legal! – Brazil is Putting an End to the 'War on Sharing,' at R$ 3,00 per Month. September 1, 2010. **http://www.vgrass.de/?p=382**

119 Geist, Michael (2010): Brazil's Approach on Anti-Circumvention: Penalties for Hindering Fair Dealing. July 9, 2010. **http://www.michaelgeist.ca/content/view/5180/125/**

> *recognize what the Supreme Court of Canada stated several years ago – over-protection is just as harmful as under-protection.*

I like this one, as it illustrates very nicely how national legislative leeway emerges from regulatory voids: of course, Brazil has to abide by Article 11 of the WIPO Copyright Treaty, which requires "legal protection and effective legal remedies against the circumvention of effective technological measures"; but the treaty neither forbids exceptions nor penalises producers of protection technologies, which foreclose those exceptions.

The second example of national leeway in the opposite direction – strengthening copyright and hindering alternatives such as open content licensing – is a recently leaked reform proposal from the Czech Republic. The European Digital Rights Initiative (EDRI) describes the draft[120] that was developed by the Czech Ministry of Culture, collecting societies and The Association of Copying Services Entrepreneurs, as follows:

120 Michàlek, Jakub (2010): ENDitorial: Leaked Draft of the New Czech Copyright Act. *European Digital Rights (EDRi)*. August 25, 2010. **http://www.edri.org/edrigram/number8.16/new-czech-copyright-draft**

> *The Copyright Act draft contains a controversial section on the temporal effect of copyleft licenses (e.g. Creative Commons, also called public licenses in legal terminology). It imposes the obligation to notify collecting societies on authors each time they decide to publish their works outside the strict copyright framework. The legislation thus disrupts the idea of quick and simple publishing enabled by public licenses and forces bureaucratic elements into the system. Collecting societies would also have a complete overview of copyleft works. (Michàlek 2010)*

Moreover, according to EDRI, the draft grants collecting societies the right to control orphan works, strengthens their monopoly, and reintroduces the obligation to report all live performances to the collecting society OSAm, including a detailed programme. Of course, this proposal has "lobbying" written all over it. At the same time, however, it also illustrates why we speak of "transnational" rather than "global" or "international" governance in this blog: the growing importance of border-crossing governance processes does not render obsolete those very borders that are crossed.

Shifting Baseline in Assessing Copyright Regulation? IP as Conceptual Pac Man!

Leonhard Dobusch, 2011/07/22

During a stay as a visiting researcher at the Social Science Research Centre Berlin (WZB) I had the chance to work on a research project about the societal and economic role of the digital public domain, which I have been working on together with Jeanette Hofmann. In this context, I started re-reading some of the classic works on the issue, such as David Lange's *Recognising the Public Domain*[121] from the year 1981.

While reading through this paper and his assessment of some then recent changes in copyright law, I noticed that several of his conclusions are strikingly similar to the ones made by contemporary copyright critics:

> *"I will argue that the growth of intellectual property in recent years has been uncontrolled to the point of recklessness." (p. 147)*

> *"The [copyright] law seemed suddenly to metastasize." (p. 153)*

> *"The field of intellectual property can begin to resemble a game of conceptual Pac Man in which everything in sight is being gobbled up." (p. 156)*

Since Lange's assessments in 1981, however, there have been some of the most fundamental revisions in copyright's history, such as the TRIPS treaty or the subsequent WIPO Copyright Treaties and their respective implementation in national law – all of this further increasing the strength and scope of intellectual property rights[122].

This leads to the question of whether we are observing a shifting baseline effect in our assessment of intellectual property rights in general and copyright in particular. The concept of a shifting baseline is used to describe cases where gradual changes over time lead to substantially different outcomes, which are, however, not recognised as such by the actors.

121 Lange, David L. (1981): Recognising the Public Domain. In: *Law and Contemporary Problems*, 44: 147–178. **http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1727&context=faculty_scholarship**

122 For a detailed account of the regulatory changes between 1980 and 2000, see Drahos, Peter, Braithwaite, John (2002): *Information Feudalism*. London: Earthscan Publications. **http://www.anu.edu.au/fellows/pdrahos/books/Information%20Feudalism.pdf**

According to Wikipedia, the concept was first developed by David Pauly in the context of environmental psychology. In his 1995 article *Anecdotes and the shifting baseline syndrome of fisheries*[123], Pauly argues that fisheries scientists sometimes fail to identify the correct "baseline" population size (e.g. how abundant a fish species population was before human exploitation) and thus work with a shifted baseline. Sáenz-Arroyo et al. generalised the concept and define it as follows[124]:

123 Pauly, Daniel (1995): Anecdotes and the Shifting Baseline Syndrome of Fisheries. In: *Trends in Ecology and Evolution*, 10 (10): 430. **http://www.seaaroundus.org/researcher/dpauly/PDF/1995/JournalArticles/Anecdotes%26ShiftingBaselineSyndromeFisheries.pdf**

124 Sàenz-Arroyo, Andrea et al. (2005): Rapidly Shifting Environmental Baselines among Fishers in the Gulf of California. In: *Proceedings of Biological Science*, 272: 1957–1962.

> *Shifting environmental baselines are inter-generational changes in perception of the state of the environment. As one generation replaces another, people's perceptions of what is natural change even to the extent that they no longer believe historical anecdotes of past abundance or size of species. (p. 1957)*

Returning to Lange's assessment of copyright, I would argue that we can observe a shifting baseline in the discussion of intellectual property regulation, too. A large proportion of researchers, practitioners and regulators cannot even envision how the much less restrictive intellectual property regimes of the past worked. In the field of copyright in particular, the perception of what is a "natural" level of protection has changed.

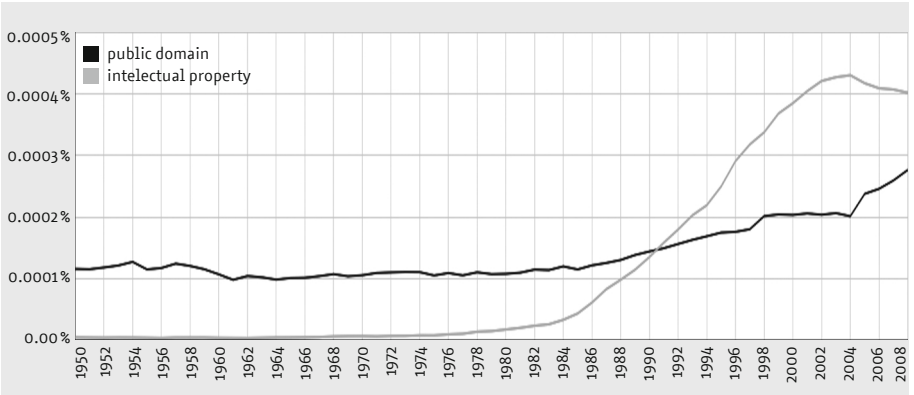
Intellectual Property versus Public Domain: Mentions in the Google Books Corpus

Leonhard Dobusch, 2011/08/09

Google Books Ngram Viewer is a fantastic tool showing how certain phrases have occurred in a corpus of books over a selected period of time. Recently, fellow bloggers over at "orgtheory" have played around with this tool[125].

Working on the issue of the digital public domain during my stay at the WZB, I was curious to compare the mentions of "public domain" and "intellectual property", which are depicted in the graph below:

Google Books References to Intellectual Property and Public Domain 1950–2008



Source: Author's composition based on an analysis with Google Ngram. http://books.google.com/ngrams

The resulting graph is rather interesting. First, I did not know that the term "intellectual property" was virtually non-existent at all prior to 1980. This is remarkable, since the negotiations that finally led to the WTO's agreement on Trade-Related Aspects of *Intellectual Property* Rights (TRIPS) had started in the early 1980s. Again, we can observe a shifting baseline effect (see p. 120 *"Shifting Baseline in Assessing Copyright Regulation?"* in this volume): today, the concept of "intellectual property" has become completely taken for granted, while 30 years ago even the phrase hadn't been used.

Second, the rising interest in intellectual property is accompanied by a rising interest in its counterpart, the public domain. As intellectual property becomes more important, so does the public domain.

Third, there was quite a sudden change in the overall trend regarding both phrases somewhere around 2004. Of course, I can only speculate about the reasons for that.

125 See, for example, Rojas, Fabio (2011): Markets > Science > Religion. *orgtheory.net*. August 11, 2011. **http://orgtheory.wordpress.com/2011/08/09/markets-science-religion/**

Maybe the special issue of Law & Contemporary Problems on *The Public Domain*[126] had some impact? Even more so, the increasingly widespread diffusion of Creative Commons licenses, launched in 2002, might have contributed to a growing interest in the public domain. This does not, however, explain why mentions of intellectual property started to decrease at about the same time, given the fact that public domain is regularly defined in demarcation to intellectual property.

126 Boyle, James (ed.) (2003): The Public Domain. In: *Law and Contemporary Problems*, Special Issue, 66 (1, 2).

Government across Borders: From Inspiration to Implementation

Leonhard Dobusch, 2012/01/07

In the history of copyright law, legislations in Europe and the US have wound each other up more and more. Every time there was an extension of the copyright term on one side of the ocean, lobbyists on the other side started finger-pointing, demanding the same rights to protect artists and industry. A recent example of such regulatory inspiration has been the EU database directive, which created a sui generis right for the creators of databases that do not qualify for copyright. Ever since this directive was passed in Europe, lobbyists in the US have tried to introduce a similar provision into US copyright law[127]. Such regulatory inspiration is neither new nor surprising, nor restricted to the domain of copyright.

127 See Boyle, James (2008): *The Public Domain. Enclosing the Commons of the Mind*. New Heaven: Yale University Press. **http://thepublicdomain.org/thepublicdomain1.pdf**

However, what has been leaked in the Wikileaks cables – classified cables that had been sent to the US State Department by 274 of its consulates, embassies, and diplomatic missions around the world – about the influence of the US on the new Spanish copyright law is way beyond mere inspiration for lobbyists. As reported by the Guardian, in this case the lobbyist was the US government itself[128]:

128 Rushe, Dominic (2012): US Pressured Spain to Implement Online Piracy Law, Leaked Files Show. *The Guardian Online*. January 5, 2012. **http://www.guardian.co.uk/technology/2012/jan/05/us-pressured-spain-online-piracy**

> *The US ambassador in Madrid threatened Spain with "retaliation actions" if the country did not pass tough new internet piracy laws, according to leaked documents. ... In his letter, Solomont [i.e. the US ambassador] issued veiled threats, reminding its recipients that Spain is on the Special 301, the US trade representatives'*

list of countries that do not provide "adequate and effective" protection of intellectual property rights. Spain risks having its position on the list "degraded", and could join the real blacklist of "the worst violators of global intellectual property rights" (Rushe 2012).

According to the Guardian, the resulting draft for Spain's new copyright law is "similar to the Protect IP Act (PIPA) and SOPA, the Stop Online Piracy Act, two pieces of anti-piracy legislation now being discussed in the US Congress". This is not inspiration, this is implementation. And, of course, this is a case not of gover*nance* but of gover*nment* across borders.

Finally, this case also evidences how powerful the list of so-called notorious markets published by the U.S. Trade Representative still is[129]. Not only developing countries but even large EU member states are effectively pressured with this trade whip.

129 For more information, see Palmedo, Mike (2011): USTR Publishes List of "Notorious Makets". infojustice.org. December 21, 2011. **http://infojustice.org/archives/6659;** or Drahos, Peter, Braithwaite, John (2002): *Information Feudalism*. London: Earthscan Publications. **http://www.anu.edu.au/fellows/pdrahos/books/Information%20Feudalism.pdf**

ACTA as a Case of Strategic Ambiguity

Leonhard Dobusch, 2012/02/02

While the dust of the SOPA and PIPA battle in the US has not settled yet, we are quickly approaching the next showdown around an acronym in the realm of intellectual property regulation. This time, the main battleground is Europe, the acronym is ACTA. The "Anti-Counterfeiting Trade Agreement" had been negotiated secretly for years until, in early 2010, a draft of the agreement was leaked[130]. Since this leak, the draft has been substantially reworked and, last week, the treaty was signed by representatives of the European Commission and 22 member states in an official signing ceremony[131].

However, the political controversy is far from over. For one, the treaty needs to be approved by the European Parliament, which is now the main target for the mobilisation of both supporters and opponents. Secondly, the signing of ACTA has sparked surprisingly strong protests in some EU member states, above all in Poland. The intensity of the Polish opposition has raised attention in neighbouring states in turn, most importantly in Germany.

130 See Geist, Michael (2010): ACTA Guide, Part Two: The Documents (Official and Leaked). January 26, 2010. **http://www.michaelgeist.ca/content/view/4730/125/**

131 For further information, see, for example: **http://www.mofa.go.jp/policy/economy/i_property/acta1201.html**

One, admittedly not very representative indicator of the growing awareness of ACTA in Germany is that I have received an increasing number of requests for expertise, talks or comments on the issue over the last weeks. What puzzled me in this respect was that I had difficulties giving concrete examples of why ACTA was problematic. Of course, the whole direction of the treaty, along with the secretive, undemocratic negotiation process, deserves enough criticism to justify opposition. But when asked for detailed examples of how ACTA endangers free speech and innovation on the Net, it was not so easy to come up with a convincing answer. After the initial leaks, the draft was changed repeatedly and many of the most worrying provisions have been moderated, reformulated or altered.

Jan Engelmann, head of the politics and society division at the German Wikimedia chapter, seems to have encountered similar difficulties and has also blogged about it (German only)[132]. His bottom line: ACTA represents the "principle of fuzziness". And I completely agree. ACTA is an exemplary case of what Raustiala and Victor call "strategic inconsistency"[133] and others have referred to as "strategic"[134] or "constructive ambiguity"[135].

In its digital chapter, for example, ACTA is not very specific about how online copyright protection should be enforced. Article 27 (3) reads as follows[136]:

> *Each Party shall endeavour to promote cooperative efforts within the business community to effectively address trademark and copyright or related rights infringement while preserving legitimate competition and, consistent with that Party's law, preserving fundamental principles such as freedom of expression, fair process, and privacy.*

How do you "promote cooperative efforts within the business community to effectively address … infringement" while at the same time "preserving fundamental principles such as freedom of expression, fair process, and privacy"? In this clause, ACTA obviously calls for the privatisation of copyright enforcement measures following the

132 Engelmann, Jan (2012): ACTA in Aktion: Unschärfe als Prinzip [Update]. *blog.wikimedia.de*. January 31, 2012. **http://blog.wikimedia.de/2012/01/31/acta-in-aktion-unscharfe-als-prinzip/**

133 Raustalia, Kal, Victor, David G. (2004): The Regime Complex for Plant Genetic Resources. In: *International Organisation* 58 (2): 277–309. **http://irps.ucsd.edu/dgvictor/publications/Faculty_Victor_Article_2004_Regime Complex_International Organisation.pdf**

134 Buffet Center (2007): The Politics of International Regime Complexity Symposium. Working Paper 07–003. *Roberta Buffett Center for International and Comparative Studies. Evanston, IL:* Northwestern University. **http://www.bcics.northwestern.edu/documents/workingpapers/Buffett_07-003_Regime_Complexity.pdf**

135 See, for example, Yu, Peter K. (2007): International Enclosure, the Regime Complex, and Intellectual Property Schizophrenia. In: *Michigan State Law Review*, 1: 1–33. **http://www.msulawreview.org/PDFS/2007/1/Yu.pdf**

136 Anti-Counterfeiting Trade Agreement (2011): Enforcement of Intellectual Property Rights in the Digital Environment, Section II.2. Tokyo, October 1, 2011. **http://en.wikisource.org/w/index.php?title=Anti-Counterfeiting_Trade_Agreement&oldid=3601073#Section_5:_Enforcement_of_Intellectual_Property_Rights_in_the_Digital_Environment**

US example of "Copyright Alerts" (see p. 157 *"'Copyright Alerts' against 'Content Theft'"* in this volume). How these "cooperative efforts" should be implemented remains diffuse, and the commitment to "fair process and privacy" is obviously inconsistent with the type of private enforcement measures called for in the first sentence.

Consequently, critics such as *La Quadrature Du Net (LQDN)* argue in their analysis of the final version[137] that "police (surveillance and collection of evidence) and justice missions (penalties) could be handed out to private actors, bypassing judicial authority and the right to a fair trial to block and take down allegedly infringing content".

137 La Quadrature Du Net (2010): ACTA: Updated Analysis of the Final Version. December 9, 2010. **http://www.laquadrature.net/en/acta-updated-analysis-of-the-final-version**

In the above cited studies on strategic or constructive ambiguity, the focus is on the people crafting international treaties. For them, introducing ambiguity into a text is a way out of gridlocked negotiations. Often, an ambiguous treaty is much better for some parties than no treaty at all. In the case of ACTA, this is the case for the entertainment industry, which has nothing to lose if ACTA fails, but the resources to lobby for strong national and private implementation if ACTA is passed.

But the ACTA case also elucidates another aspect of ambiguity in international treaties. While ambiguity might be constructive from a negotiator's perspective, it might at the same time be obstructive to counter-mobilisation. Since it is not obvious what will actually happen when the treaty is signed, warnings can be dismissed easily as excessive. At least, ambiguity forces opponents to actively create a narrative of how ambiguous passages are likely to be implemented. Seen from this perspective, ambiguity provides both a threat and an opportunity for counter-mobilisation: ambiguity requires more work to frame protests, but it also allows such framing.

The ACTA-Copy-Paste-Syndrome: Zombie Provisions of Failed Treaties[138]

Leonhard Dobusch, 2012/07/09

Last week the European Parliament rejected the Anti-Counterfeiting Trade Agreement (ACTA, see also p. 124 *"ACTA as a Case of Strategic Ambiguity"* in this volume) with 478 voting against the treaty, 39 in favour and 165 MEPs abstaining. Commenting on this outcome[139], Joe McNamee from the ACTA-critical NGO European Digital Rights (EDRi) stated that "ACTA is not the end. ACTA is the beginning". In his optimistic account, he argues that the rejection of ACTA has substantially changed the debate on intellectual property rights regulation in Europe:

> *Thanks to SOPA, European citizens better understood the dangers of ACTA. Thanks to the anti-ACTA campaign, it would be politically crazy for the Commission to launch the Criminal Sanctions Directive. Thanks to ACTA, there is broad understanding in the European Parliament of just how bad IPRED really is and any review now, if the Commission has the courage to re-open it, is more likely to improve the Directive rather than increase its repressive measures. (McNamee 2012)*

However, a recent op-ed[140] by Canadian copyright scholar Michael Geist illustrates why ACTA's contents might not be so dead after all. Referring to leaked documents of negotiations between Canada and the EU Commission on the "Comprehensive Economic and Trade Agreement" (CETA), he states:

> *According to the leaked document, dated February 2012, Canada and the EU have already agreed to incorporate many of the ACTA enforcement provisions into CETA, including the rules on general obligations on enforcement, preserving evidence, damages, injunctions, and border measure rules. One of these provisions even specifically references ACTA.*

138 The title of this post relates to the title of Weber, Stefan (2006): *Das Google-Copy-Paste-Syndrom. Wie Netzplagiate Ausbildung und Wissen gefährden*. Hanover: Heise Zeitschriften Verlag.

139 McNamee, Joe (2012): Thank You SOPA, Thank You ACTA. *European Digital Rights*. July 4, 2012. **http://www.edri.org/edrigram/number10.13/good-bye-acta**

140 Geist, Michael (2012): Controversial Copyright Rules Threaten Canada – European Trade Deal. *thestar.com*, July 7, 2012. **http://www.thestar.com/business/article/1223118--controversial-copyright-rules-threaten-canada-european-trade-deal**

According to Geist, "the EU has also proposed incorporating ACTA's criminal enforcement and co-operation chapters into CETA" and "Canada has similarly pushed for the inclusion of ACTA provisions, proposing identical digital lock rules as well as ACTA-style Internet service provider provisions that raised privacy concerns from the European Data Protection Supervisor".

I propose that ACTA is far from being an atypical case here. The main rationale for *forum shopping*[141] is often to revive provisions that failed elsewhere. I think it would be an interesting research project to track "zombie provisions" of failed treaties in subsequently adopted treaties or even in functionally equivalent types of private regulation via standards.

141 See, for example, Bush, Mark L. (2007): Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade. In: *International Organisation*, 61 (4): 735–761. **http://www9.georgetown.edu/faculty/mlb66/Forum%20Shopping.pdf**

The EU Orphan Works Directive: Strategic Ambiguity Empowering National Legislatures

Leonhard Dobusch, 2012/09/13

Today, with an overwhelming majority – 531 voting in favour, 11 against and 65 abstentions – the European Parliament passed a compromise proposal for a directive on certain permitted uses of "orphan works". In Europe, orphan works are a much greater problem than in the USA, for example, because European copyright has featured automatic protection for a much longer time. As a consequence, finding rights holders is more difficult than in the USA, where works had to be registered until the end of the 1980s. And due to ever-longer protection terms, the number of orphan works is going to increase even further every year, making access to our common cultural heritage increasingly difficult.

The so-called orphan works directive addresses the problem by allowing public-sector institutions such as libraries, museums, archives, educational establishments and film heritage institutions to digitize and publicize orphan works after conducting a "diligent search". What constitutes a "diligent search" is outlined in more detail in a "Memorandum of Understanding on Diligent Search Guidelines for Orphan Works"[142].

142 European Digital Libraries Initiative (2008): Memorandum of Understanding on Diligent Search Guidelines for Orphan Works. **http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/ orphan/mou.pdf**

One of the best provisions in the new directive is the principle of "mutual recognition" of diligent searching, which means that the search needs to be conducted only in the Member State where the work was first published or broadcasted. In addition, the directive deals with the issue of partial orphans, which is of particular importance in the case of films with several rights holders[143]:

143 See European Parliament (2012): Position on European Parliament on Certain Permitted Uses of Orphan Works. September 13, 2012. **http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TC+P7-TC1-COD-2011-0136+0+DOC+PDF+V0//EN**

> *Where a work has more than one rightholder, and at least one of the rightholders has not been identified, or even if identified, has not been located after a diligent search has been carried out and recorded in accordance with Article 3, that work shall be considered an orphan work insofar as the rights of the non-identified or non-located rightholders are concerned. (European Parliament 2012: 16)*

And in a last minute change, as is emphasised in the official press release[144], the MEPs inserted a provision, Art. 6 (2), that allows cultural heritage organisations to earn money as long as it is used for search and digitisation:

144 Press Service European Parliament (2012): Orphan Works to Go Public. September 13, 2012. **http://www.europarl.europa.eu/pdfs/news/expert/infopress/20120907IPR50827/20120907IPR50827_en.pdf**

> *At the insistence of MEPs, the text includes an article to allow public institutions to generate some revenue from the use of an orphan work (e.g. goods sold in a museum shop). All of this revenue would have to be used to pay for the search and the digitisation process. (p. 1)*

However, the compromise also includes a highly problematic provision that was very controversial in negotiating the directive and reads as follows:

> *Member States shall provide that a fair compensation is due to rightholders that put an end to the orphan work status of their works or other protected subject-matter for the use that has been made. (p. 16)*

The original proposal of the European Commission had not included such a right for "fair compensation", which constitutes a risk for cultural heritage organisations engaging in digitisation efforts. Because even though they invest in a diligent search and in digitisation they cannot be sure that rights holders won't suddenly reappear and demand remuneration. Moreover, again we have a case of strategic ambiguity here (see also p. 124 "*ACTA as a Case of Strategic Ambiguity*" in this volume). What constitutes "fair compensation" is left entirely to the national legislatures. The ambiguity of the term "fair compensation" allowed the passing of the directive, because each side of the controversy could interpret it their own way.

It remains to be seen how national legislatures will implement this most important part of the directive. If the risk for heritage organisations is not contained, it may render the whole directive toothless. The final version of the directive gives substantial leeway to the Member States in that regard in Art. 6 (5):

> *Member States shall be free to determine the circumstances under which the payment of such compensation may be organised. The level of the compensation shall be determined, within the limits imposed by Union law, by the law of the Member State in which the organisation which uses the orphan work in question is established. (European Parliament 2012: 21)*

More details are given in the preamble to the directive, which is not binding for national legislatures, of course:

> *For the purposes of determining the possible level of fair compensation, due account should be taken, inter alia, of Member States' cultural promotion objectives, of the non-commercial nature of the use made by the organisations in question in order to achieve aims related to their public-interest missions, such as promoting learning and disseminating culture, and of the possible harm to rights holders.*
> *(European Parliament 2012: 10)*

All in all, the orphan works directive is a step in the right direction and has the potential to really improve access to our cultural heritage – specifically to the "Missing 20th Century"[145]. Whether this chance is actually taken now depends on how the national legislatures implement the directive over the next two years.

145 Rosen, Rebecca J. (2012): The Missing 20th Century: How Copyright Protection Makes Books Vanish. *The Atlantic Online*. March 30, 2012. **http://www.theatlantic.com/technology/archive/2012/03/the-missing-20th-century-how-copyright-protection-makes-books-vanish/255282/**

Private Protection and Enforcement: Transnational Copyright #2

Leonhard Dobusch

Facing and to some extent even pre-empting threats of increased copyright infringement in the digital realm, corporate actors with business models relying on copyright protection – above all the entertainment industry – soon started to pursue a dual strategy to preserve these business models. For one, these companies and the business associations controlled by them such as the Recording Industry Association of America (RIAA) lobbied successfully for new legislation supporting copyright enforcement online. For another, substantial parts of these new laws (e.g. anti-circumvention provisions) were introduced predominantly to support private protection measures such as Digital Rights Management (DRM).

However, in spite of supporting laws, DRM strategies have only seen limited success. Specifically, as is evidenced in several of the articles in this and also the subsequent sections, DRM in the music industry has been something of a failure. Nevertheless, other and more recently explored avenues for private copyright enforcement have proven to be much more effective. One such example described in more detail below is pressurising search engine operators to delete potentially infringing search results. Another example is technological protection regimes incorporated into mobile devices such as the Kindle E-Book reader.

Overall, the variety and intensity of private protection and enforcement measures in the field of copyright illustrates both the power and the related political struggles of private regulatory initiatives in the market sphere. The consequences of private regulation for access to knowledge as well as for free speech online are substantial. In addition, the examples discussed in this chapter underline the fact that forms of private regulation are interlinked with those national and international laws discussed in the previous chapter.

Private Copyright Regimes: Facebook

Leonhard Dobusch, 2009/02/18

In theory, first and foremost copyright belongs to the creator of any new work. In practice, creators are often forced to give up their copyright completely. Most researchers, for example, who need to publish in high impact journals have hardly any choice but to hand over their copyright to journal publishers. Musicians cannot exclude some of their works from the terms of their copyright collectives to publish them under alternative licenses. By joining a collecting society like the German GEMA you trade certain parts of your copyright for the right to receive royalty payments. The GEMA's terms of service, however, are non-negotiable for individual musicians: it is a case of take it or leave it (see p. 188 *"Competition for Copyright Collectives"* in this volume).

In many sector contexts *private copyright regimes* more or less completely replace the logic of (inter-)national copyright legislation. Mostly, this is due to private standardisation and respective network effects: if the individual benefits of adopting a standard depend on the total number of adopters, "exit" is not an option. People dissatisfied with such a private copyright regime are only left with the possibility of "voice", thereby revealing the inherently political nature of private copyright regulation.

A recent example of political struggles around private copyright regimes is a change in the terms of service in the world's largest social networking platform Facebook. Any content that you upload can be used subsequently forever by Facebook, no matter whether you close your account.

There is already opposition to these changes, manifest in a Facebook-group called "People Against the New Terms of Service (TOS)". However, the bargaining power of users is limited and likely to decline further as the importance of social networks and other web 2.0 services grows for everyday life: even today, leaving the dominant social network would mean complete social exclusion in many juvenile peer groups. For many Facebook users, exit is not an option. Hence, I expect to see much more political discussion on and within private regulation regimes, not only in the field of copyright, which actually seems to be a minor issue compared to others like privacy and free speech.

[Update #1:]

Within just one (!) day, the member count in the Facebook group "People Against the New Terms of Service (TOS)" rose from below 500 to over 17,000 (as of 1 pm CET, Feb. 17, 2009). Facebook founder and CEO Mark Zuckerberg already felt the need to make a statement[146] on his blog.

146 Zuckerberg, Mark (2009): On Facebook, People Own and Control Their Information. *blog.facebook.com*. February 16, 2009. **http://blog.facebook.com/blog.php?post=54434097130**

[Update #2:]

Facebook has surrendered. The old TOS are back in place, as announced by Zuckerberg[147]. Not only have more than 65,000 people joined the protest group on Facebook but there has also been enormous media coverage. In the meantime, Facebook has launched its own group to collaboratively discuss new TOS called the "Facebook Bill of Rights and Responsibilities".

147 Zuckerberg, Mark (2009): On Facebook, People Own and Control Their Information. February 18, 2009. **http://blog.facebook.com/blog.php?post=54746167130**

The Kindle Controversy: No Right to Be a Reader?

Leonhard Dobusch, 2009/03/01

The second version of Amazon's relatively successful ebook-reader "Kindle" comes with a new feature, the so-called "text-to-speech function": it enables ebooks to be read aloud. So, while you are cooking or driving to work this feature allows you to continue "reading" a book. Computers have had this feature for a long time (e.g. reading aloud PDF documents) but the Kindle with its specialisation in ebooks is the first to bring it to the world of mobile devices. Or rather, it could have been the first. Soon after the president of the US Authors' Guild, Roy Blount, had publicly criticised the feature as a potential threat to audio books in a New York Times piece entitled "The Kindle Swindle"[148], Amazon gave in and agreed to disable text-to-speech on a title-by-title basis at the rightsholder's request[149]. In his blog, Creative Commons founder Lawrence Lessig describes this as *"caving into bullies"*, emphasising that Amazon did not violate any exclusive copyrights with this feature and bemoaning the fact that *"users and innovators have less freedom"*[150].

148 Blount, Roy (2009): The Kindle Swindle? In: *The New York Times*, February 25, 2009: 27.
149 See posting by Slashsdot-User "Soulskill" (2009): Amazon Caves on Kindle 2 Text-to-Speech. February 28, 2009. **http://news.slashdot.org/story/09/02/28/0127236/amazon-caves-on-kindle-2-text-to-speech**
150 Lessig, Lawrence (2009): Caving into Bullies (aka, Here We Go Again). February 28, 2009. **http://www.lessig.org/blog/2009/02/caving_into_bullies_aka_here_w.html**

From a regulation point of view, two points seem particularly noteworthy: first, representatives of copyright holders have the potential to extend copyright protection even beyond the already extensive copyrights granted by national and international legislation. The basis for their (bargaining) power is those legally granted exclusive rights. In a way, copyright appears to be self-reinforcing or even self-expanding. Second, the possibility to disable the text-to-speech feature underlines the regulatory role of technology – here, in the form of fine-grained Digital Rights Management software – in the field of copyright.

Independent of the text-to-speech function but related to the latter point is the discussion on why the success of ebooks in general and the Kindle in particular is still limited. On his Guardian-blog Bobbie Johnson offers a simple explanation: "not enough pirates"[151]. But that is another discussion.

151 Johnson, Bobbie (2009): Why Aren't Ebooks Taking off? Not Enough Pirates. *The Guardian Online*. February 9, 2009. **http://www.guardian.co.uk/technology/blog/2009/Feb/09/kindle-ipod-books-piracy**

Kindle Controversy Continued: 'Exit' and 'Voice'

Leonhard Dobusch, 2009/04/15

After Amazon had decided to give authors and publishers the ability to disable the text-to-speech function on any or all of their ebooks available for the Kindle 2 ebook-reader, public protests were directed mainly at the US Authors' Guild, which had demanded these changes. A "Reading Rights Coalition", which represents people who cannot read print, even protested outside the Authors' Guild headquarters at 31 East 32nd Street in New York City on April 7.

Yesterday, Richard M. Stallman, the founder and president of the Free Software Foundation, criticised these protests on the public Access-to-Knowledge (A2K) mailing list[152] as being "directed at the wrong target". He would rather see Amazon at the focus of critique:

> *The protestors rightly condemn the Authors' Guild for demanding the removal of the screen reader feature, but the way they are doing it makes Amazon look like a victim. Actually it is the main perpetrator. The reason that Amazon can turn off the screen reader capability is that the machines use non-free software, controlled by Amazon rather than by the user. If Amazon can turn this off retroactively (does anyone know for certain if they did?), it implies the product has a dangerous back door. In addition, the Amazon Swindle is designed with Digital Restrictions Management to stop people from sharing. It is a nasty product with an evil goal.*

152 Stallman, Richard M. (2009): A2K Mailing List. *essential.org*. April 14, 2009. **http://lists.essential.org/pipermail/a2k/2009-April/004172.html**

While being less blunt, Web 2.0 pioneer Tim O'Reilly took up a similar stance on the issue in a Forbes article[153] in February, thereby predicting Kindle's failure within the following two to three years:

153 O'Reilly, Tim (2009): Why Kindle Should Be an Open Book. *Forbes Online*. February 23, 2009. **http://www.forbes.com/2009/02/22/kindle-oreilly-ebooks-technology-breakthroughs_oreilly.html**

> *Unless Amazon embraces open ebook standards like epub, which allow readers to read books on a variety of devices, the Kindle will be gone within two or three years.*

O'Reilly presents successful experiments with open ebooks of his own publishing house and compares Amazon's restrictive DRM strategy to failed attempts by AOL or Microsoft to control the World Wide Web:

> *Open allows experimentation. Open encourages competition. Open wins. Amazon needs to get with the program. Or, like AOL and MSN, Amazon will wind up another online pioneer who ends up a belated guest at the party it planned to host.*

Speaking with Albert O. Hirschman, O'Reilly – the entrepreneur – suggests "Exit" and hopes market forces will clear the way for open ebooks, while Stallman – the political software activist – relies on the "Voice" of public protests. I am not sure which of the two strategies is more promising in this case. As the recent complete abandonment of DRM in the music industry has shown, wide adoption of a (relatively) open format such as MP3 together with compatible and user-friendly hardware devices such as the iPod makes DRM very difficult to uphold. In the market for ebooks, however, the situation is different: while the Kindle somehow represents the "iPod of ebook readers", it is not compatible with open ebook formats. The longer it takes to develop comparable readers that function in both worlds, the larger the installed base of Kindle users may become. In this context, protests that put pressure on Amazon to at least support open ebook standards in addition to its own DRM could be decisive and, thus, demonstrate that "Exit" and "Voice" may sometimes be mutually dependent.

Google Books and the Kindle Controversy: Merging Conflict Arenas?

Leonhard Dobusch, 2009/09/02

Interestingly enough, two of the most visible current copyright-related conflicts are in the realm of the most classic of all copyrighted media: books. On the one hand, Google books is trying to digitize and eventually offer online no less than all the books ever published. Aside from the fundamental question whether companies should be allowed to do this, the main controversy is about how to compensate authors and publishers of books that are out of stock and of orphan works (see p. 192 *"Google versus Copyright Collectives"* in this volume). On the other hand, the book itself as a medium may be changed by ebook-readers such as Sony's "Daily Edition" or Amazon's "Kindle"[154]. Both allow the direct wireless download of books to the reader via mobile phone networks. The latter raises a lot of controversy because of its restrictive digital rights management (see p. 134 *"Kindle Controversy Continued"* in this volume) and Amazon's ability to delete books from the reader even after their purchase[155].

In spite of their common field of digital books and publishing, these two controversies evolved relatively independently from one another until very recently, when Amazon, Yahoo and Microsoft formed the "Open Book Alliance"[156] to counter Google Books. Google's rejoinder was an alliance with Sony. This merger of conflicts bears the potential to alter the dynamics in both controversies.

First, at least in the US, the fundamental question of whether large-scale corporate book digitisation should be allowed at all will be off the table once Google has no monopoly in the area.

Second, the pressure on the still fragmented European publisher and author lobbies to come up with more standardised and pragmatic suggestions for compensation will rise dramatically. Currently, representatives of some European collecting societies such as the German VG Wort seem to think that opting-out of Google Books could solve the problem. It cannot. Keeping German works unavailable by default is just not a sustainable option in a world where every piece of text will be either online or not.

154 See Newman, Jared (2009): Sony's E-Reader versus Kindle: 5 Reasons Amazon Should Worry. *PC World*. August 26, 2009. **http://www.pcworld.com/article/170828/Sony_EReader_vs_Kindle_Reasons_ Amazon_Should_Worry.html**

155 Stone, Brad (2009): Amazon Erases Orwell Books From Kindle. *New York Times Online*. July 17, 2009. **http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html?_r=0**

156 Krazit, Tom (2009): Open Book Alliance to Oppose Google Book Deal. *cnet.com*. August 26, 2009. **http://news.cnet.com/8301-30684_3-10318462-265.html**

Third, we are experiencing the onset of a great new standard battle about the data formats of digital books. In this context, calling an alliance of Amazon, Yahoo and Microsoft "Open Book Alliance" is a telling example of "Newspeak": while Amazon's ebook format is the opposite of Sony's open "ePub", the naming shows that (at least an impression of) openness may be the key to getting a standard diffused and established.

Unilateral Governance Negotiations: News Corp. versus Google

Leonhard Dobusch, 2009/12/03

When preparing this post I struggled with the question of what to call the process between two parties offering complementary services that obviously refer reciprocally to each other in their actions but do not directly and explicitly negotiate? This question came to me, when the German debate over an ancillary copyright for publishing houses recently arrived in the US. "Editor & Publisher", proud of being *"America's Oldest Journal Covering the Newspaper Industry"*, features an article asking "Change in Copyright Law: A Possible Solution to News Content Crisis?"[157] As a solution suggested by industry representatives, the article reports demands to introduce compulsory licensing fees for Web-based aggregators or re-distributors of news content.

But aside from this transatlantic discourse coalition addressing legislative bodies, we can see interesting dynamics of unilateral (non-)negotiation between two big players in this game, thereby changing the rules as they "play": Google and Rupert Murdoch's News Corp. The latter's opener was plans for a partnership with Microsoft regarding the new search engine, Bing. Business Week's Douglas MacMillan describes the potential deal as follows:

> *In an effort to keep News Corp.'s newspaper content out of Google's search results, Murdoch's media giant has held early-stage talks to forge a deal that would put content from The Wall Street Journal, and possibly other company-owned publications, exclusively in Microsoft's Bing search engine. ... In exchange for the exclusive content, Microsoft would pay an undisclosed fee*[158]*[.]*

157 Leatherwood, Evan (2009): Change in Copyright Law: A Possible Solution to News Content Crisis? Editor and Publisher. November 24, 2011. **http://www.editorandpublisher.com/Article/Change-in-Copyright-Law-A-Possible-Solution-to-News-Content-Crisis-**

158 MacMilan, Douglas (2009): News Corp.'s Talks with Microsoft: A Flawed Deal? *Bloomberg Business Week*. November 24, 2009. **http://www.businessweek.com/technology/content/nov2009/tc20091124_203544.htm**

Only about a week later Google announced its counterstrike on its corporate blog, explicitly referring to concerns of newspaper publishers[159]:

> *As newspapers consider charging for access to their online content, some publishers have asked: Should we put up pay walls or keep our articles in Google News and Google Search? ... One way we overcome this is through a program called First Click Free. ... The user's first click to the content is free, but when a user clicks on additional links on the site, the publisher can show a payment or registration request. First Click Free is a great way for publishers to promote their content and for users to check out a news source before deciding whether to pay. Previously, each click from a user would be treated as free. Now, we've updated the program so that publishers can limit users to no more than five pages per day without registering or subscribing.*

The reason why Google had to change its programmes and policies in the first place is its anti-cloaking strategy. Cloaking means showing one web page to the crawler that indexes it but then a different page to a user – a practice necessary for publishers who want to charge for their content, as they want it to be found by the crawler but not to be accessible to the user before subscribing. For the individual user, however, this small change in Google's policy may severely alter his or her web-surfing experience: he or she will encounter many more digital tollbooths when searching for content via Google search.

Looking at the process, we can observe something I would like to call – thereby coming back to the introductory question – "unilateral governance negotiations": new rules emerge without direct bargaining between the actors but rather from reciprocally related, unilateral measures. In the case at hand, it's Murdoch's turn now.

159 Cohen, Josh (2009): Google and Paid Content. *Google News Blog*. December 1, 2009. **http://googlenewsblog.blogspot.de/2009/12/update-to-first-click-free.html**

DRM in the Music Industry: Revival or Retreat?

Leonhard Dobusch, 2010/04/10

When EMI, the smallest of the "Big Four" major labels, announced it was going to start selling its music without technological protection measures ("Digital Rights Management", DRM) in 2007, the other three majors quickly saw no other possibility but to follow the same road. Flanked by Apple's CEO Steven Jobs' "Thoughts on Music"[160], this move brought an astonishingly unsuccessful decade of attempts by industry incumbents to establish DRM technologies to an end.

In theory, put forward by industry researchers such as Mark Stefik, for example, DRM technologies should not only prevent illegal copying practices ("piracy") but also allow new streams of revenue by tailoring prices individually to the consumer's needs. In practice, however, this vision never became reality. While DRM never was important in the world of small independent labels (see, for example, the online-store "finetunes", which was DRM-free from the beginning), the cartel of major labels first tried to develop industry-wide and all-embracing DRM standards in a so-called "Secure Digital Music Initiative" (SDMI). Remains of this bold attempt, which was quietly abandoned after only two years of existence in May 2001, can only be found in the Internet archive[161]. Controversies between content owners and hardware producers about the necessary protection levels had delayed DRM development, and the outcome was then rejected by consumers, leading DRM-mastermind Stefik to conclude in 2007: "The situation reflects the core issue that current DRM provides no compelling benefits to consumers"[162].

The only refuge where DRM solutions still prevail is the – far from thriving – field of mobile music: supported by all four major and hundreds of independent labels, Nokia's bundling of phone hardware and music-flatrate, entitled "comes with music", uses Microsoft's "plays for sure" DRM solution. But even in this field DRM seems to be in retreat, since Nokia recently abandoned DRM when introducing "comes with music" in China. Ironically, Nokia spokesman Doug Dawson justified waiving copy protection measures with fighting piracy:

160 Jobs, Steve (2007): Thoughts on Music. *apple.com*. February 6, 2007. **http://www.apple.com/ de/hotnews/thoughtsonmusic/**

161 SDMI (2010): The Secure Digital Music Initiative Webseite. May 10, 2010. **http://web.archive.org/web/20000302230740/www.sdmi.org/**

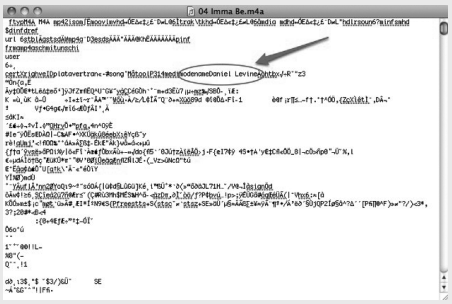
162 See Stefik, Mark (2009): DRM Inside. Presented at the Digital Rights Strategies Conference. New York City. September 17, 2007. **http://www.parc.com/content/attachments/drm_inside_drm_6250_parc.pdf**

163 Reuters, Thomas (2010): Nokia Eyes China to Boost Struggling Music Service. *pcmag.com*. April 8, 2010. **http://www.pcmag.com/article2/0,2817,2362383,00.asp**

It's unique for China where piracy has had a stronghold[163].

Does this mean DRM measures against piracy only make sense where piracy is weak? While such paradoxical lines of reasoning finally seem to herald the end of DRM in the music industry, Michael Arrington at techcrunch nevertheless reports on renewed attempts to introduce DRM through the backdoor – via watermarking and cloud computing:

Personal Information in MP3 File



Source: Arrington, Michael (2010): How "Dirty" MP3 Files Are. A Back Door into Cloud DRM. Tech Crunch. April 6, 2010. http://techcrunch.com/2010/04/06/how-dirty-mp3-files-are-a-back-door-into-cloud-drm/

The big music sellers may have moved to non-DRM MP3 files long ago, but the watermarking of files with your personal information continues. Most users who buy music don't know about the marking of files, or don't care. Unless those files are uploaded to BitTorrent or other P2P networks, there isn't much to worry about[164].

164 Arrington, Michael (2010): How "Dirty" MP3 Files Are. A Back Door into Cloud DRM. *techcrunsh.com*. April 6, 2010. **http://techcrunch.com/2010/04/06/how-dirty-mp3-files-are-a-back-door-into-cloud-drm/**

Quoting an anonymous source, Arrington explains how this watermarking may be used in the future to introduce new forms of DRM protection measures, namely when users wish to store their music in cloud-computing services for ubiquitous access:

> *Certain record labels have aspirations to use this hidden data to control future access to music in a return to DRM (digital rights management). The labels yearn to control where you can listen to your music and this could be a backdoor for them to achieve it. When personal libraries are stored in the cloud, it becomes possible to retrieve this personal data and match it to a user identity. If the match is successful the song plays, but if not, access can be blocked through a network DRM system such as the one Lala patented (which is now owned by Apple).*

As it stands, attempts at reviving DRM seem to coincide with the introduction of new technologies: similar to the (short-lived) hype around mobile music, cloud computing again inspired DRM initiatives, indicating that music industry representatives have not given up on DRM yet. The example of "comes with music" in China in turn demonstrates an almost unlimited willingness to make concessions when facing continued and severe consumer defection.

Private Negotiation of Public Goods: Collateral Damage(s)

Leonhard Dobusch, 2010/05/10

Content hosting services such as Google's YouTube or Facebook are among the most important digital public spaces. Many entirely new forms of creativity have been inspired and flourish due to new and easy ways of sharing (more or less slightly) modified content on the net. What is more, popular examples of such user-generated remixes or mash-ups rarely stay isolated but lead to video responses – often based on another round of remixing.

The precondition to this ecology of user creativity is not only the technological platform but also an enabling legal framework: while many instances of remix culture, at least in the US, fall under the fair-use exemption of copyright, this cannot easily be recognised and thus bears risks of costly litigation. As a result, platform operators such as Google are tempted to pursue policies best described as "delete if in doubt" whether a particular work infringes copyrights.

But why should copyright holders persecute such "infringements" by ordinary users – often fans and dear customers – who engage in creative work without commercial interests? The reason is commercial revenues generated by platform operators, mostly via advertising. Copyright holders of works (re-)used in user-generated content distributed on these platforms demand their share of those revenues and use their copyrights as collateral in the respective negotiations.

Strategic copyright enforcement by rights holders at the expense of non-commercial creators is not an empty threat. Quite the contrary, what we observe are continuous (re-)negotiations with recurrent instances of mass-infringement claims, leading to the deletion of hundreds of thousands of user-generated videos – collateral damage.

In a recent study in the realm of the EU-funded COUNTER project, Domen Bajde has conducted an impressive virtual ethnography on how one such strategic copyright enforcement by the Warner Music Group (WMG) had incited something he calls a "web storm" – massive user protests against the deletion of their works. On his blog Bajde presents a condensed version of the story, which started with a private agreement between WMG and YouTube:

> *Warner Music Group (WMG) was the first company to strike a revenue sharing deal with Youtube. The deal (put simply) included WMG getting a share of Youtube advertising revenue in return for allowing the copyrighted content to be published on Youtube either in the form of "original" WMG content (music videos, etc.) or in the form of user generated videos using WMG content (for example a video of your mom*

snoring with Madonna's "Bedtime story" playing background)[165].

In a way, this private deal between two corporations led to the generation of a public good. This seemingly win-win situation turned lose-lose two years later when a renegotiation of the terms of the agreement between the same two companies failed:

> *Users' videos containing WMG stuff either got muted or pulled down. You could imagine the users were not too happy with that. A host of user rants and comments ensued, some quite feisty!*

As both contributors to and beneficiaries of the public good that is a user-generated content ecology, these protests may lead to another form of collateral damage – in this case for the corporate brand of Warner.

But WMG, which settled the case with Google for the time being in 2009, is not the only rights holder in constant conflict with Google/YouTube over adequate compensation for usage of contents. This week, to give only the most recent example, the German copyright collective GEMA publicly announced it would abandon negotiations with YouTube after over one year of fruitless haggling.

As a final remark with regard to governance across borders, let me highlight another interesting development in the latter case: the negotiation struggles with the transnational YouTube platform motivated GEMA to team up with 8 other national collecting societies listed in the press release: AKM (Austria), ASCAP, BMI and SESAC (all from the US), SABAM (Belgium), SACEM (France), SIAE (Italy), and SUISA (Switzerland). Thus the common transnational "enemy" YouTube is accomplishing something that the European Union has striven to do unsuccessfully over the past decades: it is leading to more transnational integration of the still very nationally rooted collecting societies.

165 Bajde, Domen (2012): Consumer Researchers Spend… . *bajde.net*. May 21, 2010. **http://bajde.net/2009/10/07/nobodys-tubemonkey-users-stand-up-to-wmg/**

This Post Is Available in Your Country

Leonhard Dobusch, 2010/12/08

Harvard law professor Lawrence Lessig is one of the most highly recognised copyright experts in the world. When giving public presentations, he regularly includes short video clips to make his point. Obviously, these video quotations are covered by the fair-use clause in US copyright. As I reside in Germany, however, YouTube does not allow me to watch the video of one of Lessig's talks embedded below. I stumbled upon the link to the video because a Slovenian colleague, Domen Bajde, recommends it to his students in a course on global business environments. When clicking on the link, YouTube simply tells me that

> *Dieses Video enthält Content von UMG. Es ist in deinem Land nicht verfügbar. (Translation: "This video contains content from UMG. It is not available in your country.")*

Previously, I have described how such problems arise as a consequence of (re-)negotiations between platform providers such as Google (the owner of YouTube) and rights holders, which demand a share from the platform's ad revenues and hold hostage content created and shared by users (see p. 141 *"Private Negotiation of Public Goods"* in this volume). The funny thing is how this is erecting new and increasingly ridic-

Painting by the Hungarian Artist Paul Mutant

Source: Paul Mutant (2010): This Painting Is Not Available in Your Country. Flickr. BY-NC-ND 2.0 USA. http://www.flickr.com/photos/paulmutant/4992725876/in/photostream

ulous barriers in the seemingly global online world, barriers that are still bound to national borders. As an Austrian living in Germany, for example, I can only watch every second video shared by my Austrian friends via Facebook. Obviously, I am not the only one annoyed by this phenomenon. Paul Mutant, a Hungarian artist currently living in Brighton, U.K., converted his frustration into the superb painting featured above (see p. 143).

Online video-sharing platforms are not the only cases of increasingly absurd inconveniences due to artificial and mostly incomprehensible borders erected in the realm of transnational business. DVD region codes are another example: while pirated or downloaded copies of a movie will work anywhere, legally purchased DVDs only work on players with a corresponding region code. The arbitrariness of this system was evidenced by the creators of the region code system themselves when they reduced the number of different regions to only three for the DVD-successor Blue-Ray Disc.

Taken as a whole, YouTube's selective blocking of videos in certain areas, and region codes for video discs demonstrate at least two things: first, both show the power of technological measures in regulating access to digital goods, which may effectively overrule rights granted to individuals by law. Second, both are examples of the continued or retroactively reinstated importance of national borders in the realm of seemingly global flows of communication and services. Google and others are still governing across – and not beyond – borders, after all.

Viral Web Videos and Blocked Talent

Leonhard Dobusch, 2010/12/16

At the end of the year, Time Magazine traditionally publishes "The Top 10 of Everything" online. Many of those lists contain videos and some lists, such as "Viral Videos"[166], "Talented Web Videos"[167] or "Songs"[168], exclusively comprise web videos.

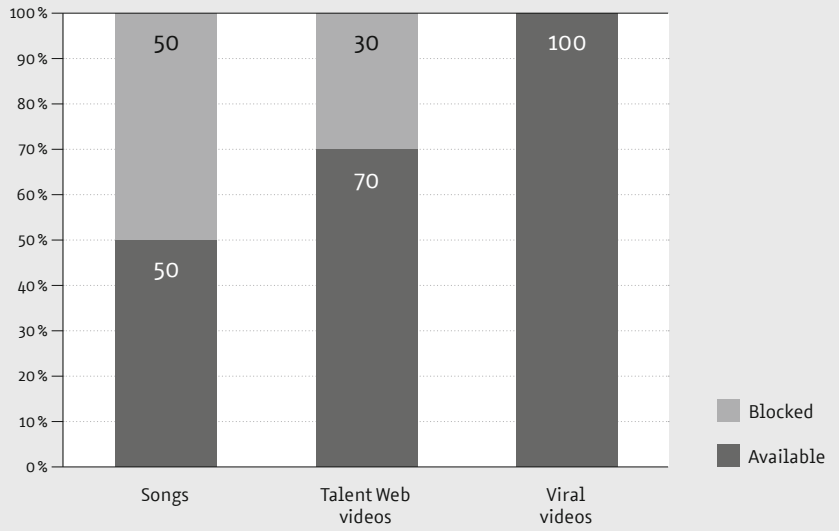
As discussed in an earlier contribution (see p.143 *"This Post Is Available in Your Country"* in this volume), many user-created videos that remix existing works are not available in certain areas of the world due to the intervention of large rights holders such as SonyMusic or Warner Music Group. Looking at the three top 10 lists mentioned above, I have put together the following graph showing how many of these videos were blocked in Germany:

166 Friedman, Megan (2010): Double Rainbow. *time.com*. December 9, 2010. **http://www.time.com/time/specials/packages/article/0,28804,2035319_2033729,00.html**

167 Duff, Craig (2010): Happy Together/Paper Planes Lip Dub. *time.com*. December 9, 2010. **http://www.time.com/time/specials/packages/article/0,28804,2035319_2035128,00.html**

168 Suddath, Claire (2010): Cee Lo Green, "F___ You". *time.com*. December 9, 2010. **http://www.time.com/time/specials/packages/article/0,28804,2035319_2034688,00.html**

Proportion of Blocked and Available Videos Listed in Time's Top 10 Lists of 2010



Source: Author's composition based on Time's Top 10 Everything of 2010. http://www.time.com/time/specials/packages/article/0,28804,2035319_2033729,00.html

An interesting detail: the 3 blocked videos in the category "Talented Web Videos" are ranked 1, 3 and 4 in Time's Top 10 list. In other words: the most creative videos – at least according to Time Magazine – are blocked. In its description of the category, Time wrote the following:

> *As this year's list of the top viral videos clearly shows, not all that goes viral is great. The flipside is also sadly true: not all great videos go viral.*

One of the reasons for the latter might be the lack of availability. The music industry's blocking policies seem to be a major obstacle preventing creative web videos from going viral. The possibility that blocking might even be self-damaging for the rights holders was argued by Google's senior copyright counsel Fred von Lohmann in a talk he gave earlier this week in Berlin, where he presented the example of "JK's wedding entrance dance" video (of course, not available in Germany via YouTube, either, but only at myvideo.de). With over 60 million viewers, the unorthodox wedding ceremony is one of the most watched web videos of all time. The funny thing is that the song "Forever" by Chris Brown, which is featured in the video, got a "second commercial life" after the video had gone viral, making it a greater – also: commercial – success than before.

Taking this into account, blocking 5 out of 10 songs listed by Time in the respective category does not seem to be either reasonable or in the interest of the artists. What

is more, I much doubt that Time would have even included songs in its top 10 list, of which no web video was available in the US.

PS: Although blocked at YouTube, I found an accessible version of Lip Dub, Time's no. 1 "Talented Web Video" at Dailymotion.com[169].

169 Eleves de troisième année [promotion 2010] de l'Ecole d'Arts Graphiques Axe Sud de Toulouse (2010): Lip Dub. *dailymotion.com*. January 17, 2010. **http://www.dailymotion.com/video/xbw2iq_lip-dub-axe-sud-toulouse-2010_music**

Angry Librarians: The Ebook User's Bill of Rights

Leonhard Dobusch, 2011/03/09

Sarah Houghton-Jan is the Assistant Director of San Rafael Public Library. She runs a blog entitled Librarian in Black. And Sarah Houghton-Jan is angry:

I care about digital content in libraries. And I am about to lose my cool in a big way. No more patience, no more waiting for advocacy groups to do their work, and certainly no more trusting vendors to negotiate good deals for us with the publishers. I am angry, I am informed, and I am ready to fight[170].

170 Houghton-Jan, Sarah (2011): Library Ebook Revolution, Begin. *librarianinblack.net*. February 25, 2011. **http://librarianinblack.net/librarianinblack/2011/02/library-ebook-revolution-begin.html**

Logo of the Librarians against DRM Campaign

Source: https://readersbillofrights.info/, CC-BY-SA

The reason for Houghton-Jan's anger is that the US publishing house HarperCollins has introduced a limit of 26 lifetime uses per copy. To be clear: per *ebook* copy. Such an attempt at using private licensing agreements, together with Digital Rights Management (DRM) technologies, to control usage is not new in the realm of electronic books (see p. 133 *"The Kindle Controversy"* in this volume). But the boldness of HarperCollins terms of use is new. What Pamela Samuelson fears in the context of Google Books, namely that this could be treated as a "precedent" by publishers for charging libraries per-page copying fees more generally (see p. 329 *"Pamela Samuelson on the Future of Books in Cyberspace"* in this volume), seems to be becoming reality now, anyway.

Sarah Houghton-Jan, however, chose not only to complain but to channel her anger into an impressively productive form of protest, which recently spread all over the web: The ebook User's Bill of Rights[171]. The main points read as follows:

171 Houghton-Jan, Sarah (2011): The Ebook User's Bill of Rights. *librarianinblack.net*. February 28, 2011. **http://librarianinblack.net/librarianinblack/2011/02/ebookrights.html**

Every ebook user should have the following rights:

- the right to use ebooks under guidelines that favour access over proprietary limitations
- the right to access ebooks on any technological platform, including the hardware and software the user chooses
- the right to annotate, quote passages, print, and share ebook content within the spirit of fair use and copyright
- the right of the first-sale doctrine extended to digital content, allowing the ebook owner the right to retain, archive, share, and re-sell purchased ebooks

By posting these points online, I have also followed the imperative given in the last paragraph of "The ebook User's Bill of Rights":

> *These rights are yours. Now it is your turn to take a stand. To help spread the word, copy this entire post, add your own comments, remix it, and distribute it to others. Blog it, Tweet it (#ebookrights), Facebook it, email it, and post it on a telephone pole.*

Rejection of the Google Book Settlement: The Transnational Dimension

Leonhard Dobusch, 2011/03/25

The first large-scale private attempt to resolve the problem of orphan works and simultaneously create new revenue models on the market for books has failed. This week, Circuit Judge Denny Chin rejected the Google Book Settlement in a 48-page ruling[172]. Whether approval of the so-called "Google Book Settlement" would have been to the good or the bad was highly controversial (see "Pamela Samuelson on the Future of Books in Cyberspace" in this volume) and the related discussions have not been futile. The whole Google Books controversy highlights the opportunities and dangers of all-embracing and essentially private regulatory frameworks for access to books in the digital age.

Many blogs specialising in IP issues have immediately started to discuss the short- and long-term consequences of this decision, so that for an general overview I simply recommend some of these postings:

- The 1709 Blog: Google Books Settlement hits brick wall[173]
- Scrivener's Error: The Settlement Is Dead; Long Live the Settlement Negotiations[174]!
- Balkinisation: Google Books Settlement: Copyright, Congress, and Information Monopolies[175]
- Copyright Litigation Blog: Google Books Settlement Rejected, A Waste for the Blind[176]
- James Grimmelmann: Inside Judge Chin's Opinion[177]

Grimmelmann is the only one of these commentators who also briefly mentions the international dimension of the ruling. He summarises as follows:

172 Decision of Judge Chin in Author's Guild versus Google. March 22, 2011. **http://docs.justia.com/cases/federal/districtcourts/newyork/nysdce/1:2005cv08136/273913/971/0.pdf**

173 "Hugo" (2011): Google Book Settlement Hits Brick Wall. *The1709blog*. March 24, 2011. **http://the1709blog.blogspot.de/2011/03/googlebook-settlement-hits-brick-wall.html**

174 Petit, C.E. (2011): GBS Update: The Settlement Is Dead; Long Live the Settlement Negotiations! *scrivenerserror.blogspot.de*. March 23, 2011. **http://scrivenerserror.blogspot.de/2011/03/b323a.html**

175 Ammori, Marvin (2011): Google Books Settlement: Copyright, Congress, and Information Monopolies. *balkin.blogspot.de*. March 23, 2011. **http://balkin.blogspot.de/2011/03/googlebooks-settlement-copyright.html**

176 Dowd, Ray (2011): Google Books Settlement Rejected, A Waste for the Blind. *copyrightlitigation.blogspot.de*. March 23, 2011. **http://copyrightlitigation.blogspot.de/2011/03/sdny-googlebooks-settlement-rejected.html**

177 Grimmelmann, James (2011): Inside Judge Chin's Opinion. *laboratorium.net*. March 22, 2011. **http://laboratorium.net/archive/2011/03/22/inside_judge_chins_opinion#comments**

> *The most specific point about how their interests differ from those of domestic copyright owners is a point made by various international publishers, that they will face a more difficult problem searching United States copyright records, due to historical twists in our law on when registration was required.*

Then Grimmelmann points to the following passage in the settlement (p. 43), which leads him to ask whether "the fact that foreign rights holders objected, just by itself, cuts against the settlement?":

> *In any event, I need not decide whether the ASA would violate international law. In light of all the circumstances, it is significant that foreign authors, publishers, and, indeed, nations would raise the issue.*

Judge Chin seems to add particular authority to statements by collecting societies, explicitly mentioning the German VG Wort and then listing several other countries (p. 41–42):

> *VG Wort, a German "collecting society" representing authors and publishers of literary works and the fiduciary owner of some 380,000 German authors and 9000 German publishers, notes that many foreign copyright owners remain members of the class because they registered their works with the U.S. Copyright Office. ... Indeed, France and Germany, as well as many authors and publishers from countries such as Austria, Belgium, India, Israel, Italy, Japan, New Zealand, Spain, Sweden, Switzerland, and the United Kingdom continue to object to the ASA, even with the revisions.*

Chin also mentions concerns that the Google Books Settlement could "violate international law, including the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights". In my view, this is remarkable since it demonstrates the direct and unfiltered influence of international treaties on the formulation of national rulings. And while not finally deciding with respect to the transnational dimension of the settlement, Chin obviously felt the need to reject Google's argument that the settlement was about the United States copyright interests only:

> *Google responds that "this case is about United States copyright interests. It's about uses of works in the United States." (Hr'g Tr. 157–58 [Daralyn J. Durie]). This argument, however, ignores the impact the ASA would have on foreign rightsholders.*

In a networked information society, copyright issues are inherently issues of transnational governance. And even when attempting national solutions, this transnational dimension cannot simply be ignored.

[Update]

My favourite Google Books expert, Pamela Samuelson, has given her analysis of the rejection of the Google Book Settlement in an interview in the Chronicle for Higher Education[178]. While recommending my readers to read the whole interview, let me quote only one paragraph referring to the transnational dimension and conflicting interests among stakeholders:

> *The thing that surprised me about the opinion was that he took seriously the issues about whether the Authors Guild and some of its members had adequately represented the interests of all authors, including academic authors and foreign authors. That was very gratifying because I spent a lot of time crafting letters to the judge saying that academic authors did have different interests. Academic authors, on average, would prefer open access. Whereas the guild and its members, understandably, want to do profit maximisation.*

178 Parry, Marc (2011): A Copyright Expert Who Spoke Up for Academic Authors Offers Insights on the Google Books Ruling. *The Chronicle for Higher Education*. March 23, 2011. **http://chronicle.com/article/A-Copyright-Expert-Who-Spoke/126877/**

Crazy Copyright Cartoon: The YouTube Copyright School

Leonhard Dobusch, 2011/04/16

Right on time before I flew to a research workshop on "Consuming the Illegal", Google/YouTube published *the* copyright cartoon perfectly illustrating what the workshop was about: the YouTube copyright school[179].

The copyright abolitionists over at "Against Monopoly" feature a series entitled "IP as a joke"[180]. But this video, funny as it may seem, is to be taken entirely seriously. The background to this crazy/disturbing/awkward "Copyright School" is a change in YouTube's copyright infringement policies. As described by fellow workshop participant Domen Bajde (see p. 141 *"Private Negotiation of Public Goods"* in this volume), users who posted three videos containing (seemingly) infringing content to YouTube have not only lost those videos but all of their videos: their account has been deleted.

179 YouTube (2011): YouTube Copyright School. *youtube.com*. March 24, 2011. **http://www.youtube.com/watch?v=InzDjH1-9Ns**

180 Kinsella, Stephan (2011): IP Is Not a Joke. *againstmonopoly.com*. February 7, 2011. **http://www.againstmonopoly.com/index.php?perm=593056000000002535**

But since it is often difficult, even for copyright lawyers, to distinguish between infringing and non-infringing (fair) use[181], a lot of creative users remixing existing works were in constant danger of losing all their uploaded videos due to suddenly becoming a "multiple infringer". This week, Google has softened this policy a little. "Infringers" are now first sentenced to "copyright school". On the official YouTube-blog[182] this reads as follows:

> *If we receive a copyright notification for one of your videos, you'll now be required to attend "YouTube Copyright School," which involves watching a copyright tutorial and passing a quiz to show that you've paid attention and understood the content before uploading more content to YouTube.*

The reason for this move is given below:

> *YouTube has always had a policy to suspend users who have received three uncontested copyright notifications. This policy serves as a strong deterrent to copyright offenders. However, we've found that in some cases, a one-size-fits-all suspension rule doesn't always lead to the right result. Consider, for example, a long-time YouTube user who received two copyright notifications four years ago but who's uploaded thousands of legitimate videos since then without a further copyright notification. Until now, the four-year-old notifications would have stayed with the user forever despite a solid track record of good behaviour, creating the risk that one new notification – possibly even a fraudulent notification – would result in the suspension of the account. We don't think that's reasonable. So, today we'll begin removing copyright strikes from user's accounts in certain limited circumstances, contingent upon the successful completion of YouTube Copyright School, as well as a solid demonstrated record of good behaviour over time. Expiration of strikes is not guaranteed, and as always, YouTube may terminate an account at any time for violating our Terms of Service.*

While changing YouTube's policy towards "multiple infringers" was already way overdue, I see several problems with the educational "Copyright School" approach. First, like the previous three-strikes-rule, this is not backed by any copyright law. It is another attempt at establishing a private standard for governing user-generated content. Second, it does not account for national differences in terms of Fair Use or other types of copyright limitations. Third, the video explicitly discourages the uploading of mash-ups and remixes of existing works by emphasising that those "may also re-

181 See Dobusch, Leonhard, Quack, Sigrid (2011): Transnational Copyright: Misalignments between Regulation, Business Models and User Practice. Paper presented at the ESF Exploratory Workshop "Consuming the Illegal: Situating Digital Piracy in Everyday Experience" in Leuven, Belgium. April 17–19, 2011. **http://www.dobusch.net/pub/uni/Dobusch-Quack(2011)Leuven-Paper.pdf**

182 Green, Justin (2011): YouTube Copyright Education (Remixed). *youtube-global.blogspot.com*. April 14, 2011. **http://youtube-global.blogspot.de/2011/04/youtube-copyright-education-remixed.html**

quire permission from the original copyright owner"; of course, the latter is true, but the "Copyright School" does not help in drawing the line between legitimate and infringing re-use of content.

To a certain degree, Google's copyright school suffers from trying to explain an unreasonable regulation in a reasonable way. Maybe the format and style of the video is Google's way of expressing that.

Is Everyone on the Net a Copyright Infringer?

Leonhard Dobusch, 2011/06/01

Markus Beckedahl, blogger, digital rights activist and one of the representatives of Creative Commons Germany, inspired a raging controversy within the German blogosphere with the following simple statement:

> *Anyone who actively uses the Internet and shows media literacy, constantly infringes copyright. (German original: "Jeder, der das Internet aktiv nutzt und Medienkompetenz zeigt, begeht die ganze Zeit Urheberrechtsverletzungen.")*

David Ziegelmayer, a lawyer at CMS Hasche Sigle, immediately cast doubt on whether Beckedahl was serious and admits to being swept off his feet by the statement. He claims that on the contrary, uneducated users are responsible for copyright infringements such as unauthorised copying of pictures and texts, not the media literate ones.

Simon Assion, law blogger at Telemedicus, however supports Beckedahl's claim and gives the following five examples[183]:

1. *Commented links in blogs:* the media literate blogger copies passages of texts, includes the links and a short comment. Such behaviour is not covered by the citation exemption of copyright due to the unequal ratio between cited text and comment.
2. *Embedding videos in blogs*, since this would often require a license.
3. *Using ID pictures:* the rights for publishing ID pictures online are not normally acquired from the photographer.
4. *Unclear terms in open content licenses* such as, for example, the Creative Commons NonCommercial clause.
5. *Using cloud services*, which are not necessarily covered by extant copyright exemptions, at least in Europe.

183 Assion, Simon (2011): Jeder, der das Internet aktiv nutzt, begeht Urheberrechtsverletzungen. *Telemedicus*. June 1, 2011. **http://www.telemedicus.info/pages/simon-assion.html**

In the end, Möller speculates that the reason for the outrage is that most legal professionals and academics recommend improving media literacy as a response to problems with copyright in the online realm. And it is indeed provocative to argue that increasing media literacy would not lead to a reduction but might even increase copyright infringements by regular Internet users.

Two things seem particularly remarkable about this debate: first, even if some of Möller's examples are wrong, they nevertheless evidence a great deal of legal uncertainty, not only among laymen but also among lawyers and even copyright experts. Second, all of the examples are developed with respect to German copyright law and do not account for the transnational dimension inherent in most – if not all – online activities.

In a way, the argument is similar to the one Sigrid Quack and I put forward in a recent contribution to an ESF Exploratory Workshop on "Consuming the Illegal", in which we argued that even copyright experts have difficulties in drawing the line between the legal and illegal due to regime complexities and the transnational dimension inherent in everyday online usage practices[184].

184 Dobusch, Leonhard, Quack, Sigrid (2011): Transnational Copyright: Misalignments between Regulation, Business Models and User Practice. Paper presented at the ESF Exploratory Workshop "Consuming the Illegal: Situating Digital Piracy in Everyday Experience" in Leuven, Belgium. April 17–19, 2011. **http://www.dobusch.net/pub/uni/Dobusch-Quack(2011)Leuven-Paper.pdf**

Cracks in the Content Coalition: Corporations versus Copyright Collectives

Leonhard Dobusch, 2011/06/16

In April this year, broadcasters, collecting societies, and representatives of the music and film industry in Germany publicly announced the foundation of the "Deutsche Content Allianz" ("German Content Alliance") at a press conference in Berlin:

Representatives of the Deutsche Content Allianz

Source: Krempl, Stefan, Kuri, Jürgen (2011): Deutsche Content Allianz will Netzbetreiber in die Pflicht nehmen. heise.de. April 13, 2011. http://www.heise.de/newsticker/meldung/Deutsche-Content-Allianz-will-Netzbetreiber-in-die-Pflicht-nehmen-1227459.html

Harald Heker, CEO of the leading German collecting society GEMA, even praised the initiative as an "important closing of ranks" among rights holders[185].

Only two months later, this coalition is exhibiting some severe cracks. And the reason for these cracks is the extensive blocking of YouTube vide-

185 Krempl, Stefan, Kuri, Jürgen (2011): Deutsche Content Allianz will Netzbetreiber in die Pflicht nehmen. *heise.de*. April 13, 2011. **http://www.heise.de/newsticker/meldung/Deutsche-Content-Allianz-will-Netzbetreiber-in-die-Pflicht-nehmen-1227459.html**

os demanded by GEMA – something we have discussed repeatedly on this blog (see p. 144 *"Viral Web Videos and Blocked Talent"* in this volume). Originally, blocked videos only delivered a page stating that the video was not available "in your country" and referring to the rights holder – the latter usually being one of the leading media corporations such as Universal, Warner or Sony.

Spiegel Online now reports[186], however, that in Germany YouTube has amended this sentence with an important subordinate clause, stating that responsibility for the blocking actually lies with the GEMA and not the copyright holder (see screenshot above). This seemingly minor change points to substantial conflict among members of the self-proclaimed content alliance. Spiegel Online quotes Edgar Berger, CEO of Sony Music Germany, criticising the fact that members of the GEMA executive board *"seemingly have not arrived in the digital era yet"*. And Frank Briegmann, CEO of Universal Music Germany, is quoted as bemoaning that

> *one needs to ask the question why collecting societies and YouTube can manage to find agreement on many music markets but not in Germany, the most important market in Europe.*

The latter statement emphasizes the transnational dimension of the problem. Google, the owner of YouTube, is a true global player, whereas copyright collectives are nationally dispersed monopolies; a situation that allows Google to divide and conquer by making agreements with cooperative collecting societies, thereby putting pressure on not-yet-cooperative ones. Consequently, Sony Music CEO Berger also points to agreements between Google and copyright collectives in France and Italy.

Other reasons for substantial bargaining power on the side of Google/YouTube are that blocked videos deliver no revenues at all and make it more difficult to share videos in social networks such as Facebook; the latter is a problem for music labels, since a YouTube video going viral regularly increases record and download sales.

Taken as a whole and at least in this particular conflict, time is on Google's side. Tertius gaudens.

YouTube Screenshot of Blocked Video

Source: YouTube (youtube.com). Wikimedia Commons. http://commons.wikimedia.org/wiki/File:YouTube_blocked_UMG_Germany_GEMA_de.png

186 Reißmann, Ole, Lischka, Konrad (2011): Plattenbosse rebellieren gegen YouTube-Blockade. *Der Spiegel Online*. June 16, 2011. **http://www.spiegel.de/netzwelt/netzpolitik/streit-mit-der-gema-lattenbosse-rebellieren-gegen-youtube-blockade-a-768816.html**

The Dark Side of Copyright's Force: LucasArts versus YouTube versus Greenpeace versus VW

Leonhard Dobusch, 2011/07/01

In their book *Information Feudalism*[187], Peter Drahos and John Braithwaite argue that the "danger of intellectual property lies in the threat to liberty" (p. 3). Jamie Boyle, in his open access book *The Public Domain*[188], also warns against the potential of strong copyrights to interfere with some of the most basic human rights such as free speech. Only rarely, however, do these dangers become as clearly visible as in the current controversy concerning a Greenpeace campaign video.

It all started with a very successful Superbowl commercial by VW[189] featuring a child as Darth Vader, which has been enormously successful on YouTube with over 40 million viewers so far.

Inspired by this commercial, Greenpeace created a parody featuring several kids playing other famous Star Wars characters and attacking VW for its CO^2 policies on the campaign website www.vwdarkside.com. When I wanted to see the video embedded in the site today, I only encountered a message delivered by YouTube that the video was not available due to copyright infringement.

Meanwhile, Greenpeace has uploaded the video to another video-sharing platform (Vimeo), where it at least for now was blocked soon afterwards.

But this is not the end of the story. Not only has the VW parody been blocked at YouTube; the official Greenpeace account and all its videos are now offline. YouTube only delivers the following notice:

"YouTube account GreenpeaceVideo has been terminated because we have received multiple third-party notifications of copyright infringements from claimants including:

- Lucasfilm Ltd
- Lucasfilm Ltd
- Lucasfilm Ltd"

187 Drahos, Peter, Braithwaite, John (2002): *Information Feudalism*. London: Earthscan.

188 Boyle, James (2008): *The Public Domain. Enclosing the Commons of the Mind*. New Heaven: Yale University Press. **http://thepublicdomain.org/thepublicdomain1.pdf**

189 Volkswagen (2011): The Force: Volkswagen Commercial. *youtube.com*. February 2, 2011. **http://www.youtube.com/watch?v=R55e-uHQna0**

Screenshot of the (Temporary) Termination of Greenpeace's YouTube Account

Source: YouTube (youtube.com)

For a social movement organisation such as Greenpeace, having *all* its videos blocked on *the* major online video-sharing platform seems to be a big deal – and again, this questions the three-strikes-rule practiced by YouTube (see p. 143 *"This Post Is Available in Your Country"* in this volume).

Even more so, when the transnational dimension of this case is taken into account. The Greenpeace parody may very well be covered by copyright exemptions in several jurisdictions, but for reasons of simplicity and to reduce legal risks, YouTube generally blocks videos across the board. *In dubio contra libertas.*

'Copyright Alerts' against 'Content Theft': Three Strikes through the Backdoor?

Leonhard Dobusch, 2011/07/08

Yesterday, as reported by the 1709 Blog[190], the Recording Industry Association of America (RIAA) announced that *"Music, Movie, TV and Broadband Leaders Team to Curb Online Content Theft"*[191]. The press release not only evidences rather obtrusively the change in wording from "piracy" to "content theft", but also advertises two remarkable initiatives: the introduction of a common framework for so-called *"Copyright Alerts"* and the foundation of a "Center for Copyright Information". Taken as a whole, these initiatives constitute the most comprehensive attempt at private regulation in the field of copyright since the (failed) attempt to establish all-encompassing Digital Rights Management (DRM) systems at the end of the 1990s and the early 2000s (see p. 139 *"DRM in the Music Industry"* in this volume).

190 Chalis, Ben (2011): US Content Industry and ISPs to Inform and Alert. *The 1709 Blog*. July 8, 2011. **http://the1709blog.blogspot.de/2011/07/us-content-industry-and-isps-to-inform.html**

191 Hainen, Kristen (2011): Music, Movie, TV and Broadband Leaders Team to Curb Online Content Theft. *Recording Industry Association of America*. July 7, 2011. **http://riaa.com/newsitem. php?content_selector=newsandviews&news_month_filter=7&news_year_filter=2011&id=2DDC3887-A4D5-8D41-649D-6E4F7C5225A5**

Source: Author's screenshot of http://www.copyrightinformation.org/

According to the RIAA, the "Copyright Alerts System" will address (alleged) online copyright infringement

> *with a series of early alerts – up to six – in electronic form, notifying the subscriber that his or her account may have been misused for online content theft of film, TV shows or music. It will also put in place a system of "mitigation measures" intended to stop online content theft on those accounts that appear persistently to fail to respond to repeated Copyright Alerts (see Hainen 2011).*

Such alerts are not completely new. Even today, the RIAA states, many Internet Service Providers (ISPs) forward to subscribers notifications that they receive from content owners about alleged content theft. What is new, however, are the proposed consequences. The press release remains silent about details of these measures and only assures us that *"[t]ermination of a subscriber's account is not part of this agreement"*.

What is, indeed, part of the agreement can be read at the Center for Copyright Information's FAQ-page, which provides the following list of potential "mitigation matters":

> *Failure to respond to these alerts will lead to additional steps designed to ensure that the account comes into compliance. These steps, referred to as "Mitigation Measures," might include, for example: temporary reductions of Internet speeds, redirection to a landing page until the subscriber contacts the ISP to discuss the matter or reviews and responds to some educational information about copyright, or other measures that the ISP may deem necessary to help resolve the matter*[192].

192 Center for Copyright Information (2012): Frequently Asked Questions. **http://www.copyrightinformation.org/faq**

In the light of this catalogue of enforcement measures, it sounds quite odd when the RIAA argues in its press release that *"[t]here are no new laws or regulations established as a part of this voluntary agreement"* (see Hainen 2011). What, if not private regulatory measures, is the very essence of this agreement? Furthermore, the agreement between ISPs and the content industry may be voluntary, but it is definitely not voluntary from the perspective of the affected Internet user.

In its proposed form, the 'Copyright Alerts System' is as close as one might get to a private version of the much-debated "Three Strikes/Graduated Response" laws. The proponents of this system seem to be very well aware of that and try to preemptively defy any such accusation, for example in point 14 of the FAQ-page quoted above:

> *Contrary to some press reports, this program is unlike so-called "three strikes" as it creates no new laws or formal legal procedures, nor does this system require account suspension or termination. Rather, it is a voluntary cooperative effort among ISPs and leading U.S. content providers. Neither the copyright owners nor the ISPs will take any new actions that are not already authorised under existing law.*

Of course, this agreement does not create new laws in a narrow legal sense because this is the privilege of democratically elected legislatures. For Internet users, however, this agreement could manifest in law-like consequences. If most ISPs abide by the Copyright Alerts System, users will have little choice but to abide, as well. That is why even private regulation, which is often referred to as "soft law"[193], potentially bears hard consequences when given widespread adoption and enforcement.

What we are observing in the US right now – and one need not be a prophet to predict that Europe will follow suit – is the introduction of an Internet traffic surveillance and copyright enforcement infrastructure through the backdoor of private regulation. For civil society organisations, which have been quite successful in many European countries such as Germany in mobilising against the introduction of such an infrastructure by national legislatures, these private regulatory initiatives constitute a difficult new challenge.

193 Abbott, Kenneth W., Snidal, Duncan (2000): Hard and Soft Law in International Governance. In: *International Organisation*, 54: 421–456. **http://web.efzg.hr/dok/pra/hhorak/Hard and soft law in international governance.pdf**

New Layer of Copyright Enforcement: Search

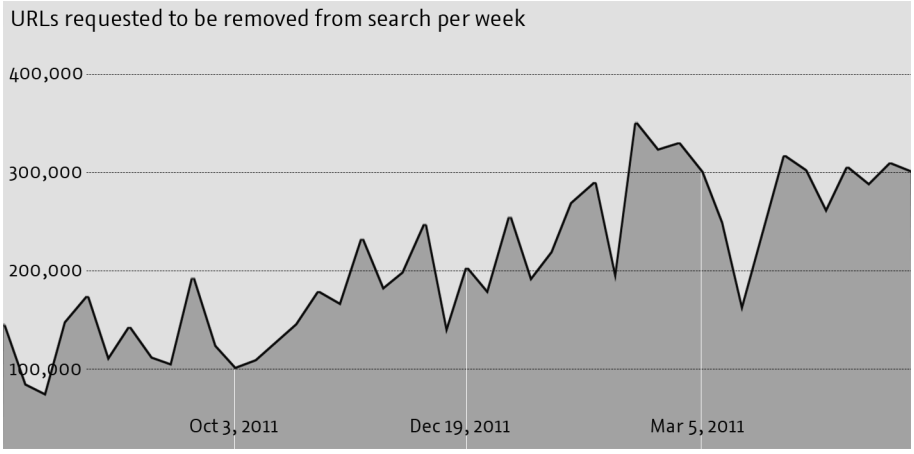
Leonhard Dobusch, 2012/05/28

Recently Google announced[194] an extension to its "Transparency Report"[195], which now also includes a section on requests to remove search results that link to material that allegedly infringes copyrights. Last month, Google processed 1,294,762 copyright removal requests by 1,109 reporting organisations, representing 1,325 copyright owners. The figure below illustrates how the number of requests increased between July 2011 and mid May 2012.

194 von Lohmann, Fred (2012): Transparency for Copyright Removals in Search. *Google Official Blog*. May 24, 2012. **http://googleblog.blogspot.de/2012/05/transparency-for-copyright-removals-in.html#!/2012/05/transparency-for-copyright-removals-in.html**

195 Google (2012): Transparency Report. **http://www.google.com/transparencyreport/**

Removal Requests due to Alleged Copyright Infringement July 2011 to mid May 2012



Sources: Author's presentation based on Google data. http://www.google.com/transparencyreport/removals/copyright/

The growing number of removal requests points to the relevance of search technology as a means for copyright enforcement. Since what is not found by Google appears to be non-existent for many Internet users, removing search results from Google's results lists is obviously a powerful tool for private copyright enforcement. However, several downsides are connected with such private copyright enforcement practices:

1.) While Google frames its removal reports as a matter of transparency, little is revealed on how exactly removal decisions are made. At the same time, the "Trans-

parency Report" allows Google to counter allegations by content owners that it is deliberately soft on copyright infringers. In Germany, for example, Thomas Ebeling, CEO of the German media conglomerate Pro7Sat.1 Media, has recently criticised Google for profiting from copyright infringement and was supported by Axel Springer lobbyist Christoph Keese. The latter criticised Google for linking to copyright infringing websites in its search results, while removing links to child pornograph[196].

2.) The sheer number of removal requests implies using at least some technological/algorithmic approach. Similar to removals of (seemingly) infringing YouTube videos (see p. 150 *"The YouTube Copyright School"* in this volume), this automatisation regularly leads to removal in case of doubt. Andre Meister, blogger at netzpolitik.org, refers to the Google FAQ as listing several "examples of requests that have been submitted through our copyright removals process, which were clearly invalid copyright removal requests"[197].

3.) The legal basis for copyright removals is the US "Digital Millennium Copyright Act" (DMCA), whose protection level is enforced by Google not only in the US but all around the world. Responding to Meister's netzpolitik.org-report[198], Google justified this globalisation of US enforcement levels with similar clauses in other jurisdictions:

While Google uses DMCA takedown procedures, this keeps us in compliance with local copyright law in many countries globally. For example, in Europe, intermediary liability is governed by the e-commerce directive, which, similar to the DMCA, provides freedom from liability for intermediaries who act expeditiously to remove infringing content once notified by a right owner.

4.) Investments in such filtering technologies raise the level of what courts can demand from search engine operators; smaller or new competitors face difficulties in abiding by such increasingly higher enforcement standards, making costly enforcement measures a competitive advantage for large players such as Google. Paradoxically, litigation pressure from rights holders may even strengthen Google's market dominance in the end by reducing the number of firms being able to implement ever more sophisticated enforcement technologies.

196 See, for example, Keese, Christoph (2012): Die Google-Kritik des ProSiebenSat.1-Chefs Thomas Ebeling. *Der Presseschauder*. May 16, 2012. **http://www.presseschauder.de/prosiebensat1-google-thomas-ebelin/**

197 Meister, Andreas (2012): Copyright-Verstöße: Google löscht alle zwei Sekunden ein Suchergebnis. *netzpolitik.org*. May 25, 2012. **http://netzpolitik.org/2012/copyright-verstose-google-loscht-alle-zwei-sekunden-ein-suchergebnis/**

198 Google's comments on Meister, Andreas (2012): Copyright-Verstöße: Google löscht alle zwei Sekunden ein Suchergebnis. *netzpolitik.org*. Untitled. May 25, 2012. **https://netzpolitik.org/2012/copyright-verstose-google-loscht-alle-zwei-sekunden-ein-suchergebnis/#comment-461859**

5.) Given the importance of Google's search index, removal requests may also constitute a risk for free speech online. In their comment on the report, the Electronic Frontier Foundation weighed in on this issue:

> *Although the burden of liability is supposed to lie with the organisation that sends the takedown notice – it is required to claim, under penalty of perjury, to have a good-faith belief in copyright infringement – in practice many groups are willing to skirt those rules, sending takedown notices to silence unfavourable speech*[199]*, and sometimes even without human review*[200]*. The 3% of takedown notices that Google chooses not to comply with is a large absolute number, and each of those is an instance of legitimate speech that would have been shut down otherwise.*

Taken as a whole, all five points underline Lawrence Lessig's insight that "Code is Law"[201]. Algorithms are regulation. Better enforcement algorithms in dominant search engines effectively raise the level of copyright protection without changing the underlying laws. I think it is a safe bet to predict that this technological layer of copyright is going to become more and more important – also as a field for political lobbying in the market arena. Facing growing resistance against further increasing copyright protection legislation, not least by the surging Pirate Party movement, pressuring platform providers such as Google or Facebook to improve technological enforcement measures constitutes a policy alternative for rights holders.

199 Higgins, Parker (2011): Blacklist Bills Ripe for Abuse, Part I: "Market-Based" Systems. *eff.org (Electronic Frontier Foundation)*. December 8, 2011. **https://www.eff.org/deeplinks/2011/12/blacklist-bills-ripe-abuse**

200 MacSherry, Corynne, Stoltz, Mitch (2012): EFF Calls Foul on Robo-Takedowns. *eff.org (Electronic Frontier Foundation)*. March 6, 2012. **https://www.eff.org/press/releases/eff-calls-foul-robo-takedowns**

201 See Lessig, Lawrence (1999): *Code and Other Laws of Cyberspace*. New York: Basic Books.

Algorithm Regulation #1: Felix Stalder on the Front and Back of the Social Web

Leonhard Dobusch, 2012/06/22

In the series "algorithm regulation", we discuss the implications of the growing importance of technological algorithms as a means of regulation in the digital realm.

Google's recent move to advertise its practice of removing search results that link to material that allegedly infringes copyrights (see p. 160 *"New Layer of Copyright Enforcement"* in this volume) demonstrates the importance of a web service's back-end for issues such as free speech or (actual) enforcement levels in certain fields of regulation such as copyright. In his contribution to the *Social Media Reader*[202], Felix Stalder puts this insight into a broader context when reflecting on "the front and the back of the social web"[203]. He criticises the "overly utopian" picture of the new digital possibilities drawn by scholars such as Clay Shirky, author of *Here Comes Everybody*[204], which he attributes to "focusing primarily on the front-end" of web technologies:

> *The social web enables astonishingly effective, yet very lightly organised cooperative efforts on scales previously unimaginable. However, this is only half of the story, which plays out on the front end. We cannot understand it if we do not take the other half into account, which plays out on the back-end. New institutional arrangements make these ad-hoc efforts possible in the first place. There is a shift in the location of the organisational intelligence, away from the individual organisation towards the provider of the infrastructure. It is precisely because so much organisational capacity resides now in the infrastructure that individual projects do not need to (re)produce it and thus appear to be lightly organised. If we take the creation of voluntary communities and the provision of new infrastructures as the twin dimensions of the social web, we can see that the phenomenon as a whole is characterised by two contradictory dynamics. One is decentralised, ad-hoc, cheap, easy-to-use, community-oriented, and transparent. The other is centralised, based on long-term planning, very expensive, difficult-to-run, corporate, and opaque. If the personal blog symbolizes one side, the data-center represents the other.*

202 Mandiberg, Michael (ed.) (2012): *The Social Media Reader*. New York City: NYU Press.

203 Stalder, Felix (2012): Between Democracy and Spectacle. The Front and the Back of the Social Web. *felix.openflows.com*. March 13, 2012. **http://felix.openflows.com/node/223**

204 Shriky, Clay (2008): *Here Comes Everybody*. London: Penguin Press HC.

In a way, this analysis of the social web even holds for the open web showcase Wikipedia. While the content of the multilingual and free online encyclopedia is provided by a transnationally dispersed community of volunteers, the back-end in the form of the Wikimedia Foundation is becoming more and more centralised as the project grows. As a consequence, I could not agree more with Stalder's claim that we have to look at the complex interplay between front- and back-end to fully grasp how the brave new digital world works:

> *All the trappings of conventional organisations with their hierarchies, formal policies, and orientation towards money, which are supposed to be irrelevant on the one side, are dominant on the other. Their interactions are complex, in flux, and hard to detect form the outside.*

Technological algorithms are, of course, only part of the back-end dynamics that deserve more attention. But they tend to incorporate what Stalder describes as "a tension at the core of the social web created by the uneasy (mis)match of the commercial interests that rule the back-end, and community interests advanced through the front-end". In this context, lack of algorithm transparency results from the "structural imbalance between the service providers on the one side, who have strong incentives to carefully craft the infrastructures to serve their ends, and the users on the other side, who will barely notice what is going on, given the opacity of the back-end".

As solution, Stalder suggests "[a] mixture of new legislation and granting public access to back-end data". How this access to back-end data could be implemented and whether this access should include algorithm transparency provisions: those are interesting and as yet unanswered questions.

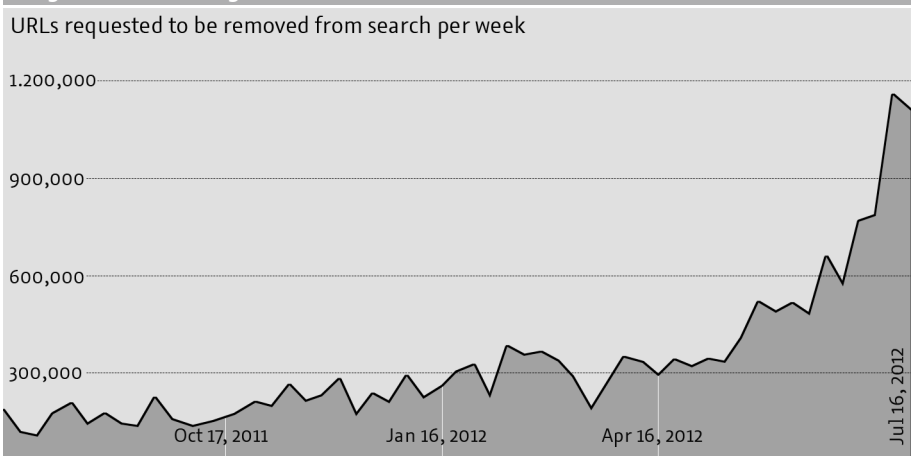
Algorithm Regulation #2: Negotiating Google Search

Leonhard Dobusch, 2012/08/11

Earlier this year, Google revealed[205] that it routinely removes search results that link to material allegedly infringing copyrights, thereby following removal requests made by copyright holders. Since this announcement, the number of removed search results per month has quadrupled (see Figure below).

205 von Lohmann, Fred (2012): Transparency for Copyright Removals in Search. *Google Official Blog*. May 24, 2012. **http://googleblog.blogspot.de/2012/05/transparency-for-copyright-removals-in.html#!/2012/05/transparency-for-copyright-removals-in.html**

Removal Requests due to Alleged Copyright Infringement July 2011 to mid July 2012



Sources: Author's presentation based on Google data. http://www.google.com/transparencyreport/removals/copyright/

Yesterday, Google announced that in addition to removing search results, it is also going to adapt its ranking algorithm[206]:

> *Starting next week, we will begin taking into account a new signal in our rankings: the number of valid copyright removal notices we receive for any given site. Sites with high numbers of removal notices may appear lower in our results.*

206 Singhal, Amit (2012): An Update to Our Research Algorithms. *insidesearch.blogspot.co.uk*. August 10, 2012. **http://insidesearch.blogspot.co.uk/2012/08/an-update-to-our-search-algorithms.html**

As discussed above, the technological layer of regulation is becoming increasingly important for copyright enforcement. But Google's move to tinker with its most precious asset, the search algorithm, also evidences that technological regulation of this kind may result directly from stakeholder negotiations.

This is because with this measure, Google is implementing exactly one of the demands that the content industry approached search engine operators Google, Bing and Yahoo with in a behind-closed-doors meeting in January. The document guiding this meeting was leaked by the Open Rights Group[207]. The list of demands presented in the executive summary reads as follows:

- Assign lower rankings to sites that repeatedly make available unlicensed content in breach of copyright,
- Prioritize websites that obtain certification as a licensed site under a recognised scheme,
- Stop indexing websites that are subject to court orders while establishing suitable procedures to de-index substantially infringing sites,
- Continue to improve the operation of the 'notice and takedown' system and ensure that search engines do not encourage consumers towards illegal sites via suggested searches, related searches and suggested sites,
- Ensure that they do not support illegal sites by advertising them or placing advertising on them, or profit from infringement by selling key words associated with piracy or selling mobile applications which facilitate infringement.

This list indicates that the upcoming change in the search algorithm due to rights holder demands is unlikely to be the last. However, in the blogpost announcing the change in its search algorithm, Google did not mention the negotiated background to this decision.

207 Bradwell, Peter (2012): Revealed: Proposed New Powers over Search Results. *openrightsgroup.org*. January 26, 2012. **http://www.openrightsgroup.org/blog/2012/new-powers-over-search-results-proposed**. Full PDF: **http://www.openrightsgroup.org/assets/files/pdfs/proposals to search engines.pdf**

Open Licensing and Open Business: Transnational Copyright #3

Leonhard Dobusch

Parallel to the growing intensity of private copyright protection described in the previous chapter, other groups of non-state actors have been pursuing a completely oppositional approach using similar means: private regulation via standardisation. Following the successful example of open source software licensing, the NGO Creative Commons developed a set of standardised open content licenses with the goal of reconciling copyright with new Internet usage practices such as file-sharing and remixing.

The impact of such open licensing approaches depends on the rate of license adoption, leading to a fundamental dilemma: a high level of license adoption is the basis for the emergence of related open business models, which would increase the attractiveness of license adoption in turn. Furthermore, license effectiveness also depends on compatibility between different types of licenses.

Lacking financial resources comparable to those of the corporate players in the copyright industries, as several articles in this chapter show, actors wishing to promote open licensing can still experiment with a wide array of mobilisation and collaboration strategies. In effect, at least some of these strategies have been able to partly offset financial shortcomings, leading to the creation of a substantial commons of openly licensed works.

Standardising via Polling? Creative Commons' Study on Its Non-Commercial Clause

Leonhard Dobusch, 2009/09/16

Creative Commons offers a set of license modules such as "Attribution" or "ShareAlike" that can be recombined to different copyright licenses. One such license module is the "non-commercial" module. From the very beginning of Creative Commons, this module has been at the centre of most of the license related debates.

First of all, the non-commercial clause was an attempt to enable both sharing and remixing among users, and commercialisation for creators. Successful examples of hybrid business models such as Jamendo[208] rely on this clause: at Jamendo, musicians receive 50 percent of all revenue generated by commercial use of their works – for example when used in commercials, played as background music in restaurants or in films – while at the same time users can freely download, share and remix those works.

Powerful critics like Wikimedia's vice-executive director Erik Möller, however, fundamentally challenge the need for a non-commercial module. He sees the diversity of incompatible open content licenses as a major barrier to the remixing of different works. In his 2006 piece "The Case for Free Use: Reasons Not to Use a Creative Commons-NC License"[209] he instead advocates using the copyleft module "ShareAlike".

But even adopters and users of the non-commercial clause face the non-trivial problem of defining commercial and non-commercial use. Is it commercial use, for example, if content is used on the webpage of a non-profit organisation (for example, a research centre), which allows advertisement on this webpage? What if the content is used by a government or state-run entity? What if the work is posted on an aggregator website that hosts millions of works (such as YouTube or MySpace), and makes money from the advertising because of the high volume of traffic it attracts?

These and dozens of similar questions have been asked in a study conducted by Netpop Research under the auspices of Creative Commons. The recently released final report "Defining Noncommercial"[210] is very interesting – even

208 See "Jamendo" Hompage. **http://www.jamendo.com/en/**

209 Möller, Erik (2006): The Case for Free Use: Reasons Not to Use a Creative Commons-NC License. In: Lutterbeck, Bernd, Baerwolff, Matthias, Gehring, Robert A. (eds.): *Open Source Jahrbuch 2006*. Berlin: Lehmanns Media, 271–282. **http://www.opensourcejahrbuch.de/download/jb2006/chapter_06/osjb2006-06-02-en-moeller.pdf**

210 Creative Commons (2009): Defining "Noncommercial". Report published in San Francisco, September 2009. **http://mirrors.creativecommons.org/defining-noncommercial/Defining_Noncommercial_ fullreport.pdf**

though it hardly gives precise answers as to how best define a non-commercial clause.

First, the study is an interesting example of community participation in processes of private regulation. Before, drafting Creative Commons licenses had been reserved to legal professionals who were trying to offer legally waterproof licensing options. While there were calls for feedback on the licenses, the open invitation to a broad audience of both creators and users to participate in a survey on one particular license clause is a completely new approach.

Second, looking at some of the study's key results points to the difficulties of such a participative approach to standardisation. The press release[211] mentions as an example the fact that "creators and users gave the specific use case 'not-for-profit organisation uses work on its site, organisation makes enough money from ads to cover hosting costs' ratings of 59.2 and 71.7, respectively". The numbers refer to a scale of 1–100, where 1 is "definitely non-commercial" and 100 is "definitely commercial". So, asking (potential) standard adopters does not free standardizers from their burden of making decisions on what to include or exclude under a certain standard.

211 Linksvyer, Mike (2009): Creative Commons Publishes Study of "Noncommercial Use". *creativecommons.org*. September 14, 2009. **http://creativecommons.org/press-releases/entry/17721**

Finally, the results seem to emphasise the benefits of (at least some degree of) vagueness in defining a standard. Coming up with "the final" or a "definite" description of "non-commercial" might even lead to more conflict and hinder license adoption in fringe areas, while it would not help in (the majority) of clear cases.

Extending Private Copying Levies: Approaching a Cultural Flat-Rate?

Leonhard Dobusch, 2010/01/30

While copyright critics around the globe advocate the adoption of Creative Commons licenses as a way of enabling remix and non-commercial file-sharing, in Europe a second solution is being debated more and more intensively: a so-called "cultural flat-rate". Internet users should be mandated to pay a fixed amount per month and be allowed in return to non-commercially remix and share copyrighted files. Of course, by contrast to the private regulation approach of Creative Commons, such a "culture tax" would require legislative changes.

Technically, most countries already have a minor form of such a culture tax called private copying levies: a special tax or levy is charged on purchases of recordable media – in some cases also on recording or copying devices – and then redistributed to rights holders via copyright collectives. Copying levies are justified as being a compensation for limitations and exceptions to copyright such as the right to make a private copy (see, for example, the US Audio Home Recording Act).

Compared to other aspects of copyright regulation, which are being harmonised increasingly across jurisdictions in the course of international treaties such as the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), copying levies still vary significantly from country to country – both in terms of the types of devices and recordable media covered, and in terms of levy levels. And these differences are far from being diminished, as recent developments in the neighbouring countries Germany and Austria illustrate: while the Association of Computer Manufacturers and a consortium of different collecting societies in Germany agreed on a new copying levy on any computer with a recording device, the Austrian supreme court of justice ruled against a similar levy[212].

In his contribution[213] to last year's Free Culture Research Workshop at Harvard's Berkman Center, the German media sociologist and activist Volker Grassmuck argues in favour of a *"Culture Flat-Rate to end copyright extremism and bring information freedom and remuneration for authors to the Internet"*. He describes the model as follows:

212 Austrian Supreme Court of Justice (2009): Reprographievergütung auf PC. Verdict 4 Ob 225/08d. February 24, 2009. **http://www.internet4jurists.at/entscheidungen/ogh4_225_08d.htm**

213 Grassmuck, Volker (2009): IP4D – Sustainable Production of and Fair Trade in Creative Expressions. Paper presented at the Research Workshop on Free Culture Berkman Center for Internet and Society at Harvard University Cambridge, MA. October 23, 2009. **http://cyber.law.harvard.edu/fcrw/sites/fcrw/images/Grassmuck_09-10-23_Free-Culture_Berkman_txt.pdf**

> *"In 1965 the German lawmaker acknowledged that private copying cannot be prevented, therefore it needs to be legalised, ensuring remuneration to creatives through a levy on recorders and recordable media .... In analogy, the Culture Flat-Rate introduces the legal permission to copy and make available published works under copyright by private persons for non-commercial purposes, and in return a monthly levy is paid by broadband Internet users, collected by ISPs and collectively managed by the communities of authors, i.e. collecting societies."*

How serious debates about a lump-sum levy have become, even in countries with traditionally strict copyright regulation such as Germany, has been demonstrated by the Association of the German Music Industry's publication of a policy paper presenting *"ten arguments against the culture flat-rate"*[214]. These are the following (my own translation):

1. The culture flat-rate is unfair, as consumers pay for something they are not using.
2. The culture flat-rate undermines the economic base, especially that of the new digital business models.
3. The culture flat-rate is a disproportionally high burden for all consumers and disadvantages the socially deprived.
4. The culture flat-rate requires the set-up of a gigantic bureaucracy.
5. The culture flat-rate flattens culture.
6. The culture flat-rate takes the right to control the usage of their works away from creators and artists.
7. The culture flat-rate is inconsistent with the economic principles of our society.
8. The culture flat-rate is inconsistent with international law.
9. The culture flat-rate devalues intellectual property.
10. The culture flat-rate raises more questions than it answers.

214 Knöll, Daniel (2010): Bundesverband Musikindustrie veröffentlicht Positionspapier zur Kulturflatrate. *Bundesverband Musikindustrie*. January 25, 2010. **http://www.musikindustrie.de/fileadmin/news/presse/100125_Kulturflatrate_10_Argumente_FINAL.pdf**

This list is highly partisan, of course, and has a very narrow concept of creators in mind. Without going into too much detail, many of the points need to be and can easily be put into perspective: arguments #1, #3 and #7 also hold for existing private copying levies, which creators and their collecting societies are continuously striving to expand. The latter's "gigantic bureaucracy" (#4) is also already in place. Whether a cultural flat-rate really "flattens culture" (#5) is both a normative and an empirical question. While in this context the paper argues that a cultural flat-rate would reduce economic incentives to invest in niche products, large-scale empirical studies[215] regularly show that

215 See, for example, Kretschmer, Martin, Hardwick, Philip (2007): Authors' Earnings from Copyright and Non-Copyright Sources: A Survey of 25,000 British and German Writers. *Centre for Intellectual Property Policy and Management*. Bournemouth: Bournemouth University. **http://www.cippm.org.uk/downloads/ACLS%20Full%20report.pdf**

(the majority of) niche artists receive(s) little to nothing from classic copyright-based business models. This is what in turn significantly delimits the field of application for argument #6. Whether a devaluation of intellectual property (#9) would really harm creative production and expression or rather foster new (collaborative) forms of creativity such as remix and mash-up is more of an open question than an argument; similarly, bemoaning the number of questions raised by a cultural flat-rate (#10) does not mean that there are no feasible answers available for them (see, for example, Grassmuck 2009)[216]. And while a cultural flat-rate could indeed harm new digital business models (#2), ironically this is the field where the industry incumbents dominating the Association of the German Music Industry have constantly failed over the past decade – even without a cultural flat-rate. Business models using alternative copyright licensing such as Magnatune or Jamendo, on the other hand, are perfectly compatible with a cultural flat-rate covering only non-commercial usage.

This leaves us with #8 as the only straightforward argument on the list: a cultural flat-rate is incompatible with extant international copyright regulation as put forward in the respective WTO and WIPO treaties. For proponents of cultural flat-rates, these two organisations are therefore the primary arenas for advocacy.

216 Grassmuck, Volker (2009): Inside Views: The World Is Going Flat(-Rate). *ip-watch.org*. May 11, 2009. **http://www.ip-watch.org/2009/05/11/the-world-is-going-flat-rate/**

Alternative Licensing: Subverting or Supporting Copyright?

Leonhard Dobusch, 2010/03/03

In its recent "Special Report"[217] on copyright protection and enforcement to the US Trade Representative, the International Intellectual Property Alliance (IIPA) recommended keeping Indonesia on the "watch list". One of the major reasons given for this recommendation was the following:

> *Worse yet, instead of focusing attention on piracy and solutions to the problem, the government retained onerous market access barriers ... and added new restrictions. For example, in March 2009, the Ministry of Administrative Reform (MenPAN) issued Circular Letter No. 1 of 2009 to all central and provincial government offices including State-owned enterprises, endorsing the use and adoption of open source software within government organisations. While the government issued this circular in part with the stated goal to "reduc[e] software copyright violation[s]", in fact, by denying technology choice, the measure will create additional trade barriers and deny fair and equitable market access to software companies. (IIPA 2010: 50)*

In what follows, the paper argues that endorsing the adoption of open source software "fails to build respect for intellectual property rights". While this opposition towards open source software can be explained by the fact that the Business Software Alliance, which is dominated by proprietary software vendors such as Microsoft, is among the most influential IIPA member organisations, others share the basic concern. The Austrian researcher Stefan Weber, for example, similarly decries a declining respect for intellectual property and a rise of plagiarism – something he refers to as the "Google-Copy-Paste-Syndrome"; he also links alternative licensing such as Creative Commons with an allegedly falling respect for authors' copyrights (pp. 34-35)[218].

Ironically, some critics of the prevalent copyright regime such as Niva Elkin-Koren fear exactly the opposite. They worry that free/open licensing, which is based upon existing copyright law, might even strengthen an outdated and overly restrictive copyright regime. For example, in her piece "Exploring Creative Commons: A

217 U.S. Trade Representative by the International Intellectual Property Alliance (2010): IIPA's 2010 Special 301 Report. Presented in Washington, D.C., February 18, 2010. **http://www.regulations.gov/#!documentDetail;D=USTR-2010-0003-0287;oldLink=false**

218 Weber, Stefan (2007): Section 3: The New Paradigm of Plagiarism – and the Changing Concept of Intellectual Property. In: Maurer, Hermann (ed.): *Report on Dangers and Opportunities Posed by Large Search Engines, Particularly Google*. Institute for Information Systems and Computer Media. Graz: Graz University of Technology. **http://www.iicm.tugraz.at/iicm_papers/dangers_google.pdf**

Skeptical View of a Worthy Pursuit"[219] Elkin-Koren argues that

Creative Commons' strategy is left with the single unifying principle which empowers authors to govern their own work. This paper argues that such a strategy could spread and strengthen the proprietary regime in information.

219 Elkin-Koren, Niva (2006): Creative Commons: A Skeptical View of a Worthy Pursuit. In: Guibault, Lucie, Hugenholtz, P. Bernt (eds.): *The Future of Public Domain*. Alphen aan den Rijn: Kluwer Law International, 325–345. **http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885466**

My personal perception lies somewhere in between: on the one hand, I would argue that alternative copyright license schemes increase awareness and reflectivity on copyright issues in the digital realm. When people are asked to decide under which license they want to upload photos at Flickr, this probably makes them more reluctant to simply copy-paste photos by others for their own homepage or blog.

The Creative Commons system as a whole, and related business models, on the other hand, may be a thorough challenge – if not for copyright per se, then for its currently long and extensive protection. First, it enables and thereby demonstrates the feasibility of new or alternative forms of cultural production[220] and creative practices[221]. Second, as a system Creative Commons is more than just licensing, it is a licensing *standard*, which comprises an alternative regulatory regime.

220 See, for example, Benkler, Yochai (2006): *The Wealth of Networks*. New Heaven: Yale University Press. **http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf**

221 Lessig, Lawrence (2008): *Remix: Making Art and Commerce Thrive in the Hybrid Economy*. London: Bloomsbury. **http://archive.org/details/LawrenceLessigRemix**

In other words, by developing and using Creative Commons licenses, critics of the current copyright regime not only point to the latter's problems and difficulties but also practically demonstrate the feasibility of alternative forms of regulation. Of course, the "degree of subversion" then depends on the rate of adoption of compatible licenses.

Iconic Standards: Regulating and Signaling

Leonhard Dobusch, 2010/07/16

Standards have two major functionalities: for one, they coordinate and – depending on their stickiness due to network effects – regulate human behaviour. They also function as signaling devices. Of course, which of the two functionalities is dominant and how the two are interrelated are empirical questions. In the case of certain private labeling standards, for example, a broad bundle of rules and minimum standards are condensed into one label or brand, whose premium value in turn is intended to attract both (additional) producers and consumers to adhere to the standard (see also p. 94 *"Forest Stewardship Council Goes Fair Trade"* in this volume).

In the case of Creative Commons' alternative copyright licensing standards, James Boyle explicitly referred to the important (albeit unintended) signaling role of licensing standards on a discussion panel at Harvard's Berkman Center[222] (after 42:50 minutes):

> *What we didn't understand was the most important thing about the license was not that they were licenses, it was that they created space, a focal point around which people would make communities.*

Markus Lang, a doctoral student in the Max Planck research group on institution building across borders not only pointed out to me this quotation from James Boyle but also put it in the broader context of Julia Black's notion of "regulatory conversations"[223]. In applying a discourse theoretical perspective on both public and private regulation, she delineates how the coordination of practices is achieved via communicative interactions.

One important communicative tool in private regulation not mentioned by Black are logos or icons. In both examples mentioned so far, private labeling and Creative Commons licenses (for icons of the latter, see above), signaling via easily recognizable logos seems to be of the utmost importance for license diffusion and, thus, for success.

222 Berkman Center (2012): The Commons: Celebrating Accomplishments, Discerning Futures. *youtube.com*. December 13, 2012. **http://www.youtube.com/watch?v=AlW1ew_sNEk**

223 Black, Julia (2002): Regulatory Conversations. In: *Journal of Law and Society*, 29 (1): 163–196.

Creative Commons License Icons

	CC Symbol	Description
1		**[BY] By Attribution** Permits all uses of the original work, as long as it is attributed to the original author (Note: Attribution is in all six licences)
2		**[BY-SA] By Attribution – Share Alike** As above, but any derivative work must also use a similar license, hence "Share Alike"
3		**[BY-ND] By Attribution – No Derivatives** Licensed works are free to use / share with attribution, but does not permit derivative works from the original
4		**[BY-NC] By Attribution – Non-Commercial** Licensed works are free to use / share / remix with attribution, but does not permit commercial use of the original work
5		**[BY-NC-SA] By Attribution – Non-commercial – Share Alike** Does not permit commercial use of the original work, and any derivatives from it must use a similar licence
6		**[BY-NC-ND] By Attribution – Non-Commercial – No Derivatives** Does not permit any commercial use or derivatives of the original work. *Note: this is the most restrictive of CC licenses, and is often regarded as a "free advertising" license*

Source: http://creativecommons.org/licenses/

Mozilla Privacy Icons Project

Source: Azaraskin (CC-BY-NC) as reproduced in: Beckedahl, Markus (2010): Erste Version für das Mozilla Privacy Icons Project. Netzpolitik.org. July 13, 2010. https://netzpolitik.org/2010/erste-version-fur-das-mozilla-privacy-icons-project/

In the recent "Mozilla Privacy Icons Project"[224] icons even seem to predate regulatory standards. The project's initiator Aza Raskin explicitly referenced Creative Commons licenses as a role model[225] and the project description refers to both Fair Trade and Creative Commons:

> *Design a simple set of icons that can educate users about the privacy policies of websites. (Think of something as simple as the Fair Trade Coffee label on food or Creative Commons logos for copyright)*

Whether starting with the development of a set of icons is a viable way of standardising online privacy practices still remains to be seen. Aza Raskin himself asks in a blog post "Is a Creative Commons for Privacy Possible?"[226], discussing issues such as why anybody should use negative icons to describe his service.

224 Mozilla Wiki (2012): Drumbeat/Challenges/Privacy Icons. *wiki.mozilla.org*. **https://wiki.mozilla.org/ Drumbeat/Challenges/Privacy_Icons**

225 See Raskin, Aza (2010): Making Privacy Policies Not Suck. *azarask.in*. **http://www.azarask.in/blog/post/making-privacy-policies-not-suck/**

226 Raskin, Aza (2010): Is a Creative Commons for Privacy Possible? *azarask.in*. **http://www.azarask.in/blog/post/is-a-creative-commons-for-privacy-possible/**

Money Buys You Standards? The Gates Foundation's Push for CC-BY

Leonhard Dobusch, 2010/10/12

License proliferation – the development and use of different and incompatible licenses – has always been an issue in the field of open content licensing. As in any process of standardisation, the utility of a certain standard depends on its diffusion. Open content licensing regimes thus become a viable alternative to the prevalent all-rights-reserved copyright regime only insofar as a critical mass of works is licensed under compatible licensing standards. For example, in the field of free/open source software the GNU General Public License (GPL) is becoming the de-facto standard more and more.

One major innovation brought by Creative Commons into the realm of open content licensing was the modularity of its licenses: probably inspired by libertarian ideals of maximising individual choice[227], Creative Commons allows the combination of different license modules such as "share-alike" or "non-commercial" and thus ends up with 6 different and partially incompatible licenses. Initially, Creative Commons had even allowed five more combinations and developed several special purpose licenses such as the "Sampling licenses" or the short-lived "Developing Nations License". Recognising that this increase in license choice led to a fragmentation instead of a maximisation of the aspired commons of digital works, Creative Commons is now struggling to solve a problem it partially helped to create in the first place.

227 See Elkin-Koren, Niva (2005): What Contracts Can't Do: The Limits of Private Ordering in Facilitating a Creative Commons. In: *Fordham Law Review*, 74: 375–422. **http://papers.ssrn.com/sol3/papers.cfm?abstract_id=760906**

For instance, the education division of Creative Commons, formerly known as CCLearn, has published a detailed "Guide to License Compatibility"[228] to enhance the remixability of Open Educational Resources (OER). In this guide, Creative Commons explicitly recommends the usage of the most flexible and open Attribution license, which only requires credit to be given when re-using, re-distributing or remixing a certain work. This is striking, given the fact that the most prominent adopters of Creative Commons licenses in the field of education use much more restrictive licenses; the MIT's Open Courseware initiative, for example, uses the Attribution-NonCommercial-ShareAlike license. In spite of all communicative efforts by Creative Commons to use more open licenses, the dominance of restrictive licenses in the field of educational resources has not changed much over the years.

228 ccLearn (2009): Remixing OER: A Guide to License Compatibility. *creativecommons.org*. **http://learn.creativecommons.org/wp-content/uploads/2009/10/cclearn-explanations-cc-license-compatability.pdf**

In the future, however, this may change. Creative Commons' new argument: money. In a blog post entitled "Gates Foundation announces $20M for Next Generation Learning Challenges; CC BY required for grant materials"[229] Creative Commons celebrates financial support for its licensing recommendation:

> *Adopting CC BY is precisely aligned with the overarching goals of foundation funding and initiatives such as the Next Generation Learning Challenges. Last year, the Berkman Center's study on foundation copyright licensing policies said that open licensing "ensures[s] the broadest and fastest dissemination of the valuable ideas, practices, works, software code and other materials the foundation's funding helps to create". That report went on to suggest that the impact of funding is even greater when permissive licenses (such as CC BY) are applied, allowing the resources "to be freely tested, translated, combined, remixed, repurposed or otherwise built upon, potentially by many subsequent researchers, authors, artists or other creators anywhere in the world, as the basis for new innovation, discovery or creation".*

It will be interesting to see how many already existing providers of Open Educational Resources such as the MIT will be drawn into the CC-BY-camp by both the Gates Foundation's monetary incentives and the growing attractiveness of a more widely adopted CC-BY licensing standard.

229 Vollmer, Timothy (2010): Gates Foundation Announces $20M for Next Generation Learning Challenges; CC BY Required for Grant Materials. *creativecommons.org*. October 11, 2010. **http://creativecommons.org/weblog/entry/23831**

With YouTube on Board: Creative Commons Going Mainstream?

Leonhard Dobusch, 2011/06/02

Today YouTube announced the introduction of Creative Commons support[230] on its official blog:

> *Have you ever been in the process of creating a video and just needed that one perfect clip to make it pop? Maybe you were creating your own music video and needed an aerial video of Los Angeles at night to spice it up. Unless you had a helicopter, a pretty powerful camera and some fierce editing skills, this would have been a big challenge. Now, look no further than the Creative Commons library accessible through YouTube Video Editor to make this happen. Creative Commons provides a simple way to license and use creative works.*

230 Peterson, Stace (2011): YouTube and Creative Commons: Raising the Bar on User Creativity. *youtube-global blogspot*. June 2, 2011. **http://youtube-global.blogspot.de/2011/06/youtube-and-creative-commons-raising.html**

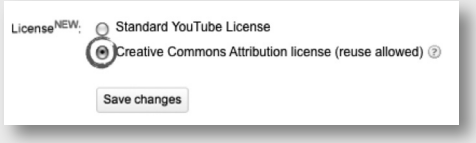
Actually, YouTube had tested the implementation of Creative Commons licenses already more than two years ago[231] but had shied away from introducing it as a general feature until today. The fact that now this has finally happened is being celebrated by many Creative Commons sympathizers in the blogosphere under headings such as "Why YouTube Adopting Creative Commons Is a Big Deal"[232].

231 Steuer, Eric (2009): YouTube Tests Download and Creative Commons License Options. *creativecommons.org*. February 12, 2009. **https://creativecommons.org/weblog/entry/12757**

232 Roettgers, Janko (2011): Why YouTube Adopting Creative Commons Is a Big Deal. *gigaom.com*. June 2, 2011. **http://gigaom.com/video/why-youtube-adopting-creative-commons-is-a-big-deal/**

I tend to agree that for Creative Commons, YouTube's move might be the final breakthrough into mainstream culture and maybe even the business sphere. Not just because creators are now finally allowed to choose at least one Creative Commons license (CC-BY) for their content hosted on YouTube, but because of the additional features YouTube is promoting, such as the cloud-based "YouTube Video Editor" mentioned already in the blog quote above. This demonstrates that in the cloud, Creative Commons licenses may actually constitute the basis for additional features. Only with Creative Commons licenses is YouTube able to offer its users the possibility to remix and mash-up thousands – soon probably millions – of videos online from other creators online in the

Screenshot of YouTube License Chooser



Source: Author's screenshot of YouTube license chooser. http://www.youtube.com/t/creative_commons

cloud. YouTube might thus contribute to making Creative Commons support a standard feature of many of the upcoming cloud services.

A lot of discussion, I expect, will follow with regard to YouTube's decision to (at least initially) only allow the most liberal Creative Commons Attribution license (CC-BY)[233]. This choice by the most important video platform on the web will definitely have an impact on the licensing decisions of a huge number of content providers. For example, universities producing Open Educational Resources, such as the MIT Open Courseware programme, which want to host their content on YouTube will be tempted to rethink their often very restrictive licensing policies (see also p. 177 *"Money Buys You Standards"* in this volume).

Other consequences of this licensing decision are the following: for one, CC-BY allows YouTube (and anyone else) to make a profit with such content, as well. I am curious to see what entrepreneurs will make of this opportunity. CC-BY is also compatible with the license of Wikipedia and its sister projects, which are licensed CC-BY-SA[234]. We can therefore expect to see much more video content being embedded in Wikipedia articles in the future.

All in all, I guess this decision could be a turning point in the history of the still young "Free Culture Movement".

233 Creative Commons (2011): Attribution 3.0 Unported (CC BY 3.0). *creativecommons.org*. **http://creativecommons.org/licenses/by/3.0/**

234 Creative Commons (2011): Attribution-ShareAlike 3.0 Unported (CC BY-SA 3.0). *creativecommons.org*. **http://creativecommons.org/licenses/by-sa/3.0/**

CC Global Summit 2011 #1: The End of the Porting Experiment?

Leonhard Dobusch, 2011/09/16

This post was written "live" at the Creative Commons Global Summit 2011[235]*, taking place in Warsaw, Poland, from September 16–18.*

235 For further information, see Creative Commons (2011): Global Summit 2011. *wiki.creativecommons.org*. September 18, 2011. **http://wiki.creativecommons.org/Global_Summit_2011**

In the field of open content licensing, Creative Commons licenses were the first, and they still are the only licenses adapted ("ported") to local jurisdictions. Free/open source software licenses such as the GNU GPL, which served as the role model for Creative Commons in the first place, are generally unported licenses. And not all licenses in the realm of Creative Commons are ported, either.

In the first session on the upcoming versioning process, Paul Keller (CC Netherlands) mentioned the "no rights reserved" (CC0) license as an example of a Creative Commons license working without any adaption to local jurisdictions. Therefore, Keller argued, the labourious task of license porting could be abandoned as the licenses approach version 4.0. This statement was followed by several legal arguments with respect to the benefits and pitfalls of license porting.

The legal aspects are, however, only one side of the coin. For both the organisation and the community behind Creative Commons, license porting has always been a transnational "growth strategy". Although it was probably not intended as such, Creative Commons founder Lawrence Lessig already emphasised this community-building function of the porting process in an interview in 2007[236]. There, he also added that porting "make[s] clear that [Creative Commons] is not an American thing".

236 See Dobusch, Leonhard, Quack, Sigrid (2008): Epistemic Communities and Social Movements: Transnational Dynamics in the Case of Creative Commons. MPIfG Discussion Paper 08/8. Cologne: Max-Planck-Institute for the Study of Societies. **http://www.mpifg.de/pu/mpifg_dp/dp08-8.pdf**

Paradoxically, the work necessary to port Creative Commons licenses to a local jurisdiction provided a clear-cut task for potential local affiliate organisations, thereby effectively (trans)porting Creative Commons' ideas and concepts, as well as building an international community of (legal) experts. The question is whether, as this community is already in place, the porting process is still necessary today?

Lawrence Lessig also weighed in on the issue, asking whether there are other ways to provide the community building function of the porting process, such as, for example, simply translating the license into the local language(s). In addition, Lessig mentioned practical problems associated with the porting process as the number of

jurisdictions keeps growing: "The porting process is difficult in some countries and it is difficult for Creative Commons to uphold the standard across all countries."

As I see it, the community aspects of license porting are (much) more important than the legal problems. Without license porting, a new task for local lawyers to engage with Creative Commons would be needed to uphold the global community of legal experts; translating the licenses would definitely not be enough.

CC Global Summit 2011 #2: Making the Case for Global Licenses

Leonhard Dobusch, 2011/09/16

This post was written "live" at the Creative Commons Global Summit 2011[237]*, taking place in Warsaw, Poland, from September 16–18.*

Continuing the debate on license porting in the realm of Creative Commons, Paul Keller of CC Netherlands took a clear stance, calling for the development of only one, global license in the future. In his talk, he mentioned the following advantages of the global approach:

- Reducing (potential) incompatibilities;
- It forces us to adopt a consistent position on issues that are specific to certain regions (e.g. moral rights, database rights);
- It will produce licenses that meet users' expectations better;
- It will cover all jurisdictions, not 'just' 55;
- It has the potential to initiate an interjurisdictional discussion on the substance of the licenses;
- It will free time for other activities (community building, promoting adoption, policy work, implementation advice).

Keller was followed by Massimo Travostino from Creative Commons Italy, who added his opinion that the more a license is successfully "ported", the more likely it is to create problems in other jurisdictions.

While I agree with most of these arguments, I would like to warn particularly with regard to the last of Keller's points. After having interviewed dozens of Creative Commons legal project leads responsible for license porting, I have learnt at least two things: first, they know that porting licenses is hard work. Second, as legal professionals they feel responsible, if not needed to accomplish this task.

237 For further information, see Creative Commons (2011): Global Summit 2011. *wiki.creativecommons.org*. September 18, 2011. **http://wiki.creativecommons.org/Global_Summit_2011**

Given the tight schedules of most legal members of the Creative Commons community, I have my doubts that those same people will engage as intensively in "community building, promoting adoption, policy work" as they did in license porting. The simple reason is that for these tasks you do not need to be a lawyer. To put it bluntly: others can do those tasks, too.

This does not mean that there is no other possibility for engaging legal professionals in the realm of Creative Commons without license porting. Other options could be, for example, new or more professional consulting in implementation processes or intensified legal lobbying. However, setting up structures for and continuously supporting such work is also far from a trivial task.

CC Global Summit 2011 #3: Discussing the Non-Commercial Module

Leonhard Dobusch, 2011/09/17

This post was written "live" at the Creative Commons Global Summit 2011[238]*, taking place in Warsaw, Poland, from September 16–18.*

238 For further information, see Creative Commons (2011): Global Summit 2011. *wiki.creativecommons.org*. September 18, 2011. **http://wiki.creativecommons.org/Global_Summit_2011**

Among the seemingly never-ending issues connected with Creative Commons licenses is the non-commercial (NC) module. In 2008, Creative Commons even did a large quantitative study entitled "Defining Noncommercial" (see p. 168 *"Standardising via Polling? Creative Commons' Study on Its Non-Commercial Clause"* in this volume).

Reflecting on the results of this study, Creative Commons representative Mike Linksvayer emphasised that licensors say they are somewhat liberal in their expectations of what licensees will do, which might explain the lack of open disputes with regard to license interpretation in spite of the module's ambiguity. With regard to license adoption numbers, Linksvayer showed graphs illustrating that NC is still the most popular license module, while the license-mix is changing, with a very slow downward trend in the use of the NC module.

Describing the upcoming license versioning process as "a once-in-a-decade-or-more opportunity", Linksvayer listed a number of issues that could be addressed within a new version 4.0 of the licenses.

First, continuous discussion about the correct interpretation of the license module might damage Creative Commons as a brand. The flipside of this argument is, however, that Creative Commons as an organisation does not really know what freedom means in various communities, which need to discover it for themselves. This

was also the case in the realm of software, where Linux was first released under NC terms.

Second and probably more importantly, the flexible definition of the NC module might function as a barrier to conservative use such as the often discussed compatibility of Creative Commons usage with collecting society membership and revenues. Weighing in on that issue, Paul Keller recalled that in his experience as a project leader in the Netherlands, the flexibility of the NC definition was indeed a problem for collecting societies. More generally, a clear-cut definition of NC could be valuable because it would not mean persecuting fans for sharing but at the same time protect alternative revenue streams.

Third, the NC module still sounds very appealing to many creators and is thus probably overused by those without existing revenue streams to a project. This could lead in turn to an under-use of non-NC licenses, which realise far more value since there are projects (e.g. Wikipedia) that rely on free licenses to exist.

Fourth, there are several other arguments against users choosing the NC module that are well known, see for example the list at freedomdefined.org[239]. Among those arguments is the built-in non-interoperability with other licenses in the Creative Commons suite.

239 The Case for Free Use: Reasons Not to Use a Creative Commons-NC License. *freedomdefined.org*. **http://freedomdefined.org/Licenses/NC**

To address these issues in the course of the versioning process, Linksvayer then presented four "provocative alternatives":

1. Don't version NC licenses, eventually hide the option from the license chooser, thereby formally retiring the NC module;
2. Drop BY-NC-SA and BY-NC-ND to simplify the license suite, which means effectively keeping just one version (BY-NC);
3. Support NC licenses, but rebrand them as something other than CC.; a move to non-creativecommons.org domain would be strongest;
4. Clarify the definition of NC (e.g. match conservative user wish; as pointed out earlier, a more thorough definition in license could be useful for global licensing).

Options (3) and (4), of course, are compatible with one another. In deciding whether to pursue any of these options, Creative Commons faces dilemmas, two of which Linksvayer explicitly mentioned:

- Any of the options would address the issue of incompatibility but could dilute the brand of CC at the same time.
- Any of the options would increase certainty but there would be a number of costs, and resistance from existing NC users.

Specifically, the last point is interesting, since it points to the inherent path dependence of private regulation via (licensing) standards. Once you've launched and dif-

fused a standard, fundamental changes become more and more difficult. In this regard, I doubt whether versioning is really this "once-in-a-lifetime opportunity".

What is more, the main reason for the perceived "flexibility" in the adoption of the NC module is due to ambiguity in legal formulations. I am skeptical as to whether a global license version 4.0 could afford to be less ambiguous. I am not even sure whether version 4.0 should strive to be less ambiguous. At least to some degree, the ambiguity of the NC module is a productive one, since it allows different communities of license users to agree on (maybe slightly different) interpretations of the NC clause. As mentioned by Linksvayer in his talk, this advantage of ambiguity is at odds with the strategy to win over powerful but more conservative adopters such as collecting societies. This is probably the most important dilemma that Creative Commons is facing while attempting to tinker with the NC module.

Personally, I think it might be helpful to think also – or even mainly – of non-license-changing measures such as (official) license endorsements for certain areas (e.g. Open Educational Resources, Open Data, etc.) or more selective license promotion such as in Linksvayer's second suggestion above.

Copyright and Collective Goods: From Academia to Collecting Societies

Leonhard Dobusch

As academics blogging about copyright issues we could not help but address copyright related issues in academia itself. Of course, scientific publishing has also been affected by the digital revolution: the utopian vision of worldwide, equally open access to research has become a practical possibility. However, implementing open access policies has proven far from easy, which is evidenced by several articles in this chapter that deal with the problems of improving access to scientific knowledge as a transnational public good. Never before has scientific publishing been such a political issue.

Similarly, the role of collecting societies has been politicised in the course of digitisation. For decades, copyright collectives were rarely visible to a wider public and, at least in Europe, enjoyed the privilege of being mostly national monopolists in representing the creators of all kinds of copyrighted works. With the rise of transnational platforms hosting user-generated content such as YouTube, even ordinary Internet users cannot help but come into contact with collecting societies. Specifically in Germany, where Google and the collecting society GEMA have been failing for years to find agreement with regard to proper compensation for music played on the platform, copyright collectives' conduct is a matter for political debate. The European Commission also sees the national structure of copyright collectives as a barrier to common online markets, pushing a directive to reform the respective legislation.

The articles in this chapter illustrate how nationally established governance regimes of collective goods are challenged by technological and institutional change on the transnational level.

Competition for Copyright Collectives: New Market Logics

Leonhard Dobusch, 2009/02/06

"It is difficult to make predictions, especially about the future." (Karl Valentin and others)

Not so long ago, the monopolistic concept of a musicians' copyright collective like the German GEMA or the British PRS seemed as if it would last forever. Even in countries with more than one copyright collective like the US (e.g. BMI, ASCP), membership is exclusive and all-encompassing, meaning that an artist is not allowed to license any of his/her works differently.

Yet Jamendo's recently launched service jamendo pro might prove that forever is a thing of the past. Jamendo is an aggregator of Creative Commons (CC) licensed music. Commercial revenue is shared equally between Jamendo and the artists, non-commercial use is free. In spite of the collecting societies' prohibition of any open content licensing such as CC, Jamendo's back catalogue already consists of more than 15,000 albums.

In its new offer Jamendo directly challenges the monopoly position of collecting societies in fields such as background music or music for audiovisual works and websites. For example, restaurant owners have to pay royalties for background music, depending on the number of occupants (in the US) or the restaurant size in square meters (in Germany). GEMA charges German restaurant owners (< 100 m2) EUR 309.78/year when they use copied CDs or mp3s[240]. Jamendo's launch price for the same service is EUR 96/year.

The most interesting developments, I predict, are still ahead of us: as authors of CC-licensed works can put them in alternative repositories as well, Jamendo won't be the sole competitor of collecting societies for long. Actually, the US independent label Magnatune had offered similar services long before jamendo, but on a smaller scale (<1000 albums). So, there is no doubt that there will be more commercial suppliers of CC-licensed music in the future. The remaining question is: how will these competitors differentiate? They can all harness the same commons of steadily (exponentially?) growing CC-licensed music. Of course, price will play an important part. But as I see it, the key distinguishing feature could also become taste: filtering the digital music commons for pearls and assembling them in a neat way on a continuous basis.

Actually, I like the idea of several suppliers competing to best match the customer's preferences when assembling music for different purposes.

240 GEMA (2010): Tarifübersicht für Gaststätten, Hotels, Pensionen 2010. **https://www.gema.de/fileadmin/inhaltsdateien/musiknutzer/tarife/tarife_ad/tarifuebersicht_gaststaetten.pdf**

Universities as Copyright Regulators: Power and Example

Leonhard Dobusch, 2009/03/21

A few days ago, the MIT faculty unanimously adopted a university-wide OA mandate[241], which establishes as a default rule the obligation for MIT researchers to hand over a pre-print version of their scientific works for publishing in an open access repository. In a note on this decision[242], the chairman of the drafting committee Hal Abelson explains the context of this decision:

> *Our resolution was closely modeled on similar ones passed last February by Harvard's Faculty of Arts and Sciences and by the Harvard Law School, also passed by unanimous vote. Stanford's School of Education did the same, as did Harvard's Kennedy School of Government just last Monday.*

So, MIT's step towards open access is an illustration of both elite universities' regulatory power and of the power of their example. When MIT announced its Open Courseware programme it was soon followed by hundreds of universities all over the world, many of which joined the Open Courseware Consortium. But most of these universities followed the MIT example not only generally, in making course materials openly available, they also adopted MIT's relatively restrictive Creative Commons license policy, namely an Attribution-NonCommercial-ShareAlike license[243].

Today, people at Creative Commons' education division are struggling with MIT's historical license decision and trying to convince educational institutions to adopt more open licenses such as Attribution-ShareAlike or mere Attribution to foster the exchange and remix of open course materials. As I see it, there is a good deal of regulatory path dependence emerging in the domain of Open Access, as well.

241 Suber, Peter (2009): MIT Adopts a University-Wide OA Mandate. *Open Access News*. March 18, 2009. **http://www.earlham.edu/~peters/fos/2009/03/mit-adopts-university-wide-oa-mandate.html**

242 Abelson, Hal (2009): MIT Adopts an Open-Access Policy. *bitsbook.com*. March 19, 2009. **http://www.bitsbook.com/2009/03/mit-adopts-an-open-access-policy/**

243 Creative Commons (2011): Attribution-ShareAlike 3.0 Unported (CC BY-SA 3.0). *creativecommons.org*. **http://creativecommons.org/licenses/by-sa/3.0/**

The German Open Access Uproar: Missing the Point?

Leonhard Dobusch, 2009/03/27

In the realm of transnational copyright regulation, several struggles are being fought parallel to each other: stylised and simplified, these are the Free/Open Source Software movement versus the proprietary software industry, the free culture movement around Creative Commons versus the established music and film industry, and, of course, there is the industry-spanning battle against "pirates", sometimes even literally and in court[244]. For a long time, the publishing industry in general and the field of scientific publishing in particular seemed to be the only copyright field without open and severe conflict. While the former prevents both piracy and the growth of the ebook market with strict digital rights management (see p. 133 *"The Kindle Controversy: No Right to be a Reader?"* in this volume), in the latter Open Access[245] initiatives for the free and open availability of scientific publications – for example by the European Research Council or by the "Alliance of German Science Organisations", which includes the Max Planck Society and the German Research Foundation (DFG) – did not raise substantial public opposition.

At least for Germany, this description is yesterday's news. A series of articles in German newspapers during the last weeks criticising the "expropriation" of authors by a sinister coalition of "Open Access" zealots and Google culminated in a petition called the "Heidelberger Appell"[246]. This petition was not only signed by numerous renowned researchers, publishers and authors but also inspired an immediate thunderstorm of reactions including a joint statement[247] by the "Alliance of German Science Organisations".

244 See Lindenberger, Michael A. (2009): Internet Pirates Face Walking the Plank in Sweden. *time.com*. **http://www.time.com/time/business/article/0,8599,1880981,00.html**

245 Suber, Peter (2009): Open Access Overview. *Open Access News*. June 21, 2004. **http://www.earlham.edu/~peters/fos/overview.htm**

246 Institut für Textkritik (2009): The Freedom to Publish and the Protection of Copyright. *textkritik.de*. Heidelberg. **http://www.textkritik.de/urheberrecht/index_engl.htm**

247 Helmholtz-Gemeinschaft Deutscher Forschungszentren et al. (2009): Open Access und Urheberrecht: Kein Eingriff in die Publikationsfreiheit. March 25, 2009. **http://www.helmholtz.de/aktuelles/presseinformationen/artikel/artikeldetail/open_access_gemeinsame_erklaerung_der_wissenschaftsorganisationen_vom_25_maerz_2009/**

Without reproducing these extensive discussions here, I would like to mention just three reasons why I think the "Heidelberger Appell" misses the point:

1. The initiator (Roland Reuß) and the majority of early subscribers to the petition stem from the humanities, a particularly large proportion from the field of liter-

ature studies. This is remarkable, as all quantitative assessments of Open Access usage show that it does not play any part in these disciplines[248]. At the same time, researchers in disciplines where Open Access publishing actually is an issue are generally more sympathetic towards the approach. This leads to the educated guess that most of the supporters of the "Heidelberger Appell" lack any empirical contact with Open Access publishing, either as readers or as authors or editors. This is probably the best explanation for the next two points.

248 See, for example, Deutsche Forschungsgemeinschaft (2005): Publishing Strategies in Transformation? *dfg.de*. Bonn, Germany. **http://www.dfg.de/download/pdf/dfg_im_profil/evaluation_statistik/programm_evaluation/studie_publikationsstrategien_bericht_en.pdf**

2. As opposed to the critique in the petition, Open Access is not against copyright. On the contrary, even Open Access initiatives that use very liberal Creative Commons licenses such as the Public Library of Science (PLoS) still rely on copyright. They just use their copyright to guarantee continued free and open access to their authors' works. In fact, for researchers and research itself copyright does not really matter: researchers do not earn their living by selling their scientific writings. The large majority even earn absolutely nothing by this means. When they publish, they do so to gain reputation and to contribute to a commons of scientific knowledge. To gain reputation, in turn, researchers are required to publish their work in reputed journals or publishing houses, which, in most cases, force them to transfer all their copyrights, anyway. The only actors in research and science that profit from copyright are scientific publishers, and among them most of all the "Big 8" publishing houses with a more than 60 percent market share in total[249]. And their profits are so huge that the Austrian philosophy of science professor Gerhard Fröhlich calls them only comparable to the profits made in "the trade of arms and drugs" (German interview in the edited volume *Freie Netze. Freies Wissen*)[250]. In fact, in most disciplines the problem is not actually too much but far too little Open Access, since so-called "top journals" exploit their powerful position by charging monopoly prices and hence restrict access for financially weaker institutions.

249 See House of Commons Science and Technology Committee (2009): Scientific Publications: Free for All? Tenth Report of Session 2003–04. Published in London. July 10, 2004. **http://www.parliament.the-stationery-office.com/pa/cm200304/cmselect/cmsctech/399/399.pdf**

250 Dobusch, Leonhard, Forsterleitner, Christian (eds.) (2009): Freie Netze. Freies Wissen. Vienna: Echo Media Verlag. **http://www.freienetze.at/pdfs/fnfw(komplett).pdf**

3. The most surprising – and annoying – aspect of the current debate in Germany is the intermixing of Open Access and Google Books. These two issues are simply unrelated. Google is neither explicitly nor implicitly pursuing an Open Access agenda with its Google Books project. It does not provide its scanned books openly or for free.

As I see it, the main points of debate around scientific Open Access publishing should not be "whether" but rather "how" – as in the question, "how can a regulatory framework be developed that prevents Open Access publishing from becoming a mere shift from exorbitant journal prices to exorbitant fees in author-pays business models?" This is a discussion that I would be interested in.

Google versus Copyright Collectives, or: Transnational versus National Governance

Leonhard Dobusch, 2009/04/08

Independently, the recent copyright conflicts around Google Book Search[251] and Google's video platform YouTube[252] have received a lot of media attention, but they have not been discussed jointly. This is surprising, not only because Google is under attack in both conflicts but also because both cases have several patterns in common:

First, Google Book Search and YouTube are both tools for making copyrighted material more easily accessible to other users. Here, Google represents a new type of intermediary between creators and consumers, as they have emerged repeatedly alongside technological change. And as the example of radio broadcasting in the early 20th century demonstrates (Lessig 2011: 73 ff.)[253], the role and regulation of such new intermediaries is a highly contingent negotiation process.

Second, and by contrast to the example of radio broadcasting, both Google Book Search and YouTube are "born global" or at least "born transnational". This leads to a variety of difficulties that are likely to protract significantly the current conflicts between Google and national copyright collectives over adequate financial compensation for the use of copyrighted materials. The reason is simply that there is no transnational "referee" who could settle the conflict quickly and definitely, as happened in the case of radio broadcasting. On the contrary, in both cases there is not just one conflict but several, which are related but still different from country to country. This national fragmentation of a transnational conflict not only gives Google the chance to employ divide et impera tactics – in recent royalty negotiations, for example, Google played off the claims of the German GEMA

251 See Helft, Miguel (2009): It's Not Just Microsoft Balking at Google's Book Plans. *New York Times Online*. April 4, 2009. **http://bits.blogs.nytimes.com/2009/04/04/its-not-just-microsoft-thats-balking-at-googles-book-plans/**

252 O'Brien, Kevin J. (2009): Royalty Dispute Stops Music Videos in Germany. *New York Times Online*. April 2, 2009. **http://www.nytimes.com/2009/04/03/technology/internet/03youtube.html?_r=2&**

253 Lessig, Lawrence (2001): The Future of Ideas. New York: Random House. **http://www.the-future-of-ideas.com/download/lessig_FOI.pdf**

against those of their British counterpart PRS – but also leads to irreproducible differences for users in different countries; as it stands, YouTube blocks videos for users with German IP addresses while users from neighbouring EU member countries such as Austria or France don't experience any restrictions.

Third, copyright collectives around the world are not only nationally divided, they are also only reacting to Google's moves. By scanning millions of books or by inviting millions of users to put video content on YouTube, Google has created accomplished facts. Of course, copyright collectives can – and obviously are trying to – retroactively challenge Google's position, but what they cannot undo is the experience of millions of users. As with most innovations, people did not know beforehand how much they needed services such as YouTube or Google Book Search. This, in turn, puts copyright collectives in the position of a kill-joy.

In the end, I predict that we will see a rather standardised, transnational governance regime for services such as YouTube and Google Book Search. In spite of all reservations, copyright collectives have a vital interest in settling the conflict: as opposed to peer-to-peer file-sharing networks, Google at least pays royalties and its services bear the potential of inducing additional revenues.

Declaring War on Free Culture? Collecting Society Confronts Creative Commons

Leonhard Dobusch, 2010/06/27

"First they ignore you, then they laugh at you, then they fight you, then you win."

If this description of political struggles applies to the Creative Commons' quest for an alternative copyright, then the American Society of Composers, Authors and Publishers (ASCAP) has just entered stage three: open battle.

In a letter to members[254] ASCAP asks for donations with the following rationale[255]:

> *At this moment, we are facing our biggest challenge ever. Many forces including Creative Commons, Public Knowledge, Electronic Frontier Foundation and technology companies with deep pockets are mobilising to promote 'Copyleft' in order to undermine our 'Copyright.' They say they are advocates of consumer rights, but the truth is these groups simply do not want to pay for the use of our music. Their mission is to spread the word that our music should be free.*

254 Rugnetta, Mike (2010): Dear Michael. *twitpic.com*. **http://twitpic.com/1zai6e** (Part 1), **http://twitpic.com/1zai66** (Part 2)

255 See Doctorow, Cory (2010): ASCAP Raising Money to Fight Free Culture. *boingboing.net*. June 23, 2010. **http://boingboing.net/2010/06/23/ascap-raising-money.html**

According to this statement, the biggest enemies of copyright holders are no longer "pirates" and respective platforms such as "The Pirate Bay" but rather NGOs and unnamed corporations pursuing a copyright reform agenda.

This is a remarkable change. Some even claim that with this letter "ASCAP Declares War on Free Culture"[256]. Before, copyright collectives such as the ASCAP have mainly hovered between ignoring copyleft licensing models altogether and emphasising their impracticality for professional creators (see, for example, ASCAP's feature "Common Understanding"[257]). One of the major issues, therefore, was the compatibility of membership in a collecting society and usage of alternative copyright licenses[258]. Ironically, as evidenced by a lengthy description[259] by an ASCAP-member in the Creative Commons forum, ASCAP's practice of signing non-exclusive contracts with artists is more compatible with Creative Commons licenses than the practices of many of its European counterparts (in this case the Austrian AKM).

Consequently, Wired's David Kravets[260] calls the attack on Creative Commons "more laughable than ASCAP's stance against EFF and Public Knowledge", since "Creative Commons actually creates licenses to protect content creators". In a first response[261] to the ASCAP-letter, Creative Commons spokesperson Eric Steuer played defensively, however:

> *It's very sad that ASCAP is falsely claiming that Creative Commons works to undermine copyright. Creative Commons licenses are copyright licenses – plain and simple, without copyright, these tools don't even work. CC licenses are legal tools that creators can use to offer certain usage rights to the public, while reserving other rights. Artists and record labels that want to make their music available to the public for certain uses, like noncommercial sharing or remixing, should consider using CC licenses. Artists and labels that want to reserve all of their copyright rights should absolutely not use CC licenses.*

It remains to be seen whether continued attacks by rights holders' associations will force Creative Commons to engage more in political debate or whether it will even strengthen its current strategy of presenting itself as a mere provider of legal licensing tools, which does not get involved in political lobbying.

256 Wilson, Drew (2010): ASCAP Declares War on Free Culture. *zeropaid.com*. June 24, 2010. **http://www.zeropaid.com/news/89494/ascap-declares-war-on-free-culture/**

257 McGivern, Joan (2007): Creative Commons Licensing. The American Society of Composers, Authors and Publishers (ASCAP). September 1, 2007. **http://www.ascap.com/playback/2007/fall/features/creative_commons_licensing.aspx**

258 See Thorne, Michelle (2008): Improbable Match: CC and Collecting Societies in Europe. *creativecommons.org*. November 21, 2008. **http://creativecommons.org/weblog/entry/10819**

259 "Jam" (2010): I Am My Own Rights Organization & I Collect. *creativecommons.org*. **http://forum.creativecommons.org/topic/89**

260 Kravets, David (2010): ASCAP Assails Free-Culture, Digital-Rights Groups. *wired.com*. June 25, 2010. **http://www.wired.com/threatlevel/2010/06/ascap-assails-free-culture-digital-rights-groups/**

261 Steuer, Erik (2010): Creative Commons Responds to ASCAP. *zeropaid.com*. June 25, 2010. **http://www.zeropaid.com/news/89521/creative-commons-responds-to-ascap/**

[Update]

In the meantime, Creative Commons founder and professor at Harvard Law School, Lawrence Lessig, has responded to ASCAP's allegations in the Huffington Post[262], inviting ASCAP President Paul Williams to a public debate:

> *This isn't the first time that ASCAP has misrepresented the objectives of our organisation. But could we make it the last? We have no objection to collecting societies: They too were an innovative and voluntary solution (in America at least) to a challenging copyright problem created by new technologies. And I at least am confident that collecting societies will be a part of the copyright landscape forever. So here's my challenge, ASCAP President Paul Williams: Let's address our differences the way decent souls do. In a debate. I'm a big fan of yours, and if you'll grant me the permission, I'd even be willing to sing one of your songs (or not) if you'll accept my challenge of a debate. We could ask the New York Public Library to host the event. I am willing to do whatever I can to accommodate your schedule.*

262 Lessig, Lawrence (2010): ASCAP's Attack on Creative Commons. *Huffington Post Online*. July 19, 2010. **http://www.huffingtonpost.com/lawrence-lessig/ascaps-attack-on-creative_b_641965.html**

Anonymous Attacks German Collecting Society GEMA

Leonhard Dobusch, 2011/06/20

A few days ago, the German collecting society GEMA was criticised by the CEOs of leading music labels such as Universal or Sony Music for not being able to negotiate an agreement with Google, the owner of YouTube, that would allow their music videos to be featured on the site (see p. 154 *"Cracks in the Content Coalition: Corporations versus Copyright Collectives"* in this volume). Today, the German branch of the "hacktivism" group Anonymous weighed in and launched a campaign against GEMA[263].

263 Anonymus (2011): Stellungnahme zur GEMA. *youtube.com*. June 16, 2011. **http://www.youtube.com/watch?v=g-qFLX26-O8**

At the time I was writing this post, the GEMA homepage was down, most likely because of a distributed denial-of-service attack – the standard form of online protest organised by Anonymous. The rationale for the attack given in the video explicitly refers to the recent criticism by major label representatives and reads as follows (my translation):

Anonymous Flag – the Symbolism of the "Suit without a Head" Represents Leaderless Organisation and Anonymity

Source: Kizar (2011): Anonymous Anarchist Flag. Wikipedia. http://en.wikipedia.org/wiki/File:Anonymous_Anarchist_Flag.svg

Operation Payback Flyer

Source: Anonymous (2010): You Call It Piracy.jpg. Wikipedia. http://upload.wikimedia.org/wikipedia/commons/e/ee/You_call_it_piracy.jpg

Dear Society for Musical Performing and Mechanical Reproduction Rights [GEMA, L.D.], we are Anonymous. We observe with apprehension your excessive demands with regard to copyrighted materials on YouTube and similar platforms. The result is certainly known to many YouTube users in this country. One clicks on a music video but only receives the message that regrettably this video is not available in Germany since the GEMA has not granted the rights to publication. ... Anonymous regards this as a restriction of the free flow of information. ... Google will not be able to meet your excessive demands, since it cannot generate the necessary ad revenues. We don't have a problem with the fact that you want to provide earnings for music labels and artists – in doing so, however, you stand in your own way and, therefore, also that of the artists. Musicians need YouTube videos. In the meantime, this has even been recognised by the music labels, since these constitute promotion free of charge, which no musician wants to waive voluntarily. If this behaviour does not change, we will feel impelled to induce further measures. By now we will have already distributed certain tools with which we will enable users to watch blocked videos as well. The link to such tools is provided in the description of this video. By this means we wish to achieve a faster agreement with Google.

The remainder of the video features the standard description of groups considering themselves part of the Anonymous network:

We are Anonymous.
We are Legion.
We do not forgive.
We do not forget.
Expect us!

According to the Wikipedia-List[264] of activities that Anonymous groups claim responsibility for, this is not the first attack predominantly motivated by copyright issues. The so-called "Operation Payback"[265] had also targeted major pro-copyright and anti-piracy organisations, law firms, and individuals (see also the Operation Payback flyer "You Call It Piracy. We Call It Freedom.").

Such clear positioning in support of a corporate actor such as Google is also remarkable, while previously it was corporations such as Sony (see "Operation Sony"[266]) or credit card companies that were attacked.

Finally, the mobilising and organising processes under the label of "Anonymous" seem particularly interesting from an organisation theory perspective – but these deserve their own post.

264 "Anonymous (group)", *Wikipedia*. **http://en.wikipedia.org/wiki/Anonymous_(group)#Activities**

265 "Operation Payback", *Wikipedia*. **http://en.wikipedia.org/wiki/Operation_Payback**

266 "Anonymous (group)/Operation Sony", *Wikipedia*. **http://en.wikipedia.org/wiki/Anonymous_(group) #Operation_Sony**

Elsevier Withdraws Support for Research Works Act, Continues Fight against Open Access

Leonhard Dobusch, 2012/02/27

In January 2012, Fields Medalist Tim Gowers complained in a blog post[267] about Elsevier's publication practices, which inspired the mathematics PhD student Tyler Neylon to launch the campaign "The Cost of Knowledge"[268]. The website makes three main accusations against Elsevier:

1. *They charge exorbitantly high prices for subscriptions to individual journals.*
2. *In the light of these high prices, the only realistic option for many libraries is to agree to buy very large "bundles", which will include many journals that those libraries do not actually want. Elsevier thus makes huge profits by exploiting the fact that some of their journals are essential.*
3. *They support measures such as SOPA, PIPA and the Research Works Act, which aim to restrict the free exchange of information.*

At the time I was writing this post, 7,434 researchers had signed a petition to declare publicly that they will not support any Elsevier journal unless the company radically changes how it operates. Most of the signers even specified that they "won't publish,

267 Gowers, Tim (2012): Elsevier – My Part in Its Downfall. *Gowers Weblog*. January 21, 2012. **http://gowers.wordpress.com/2012/01/21/elsevier-my-part-in-its-downfall/**

268 **http://thecostofknowledge.com/**

won't referee, and won't do editorial work" for Elsevier any more. And Elsevier, one of the largest and most profitable publishing houses in the world, seems to be beginning to falter.

First, Elsevier saw the necessity to respond with an open letter entitled "A message to the research community: journal prices, discounts and access"[269]. Again, Gowers took the time to respond point by point[270]. Today, Elsevier publicly announced that it is withdrawing its support for the Research Works Act[271]. However, this withdrawal is not the end of Elsevier's fight against open access mandates:

> *While we continue to oppose government mandates in this area, Elsevier is withdrawing support for the Research Work Act itself. We hope this will address some of the concerns expressed and help create a less heated and more productive climate for our ongoing discussions with research funders.*

As a researcher, I very much appreciate "The Cost of Knowledge". But looking at what is going on in other sub-fields of the copyright-based industries, I am still worried that in the end, the minority of large publishers will succeed in undermining the Internet's potential for open access to research; specifically, if researchers are not united on this issue, as was the case in "The German Open Access Uproar" in 2009 (see p. 190 *"The German Open Access Uproar: Missing the point?"* in this volume).

269 Gowers, Tim (2012): Elsevier's Open Letter Point by Point, and Some Further Arguments. *Gower's Weblog*. February 26, 2012. **http://gowers.wordpress.com/2012/02/26/elseviers-open-letter-point-by-point-and-some-further-arguments/**

270 Same source as above.

271 Doctorow, Cory (2012): Elsevier Withdraws Support from Research Works Act, Bill Collapses. *boingboing.net*. February 28, 2012. **http://boingboing.net/2012/02/28/elsevier-withdraws-support-fro.html**

'Move Prestige to Open Access': Harvard University Weighs in on Open Access

Leonhard Dobusch, 2012/04/25

In the academic world, the conflict between research institutions and publishers about the latter's reluctance to embrace open access strategies has been looming for years. While the Internet makes the distribution of research much cheaper and easier, subscription fees for the most important journals have kept rising. In 2009, the MIT Faculty had already unanimously adopted a university-wide Open Access rule (see p. 189 *"Universities as Copyright Regulators: Power and Example"* in this volume). In 2012, we can finally observe open battles on the issue.

After more than 10,000 researchers had joined the boycott of Elsevier earlier this year, last week Harvard University issued an official "Memorandum on Journal Pricing"[272]. After criticising the "untenable situation" that "many large journal publishers have made the scholarly communication environment fiscally unsustainable and academically restrictive", the memorandum suggests the following 9 points to faculty and students (F) and the Library (L):

272 The Faculty Advisory Council (2012): Major Periodical Subscriptions Cannot Be Sustained. *The Harvard Library*. April 17, 2012. **http://isites.harvard.edu/icb/icb.do?keyword=k77982&tabgroupid=icb.tabgroup143448**

1. Make sure that all of your own papers are accessible by submitting them to DASH in accordance with the faculty-initiated open-access policies (F).
2. Consider submitting articles to open-access journals, or to ones that have reasonable, sustainable subscription costs; move prestige to open access (F).
3. If on the editorial board of a journal involved, determine if it can be published as open access material, or independently from publishers that practice pricing described above. If not, consider resigning (F).
4. Contact professional organisations to raise these issues (F).
5. Encourage professional associations to take control of scholarly literature in their field or shift the management of their e-journals to library-friendly organisations (F).
6. Encourage colleagues to consider and to discuss these or other options (F).
7. Sign contracts that unbundle subscriptions and concentrate on higher-use journals (L).
8. Move journals to a sustainable pay per use system (L).
9. Insist on subscription contracts in which the terms can be made public (L).

Points #2 and #3 in particular target the most critical issues: prestige and reputation. Scientific publishing is a reputation game and the prestige of an outlet is all

that matters. This is why, so far, pleas for publishing Open Access have gone unheard. The most successful Open Access outlets such as the Public Library of Science (PLoS) were founded by Nobel laureates, who transferred their reputation to the new journals. To really change something, researchers have to take their reputation and run – away from restrictive publishers and towards Open Access outlets.

As a researcher, I can only hope that with Harvard weighing in so forcefully on Open Access, we will be able to observe change on this front soon. As I see it, chances have never been better. Reputation matters not only in science but also in regulatory struggles. And if Harvard cannot afford journal prices any more, which university can? For more information on the issue, check out the Guardian article "Harvard University says it can't afford journal publishers' prices"[273].

273 Sample, Ian (2012): Harvard University Says It Can't Afford Journal Publishers' Prices. *The Guardian Online*. April 24, 2012. **http://www.guardian.co.uk/science/2012/apr/24/harvard-university-journal-publishers-prices**

Piracy, Pirates and Pirate Parties

Leonhard Dobusch and Sigrid Quack

Having been started in January 2009 and dealing with issues of transnational copyright from the very beginning, the blog "governance across borders" has allowed us to track the rise of the transnational pirate party movement in real-time. A key finding is that the success of the pirate party movement has been truly transnational: drawing on transnational copyright-related social movements such as access to knowledge or open source software, successful pirate parties such as the German Piratenpartei have managed to link this overall frame to local peculiarities.

However, the articles in this chapter not only track the development of the German Pirate Party but also look at the piracy framework more generally: how was it possible for the pejorative notion of "pirates" as immoral criminals to be turned into an attractive denomination for political activists? In addition, one of the articles also discusses the role of the piracy discourse for the copyright industries.

Taken as a whole, the boom of piracy, pirates and pirate parties suggests that the current regime of intellectual property rights is in disarray – and regulatory responses so far seem to have fueled – if not created – political resistance rather than dampening it.

Social Movements, Pirate Parties and the European Parliamentary Elections

Leonhard Dobusch, 2009/06/08

Yesterday, the Swedish "Pirat Partiet" ("Pirate Party") actually made it into the European Parliament with 7.1 percent of the vote[274]. According to exit polls, the Pirat Partiet got 19 percent of the votes cast by young voters (18–30 years of age). This is remarkable for a single-issue party. But while the Swedish results can be explained to a large degree by the enormous attention for copyright issues around the Pirate Bay trial, the German "Piratenpartei" got nearly 1 percent (about 230,000 votes), as well. There, the pirate party achieved its best results in urban areas with large universities such as Bremen, Frankfurt or Gießen.

Given the fact that the Swedish Pirat Partiet, as the first pirate party, was not founded before 2006, the global proliferation of pirate parties is impressive. As of June 2009 the international pirate party listed 23 countries *"where you can find a Pirate Party, or where one is starting up"*. All pirate parties share a principle opposition towards the prevalent copyright regime in general and the criminalisation of peer-to-peer file-sharing in particular.

As was mentioned by Teppo Felin at orgtheory.net[275], pirate parties are obviously "an interesting setting to study organising and movements". Elsewhere, Sigrid Quack and I have also mentioned pirate parties as one important part of a broader, copyright related social movement. Still, this movement lacks a name[276]. Suggestions and self-descriptions range from "free culture" and "access to knowledge movement" to "cultural" or "digital environmentalism".

Independent of its labeling, some points can be made about this movement that has gathered around copyright related issues: *first*, it is the first social movement of a new generation of "digital natives". This explains, *second*, why (free and creative) usage of the Internet is both a means and an end of the different groups of actors carrying the movement. *Third*, it is probably the first social movement that was "born transnational". Free and open source software, peer-to-peer file-sharing and Internet neutrality are inherently transnational – if not global – phenomena.

274 See Pirate Parties International (2009): Pirate Parties Celebrate Election Victory. *pp-international.net*. June 7, 2009. **http://www.pp-international.net/files/PP_EU_Election_09_PR.pdf**

275 Felin, Teppo (2009): Pirate Party Social Movement. *orgtheory.net*. June 1, 2009. **http://orgtheory.wordpress.com/2009/06/01/pirate-party-social-movement/**

276 Dobusch, Leonhard, Quack, Sigrid (2008): Epistemic Communities and Social Movements: Transnational Dynamics in the Case of Creative Commons. MPIfG Discussion Paper 08/8. Cologne: Max Planck Institute for the Study of Societies. **http://www.mpifg.de/pu/mpifg_dp/dp08-8.pdf**

And as the movement's constituents are digital natives they are seemingly very open to and fast at adopting and adapting ideas and concepts developed elsewhere.

Internet Piracy: A Perfect Excuse?

Leonhard Dobusch, 2009/06/20

Yesterday, the organisers of one of Europe's largest music conferences "Popkomm" publicly announced its cancellation for 2009. Originally, it was to take place in September at "Station Berlin". Ralf Kleinhenz, Managing Director of Popkomm Gmbh, gave the following reasons for the cancellation of this year's event[277]:

> *A situation that was becoming clear early this year at Midem in Cannes also seems to be affecting Popkomm in Berlin. Despite positive reactions to the new event location and a satisfactory number of bookings by exhibitors, because of the economic situation we anticipate a considerable decline in trade visitor attendance. Out of responsibility towards the exhibitors we have therefore decided to postpone Popkomm for one year.*

277 The original press statement is no longer available online. However, the quote can be found online. See, for example, Suisa (2009): Next Popkomm to Take Place in 2010. *suisa.ch*. June 19, 2009. **http://www.suisa.ch/en/news/old-news/news/article/2009/06/19/popkomm-2009-abgesagt/**

While this reads like a reference to the overall economic crisis, Dieter Gorny, head of the Association of the German Music Industry, tried to reframe the cancellation into a political statement later that day:

> *The digital crisis is hitting the music industry full on. Because of Internet piracy, many companies cannot afford to take part at Popkomm any longer. ... We want to show that politics must finally act to stop the theft of intellectual property on the net*[278] *(translated by Leonhard Dobusch).*

278 Handelsblatt (2009): Popkomm wegen Piraterie-Protest abgesagt. *Handelsblatt Online*. June 19, 2009. **http://www.handelsblatt.com/unternehmen/it-medien/musikmesse-popkomm-wegen-piraterie-protest-abgesagt/3202288.html**

This strategy of blaming Internet piracy for all of the music industry's problems is not new. For years this has been the chorus sung by music industry representatives whenever there is bad news. But piracy is probably too good an excuse: if one has the impression that business models and strategies are only threatened by criminals and would otherwise work, this may not be the best starting point for (self-) critical reflection and innovation. Might it be that the music industry is failing to

cope with digital challenges because its major proponents have a "perfect excuse" for their management failures? In a way, their defeatism might *performatively*[279] lead to their eventual defeat. Just consider this as an alternative explanation.

279 See Ferraro, Fabrizio (2009): What Can Performativity Do for You? *orgtheory.net*. June 4, 2009. **http://orgtheory.wordpress.com/2009/06/04/what-can-performativity-do-for-you/**

Is Google News Piracy? Publishers, Zoo Directors and Copyright

Leonhard Dobusch, 2009/08/10

More than seven years ago in 2002, Google launched its automated news aggregator "Google News": articles are selected and ranked by an algorithm according to characteristics such as issue frequency, freshness, location, relevance and diversity. On its front page, Google News presents the headlines and about 200 characters from some articles together with links to the full texts wherever available online.

No later than 2005, Google had to face the first law suits dealing with alleged copyright infringement filed by news agencies (e.g. Agence France Presse). Their claim: Google was generating revenue using their content without proper compensation. But news agencies are not the only ones demanding their share from Google's profits. Recently, the European Publisher Council (EPC) as well as the World Association of Newspapers and News Publishers (WAN-IFRA) and several of their member organisations signed the "Hamburg Declaration on Intellectual Property Rights"[280] that bemoans too little protection of and compensation for online content. In Germany, the Federation of German Newspaper Publishers (BDVZ) is even calling for a new, all-embracing ancillary copyright with lump-sum payments as compensation for revenues that third parties like Google make with their content.

Critics of these claims, however, accuse publishing houses of simply failing to develop new business models and therefore now trying to lobby for legally enforced compensation. One of these critics, blogger Malte Welding, compared the CEOs of publishing houses to zoo directors in a very entertaining piece[281] in the German online-only paper "netzzeitung":

280 European Publisher Council and World Association of Newspapers and News Publishers (2009): Hamburg Declaration on Intellectual Property Rights. *encourage-creativity.org*. June 2009. **http://www.encourage-creativity.org/en/**. See list of signatories: **http://www.encourage-creativity.org/signatories/**

281 Welding, Malte (2009): Google und der Zoodirektor. *netzeitung.de*. July 31, 2009. **http://www.netzeitung.de/internet/blogblick/1418719.html**

> *Imagine you are a zoo director. 50 percent of your visitors arrive via public transport. Bus and train operators and taxi drivers don't pay a cent for feeding the animals but make a lot of profit from the visitors to the zoo. So it is common sense that you, as a zoo director, would demand money from the transport corporations. (translated by Leonhard Dobusch)*

The absurdity of the comparison perfectly demonstrates the way in which the legitimacy of claims for compensation is socially constructed; a task that publishing houses are in a privileged position to fulfil due to their numerous and powerful media outlets. But not only the legitimacy of the claims is far from being self-evident; their framing as a copyright issue is, as well. Zachary M. Seward from the Nieman Journalism Lab at Harvard University provides snippets from a debate between Doug Lichtman (UCLA) and NYT lawyer Ken Richieri, in which the latter expresses his doubts that aggregation is a copyright issue after all[282]:

> *"I mean, I think the big issue online and the pressure publishers are feeling is that publishers online are having a hard time replicating the economics that they saw offline. And many of them are looking at that through the lens of copyright. ... I think where I would just draw a distinction is I am not so sure that copyright is really the culprit in a lot of this ... that that's an imperfect lens and an imperfect remedy."*

This points to an interesting challenge for research dealing with copyright regulation, namely not to take the object or field of copyright regulation as given. At the same time, it impressively emphasizes the power of framing: successfully framing a subject matter as an object of copyright regulation may lead performatively to its regulation within an existing copyright regime.

282 Spielkamp, Matthias (2009): Wir können nicht so viel Geld verdienen, wie wir gern würden, also sagen wir, das Urheberrecht muss geändert werden. *immateriblog.de*. July 23, 2009. **http://immateriblog.de/journalismus/wir-konnen-nicht-so-viel-geld-verdienen-wie-wir-gern-wurden-also-sagen-wir-das-urheberrecht-muss-geandert-werden/**

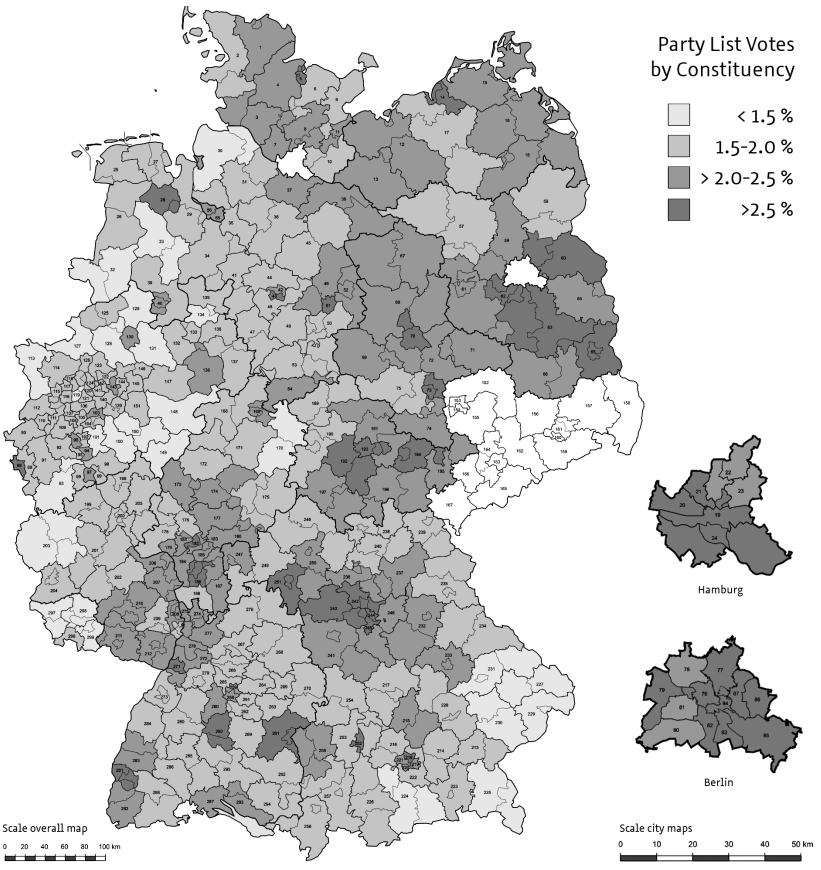
Pirate Parties: Transnational Mobilisation and German Elections

Sigrid Quack and Leonhard Dobusch, 2009/10/01

On Sunday, 27 September 2009, the Pirate Party running for the first time in German federal elections promptly won 2 percent of the votes. In some constituencies, particularly in university towns and urban centres, it gained up to 6 percent. In total, 850,000 voters cast their vote for the Pirate Party[283].

283 Der Bundeswahlleiter (2009): Endgültiges Ergebnis der Bundestagswahl 2009. **http://www.bundeswahlleiter.de/de/bundestagswahlen/BTW_BUND_09/ergebnisse/bundesergebnisse/index.html**

Pirate Party Votes in the German Federal Election 2009



Source: Doc_ter_ror (2010): Bundestag 2009 PIRATEN.svg. Wikipedia. http://de.wikipedia.org/wiki/Datei: Bundestag_2009_PIRATEN.svg, declared as public domain by the author.

While this result does not bring the Pirate Party into the German parliament because of its 5 percent barring clause, this is nevertheless quite an impressive result for a young party that was founded only three years ago. Just to compare, the Green Party gained only 1.5 percent in its first run at the German Federal elections in 1980[284], even though it had reunified a number of regional parties with experience in municipal councils and *Länder* parliaments.

284 Der Bundeswahlleiter (2009): Wahl zum 9. Deutschen Bundestag am 5. Oktober 1980. **http://www.bundeswahlleiter.de/de/bundestagswahlen/fruehere_bundestagswahlen/btw1980.html**

The first signs of the Pirate Party gaining electoral support became visible in the earlier elections for the European Parliament on 7 June this year, where the Pirate Party obtained 0.9 percent (see also p. 202 *"Social Movements, Pirate Parties and the European Parliamentary Elections"* in this volume). In the *North Rhine-Westphalian* communal elections on 30 August, members of the Pirate Party gained seats in the municipal councils of the cities of *Münster* and *Aachen*. Parallel to its public visibility and electoral support, the membership of the Pirate Party has been growing rapidly to what are currently almost 10,000 members, of which about 8,000 joined the party during the last four months.

Still, this leaves interesting questions about what made nearly a million people vote for a relatively unknown and non-established party, and what this party's perspectives are for the next elections in North Rhine-Westphalia in 2010. Is the Pirate Party comparable to a "Biertrinker-Partei" ("beer-drinker party"), as suggested by political scientist Oscar W. Gabriel[285], and is its success therefore a short flash in the pan, which will disappear as quickly as it popped up?

285 Der Westen (2009): Politologe sagt Piratenpartei keine große Zukunft voraus. *Westdeutsche Allgemeine Zeitung Online*. September 28, 2009. **http://www.derwesten.de/politik/politologe-sagt-piratenpartei-keine-grosse-zukunft-voraus-id227265.html**

In the following we will suggest that the development of the Pirate Party in Germany needs to be placed within a broader context in order to be understood better: the gains of the Pirate Party build on both a network of transnational activists criticising what is, in their view, an unbalanced extension of copyright protection and more localised social movements concerned with new data retention and surveillance plans. The internet is the place where these rather broad trends enter people's everyday experience, particularly that of those who have jobs in computing, software, creative industries, media, education, research, universities – not to mention the palpable and rather concrete experiences of all those who wish to download music, share files and access open content in their free time.

Transnational context: How a file sharing server in Sweden led to the birth of a party in Germany

Originally, "piracy" was considered to be something evil. As Sell and Prakash convincingly argue, lobbyists in favour of stronger protection of intellectual property

rights had used the term to describe and thereby delegitimize previously legal practices in (mostly developing) countries[286]. How come pirate parties in over 20 countries have managed to at least partially re-define the notion of "pirates" and "piracy" by using it successfully as a description of their idealistic and political actions? In a way, establishing pirate parties resembles the adoption and re-definition of previously derogatory terms such as "queer"[287] by the very group that is addressed using such terms.

In their self-description as "pirates", the founders of the first pirate party, the Swedish "Piratpartiet"[288], followed the Swedish anti-copyright organisation "Piratbyrån" ("The Pirate Bureau"). In 2003 the Piratbyrån had started the now famous website "The Pirate Bay", which enables file-sharing by indexing "torrent-files" and received enormous media attention around the "Pirate Bay Trial". It was this media attention not least that led to the Piratpartiet's success in the elections to the European Parliament, where they won 7.1 percent of the votes and became the fifth strongest party, overtaking the old-established Left Party and the Centre Party[289].

But the success of the Piratpartiet was not limited to the ballot boxes. Established parties like the Moderate Party (Moderaterna) and Swedish Left Party (Vänsterpartiet) have meanwhile changed their positioning within the field of copyright in general and on file-sharing in particular. What is more, the Swedish example initiated a series of followers in currently over 30 different countries. One such follower is the German "Piratenpartei".

But neither the Swedish nor the German pirate party had to start from scratch; several other organisations had prepared the ground for their mobilisation; actually, pirate parties are part of a relatively broad, transnational social movement. The prevalent regime of strong intellectual property rights protection had come under attack by NGOs such as the ETC Group (Action Group on Erosion, Technology and Concentration) in the field of patents, and by Creative Commons in the field of copyright[290]. Among the "movements" in the field of "Intellectual property reform activism" Wikipedia lists by name the Access to Knowledge Movement, Anti-Copyright, Cultural Environmentalism, the Free Culture Movement, and the Free Software Move-

286 Sell, Susan K., Prakash, Aseem (2004): Using Ideas Strategically: The Contest between Business and NGO Networks in Intellectual Property Rights. In: *International Studies Quarterly*, 48 (1): 143–175. **http://www.asc.upenn.edu/usr/ogandy/C45405 resources/Sell and Prakash using ideas.pdf**

287 See Jagose, Annemarie (1996): *Queer Theory*. Melbourne: University of Melbourne Press. **http://www.australianhumanitiesreview.org/archive/Issue-Dec-1996/jagose.html**

288 **http://www.piratpartiet.se/international/english**

289 Statistics Sweden (2009): Sweden Goes against European Trend. Published in Stockholm, October 15, 2009. **http://www.scb.se/Pages/PressRelease____280644.aspx**

290 See Dobusch, Leonhard, Quack, Sigrid (2008): Epistemic Communities and Social Movements: Transnational Dynamics in the Case of Creative Commons. MPIfG Discussion Paper 08/8. Cologne: Max Planck Institute for the Study of Societies. **http://www.mpifg.de/pu/mpifg_dp/dp08-8.pdf**

ment. It is the year-long activism of their proponents, together with (partly illegal) file-sharing as a mass phenomenon, upon which pirate parties all around the world are building.

At least to some extent, this social movement context makes a pirate party into more than a mere "single issue party". Opposition to copyright and patents spans many different areas – from genetically engineered food and development politics ("biopiracy" and "gene patenting") to education and science (Open Courseware, Open Access), software, culture and innovation (Free Software, Free Culture, Open Innovation) – and includes aspects of inequality in terms of access to immaterial goods in a so-called knowledge society. Furthermore, this range of issues may be complemented by local initiatives, as is the case in Germany.

Local context: Reminiscences of the campaign against "Volkszählung" in the 1980s

In spite of the transnational or even global character of these movements, pirate parties develop differently from country to country as they mix and co-evolve with local idiosyncrasies and movements.

Within Germany, some advocacy of the Piratenpartei evokes reminiscences of the civil activist campaign against the "Volkszählung" in 1983. At that time, the plan of the German government for a population census was seen as intruding into the privacy of citizens and creating the technical potential for a "Big Brother Society" of state surveillance. These fears gave rise to the rapid creation of thousands of citizens' action committee's against the census, petitions signed by thousands of people, and a broad civil society coalition including representatives of churches, unions and civil society organisations like the Humanistische Union, and led the German Constitutional Court *(Bundesverfassungsgericht)* in its decision (1 BvR 209/83) to formulate a basic right to "Informationeller Selbstbestimmung" (data privacy) which also shaped European policies in this field[291].

Some loose threads of this historical movement have recently been taken up by the German pirate party in its opposition against new legislation on "data retention", online computer surveillance and Internet censorship by a so-called "Access Impediment Act"[292].

While tapping into the remaining skepticism towards technical surveillance by the state, which has grown after German reunification due to decade-long spying by the East German "Ministry for State Security" ("Stasi") as well as in response to new anti-terror legislation introduced following September 11, the new anti-surveillance ac-

291 See Newman, Abraham L. (2008): *Protectors of Privacy*. Ithaca, NY: Cornell University Press.

292 See Bendrath, Ralf (2007): Surveillance Plans and the Growing Privacy Movement in Germany. *bendrath.blogspot.de*. April 20, 2007. **http://bendrath.blogspot.de/2007/04/surveillance-plans-and-growing-privacy.html**

Pirate Party Campaigning Poster on Issues of Privacy and Surveillance

Source: Piratenpartei (2009). http://wiki.piraten-partei.de/wiki/images/c/c2/Plakat_-_Demokratie_braucht_Privatsphäre.pdf

tivists in Germany do not reject the use of new technologies in principle. On the contrary, the majority of German pirate party activists might very well be called "netizens", who integrate new digital technologies into nearly every aspect of their professional and personal lives. As opposed to the general critique of technology in the 1983 census protests, pirate party activists reject technological surveillance because they also want to use these new devices in their most personal matters.

Future perspectives

Consequently, most of the German pirate party's election campaigns also take place on or are at least organised via the Internet. A visit to the Piratenpartei's website prior to the elections revealed the busy life of a beehive: while it is common for politicians of all parties to use online platforms like Facebook and Twitter to let their electorate participate in their everyday experiences, there is no other German party that has made such innovative use of its website for coordinating the election campaign, from fund raising to plastering cities with posters, and from meetings at regulars' tables to organising public demonstrations. Christoph Bieber even calls this form of campaigning an *"augmented reality game"*[293].

While the focus on online campaigning was due not least to scarce financial resources, this may change due to the recent election results, which crossed the 0.5 percent threshold required to get campaign funding from the federal government for the next elections. Party chief Jens Seipenbusch is already considering how to invest the funds for further mobilisation. As appropriate for a party representing a growing population of young (and old) internet users, among the options discussed is not only the hiring of additional personnel to handle the party's exceptional growth (see graph below), but also the acquisition of new software and equipment to facilitate online voting and a discussion forum for members.

The (intentionally) very open mode of online campaigning, however, also has its adverse side-effects, such as maverick followers whose views might compromise the

293 Bieber, Christoph (2009): Kampagne als "Augmented Reality Game": Der Mitmachwahlkampf der Piratenpartei. *carta.info*. September 25, 2009. **http://carta.info/15450/kampagne-als-augmented-reality-game-der-mitmach-wahlkampf-der-piratenpartei/**

party, legions of "trolls"[294] and a male bias: as opposed to the Swedish Piratpartiet, for example, which had several female candidates on its list for the European parliamentary election, its German counterpart is dominated by male computer professionals. This is a situation that has inspired heated debates in the German blogosphere about whether feminists could vote for the pirate party or not (see, for example, danilola or maedchenmannschaft)[295].

Antje Schrupp summarised her concerns in a blog post titled "Can a feminist vote for pirates?"[296] as follows:

> *There is a new party, rebellious, wild and strong-willed in their struggle against old frumps – and then they emerge as deeply sexist, and even worse, they don't even seem to care about this. Now what shall we do with the pirates? (translated by Leonhard Dobusch).*

A question that is still open to answers, not only for feminists.

294 See Guenther, Tina (2009): Die neue Hitze des Wahlkampfs & die Piratenpartei. *sozlog.wordpress.com*. September 17, 2009. **http://sozlog.wordpress.com/2009/09/17/die-neue-hitze-des-wahlkampfs-die-piratenpartei/**

295 See, for example, Vetter, Danilo (2009): Warum ich keine Piratenpartei wählen werde, aber im Herzen ein_e Pirat_in bin. *danilola.wordpress.com*. September 1, 2009. **http://danilola.wordpress.com/2009/09/01/warum-ich-keine-piratenpartei-wahlen-werde-aber-im-herzen-ein_e-pirat_in-bin/**; Berg, Anna (2009): „Jede Diskriminierung ist abzulehnen" – Das Wahlprogramm der Piratenpartei. *maedchenmannschaft.net*. September 22, 2009. **http://maedchenmannschaft.net/„jede-diskriminierung-ist-abzulehnen"-das-wahlprogramm-der-piratenpartei/**

296 Schrupp, Antje (2009): Can a Feminist Vote for Pirates? *antjeschrupp.com*. September 3, 2009. **http://antjeschrupp.com/2009/09/03/kann-eine-feministin-piraten-wahlen/**

Bono Bashes File-Sharing: Learning from China's Online Censorship?

Leonhard Dobusch, 2010/01/05

Paul David Hewson, better known under his stage name "Bono Vox" as frontman of the rock band U2, is undisputedly one of the world's best-known philanthropists. He holds – and expresses – pointed opinions on a huge variety of subjects, leading him to the foundation of his organisation DATA, an acronym for "Debt, AIDS, Trade, Africa". So it was no surprise when, in his recent New York Times op-ed, he addressed issues covered by this blog. In his piece *Ten for the Next Month*[297], number 2 dealing with intellectual property caught my attention particularly:

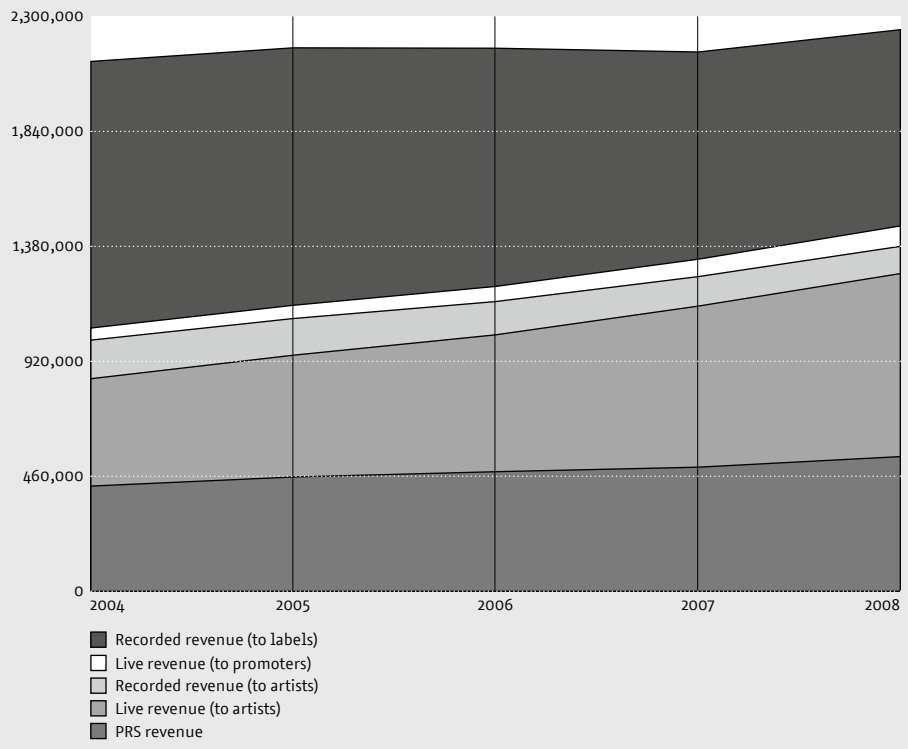
297 Hewson, Paul David [Bono] (2010): Ten for the Next Month. *New York Times*. January 12, 2010: WK10. **http://www.nytimes.com/2010/01/03/opinion/03bono.html?_r=0**

> *A decade's worth of music file-sharing and swiping has made clear that the people it hurts are the creators – in this case, the young, fledgling songwriters who can't live off ticket and T-shirt sales like the least sympathetic among us – and the people this reverse Robin Hooding benefits are rich service providers, whose swollen profits perfectly mirror the lost receipts of the music business. (Hewson [Bono] 2010)*

Is it really true that the biggest losers of file-sharing are the creators? Bloggers at the UK Times[298] came to different conclusions in their recent analysis, presenting the following *"graph the record industry doesn't want you to see"*:

298 Do Music Artists Fare Better in a World with Illegal File-Sharing? *The Times Online*. November 12, 2009. **http://web.archive.org/web/ 20101029235815/http://labs.timesonline.co.uk/blog/2009/11/12/do-music-artists-do-better-in-a-world-with-illegal-file-sharing/**

UK Music Industry Revenues 2004 to 2008



Source: Do music artists fare better in a world with illegal file-sharing? The Times Online. November 12, 2009. Available online: http://web.archive.org/web/20101029235815/http://labs.timesonline.co.uk/blog/2009/11/12/do-music-artists-do-better-in-a-world-with-illegal-file-sharing/

The Times-Online analysis shows that *"revenues accrued by artists themselves have in fact risen over the past 5 years, despite the fall in record sales"*. But Bono did not stop at bemoaning his fellow musicians' situation. Instead, he presented a solution to the problem, namely to "track content" on the Internet:

> *But we know from America's noble effort to stop child pornography, not to mention China's ignoble effort to suppress online dissent, that it's perfectly possible to track content. (Hewson [Bono] 2010)*

Two things about this line are disturbing: first, Bono seems to demand and justify the same measures used to stop child pornography to hunt down kids sharing their favourite songs on the net. Second, he seems to advocate the establishment of an infrastructure for online content control similar to the one in China. This infrastructure should, of course, only be put into action for "noble efforts" such as pursuing evil music pirates. If I was a member of one of the growing pirate parties in Europe, I could not thank Bono enough for such elaborate comparisons.

Too Sexy to Be an Insult: Framing Piracy

Leonhard Dobusch, 2010/03/19

No discussion of regulatory struggles, transnational mobilisation, or institutional entrepreneurship lacks references to the importance of actors' framing strategies[299]. More often than not, oppositional attempts to establish discursive hegemony lead to changes in wording and/or a constant drift in the meaning and connotation of important terms. One of the most interesting questions in the context of such framing battles is whether actors try to establish their own, new wording or attempt instead to change the meaning/connotation of existing frames.

299 For an overview, see Benford, Robert D., Snow, David A. (2000): Framing Processes and Social Movements: An Overview and Assessment. In: *Annual Review of Sociology*, 26: 611–639. **http://www.annualreviews.org/doi/pdf/10.1146/annurev.soc.26.1.611**

Discussing the election success of European pirate parties (see p. 206 *"Pirate Parties: Transnational Mobilisation and German Elections"* in this volume), Sigrid Quack and I had already emphasised their success in re-defining a derogatory designation and compared it to other examples of successful re-framing such as the case of the term "queer"[300].

300 Jagose, Annemarie (1996): *Queer Theory*. Melbourne: University of Melbourne Press. **http://www.australianhumanitiesreview.org/archive/Issue-Dec-1996/jagose.html**

In the meantime, major representatives of the copyright industries seem to have recognised that the continued fight against "pirates" could be a strategic mistake – at least when it comes to wording. As Nate Anderson at ars technica[301] reports, the head of the International Actors' Federation, Agnete Haaland, said *"We should change the word piracy"* at a press conference:

301 Anderson, Nate (2009): "Piracy" Sounds Too Sexy, Say Rightsholders. *arstechnica.com*. March 18, 2010. **http://arstechnica.com/tech-policy/2010/03/piracy-sounds-too-sexy-say-rightsholders/**

> *"To me, piracy is something adventurous, it makes you think about Johnny Depp. We all want to be a bit like Johnny Depp. But we're talking about a criminal act. We're talking about making it impossible to make a living from what you do."*

On the one hand, this statement declares defeat in the battle on framing "piracy" as something evil. Or, in the words of Nate Anderson: they *"should have chosen a less-sexy term"*. On the other hand, it is the kick-off for the next round, in which proponents of the copyright industry will follow a change-the-wording-strategy. Ars technica points to Rupert Murdoch's son James to illustrate these tactics, referring to a quote in a guardian article[302]:

302 Martinson, Janes (2010): James Murdoch: Illegal Downloading No Different from Stealing a Handbag. *The Guardian Online*. March 18, 2010. **http://www.guardian.co.uk/media/2010/mar/10/murdoch-illegal-dowloading-stealing-handbag**

> *We need enforcement mechanisms and we need governments to play ball… There is no difference between going into a store and stealing Pringles or a handbag and taking this stuff. It's a basic condition for investment and economic growth and there should be the same level of property rights whether it's a house or a movie.*

From a research perspective it would be interesting to reconstruct when and how the connotation of "piracy" switched. Was it really Johnny Depp's performance in "Pirates of the Caribbean"? Was it the success of "The Pirate Bay"? Or was it a mistake to use the word "pirate" to designate file-sharers from the very beginning? And if so, why did the industry and their multi-million-dollar anti-piracy campaigns follow this path for such a long period of time?

On a more general level, it would also be interesting to look at the reasons why actors choose to adopt and change the meaning of a term instead of trying to change the wording. As a first guess, I would say that the former strategy is also possible without marketing budgets – especially when there is a mismatch between the hegemonial discourse and the actual practices of large groups of people. Such a discrepancy between discourse and practice could be seen as an invitation to subversive re-framing.

Boarding Berlin: The Pirate Party Triumph in the German Capital (FAQ)

Leonhard Dobusch, 2011/09/19

Returning to Berlin from the Creative Commons Global Summit 2011 in Warsaw (see p. 181 *"CC Global Summit 2011: The End of the Porting Experiment?" [#1–3]* in this volume), it seems the political landscape of the city has been shaken by a Pirate Party election success. Two years ago, the German Pirate Party won 2 percent in the German federal election (see p. 206 *"Pirate Parties: Transnational Mobilisation and German Elections"* in this volume). Today, they entered Berlin's state parliament with 8.9 percent of the votes and 15 seats[303]. This is the first time that the German Pirate Party has been able to enter a state parliament, proving that the 2009 election results were not just a flash in the pan.

The dimension of the win was completely unexpected, even for the Pirate Party, which is best illustrated by the following fun fact: the Berlin Pirate Party had only nominated 15 candidates[304]

303 Die Landeswahlleiterin für Berlin (2011): Wahlen zum Abgeordnetenhaus von Berlin und zu den Bezirksverordntenversammlungen am 18. September 2011. Endgültiges Ergebnis. *berlin.de*. **http://www.wahlen-berlin.de/wahlen/BE2011/ergebnis/karten/zweitstimmen/ErgebnisUeberblick.asp? sel1=1052 &sel2=0651**

304 Germany's Pirate Party Celebrates Historic Victory. *Der Spiegel Online*. September 19, 2011. **http://www.spiegel.de/international/germany/the-new-rebels-germany-s-pirate-party-celebrates-historic-victory-a-787044.html**

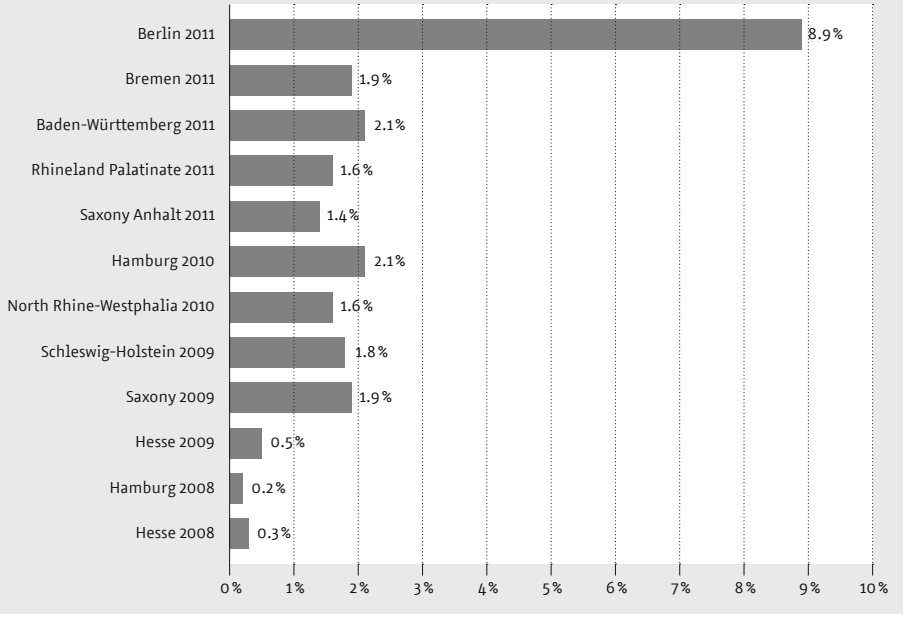
for the state-wide election, all of which are now members of the parliament; had the Pirate Party won only one more seat it would not have been able to fill it.

The following Q&A is meant to give some background information to a non-German-speaking audience.

Is the success of the Pirate Party in Berlin only a regional exception?

Yes and no. Yes, because so far at least the German Pirate Party has only succeeded in urban areas and not at all on the state level – even in city-states such as Hamburg it did not get more than 2.1 percent (see graph below). For now, the *dimension* of the election success of the Pirate Party in Berlin is a regional peculiarity.

Election Results of the German Pirate Party (State Level) 2008–2011



Source: Author's presentation based on http://www.wahlrecht.de/

No, because the German Pirate Party is part of a transnational movement critical of the prevalent regime of strong intellectual property rights protection, which manifests in a growing number of national pirate parties (see also the following articles in this volume).

Has the Pirate Party overcome its male bias?

Pirate Parties are regularly criticised for their gender bias. The Berlin chapter provides striking evidence of this bias. Only one (!) of the 15 Pirate Party members of the state parliament in Berlin will be a woman. The electorate of the Pirate Party in Berlin is also dominantly male.

Who are the Pirate Party candidates? What do they have in common?

Most of the newly elected members of the Berlin state parliament (9 out of 15) have a professional background in the field of information technology, and the majority have university degrees.

Is the Pirate Party a one-issue-party?

The core of the Pirate Party brand is, of course, issues related to the Internet. And one wing of the German Pirate Party known as "Kernis" – relating to "Kern", the German word for "core" – suggests that the Party should focus solely on these core issues; these include opposition to Internet surveillance or access controls as well as demands for substantial copyright reform. The other wing of the party, which is dominant in Berlin, favours developing a comprehensive programme addressing all kinds of issues.

What other issues did the Pirate Party campaign for in Berlin?

In addition to its core Internet topics, the Pirate Party Berlin campaigned, among others, for the following issues (the complete list can be found in the German manifesto[305]):

- Minimum wage law
- Guaranteed basic income
- Free access to public transport
- Free access to education (e.g. no tuition fees)
- Legalisation of soft drugs, specifically Marijuana

The official TV spot[306] for the Berlin election illustrates some of these issues.

305 Piratenpartei Landesverband Berlin (2011): Wahlprogramm Berlin 2011. **http://berlin.piratenpartei.de/wp-content/uploads/2011/08/PP-BE-wahlprogramm-v1screen.pdf**

306 Piraten Berlin (2011): Wahlwerbespot der PIRATEN Berlin zur Abgeordnetenhauswahl 2011. *youtube.com*. August 18, 2011. **http://www.youtube.com/watch?v=MgGwOUMwHCs**

Is the Pirate Party politically left or right?

In Berlin, the Pirate Party definitely belongs to the left political spectrum, both in terms of its political programme (see the previous question) and in terms of its electorate. Exit polls show that the Pirate Party received votes from two main sources: left-wing parties (Social Democratic Party, The Left, and the Greens) and previous nonvoters.

Pirate Party Win in Berlin: Transnational Implications?

Leonhard Dobusch, 2011/09/20

This blog is intended to deal with issues related to governance across borders. So why devote so much space to the results of a regional election in Germany? The answer is twofold.

First, the Pirate Party's election win in Berlin would not have been possible without its relations with a much broader, transnational movement. For one, this includes fellow pirate parties in over 40 different countries, most of which are members of the meta-organisation[307] "Pirate Parties International". But the pirate party movement itself is also only one of several related and partly overlapping social movements inspired by the new technological possibilities of the Internet and digital technologies.

Most of these movements address regulation that is considered incompatible with or even harmful to new technology-related freedoms, often related to surveillance and intellectual property regulation. And all of these movements are transnational in both their perspective and their activism. Wikipedia, for example, lists five "movements" in the field of "Intellectual property reform activism"[308], namely the Access to Knowledge Movement, Anti-Copyright, Cultural Environmentalism, the Free Culture Movement, and the Free Software Movement. Prominent transnational organisations within these movements include, as pioneers, the Free Software Foundation and the Electronic Frontier Foundation, as well as more recent examples such as Creative Commons or the Wikimedia Foundation. In a way, the pirate party movement can be considered the

307 See Ahrne, Göran, Brunsson, Nils (2008): *Meta-Organisations*. Cheltenham: Edward Elgar. **http://books.google.de/books?id=-E-PfiuEWEQC&lpg=PR1&ots=ITBi7mvG0I&dq=meta-organisation%20brunsson&lr&pg=PR1#v=onepage&q=meta-organisation%20brunsson&f=false**

308 "Template: Intellectual Property Activism", *Wikipedia*. **http://en.wikipedia.org/wiki/Template:Intellectual_property_activism**

political arm of these movements – even though not all of the movement members feel comfortable about being associated with "Pirates". The similarity to the origins of the Green Party, which also emerged from several interrelated, environmentalist movements is in any case striking, not to mention the fact that Jamie Boyle already called for an "environmentalism for the net"[309] in 1997.

Second, the symbolic impact of entering the state parliament of a large country's capital city, with close to 10 percent of the votes, is substantial and definitely border-crossing. Even the New York Times felt the need to comment on the issue, quoting fellow German research blogger Christoph Bieber[310]:

> *"They are absolutely not a joke party", said Christoph Bieber, a professor of political science at the University of Duisburg-Essen. "While there was certainly an element of protest in the unexpectedly large share of the votes the Pirates won, they were filling a real need for voters outside the political mainstream who felt unrepresented. In the Internet, they have really found an underexploited theme that the other political parties are not dealing with", Mr. Bieber said.*

The pirate parties can be considered another instance of "revolting across borders", where the successes of one actor in one country quickly inspire similar initiatives in other countries, which might then retroact to their source. Hoping for such retroactive re-ignition of momentum might have been the reason why the founder of the first pirate party, Rick Falkvinge from the Swedish "Piratpartiet", joined the Pirates in Berlin at their election party; in Sweden, the Pirates received only 0.65 percent of the votes in the last federal election.

309 Doyle, James (1997): A Politics of Intellectual Property: Environmentalism for the Net? In: *Duke Law Journal*, 47: 87–116. **http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article= 1013&context=dlj**

310 Kulish, Nicholas (2011): Pirates' Strong Showing in Berlin Elections Surprises Even Them. *New York Times*. September 20, 2011. **http://www.nytimes.com/2011/09/20/world/europe/in-berlin-pirates-win-8-9-percent-of-vote-in-regional-races.html**

German Pirates' Winning Streak: More than Protest

Leonhard Dobusch, 2012/03/26

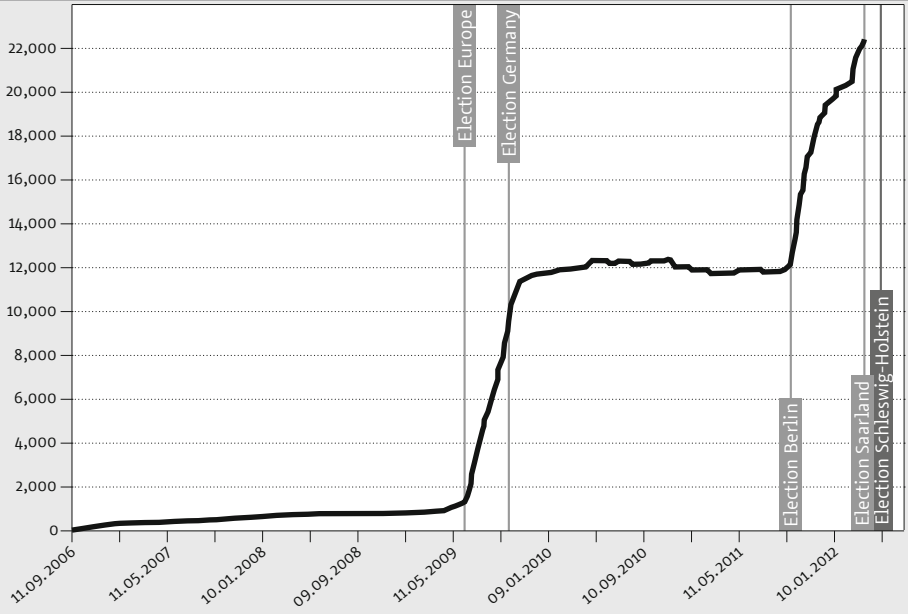
While the big win of the German Pirate Party in Berlin was major news, reported even by the New York Times, yesterday's win in the state of Saarland was already expected and thus received less international attention. However, the success remains remarkable. With 7.4 percent of the votes, the Pirate Party will receive twice as many seats in Saarland's state parliament as the Greens. Even more importantly, the Saarland results refute two common explanations of the Berlin victory. First, the success in Berlin was not a one shot wonder. Second, the Pirates can also win in more rural areas outside of the city states.

As a result, media commentators have turned to another narrative, attributing the Pirate Party's success mainly to collecting protest votes. I think this is wrong. While protest does play a part, several indicators suggest that this is not the dominant one.

Strong membership base: fueled by local election successes, the German Pirate Party reports growing membership numbers[311] all over the country

311 Pirateinpartei Deutschland (2012): Mitglieder. *wiki.piratenpartei.de*. **http://wiki.piratenpartei.de/Mitglieder**

Membership of the German Pirate Party 2006–2012

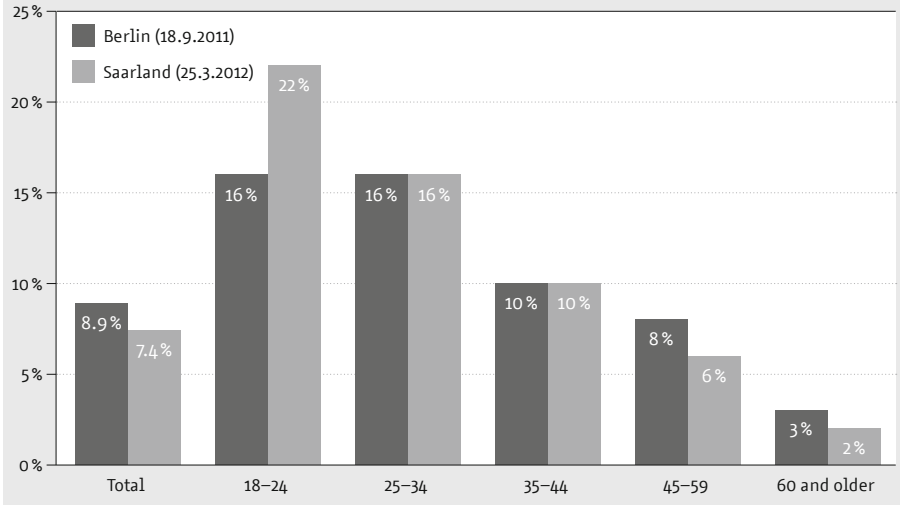


Source: Author's presentation based on http://wiki.piratenpartei.de/Mitglieder

(see Figure p. 220). However, becoming a member can be interpreted as a sign of identification with an organisation and certainly differs from mere protest directed against the so-called "established parties".

Success among young voters: in a similar way to the Berlin election, nearly one quarter of the first time voters (23 %) gave their vote to the Pirate party in Saarland. The sharp generational divide (see Figure below) indicates that reasons other than protest are more important for the Pirate Party's success. Or at least, the Internet generation or digital native arguments seem more convincing than the protest argument.

Pirate Party Voters by Age Group



Source: Author's presentation based on http://wahlarchiv.tagesschau.de

Transnational dimension: As mentioned several times on this blog (see p. 218, for example, *"Pirate Party Win in Berlin: Transnational Implications?"* in this volume), the German Pirate Party can only be understood in the context of several transnational movements. Together with Kirsten Gollatz, I have written a book chapter on the transnational dimension of the Pirate Party's success[312], which will appear soon in the German volume "Unter Piraten" edited by fellow research bloggers Christoph Bieber and Claus Leggewie. Some of the data we collected for this chapter is presented by my co-author in the following posts.

312 Dobusch, Leonhard, Gollatz, Kirsten (2012): Piraten zwischen transnationaler Bewegung und lokalem Phänomen. In: Bieber, Christoph, Leggewie, Claus (eds): *Unter Piraten: Erkundungen in einer neuen politischen Arena*. Bielefeld: Transcript, 25–40. **http://www.dobusch.net/pub/uni/Dobusch-Gollatz(2012)Transnationale-Piraten_PrePprint.pdf**

Transnational Pirates #1: State of the Movement

Kirsten Gollatz, 2012/04/05

The recent success of the Pirate Party in the Saarland state election in Germany is remarkable. The Pirates received 7.4 percent of the votes. Just days after the election, the party has even increased its acceptance on the federal level. Current opinion polls[313] measure their support at 12 percent of German voters.

In addition to its success in regional elections, the German Pirate Party also operates consciously within a transnational context. For example, the transnational perspective of the German pirates has been mentioned explicitly by Bernd Schlömer, at the time vice chair of the Pirate Party Germany, who pointed out that his party is part of a global movement. This movement, Schlömer added, might help to develop international positions, for example, regarding Foreign Affairs and Security Policies issues, which could then be reintroduced into national politics[314].

This recent example illustrates the two perspectives of the Pirate Party movement's transnational context, which Leonhard and I aim to examine further in a study pursued in January 2012, which will appear as a book chapter in the German edited volume "Unter Piraten"[315] .

We would like to present our empirical findings in three short posts, starting with a general description of the project, the data collection, and the first results concerning the state of the global Pirate Party movement.

State of the Movement

The central thesis of the project was that the success of pirate parties can only be understood by taking into account the transnational dimension. In this context, transnationality means the combination of cross-border and local practices by actors who are

313 Stern-RTL-Wahltrend (2012): Die Piraten stürmen voran. *Stern Online*. April 2, 2012. **http://www.stern.de/politik/deutschland/stern-rtl-wahltrend-die-piraten-stuermen-voran-1808568.html**

314 Schlömer, Bernd (2012): Wir dürfen jetzt nicht die Bodenhaftung verlieren. Interview in the German television news show *Tagesschau*. Video. Quote at 1:46 of 3:52 minutes. **http://www.tagesschau.de/inland/saarland-wahl132.html**

315 Dobusch, Leonhard, Gollatz, Kirsten (2012): Piraten zwischen transnationaler Bewegung und lokalem Phänomen. In: Bieber, Christoph, Leggewie, Claus (eds): *Unter Piraten: Erkundungen in einer neuen politischen Arena*. Bielefeld: Transcript, 25–40. **http://www.dobusch.net/pub/uni/Dobusch-Gollatz(2012)Transnationale-Piraten_PrePprint.pdf**

rooted simultaneously in local contexts and global networks[316]. Transnationality within the Pirate Party context is also twofold: on the one hand, the idea of the pirate parties has spread globally within the few years since the first party was founded in Sweden in 2006, leading to the establishment of more than 60 national pirate groups. And each of these parties adapts to different local conditions. On the other hand, this wave of founding new parties within a very short time span was only possible because the central ideas and concepts ("frames") of the pirate parties had already been established earlier in the context of transnational social movements concerning intellectual property rights (see p. 206 *"Transnational Mobilisation and German Elections"* in this volume)[317].

316 See Djelic, Marie-Laure, Quack, Sigrid (2003): *Globalisation and Institutions. Redefining the Rules of the Economic Game*. Cheltenham: Edward Elgar.

317 See also Dobusch, Leonhard, Quack, Sigrid (2012): Framing Standards, Mobilising Users: Copyright Versus Fair Use in Transnational Regulation. In: *Review of International Political Economy*, iFirst, 1–37. **http://www.dobusch.net/pub/uni/dobusch-quack(2010)copyright_between_creativity_and_exploitation.pdf**

Our data for the comparison of pirate parties in different countries was provided by an online survey of all pirate parties at the national level, which were listed on the Pirate Party International (PPI) website in January 2012. In addition, we gathered available online information about the respective parties. At the time of the survey 18 of the 64 identified pirate parties were officially registered as a party (28 %). Because contact details weren't available for all of these parties, the actual population of the survey was reduced to 56 national pirate parties.

In total, we received a response via e-mail from 28 (50 %) of the parties. Whenever a contact person could be elicited and the survey had not been filled out online, the survey was conducted via telephone. In this way we obtained a response from 14 (78 %) of all the officially registered pirate parties.

Data Base and Response Rate

Status	Parties	Population	Responses	Response rate
Registered parties	18	18	14	78 %
Active groups	30	30	12	40 %
Forming a group	6	3	1	33 %
Inactive groups	10	5	1	20 %
Totals	**64**	**56**	**28**	**50%**

Source: Author's survey

The forthcoming posts will present our analysis of issues and campaigning and the (inter-)organisational relation to local networks.

Transnational Pirates #2: Issues and Campaigning

Kirsten Gollatz, 2012/04/10

We operationalised the local context of pirate parties in three dimensions: the local roots of issues, the (inter-)organisational embeddedness in the local, and – related to the latter – the participation in elections (we will come back to that in Part 3 of the series). We intend to reveal how the parties build on various local opportunity structures and adapt to different local conditions. The following analysis focuses on our sample of 14 officially registered pirate parties.

Their integration into both a global and a specific local network can be shown in terms of themes and issues pursued by the respective pirate parties. Asking for the rationale for establishing a national pirate party in the first place paints a consistent picture. Although this was an open question, all 14 registered parties only referred to four main objectives:

1. Pursuit of themes of the global Pirate Party movement in their respective countries (8)
2. Transformation of political structures towards more transparency and participation (8)
3. To live up to earlier success and attention gained by pirate parties (7)
4. To take up concrete political issues in their respective countries (6)

The small range of general objectives reflects a common motivation within a transnational movement, which has led to a global wave of founding pirate parties. Against this backdrop, our findings also indicate that the range of political campaigning issues is more diverse and context-sensitive.

In addition to central concepts of the Pirate movement, such as intellectual property rights, transparency and political participation, freedom and civil rights, political campaigns are often specifically related and adapted to local needs. Important campaigns in particular, as highlighted by the respondents, are tied to specific local circumstances. We asked the respondents for a detailed description of one central campaign (see Tables below).

These examples indicate that the campaigns are based on specific and in many cases local events. As such, the campaign *Linking is not a crime*[318] realised by the Pirates of the Czech Republic was set

318 Bright, Peter (2011): "Linking Is Not a Crime": Czech Pirate Party Declares War on Big Content. *arstechnica.com*. July 29, 2011. **http://arstechnica.com/tech-policy/2011/07/linking-is-not-a-crime-czech-pirate-party-declares-war-on-anti-piracy-unionlinking-is-not-a-crime-czech-pirate-party-declares-war-on-big-content/**

Most Frequently Mentioned Political Campaign Topics		
Topics	**Frequency**	**Countries**
Intellectual property and copyright	9	B, CDN, CZ, DK, F, FIN, L, UK, USA
Transparency	8	B, CAT/E, CH, D, F, FIN, L, UK
Freedom and civil rights	8	CH, CZ, D, DK, F, FIN, UK, USA
Democracy and participation	6	B, CAT/E, D, L, UK, USA
Privacy and surveillance	6	B, F, FIN, S, UK, USA
Free access	4	CAT/E, F, S, USA
Open data	3	F, L, UK
Reform of the electoral system	3	CDN, UK, USA
Culture of sharing	2	S, F
Education and science	2	B, UK
Innovation	2	B, CDN
Whistle blowing	2	CZ, UK
Data retention	1	A
Basic income	1	B
Law on addictive drugs	1	A
Digital Economy Act	1	UK
Reform of the Canadian Telecommunications Commission	1	CDN
Laicism	1	CH

Source: Author's survey. Open-ended question, multiple responses possible. N=14.

Campaigns with Local Relevance			
Country	**Title**	**Context und objectives**	**Accompanying activities**
Luxembourg	*Depuwatch*	Improve transparency of Luxembourgish parliamentarians' voting behaviour	Aggregation and public release of votes on the website
Catalonia, Spain	*Yo Avalo*	Campaign against the change of electoral law which would be very restrictive for new and smaller parties	Website, public relations
United Kingdom	*Axe the Act*	Opposition to the revision of the UK Digital Economy Act	Call to write to MPs, online petitions, media campaign
Austria	*Stoppt die Vorratsdaten-speicherung!*	Prevention of the implementation of the EU directive on data retention in Austria	Website, public relations
Czech Republic I	*Linking is not a crime!*	Protest against the Czech Anti-Piracy Union	Websites with numerous links to download movies
Czech Republic II	*Ticket Barrier Trial*	Protest against public surveillance enabled by a new metro ticket system in Prague	Demonstration at the turnstiles in Prague Metro

Source: Author's survey. Open-ended question.

up around the indictment of a 16-year-old who allegedly caused a loss of about 5 million Euros by linking to copyrighted films on his website. In response to this, the pirate party launched two websites that provide numerous links to movies. Specifically, the action was addressed at a local actor, the Czech Anti-Piracy Union.

Other campaigns are related to the national political system, such as the project Depuwatch, which aims to create greater transparency regarding voting behaviour in the Luxembourg Parliament, or the Yo Avalo campaign by the Catalan Pirate Party, which protests against new electoral policies that require new parties to collect thousands of signatures in order to be able to run for election.

Finally, some activities of pirate parties are tied to specific locations. Another campaign[319] of the Czech Pirate Party, for example, tried to raise awareness of a surveillance system that might result from a new ticket control system in the Prague metro.

In all of these cases the shared issues of the transnational, social Pirate movement were linked to local circumstances differing in each country. Furthermore, issues such as the transparency of political decisions, and civil and fundamental rights not only bear the potential for engagement but also require adaptation to different national contexts.

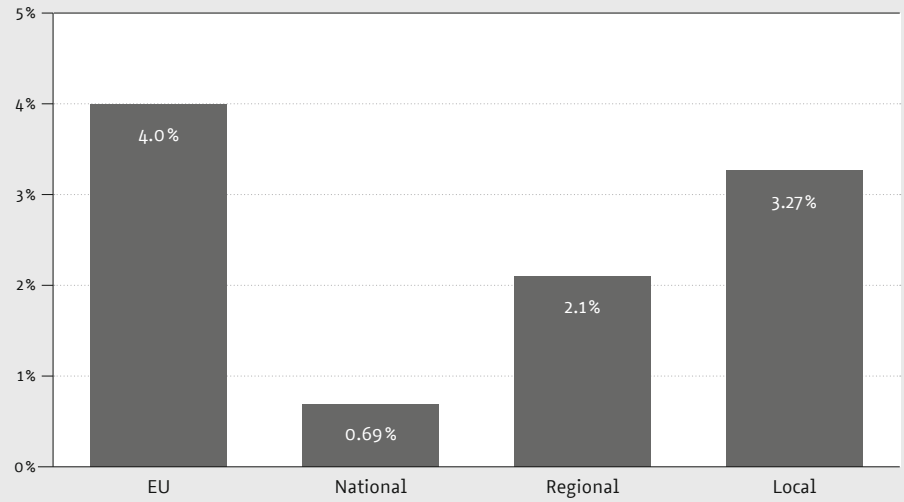
319 Matejcek, Petr (2011): Czech Pirate Party: Metro Ticket Barriers to Be Used for Surveillance. *ceskapozice.cz*. September 14, 2011. **http://www.ceskapozice.cz/en/news/politics-policy/czech-pirate-party-metro-ticket-barriers-be-used-surveillance**

Transnational Pirates #3: Global Movement, Local Networks

Kirsten Gollatz, 2012/04/12

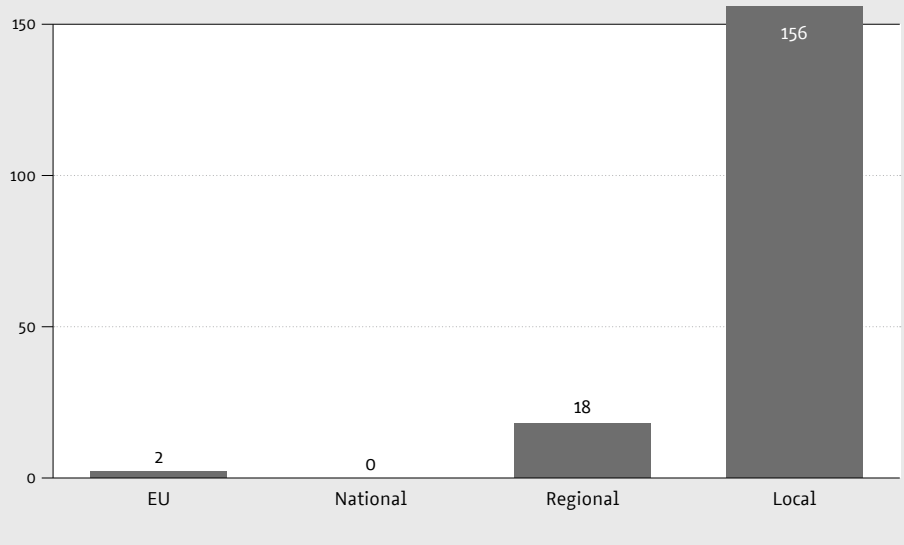
The local embeddedness of pirate parties is not only important in terms of issues and campaigning, but also with respect to (inter-)organisational relations. In our brief survey, almost every registered pirate party (13 of 14) reported ties to partner organisations at the local or regional level. Together with lower barriers to entry into local representative bodies, this localisation strategy also tends to result in better election results at lower political levels (see Figures below).

Average Election Results of Pirate Parties 2006–2011 (in %)



Sources: Author's presentation based on http://www.kommunalpiraten.de/; http://wiki.pp-international.net/Main_Page

Elected Pirate Party Officials 2006–2011 (absolute)

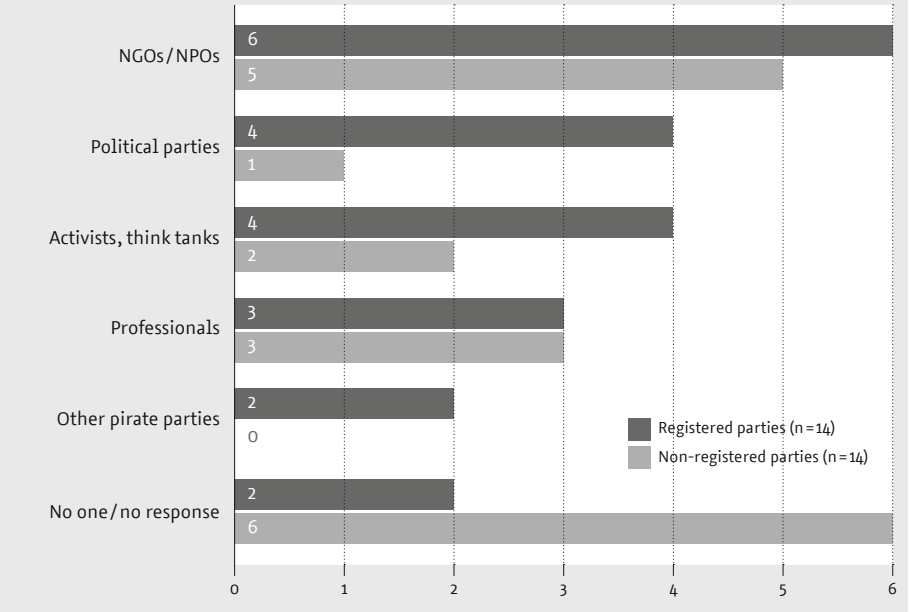


Sources: Author's presentation based on http://www.kommunalpiraten.de/; http://wiki.pp-international.net/Main_Page

In addition to the development of local branches, the sampled parties mostly operate within a local network of organisational supporters and partners. The majority of registered parties named local branches of active NGOs, including organisations op-

erating transnationally such as Wikimedia and the Electronic Frontier Foundation, as well as local activist groups and think tanks.

Collaboration in Local Networks



Source: Author's survey. Open-ended question.

According to our survey results, other important groups for cooperation and joint campaigns are other political parties, especially in the form of their youth organisations. When we compare the answers of registered and non-registered parties, the local networks of the latter are less differentiated – with the exception of very active groups such as the Pirate Party in New Zealand.

The connections between pirate parties and local partner organisations are fostered by the personal background of party chairs and organisers. According to registered parties, in most cases core team members already served actively in NGOs and activists groups before joining the local pirate party. In other words, many protagonists of pirate parties have previously dealt with similar or the same issues, concepts and frames that are now being pursued by the pirate parties; and these organisational breeding grounds were as transnational as the Pirate Party movement.

In a nutshell, pirate parties are acting within a transnational context, combining transnational concepts and frames with local issues, opportunities and organisational networks. Furthermore, these results lead us to reject notions such as the idea that pirate parties are merely a temporary phenomenon or a protest party (see p. 206 *"Pirate Parties: Transnational Mobilisation and German Elections"* or "German Pirates' Winning Streak: More than Protest" in this volume).

The German Pirate Party Convention 2012: English Manifesto and Troubles with Wingnuts

Leonhard Dobusch and Sigrid Quack, 2012/05/04

With the German Pirate Party continuously gaining support in national polls – currently ranging between 10 and 13 percent – media attention paid to the party's convention last weekend reached a new height.

And this media coverage is becoming increasingly transnational. Germany's largest weekly, Der Spiegel, devoted an extensive feature article in English[320] to the phenomenon, trying to explain questions such as "Why the Pirates Are Successful":

> *This is precisely the Pirates' biggest attraction: transparency and participation, as well as a healthy dose of freshness and otherness. This sometimes makes the Pirates seem childishly naïve and chaotic, and yet they seek to make do without backroom backslapping and conventional political smoothness. (Becker 2012)*

But criticism is also voiced in the recent coverage. The Economist, for example, calls the Pirates "slightly barmy" in its recent printed edition[321] and the Süddeutsche Zeitung published a series of articles on unfortunate comparisons between the Pirate Party's rise and that of the NSDAP by the secretary of the Berlin Pirate caucus and some right wingnuts in the party, who denied the Holocaust, among other statements.

Last weekend, 2000 delegates at the German Pirate Party Convention distanced themselves clearly from such positions. In a unanimous vote delegates stated that to deny or diminish the Holocaust under the cloak of freedom of speech (as one of the Party's members had claimed before) is incompatible with the basic principles of the party. This is in line with the statements that form part of the Party's Manifesto, which is now also available in an English version[322]. The Manifesto emphasizes that migration and cultural diversity enrich society, and accentuates the need to oppose "prejudice and intolerance at the heart of society: everyday racism, latent anti-Semitic stereotypes and the emerging trend of Islamophobia".

320 Becker, Sven (2012): German Pirate Party Attempts to Reinvent Politics. *Der Spiegel Online*. April 25, 2012. **http://www.spiegel.de/international/germany/germany-s-pirate-party-seek-to-reinvent-politics-a-829451.html**

321 The Ayes Have It. *The Economist Online*. April 28, 2012. **http://www.economist.com/node/21553484**

322 Piratenpartei Deutschland (2012): Manifesto of the Pirate Party of Germany: English Version. Agreed on (German Version) at the Founding Meeting in Berlin on September 10th, 2006. **http://www.piratenpartei.de/wp-content/uploads/2012/04/parteiprogramm-englisch.pdf**

Compared to the public attention (rightly) paid to political worldviews, other parts of the comprehensive Party Manifesto have not received so much interest. However, since the German party is by far the largest pirate party within the transnational Pirate Party movement, its manifesto is likely to become a reference point for discussions in other parties in Europe. It therefore deserves more detailed attention.

One of the most controversial passages in the German Pirate Party's manifesto does not even deal with Internet-related issues but with guaranteed minimum income. The paragraph on the "Right to secure livelihood and social participation" states that

> *People can only live in dignity if their basic needs are met and their social participation is assured. In our monetary economy, this requires an income. If an income can only be achieved through work, we must assure full employment to protect all people's dignity. This is why full employment has been a major goal of our economic policy in the past. There are two paths by which we try to achieve this goal: Through economic measures which aim to create jobs or through publicly financed jobs with the main goal of securing people's livelihood. These are both detours which require substantial public funding. If public funds are used, however, this must be done as efficiently as possible. Since the goal is to secure an income and a livelihood for everyone, this income should be guaranteed directly to each individual. Only this way can we protect the dignity of all people without exception.*
> *(Piratenpartei Deutschland 2012: 17)*

It will be interesting to see whether other pirate parties in Europe follow the German party in this respect. More generally, the debates within and outside of the Pirate Party on the issue illustrate the difficulties associated with the transformation of topically oriented movements into a party with a full-fledged political programme.

Questioning Some Microcredit Myths

Philip Mader

In the popular literature surrounding microcredit (or microfinance), a number of repeatedly made claims deserve a closer look. The mass media are full of heart-warming stories, anecdotes and PR-like representations of microfinance institutions' (MFIs) work, showing the apparent power of microcredit to improve the lives of the poorer inhabitants of this planet, and even many academic productions make similar claims without providing sufficient evidence to back them up. In this way, the impression is created that the development industry has found a panacea for poverty; a dangerous insinuation which can only lead to disappointment. Via these blog entries I have addressed and critically illuminated some myths – insufficiently supported claims or untested assumptions – that stand in the way of a balanced assessment of the true powers and drawbacks of microcredit as a development tool.

Microcredit Myth #1: Microcredit Is Good for All Poor People

Philip Mader, 2009/02/05

Credit is a useful lever for helping businesses grow. Many poor people in the developing world are self-employed farmers or petty traders, so technically they can be conceived of as business people. But most farmers are actually subsistence farmers, working not for the market but for their own family's meals, and many traders are simply traders for lack of a better alternative in stable, paid employment. They resiliently eke a meagre living from their harsh surroundings, and truly deserve the admiration of comfortable Westerners for this daily achievement. But does that necessarily warrant them being treated as Schumpeterian entrepreneurs, willing and

able to "creatively destroy" their traditional economic environments, if only they were lent the necessary finance?

We should keep in mind that people are incredibly diverse, and this must be taken into account and respected when formulating development policies. One-size-fits-all approaches have failed repeatedly in development history, and serve as a warning.

Various studies working with rigorous empirical data have found that microcredit helps the "not-so poor" increase their incomes far more[323] than those actually below the poverty line, and that on average, very poor borrowers are even worse-off after the loan-cycle. This is perhaps because the poorest are least financially literate, more risk-averse, more exposed to risks, and tend to use their loans for sheer survival, not for true investment purposes. Microcredit can "make an already slippery slope more slippery", as Thomas Dichter[324] says.

But doesn't microfinance also help the poor to save? The industry realised quite late – in the 90s, but better late than never – that poor people lacked secure opportunities for saving money. Many programmes have rectified that problem, but most still offer savings facilities only to people who also take out loans, thus increasing these people's liabilities but not their assets as a net result. If interest is paid at all on these savings, the rates are normally a mere fraction of what is charged on loans, and often they even have to *pay* interest to save, as the Harper/Dichter volume notes[325]. Savings for the poor would be helpful, but only without loan strings attached. The microfinance industry would do well to drop its current obsession with getting people into debt, and focus instead on reducing poor peoples' vulnerability by helping them build up reserves. Savings accumulation should be viewed as a key purpose, possibly as the single most important service; not just as a cheap source of capital.

323 Morduch, Jonathan (1999): The Microfinance Promise. In: *Journal of Economic Literature*, 37 (4): 1569–1614.

324 Dichter, Thomas (2007): Can Microcredit Make an Already Slippery Slope More Slippery? Some Lessons from the Social Meaning of Debt. In: Dichter, Thomas, Harper, Malcolm (eds.): *What's Wrong with Microfinance?* Bourton on Dunsmore: Immediate Technology Publications, 9–17.

325 Dichter, Thomas, Harper, Malcolm (eds.) (2007): *What's Wrong with Microfinance?* Bourton on Dunsmore: Immediate Technology Publications.

Microcredit Myth #2: Microcredit Is (and Should Be) Profitable

Philip Mader, 2009/02/10

Since the beginning, proponents of microcredit claimed to have found a self-sustaining, profitable route to reducing poverty: borrowers repay loans with enough interest to cover the costs plus an increase in the bank's capital base, plus a payout for its owners. Skeptics of this story point to the fact that most microcredit programmes are still subsidised by donors. They argue that this is because many borrowers cannot afford to repay so dearly, and that the cost of capital should be lower in order to help more and poorer people.

Welcome to the 'sustainability versus outreach' debate. At the core, it is about the question of whether incentives or impact matter more. Time to examine the arguments.

First, we may ask: are most microcredit programmes *actually* working profitably? Authors such as Balkenhol[326] claim that two-thirds of the sampled MFIs had achieved "full financial sustainability". But this was calculated as whether they *would* be able to cover full costs of capital at commercial rates if forced to do so, not that they were actually covering costs.

Another author[327] found that only half of those programmes with a "commitment to financial sustainability" were profitable, but there are hundreds more worldwide without such a commitment. A further common finding[328] is that those programmes focused on the poorest sections of the population fare worse financially, and many cover only 70 percent of costs. Thus, it is far from clear whether microcredit really is profitable.

And so we ask whether theoretically, programmes *should* cover costs? What would be wrong with subsidies if, after all, microfinance really were an effective solution with which to address poverty? Why should it be made wholly dependent on private-sector funding?

If it is true that millions more households still require microfinance for a better living, then it would be false, indeed immoral, to wait for the private sector to step in to fill the gap. Yet precisely this is what the World Bank and other international, public-sector financial institutions are preaching now: let the market take care of it.

326 Balkenhol, Bernd (2007): *Microfinance and Public Policy: Outreach, Performance and Efficiency*. Basingstoke: Palgrave Macmillan.

327 Morduch, Jonathan (1999): The Microfinance Promise. In: *Journal of Economic Literature*, 37 (4): 1569–1614.

328 Hulme, David, Mosley, Paul (1996): *Finance against Poverty*. New York: Routledge.

A certain ideology underlies the argument. It is the belief that all aspects of the economy are best run by the market and that state interference will distort and harm the market. One could reasonably respond that if the self-regulating market did function as envisioned by the Washington Consensus, then private enterprise would *already* be meeting the demand for microfinance; current attempts to 'privatize' microfinance would be wholly unnecessary.

But my critique is a different one. Not only is microcredit, if it wants to keep its poverty focus, incompatible with the demands of private-sector finance; it should not be made to conform with those rules, either.

Microfinance programmes are finding that people at the lower end of the income scale cannot afford to repay loans with interest rates high enough to cover all costs. And all borrowers will be more likely to work their way out of poverty if they can retain a larger proportion of their income for themselves, rather than repay loans at interest rates that satisfy the financial demands of northern financiers and the ideological convictions of free-market economists.

If microfinance really produces the benefits adduced to it, then it is a public good and should be treated as such. After all, very few people in rich countries would be happy to leave family planning, sexual health, poverty relief and women's rights to private enterprise initiatives; most people don't believe that public hospitals, schools, and other government/donor-funded undertakings are "a priori unsustainable" just because they are not run with private gains in mind.

If helping the poor is really what microcredit is about, then public funding should be increased, not abhorred.

Microcredit Myth #3: Microcredit Empowers Women

Philip Mader, 2009/04/24

Small loans for women, often organised into groups, with which to build their own businesses – the standard model of microfinance. Many microfinance organisations are focused on women, and 96 percent of Grameen Bank's borrowers are female (according to its own statistics[329]).

Through the establishment of self-owned businesses which provide an independent income stream, it is theorised (or often simply claimed) that women will be empowered thanks to microcredit. A compelling argument this may be, but the evidence, sadly, is thin.

Many men send their women to obtain loans which they themselves would not be eligible for, as researchers like Aminur Rahman[330] have found. These men subsequently allocate the loan within the family as they see fit, possibly buying a rickshaw which they themselves pull, or on-lend to a relative with an existing business. However, if repayment becomes a problem, it is the woman who is held responsible by the microfinance organisation, and is then subject to legal and social sanctions.

Other researchers, such as Naila Kabeer[331], have found that the effects on social roles are ambiguous. Many women, especially the better-off, used their loans in order to *withdraw* from public life. By using microloans to shift from the market to non-market activities by producing at home, Bangladeshi women removed themselves from the public sphere in order to conform better to traditional *purdah* norms. In this sense, microcredit often did increase their levels of economic activity and perhaps somewhat raise their sense of self-worth, but these women remained bound to their traditional gender roles.

Ethnographic research by Katharine Rankin[332] in Nepal found that increased economic activity did not automatically convey social status, but rather depended on the status of male relatives. And in the U.S.A. – where microfinance has also

329 Grameen Bank (2009): Grameen Bank at a Glance. *grameen-info.org*. October 2011. **http://www.grameen-info.org/index.php?option=com_content&task=view&id=26&Itemid=0**

330 Rahman, Aminur (1999): Micro-Credit Initiatives for Equitable and Sustainable Development: Who pays? In: *World Development*, 27: 67–82.

331 Kabeer, Naila (2000): Conflicts over Credit: Re-Evaluating the Empowerment Potential of Loans to Women in Rural Bangladesh. In: *World Development*, 29: 63–84.

332 Rankin, Katharine N. (2001): Governing Development: Neoliberalism, Microcredit, and Rational Economic Woman. In: *Economy and Society*, 30 (1): 18–37.

been adopted as an empowerment tool – women tended to remain locked in traditional 'female' activities that produced the lowest financial gains: domestic services, arts and crafts, catering, as Tracy Bachrach Ehlers and Karen Main[333] found.

I'm no gender theorist and hardly feel capable of getting involved in a debate about how to facilitate "real" empowerment. But I know that it's a social issue more than a private, household-level one. Yet this private level is precisely the level microfinance seeks to work at. If anything, the facts here should shed some doubt on the common script that microfinance is the single best means for emancipating women from patriarchal relations, because it places the burden on individual women rather than society at large.

333 Bachrach Ehlers, Tracy, Main, Karen (1998): Women and the False Promise of Microenterprise. In: *Gender and Society*, 12 (4): 424–440.

The State of Microfinance – in Research and in the Real World

Philip Mader

These posts have the commonality of contrasting the ideology of microfinance with the empirical evidence concerning its impacts; from different angles which, in hindsight, have often turned out to be prescient. First, there has been the issue of microlending forcing poor people in India to take out expensive moneylender loans, which foreshadowed the microfinance crisis that struck nearly a year later. Intervention in the debate about the book "Why Doesn't Microfinance Work" also preceded what has become an almost classic rivalry in the debate over microfinance: the argument between Milford Bateman and David Roodman. What the persistent lack of evidence for microfinance reducing poverty should mean remains one of the most controversial topics in development policy, as is shown particularly by the posts on the logic of microfinance impact assessment.

Domen Bajde's guest contribution offered a fascinating deconstruction of the online microlending platform Kiva as a pioneering instrument of the ideology of "entrepreneurial philanthropy". Kiva has since been ostracised for supporting a variety of unsavoury activities (like coca leaf production or cockfighting) as well as misleading its supporters about the returns earned via its interest-free, small loans.

And finally, this blog's involvement in the debate over "The Micro Debt" was among its most controversial actions. While the film was later rehabilitated and gained many prestigious awards, the blog's analysis attracted strong criticism from the Grameen Foundation. Hugh Sinclair's bestselling book "Confessions of a Microfinance Heretic" now cites us as an accurate depiction of how the microfinance industry cannot deal with criticism, attacking the critic instead of addressing the arguments.

'Group Pressure Makes Us Go to Moneylenders' – Microfinance's Unwanted Lateral Linkages

***Philip Mader*, 2009/12/16**

334 Gokhale, Ketaki (2009): As Microfinance Grows in India, So Do Its Rivals. *The Wall Street Journal*. December 15, 2009. **http://online.wsj.com/article/SB126055117322287513.html**

The microfinance industry, which once set out to protect the poor from extortionate moneylenders, may depend on those same moneylenders for its business success; and these moneylenders in turn may be profiting from microfinance. This is reported by the Wall Street Journal today[334].

Ketaki Gokhale is a Stanford University graduate student currently working for the WSJ as this year's Daniel Pearl Memorial Journalism Intern. Earlier this year Gokhale reported on credit bubble tendencies brewing in the microfinance sector in India, an article which provoked controversy and some indignation in the microfinance industry and among its advocates.

One of Gokhale's interviewees reported being overwhelmed by the sudden, forceful supply of credit in her neighbourhood. "Suddenly, in the shantytown where she lives, lots of people wanted to loan her money. She borrowed $125 to invest in her husband's vegetable cart. Then she borrowed more." The lady descended into a borrowing binge, at the end of which she even bought a television. She was forced to sell virtually all of her assets and still remained in debt to the value of around a quarter of her annual income.

Refinancing microfinance loans through the grey market

Gokhale has now followed up her earlier investigation into the dark side of microfinance and uncovered structural complementarities and interdependencies between the microfinance business and local moneylenders. The irony and sadness of the story is that microfinance originally set out to put these same moneylenders and their practices of extortion out of business by offering loans to the poor that they could afford. Moneylenders in India are reported to charge interest rates even beyond 1000 per cent annually, leading to debt bondage and other existential problems for the poor.

The entry of microfinance banks into the market may have pushed down the interest rates of some moneylenders, but paradoxically the moneylending business appears to be growing. As Gokhale reports, more than 80 % of registered moneylenders in Mahabubnagar started their businesses after the year 2000, which coincides with the phenomenal bout of growth in microfinance in India in the past decade.

It appears that many microdebtors cannot afford to comply with the extremely rigid repayment schedules of microfinance banks, so they must turn to moneylend-

ers, thereby re-financing their loans through the grey market – the market which microfinance sought to protect them from.

Lose money or lose friends

The peculiar group-lending techniques of most microfinanciers may serve to compound this problem, as poor people stand to lose far more than just their creditworthiness by being in arrears. Their social standing will suffer, they will be shunned by their neighbours, and punished for failing to honour their obligations, which are to the group in the first instance and to the bank only in the second instance. Therefore, they will prefer to run to exploitative and often illegal moneylenders than risk those social safety networks on which they are forced to rely in hard times – and on which microfinance banks rely for their business models to succeed.

> *"Group pressure makes us go to moneylenders" to cover our microfinance loans, says Baleshwari, who goes by only one name, as does her sister. "We get small loans for 15 days to fill the gaps when we can't pay. If you lag behind, the rest of the group members can't get new loans." This dynamic is why some analysts believe the village moneylenders are actually floating the microfinance lenders.*

As Gokhale's article indicates, this invisible co-operation between two avowed foes likely runs both ways, so that microfinance banks must thank moneylenders for facilitating their often phenomenal repayment and arrears rates. In return, they foster the business opportunities of moneylenders by creating demand for less structured credit to help poor people through fluctuations in their income. Furthermore, it is widely reported that many microborrowers lend on, becoming moneylenders themselves or lending to the more established moneylenders who then claim a cut.

> *M. Murlidhar owns a traditional moneylending business. He says people are "repaying their loans faster," and that the "overall rotation of money in society has been increased" by the advent of microfinance and government lending programs.*

It is interesting to note how microfinance projects, which usually (and perhaps crucially) lack any element of industrial policy or community development strategy, do seem to generate lateral linkages in the local economy – just not necessarily ones of a desirable kind.

Ketaki Gokhale has uncovered some fascinating evidence on the unintended effects of microcredit. In the past, some proponents of microfinance have even reacted with hostility to such findings. It will be interesting to observe whether more systematic findings emerge in time, and whether institutional learning will come about within the microfinance industry to deal with such issues.

Beef with Bateman, or Why Can't the Microfinance Community Handle Criticism?

Philip Mader, 2010/09/13

Prior to a seminar I hosted with Milford Bateman at the MPIfG in July, I published a review of his book *"Why Doesn't Microfinance Work?"* (see p. 333 in this volume). When the book was released this summer, its first print run sold out within four weeks. It was the basis for an article (with a great cartoon) in the Dutch daily De Pers. It introduced a wider audience to the fundamental doubts surrounding microfinance. It also seems to have made Milford Bateman his fair share of enemies.

My review was resoundingly positive, since I felt that the book expressed growing concerns about microfinance's impacts and legitimacy with great clarity and poignancy. What astonishes me is the type of criticism and hostility that has greeted the book. While the book sparked some general neutral publicity, the in-depth reviews have ranged from cautious praise for raising important questions to heavy-handed attacks on Bateman's academic integrity.

335 Roodman, David (2010): Why Doesn't Milford Bateman's Book Work? *David Roodman's Microfinance Open Book Blog*. August 26, 2010. **http://blogs.cgdev.org/open_book/2010/08/why-doesnt-milford-batemans-book-work.php**

336 Blase, Liz (2010): Wokai's Response to Milton Bateman's Book: Why Doesn't Microfinance Work? The Destructive Rise of Local Neoliberalism. *wokai.org*. August 19, 2010. **http://web.archive.org/web/ 20101023071922/.** See as well: **http://www.wokai.org/blog/2170/okais-response-to-Milton-Batemans-book-Why-Doesnt-Microfinance-Work-The-Destructive-Rise-of-Local-Neoliberalism.html**

337 Green, Duncan (2010): New Books on Development: Bad Microfinance; Climate Change and War; What Works; Inside the World Bank; Mobile Activism. *From Poverty to Power*. July 21, 2010. **http://www.oxfamblogs.org/fp2p/?p=3002**

Some recent reviews:

negative

David Roodman[335] @ cgdev: "I am allergic to (as I perceive it) sloppy thinking … Bateman's passion seems to lead him to select and distort evidence. I find it hard to fully engage with a piece of analysis in which the conclusions so seem to drive the evidence … I don't think you need to read this book."

Liz Blase[336] @ wokai: "We urge that readers not fall prey to Bateman's infatuation with short-term profits."

positive

Duncan Green[337] @ oxfam: "A passionate polemic that takes on a development shibboleth – sometimes it feels as though doubting microfinance is as heretical as criticising Nelson Mandela. But Bateman does so."

Phil (see p. 333 "Why Doesn't Microfinance Work?" in this volume): "The first critical book capable of crossing the border between academia and the lay world … The proverbial 'book' on why (this) micro-

finance is not an adequate response to poverty."

in between

Malcolm Harper[338] *@ microfinance focus: "Few readers will agree with everything in it, and most will be irritated by some of it. All of us, however, should think carefully about what Bateman writes.*

Fehmeen[339] *@microfinance hub: "While some welcome this opportunity to re-think the basic microfinance model, others deem some of his claims exaggerated ... We think this book is a worthy effort."*

338 Harper, Malcolm (2010): Book Review: "Why Microfinance Doesn't Work". Microfinance Focus, June 7, 2010. **http://web.archive.org/web/20121102022907/http://www.microfinancefocus.com/news/2010/06/07/book-review-why-microfinance-doesn%E2%80%99t-work%E2%80%9D/**

339 "Fehmeen" (2010): Book Review: "Why Microfinance Doesn't Work" by Milford Bateman. Microfinance Hub. August 16, 2010. **http://web.archive.org/web/20100821210813/http://microfinancehub.com/2010/08/16/book-review-"why-microfinance-doesn't-work"-by-milford-bateman/**

To me, the intensity of the reactions to Bateman's book is a gauge for measuring just how worried many in the development industry have become about their poster child. I get the impression that a systematic critique of microfinance touches highly sensitive nerves with many researchers and industry insiders, whose reaction is to challenge the person rather than the argument.

The most balanced review comes from former BASIX-chairman Malcolm Harper, who writes that "it is not difficult to find fault with many of Bateman's assertions, or to point to his omissions", but advises that "all of us, however, should think carefully about what Bateman writes". Harper sees the chapter unpacking the politics of microfinance as "the weakest part of the book" (I disagree) and his opinion is echoed by Hans-Dieter Seibel, who supports Bateman's critique but rejects the political story.

Most importantly, Harper lauds Bateman for concluding with a solid discussion of alternatives to microfinance, and in this perhaps Harper is the only reviewer to have actually read the entire book before making up his mind (and pouring words onto webpages). To polemicize, as some true believers do (Harper points out), that 'it is easier to destroy than to create' both misses Bateman's point and fails to appreciate the essential role of the critic in correcting aberrations.

Belief over evidence? When critics become heretics

Some reviewers apparently chose to give Bateman's work short shrift – after all, why challenge your preconceived opinions? In one review on MicrofinanceHub.com, the authors not only got the book's title wrong, they also admit to never having read it! While they do offer some vague and promissive replies to Bateman's arguments, most of their counter-arguments are actually dealt with in the book.

But what is particularly revealing about the MicrofinanceHub review is the wording chosen by the reviewers, who entitle their replies "we believe" (not "we know", or

"we posit", etc). This is perhaps more of an admission than was intended. Is microfinance more about belief than evidence? When those who criticize an orthodoxy are treated as heretics, open-minded discussion on how best to help the poor is inevitably stifled.

The most biting review of Bateman's book came from David Roodman, which was a departure from his habitual sharp analysis and reasoned argument in my opinion. He claims to be annoyed by Bateman's "sloppy thinking" and levies three main critiques against the book: first, it makes "dramatic conspiracy claims"; second it is "careless in [its] use of evidence"; and third, it has bad style. He also accuses Bateman of "extremism".

As a reviewer, Roodman makes no further mention of his 'conspiracy theory' charge, nor does he really explain his stylistic criticism; instead, he seeks to correct Bateman on minor, hand-picked technical points of evidence. For instance, he questions whether Jonathan Morduch may be called a microfinance "advocate" or not (does being the Managing Director of the Financial Access Initiative count?). Also, there seems to me little wrong with the statement that Muhammad Yunus "cancelled" (Bateman's words) 42 Bangladeshi farmers' debt to a moneylender in the 1970s, even if Roodman points out that he "substituted his lenient, no-interest loans for the moneylenders' " – either way, Yunus saw an injustice and paid the farmers' way out.

What Roodman regrettably fails to do is engage with Bateman's overall argument that microfinance has few and questionable *economic* impacts, but is nevertheless promoted because of its *political* usefulness. His selective and nit-picking engagement with Bateman's line of reasoning is unworthy of the book, and his attacks on the author's personal integrity probably serve to distract. It would have been more satisfying to see an intellectual of Roodman's caliber engage in more reasoned discussion of the argument instead of shooting polemical broadsides. (A long and unrelentingly technical debate later erupted in the comments section of Roodman's review, but personal potshots were hard to expunge after an aggressive start.)

Yet why do both Harper and Roodman accuse Bateman of seeing microfinance as a conspiracy? I believe they are wholly mistaken; not least because I can't remember reading anything about such a conspiracy in the entire book.

An epistemic community is not a conspiracy

Say I claim that a set of organisations and/or individuals is promoting an idea, a policy, a product – all of which microfinance is, to an extent – does that make me a conspiracy nut? Social scientists have countless conceptual tools with which to grasp such phenomena: advocacy networks, social movements, collective action, interest groups, etc. What Bateman's book claims (or, I would argue, shows) is that (A) microfinance is a politically viable tool for the restructuring of poor countries to conform

better to contemporary economic doctrines; and (B) microfinance is promoted by a network of influential organisations and individuals. This is by no means a conspiracy claim, and Bateman's critics have yet to refute the claim. Conspiracy is secret, concerted action with sinister motives. Microfinance was promoted both intellectually and financially over recent decades by publicly-known institutions and individuals via well-documented activities and for known reasons.

I, for one, have read the entire book, and Bateman claims nothing other than this. What he does claim, however, is that there is a disjunction between the private (in-community) knowledge about microfinance, which includes knowledge about its limitations and failures, and the public account of microfinance as pure success. I observe that a *transnational epistemic community* has grown around the topic of microfinance, whose aim is to organize and promote microfinance (as a business and as a policy). This community consists of people from a variety of different backgrounds, from music and film stars to academics, politicians, business leaders, activists and philanthropic billionaires, and a number of organisations in which these groups are active. What unites them, among other things, is that (with very few exceptions) they belong to a global socio-economic elite and that they share an unwavering belief in the power of microfinance to do good. Epistemic communities are infamous for the *groupthink* they produce, something psychologist Irving Janis termed

> *the mode of thinking that persons engage in when concurrence-seeking becomes so dominant in a cohesive ingroup that it tends to override realistic appraisal of alternative courses of action*[340].

340 "Groupthink", *Wikipedia*. **http://en.wikipedia.org/wiki/Groupthink**

The microfinance industry (and its groupies) might be taken as a case study of such a transnational in-group. It is held together by specialised media, purpose-built information exchanges, supervisory agencies, IFI-funded promotional bodies, expensive conferences and supportive NGO networks; each of which has a substantial financial and (more importantly) reputational investment in the future of microfinance as a result. Because these investments are threatened, shaking the consensus is unwelcome. So Bateman's challenge to think outside the cramped box of microfinance is seen as a threat.

Let he who is without ideology cast the first stone

Furthermore, ideologies do exist, whether we admit to them or not. Microfinance is an ideological product like most (or all) policies. But seeing one's own position as non-ideological while branding any challenger as ideologically motivated *per se* is a luxury afforded only to those thinking within the narrow consensus. It also bears the totalitarian risk of stifling dissent.

When Bateman argues (as I do, too) that microfinancialists are ideologically motivated, he accuses nobody of "conspiring" to keep poor countries poor, or of aiming to keep people in low-productivity work. The opposite is the case: the microfinance industry and its groupies may perpetuate poverty despite and because of their good intentions. "Ideology has very little to do with 'consciousness' – it is profoundly unconscious", as Althusser says.

When neoliberal (and by the way, there is nothing "obscurantist" about the term) economists and policy makers in the 1980s and 90s went about dismantling Bolivia's social safety-net or undoing Bosnia's worker-run enterprises, replacing them with the risks and opportunities of microenterprise, I assume that they did so with the best of intentions. I am sure their models told them the poor were most likely to thrive under a meritocratic economic polity of freely contracting agents, and that the only thing missing was small finance. I give them the benefit of that doubt. The trouble is, as rigorous evaluations of microfinance are showing increasingly, the models are wrong. But because microfinance fits the economic orthodoxy of the recent decades so well – the supposition that free markets, minimal states and maximum financialisation will lead to the highest welfare – it is so difficult to challenge.

That is why Slavoj Zizek wrote recently[341] (about economic crisis and the responses to it):

> *This brave new world of global commodification considers itself post-ideological. ... Insofar as, in its self-perception, ideology is located in subjects, in contrast to pre-ideological individuals, this hegemony of the economic sphere cannot but appear as the absence of ideology. What this means is not that ideology simply 'reflects' the economy, as superstructure to its base. Rather, the economy functions here as an ideological model itself ... in contrast to 'real' economic life, which definitely does not follow the idealised liberal-market model.*

There we have it. As I read him, Bateman's core argument is that microfinance fits the orthodox economic model, which itself is an ideology held by powerful people and institutions, but the real effects of microfinance don't fit the model's predictions. Why? Because the model's assumptions are false.

There is definitely no conspiracy claim in this, or even a claim that pure financial self-interest is the prime motivator for the microfinancialists. Rather, Bateman's book is a challenge to examine their positions in the light of evidence. If those who are so strongly opposed to Bateman's arguments are actually committed to helping the poor, they should step up to a fair debate and, if possible, reflect upon their basic assumptions. Otherwise, in my view, they will lose their credibility. Rather than protect the assumptions of an increasingly defunct model, they should take the challenge as an invitation to start thinking outside the box.

341 Zizek, Slavoj (2010): A Permanent Economic Crisis. In: *New Left Review*, 64: 85–95. **http://newleftreview.org/II/64/slavoj-zizek-a-permanent-economic-emergency**

The Bateman Controversy Continues ...

Philip Mader, 2010/09/15

Milford Bateman's book *Why Doesn't Microfinance Work?*[342] has generated heated discussion, with blows not always struck very far above the belt. Recently, I got involved by recapping and analysing several book reviews published on the web (see contributions above). I was critical of the tone and substance of David Roodman's review (published on his blog, of which I remain a fan, notwithstanding) because I felt it attacked the person more than the argument, and it didn't engage with Bateman's overall point that microfinance is politically useful while economically questionable.

342 Bateman, Milford (2010): *Why Doesn't Microfinance Work? The Destructive Rise of Local Neoliberalism*. London: Zed Books.

David Roodman has responded to this challenge[343] in a more elegant and eloquent piece than his original review. Some allegations against Bateman's writing have been clarified, new ones have appeared. I think Roodman is still off the mark with his accusations of "sloppy thinking" and "extremism". I would still like to see him engage with Bateman's overall argument.

343 Roodman, David (2010): No Really, Bateman's Book Doesn't Work. *David Roodman's Microfinance Open Book Blog*. September 14, 2010. **http://blogs.cgdev.org/open_book/2010/09/no-really-batemans-book-doesnt-work.php**

Most of the criticisms launched against the book (by diverse authors) have validity; however, I would urge those who dislike the work to beware the trap of accusing Bateman of what they see *him* as accusing others of, namely malignance. In plainer English: try to measure the book and your reactions to it by the same standard.

Here are my (less brief than intended) responses to what I see as David Roodman's main points:

- "Sloppy thinking" or "careless use of evidence", as *I understand it*, is when the conclusions don't follow from the evidence. Bateman's do; I would like to hear if anyone disagrees with this. What Roodman rather seems to dispute is how the evidence is presented. His "marginalia" lament the omission of, for instance, the precise arguments of the Ohio School, reasons for calling Jonathan Morduch a proponent of microfinance, or the use of anecdotes and client stories (what else is his point about Rich Rosenberg?). But, when an author interprets the available evidence in one logically consistent way instead of another, thereby assembling and interpreting the facts into a coherent picture – which seems to me what Bateman is accused of – isn't that how *argument* works? The elements of any argumentation may be challenged with rebuttals and rearranged or overturned. True: it isn't balanced, but to leave aside certain strands of discussion while following others seems to me essential for concise writing and good style ... and especially for making a point. I would also add that certain issues are probably simplified because

the book is aimed at a wider audience of practitioners and lay people, not just at technocrats and economists.

- I can't cross-check every point of evidence made by Milford Bateman and challenged by David Roodman. I definitely won't back Bateman's every point. Surely the book contains factual errors. I'll trust Roodman's seniority more than my junior knowledge of microfinance. Still, I think sharing margin notes is a poor substitute for head-on engagement with an argument. Are the examples significant enough to collapse Bateman's line of reasoning?
- On the use of the passive voice (e.g. "microfinance was promoted"), I agree that it denies the reader certain information. The passive voice does relieve Bateman of the need to identify what was done *by whom*, which would certainly have been informative and could have strengthened his argument. Grammatically, the passive usually is used (by whom? you may ask) when the object is more important than the subject; or when the precise subject is unknown or difficult to define – as is often the case with institutional theories. Would 'the microfinance community', for instance, have been a better choice of wording? It seems similarly vague to me. Otherwise, should Bateman have attempted to somehow disentangle the individual rationales of all 755,135 Kiva users in issuing their small loans, as well as those of several dozen governments? Even if possible, such an analysis would be irrelevant to his argument. It isn't an argument about individual or even necessarily collective choices (whodunit?); ideas and ideologies have a life of their own due to their entrenchment in institutionalised practices. Microfinance as an ideology may bring harm for the poor without any harm being intended, by anyone. Bateman, fundamentally, is analysing mechanisms, not individual strategies. This may be a different epistemology from a rational-choice, individualistic one, but it is absolutely common and often necessary for political economy analysis. (In his book Bateman does sometimes accuse specific organisations of pursuing the economic interests of rich countries. That is a separate point, which he usually makes explicit.)
- Roodman's allegation of "verbal violence" dumbfounds me. I really struggle with the reasoning here. How are Bateman's charges against 'the microfinance community', 'the international donor community', 'supporters of microfinance' – take your pick – supposed to constitute "verbal violence"? The book, as I read it, alleges that these collectives are misled (not by anyone, but in their assumptions); that they adhere to an orthodoxy and defend it, and as a result they may be inadvertently harming (or at least not helping) the poor. *Some may* also have less pure motives, but that isn't Bateman's main point as far as I can tell. What I really don't see is how these allegations could be construed as "dehumanising" anyone. How are they supposed to pave the way to "real violence", as Roodman says? I think this is upping the ante too far. I fail to see the connection; it looks to me like a red herring.
- Roodman says, "those who analyze complex issues have a responsibility to try to learn from those with whom they disagree, rather than dismissing them as beneath consideration". I have nothing to add except that this goes both ways.

- The post ends with David Roodman confronting his own use of the word "conspiracy": *"Bateman is not claiming that the coordinated, malign, underhanded microfinance movement is **secretly** organised. To that extent, I should not have used the word 'conspiracy' and I apologize."* (my emphasis) I think the words malign and underhanded are misplaced, too. Or else, evidence should be provided to the contrary. In his book, does Bateman actually accuse microfinance advocates of malignance – intent to harm the poor – or coordinated secrecy (what else might 'underhanded' mean? It is as close a synonym for 'secret' as they get)?

To me, it seems that a very easy way of discrediting critics is to portray them as paranoid; as not seeing things straight. I think it does neither the accuser, nor the accusee, nor the argument of either any justice; it definitely prevents fair debate. "If liberty means anything at all it means the right to tell people what they do not want to hear" – Orwell. If Milford Bateman currently looks like a "minority of one", that's because he's doing something unpopular, and only an Orwellian society would declare him crazy/dangerous for that.

With that, I've tried to make my point.

Does the 'Microfinance Community' Suffer from Groupthink?

Philip Mader, 2010/10/11

I've recently been reading through the thought-provoking (despite its somewhat attention-grabbing title) book *Participation: The New Tyranny?*[344] The authors, from a broad range of disciplinary backgrounds, take on the paradigm of participatory development from various angles, from failing to account for local power asymmetries and problems of élite capture to the technical and perfunctory nature of many participation processes.

344 Cooke, Bill, Kothari, Uma (eds.) (2001): *Participation: The New Tyranny?* London: Zed Books.

Part of Bill Cooke's chapter entitled "The Social Psychological Limits of Participation?" caught my eye because of his concise elucidation of groupthink and its relation to development policy-making and practice, both at the transnational and the local level.

In a debate I had on this blog last month with David Roodman of the CGD about Milford Bateman's book[345], I levied what I thought was a

345 See two preceding entries.

rather strong charge against the (so-called, self-proclaimed) microfinance community: that its world-view is skewed and closed-off by mechanisms of *groupthink*. That was because I was trying to defend Milford Bateman's argument against the misconception of his critics that he held a conspiracy theory of microfinance and neoliberalism. I begged to differ by explaining Bateman's analysis of the microfinance community as a *transnational epistemic community* plagued by group-typical groupthink.

So I thought I would put my allegation to a brief test here against Irving Janis' eight symptoms of groupthink as summed up by Bill Cooke:

Symptom 1: *The illusion of invulnerability. "An over-optimism about the power of the group and the lack of any real threat to the status quo."*

I have no idea how optimistic microfinance practitioners and advocates really are about reducing poverty through their work. I don't know either how worried they really are by recent critiques and studies failing to show any impact. Maybe many secretly harbour doubts, but the facade is still up, as the public script about microfinance shows. When the father figure of microfinance re-tells the story of his Grameen Bank under the title "Creating a World Without Poverty"[346], I see unchecked optimism – see also "Poverty Museums"[347]. When Kiva's in-house blog[348] opines that "Microfinance will not end poverty, microfinance institutions will", I hear reckless optimism, even while I wonder what on earth the statement is supposed to mean (apparently it made sense to some 19 commentators) – but the point is: for the in-group, the argument doesn't have to be logical, as long as microfinance is the answer.

346 Yunus, Muhammad (2008): *Creating a World Without Poverty: Social Business and the Future of Capitalism*. New York: PublicAffairs.
347 Tharoor, Ishaan (2006): Paving the Way Out of Poverty. *TIME Magazine Online*. October 13, 2006. **http://www.time.com/time/world/article/0,8599,1546100,00.html**
348 Microfinance Will Not End Poverty, Microfinance Institutions Will. *Kiva Fellows Blog*. February 9, 2010. **http://fellowsblog.kiva.org/2010/02/09/microfinance-will-not-end-poverty-microfinance-institutions-will/**

Symptom 2: *Rationalisation. "Along with the collective ignoring of warning signals there is a collective construction of rationalisations that allow any negative feedback to be discounted, so that assumptions never need to be reconsidered each time decisions are recommitted to."*

Aside from the usual "more research is needed", the main reaction[349] from the microfinance community to recent unsatisfactory, major statistical studies was to question the use of statistics, full-stop, in assessing microfinance's value. To counter the evidence, exemplary client stories were

349 ACCION (no date [2010]): Measuring the Impact of Microfinance: Our Perspective. Press release. **http://www.accion.org/Document.Doc?id=794**

offered. Their point in a nutshell: Your numbers, what do they mean? You should talk to our clients. They know better whether it works. And we work with them. So we the practitioners know that it works... Client stories (always positive!) seem an easy means of rationalisation; but anti-scientism is no sign of open-mindedness or the acceptance of feedback.

Symptom 3: *Morality. "Ingroup members 'believe unquestioningly in the inherent morality of their ingroup', inclining members to ignore the ethical or moral consequences of their decisions."*

See Symptom 2 for ignoring potential consequences – if systematic evidence that microfinance may be harmful is discounted, the consequences for the poor are brushed aside. But see also, for instance, Tufts University's investment rationale for microfinance: "Billions of people worldwide are trapped in a cycle of poverty, because they lack access to the financial services that would allow them to secure a loan and invest in their future"[350]. Billions are poor, and only because they can't get a loan?! This mono-causal explanation of poverty – only one example of the typical microfinance discourse – constructs microfinance as a moral imperative (see also Yunus' appeal for a "human right to credit").

350 Meanwhile, the claim has evidently disappeared from the Tufts University web page.

Symptom 4: *Stereotypes. "Group members hold stereotypical views about 'enemy groups', which lead to the assumption that they must be eliminated rather than compromised with. Such stereotypes often focus on the inherent badness or evil nature of 'the enemy'."*

What originally got me started on my defence of Bateman was the fact that many opinion pieces about his book attacked the author rather than his arguments. From extremist to conspiracy nut and even revolutionary socialist, Bateman, as the most prominent critic of microfinance, was labeled all sorts of things – the upshot being that such a person's arguments shouldn't count. Evidently tolerance of dissenters is pretty low.

Symptom 5: *Pressure. "This is directly applied to anyone who momentarily expresses doubts about the group's shared illusions. Such pressure is often masked as amiability, in an attempt to 'domesticate' the dissenter, so long as doubts are not expressed outside the ingroup, and fundamental assumptions are not challenged."*

Here, I get to some more difficult symptoms to test for. Are "critics from within" silenced by the group? I think not, in fact. Many microfinance advocates critique certain models or elements of microfinance. For example, Malcolm Harper, chairman of

M-CRIL and former chairman of BASIX, remains a well-respected figure in the microfinance world despite co-editing "What's Wrong with Microfinance?"[351]. That said, his (and others') criticism never was fundamental, and therefore remains tolerable.

351 Dichter, Thomas, Harper, Malcom (eds.) (2007): *What's Wrong with Microfinance?* Bourton on Dunsmore: Immediate Technology Publications.

Symptom 6: *Self-censorship. "Individuals keep silent about their misgivings, and even minimize to themselves the importance of their doubts'."*

This one I can't test, as I lack any ability to mind-read.

Symptom 7: *Unanimity. "An illusion of unanimity exists within the group, with silence assumed as concurrence with the majority view."*

Same here. When I finally learn to mind-read, I'll fill in 6 and 7!

Symptom 8: *Mindguards. "'Individuals sometimes appoint themselves as mindguards to protect the leader and fellow members from adverse information' that might confront complacency about the effectiveness and morality of decisions, to the extent of taking it upon themselves to exclude dissenters from the group."*

Pointing fingers at any individuals or organisations would be missing the point here, but the microfinance community does have specialised media outlets and communication channels that strongly favour "good" news: success stories, interviews about challenges overcome, optimistic reports from conferences ... news of failures is rare. Still, I see no evidence that negative news is intentionally or consciously discounted.

Diagnosis: There is some strong but not conclusive evidence of groupthink within the microfinance community. The community shows symptoms of groupthink, in that it apparently feels invulnerable towards critique, ignores warning signals and rationalises its one-sided views, believes its actions to be inherently moral, and occasionally lashes out and brands critics as evil or deluded. On the other hand, a fair measure of criticism is accepted and welcomed, and there is no evidence of self-censorship, deliberate information control or imagined unanimity.

So, while my allegation needs to be qualified, it wasn't wholly unfounded.

The intention here is not to stereotype, and yes, I know that I am hand-picking evidence. I am fully aware that the microfinance "community" is heterogeneous (and shifting). I am aware that brilliant minds are questioning assumptions from within, but it is unclear whether they are reaching the mass of practitioners, proponents and policy-makers. But my point about microfinance as 'not the work of a conspiracy,

but rather of a transnational epistemic community that shows strong signs of groupthink' remains valid.

The upshot of this is that we should be aware of the risk of groupthink, which according to Janis is when "members' strivings for unanimity override their motivation to realistically appraise alternative courses of action". The microfinance community should never forget to situate its activities in a framework of alternative courses of action, since the money and effort invested in microfinance carries an opportunity cost in terms of other, potentially more effective ways of fighting poverty. And because microfinance still is anything but a proven solution.

The Danger of Symbolism: Why the Debate about 'The Micro Debt' Misses the Point

Philip Mader, 2011/03/08

Most reactions to Tom Heinemann's controversial documentary "The Micro Debt"[352] have been strong. The film sheds light on a number of questions, first and foremost the risk that microcredit borrowers face of becoming trapped in debt. However, public debate so far has focused on two rather marginal parts of the film: a more-or-less resolved dispute over aid money (see p. 296 *"And now this: GrameenLeaks?"* in this volume), and a dispute about a house supposedly promised in the village of Jobra. It is worth investigating why so much publicity has been given to these two issues, and so little to the film's main message: that microfinance can cause debt traps.

352 Heinemann, Tom (2010): The Micro Debt. Video. 2:35 minutes. *Heinemann Media*. **http://www.flipthecoin.org**

While the charges of financial malpractice in the Grameen conglomerate have now been largely cleared up, Muhammad Yunus still remains a target of negative attention from the Bangladeshi government. He is now apparently no longer Grameen Bank's director. But Yunus' personality and job status should have nothing to do with any impartial assessment of the virtues of microfinance. What becomes clear from the recent debate is how *symbols* are mobilised (and abused) when legitimising as well as challenging microfinance. However, this distracts from more substantial questions about what microfinance does or does not, and can or cannot achieve.

Let us take a look at "The Micro Debt" and the reactions to it, and also at another, less-known documentary with less impact but perhaps a better focus on substance: "Easy Money"[353]. Both films make the allegation that microfinance can

353 Delman, Lorian (2008): Easy Money. Video. 26:24 minutes. *vimeo.com*. **http://vimeo.com/1903856**

be exploitative and can cause more problems than it solves. But the reason why "The Micro Debt" has been perceived as so inflammatory, while "Easy Money" apparently has hardly been discussed at all, is that "The Micro Debt" attacks microfinance's symbolic self-representations of success and integrity.

A tale of two Sufiyas

Given director Tom Heinemann's earlier reporting on large mobile-phone operators' terrible labour record in Bangladesh, it seems natural for him to have gone after the big players and their symbols of success in his recent investigation of microfinance. Aside from reporting on Grameen's NORAD financial muddle, he sought out the basket-weaver Sufiya Begum from Jobra village, to whom Muhammad Yunus supposedly lent a sum of money in 1974. Yunus' books made her famous as the first microborrower, but according to the documentary she died in abject poverty in 1998. In the film, a lady called Narunnahar Begum is introduced as Sufiya Begum's daughter. She reports how she met Yunus years ago, and that Yunus "promised to give my mother a house ... but nothing has happened in the last 3–4 years".

This may be a rather small issue compared to the livelihoods of hundreds of millions of microfinance clients worldwide, and one which should therefore not affect an assessment of microfinance. But the Grameen-NORAD financial misunderstanding and Ms. Begum's house misunderstanding have been attended to far more than any other topics in "The Micro Debt".

YouTube user "microfinanceresponse"[354] has set out to rectify these symbolic representations of microfinance by posting contradictory videos. A number of clips have been published recently on YouTube, claiming to represent *"The Truth about Microfinance"* (a strong claim!); my guess is that the Grameen Foundation is behind this (see this letter[355]). Update: The Norwegian TV response to the letter can also be found online[356]. The name-change put forward by Grameen as the reason is indeed fishy.

In one of the "microfinanceresponse" videos, filmmaker Gayle Ferraro (a professed fan of Yunus and Grameen) is shown interviewing the same lady that Heinemann interviewed. In the new video, Begum claims she is not the daughter of the first Grameen borrower after all. The reason for the discrepancy or confusion is never explained, but Yunus' original Sufiya Begum is sought out, based on an American TV news clip from 1989. When the "real" Sufiya Begum is interviewed, the solemn music suddenly becomes upbeat, and the video ends with Ferraro's musings on "how well she's done, helped along the

354 YouTube channel "The Truth about Microfinance". By User "Microfinanceresponse". Active from January 25 to July 29, 2011. **http://www.youtube.com/microfinanceresponse**

355 Counts, Alex (2011): Letter Regarding "Caught in Micro Debt" to NRK. January, 29, 2011. **http://www.nrk.no/contentfile/file/1.7518778!-Grameen-NRK.pdf**

356 Haug, Viebke, Kalbakk, Per Arne (2011): Letter Regarding "Caught in Micro Debt" Addressed to Alex Counts. *Grameen Foundation*. **http://www.flipthecoin.org/wp-content/2011/01/nrk-answer.pdf**

way by Grameen Bank". Case closed. *Update #2*: The same point, re-iterated, in another[357] "microfinanceresponse" video.

Really, like anyone else, I have no way of figuring out the true identity of either of these Bangladeshi ladies, nor of guessing which one of the documentary filmmakers (Heinemann or Ferraro) was mistaken. I would at least give Tom Heinemann credence that he was convinced he was talking to the (daughter of) the right person. But it doesn't matter – what counts is whether "the truth about microfinance" really hinges on Sufiya Begum's house or Yunus' NORAD money (or, say, Grameen's real interest rate, the third minor point in the film that is picked up on by microfinanceresponse, and which is itself a subject of debate) ... or instead on more serious questions: microfinance's apparent lack of macro impacts, or the risk of poor people falling into debt traps.

357 De Pietro, Julio (2011): More Shoddy Journalism Revealed in "Caught in Micro Debt". Video. 5:46 minutes. *youtube.com*. March 9, 2011. **http://www.youtube.com/watch?v=Y5QfuzUhjFs**

A battle for symbols

The upshot of Heinemann's documentary really should be that microfinance is fraught with problems, and can potentially cause harm. I say *should* ... not because Heinemann doesn't get this message across (he does), but because a large part of his documentary gets caught up in confronting the symbolic representations of microfinance.

Nevertheless, the way Heinemann takes these publicly visible symbols (Yunus/Begum/Nobel Prize) and seeks to expose what lies hidden from sight is probably what ensured him a good story for TV. Documentaries always do this: focus on key symbols, which are taken to represent an entire issue, and lead the viewer to generalise on their basis. In that sense, I wouldn't criticize this documentary more than any other, especially since this also happens to be how the other side, the microfinance-is-the-solution-side, tells and sells its story. (See "Small Fortunes"[358], "Kiva Documentary"[359], or the Grameen Foundation's PR material[360], for example ... notice how here, too, the story is boiled down to a few one-sided symbolic representations; and, unlike in "The Micro Debt", the clients get to say far less than the microfinance talking heads.)

358 - (2006): Small Fortunes: Microcredit and the Future of Poverty. *pbs.org*. Video. **http://www.pbs.org/kbyu/smallfortunes/**

359 Huffmann, Brent E. (2010): Kiva Documentary – What Did They Do With My $25 Loan? *vimeo.org*. **http://vimeo.com/10076318**

360 Wrenn, Vincent (2010): Grameen Foundation. microfinance. *vimeo.org*. **http://vimeo.com/17071261**

The problem with documentaries (or at least documentaries aiming at some form of mainstream success) is that they may not be able to break away from such a symbolic, associative, non-representative depiction of the microfinance issue; whether positive or negative. TV (and increasingly Internet) documentaries are visual by their very nature, and in order to appeal to a large audience they must condense larger themes

into a few symbolic visual icons, which they then either attack or promote. Filmmakers naturally focus on the symbolic power of the Nobel Prize winner, the first borrower, the housewife-entrepreneur, her child's first school day, etc., in order to captivate their audiences. In this sense, "The Micro Debt" does what a documentary can be expected to do; but with conclusions that displease the microfinance industry.

Perhaps the Grameen Foundation would be happy to go back to the days when "the truth about microfinance" was the simple story *they* told, of "how a few dollars change lives", the upbeat microfinance story – the key figure of which was Dr. Yunus; the defining moment the 2006 Nobel Peace Prize. They can send a dozen more filmmakers to Bangladesh to tell that story over and over. But that would have little to do with engaging the public in an intellectually honest discussion about whether small loans are likely to do more good or more harm to the poor; whether the majority of Bangla people is now any better off than 30 years ago; whether the chance of one miracle entrepreneur should outweigh the risk of other clients becoming debt-trapped and suicidal. (Though, to be fair, I have been able to find this one[361] substantive Grameen response to the film.)

In February, I organised the first U.S. showing of "The Micro Debt" at the Harvard Kennedy School; and here the audience discussion treated the financial mismanagement allegation as peripheral to the film's actual message, while the Jobra house dispute was not even mentioned. The audience preferred instead to discuss the debt problems which may be linked with microfinance, and microcredit's lack of clearly demonstrated effectiveness. While not "balanced", Heinemann's film was understood as an effective "antidote" to the usual upbeat microfinance story ... Just one example of how to take the messages of "The Micro Debt" seriously, instead of polemicising against them.

361 Odell, Kathleen (2011): Kathleen Odell Responds to "Caught in Micro Debt" Documentary. *Creating a World without Poverty: A Grameen Foundation Blog*, February 10, 2011. **http://grameenfoundation.wordpress.com/2011/02/10/kathleen-odell-responds-to-caught-in-micro-debt-documentary/**

The documentary you won't see on TV

Thanks to the good people at indiamicrofinance.com I recently became aware of another documentary, called "Easy Money", which I would highly recommend to anyone concerned with the real questions of microfinance. Particularly against the background of the Andhra Pradesh crisis, it is almost something of a historical document.

For 50 minutes, "Easy Money" does exclusively what Tom Heinemann's "The Micro Debt" does in its better part: talk to the people on the ground in order to figure out what microfinance does there. I wouldn't call this film more "balanced" (which isn't, and never has been, the purpose of journalistic documentaries) than "The Micro Debt"; it is definitely less professional, which is probably the reason why it focuses more consistently on the questions an average TV audience would have less patience for. And I give it credit for that focus.

Filmed in 2007, "Easy Money" shows that the problems exposed by the Andhra Pradesh microfinance crisis (which began in September 2010) were visible far earlier for those willing to look. In doing so, it discredits the industry claim[362] that the compulsion, malpractice, suicides, and over-indebtedness problems found in AP during the crisis were invented or instrumentalised by a jealous or zealous state government aiming to bring down microfinance. Rather, it appears that in 2010 a long-festering problem finally reached a critical volume and became political.

362 Rai, Vineet (2010): India's Microfinance Crisis is a Battle to Monopolize the Poor. *Harvard Business Review Blog Network*. November 4, 2010. **http://blogs.hbr.org/cs/2010/11/indias_microfinance_crisis_is.html**

Best of all, "Easy Money" addresses the question with which I was left hanging most after watching "The Micro Debt": if borrowing is so harmful, why do these people borrow? "Easy Money" explains,

> *Poor labourers continue to borrow in order to survive the debt cycle, each loan being used to pay back another, and so on, until the borrowers are forced to spend their entire lives paying off loans … It kind of made me think that this was a developing-country version of getting one credit card to pay off another; the debt cycle common in developed countries.*

We are also shown the asymmetry of information that favours irresponsible microlending and borrowing. A client says, "I don't know anything about microfinance, but I just took a loan from the group and repaid it." The narrator explains,

> *Amongst the poverty-stricken, there is no question that words travel fast when the subject concerns access to money. When speaking with microfinance clients, one has the impression that microfinance has spread like a wildfire. So fast that it isn't always clear that people know what microfinance even is.*

AP microfinance institutions have apparently been willing to grow and become profitable on the basis of this naivety. In that connection, we should explore the power dynamics and mission ambiguities underpinning microfinance.

> *The women leave the same way they came: single-file, silently, orderly, obediently … To achieve the high repayment rates the MFIs target, the ethos of self-help groups needs to be one of compliance and conformity, and not one of social empowerment and transformation. We are forced to ask ourselves then what the true goals of the MFIs are, and if there really is a social mission, masked behind their apparent obsession with repayment rates. Like everything, it matters with whom you speak.*

That's the sort of unclear picture independent microfinance researchers have to deal with – and the sort of reality that will prompt TV audiences to change the channel.

Both "The Micro Debt" and "Easy Money" make the allegations that microfinance causes more problems than it solves and that it exploits the gullibility of the uninformed, who have little choice. Both films make them well, in their own ways.

But the reason why "The Micro Debt" is being so feverishly and polemically discussed, while "Easy Money" apparently isn't noticed at all, is that "The Micro Debt" also attacks microfinance's famous symbols of success and integrity. I maintain that we should move away from that discussion. It would be great to see practitioners like the Grameen Foundation respond to the real allegations against their business and development model, effectively and convincingly, rather than post video clips poking at marginalia. They should deal with statements like this one from "Easy Money", which seems an appropriate conclusion:

> *Those who uncritically celebrate microcredit seem unaware of the actual debates within the microcredit community, where the dominant issue is how best to build institutions that are genuinely sustainable, as versus short-term solutions designed to flood developing markets with quick cash in the hope of spawning new microenterprise. More money will not fix people's lives. In fact, frequently, it only serves to prolong debt entrapment. What is needed instead is better money, not more of it.*

That Evil, Evil Microcredit Documentary, on Tour

Philip Mader, 2011/10/08

Few documentaries in recent years can claim to have had as much impact on transnational development as *The Micro Debt*. Tom Heinemann's documentary film, produced for Norwegian public broadcasting, has contributed to a wave of critical reasoning about microfinance, but also to the axing of Grameen Bank's founder, Muhammad Yunus. While Heinemann wasn't out to harm Yunus, the documentary's fallout (as well as the Indian microfinance crisis) was an opportunity for politicians in Bangladesh to remove a weakened Yunus from office.

All in all, The Micro Debt doesn't shed a good light on microfinance, and in return it has come under fire from the microfinance community, an epistemic community which doesn't take criticism well. The Grameen Foundation in particular has mounted an organised attack on Heinemann and his film, engaging PR firm Burson-Marsteller to disseminate counter-claims and draw into question the film's integrity. But The Micro Debt is becoming increasingly difficult to ignore or deny. It won in the "Television" category at the Avanca Film Festival in Portugal earlier this year, and may win more

awards at the various other festivals internationally where it has been nominated[363]. And it's going on tour in the USA and Canada this month.

The real message of the film is that, after three decades, there is still no concrete evidence that microcredit actually does anything for the poor. Heinemann's main point is that western donors have been naive in their enthusiasm about microfinance, and his poverty-stricken interviewees testify that this might even worsen their precarious situation.

363 Prix Europa, DocsDF (Festival Internacional de Cine Documental de la Ciudad de México), Patras International Film Festival, Ekofilm, and the Sichuan TV Festival. The documentary later won the 2011 Lorenzo Natali Journalism Grand Prize, a prestigious award for journalistic work granted by the European Union in co-operation with Reporters Without Borders.

A misrepresented film

The film's director Heinemann visited Bangladesh, the Mecca of microfinance, to check up on the successes claimed by Grameen Bank and other microfinance organisations regarding poverty alleviation. He investigated Grameen's funding from the Norwegian government (where he uncovered financial irregularities amounting to $100 million) and spoke to numerous academic and practitioner experts. The film also shows him being denied interviews with Muhammad Yunus on several occasions.

The two points of contention on which most of the debate has focused, however, are a few interviews in the village of Jobra (where Yunus supposedly made his first microloans in 1976), and the alleged misuse of Norwegian aid money by Grameen Bank. Jobra and Grameen Bank are of great symbolic importance to the microfinance industry, which is why the industry's retort has focused on these aspects. It also serves to distract from the larger issue at hand: the shaky foundations of microfinance.

While the issue of the Norwegian aid money appears to have been settled in Grameen's favour (though ultimately contributing to Yunus' resignation), the issue of Jobra remains. In Heinemann's version, the village is still mired in poverty, and Sufiya Begum died in destitution in 1998 (to which a woman, identifying as her daughter, testifies). In Grameen Foundation's version, Sufiya Begum is alive and prosperous, as is her village.

Spreading uncertainty and doubt

To drive its version home, the Grameen Foundation has hired none other than Burson-Marsteller (B-M), the infamous PR/lobbying firm known (and feared) for representing such illustrious organisations as Union Carbide, Philip Morris, General Pinochet and various oil companies whenever in need (to name only a few clients with absolutely no skeletons in their closets whatsoever!). Some may call B-M's specialties

"smear campaigning" and "FUD creation"[364]; B-M seems to prefer the term "Evidence-Based Communications". I don't want to judge a defendant by their attorney here. But at the very least, Grameen Foundation's choice in hiring B-M shows that they see their discursive hegemony over microfinance's public image as acutely threatened.

364 "Fear, Uncertainty and Doubt", Wikipedia. **http://en.wikipedia.org/wiki/Fear,_uncertainty_and_doubt**

One of B-M's strategies has been to create a YouTube channel called microfinanceresponse, where various "truths" are expounded in response to Heinemann's alleged "shoddy journalism". Now, supposedly, "Sufiya Begum" never existed, but was a made-up name that Muhammad Yunus invented to protect his first borrower, who (according to microfinanceresponse) actually goes by the real name of Chaba Katun. Apparently, her anonymity is no longer important (Katun's identification papers are being flashed around YouTube), but the confusion about who Heinemann interviewed is now perfect.

Another B-M approach has been to create an astroturf organisation called "Friends of Grameen" (FoG), designed to orchestrate public outcry against any criticism of Grameen, and to attack Heinemann's documentary. FoG has been rather successful at organising media support for Yunus and Grameen Bank, and may even have swayed Hilary Clinton's diplomatic intervention[365] on Yunus' behalf.

365 US Puts on Hold Bangladesh Ties over Yunus Harassment. *Sify News*. February 28, 2011. **http://www.sify.com/news/us-puts-on-hold-bangladesh-ties-over-yunus-harassment-news-international-lc2mEojcjcf.html**

Despite all this, The Micro Debt hasn't been viewed by that many people in the English-speaking world yet. It has been broadcast on TV in Danish/Norwegian, and in 14 other countries, including the Netherlands, Belgium, Spain and Croatia; but it hasn't been shown yet in the Anglophone world. That is changing now. With Heinemann touring in October and November, the film is being screened at several institutions in the USA and Canada. The tour will surely induce interesting discussions and debate after the screenings.

The Case of Kiva: Drafting Foot Soldiers for the War on Poverty

Domen Bajde, 2011/05/06

In one of his depressingly amusing anecdotes Ronald Reagan suggests that in the US 'War on poverty' (declared by Lyndon B. Johnson two decades earlier) 'poverty won'. In the decades that followed, Reagan's smug conclusion has resonated with many who have either lost faith in organised political/governmental action against poverty or have refused altogether to conceive of poverty as an issue of governance. Similar qualms have been raised in regard to nonprofits' and charitable organisations' ability to effectively besiege poverty. Not surprisingly, the 'foot soldiers' of the anti-poverty regiment (i.e. regular citizens/donors) are often overwhelmed by endless charity appeals and a profound sense of hopelessness.

In our collective efforts to discover (create?) 'fresh' champions in the ongoing war on poverty, many heads have turned to business. Philanthropy-business hybrids, such as venture philanthropy, philanthrocapitalism or social entrepreneurship, have become central to the contemporary pursuit of poverty alleviation. These hybrid alternatives are often depicted as an unproblematic marriage of economy (self-interest, resource management) and philanthropy (social values, charitable giving). Due to their supposedly apolitical and non-ideological nature, they appeal to individuals of varied political convictions and domiciles (globally, so to speak).

Supposedly is the operative word here. In my research on Kiva, the paragon of microfinance charity, I explore the ideological contours of Kiva's appeal to the global audience of charitable givers (lenders, to be more precise). As is often the case with business-philanthropy hybrids, Kiva's appeal relies heavily on inspiring visions of poverty, progress and giving. Despite the research project being in its early stages, one thing is clear. Kiva's success is (at least in part) owed to what Holt and Cameron call cultural innovation[366], i.e., to its founders seising an ideological opportunity presented by the tensions described in the introductory paragraph.

For instance, Kiva offers an alternative (positive) view of poverty (see Jackley's TED talk[367]), which substitutes the traditional depressing images of the helpless poor with colourful stories of the 'working poor' (in Yunus' terminology the 'bonsai' entrepreneurs) waiting to be unleashed by micro loans. Kiva masterfully weaves several microfinance myths into a compelling yarn of *'Entrepreneurial Charity'* (EC) – an ideological con-

366 Holt, Douglas, Cameron, Douglas (2010): *Cultural Strategy: Using Innovative Ideologies to Build Breakthrough Brands*. Oxford: Oxford University Press.

367 Jackley, Jessica: Poverty, Money – and Love. *TED*. October 2010. **http://www.ted.com/talks/jessica_jackley_poverty_money_and_love.html**

ception of charity that draws heavily upon entrepreneurial mythology (e.g. visions of heroic individual entrepreneurs as agents of socio-economic progress). In Kiva's case EC ideology is inscribed in three ways: 1) in myths of Kiva's origin (Kiva as the quintessential child of social entrepreneurship); 2) in depictions of the poor (the working poor entrepreneurs), and perhaps most interestingly, 3) in Kiva's construction of charitable giving (lending).

Jackley, one of Kiva's founders, suggests that: 'Kiva.org democratizes philanthropy, allowing the average individual to feel like a mini-Bill Gates by building a portfolio of investments in developing world businesses.' Her words echo the utopian ideology of EC that has inspired many (in Kiva's case 579,144 people and counting). By inviting regular donors to become (mini) venture philanthropists and by 'retelling the story of poverty and charity'[368] Kiva joins the ranks of successful charity *ideologues* that are likely to play a crucial role in how poverty, charity and governance are/will be envisioned. What worries me, as I continue to analyze Kiva lenders' thoughts on poverty and charity, is the profound lack of political and systemic considerations[369] and the overriding conviction that entrepreneurship is the panacea (and never the germ[370]) of poverty. 'Democratisation' of philanthropy? OK. But what kind of philanthropy?

368 See last footnote.

369 Mader, Philip (2011): Making the Poor Pay for Public Goods via Microfinance: Economic and Political Pitfalls in the Case of Water and Sanitation. *MPIfG Discussion Paper 11/14. Cologne: Max Planck Institute for the Study of Societies.* **http://www.mpifg.de/pu/mpifg_dp/dp11-14.pdf**

370 Zizek, Slavoy (2006): The Liberal Communists of Porto Davos. *In These Times*. April 11, 2006. **http://www.inthesetimes.com/article/2574**

The Rumsfeldian Logic of Microfinance Impact Assessment

Philip Mader, 2011/08/29

In 2002, in the run-up to the USA's second invasion of Iraq, when challenged about the allegations made by the Bush administration concerning Iraq's weapons of mass destruction (WMD) arsenal, Donald Rumsfeld made a memorable logical statement: "The absence of evidence is not evidence of absence. ... Simply because you do not have evidence that something exists does not mean that you have evidence that it doesn't exist."

In terms of twisted logic, Rumsfeld was right: the fact that his intelligence services couldn't find conclusive proof of WMDs in Iraq did not necessarily mean they weren't there; their available methods simply weren't good enough to find them. But empirically, of course, he was wrong. As we now know, the reason why no proof was found for the WMDs was that they simply weren't there.

Fast-forward to 2011, to a debate about evidence demonstrating the positive impacts of microfinance. Six British researchers recently published an exhaustive study (actually a Systematic Review, S.R.)[371]; they pulled together all the existing 2,643 publications about microfinance's impact and looked in depth at the best 58.

Their conclusions – which are too complex and fine-grained to present in a nutshell – effectively (1) raised doubts about the research designs used so far, (2) re-iterated that the available evidence could "neither support nor deny the notion that microfinance is pro-poor and pro-women", and (3) suggested that there has been "inappropriate optimism towards microfinance". And finally, they suggested that pursuing microfinance without proof that it works bears the risk of not running other programmes that could work better; the opportunity cost.

The reaction from two prominent impact evaluators, Jonathan Morduch and David Roodman, has been chilly, which is somewhat understandable given that their own studies are *repeatedly mentioned (and, as David Roodman says with reference to his & Morduch's work, somewhat caricatured)*[372] in the S.R. Essentially, the retort by both to the S.R.'s authors is: the absence of evidence is not the evidence of absence.

Jonathan Morduch[373] clearly expresses this, and the implications for him. He says that the S.R. is causing "confusion" (for whom exactly?) between proving that something doesn't work, and not being able to prove that it works. His suggestion for impact assessors is

> *stick to your guns and re-double efforts to do better evaluations. The state of the literature on microfinance impacts is better characterised as "not being able to prove that it works" than as "proving that it doesn't work". I've long argued that, because of the lack of clarity on big impacts, we need to cut the hype – and, based on the available evidence, proceed with cautious optimism.*

David Roodman's[374] reaction is characteristically less subtle. On the one hand, he writes "with a

371 Duvendack, Maren, et al. (2011): *Systematic Review: What Is the Evidence of the Impact of Microfinance on the Well-Being of Poor People?* London: DFID. **http://www.dfid.gov.uk/R4D/PDF/Outputs/SystematicReviews/Microfinance2011Duvendackreport.pdf.** See also "'What is the Evidence of the Impact of Microfinance …?' by Duvendack, Maren, et al. in this volume.

372 Edition made in response to a comment by David Roodman: P*hil, actually, the systematic review does not critically review Roodman and Morduch – doesn't review it all really. Nor should it, since R&M is itself a kind of review. Most of the references to it are about how it is consistent with the work of Duvendack and Palmer-Jones. The concluding text of the systematic review quotes and questions a single sentence from the conclusion of R&M – I believe in a way that caricatures us, as I have written elsewhere.*

373 Morduch, Jonathan (2011): Disproving and Confusing. *Financial Access Initiative Blog*. August 17, 2011. **http://www.financialaccess.org/blog/2011/08/disproving-and-confusing**

374 Roodman, David (2011): I Failed to Seriously Consider the Limitations of Microfinance as a Poverty Reduction Approach. *David Roodman's Microfinance Open Book Blog*. August 17, 2011. **http://blogs.cgdev.org/open_book/2011/08/i-failed-to-seriously-consider-the-limitations-of-microfinance-as-a-poverty-reduction-approach.php**

couple of exceptions, [the S. R.] concisely corroborates my thinking," but on the other hand he finds it "problematic in certain ways, even mildly offensive". He claims that "in naming intellectual allies and opponents, the report appears to pick sides in a way that departs from the evidence it so thoroughly critiques" (a comment which mystifies me, since I can't see how saying that there are sides in a debate equals *choosing* sides). He even sees the S.R. authors seemingly making "common cause" with the "nihilism" of Milford Bateman, a comment I can only read as trying to establishing guilt by association.

But the real upshot of his reaction is the same as Morduch's: "lack of evidence means lack of evidence of help and lack of evidence of harm". A lively and refreshing debate has ensued in the comments on Roodman's blog piece, in which Maren Duvendack, one of the S.R. authors, clarifies that "while agreeing ... that the evidence of impacts ... is inconclusive we suggest that [many others] continue to believe in its (MF) beneficence ... while we suggest it might be more appropriate to conclude that the evidence is more or less equally consistent with the hypothesis of little (direct) beneficence for the poorest and that therefore what one concludes depends on other evidence and arguments".

While I took off my economics hat a few years ago and I am certainly no logician, I can't help being struck by, on the one hand, the technical sophistication of the debate, and on the other hand, by its simple logical confusedness. A quick look on Wikipedia[375] could help:

> *there are only two possibilities, given a null result:*
> 1. *Nothing detected, and X is not present.*
> 2. *Nothing detected, but X is present*
> *(Option eliminated by careful research design).*

What the S.R. does, therefore, is challenge statement #2. The S.R. proposes: if your research design is actually good, but does not find anything, then that is because nothing is there. (Note that the authors are actually very careful in their statements about nothing being there, merely proposing that this *might* be an explanation.)

I also understand (from Stephen Hales[376]) that you can prove a negative – that is, if you are looking for it. Microfinance RCTs aren't.

This is where Rumsfeld comes in again. In his view, the lack of proof of WMDs was a sign of insufficient methods, and not a sign of them not being there. At least, however, he didn't claim to be agnostic about those WMDs. He *knew* they were there, and acted accordingly with conviction, regardless of what any

375 "Argument from Ignorance: Distinguishing Absence of Evidence from Evidence of Absence", *Wikipedia*. **http://en.wikipedia.org/wiki/Argument_from_ignorance#Distinguishing_absence_of_evidence_from_evidence_of_absence**

376 Hales, Steven D. (2005): Thinking Tools: You Can Prove a Negative. In: *Think*. Summer 2005, 109–112. **http://departments.bloomu.edu/philosophy/pages/content/hales/articlepdf/proveanegative.pdf**

doubting Thomases might say. (Which reminds me of the joke at the time: "You ask how we Americans know Iraq has WMDs? We kept the receipts.")

I see a parallel with the behaviour of many members of the microfinance research community; not because they openly profess faith in microfinance's benevolent impacts or because they like wars (neither is the case!), but because they acknowledge there being no proof of microfinance's impact, yet do not (openly) doubt its impact. Their feigned agnosticism is, in my opinion, incompatible with the idea of "proceeding with cautious optimism". If Rumsfeld had proceeded *cautiously* on the assumption that WMDs were present, perhaps a terrible war would have been averted, but the maxim "in dubio pro reo" (guilty until proven innocent) would still have been violated. If microfinance programmes are considered worthwhile until proven ineffective, the logic is equally skewed.

The reason I say this is that I haven't heard any RCT researchers saying "hold your horses, stop your microfinance programming, we impact experts really haven't got a clue what this microfinance thing does; it could be beneficial or harmful in reality, but we just don't know" (though I will stand corrected if someone from the RCT community has said things along those lines – in dubio pro researcher). Proceeding with caution should not simply mean lamenting the persistent hype around microfinance (which many have done) but expressing actual serious concern about microfinance existing and growing at its current level – with the global loan portfolio set to double roughly every two years – and calling for a halt until there is evidence of positive impact.

Actually, and here is my challenge, the genuinely *cautious* thing to do would be to stop microlending except to a few (randomly selected) test populations until it can be reasonably established that it works; a move which, after all, *according to the present state of evidence*, should neither harm nor benefit the poor. My reasoning is that, if researchers really are agnostic about microfinance's impact, there should be no objection.

How to Make Microfinance Out as a Success, Even when It Isn't

Philip Mader, 2011/12/08

CGAP is the World Bank's (not-quite-so-)arm's-length sub-organisation whose role is to promote microfinance. CGAP (pronounced *"see-gap"*) once stood for "Consultative Group to Assist the Poorest", now it officially stands for "Consultative Group to Assist the Poor". Actually, if *nomen* were *omen*, it should probably stand for "Consultative Group to Assist (those who lend to) the Poor (and not-so poor)".

I don't expect CGAP to function as an independent evaluator of microfinance. What I do expect is for CGAP's publications to have minimum standards of research quality and logic.

The most recent CGAP report, entitled "Latest Findings from Randomized Evaluations of Microfinance"[377], however, is appalling on both counts. Nearly everything about this report is problematic. It is racked by wishful thinking – to paraphrase: "we may not have evidence that microfinance does what it was supposed to, but we still believe it works" – and it has a disturbing *feel* about it, which derives from: (1) what the authors have left out, and (2) the heavy tension between concern for the poor and patronising them.

377 Bauchet, Jonathan, et al. (2011): Latest Findings from Randomized Evaluations of Microfinance. *Access to Finance Forum Reports by CGAP and Its Partners*, No. 2. Washington, D.C. **http://www.cgap.org/publications/latest-findings-randomized-evaluations-microfinance**

Ignorance or ignoring?

The first main problem is that a uniquely important piece of literature has been left out. Given that their report is supposed to give an overview of the available knowledge from RCTs, I was surprised – to say the least – that Bauchet and colleagues managed without a single mention, let alone a discussion, of the systematic review by Duvendack et al.[378].

378 See previous pages.

Published this summer for the British DFID, Duvendack and her co-authors went through a whopping 2,643 publications on microfinance in order to systematically assess what is and what isn't known about the impacts (Bauchet et al., in comparison, looked at a total of 20). In what is the most comprehensive study to date, Duvendack et al. found dismayingly that (after over 30 years) "there is no good evidence for" microfinance actually working – contrary to the message Bauchet et al. wanted to convey. How could the CGAP report have missed this recent, huge and hotly-debated publication?

Either the authors were genuinely ignorant of the Duvendack study, in which case they really have no idea where the research on microfinance's impact currently stands: or they didn't agree with the conclusions, and therefore conveniently chose to ignore them.

It doesn't do what it's supposed to do … but it certainly works!

And the second problem, which is about *how* to measure success (I'm picking out examples here, but I have many more in case it seems I am being selective) … The key message of the new CGAP report is: microfinance works, but not in a miraculous fashion, and not in the ways it was expected to. It doesn't reduce poverty, but it does practically everything else that we didn't try to prove. A good example along these lines (emphasis added): "No evidence was found that microcredit was empowering women, *at least along measured dimensions*".

"Now with nearly 200 million borrowers, microcredit has been successful in bringing formal financial services to the poor," Bauchet et al. proclaim. Success indeed!! 200 million people have loans. But are these loans actually doing anything useful? Well … as was reported after the publication of the first RCT results, borrowers in India *didn't* earn higher profits, hire more employees, or see more revenues from their work – but they *did* turn out to be 1.7 percentage points more likely to start a business. Wow, receiving a loan after telling a bank that I want to start a business makes me marginally more likely to actually start one! Come on: shouldn't the standards of success be higher than that?

Pausing to think about these results: in actual fact they mean the people with small businesses, who voluntarily came forward to get a loan for whatever reasons they had, and who did *not* receive a loan, were no better-off or worse-off than their counterparts who *had* received a loan. What stronger proof could there be that microcredit is useless? an impassionate observer may ask. But not so CGAP's evaluators.

At least Bauchet et al. are honest about this much:

> *Microcredit is not transforming informal markets and generating significantly higher incomes on average for enterprises.*

But they immediately add:

> *And yet the industry has focused almost exclusively on the rhetoric of entrepreneurship and has overlooked the many important benefits to households that are using loans to accelerate consumption, absorb shocks, or make household investments, such as investments in durable goods, home improvements, or education for their children. …*

> *While these uses of financial services are different from the uses initially anticipated, they are still valuable, and the ability to manage finances is a fundamental part of everyday life for all people.*

If anything, this text is evidence of an industry searching for a new source of legitimacy. Microfinance used to be about "empowering women", then it was about "microentrepreneurship", now the slogan is "financial inclusion"; which may be little more than a catchphrase for the idea that giving the poor access to finance is considered an end in and of itself.

Thank you for not smoking, thanks to microfinance

Worse yet, the new focus seems to be on making microborrowers into better people. Now the measure of success is that borrowers should adhere to a protestant work ethic:

> *Those who started a new business cut back on temptation goods (tobacco, alcohol, tea, betel leaves, gambling, and food consumed outside the home) and invested more – tightening their belts to make the most of the new opportunity. This switch from temptation goods to investment and durable consumption in the groups with businesses is an encouraging finding.*

Perhaps the economist who wrote that sentence doesn't smoke and never eats a samosa at a roadside stall. Yet, the patronising audacity of categorising a cup of tea as "temptation goods", as if it was a frivolous luxury (in India, mind you), is unsettling. Certainly, the poor need to "tighten their belts"! While to a *homo oeconomicus* a foregone cigarette or cup of chai is merely one small step towards rationality, one can imagine the real-life borrower's view of this: "Working to pay off this loan has even taken my daily cup of tea from me." Only in the economist's world is this an improvement thanks to microcredit.

Unsurprisingly, the authors of the report don't bother to dwell on the statistically-significant findings (from the Philippines) that "subjective well-being slightly declined" among borrowers. Instead, they contently note:

> *The new businesses created and the shift away from small "wasteful" expenditures implied that access to loans enabled households to make clear choices to reprioritize, invest, and make the most of the new opportunity: "The main objective of microfinance seemed to have been achieved. It was not miraculous, but it was working" (Banerjee and Duflo 2011, p.171).*

Is this really a positive thing? When read in the cold light of reason, the evidence presented here shows: *because of microcredit, poor people consume fewer locally-pro-*

duced goods and services (like tea, hand-rolled cigarettes, and roadside food), thereby hollowing out the local market, and they now work harder (or do something, anything) to pay off loans from a microfinance bank with foreign shareholders; and (unsurprisingly) as a result they are less happy.

Yet consistently, throughout the report, Bauchet and co-authors (who are, in fact, mostly affiliated with the same institutes producing the RCTs) reproduce the subtle spin put on the evidence. The main objective, as they interpret it, is not to make the poor materially better-off: it is to get them to make sensible choices (as western economists define them) and get them to work. The new success of microfinance: re-programming people? Microfinance then clearly becomes a tool of governmentality, a subtle but forceful way of changing people's behaviour.

In the section on savings products, they present poor people as irrational with regards to the future. Microfinance organisations should therefore work to create savings discipline.

> *Despite the lack of evidence for positive effects on welfare from credit, the studies so far offer tantalising evidence that there could be important potential benefits for some poor households to be gained by helping the poor reprioritize their expenditures.*

When neither a lack of positive evidence, nor a fair amount of negative evidence can break the optimistic outlook, it seems that in reality, the irrational wishful thinkers are the evaluators themselves – and not the borrowers.

Ultimately, therefore, the mind boggles as to what the minimum requirement is for being allowed to publish reports for CGAP:

- Is it high standards of evidence, solid logic, transparency of assumptions? Maybe high standards, good logic and transparency are a bonus, since very insightful reports sometimes emerge from CGAP ...
- Or is the minimum requirement being "on message"? No matter what, microfinance has to be the solution. After reading this report, I am inclined to think it is that ...

False Histories: Microfinance and Its Non-Lineage of German Cooperative Banking

Philip Mader, 2011/09/14

Recently, I've been writing a section about the history of microfinance for my dissertation. Having read around a bit, I feel the need to correct a myth that seems all too common among microfinance enthusiasts: that microfinance follows in the footsteps of German cooperative banking. I will admit this is becoming something of a pet peeve. But really, microfinance and the cooperative movement have very little in common. Here's an explanation.

At least not all microfinance histories follow the simplistic story that casts microfinance as an invention of Muhammad Yunus in 1976, essentially saying that microfinance has no history. But there is also an account of microfinance that I would call the *over-historicised* account, which sees microfinance as part of a very long history of credit. Mainly, the idea is that philanthropists have been using credit to "do good" for aeons because the poor have always needed credit, so microfinance is just the modern iteration of this idea. Muhammad Yunus has even been compared[379] to Friedrich Wilhelm Raiffeisen (by Bernd Balkenhol at the ILO).

379 Balkenhol, Bernd (2007): Microfinance and the Nobel (Social) Peace Prize. In: *Finance & Bien Commun*, 26 (1): 17–18.

But I don't think the poor have always needed credit (definitely not before the monetised economy), and I don't believe microfinance really follows in the footsteps of, say, the Irish loan societies or the German cooperative movement. The particular for-profit, financialisd "social business" commercial enterprise, which a modern microfinance institution is, bears very little resemblance to anything before it; it is a distinct product of the financialised capitalism of our time.

Nevertheless, microfinance enthusiasts try now and again to establish a direct link between modern microfinance and European cooperative banking. My guess is that they are trying to associate the former with the successes of the latter. Thankfully, that view isn't very common in academically-produced literature, but I have seen/heard the comparison between the German cooperative banks and microfinance organisations made informally all too often; for instance at conferences, along the lines of "We need to create a Raiffeisen for the poor of the 21st century" – the way to do that being, of course, microfinance.

The British did it, once again

It is true that microfinance shares a very distant relationship with the German cooperative finance movement of the 19th century, thanks to – of all people – the British; but really a very distant one. The first *Genossenschaften* in Germany were founded simultaneously in 1847 by Friedrich-Wilhelm Raiffeisen and Herrman Schulze-Delitzsch as a response to famine. Among other things, they gave credit to small businesses and farmers. In the early 20th century, when the British identified rural poverty and dependence on moneylenders as a serious social problem in the Indian colonies, they were inspired by the German successes and sought to tackle the problem via cooperative credit. These credit cooperatives were a "transplant of a German idea, with English characteristics, slightly modified to suit conditions in British India"[380].

Henry W. Wolff, an ardent British promoter of cooperative credit, assessed and compared the cooperative systems around the world in 1910[381], and specifically applauded the Indian cooperative societies. In what can only be regarded as historically ironic, he believed their independence and capitalist outlook would make them more advanced and prosperous than the German cooperatives.

380 Turnell, Sean (2005): The Rise and Fall of Cooperative Credit in Colonial Burma. *Research Paper 0509*. Department of Economics. Sydney: Macquarie University. **http://ideas.repec.org/p/mac/wpaper/0509.html**

381 Wolff, Henry W. (1910): *People's Banks: A Record of Social and Economic Success*. London: P. S. King & Son. **http://books.google.de/books/about/People_s_banks.html?id=6AcpAAAAYAAJ& redir_esc=y**

> *Compare the eagerness and the good practice of the non-State aided Indian rayats with the listless indifference and sluggish backwardness of the French and Italian peasantry now being urged by government officers to array themselves in State-fed banks against their will! You will quickly come to a conclusion which of the two systems is the better. And, large as the results of State-assisted agricultural co-operation in Germany and Austria have been – where people are systematically drilled into obeying State orders – they can still not compare in degree with what has been accomplished, in little more than four brief years, in India ...*

For complex reasons, in the 1920s and '30s, the cooperatives in British India went into decline, but they left a heritage inasmuch as they influenced the development of the Comilla model cooperatives in post-independence East Pakistan (Bangladesh). That model, in turn, influenced the development of microfinance by Grameen, BRAC, and others, making microfinance at best a very distant and estranged relative of the German cooperatives.

A world of differences

Prof. Hans Dieter Seibel of the University of Cologne (for whose knowledge about the Indian Self-Help Group (SHG) model I have the greatest respect) sadly also makes a false connection when he claims[382] that "microfinance is not a recent development, and neither is the development of regulation and supervision of microfinance institutions (MFIs). Every now developed country has its own history of microfinance." I believe that this reverse sourcing of modern microfinance (by saying older models *are* microfinance) is misleading. It becomes clear why if one looks at the ways in which the phenomenon known today as "microfinance" is practised.

382 Seibel, Hans Dieter (2003): History Matters in Microfinance. In: *Small Enterprise Development – An International Journal of Microfinance and Business Development*, 14: 10–12.

The commonalities between the Raiffeisen model and the standard microfinance model are very few, and the specific strengths of the German cooperative financial institutions were never taken on board by the microfinance industry. The group aspect is perhaps where the closest resemblance between MFIs and the German cooperatives can be imagined, since borrower groups and "centres" (as Grameen Bank and its replicators call their groupings-of-groups) could perhaps be misunderstood as something like a cooperative. But the groups and centres in microfinance do not assume an organisational and legal identity like the German cooperatives, which operated autonomously.

As Seibel himself outlines, from the outset the Raiffeisen cooperatives did far more than organize credit: for instance, setting up purchasing and sales cooperatives for inputs and produce, transmitting technological changes, and organising famine relief. A full list of differences between modern microfinance and Raiffeisen's/Schulze-Delitzsch's cooperatives (later Volksbanken) would be too extensive in this context, but some key divergences are easy to note:

- *German cooperatives*, from their inception, provided longer-term and much larger loans (relative to clients' incomes) at lower interest rates than MFIs. Both were based on local savings, rather than on foreign investment, commercial borrowing, or donations. The German cooperatives were structured through regional supervision and auditing associations, which the cooperatives themselves owned; these smoothed out seasonal fluctuations and acted as "lender of last resort".
- *MFIs*, on the other hand, often operate on a credit-only basis. They sometimes sell products through affiliates, but never organize consumers or producers. They make far smaller loans – the average loan size in South Asia is only 15 % of GNI – with far shorter repayment terms, and charge interest rates aimed at more than simple cost recovery. MFIs are controlled top-down, most have only recently begun to focus on savings, and they are usually owned by shareholders instead of cooperative members. Their profits can be extracted.

Ownership & control matter

These differences are highly relevant. Who owns and controls a financial institution decides the type of lending it should provide, and in turn the relations of production it promotes. Longer-term, larger loans from cooperative banks – which were owned and controlled by local small- and medium-sized businesspeople – contributed to the making of today's German *Mittelstand*. The small, short-term loans from today's MFIs – owned and controlled by a potpourri of philanthrocapitalists, Wall Street bankers and development finance organisations –, on the other hand, are contributing to the establishment of bazaar economies, full of business activity but hollow in terms of job-creation, innovation and capital accumulation.

The cooperatives in Germany (and elsewhere) became formal local banks in time; microfinance groups still meet for the sole purpose of accessing loans from the external MFI source, for whom they represent little more than a risk management tool. This group structure compels them to share losses on the downside, but not gains on the upside. (One rare exception to this pattern is the route taken in recent years by India's SHGs, which Prof. Seibel has been involved in, where SHGs are registering as independent cooperatives.)

Thus it becomes clear, at the level of organisational philosophy and culture, that the motto which became synonymous with the Raiffeisen movement, "one for all – all for one", has never applied to microfinance. Expecting one to perform like the other is a mistake.

The Andhra Pradesh Microfinance Crisis

Philip Mader

The crisis that broke out in the Indian state of Andhra Pradesh in 2010 has proven a very significant event in the public perception of microfinance. The suicides of dozens of over-indebted borrowers under mental and physical pressure from unscrupulous loan agents, followed by a heavy-handed intervention by the state government, exposed the dark side of microfinance as clearly as they also exposed the political nature of the microfinance business.

The Governance across Borders blog was the first source outside India to report the breaking news; it offered an in-depth analysis long before other commentators did, and if site usage statistics mean anything, it created a lasting resource of information for people trying to understand the situation in Indian microfinance. This is all the more important since the version of events preferred by the microfinance industry, of being suddenly and innocently preyed upon by an unscrupulous government, has become the global microfinance community's preferred narrative of the crisis. These blog posts, written in the heat of the moment, are a testament not only to the dramatic situation faced by borrowers at the hands of microlenders, but also to the manner in which the industry worked over time to spin events so that it became the actual victim.

To paraphrase the film "The Social Network": the Internet is written in ink; and these pages have preserved some of the humility and regret shown by representatives of Indian microfinance in their initial reactions, before they later attempted to return to business as usual by feigning innocence.

A Full-blown Microfinance Crisis Brewing in Andhra Pradesh?

***Philip Mader*, 2010/10/19**

Right now, a severe microfinance crisis appears to be brewing in Southern India. A large number of suicides has led to a legal clampdown and a corporate backlash against the government. With a complaint launched by microfinance institutions (MFIs) at the Andhra Pradesh High Court in Hyderabad against the government of Andhra Pradesh, the recent conflict over MFI practices and borrowers' debt levels – debt which may be responsible for the deaths of over thirty people – has come to a head. How this case develops is bound to shed light on what actually matters in microfinance in India today. Bluntly: is it power, profits or people?

Flashback: In August and September, nineteen microfinance borrowers in Andhra Pradesh (A.P.) took their lives because of over-indebtedness blamed on microfinance – some reports say more than 30 (or even 57; see updates below). Then, in early October, the debt-driven suicide of a fruit-seller named Prabhakar[383] in Kurnool, southern A.P., triggered a public outcry and attacks on several MFI offices.

On October 14th, the A.P. state government "brought an ordinance making it compulsory for MFIs to register themselves, declare the effective rate of interest they charge, ensure that no security is sought for loans and no coercion is used for recovery. Non-compliance will be punished with a three-year prison term and a fine of Rs 1 lakh"[384]. In response, yesterday a consortium of MFIs operating in A.P., MFIN, filed a petition at the Andhra Pradesh High Court seeking an order to squash the ordinance issued by the government. Meanwhile, another over-indebted microborrower, K. Narayana, who was being harassed by the agents of four MFIs, took his own life by drinking poison.

For the microfinance industry, the regulatory initiative is clearly a bombshell. Registering with local authorities and improving transparency will require time and Herculean effort. Vijay Mahajan, chairman of BASIX and speaker for the MFIN consortium, thinks it impossible in the short run. He explained[385] today: "Our agents are idle. Our members (customers) have stopped attending the meetings where we seek repayments. About 9,000 crore [almost 1.5

383 Suicide Leash on Lenders: *The Telegraph India*. October 19, 2010. **http://www.telegraphindia.com/1101019/jsp/nation/tory_13073642.jsp**

384 See last footnote.

385 Ramana, K. V. (2010): Rs 9,000 Crore at Risk, Business at a Standstill in Andhra Pradesh: *MFIs. Daily News and Analysis India*. October 20, 2010. **http://www.dnaindia.com/money/report_rs9000-crore-at-risk-business-at-a-standstill-in-andhra-pradesh-mfis_1455209**

bn Euros] is at risk. And there is a much bigger danger of the entire system collapsing if this situation continues for another 60 to 90 days."

This conflict hasn't come from nowhere, though. Nicaragua saw a popular campaign of repayment refusal last year called "No Pago" (I'm not paying); this was dismissed by MFIs around the world as mere political campaigning. Then, Wall Street Journal Intern Ketaki Gokhale caused a stir (and a backlash) when she found symptoms of a lending bubble and high pressure on borrowers last year simply by talking to borrowers[386] in India – and the potential consequences of microfinance indebtedness have been known for some time.

But locally, tremors could be heard before the earthquake, too, and were probably ignored. Andhra Pradesh's capital Hyderabad was the site of the large-N, randomised control trial performed by JPAL researchers, which last year failed to find[387] positive outcomes for urban microfinance on almost all counts. While these results were challenged by the microfinance industry and also re-interpreted in a softer light[388] later by the study's authors, the upshot of the study was pretty clear: microfinance in Hyderabad wasn't actually fighting poverty. The city is also where SKS Microfinance is based; SKS is the MFI whose shares sale in July famously heaped riches onto its founders and investors but generated serious questioning inside and outside the microfinance community about the MFI's mission. The CEO of SKS was sacked earlier this month amidst a nebulous, high-level power struggle and shaken investor relations.

386 Gokhale, Ketaki (2009): In Microlending, Group Borrowing Leads to Pressure. *The Wall Street Journal*. August 13, 2009. **http://online.wsj.com/article/SB125008232217325553.html**; ibid. (2009): As Microfinance Grows in India, So Do Its Rivals. *The Wall Street Journal*. December 15, 2009. **http://online.wsj.com/article/SB126055117322287513.html**

387 Banerjee, Abhijit, et al. (2010): *The Miracle of Microfinance? Evidence from a Randomized Evaluation*. Unpublished paper. Cambridge, MA. **http://econ-www.mit.edu/files/4162**

388 Roodman, David (2009): Randomistas Attempt Message Control. *David Roodman's Microfinance Open Book Blog*. December 29, 2009. **http://blogs.cgdev.org/open_book/2009/12/randomistas-attempt-message-control.php**

Power, profits or people?

Those who are interested in where microfinance is going (and in its poor track record on the ground) should keep their eyes firmly on Andhra Pradesh right now. At the moment, I can discern three drivers in this ongoing struggle with completely open outcomes: will this mean the demise of microfinance in India, heavy regulation, or a return to business as usual?

First driver: the state is asserting its legislative *power*. The A.P. government has performed something of an about-face from its previous microfinance-friendly approach, which in the past consisted for instance of creating the "MACS Act", giving special legal status to borrower groups; or supporting microfinance-funded attempts

at providing water and sanitation, which my own field research in A.P. earlier this year dealt with. The form in which this newly-asserted power is exercised may be wild and populist, it may be ostentatious muscle-flexing by a weak government, designed to distract attention from other issues (such as Telangana separatist agitation), but this much is clear: state bodies do have the authority and the duty to act when their citizens' lives are at risk. This is especially clear when suicide notes point to MFIs' harmful business practices as the cause. What role the A.P. government should play ultimately in regulating microfinance is up to India's government to decide; but for now it has acted correctly to prevent more harm to lives and livelihoods.

Second driver: MFIs are moving to protect their business models and *profits*. While the allegation that MFIs often act like moneylenders isn't that new, the A.P. crisis is starkly revealing a callous ego-perspective among MFIs. "I had no arrears with these people, so where is the question of coercive recovery tactics?" SKS spokesman Atul Takle said[389] yesterday, and "I personally don't think a person would take her life for 225 rupees ($5.08) a week." In a country where four out of five people live on less than 20 rupees a day (2007), Takle's statement is so far removed from reality that one wonders whether he has lost all connection to it. Meanwhile, Vijay Mahajan has explained MFIN's hostility to the recent regulatory initiative from an investor's point of view: "It is quite understandable that our investors are concerned because as I said 80 per cent of our balance sheet is debt and the rest is equity". So what? I ask, when borrowers' lives are evidently at risk. Mahajan did also admit that an MFI responsible for at least one suicide was a MFIN member and would be expelled from the MFIN – the blame game of pointing at black sheep is winding up.

389 Kinetz, Erika (2010): Suicides Spark Scrutiny of Indian Microfinance. *Associated Press*. October 19, 2010. **http://www.microfinance-transparency.com/evidence/PDF/12.26%20Business%20Week%20article%20India%20suicides.pdf**

Third driver: the *people* are fighting for their own welfare. Suicide in India is already horrendously common amongst the poor, especially farmers, who are usually choked by debt before they physically end their lives. Suicide is their last feeble outcry against a cruel world. Traditionally, moneylenders have been blamed, and traditionally it is rural farmers who have suffered. Now, apparently the poor (both urban and rural) are crying out against microfinanciers. How, I wonder, can a microfinance "community" that set out to help the poor justify such suicides as a potential consequence of its activities? With their desperate actions, the poor of Andhra Pradesh have brought an issue to the fore that has rarely been heard thus far – that microfinance loans can, and often do, lead to severe over-indebtedness. The trouble is that compiling databases of over-indebted households and withholding them credit, as Mahajan now suggests, will not make things better: anyone who is deep in debt fears denial of credit most of all, because it finally locks them in insolvency. Real solutions

are needed, not solutions to save the balance sheets. Now the crisis is unfolding and I sincerely worry about some of the kind, hospitable (and indebted) people I met in Andhra Pradesh in the course of my research. I hope they are not stuck in the middle of this.

Update (20 Oct., 15:00 GMT):

- Late yesterday, MicroCapital Brief reported[390]:"Indian government finalises debt-swap scheme"; going on to explain that "Under the scheme, self-help groups would take out loans at lower interest rates from banks to pay off loans of higher interest from MFIs. The scheme is being set up in response to news that some self-help groups are struggling to repay their loans." However, this news remains unreported by others.
- India Microfinance Business News launches a bizarre poll, asking who is primarily responsible for the microfinance crisis in A.P. (Some even say: China!)
- Bala Murala Krishna at Asia Sentinel shames India's microlenders as "loan sharks", and asks[391], "What is society to do if for-profit microfinance, in its quest for ever-higher profits, pushes the boundaries of usury and becomes exploitative?"

390 This scheme never materialised. Source of citation: Kwong, Trevor (2010): Indian Government Finalises Debt-Swap Scheme, Ordinance to Counter Coercive Practices of Microfinance Institutions (MFIs). *Microcapital Brief.* October 19, 2010. **http://www.microcapital.org/microcapital-brief-indian-government-finalises-debt-swap-scheme-ordinance-to-counter-coercive-practices-of-microfinance-institutions-mfis/**

391 Krishna, Bala Murala (2010): India's Microlending Loan Sharks. *Asia Sentinel.* October 20, 2010. **http://asiasentinel.com/index.php?option=com_content&task=view&id=2771&Itemid=225**

Update (20 Oct., 22:00 GMT)

- The number of microfinance-related suicides may be as high as 57.
- The A.P. high court has asked the state government to come up with a mechanism to carry on loan collections until it passes judgment.

Microfinance Employees Pushing Clients to Commit Suicide?

Philip Mader, 2010/10/21

There is more shocking news from Andhra Pradesh. Obligatory life insurance sold with microfinance loans may be incentivising over-indebted borrowers to commit suicide. Worse still, it appears that loan officers have been pushing debtors to commit suicide as a way out of debt.

Here's the gist of a *Times of India* article[392] by Jinka Nagaraju published earlier today:

> *A government study has found that some MFI agents themselves are encouraging the debtors to commit suicide so that their loans are repaid. This happens because the borrowers are covered by insurance.*
>
> *Till now, there have been at least 45 suicides reported in the state in the last one-and-a-half months allegedly due to the coercive practices employed by the MFIs in recovering the loans. ...*
>
> *According to sources, the MFIs draw up an insurance cover for the borrower at the time of loan disbursement. In the eventuality of suicide, they recover the amount under the Loan Protection Fund (LPF) by which 10 per cent of the loan amount is deposited with the RBI which repays the remaining loan amount due from the defaulter. ...*
>
> *Explaining the methods adopted by the MFIs to trap the rural folk by doling out loans, Budithi Rajasekhar, CEO of Society for Elimination of Rural Poverty (SERP), the monitoring body of Self Help Groups (SHGs), said: "A major modus operandi is to lure a greedy SHG group member by bribing her with money and gifts to introduce the MFI agents to other members. For example, in Dubbaka mandal of Medak district, all the MFIs formed a syndicate to coerce the members to take loans."*

Sickening, if true. Under these circumstances, it only seems right that the A.P. government has halted MFI activities until the smoke clears and the cause of the suicides is established.

392 Nagaraju, Jinka (2010): MFI Agents "Forcing" Debtors to Commit Suicide: Study. *The Times of India*. October 20, 2010. **http://articles.timesofindia.indiatimes.com/2010-10-20/india/28247030_1_mfi-agents-loan-amount-elimination-of-rural-poverty**

Update (21 Oct., 15:00 GMT)

The ToI reports[393]:

> *The AP High Court on Wednesday asked the state government to explain as to what protective measures it envisaged for the micro finance institutions (MFIs) while implementing its recent ordinance that aims to regulate these MFIs. However, the bench observed that "the space that ought to govern MFIs is unoccupied so far".*

A further hearing is scheduled for Friday.

393 What about Protection for MFIs? Asks HC. *The Times of India*. October 21, 2010. **http://articles.timesofindia.indiatimes.com/2010-10-21/hyderabad/28216008_1_mfis-ordinance-bench#ixzz130F0oc6A**

Milking the Cow for What It's Worth: Regulatory Failure and Perverse Incentives in Andhra Pradesh

Philip Mader, 2010/10/22

Maybe it is too early to seek real explanations for the microfinance tragedy in Andhra Pradesh (AP). The dust hasn't settled yet, but I am struggling to come to grips with the big "why?". My usual blog sources of all colours for all things concerning development are silent, so far. But the Indian media are buzzing with coverage and an occasional piece of analysis. From what I can tell from these reports, the crisis was caused by a failure to regulate and a set of ultra-perverse incentives for microfinanciers and their employees.

What happened? In the past 6 weeks or so, some 30 to 60 (according to different sources) microcredit borrowers in Andhra Pradesh committed suicide because of their loans. Individual stories had been surfacing increasingly throughout early and mid-October about borrowers suffering under heavy burdens of debt and massive pressure from agents; with measures apparently even including child abduction as punishment[394] for loan default and agents urging borrowers to take their lives to reap credit life insurance. Protests ensued, and last week the AP government issued an ordinance imposing rules of conduct and compulsory registration on MFIs (microfinance institutions). A consortium of MFIs, MFIN, claimed this had halted their busi-

394 Agents Kidnap Girl to Punish Mother for Loan Default. *The Times of India*. October 13, 2010. **http://articles.timesofindia.indiatimes.com/2010-10-13/india/28229879_1_agents-loan-girl#ixzz12C5V6J8n**

ness completely, and this week the MFIs submitted a petition to the AP High Court asking to quash the government's ordinance.

Today, the High Court officially permitted MFIs to continue their business activities, while also upholding[395] the terms of the ordinance that MFIs may not engage in coercive practices and must proceed with registration. Meanwhile, employees of SKS Microfinance and Spandana have been arrested for harassing borrowers. SKS shares have dropped by over one fifth, indicating that investors are worried about profitability (rightly so). An Indian microfinance apex organisation has proposed for all its members to cut interest rates – more about that below.

According to Associated Press[396], 17 of the suicide victims had borrowed from SKS Microfinance, which went public only this summer at a valuation of 1.5 billion US dollars, paying out multimillions[397] to founder Vikram Akula and investor Sequoia Capital (an American venture capital firm) and other private shareholders and international NGOs.

It may be too early to say whether that money has blood on it. But I will argue here that the drive for profitability in the microfinance sector contributed significantly, perhaps even decisively, to this tragedy in Andhra Pradesh.

395 Kotoky, Anurag (2010): Andhra Pradesh Court Tells Microlenders to Register. *Reuters*. October 22, 2010. **http://in.reuters.com/article/2010/10/22/idINIndia-52386320101022**

396 Kinetz, Erika (2010): Suicides Spark Scrutiny of Indian Microfinance. *Bloomberg Businessweek*. October 19, 2010. **http://www.microfinancetransparency.com/evidence/PDF/12.26%20Business%20Week%20article%20India%20suicides.pdf**

397 Strom, Stephanie, Bajaj, Vikas (2010): Rich I.P.O. Brings Controversy to SKS Microfinance. *The New York Times*. July 29, 2010. **http://www.nytimes.com/2010/07/30/business/30micro.html?_r=1&**

Milking the cow for as much as it will give

At this week's meeting of the microfinance sectoral organisation/lobby group Sa-Dhan, which represents 260 MFIs, the organisation's executive director Matthew Titus admitted MFIs were not forthcoming in following voluntary codes of conduct. He also acknowledged that the suicides and the resultant government ordinance had created a crisis of confidence[398] in the microfinance sector. But the far greater, and unintended, admission made by Sa-Dhan is that interest payments have been excessively high; the cow will simply not give milk forever at this rate. At its Thursday meeting, Sa-Dhan members agreed collectively to cut interest rates by 0.5 to 2 percent – the Indian broadsheet The Hindu[399] smells an image makeover:

398 Sa-Dhan Members Propose to Cut down Interest Rates by 0.5–2%. *Microfinance Focus*. October 21, 2010. **http://web.archive.org/web/20101220213617/http://microfinancefocus.com/content/sa-dhan-members-propose-cut-down-interest-rates-05-2**

399 Image Makeover: MFI Body to Cut Interest Rates. *The Hindu*. October 21, 2010. **http://www.thehindubusinessline.in/bline/2010/10/22/stories/2010102251460300.htm**

> *The step to snip rates is seen as part of the industry's fresh initiatives to clear its image in the wake of the suicides in rural Andhra Pradesh allegedly due to coercive methods employed by some MFIs to collect dues and the subsequent ordinance clamped by the State Government.*

The Hindu is probably right. SKS, which increasingly looks to be a central figure in this tragedy, has even offered to cut its lending rate by 2 percent. It looks like microfinanciers in India are worried they will lose public support, and are hurrying to cut back on their profitability until this storm blows over.

The incentive structure facing MFIs thus far has been to maximize profitability, attract investment capital, and then generate returns for shareholders. At least for the moment, that incentive structure has moved back, while the cultural capital embodied in microfinance investments (in the Bourdieuan sense) must be restored/recapitalised through visible "socially responsible" behaviour.

For years, the received wisdom among supporters of microfinance commercialisation has been that competition among privately-owned profit-maximising MFIs will lead to the lowest possible rates for borrowers (though some have begged to differ[400]). If MFIs in India can suddenly cut back rates now in order to attract or retain capital, they must be overcharging borrowers. Of course the Indian microfinance market is far from perfectly competitive, and the concerted action by MFIs in lowering interest rates and challenging the AP government's ordinance shows that microfinanciers can even get together to co-ordinate and set prices.

Yet given that "a vast majority of MFIs in India are non-profit NGOs, which are legally not "owned" by anyone" (Vijay Mahajan and G. Nagashri's words[401]), the *range* of interest rates charged is surprisingly narrow. Sa-Dhan members (mostly NGOs) charge 19 to 27 percent[402], while MFIN's MFIs – "31 non-banking finance companies (NBFC) MFIs including the top 10 MFIs" – "normally" charge 24 percent[403]. In this comparison, the non-profit microfinance sector appears to act *as if* it was a profit maximizer, guided by the ideal that microfinance companies must be "sustainable", i.e. able to hold their own on the capital market against other investment opportunities. In the case of the for-profit sector, *nomen est omen*. Dropping interest rates in re-

400 McIntosh, Craig, Wydick, Bruce (2005): Competition and Microfinance. In: *Journal of Development Economics*, 78 (2): 271–298. **http://www.sciencedirect.com/science/article/pii/S0304387805000696**

401 Mahajan, Vijay, Nagasri, G. (no date): Building Sustainable Microfinance Institutions in India. **http://www.sa-dhan.net/Adls/Microfinance/PerspectiveMicrofinance/BuildingSustainableMFIs.pdf**

402 Sa-Dhan Members Propose to Cut Down Interest Rates by 0.5–2 %. *Microfinance Focus*. October 21, 2010. **http://web.archive.org/web/20101220213617/http://microfinancefocus.com/content/sa-dhan-members-propose-cut-down-interest-rates-05-2**

403 Das, Kumud (2010): MFI Body Seeks Regulator to Check Indiscipline in Sector. *The Financial Express Online*, October 21, 2010. **http://www.financialexpress.com/news/mfi-body-seeks-regulator-to-check-indiscipline-in-sector/700225/**

sponse to the AP tragedy constitutes an admission that both sectors' ideal of profitability has been pursued on the backs of the poor.

Failure to regulate – even worse than a revolving door

Given such evident market failures in the stylised "market" of microfinance in India, the need for regulation is clear. Up until now, the regulatory focus of Indian microfinance has been on self-regulation. While some industry observers have worried about an emergent microfinance bubble since early 2010, industry chiefs like Mahajan have been professing their insouciance. Private regulation remains un-enforceable.

In terms of formal regulation, the Indian government fence-sat for a long time on whether and how to regulate microfinance, stalling for years. Finally, in early 2010, a draft bill was circulated by NABARD with the call for input from "stakeholders" – the regulatees were supposed to tell the regulator how to regulate them. In that draft, a cap on interest rates was never proposed, and Non-Bank Financial Companies (the corporate form preferred by most Indian commercial MFIs) were exempt from the proposed regulation. To date, the bill has not been passed by the Indian national parliament, the Lok Sabha.

After the mass suicides, the AP government's heavy-handed clampdown on MFIs has to be seen in this context of Delhi's failure. Hyderabad had to act to protect the poor, even if in a rushed and perhaps populist way. Vague in its wording, the AP ordinance created confusion and allegedly led MFIs to halt their activities – at least officially, since, as arrests of MFI workers showed, debt collection was still going on unofficially at the local level. (According to the *Times of India*, even Vikram Akula of SKS was under risk of arrest for some time, until the AP High Court decided to quash the arrest clause.)

India's federal system grants the states power over security, but few powers for financial regulation. By forcing MFIs to divulge interest rates and register at the local level, the AP government took an important step towards finally enforcing transparency. Given the coercive tactics reportedly employed by MFI employees, there would surely have been more straightforward means available to preserve lives and prevent abuses than to issue an unclear ordinance that left open whether loan officers would be arrested for recovering loans, or not. But the resounding message from Hyderabad was not to MFIs to halt their business activities. The main message, as I see it, went to Delhi: Regulate!

Andhra Pradesh's Animal Farm: Debt Traps, Life Insurance and Death Bonuses

Philip Mader, 2010/10/25

Since my last post, on Saturday SKS Microfinance posted profits up by 116 percent y-o-y[404] (read: more than doubled), and also apparently held a secret board meeting over the weekend. You don't need to be a Marxist to find a steep rise in profits disturbing for a bank that lost at least 17 of its clients to debt-driven suicide in the same quarter. Yet the crisis in AP is far bigger than SKS, and the five biggest MFIs have realised this and announced collectively last Friday that they would be restructuring distressed loans. Finally. It took nearly two months of suicides, a heavy-handed regulatory clampdown and a media backlash to drive enough sense into the MFIs. The women's Self-Help-Group movement is also pushing for better regulation. How did we get here in the first place?

404 Controversy-Ridden SKS Microfinance' Q2 Net Up 2 Folds. *The Economic Times Online*. October 23, 2010. **http://articles.economictimes.indiatimes.com/2010-10-23/news/27581086_1_sks-microfinance-ceo-suresh-gurumani-folds**

The poor are prone to debt traps

The media have caught onto some of the macro issues, but here I will identify some drivers behind the heavy debt burdens and suicides that operate at the micro level. We must be aware that suicide in India is already shockingly common among farmers. But many, if not most of the victims in AP were small traders, not subsistence farmers, so we're dealing with a new phenomenon here.

It is no surprise that highly-indebted microfinance borrowers can be driven into spirals of debt to MFIs under conditions of heavy marketing, misinformation, social pressure to join self-help groups, and the vagaries of economic life at the bottom of the social order. If one thing goes wrong (an illness, a crop loss), an apparently sensibly invested loan suddenly turns into an insurmountable debt burden. In reality, "India Shining" is home to some of the poorest people in the world. As we saw last week, some microfinanciers are apparently out of touch with this reality. Atul Takle of SKS went on record as telling the Associated Press[405], "I personally don't think a person would take her life for 225 rupees ($5.08) a week." But four out of five people in India live on less than 20 rupees a day (in 2007; the latest figure I could find).

This (self-drafted, non-exhaustive) list outlines individual causes for the poor taking on un-

405 Kinetz, Erika (2010): Suicides Spark Scrutiny of Indian Microfinance. *The Associated Press*. October 19, 2010. **http://www.businessweek.com/ap/financialnews/D9IUS7EG1.htm**

sustainable debt. It shows that there are multiple reasons for the poor falling into microfinance debt traps, and that most are outside of their control.

- Prior indebtedness: if the poor are already in debt before they come to an MFI, which is likely, the new loan will be an additional burden unless interest rates are sufficiently low (which they weren't in AP).
- Business failure: (assuming clients actually use their MFI loans for business purposes, which is unlikely) micro-businesses fail regularly. MFIs' clients operate in highly volatile economic environments that are usually already saturated at the lower end, creating a high risk of entrepreneurial failure and thus deeper debt.

The Low End of the Market in Andhra Pradesh

Source: Author's photo. Hyderabad.

- Consumption borrowing; needs borrowing: some borrowers make unwise decisions, but many are so poor that they simply must use loan funds to cover the costs of immediate survival needs, such as rent, food or medical assistance. The interest paid on their loan can effectively increase the cost of those bills by factors of 1.5 to 2 or more.
- Unsustainable, excessive or dishonest interest rates – there comes a point where, no matter how profitably a loan is used, the interest becomes too large to be covered by business proceeds; lower rates would mean more profits retained by the poor and lower debt burdens. High rates may be "sustainable" for MFIs but unsustainable for borrowers. Additionally, MFIs often hide the real interest cost by quoting flat interest rates or charging hidden fees.

- Graduated lending: offering a larger loan to a borrower at the end of a completed loan cycle is not bad per se. But in many cases MFIs require borrowers to take larger loans, leaving the poor with the only choice of taking on greater debt or otherwise exiting the programme.
- Skewed repayment cycles: in some cases, MFIs such as Grameen Bank operate repayment modalities for their loans that require large lump-sum payments (for instance, loan fees) at the end of the loan cycle. This creates a bottleneck in borrowers' finances, which often leads them to borrow at higher interest rates from other sources and use the next MFI loan to repay the temporary loan, which in turn must be repaid with fees, and so on.
- Multiple borrowing and multiple lending: most of the over-indebted poor are indebted to more than one creditor and must balance their repayments to all creditors. While a client may be 'performing' well on one loan, she or he may be in arrears on another, making her or him subject to higher interest rates as a punishment and harassment from that lender's agents.

As the dust settles in AP, I predict that all these causes will be found. Webs of reasons will account for each suicide and will lead to complex fault-finding discussions; but it was the debt that pushed the debtors over the edge. The same was the case for subprime borrowers in the USA who perhaps lost a job or fell ill in some cases, but never should have been granted the loan that brought them under an excessive debt burden in the first place (they were, however, lucky enough to find government assistance forthcoming).

Perverse incentives: life insurance and death bonuses

Evidence is that in AP the incentives at the micro level were geared towards pushing clients to their desperate measures. According to local newspaper reports, in one village a credit group kidnapped a borrower's ten-year-old daughter to enforce repayment (according to other reports it was MFI employees[406]); police had to intervene. In many other cases, a government study found that MFI agents had urged non-performing clients to commit suicide[407]; under the loan terms, borrowers' debts were covered by insurance in case of death. Clearly these are unintended outcomes of schemes which sought to: (1) outsource repayment risk to client groups, thus getting altercations resolved within existing social networks, (2) protect families against debts incurred by a deceased member. However, under heavy pressure for repayment, both schemes have taken perverse (yet perhaps predictable) twists.

406 Andhra Pradesh Government to Introduce Bill to Check Rogue MFI's. *India Microfinance*. October 13, 2010. **http://indiamicrofinance.com/andhra-mfi-suicide-972532.html**

407 See above.

MFI employees are incentivised to facilitate full loan repayment, and therefore any defaulting client creates a hole in their paycheck. A 2005 CGAP survey[408] found that 91 percent of microfinance banks had a staff incentive scheme in place. It also found that more profitable institutions were more likely to incentivise their staff. Most of these schemes paid bonuses to successful individual employees, though CGAP found a wide variety of systems including team-based monetary schemes, branch-based schemes, employee stock ownership programmes, gain-sharing, profit sharing and "monetary tournaments/competitions". The study reported that:

> *Among MFIs that have an SIS [Staff Incentive Scheme], the average fixed salary is $295 per month and the average variable salary among those that receive an incentive is $160 per month. (McKim and Hughart 2005: 7)*

In an incentivising-type MFI, therefore, a satisfactory (average) employee would earn 55 percent on top of his fixed salary – a sizeable share that would be even higher for above-average loan officers. Most incentive schemes also pay out more for larger loans, encouraging agents to step up loan sizes over time.

When, as is now becoming evident in AP, the microfinance sector becomes saturated and clients over-indebted, the performance-based part of MFI employees' salary is threatened. AP last year was also hit by floods and then a particularly dry summer, putting many farmers, and even clients in the non-farm sector under severe stress. These factors all raised financial pressure on MFI agents, which they would logically pass onto their clients. A recent investigative report[409] by the *Indian Express*, the best so far, paints a stark picture of the fear and loathing brewing in an Andhra village:

> *On October 4, unable to pay back the five loans she had taken, 23-year-old Bandaru Padma jumped into the village well along with her two children. "The total outstanding against her name was Rs 79,000. She had taken loans from Sharemicrofin, Spandana, SKS, Basix and L&T", says Padma's father Balaiya.*
>
> *An uneasy calm settles in the lane, broken by sobs in the background. "I don't want my children to suffer because of the loans that I have taken which we are in no position to repay. Our maize crop did not yield as much as we had expected and now we do not have money to pay the weekly interests on loans", says P Satyamma, the most senior member of a SHG. ...*

408 McKim, Andrew, Hughart, Matthew (2005): Staff Incentive Schemes in Practice: Findings from a Global Survey of Microfinance Institutions. *CGAP/The Microfinance Network*. September 2005. **http://www.microfinancegateway.org/gm/document-1.9.27174/29906_file_Staff_Incentive_Schemes_in_Practice.pdf**

409 Andhra's Small-Debt Trap. *The Indian Express*. October 24, 2010. **http://www.indianexpress.com/news/andhra-s-smalldebt-trap/701577**

In the villages of Medak district, there is no sound as dreaded as that of a motorcycle in the morning. By the time the loan recovery agents reach the villages on their bikes, the men here would have left their homes in order to avoid meeting them. The women scamper for cover but have no choice but to meet them.

The recovery agents who are spreading terror in the villages are far from being the toughies they are made out to be. "They are mostly youngsters who apply for vacancies of 'business developers', 'helpers' and 'assistants' advertised by the MFIs. Once they get the job, they are assigned the task of recovery with a carrot-and-stick approach. There are incentives for maximum recoveries and threats of being fired for every bad loan. The MFIs make sure that the recovery agents assigned to one village hail from the nearby town and belong to a caste that is higher than those living in the village they have been assigned to," explains a recovery manager of an MFI.

Add to this potent mixture the (usually compulsory) loan life insurance which has become common in Indian microfinance, and it is a small step for an unscrupulous (or financially cornered) loan officer to realise that a non-performing loan will become a fully repaid loan if the client just happens to be dead. The life insurance thus becomes a death bonus.

If certain MFIs are now beginning to play the blame game, feigning innocence while pointing fingers at a few black sheep, they are stealing their way out of the responsibility for a system they helped to create. The fault does not lie with either faceless market mechanisms (for microfinance in India is no real market) or any individual MFIs – but rather with the pervasive market logic governing the entire sector.

Animal Farm: the pigs take over and nothing changes

It's not as if nobody saw this whammy coming. Daniel Rozas' late-2009 question "Is there a microfinance bubble in South India?"[410] resounds eerily now. At the time he found that "AP has more microfinance clients than any other country in the world except for Bangladesh; it shares the distinction as the most penetrated market in the world, on a par with Bangladesh; and most disquieting, the state was already at 6% over-capacity a year ago." Understandably, he now wonders[411] why his warnings were ignored. He sees a sector preoccupied with itself and ignoring ominous rumblings. But Rozas claims he is still hopeful, saying, "Disaster may yet be avoided."

410 Rozas, Daniel (2009): Is There a Microfinance Bubble in South India? *Microfinance Focus*. **http://www.danielrozas.com/2009/11/17/is-there-a-microfinance-bubble-in-south-india/**

411 Rozas, Daniel (2010): Editorial: AP Microfinance Crisis – A Signpost Ignored. *Microfinance Focus*. **http://web.archive.org/web/20120304204520/http://www.microfinancefocus.com/news/2010/10/23/editorial-ap-microfinance-crisis-a-signpost-ignored/**

To me, these up to 60 deaths because of misguided lending are already a disaster. That is why I have tried to divine the roots of the crisis here. In seeking an answer to

the big "why?", I have identified four clusters of causes. In my last post I pointed to macro-level causes: (1) the drive for profitability among MFIs leading to an overcharging of borrowers; (2) the sector failing to regulate itself and the Indian government failing to regulate from above. In this posting, I have discussed micro-level causes: (3) the inherent debt dynamics of being poor in the presence of MFIs easily leading to over-indebtedness; (4) MFIs having created incentive structures which favoured both coercion and suicide.

Microfinance set out with a goal similar to that of the pigs in Animal Farm: to make everyone more equal. Right now in AP it looks like microfinance has achieved the same result as the pigs in Orwell's fable: making some more equal than others. Some (a few borrowers and a few shareholders) may prosper, while others fall deeper into debt.

Perhaps this crisis alone won't convince supporters that microfinance should be abandoned. But it should at least prompt everyone to question the efficacy of microfinance at dually helping the poor and earning profits. There is a long-standing name for local oligopoly players who charge the poor high interest rates for the small loans they grant them, and occasionally use strong-arm tactics to ensure they collect: moneylenders. I couldn't put it any better than Sunil Nair's opinion piece[412]:

412 Nair, Sunil (2010). Microfinance Is Good, If We Accept That All the Stakeholders Need to Make Money ... *Trak.in*. October 18, 2010. **http://trak.in/tags/business/2010/10/18/microfinance-india/**

> *The point I am making is that microfinance is nothing new. It has existed for a long, long time. The workings have been exposed and outrage has piled up on the corporate ones only now when moneyed, educated sophisticates have entered the fray with truck loads of money – from other banks and the public – and have stopped pretending that they are here for doing good.*
>
> *Once we accept that microfinance like any other form of business has the aim of making money for its stakeholders, including the borrower, the bitterness goes away.*

Of course it's not new to say microfinance has come in and merely replaced the moneylenders – as the WSJ reported last year[413], it may even help the moneylenders – but the one big difference between MFIs and traditional moneylenders is that microfinance set out to make the world a better place, not just make a buck. Then, in recent years, the idea was tacked onto microfinance that it could, and then even that it should, make a buck while achieving its goals. The AP tragedy brings out harshly the tradeoffs involved. Far from bringing a better local financial environment, the drive for "sustainability", "outreach" and

413 Gokhale, Ketaki (2009): As Microfinance Grows in India, So Do Its Rivals. *The Wall Street Journal*. December 15, 2009. **http://online.wsj.com/article/SB126055117322287513.html**

"competition" can lead to suffering and harm for borrowers. Actually, we could have learned this from the moneylenders – who are profitable, reach remote villages, and do compete – decades ago, without spending billions on pilot projects, start-up funding, academic research, backslapping conferences, and non-funding of other development efforts.

As yet, to me it is unclear what role the Self-Help-Group model, which is prevalent in AP, could have played in this – exacerbating the debt crisis, or cushioning its effects? Also, it is still too early to tell what effect regulation will have – bringing the sector under control, just setting it back, or collapsing it entirely?

I have no doubt that the poor need financial services, like everyone else does. But, first, to a large extent the poor already have loan sources; so if microfinance and moneylenders cause the same problems, why bother with microfinance? That's a serious question. Second, as I've tried to show, most poor people really need anything but a loan. Probably what they need are a decent job, a safety net, and a savings account. Profit-driven microcredit companies don't fit that picture. The poor are in no position to take on debt, and it should not be the way we continue envisioning their route towards development. We should learn this from the tragedy in AP, in order to prevent the next one.

Update/Postscript:

- Here is an insightful piece[414] published on IMBN by two practitioners from Tamil Nadu, also trying to get to the causes of the crisis; it echoes a few of my points.

414 Jerauld, S. L., Inbaraj, P. (2010): Community Based Microfinance Could Have prevented AP Microfinance Crisis. *India Microfinance*. October 25, 2010. **http://indiamicrofinance.com/ap-causes-crisis-microcredit.html**

The Search for Reasons & Solutions: A Compendium of Voices on the AP Microfinance Crisis

Philip Mader, 2010/11/03

As India celebrates Diwali this week, the debate about how to deal with microfinance has calmed down a bit. But since I wrote up my analysis of the root causes of the Andhra Pradesh showdown, the news has taken a few further twists. Here is an update:

- Vijay Mahajan, Chairman of BASIX and speaker for the MFIN industry organisation, stated on TV: *"A lot of the reasons for invoking the ordinance were the creation of the microfinance sector itself. There has been a certain degree of wrongdoing by our sector. And as the president [of MFIN] I am the first one to accept it, I want to do so on record".*
- The interest rate disclosure requirement under the new microfinance ordinance in AP has uncovered interest rates far higher than previously reported – up to 60.5 percent. I wish I was surprised; but MFIs usually neglect to factor compulsory savings, fees, etc., into their publicly quoted rates.
- The AP government has published the complete list of complaints of malpractice and suicide launched against the MFIs – see here[415].
- A massive borrower database in AP will go online in January, in an effort to clear up the mess.

Meanwhile, India's vibrant media and civil society have been grappling with the issue, as are some American media. The rest of this post is a digest of the most provocative, insightful and intelligent commentaries I've seen on the subject.

Corrupted. Amy Kazmin, Financial Times[416]*:* *"Suicides by debt-burdened farmers are not new in India's southern state of Andhra Pradesh, where crop failure and aggressive tactics by moneylenders have long been a deadly combination. Indian microfinance schemes – mostly started as donor-funded charities – were conceived precisely to rescue the poor from such loan sharks. But a recent wave of suicides by borrowers of what has evolved into a huge, for-profit microfinance industry – charging in-*

415 SERP (2010): Exclusive: 54 Microfinance-Related Suicides in AP, Says SERP Report. *Microfinance Focus*. October 28, 2010. **http://web.archive.org/web/20120331201030/http://www.microfinancefocus.com/content/exclusive-54-microfinance-related-suicides-ap-says-serp-report**

416 Kazmin, Amy (2010): Debt Trap Leads to Despair for Rural Poor. *Financial Times*. October 29, 2010. **http://www.ft.com/intl/cms/s/0/33dfa528-e378-11df-8ad3-00144feabdc0.html#axzz2Jw9MGzdH**

terest rates between 26 to 30 per cent – has raised serious questions about whether the pursuit of profits has corrupted Indian microfinanciers' original social mission".

Told you so. Editorial, microfinancefocus[417]*: "A year ago ... [Daniel] Rozas wrote: 'The spark that sets off a large-scale delinquency crisis can be anything and could come at any time – a rapid drop in economic growth, a populist political movement, a religious decree, or a collections effort gone bad. One can't control the spark, but one can control how much fuel that spark can ignite'. That spark has now been ignited. Whether the flames can be put out quickly enough to prevent disaster is by no means assured. We hope they will be. But it is also deeply disappointing to see the sector having come to this point".*

417 Rozas, Daniel (2010): Editorial: AP Microfinance Crisis – A Signpost Ignored. *Microfinance Focus*. October 23, 2010. **http://web.archive.org/web/20120304204520/http://www.microfinancefocus.com/news/2010/10/23/editorial-ap-microfinance-crisis-a-signpost-ignored/**

Moneylender-funded haloes. A. Dharker, DNA[418]*: "The shamelessness with which American bankers have paid themselves million dollar bonuses while pauperising their middle-class clients is too well documented to require repetition. But a microfinance institution? Somehow that was meant to be different. Ever since Mohammed Yunus was given a Nobel for his work with Grameen Bank, the world was under the illusion that microfinance was a benevolent exercise, and people like Akula wore a halo that shone in any light. Now we know that the halo dazzled us so much that we failed to see how fat their wallets had become. ... The microfinance bottom line works because of the traditional money lender. If he charges 50% interest, anyone charging half of that seems like an angel."*

418 Dharker, Anil (2010): MFIs Are Making Profits at the Expense of the Poorest People. *DNA India*. November 1, 2010. **http://www.dnaindia.com/opinion/main-article_mfis-are-making-profits-at-the-expense-of-the-poorest-people_1460376**

The boom has ended. M. Bateman on indiamicrofinance[419]*: "Any which way you look at it, this is not a good advertisement for the 'microfinance-as-poverty-reduction' model, and in a region too that was long held up as a spectacular positive demonstration of the far-ranging impact of the commercialised microfinance model. Moreover, often held up as important examples of a new type of business, a so-called 'social business', their activities to date do not suggest that this new business structure operates in favour of the poor as much as is all too often naively claimed for them. ... What we are seeing today in AP, in actual fact, is the beginning of the end of AP's commercialisation-driven microfinance 'boom'."*

419 Bateman, Milford (2010): The Distressing and Entirely Predictable Situation in Andhra Pradesh. *India Microfinance*. November 8, 2010. **http://indiamicrofinance.com/milford-bateman-andhra-microfinance-crisis-273203821.html**

Inevitable. M. S. Sriram, Economic & Political Weekly[420]*: "It was inevitable that the commercial model of microfinance in India, with its minimalist and standardised model of lending, would grow into a bubble and run into trouble. Many microfinance commercial organisations have entered the market in search of profits and are competing to lend to the poor. ... For these institutions, the poor are not seen as human beings having individual identities and needs. Instead they are seen as data points that add up in their profit statements. The anxiety for growth is dictated by the fact that the investors in the market-based models are impatient and look for high returns – and then exit!"*

420 Sriram, M. S. (2010): Microfinance: A Fairy Tale Turns into a Nightmare. *Economic & Political Weekly*. October 23, 2010. **http://www.epw.in/commentary/microfinance-fairy-tale-turns-nightmare.html**

Subprime regulation. S. Dalal, Moneylife[421]*: "The RBI had better not shirk its responsibility and get down to regulating MFIs. ... All these actions will make sense if they lead to a dispassionate assessment of MFIs, without being influenced by the powerful lobbies working for MFIs who like to dismiss criticism as being alarmist. One can only say that it is precisely this attitude that gave us a global financial crisis in 2008."*

421 Dalal, Sucheta (2010): Not If, But When. *Moneylife*. November 3, 2010. **http://www.moneylife.in/article/not-if-but-when/10809.html**

MFIs should welcome regulation. Editorial, The Hindu[422]*: "It is obvious that the MFIs face an extremely challenging environment. They should welcome uniform regulation, more transparency in their operations, particularly interest rates, and governance. They are providing a valuable service, and only by being transparent and sprucing up their governance can they acquire legitimacy in the financial mainstream."*

422 No author (2010): Microfinance, Macro Challenges. *The Hindu*. November 1, 2010. **http://www.thehindu.com/opinion/editorial/article861645.ece**

Robbin' the hood. D. Sharma, Tehelka[423]*: "The portfolio of MFIs has grown by 97 percent, and the number of beneficiaries has gone up by 60 percent. The unprecedented growth is in a way shifting the game from the hands of the villains of the story, the sahukars or moneylenders, to a sophisticated, media-friendly organised class of neo-moneylenders. These are not the usual banias but a highly educated class who literally rob the poor. And they have done it remarkably well."*

423 Sharma, Devinder (2010): MFIs Are Loan Sharks, Not Saviours of the Poor. *Tehelka*. October 30, 2010. **http://archive.tehelka.com/story_main47.asp?filename=Ne301010Proscons.asp**

(Not) the Messiah. S. Nath, Forbes India[424]*:*
" 'I feel like my whole life's work is turning to ashes. I've spent the last two weeks, just running to regulators and government officials, defending microfinance,' says the founder and chairman of BASIX [Vijay Mahajan]. ... Despite all its success, many of its peers feel SKS' aggressive growth has put them on a back foot. Its for-profit image is making regulators deeply uncomfortable. SKS is intriguingly eroding its own messianic image before the world."

424 Nath, Shloka (2010): The Indian Microfinance Lending Machine. *Forbes India*. October 28, 2010. **http://forbesindia.com/article/boardroom/the-indian-microfinance-lending-machine/18502/0?id=18502&pg=0**

Savings as the answer. S. Sinha (M-CRIL), microfinancefocus[425]*: "The ongoing microfinance crisis results from a combination of promoter hubris and observer envy. ... In an environment of frenzied growth, MFI lending quality has declined and internal controls have failed to keep pace; if some loan officers have engaged in inappropriate behaviour with clients, it comes as no surprise. The 'indulgence' required from the RBI to enable the provision of microfinance services in a more measured way is permission to provide deposit services".*

425 Sinha, Sanjay (2010): Microfinance Regulation: A More Subtle Approach. *Microfinance Focus.* November 2, 2010. **http://web.archive.org/web/20120910041957/http://www.microfinancefocus.com/ews/2010/11/03/microfinance-regulation-a-more-subtle-approach/**

But finally, I must address the cynical views of some who seem to think the crisis came out of nowhere and is a product of the government and media causing a stir about nothing. The crisis is being used by many as a vehicle for their own purposes, sadly, but from all the available evidence, the roots do lie with the actions of the microfinance industry itself. The cynics might want to think about the words written by industry insider M. S. Sriram in May[426] (6 months ago):

426 Sriram, M. S. (2010): What Is Wrong With Indian Microfinance. *Forbes India*. May 5, 2010. **http://forbesindia.com/article/special/hat-is-wrong-with-indian-microfinance/12962/0?id=12962&pg=0**

What Is Wrong with Indian Microfinance? "The question is not whether there is multiple lending. The question is whether the lender knows the absorption and repayment capacity of the borrower. It is impossible to know this if we are doing a group meeting in 20 minutes and moving on. It is impossible to address this when we have standardised products and offer a higher loan each cycle. Our credit officers are trained to be robots following a process mechanically and are prohibited to think. Therefore multiple lending is a problem of the MFIs. We clearly do not know our customers enough, and do not have the time to know them. ...

There was a crisis in Krishna (Andhra Pradesh). We read it as a jealous government programme trying to get back at us [How easy to just do that again!]. This was a crackpot zealous set of people who just wanted to shut us up because we were immensely successful. Then there was Nizamabad (Andhra Pradesh). We said that this was communalisation. How could this happen to a secular business like lending to the poor. Then Kolar (Karnataka), and Idukki (Kerala).

This is not a localised response. People of different orientation and different backgrounds are getting upset with our business. We can have a micro argument for each one of these and be satisfied with an 'I am the best and nobody understands me' syndrome. Where are we going wrong? Is there something in what is happening? ...

There are talks of self regulation and passing a bill. Self regulation is an oxymoron. I should show responsible behaviour and I have regulated myself. Period. I do not need a peer group to regulate my already good behaviour. Therefore it is a question of intent. If I want to be responsible, then no law will prevent me from being good.

Regulation is needed to deal with the deviant behaviour. Therefore regulation is not preventive, it is only a framework to deal with an event after it happens. The industry has to auto correct. I do not think there is any other way."

And Now, All of a Sudden It Turns Out ...

Philip Mader, 2010/11/05

... that lower interest rates were possible all along:

India's embattled microfinance industry has agreed to cap interest rates on its loans in southern Andhra Pradesh state at 24 percent, as it seeks to counter an intense political backlash against the sector. ...

Previously, the industry insisted its high interest rates were needed to cover the cost of outreach to so many small borrowers. However, it has decided to cap the rates in a bid to reduce antagonism from Indian policymakers, who are increasingly uncomfortable with the large profits and personal fortunes being amassed in an industry ostensibly dedicated to alleviating poverty. (ft.com[427])

427 Kazmin, Amy (2010): India's Microlenders Cap Rates. *Financial Times Online*. November 4, 2010. **http://www.ft.com/intl/cms/s/0/7f0008ae-e841-11df-8995-00144feab49a.html**

And in The Hindu[428]:

> *"We've made several concessions because we're under duress and not because we want to. It is against our model, but we want the sector to survive. Mr Gopalan completely understands our situation, but he has not let us off the hook," said Mr Vijay Mahajan, President, MFIN.*

428 The Hindu Business Line (2010): Microfinance Institutions Cut Interest to 24 % in AP. *The Hindu Business Line*. November 4, 2010. **http://www.thehindubusinessline.com/todays-paper/microfinance-institutions-cut-interest-to-24-in-ap/article1008602.ece?ref=archive**

(Mr. Gopalan is a key official in the Indian Finance Ministry.)

Economic sociologists have always known that markets follow the *political* market rules. Try as they might, the World Bank's microfinance promotion agency CGAP and others have not succeeded in creating microfinance markets that follow neoclassical economic theory – competition pushing interest rates down to marginal cost, borrowers and MFIs borrowing/lending rationally, non-regulation leading to efficient maximisation of benefit for all – despite the effective non-regulation of Indian microlending and the commercialisation of the sector.

Apparently MFIs have consistently been overcharging and under-developing their borrowers. If now – when they must – they can actually cut rates, why have they not done so before? (I already noted this after the initial 0.5 to 2 % rate cut two weeks ago.) Collusion and market imperfections may explain part of it, but now the political constitution of the market is obvious as the key factor in setting the price for microcredit. I hope that the drive for sustainability – of borrowers' livelihoods, not MFIs' profits – will continue. It will take more messy regulation, and less glossy theory.

And Now This: GrameenLeaks?

Philip Mader, 2010/12/05

In the past few weeks, I have been silent here about the microfinance crisis events in India. But why not let others do the talking? This blog published the first analysis of the A.P. events right after the crackdown ordinance; following up with a two-piece search for the underlying causes. Most of the causes I speculated about at the time are turning out to be true:

- interest rates *were* far too high and have been rushed down;
- the sector *was* under-, or practically un-regulated (especially if Kaushik Basu says so[429]);
- the borrowers *were/are* over-indebted[430] (far more than the MFIs were aware of, I assume);
- and the profit motive created perverse incentives[431] for MFIs.

One prediction I won't make, though, is whether microfinance in India will pull through. That depends on politics in Delhi (bailout[432] or not?) as much as it does on the adaptive ability (*not* the resilience, which means "no change") of the sector. But I wouldn't bet my money on an MFI in India at the moment, given the pessimism of Vijay Mahajan ("If this situation continues, there will be no microfinance sector in 2011") or the SKS shareholders (shares down by 52 percent).

The real surprise story of the week, however, was WikiLeaks' diplo-insults.

Or really, were they? Only the Americans are really making a big deal out of the leaked diplomatic cables. If anything, the now-public secret assessments of sundry politicians should provide a few good-natured jokes at upcoming international summits. Would-be Israel-nukester Ahmadinejad will hardly be insulted by being compared to "Hitler", and German Chancellor Angela Merkel and Foreign Minister Guido Westerwelle have already had their share of laughs about "their" leaks.

So Merkel is an "un-creative", "risk-averse" politician, so slippery she must be coated with "Teflon", Westerwelle is "incompetent" and "vain", and finance minister Schäuble is an "angry old man". So what? Every German could have told you that – even the ones who elected them (only 36 % would re-elect Merkel's government).

429 Basu, Kaushik (2010): Micro Finance Institutions Must Be Regulated: Kaushik Basu. *Sify News*. November 26, 2010. **http://sify.com/news/micro-finance-institutions-must-be-regulated-kaushik-basu-news-national-kl0rEofbffj.html**

430 Gupta, Gargi, Acharya, Namrata (2010): Small Money Big Trouble. *Sify News*. November 13, 2010. **http://www.sify.com/finance/small-money-big-trouble-news-features-klnclJahgid.html**

431 Nayak, Gayatri (2010): Microfinance in India Is Like Subprime Lending: Y V Reddy. *The Economic Times*. November 23, 2010. **http://articles.economictimes.indiatimes.com/2010-11-23/news/27602978_1_priority-sector-lending-sks-microfinance-microfinance-industry**

432 Arunachalam, Ramesh (2010): The Emergency (Liquidity Bailout) Fund for the Indian Micro-Finance Industry: A Great Chance for the RBI to Take CONTROL!!! *Candid Unheard Voice of Indian Microfinance*. November 23, 2010. **http://microfinance-in-india.blogspot.de/2010/11/emergency-liquidity-bailout-fund-for.html**

And the people love it. Wikileaks has provided a global public good: a healthy laugh, for normal people, at those in power.

Leaked Grameen Bank letters

Perhaps more of a surprise is this newly "leaked" information: allegedly, Muhammad Yunus (Bangladesh's microfinance poster-boy) diverted approximately USD 100 million of Norwegian development agency NORAD's microfinance money from Grameen Bank to a non-microfinance enterprise. This has been reported by the BBC, based on the findings of a recently-aired Norwegian documentary[433] (scheduled for release in English in January).

Or, is that really such a surprise, either?

As early as 1999 Jonathan Morduch (in a seminal paper[434]) uncovered accounting flaws in Grameen's operations. The bank claimed profitability despite heavy subsidisation, without which it could hardly have survived: "Despite reporting profits, Grameen is in fact subsidised on a continuing basis," Morduch concluded, arguing that while there is nothing wrong with subsidising microfinance, one should at least be honest about it. Even Dr. Yunus' Vanderbilt thesis advisor felt the urge at the time to point out[435] his disciple's deviance from the free-market approach to poverty reduction, which both have propagated. (Though at least the fact that Grameen Bank still pays no profit or income taxes in Bangladesh is consistent with a free-market dogma.)

Also, perhaps the 2006 Nobel Peace Prize for Dr. Yunus and Grameen should have been given greater scrutiny. No reason at all to question the fact that Telenor, then majority investor of GrameenPhone, was and is a key sponsor of the Nobel Peace Centre and other Nobel events, right?[436] Or that Stein Tonneson, who nominated Yunus, used to work for Telenor?[437] Norway is a small country. And the full details of the prize-granting process are only made public by the committee 50 years later; but one would be free to speculate.

Against this background, the irregularities exposed by the documents featured in the new documentary seem rather minor. I read through the documents, which

433 Heinemann, Tom (2010): New Film: "Caught in Micro Debt". **http://www.flipthecoin.org/?p=301**. The documentary can now be viewed in full at: **http://lorenzonataliprize.eu/category/winners/2011/grand-prize-2011/?start=4730**

434 Morduch, Jonathan (1999): The Microfinance Promise. In: *Journal of Economic Literature*, 37 (4): 1569–1614.

435 Sahota, Gian (2000): Microcredit and Economic Theory. *Grameen Dialogue*. **http://www.grameen-info.org/dialogue/dialogue42/cover.htm**

436 Telenor (2004): Telenor in Nobel Peace Centre Partnership. Press Release. *telenor.com*. April 16, 2004. **http://telenor.com/news-and-media/press-releases/2004/telenor-in-nobel-peace-centre-partnership/**. See also: **http://nobelpeaceprize.org/concert/sponsors.php**

437 Tønnesson, Stein (2008): How to Win a Nobel Prize: An Interview with Stein Tønnesson. *The Wall Street Journal*. September 26, 2008. **http://blogs.wsj.com/chinarealtime/2008/09/26/how-to-win-a-nobel-prize-an-interview-with-stein-t%C3%B8nnesson/**. Former employment information on Tønnesson's website: **http://www.cliostein.com/**

are available here[438]. They begin on 17 December, 1997 with a disgruntled letter from the Norwegian embassy in Dhaka, alleging that funds had been re-transferred to Grameen Kalyan (the Grameen Bank's healthcare subsidiary), which was loaning them out to Grameen Bank (GB); "Norway has not entered into an agreement with Bangladesh to provide funds to Kalyan for on-lending to GB." Kalyan was charging GB interest on the loan.

438 ZIP file: **http://indiamicrofinance.com/wp-content/uploads/2010/12/Archive.zip**

Yunus replied to the Ambassador in January 1998, explaining the transfer as a means of ensuring "financial discipline" on the part of GB. Yunus also explained the creation of Kalyan as a means of avoiding taxes. In a separate letter in April to the Managing Director of NORAD, Yunus begs, "I need your help," against a complaint written by the embassy to the Bangladeshi government. "This allegation will create a lot of misunderstanding within the Government of Bangladesh. If the people, within and outside government, who are not supportive of Grameen, get hold of this letter we'll face real problem [sic.] in Bangladesh."

Today, Grameen responded to the whole story with a combative press release[439] stating, "The fund in question never went out of the Grameen Bank's account and the question of Professor Yunus siphoning this amount is false and baseless. All these talk [sic.] about siphoning off are just empty words for sensationalism." Heinemann actually doesn't allege that Yunus used the funds for personal enrichment, but he does accuse Grameen of intransparency. Yet, despite Yunus' request for suppression of the issue, the documents were apparently rather easily obtainable, just not much-noticed so far. "I got most of the documents from the archives of NORAD, the Norwegian aid agency in Oslo," Heinemann told the BBC.

439 Grameen Bank (2010): Grameen Bank's Response to Press Reports on December 3, 2010. **http://www.grameen-info.org/index.php?option=com_conent&task=view&id=813&Itemid=0**

Are these documents a big deal, then? Well, maybe if your belief in microfinance/Grameen depends on the soundness and transparency of its accounting. More interesting, or shocking to the general public should be the documentary's footage from Bangladesh. Some illusions may be at risk.

The documentary also looks at the effectiveness of Grameen Bank along with its miracle stories of transforming people's lives and concludes that it has had little impact on poverty in all these years. In one segment Heinemann visits the home of the celebrated original Grameen loan-taker – Sufiya Begum in Jobra village. Celebrated in Grameen folklore, that is. He finds some very uncomfortable stories and comes to know that she died in poverty and all her daughters today are beggars. (indiamicrofinance[440])

440 Grameen Bank Secret Documents (2010): Dr Yunus Accused of Diverting US$ 100 Million Aid. *India Microfinance*. December 2, 2010. **http://indiamicrofinance.com/grameen-bank-secret-documents-norway.html**

The poor always pay back[441], but did Yunus? It remains unclear how much of the NORAD money was ever paid back, since the documentary's figures and Grameen's figures in the press release diverge. The upshot of the whole scenario, though, is that Grameen operates in an intransparent and secretive way.

441 Dowla, Asif, Barua, Dipal (2006): *The Poor Always Pay Back: The Grameen II Story*. Bloomfield: Kumarian Press.

The 'Why?' of Andhra Pradesh – An Interview with Malcolm Harper

Philip Mader, 2010/12/14

In this interview, Professor Malcolm Harper analyses some of the underlying causes and consequences of the microfinance crisis in Andhra Pradesh. Professor Harper is chairman of the microfinance rating agency M-CRIL and editor of the volume "What's wrong with Microfinance?" He has been Professor of Business Development at Cranfield Business School, and as the former chairman of BASIX, he significantly pioneered microfinance in India.

Professor Harper, you recently returned from India. How bad is the situation for the microfinance sector there?
Malcolm Harper: I was in Delhi at a very large meeting of microfinance people, where of course Andhra Pradesh was being talked about a lot. I then spent some time in Orissa, in a village three kilometres from the Andhra Pradesh border. I called in on the local office – which previously I didn't even know existed – of BASIX. And the local staff said there had been no trace of any repayment difficulties, even though the Andhra Pradesh border was so close by. This surprised me, and even they were rather surprised. Repayments were at the normal high level.

But I was running a course nearby and my students were interviewing various traders in the local market, and a few of them mentioned that one or two of the microfinance institutions, from which they had taken loans, had stopped making disbursements. And that of course bears the seeds of trouble, because one reason why people repay is because they're going to get another loan.

So it seems that the MFIs are having trouble refinancing themselves now, raising capital for their lending activities.
Malcolm Harper: That's inevitable, I think, because when the banks are beginning to wonder about the quality of their loans to the MFIs, they're not about to release fur-

ther loans. And that, of course, contributes to the problem, because – as I said – people repay mainly because they're going to get another loan.

Microfinance in India has grown at an incredible rate over the past few years, nearly doubling its portfolio every year. Was growth itself the problem?
Malcolm Harper: In part, yes. There was an enormous unsatisfied demand; and some well-managed, outstandingly-marketed, well-capitalised institutions got into the business. The field was pretty well-prepared because people were used to borrowing through the Self-Help Groups, so the notion of institutional borrowing was not new to them. Although microfinance institutions were new, the Self-Help Groups, which are a very good government-promoted scheme, had been in place for some time and were also growing. So most rural women in Andhra Pradesh, particularly, were members of such groups, some of them of more than one. And therefore, when microfinance institutions came along ten years or so ago, they recognised them as a new form of formal finance, and jumped in and borrowed heavily – too heavily, of course, for their own good. And that's when the problem started.

Were the interest rates too high?
Malcolm Harper: It depends on what you mean by too high. Microfinance interest rates in India are the lowest in the world. They are still well over what middle-class people would pay for mortgages and car loans, but they are at stated rates of around 24 percent, which in actual fact reach around the mid-30s when you add on the various fees; which by microfinance standards around the world is very low. Actually, that is around half of what the same people would have to pay to a moneylender. But it's sufficient for a journalist or a politician to pick on and wave a big stick.

What about the pressures for commercialisation in this sector, which was always heralded as a "social business" – did they contribute to the crisis?
Malcolm Harper: Yes, undoubtedly. SKS, which is the biggest player, sold some shares to venture capitalists and did an IPO, and they were under great pressure to increase their size and increase their profits. And they weren't the only ones, because following their example, a number of microfinance institutions – either because they wanted to grow and they needed equity in order to borrow more money; or with a little bit of, shall we say, greed by their promoters – were anxious to jump on this bandwagon. Growth and high profits were an essential part of doing that.

Microfinance looked like a tremendous investment opportunity for some time. Do you think that's still the case?
Malcolm Harper: No, no way. Not in India now. The shares of SKS – which is in some sense the main offender, if there has been an offence – are worth less than half of what they were at their highest, and are even far below what they were at their public offering, which was just in August.

You work for the rating agency M-CRIL ...
Malcolm Harper: I'm chairman of the board, yes.

M-CRIL repeatedly warned about over-indebtedness and poor lending practices, even before the crisis broke out.
Malcolm Harper: To an extent, yes. Perhaps not as loudly as we should have, although I don't really think anybody could have foreseen this happening at this time and on this scale. But we certainly warned about it, though perhaps not as loudly and dramatically as we should have done. We definitely were saying "watch out".

What role do you think the different levels of Indian government played in bringing about the crisis? Because some MFI representatives have claimed the Andhra government attacked their business in an attempt to save the Self-Help Group model, their own microfinance model.
Malcolm Harper: That would be an oversimplification, but there is some justice in that. When I had some involvement in starting the Self-Help Group movement in Andhra Pradesh, in the early 1990s, we used to say that we've got the Self-Help Group system, and Bangladesh has the microfinance system; and we think that ours is rather better. It's linked to banks, which are secure institutions; it's cheaper, it's built on local communities, and so on. This looked like a better approach because of India's enormous numbers of rural bank branches, which Bangladesh did and does not have. So the general feeling was that this was the "Indian" approach, whereas Grameen Bank and it's replicators were the "Bangladesh" approach, and it was interesting to see which would do the best job. But then, the microfinance institutions came into India in a big way around ten years ago.

Do you think they were free-riding on the success of the Self-Help Groups?
Malcolm Harper: To an extent, yes. And some Self-Help Groups' members kind-of just walked across the road and essentially said: 'Here we are, ready to borrow'. The fact that they were already borrowing from the Self-Help Group, and it might not be good for them to borrow from the microfinance institute as well, was sadly neglected.

BASIX opted for a different, less commercial variant of microfinance years ago. Is BASIX also less affected by the crisis?
Malcolm Harper: Well, as I say, the BASIX branch just across the state border that I visited last week did not seem to be affected at all. BASIX has a bank in another part of the state, and that is also pretty much unaffected. It doesn't go under the BASIX name, but everybody knows it belongs to BASIX. However, BASIX' non-bank activities, which are far larger than the bank, are being pretty badly affected. I should imagine still that they're not being affected as seriously as other institutions, because they offer a very different package, with loans and intensive non-financial livelihood services as well, a lot of them are rather larger loans, they work with men as well as with

women, they do not work through groups in the same way, and so on. It's certainly not a standard microfinance institution, because it has a whole range of products.

You see, the classic microfinance institutions are based directly or otherwise on Muhammad Yunus' Grameen Bank, which consists of putting women into groups and lending them money, and then lending them more money when they repay it. That's basically it. Very simple, roll it out, hence you can reach 5 or 6 million customers, as SKS has, in a very short amount of time. BASIX is far more complicated. It doesn't do that sort of lending. It lends to individuals, and to groups of 4 or 5 business people with slightly more substantial businesses, which may be employing people, rather than those which are run by the typical microfinance customers. Also, most importantly, BASIX sells its customers livelihood services which are non-financial, for instance it shows them how to raise chickens, or how to run their shops a bit better, or how to vaccinate their cattle. And it's working very hard to bring those non-financial services, as well as services to promote institutions, local cooperatives and so on, to the same level as its credit services. They're not at the same level yet; they make money, not very much money, but they cover their costs and they're reaching well over half of BASIX customers now.

As the former chairman of BASIX, you helped significantly to build up the microfinance sector in India in the early days. How does it make you feel to see it discredited in this way now?

Malcolm Harper: I'm not surprised at all. Perhaps I didn't have the foresight to foresee what is happening now, but even 10 or 15 years ago one was aware – or we were – that the straight Grameen method, which at that time was hardly being done in India at all, was really not the solution. And in fact in 2000, four years after we had started, in BASIX we did a survey of our customers and we found that credit only wasn't doing them a lot of good. Some a little good, some a little harm. The poorer people were benefiting less, hardly at all. So we had a complete re-think, and said we've got to be offering people more than just credit. We are seeing that proven right now.

We kindly thank Professor Harper for his time, and for granting permission for the interview to be published here. This is the English original (and longer) version of an interview published in German by the Börsen-Zeitung, Frankfurt, p. 4, on 14 December, 2010.

Indian Microfinance: The Stalemate Is Becoming Unstable

Philip Mader, 2011/05/17

Microfinance in India is still where it was months ago – in a stalemate with the government. The crisis of microcredit in the southern Indian state of Andhra Pradesh, which began last October with a rash of client suicides – we were the first to blog about this, and followed its development throughout – climaxed in a standoff in late October between state legislature and microfinance institutions (MFIs). Mud was thrown by both sides in an intense blame-game, while actually the crisis had systemic causes rooted in weak legislation and a hyper-competitive market.

Neither side has found a way to break out of it, but the stalemate is becoming unstable. It is increasingly clear to MFIs and their funders that most loans in Andhra Pradesh will not be recoverable, since trust in the MFIs' promise of being "here to stay" is dwindling, and the new legislation has rendered erstwhile coercive recovery practices impossible. On the other hand, the Andhra government cannot step down from its legislature issued under the promise of protecting the poor without losing face, and the Indian federal government has chosen to largely ignore the issue.

The Economic Times from Mumbai recently provided a thorough update[442] on what has happened in the past few months, which I'm quoting here and below. The growing problem is that the MFIs in Andhra Pradesh will need new capital soon in order to replace the loans they have written off, or will soon be forced to write off.

442 Thorat, Usha (2011): Andhra Crisis Is Now Hurting MFIs' National Interest. *The Economic Times*. May 17, 2011. **http://articles.economictimes.indiatimes.com/2011-05-17/news/29552150_1_spandana-sphoorty-financial-mfis-share-microfin**

> *It [new capital] could come from banks, which could restructure their loans to MFIs. It could come from private investors, who could invest new capital. Seven months on, nothing is happening. The state government refuses to relent, even as MFIs threaten to leave.*

So the situation for microfinance in Andhra Pradesh has changed structurally since the advent of the crisis. What used to be India's most microfinance-friendly (or even obsessed) state is becoming a burden on Indian MFIs' books.

> *Business is becoming tougher for MFIs, and the landscape is being reshaped in a way that strips MFI promoters of wealth-creation opportunities. Two developments in the last fortnight show MFIs are hurtling towards a tipping point. One, the Reserve Bank of India (RBI) announced new rules that shrink MFIs' business and prof-*

it potential. Two, SKS Microfinance, India's largest MFI, says recovery in Andhra has dropped to 10 %.

"We admit responsibility for underestimating the external environment," Vikram Akula, founder of SKS, told ET Now.

That means Akula now realises that microfinance is dependent on political support – though probably not the full extent to which it always has been[443]. More than 80 percent of international microfinance funding still comes (directly or indirectly) from state coffers.

What Akula doesn't admit is that MFIs also had a responsibility not to lend indiscriminately at the risk of over-indebting borrowers. Clients who were previously struggling to repay multiple loans are now making use of the current respite and have stopped servicing their debt; understandably so.

443 Heloise Weber pointed out early on how microfinance was imposed as a political programme, and did not develop as a spontaneous market solution. See Weber, Heloise (2002): The Imposition of a Global Development Architecture: The Example of Microcredit. In: *Review of International Studies*, 28: 537–555. **http://www.jstor.org/discover/10.2307/20097810?uid=3737864&uid=2129&uid=2&uid=70&uid=4&sid=21101664910853**

"Most of these loans will have to be written off," says Sanjay Sinha, managing director of Micro-Credit Ratings International (M-Cril). MFIs are living on borrowed time. So far, as per RBI rules, MFIs have to write off only 10 % of their bad loans. But in another 11 months, probably sooner, MFIs will have to write off the entire 100 %. The trickle of red on their books could turn into a flood. ...

At least three senior MFI executives say 80 % of the Andhra portfolio will have to be written off. The typical tenure of micro-loans is 11 months; seven months have passed since the Andhra law.

Of course MFIs are now looking for help in the form of cash injections and political support, but first and foremost they are seeking to formally re-structure and roll over their loans from larger banks – a generosity which, ironically, MFIs usually deny their clients.

So, MFIs want banks to restructure their loans. Banks account for 70 % of MFI funds. When the going was good, MFIs borrowed from banks at 10–14 % and loaned them at 24 % or more. MFIs were happy with the margin. Banks were happy to meet their priority-sector lending targets. "Banks' exposure to Andhra is about Rs 9,000 crore", says KP Ramakrishnan, who heads the corporate-debt restructuring (CDR) cell at IDBI Bank . This is just 0.2 % of the total banking loan portfolio of Rs 40,57,000 crore. So far, not one CDR package has been approved. Ramakrishnan declined comment, but bankers and MFI promoters say negotiations are stuck on

two points: banks' unwillingness to take a hit and promoters' refusal to provide a personal guarantee. ...

"The package assumes 50–60% recovery," says Padmaja Reddy, founder and managing director of Spandana. "I will have to stand guarantee for Rs 800–1,000 crore, but I have no confidence this money will come back." Another clause says the personal guarantee can be passed on to legal heirs. She asks, "How can I make my son vulnerable to this?"

So, unlike traditional moneylenders, MFIs expect to avoid taking the hit for any bad lending they have done. This pattern of 'privatising profits, socialising losses' is all too well-known from other financial crises. On the other hand, however, MFIs are not 'too big to fail'. Bailouts only work as long as the ones being bailed out look worth the bailout; and microfinance's reputational loss has drawn its governmental support into question, not only in India. The evidence for microfinance always was thin on the ground, so that microfinance lived mainly on its reputation and public image. Squandering the public good of its reputation in the cutthroat competition of the Andhra market has severely backfired for the microfinance industry.

Because they are starting to run low on time, the MFIs are now renewing their legal battle against the Andhra legislation. But it is completely unclear what the ultimate outcome could be.

SKS moved the Supreme Court last week, asking for the Andhra Act to be quashed. The hearing is scheduled for the third week of July. ... Be it doing business or loan recovery, personal guarantees or deep cuts in their shareholding, MFI promoters are staring at a difficult 12 months. And tricky tradeoffs.

Microfinance for Water: More Money, More Problems

Philip Mader

A resource necessary for all human existence, water has been part of public governance since the earliest civilisations. But many people in the developing world today suffer from an acute lack of accessible, clean water, which urbanisation and climate change are exacerbating. A frequent policy response in recent decades has been to turn the governance of water over to market forces, with proponents arguing that letting private interests earn money on this basic need would serve poor people best. "Full cost recovery" is the battle cry of this movement, which considers aid and transfers ineffective, and envisions water being traded as an "economic good" – or the "new gold".

A particular policy among NGOs and philanthropists has been to promote microcredit schemes for water and sanitation, offering poor people loans to buy access to these basic needs. While pragmatic and innovative, these projects nonetheless make poor people go into debt for what is an internationally recognised Human Right. These entries deal with such projects, showing in particular how they may appear as pragmatic solutions to local problems, but in fact are part of the larger transnational trend of handing over the governance of this crucial resource to the market, and how they cause more problems than they solve.

World Water Day: Re-inventing Water Governance for the Poor

Philip Mader, 2010/03/22

Today is World Water Day; this year operating under the heading "Clean Water for a Healthy World". Every year since 1995, March 22 has been dedicated to *"focusing attention on the importance of freshwater and advocating for the sustainable management of freshwater resources".*

The 2010 events campaign focuses specifically on raising awareness of the importance of water *quality* for health and human well-being, and the importance of sound water management for preventing pollution.

While that means that this year World Water Day has no specific focus on the developing world, a global view of water problems naturally always draws attention to the specific problems of the developing world, where not only most of the people lacking access to safe drinking water live, where desertification and pollution are worst, and where water-borne diseases are most prevalent – just to give a few examples –, but also where the technical and financial means for dealing with the causes and consequences of this "water crisis"[444] are slimmest.

In 2002, the United Nations Economic and Social Council codified a Human Right to Water[445] in its General Comment No. 15, based on the interpretation of the pre-existing International Covenant on Economic, Social and Cultural Rights, which stated:

> *The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.*

Yet this right remains impossible to claim in many poor countries, both as a result of the failure of the international community to support the necessary steps financially, and because of a competing paradigm of "full cost recovery". This is reason enough to take a cursory look today at the transnational governance and provision systems of water and sanitation for the poor.

444 A commonly used term to describe the current situation, which is deceptive insofar as it implies that the situation is both new and temporary.

445 See: **http://www.righttowater.info/progress-so-far/general-comments-2/**

Lack of awareness is not the problem …

However important and noble such efforts as World Water Day are at informing the public consciousness (in rich countries), awareness is not the real problem – we know what's wrong, but (as in the case of climate change, for instance) we aren't going about fixing it effectively.

Even those members of the public who have never heard these (or similar – they vary according to sources) alarming figures are unlikely to be shocked to learn that "*there are still nearly 900 million people across the world who don't have access to a safe water supply*" (The Guardian[446]) and *"2.7 billion people, including 980 million children, currently lack access to proper sanitation facilities"* (The Hindu[447]). People of the 21st century are accustomed to such superlatives of inequality. Appalling as they are, these figures represent only two of the many inequalities and deprivations which, from an international perspective, look irreconcilable with our age's advanced level of technological development, and yet persist.

446 Frost, Barbara (2010): Taking Action for World Water Day. *The Guardian*, March 22, 2010. **http://www.guardian.co.uk/commentisfree/cif-green/2010/mar/22/world-water-day-climate-change**

447 880 MN People Lack Access to Clean Water: Red Cross. *The Hindu*. March 22, 2010. **http://www.thehindu.com/health/article267462.ece**

Development policy-makers and international organisations are acutely aware of the water and sanitation situation in the developing world. They know that unsafe drinking water and unhygienic sanitation are crucial disease vectors. Improving water and sanitation access is included in Goal 7 of the UN's Millennium Development Goals (the population without access should be halved by 2015).

At first sight, it appears that the problem is being tackled. Bilateral aid (ODA) in the water and sanitation sector rose by 19 percent from 2002 to 2007 to US $4.7 billion, now amounting to a share of 7 percent of total aid originating from OECD countries[448]. As recently as March 1st, the European Commission's development department announced its decision[449] to allocate significantly more aid to water.

448 See OECD (2009): Measuring Aid to Water Supply and Sanitation. February 2009. **http://www.oecd.org/investment/aidstatistics/42265683.pdf**

449 EU to Realign Development Aid towards Water. *euractiv.com*, March, 1 2010. **http://www.euractiv.com/sustainability/eu-mulls-better-focus-water-its-development-strategies-news-290041**

… but lack of effective action is. (A back-of-the-envelope calculation)

Many sources suspect that the $4.7 billion figure is too low to achieve the MDGs, and a swift back-of-the-envelope calculation confirms that suspicion. A continuation of the current rate of funding would mean a mere $6.52 given to each person currently without access, spread over the next five years[450]. Given that installing a household tap connection costs between $44 and $88 (system costs such as treatment plants etc. not included), and even the simplest of pit latrines (not connected to sewerage) come to around $140 (these figures are from India), $6.52 is hardly adequate. In fact, this is unlikely to even meet the running costs of any existing water tap or toilet.

450 USD 4.7 billion each year from 2010 until 2015 (the MDG due-date) totalling USD 23.5 billion. Assuming this to be equally spread over the population currently without access, 2,700 million + 900 million, the figure amounts to USD 6.52 per head for toilet or water over 5 years.

However, to further complicate things, most of the aid included in the $4.7 billion statistic isn't even directed at addressing the lack of basic services. While the *quantity* of aid for water and sanitation as such is patently insufficient to reach the Millennium Development Goals, *qualitatively* this aid is also unsuitable for addressing the most fundamental problems.

Funding for the water and sanitation sector rarely concentrates on those most in need. Across countries, the level of aid to water supply and sanitation per capita does not correlate with the percentage currently unserved. Furthermore, within countries the OECD[451] notes: *"Projects for 'large systems' are predominant and accounted for more than half of DAC members' total contributions to the water supply and sanitation sector in 2006–007,"* while less than 20 percent are intended for basic drinking water supply and basic sanitation. Large system projects usually reach poor areas last (if at all), instead serving more affluent neighbourhoods first, whose residents are able to pay for the infrastructure, or industrial and business zones that require large-scale water supply and wastewater treatment facilities (assuming the wastewater is treated at all). To sum up: the aid is going to the wrong places.

451 Same source as above.

Moreover, aid figures tend to create the impression that this is a one-way flow of finance. What goes unnoticed is that most of the money comes as loans that have to be paid back with interest. The OECD[452] defines Official Development Assistance (ODA), the standard measure, as *"Flows of official financing administered with the promotion of the economic development and welfare of developing countries as the main objective, and which are concessional in character with a grant element of at*

452 OECD (2003): Glossary of Statistical Terms: Official Development Assistance (ODA). August 28, 2003. **http://stats.oecd.org/glossary/detail.asp?ID=6043**

least 25 percent (using a fixed 10 percent rate of discount).” At least 85 percent, then, is recoverable in the normal case. Given that many if not most such loans have to be repaid in hard currency, which appreciates over time, they are often a loss-making calculation for the receiving country.

Even the official (OECD[453]) figure for the percentage of un-tied aid is a paltry 42 percent; that is, only 42 percent of aid comes without contractual strings attached (such as obligations to buy overpriced services or inputs from specific companies in specific countries). Japan, for instance, is the producer of the world’s largest de-salinisation and wastewater treatment plants; unsurprisingly, Japan is by far the greatest water and sanitation (watsan) donor, committing a full 32 percent of all watsan-related ODA, more than double that of next-placed Germany (Siemens, etc.) and third-placed France (Veolia, Suez)[454].

453 OECD (2005): Journal on Development: Development Co-Operation Report 2005. **http://www.oecd.org/dac/oecdjournalondevelopmentdevelopmentco-operationreport2005.htm**

454 Japan External Trade Organization (2009): Rapid Growth of the Global Water Treatment Business – Japan’s Public and Private Sectors Join Hands to Develop National Strategy. *jetro.go.jp*. **http://www.jetro.go.jp/en/reports/market/pdf/2009_01.pdf**

“Full cost recovery”: human rights becoming obligations to debt

Underlying these practices is the universal assumption that for the “donor” there must be a payoff. However, outside the state sector, too, this is the operative logic. Given the failure of multinationals and the hypocrisy of many aid-driven initiatives in the water and sanitation sectors, many people and organisations committed to improving the lot of those without water and sanitation have been abandoning the state-led approach in favour of alternative models focused solely on unserved populations. But without the state as a funding source, any non-public programme must be able to cover its costs. Thus, partly from necessity and partly because of the still strong paradigm that “the market” is the best means of managing and allocating resources/commodities, many modern water and sanitation programmes draw on private sector logics and financing arrangements. In this sense they are a relic or mutation from the 1980s and 90s, the decades of the official privatisation of water utilities in the developing world.

In the 1980s and 90s, under the auspices of financial austerity and liberalisation programmes formulated and monitored at the transnational level, multinationals were invited to acquire municipal utilities networks from the distressed governments of developing countries, only to raise (often more than doubling, even tripling) tariff rates for the poor while lowering tariffs for industry in an effort to recover investment costs and increase turnover. Most of these municipal networks have since been returned to public ownership or authority again after running into resistance, but thanks to harsh court settlements and a depreciated infrastructure, they are of-

ten in an even worse position than before – see Ann-Christin Sjölander Holland's book[455] for a stark analysis of these developments.

The idea that arose in the noughties to pair microcredit with water and sanitation has even been explored deeply[456] by the Bill and Melinda Gates Foundation. While not *per se* advocating a privatisation of the networks (municipalities are now seen as useful partners), these initiatives view the problem not as one of strengthening the (global) public commitment to improving the watsan situation of the poor, but as one of inducing private investors to enter the field and create a market. The poor are merely unserved consumers in need of firms willing to harvest the fortune at the "bottom of the pyramid"[457] – the BOP, as it is currently fashionable, for some reason, to call the poor.

Countless such initiatives are operating in India, West Africa, and South-East Asia. One particularly large programme using public funding from USAID has reached several million clients in Indonesia; but without any evidence to the contrary, it is extremely doubtful that any of these initiatives have actually moved beyond the pilot stage to a point where profit-driven private investors would really be interested in serving the poor with standard household water and sanitation solutions[458]. With two thirds of Indians, for instance, living on less than $2 a day, it also seems optimistic at best to believe that they could (or would) spend 20 percent of their yearly income on constructing a toilet, not even considering the running costs; the model is based on the false premise that the poor will be able to buy their own way out of poverty.

But, barring adequate funding from non-commercial sources, and with commercial sources unwilling and unable to serve the poor (as evidenced most famously in the Bolivian water riots of 2000), the would-be philanthropists of water and sanitation are left with little choice but to turn to debt financing and invoke the principles of the market. Full cost recovery then necessitates the poor taking on debt for what, internationally, has rightly been codified as their human right. At the nexus of ineffective transnational institutions, interest-driven donor states, and NGOs operating

455 Sjölander Holland, Ann-Christin (2005): *The Water Business: Corporations Versus People*. London: Zed Books. **http://books.google.de/books?id=V2hPqE2v7lUC&printsec=frontcover&dq= the+water+business&source=bl&ots=00SDz6gbFb&sig=hgpaTrmwpvkKhtP5UoOSrC3Ul4Q&hl=en&ei=X9ynS9eaFMHdsAatnrTgDA&sa=X&oi=book_result&ct=result&redir_esc=y#v=onepage&q&f=false**

456 Mehta, Meera (2008): Assessing Microfinance for Water and Sanitation. Exploring Opportunities for Scaling-Up. *Bill and Melinda Gates Foundation*. **http://www.gatesfoundation.org/learning/Documents/assessing-microfinance-wsh-2008.pdf**

457 Prahalad, C.K. (2004): T*he Fortune at the Bottom of the Pyramid: Eradicating Poverty through Profits.* Philadelphia: Wharton School Publishing/Pearson. **http://books.google.de/books?id= R5ePu1awf1oC&dq=the+fortune+at+the+bottom+of+the+pyramid&printsec=frontcover&source=bn&hl=en&ei=D-enS6_XK8uEsAbB2pGZDQ&sa=X&oi=book_result&ct=result&redir_esc=y#v=onepage&q&f=false**

458 I am not including such substandard solutions as simple point-of-use filters or pay-per-use toilets here, which are indeed provided by the private sector at present, but are hardly worthy alternatives to clean tap water and in-house sanitation.

under corporate principles, the Human Right to Water therefore becomes an obligation to debt.

However, what the coercive politics of liberalisation and corporate pressures were jointly unable to achieve in the 1990s – to turn water and sanitation supply to the poor into a profitable business via large-scale investments –, the "small is beautiful" interventions of the philanthrocapitalists are perhaps likelier to attain. The risks, however, are greater, as this time it is not multinational corporations that are racking up debt, but the poor themselves.

The logics of the private sector pervade parts of the NGO community so deeply that, for their work to remain coherent, even the beneficiaries of NGOs' work must be conceived of in corporate terms, as this caption for a picture on the IRC's World Water Day website[459] beautifully illustrates:

> *This woman from the Sironko District of Uganda is a true citizen of the 21st century – a multi-tasking manager with daily performance targets. She wakes early to fetch water, store it, distribute it and manage sanitation facilities in the home. She goes to bed long after dark, when the cooking, cleaning, laundering and other chores are done. She probably has more work than her mother, being also responsible today for domestic animals. The 21st century woman participates in community development work, and uses her 'spare' time for income generating activities. She lives a high-pressure executive lifestyle, lacking only the income, the status, the holidays, the help in the home, a lifestyle consultant, a retirement date and a pension.*

459 International Water and Sanitation Centre (2005): World Water Day Marks Launch of New Decade for Action – Water for Life. June 14, 2005. *irc.nl.* **http://www.source.irc.nl/page/16088**

To avoid the dual pitfalls of interest-driven ODA finance and corporate exploitation, NGOs have turned to banking on their beneficiaries. But this involves a construal of the poor as rational, businesslike actors, which outsources incalculable risks to the poor themselves.

Abandoning full cost recovery

Outside of the dichotomous logics of donor finance and full cost recovery via debt, a third way should be sought towards extending water and sanitation to those in most dire need. It should be understood that it is neither equitable nor possible to make the poor themselves pay the full price of the interventions. A human rights based approach must reject the paradigm of full cost recovery in favour of a redistributive model, where richer societies *do* provide the non-self-serving assistance which, objectively, they can afford.

What many NGOs have been claiming for a long time is correct: that people know what works best. But this does not mean these people need to pay the costs. If uni-

versal water and sanitation access is to be achieved, the beneficiaries themselves need to be involved in decision-making up to as the highest level possible. Some states in India, like Karnataka, are already successfully moving toward such a governance structure through the Panchayat system. Since 1989 the city of Porto Alegre in Brazil has been putting into place an intensely democratic system of public deliberation and participatory budgeting for its municipal water and sewage supplier[460] Porto Alegre now has the highest Human Development Index score in Brazil. Whether and how such participatory democratic structures can be extended beyond the local level should be explored, keeping in mind that water is as much a global common good as it is a local common good.

But beyond the functional benefits of participation and "people power" over water, the human right to water also implies a fundamental *entitlement* for communities to take decisions over "their" water. It would be hard to put this argument better than Anil Kumar Vaddiraju[461]:

> *The particular point that we want to make in the context of water rights is that individuals not only have a fundamental right to water but have the responsibility, if not duty, to participate in its governance matters as well. Water rights can be realised better if individuals increasingly come to participate in the community collective management of these resources. This is all the more so with small village level communities where drinking water management is as much a political as it is a 'management' matter. The point we wish to make is that water governance requires an active role of the citizens. This active role means not only participating in the drinking water supply by way of paying user charges, but the role of decision makers vis-a-vis the resources, allocation and further provision of water supply facilities to all the members. (Vaddiraju 2008: 8)*

World Water Day is surely a good day to see the multi-layered governance systems of water and sanitation in a fresh light and to explore new pathways.

460 Hall, David, et al. (2002): *Water in Porto Alegre, Brazil: Accountable, Effective, Sustainable and Democratic*. Greenwich: PSIRU & DMAE. **http://www.psiru.org/reports/2002-08-W-dmae.pdf**; Todeschini, Carlos Atílio (year unknown): DMAE General Director: Porto Alegre in Cannes – Speech. **http://www.waterjustice.org/uploads/attachments/attachment14.pdf**

461 Vaddiraju, Anil Kumar (2008): *Drinking Water in Rural Karnataka*. Saarbrücken: VDM Verlag.

Is Water the New Gold?

Philip Mader, 2010/04/12

> *Water, like oil, is finite. There is only so much ocean saltwater, glacier freshwater and water in the air, while global consumption is growing twice as fast as the world's population.*

It is hard to believe that anyone could view these facts as a positive thing. But add the story of Warren Buffet, formerly the world's richest man, buying the water treatment company Nalco for US$ 3.7 billion through his investment firm Berkshire Hathaway, and suddenly you get the view that "investing in water is an untapped opportunity". This is the argument of journalist Tatiana Serafin on mint.com in an article[462] entitled *"Invest Like a Billionaire: Water Is The New Gold"*.

462 Serafin, Tatiana (2010): Invest Like a Billionaire: Water Is the New Gold. *mint.com*. April 1, 2010. **http://www.mint.com/blog/investing/investing-in-water/**

Serafin considers publicly traded water utilities companies a bargain, quoting another author as saying "utilities are cheaper than they have ever been". Her conclusion is, "invest like Buffet", even if you're on a budget.

One might also think that viewing the so-called global water crisis as a hot investment opportunity would require the shrewd and narrow-minded perspective of the investment banking profession. Yet even the Netherlands-based IRC International Water and Sanitation Centre, an important resource centre in the water and development sphere, not officially posing as a private sector think-tank, apparently agrees that water is "the new gold". On its water and sanitation financing blog WASH news finance, the article was merely copied and uncritically reproduced.

This, among other cases from the NGO sector, shows how strategies of privatisation and commodification still heavily dominate developmental politics and practice in the water sphere. Though less aggressively and more subtly pursued now than in the IFI-driven Structural Adjustment Programs (and their successors, PRSPs), the new-millennium logic of privatisation is promoted instead by smaller, ostensibly unconnected agencies and through new, seemingly innovative means such as decentralisation, downscaling or microfinance. This is essentially a return to the days before the developmentalist state. Through blogs and social networks, the politics of liberalisation have adopted a postmodern aesthetic – always arguing in the name of the poor – complete with Internet videos in HD[463].

463 Kim, Jerome (without date): Microfinance for Small Water Schemes in Kenya. *3c-films.com*. **http://www.3c-films.com/gpoba-kenya/**

Yet the same old fundamental logic has survived from the more radically neoliberal 1980s: the notion that the private sector must take over the control of resources and sell as a commodity what is internationally defined a Human Right. What we may

have here is a classic case of cognitive institutions; it is simply impossible for certain actors to "think outside the box" when it comes to natural resources, no matter how well-intentioned they may be. The notion of rights as fundamental, inalienable, and entitling to free access to the means of survival doesn't enter into the story of water being a scarce, and therefore saleable, resource.

Rather than labour the point for a few more paragraphs here, I will simply let Monty Python's merchant banker sketch make it for me (since orphans, like water, can be a developing market).

- *Fundraiser: "I want you to give me a Pound, and then I'll go away and give it to the orphans."*
- *Banker: "Yes?"*
- *Fundraiser: "Well, that's it."*
- *Banker: "No, no, I don't follow this at all. I don't want to seem stupid, but it looks to me as though I'm a Pound down on the whole deal."*
- *Fundraiser: "Yes you are."*
- *Banker: "I am? Well what is my incentive to give you the Pound?"*
- *Fundraiser: "Your incentive is to make the orphans happy!"*
- *Banker: "Happy? Are you sure you've got this right?"*
- *Fundraiser: "Yes, lots of people give me money."*
- *Banker: "What, just like that? They must be sick!"*

Enjoy the video[464].

464 Monty Python (2008) [1972]: Blood, Devastation, Death, War, and Horror. *youtube.com*. December 18, 2008. **http://www.youtube.com/watch?v=YUhb0XII93I**

Microfinance Displacing the State: Private Credit for Public Goods?

Philip Mader, 2011/04/23

Practically everyone has heard the stories of a poor Bangladeshi or Nigerian taking out a microloan to, say, buy a few chickens or start a small business selling mangoes, and becoming a wealthy and successful farm entrepreneur or fruit trade mogul. There is even a picture book[465] for children about that story.

Picture books, however, don't make the story any more real or representative. This blog has been critical of microfinance success stories in the past, because they mislead people into generalising from a few exceptional successful cases (see also Tim Ogden's smart analysis[466] of the consequences of misleading storytelling). More generally, the blog has been critical of microfinance because not everyone who takes a loan can make a profit and use this profit to repay the loan plus interest; very few will benefit spectacularly from this, and the few successes do not equal "development".

But donor bodies increasingly expect microfinance to become the centrepiece of development efforts. Proposals abound for microfinance to reach beyond small-business-lending and into the traditional remits of the state. Microcredit loans are being suggested and applied by various agencies for a range of goods and services linked to development, from sending kids to school[467], creating better health[468], improving water and sanitation[469], even to helping with peace and reconciliation[470]. Using microfinance for water and sanitation has been an area

465 Smith Milway, Katie (2008): *One Hen – How One Small Loan Made a Big Difference*. Toronto: Kids Can Press.

466 Ogden, Timothy (2011): Lessons for Social Entrepreneurs from the Microfinance Crisis. *HBR Blog Network*. April 22, 2011. **http://blogs.hbr.org/cs/2011/04/microfinance.html**

467 Khumawala, Saleha (2009): A Model for Microfinance-Supported Education Programs. In: *Decision Line*, 40: 10–14; Leatherman, Sheila, Dunford, Christopher (2010): Linking Health to Microfinance to Reduce Poverty. In: *Bulletin of the World Health Organisation*, 88: 470–471.

468 Pronyk, Paul, Hargreaves, James, Morduch, Jonathan (2007): Microfinance Programs and Better Health – Prospects for Sub-Saharan Africa. In: *Journal of the American Medical Association*, 298: 1925–1927.

469 Mehta, Meera, Virjee, Kameel, Njoroge, Serah (2007): Helping a New Breed of Private Water Operators Access Infrastructure Finance. *Gridlines (Publication of the World Bank Public Private Infrastructure Advisory Facility, PPIAF)*, 25: 1–4; Kouassi-Komlan, Evariste (2007a): Micro Finance Institutions Facilitate Water Access to Poor Households: Lomé, Togo. IRC International Water and Sanitation Centre (ed.): *Case Studies: Innovations in Financing Urban Water & Sanitation*. The Hague: IRC International Water and Sanitation Centre, 8–13.

470 Heen, Stacy (2004): The Role of Microcredit in Conflict and Displacement Mitigation: A Case Study in Cameroon. In: *PRAXIS The Fletcher Journal of International Development*, 19: 31–51.

of particular focus (here is one prominent example[471]).

But education, healthcare, water, law and order, etc. ... are usually provided by public bodies, or at least strongly regulated and funded by them – especially in all successfully developed countries. Why, then, is microfinance suggested as a tool for the expansion of these goods and services? And can microfinance really achieve a better supply of these essentials? These are the questions I addressed in a paper[472] presented at the University of Pula in March, in which I cast an eye on projects using microfinance for water and sanitation.

To begin with, I have traced the political economy of microfinance and problematised the way in which the goods involved are conceived by advocates of such projects. I find that

> *The central premise held by advocates of microfinance solutions is that small loans from private MFIs can and will, given the appropriate programme design, act as a substitute for the commitment of the public sector. MFIs are expected to realisze the profit opportunities presented by specialised loans for education, health or water and sanitation, and the borrowers, on the other hand, are to grasp these loans as an entrepreneurial opportunity for the betterment of their livelihoods. Given the tangibility and immediate observability of the resources involved, water and sanitation can be understood as a crucial case for testing the assertion that, in developing countries, tiny loans to households can be a means of providing and governing public goods – goods which in richer country contexts are provided and/or strongly regulated by the public sector.*

While water and sanitation are not straight public goods *per se*, "the non-private characteristics of the resources involved confound a simple market-oriented approach as is usually taken by advocates of microfinance for household water and sanitation". The crux is that water and sanitation systems are dependent on, and in turn affect, common pool resources such as aquifers, surface water bodies, local environmental quality and public health levels. Even water in a piped system is a common pool resource that must be distributed and divided up in some way. Common pool resources require collective action, not private credit, to ensure their sustainable and inclusive governance.

Furthermore, water and sanitation systems have network characteristics and economies of scale which make it unreasonable to serve one household while excluding another. While individual microloans may provide some households with sufficient finance to buy their way into existing water and sanitation systems, we have

471 Naaraayana, Naagesh (2009): Microfinance Loans for Water-Starved People. *Microfinance Focus*, July 22, 2009. **http://web.archive.org/web/20111204012007/http://www.microfinancefocus.com/ews/2009/07/22/microfinance-loans-for-water-starved-people/**

472 Mader, Philip (2011): Attempting the Production of Public Goods through Microfinance: The Case of Water and Sanitation. *Journal of Infrastructure Development*, 3: 153–170. **http://governancexborders.files.wordpress.com/2009/01/ssrn-id18098191.pdf**

no reason to expect microcredit to help to create such systems in the first place. The bottom line is: without the collective elements of water supply (like mains pipes and treatment plants), what good can microloans do?

There is also the issue of fairness: it seems wrong that such projects expect poor people to pay the full price for connecting to networks *plus* interest (between 30 and 70 percent in Asia), while water and sanitation are internationally recognised Human Rights.

The predictions of collective action problems and network problems suggested in the paper are corroborated by case analyses from Vietnam and India (Andhra Pradesh). Here, the most pressing problems are found at the systems and local government levels, rather than at the level of household access to finance. This leads to the conclusion that

> *On the whole, it appears that microfinance for water and sanitation tackles symptoms, not causes, of the underprovision of water and sanitation to the poor. These causes would have to be located in larger collective failures (such as public sector capacity) and unequal access rights ultimately stemming from inequitable social relations and an increasingly unequal ownership of the means of production ... It almost appears as if the one element not missing was household access to loans.*

If we really care about extending access to the basics of a healthy and fulfiled life, including sufficient water and sanitation, education or healthcare, we would do better to learn from developed country successes that are based on functioning public sectors, instead of seeking to devise private, credit-driven, makeshift solutions.

What's Wrong with Microfinance for Water? Well ... A Few Things

Philip Mader, 2011/06/06

It's great to know that people take note of the ideas we share on this blog. In April, I posted an entry introducing a paper I had recently presented in Croatia, called *"Attempting the Production of Public Goods through Microfinance: The Case of Water and Sanitation"*. The argument was that water and sanitation, because they have the characteristics of public goods, cannot be provided adequately via private, individual credit like microfinance loans.

In a thoughtful article[473] Katya Jenkins recently re-iterated this point (and quoted the pa-

473 Jenkins, Katya (2011): Microfinance for Water and Sanitation: Lofty Dream or Wave of the Future? *microfinancefocus.com*. May 30, 2011. **http://web.archive.org/web/20120126073402/http:/www.microfinancefocus.com/microfinance-water-and-sanitation-lofty-dream-or-wave-future**

per). Her basic argument being that some organisations are reporting successes, but we have good reasons to be skeptical, and it might not work in every case.

Jenkins makes one very important point at the end, which is that there may be a better case for small self-financing in water and sanitation if we were talking about community systems. Agreed. But microfinance organisations would have to adapt their business models *a lot*, giving out much larger loans (€ millions rather than hundreds), being far more patient with repayments (slower repayment means slower turnover, means lower profits), and actually bothering to "know" their clients' businesses (instead of easy and cheap "no questions asked" lending). That's a long way from today's microfinance, even if a select few organisations like ProCredit have taken the step into SME finance; and probably "microfinance" would then be the wrong name for it.

The question still remains regarding the impact of microfinance models for water and sanitation. Not that a reduction in water-fetching time for a Zambian or Bengali lady from 3 hours a day to 15 minutes wouldn't be a great thing – of course it would – but the fact remains that everyone who reads this blog (or Water.org's success stories) has a tap that they can simply turn on and a toilet that flushes, and they would not be succeeding in life without the infrastructure that supports them.

I have grave doubts that microfinance, or private enterprise in general, could ever emulate this fantastic achievement of the public sector. So why bother trying to make third-best solutions work? At best, microfinance models could be a stopgap in lieu of something far better. To quote the wise words of Lant Pritchett (in a comment on Roodman's blog[474]):

> *I was living in India and discussing arrangements for household water supply with some development colleagues of mine. After about half an hour of pretty fruitless discussion I said, "let's step back. tell me your long-run vision of the household water sector in India" They said "Our vision is that India meets the target that every household lives within half a kilometer of an improved water source capable of providing 40 liters of safe water per person per day." I said, "I see the problem. My vision of success is that every Indian can take a hot shower inside their own home." The difference is that one can imagine meeting the first goal "programmatically" or with a series of "interventions", while the latter clearly requires endogenously functional systems. No one I know wants to have to go to a group meeting to take a hot shower. They want to turn the tap and it works.*

474 Roodman, David (2010): Is Microfinance a Schumpeterian Dead End? *David Roodman's Microfinance Open Book Blog*. May 15, 2010: Comment 7. **http://blogs.cgdev.org/open_book/2010/05/is-microfinance-a-schumpeterian-dead-end.php**

Should Poor People Have to Pay for Their Human Right to Water?

Philip Mader, 2011/10/04

Actor Matt Damon makes it sound like a great idea to give small loans to poor families so they can get access to improved water and sanitation (see video[475]). He is the co-founder of the NGO water.org, promoters of the WaterCredit loan:

> *Gary, my partner, pioneered this idea of, you give people loans. So, for instance, in a place like India in a slum, the municipality will be pumping water right through the street ... If you could give them a loan to connect directly to the municipality, so you pipe the water directly into their house, a 75 Dollar loan, they use that time that they were wasting waiting in line for water – working, they pay off the loan at rates of like 98 percent, 99 percent. And they're using that time in a more productive way.*

He makes it sound easy and appealing. And it is appealing. I'm sure Matt Damon, who is known for ardently supporting social causes, sees this as a real solution. The trouble is, his model doesn't tackle the fundamental problems – like piped water actually being available in the slum in the first place, which it normally isn't. Damon doesn't contemplate the fairness of asking the poor to pay for this Human Right with a loan, either. Will the poor want to pay? Will they even be able to pay? This idea of microfinance for water and sanitation may make an already unfair state of affairs even more unfair.

Earlier this year, I had the pleasure of presenting a paper[476] at the University of Pula, which was picked up later by Microfinance Focus in a nice article[477]. Since then, the ideas presented in that paper have mushroomed and matured into a more thorough, comprehensive and analytical (and 158.1% larger) piece, which has now appeared as a Discussion Paper[478] in the MPIfG's series.

This new paper again asks whether microfinance can be a truly effective tool to ensure that

475 "Fridgewaves" (2010): Matt Damon on Microfinance on Letterman. *youtube.com*. December 31, 2010. **http://www.youtube.com/watch?v=7yiiONmYUYA**

476 Mader, Philip (2011): Attempting the Production of Public Goods through Microfinance: The Case of Water and Sanitation. Journal of Infrastructure Development 3, 153–170. **http://governancexborders.files.wordpress.com/2009/01/ssrn-id18098191.pdf**

477 Jenkins, Katya (2011): Microfinance for Water and Sanitation: Lofty Dream or Wave of the Future? *microfinancefocus.com*. May 30, 2011. **http://web.archive.org/web/20120126073402/http:/www.microfinancefocus.com/microfinance-water-and-sanitaion-1ofty-dream-or-wave-future**

478 Mader, Philip (2011): Making the Poor Pay for Public Goods via Microfinance: Economic and Political Pitfalls in the Case of Water and Sanitation. MPIfG Discussion Paper 11/14. Cologne: Max Planck Institute for the Study of Societies. **http://www.mpifg.de/pu/mpifg_dp/dp11-14.pdf**

poor people get access to water and sanitation. In doing so, it questions whether it should be necessary to make the poor pay for these public goods. After all – weren't these goods provided in today's rich countries (from the 19th century onwards) by the state, using progressive taxation and transfer mechanisms? Like the previous one, this paper argues that goods like water and sanitation throw up serious collective action problems in their provision which make it difficult (or impossible) to ensure that everyone gains access if private/individualist means of financing are used.

If microfinance loans are the means of finance, households must each, individually, find it in their best financial interest to take on a loan for water and sanitation improvements. But many households will not find it in their best interest – individually – to take the loan and make the investment. First, because it is difficult for many to recognize the benefits of improved water and sanitation, especially given their standard of education and the long-term nature of many of the benefits. Second, because many of the benefits are well-spread-out throughout the community (if I stop going for "number 2" in the vacant lot, *all* the neighbours will benefit), so why should one household want to finance the improvement for all? Third, because most of the benefits are non-pecuniary, or at least not directly monetary, so loan repayment (in money form) will be difficult.

The paper also offers a deeper exploration of the pitfalls encountered in practice by projects using microfinance for water and sanitation, building on case studies from India and Vietnam. These problems are related to politics (water is a political resource, too!), the capacity of public providers (which isn't strengthened by such projects), the values held by households (which don't conform to rationalist assumptions), and equity (why should the poor pay? why so much?).

Aside from probably being destined for failure as a business model, microfinance for water and sanitation is also unfair – no matter how appealing Matt Damon may make it sound. Given how well many developing countries *do* succeed in supplying middle- and upper-class areas via their public sector enterprises, suggesting in turn that microfinance is the solution for *poor* areas merely institutionalises a system of "public provision for the rich, self-help for the poor". Worse yet, the poor pay an additional premium in the form of interest on their loans; depending on the country's microfinance sector, around 25 to 130 percent. That seems quite the opposite of a Human Right.

Bordercrossing Books and Articles

Over the years, we have reviewed several books and articles relating to our work and the issue of governance across borders. The reviews are still in chronological order and we invite you to read them selectively.

'Decoding Divergence in Software Regulation' by Thomas Eimer

Leonhard Dobusch, 2009/04/20

In his recent article "Decoding Divergence in Software Regulation"[479] Thomas Eimer very convincingly demonstrates and explains differences in software patent regulation between the United States and the European Union. He basically distinguishes three "structural causes for the persisting divergence" (p. 276) – namely the US practice of patenting software versus the European reluctance to do so: (1) incompatible underlying paradigms, (2) differentiated patterns of power structure, and (3) unsynchronised institutional arrangements.

479 Eimer, Thomas R. (2008): Decoding Divergence in Software Regulation: Paradigms, Power Structures, and Institutions in the United States and the European Union. In: *Governance*, 21 (2): 275–296.

Especially when dealing with the first cause, "paradigmatic cleavage", Eimer argues rather broadly, embracing both patent and copyright law. And I completely agree when he contrasts the strong "utilitarian" rationale of intellectual property rights in the US with European skepticism towards such utilitarian reasoning. I am not so sure, however, that the partial rejection of utilitarian welfare assumptions automatically leads to a better balance between "public and private interests" in the field of intellectual property regulation in general, as implied by Eimer when he

writes: "Opponents of strong intellectual property rights in Europe can refer to a long tradition of suspicion".

While this might be true of patent law in general and software patents in particular, it seems to be the other way round in copyright law. There, the European tradition of romanticism and its reference to the natural creator's rights immunizes against utilitarian critique of ever-expanding copyright protection terms[480]. This European "natural rights" position recently played a major role in what I have called the "German Open Access Uproar"[481].

So, while (the obviously utilitarian) patent law is and has been stronger in the US common law system, (not so obviously utilitarian) copyright protection has been stronger in the European civil law tradition. For example, a major argument for the US Copyright Term Extension Act (CTEA) was "harmonisation" with longer copyright protection in the European Union. Another example is the copyright protection automatism that was common in Europe decades before it was introduced into the US in 1989.

Interestingly, as both examples illustrate and in opposition to Eimer's findings for software patent regulation, copyright regulations in the US and the EU are definitely converging. What about a comparative study?

480 For an example of this critique, see Lessig, Lawrence (2001): *Future of Ideas.* New York: Random House. **http://www.the-future-of-ideas.com/download/lessig_FOI.pdf**

481 See article of the same name in this volume.

'Governing Access to User-Generated-Content' by Niva Elkin-Koren

Leonhard Dobusch, 2009/05/16

Niva Elkin-Koren's recent paper entitled *Governing Access to User-Generated-Content: The Changing Nature of Private Ordering in Digital Networks*[482] is of particular relevance for scholars of transnational governance: most of the new digital communities and their respective carrier platforms such as Facebook, YouTube or Wikipedia are "born globals". Their regulation, be it (seemingly) unilateral through terms of service (see p. 132 *"Private Copyright Regimes: Facebook"* in this volume) or multilateral through optional licensing, represents a form of transnational private ordering. At the same time, the pace of technological change and the blurring boundaries between the commercial and the non-commercial sphere make this field particularly promising for studying (collisions of) transnational governance regimes.

482 Elkin-Koren, Niva (2008): Governing Access to Users-Generated-Content: The Changing Nature of Private Ordering in Digital Networks. In: Brousseau, Eric, et al. (eds.): *Governance, Powers and Regulations on the Internet.* Cambridge: Cambridge University Press, 318–343.

In the second half of the paper, Niva Elkin-Koren describes the dual nature of platforms – as commodities of their owners and communities of their users – as well as the dual role of users – as producers and consumers of content. It is such dualities that "reflect the complexity of new social media" (p. 14). And I totally agree that it is the intermixture and dynamics of private ordering by both platforms and users that may lead to suboptimal results for individual (or groups of) users, or for the wider public, or for both. (I am especially sympathetic to her critique of *too much* choice in open content licensing, see also her paper "Creative Commons: A Skeptical View of a Worthy Pursuit"[483].)

483 Elkin-Koren, Niva (2006): Creative Commons: A Skeptical View of a Worthy Pursuit. In: Guibault, Lucie, Hugenholtz, P. Bernt (eds.): *The Future of the Public Domain*. London: Kluwer Law International, 326–345.

But while I also subscribe to her principal skepticism towards private ordering as the dominant mechanism for governing access to creative works, from my point of view the question of its feasibility can and should not be answered once and for all. It is an empirical question. Of course, if private ordering was reduced to "a market for different access terms" this would probably justify dismissing it once and for all. However, in the case of the GPL as the de-facto standard for free/open source software development, the copyleft-clause creates the basis for a hybrid ecology of commercial and non-commercial use that would be very difficult to achieve solely via public ordering. One of the reasons for this success is the political message embedded in the private license regime – a message forcefully emphasised by Richard Stallman and his Free Software Foundation. Similarly, I would claim that projects like Wikipedia flourish not in spite of, but because of their hybrid, private-public nature.

So, whether private is superior to public ordering depends not least on how the respective platforms and carrier organisations manage this hybrid or again, on the dual nature of private regulation. It is in this respect that organisational structures, decisions and decision-making processes are key.

'Human Rights and Gender Violence' by Sally Engle Merry

Olga Malets, 2009/09/15

In this entry, I will not report on governance but on a book about governance from a neighbouring discipline that sociologists, organisational scholars and political scientists often ignore – social anthropology:

Sally Engle Merry, 2006. Human Rights and Gender Violence: Translating International Law into Local Justice. Chicago: University of Chicago Press

I found this book interesting and important for a number of reasons. First, I found in it many parallels to my own work. Second and more importantly, the book motivates reflection on the concept of culture and its place in transnational governance dynamics.

In her book, Sally Engle Merry explores how different actors – both state and non-state, local and global – translate global norms associated with human rights and gender violence into practices in societies and communities where human rights are nonexistent as a concept and where gender violence is not defined in human rights terms, but is considered a part of a national culture and protected as such. She identifies three cultural processes, or flows, that constitute global-local translation:

(1) *Transnational consensus building, or the making of the transnational gender anti-discrimination law;*
(2) *Transnational institution and programme transplantation, or the making of national laws and regulations, as well as programmes and organisations compatible with the international human rights norms;*
(3) *Localisation of transnational knowledge, or the emergence of human rights consciousness among local women (pp. 19-21).*

In my dissertation I have focused on similar processes, namely on the translation of global norms for the sustainable management of natural resources into specific local practices in contexts in which many global requirements appear alien to locals and are difficult to implement. In a similar way to Merry, I argue that no matter how different and inappropriate local practices, laws and regulations may appear to be, skilful activists navigating between different levels and nodes in a patchy system of natural resource governance use local institutions and practices as a resource and so facilitate the translation of global norms. By showing how local laws and habitual practices are compatible with transnational requirements, which is not always evi-

dent and needs to be constructed, they make transnational rules appear legitimate and acceptable to local actors and therefore make it easier for local actors to implement them.

More interesting, however, is Merry's contribution to the debates on culture. What is culture and how does it shape human behaviour? Is culture a system of norms, values and beliefs that facilitate societal integration? Is it a system of traditions? It is a tool-kit, a repertoire that human beings can use as a resource to pursue their goals? It is a world-view? It is enabling or suppressive? Is it static and rigid or dynamic and fluid?

Merry suggests that culture can be both enabling and suppressive. Its elements can be used as a resource to preserve the existing distribution of power in a society or in a community, in this case the power of men over women. Cultural elements can also be used as a resource by those who challenge existing power structures and propose an alternative conceptualisation of gender violence. Those who have power over women on a national, community or family level often claim that practices of violence against women facilitate the integration of a given society and preserve national identity and cultural diversity. The challengers, on the other hand, mobilize cultural elements that are compatible with the global ideas of gender equality, respect for women and the unacceptability of discrimination and violence against women. By demonstrating this compatibility of local and global ideas they seek to redefine women's rights as compatible with national culture and identity in order to empower women.

Merry thus emphasises that culture is not homogenous, integrated, consistent and fixed but contentious, accommodating conflicting elements, fluid and flexible. Culture is actively made. Culture "learns". Culture changes through "hybridisation" and "creolisation". Culture is not independent of institutional arrangements, political structures and legal regulations. When institutional and legal arrangements change culture understood as traditions, beliefs, norms, habits, practices, meanings and common sense also change. The lack of political involvement by women can be explained as part of a traditional culture, but if policy-makers allocate funds for providing child care, women are more likely to join parties, attend political meetings and participate in elections. What we call "culture" can change, and people can learn new roles if the institutional and legal preconditions for this are installed by policy-makers (pp. 14–16).

The impetus for institutional and legal change may come from transnational political arenas, themselves embedded in the culture of modernity, which Meyer and his colleagues call the western cultural account[484] or world culture[485]. In international organisations such as the UN, the representatives of nation-states and transnational activists develop global legal frameworks for

484 Meyer, John W., Boli, John, Thomas, George M. (1987): Ontology and Rationalisation in the Western Cultural Account. In: Thomas, George M. et al. (eds): *Institutional Structure: Constituting State*. Newbury Park: Sage, 12–37.
485 Boli, John (2005): Contemporary Developments in World Culture. In: *International Journal of Comparative Sociology*, 46: 383–404.

human rights, for example the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[486]. Signatory states are obligated to accommodate international norms of gender equality and anti-discrimination in their national legislation and to implement them. Policy-making often suggests that "culture" constitutes a barrier to the implementation of conventions, while feminist activists and social workers use local "culture" to promote human rights respect and offer women support in difficult situations. They do not build on pre-existing similarities of transnational ideas and local culture, but construct similarities, embed transnational ideas into cultural frameworks, and dress them in "familiar costumes" (p. 138).

486 United Nations (1979): Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). **http://www.un.org/womenwatch/daw/cedaw/**

In other words, Merry views culture as a fluid, flexible, changing and actively made resource that can either be used to preserve the existing distribution of power embodied in legal and institutional, both formal and informal, arrangements, or it can be used to promote new ideas, concepts, policies and practices in policy-making and on the ground. In this sense, it is still unclear to me what the independent role of culture is. It appears to be merely an instrument in the hands of people who appeal to it in order to achieve their different, often contradictory political goals. There seems to be a danger in this whole debate, defining culture as either a consistent and fixed set of beliefs, traditions and values or as a flexible tool-kit of cultural instruments and resources that can be used by knowledgeable, strategic actors to pursue their own goals[487]. The truth is probably somewhere in the middle, but the question is where, exactly? Although Merry does not provide an explicit answer to this question, her book is an excellent example of a study that addresses the interplay between local culture, local politics, transnational ideas and transnational politics.

487 See also Swidler, Ann (1986): Culture in Action: Symbols and Strategies. In: *American Sociological Review*, 51: 273–286.

I would also like to note in the margin that Merry's book is also methodologically innovative and illuminating (definitely for me as a sociologist). She calls her approach deterritorialised ethnography (pp. 28–35). Traditionally, social anthropology has focused on local places. Since Merry deals with processes in which the local and the global are intertwined, she identifies places where global, national and local processes are revealed: five local places in the Asia-Pacific region and in the deterritorialised world of UN conferences and NGO activism. She thus accumulates impressive data on (and an understanding of) both transnational and local culture and politics, as well as on their interaction in local and global spheres. This book seems to be well worth looking at for all scholars doing ethnographic research into transnational governance and its local unfolding.

'Google Book Search and the Future of Books in Cyberspace' by Pamela Samuelson

Leonhard Dobusch, 2010/01/20

Books are the most traditional of all copyrightable works. Copyright as a legal institution was developed specifically to protect the authors and publishers of books. Over the years, copyrights have been granted to creators of all kinds of works, ranging from music to films and most recently to software. While most of these other types of copyrighted works are being strongly affected by new forms of content production and distribution in the course of the so-called "digital revolution", books seem to have been relatively immune to those very same technological changes – at least until Google started the mass digitisation of books and Amazon launched its increasingly popular ebook-reader "Kindle".

Especially Google Book Search (GBS) has inspired intense controversies between supporters, painting the highly optimistic picture of universal access to all the books ever published for virtually everybody, and adversaries, fearing the rise of a knowledge monopolist that exploits authors, publishers and readers alike. The best and most comprehensive comparison of both lines of argumentation I have encountered so far is a recent piece by Berkeley's Pamela Samuelson entitled "Google Book Search and the Future of Books in Cyberspace"[488].

488 Samuelson, Pamela (2010): Google Book Search and the Future of Books in Cyberspace. In: *Minnesota Law Review*, 94 (5): 1308–1374. **http://people.ischool.berkeley.edu/~pam/GBSandBooksInCyberspace.pdf**

After identifying overly restrictive copyright as the major impediment to any mass digitisation project, Samuelson turns to the pros and cons of the GBS settlement in its current, amended version. As optimistic predictions, she lists the following:

- The settlement would allow young students in rural areas or inner cities to go to public libraries and have access to millions of books at the free public access terminal that Google promises to provide for those libraries.
- GBS will enable access for print-disabled persons.
- Out-of-print books would be able to attract new readers and thereby breathe new commercial life into those works in at least three ways: first, Google will serve ads to users whose queries yield GBS results, and authors or other rights holders will share in the fruits of the ad revenues. Second, Google will sell institutional subscriptions to universities and other entities. Third, Google will provide a server-based platform where users can buy and store digital books in online personal libraries accessible from any Internet-connected device. Revenues from consumer purchases, institutional subscriptions, and ads will be split, 37 percent to Google and 63 percent to a new collecting society named Book Rights Registry (BRR).

- As an open platform, this system would allow the purchase of digital books from any bookstore and enable people to read them on any device, thereby overcoming the restrictions of proprietary devices such as Amazon's Kindle.
- Access to the complete GBS corpus via terminals or institutional subscriptions could lead to an equalisation of higher education institutions, as it would enable small, medium, and even large but resource-challenged colleges and universities to expand their collections to include millions of books from major research university collections.
- Especially from the perspective of the US Authors Guild, the creation of the new collecting society BRR would provide a new avenue for revenues not only through Google but through licenses granted to other firms as well.
- The GBS settlement would help to solve the "orphan works" problem for books, i.e. access to books whose rights holders are difficult or impossible to find.
- The GBS settlement would allow "non-display" uses of books in the corpus that would enable Google to develop improved search or translation tools. Besides, nonprofit researchers could engage in "non-consumptive" research on it.
- The GBS would be a breakthrough not only in speed of access but also in the breadth and location of access, since anyone could read these books from any Internet-connected place.

Hardly any of these points, however, is undisputed or without risks. Criticism and concerns come from different angles – publishers, authors, libraries, and readers – and include the following:

- Publishers fear the "Napsterisation" of commercially valuable books in the case of the GBS being "hacked" and all of the books therein, including the in-print books which are not available for display uses, could be "liberated" by the hackers. Even more, attractive online book service providers such as the GBS could invite authors to cut out publishers as the traditional middle-man – especially as they are already being asked to perform the bulk of copy-editing, formatting, and other tasks of book preparation anyway.
- Some publishers criticize the suggested price-setting procedures, fearing too low digital prices. As planned, Google would set prices for institutional subscriptions to out-of-print books in the corpus in consultation with the BRR, while prices for consumer purchases would be set using an algorithm designed to optimize the market returns for each book, although rights holders remain free to set their own prices for each book.
- Similarly, some professional authors worry that they will not be adequately compensated for Google's commercial use of their books as long as Google keeps the prices of GBS institutional subscriptions low.
- While some publishers and professional authors are concerned that prices could be too low, library associations and academic authors share the opposite concern that approval of the settlement could, over time, lead to price gouging for institu-

tional subscriptions. In addition to the power derived from the de facto monopoly that the settlement would confer on Google, super-competitive prices could also result from consultation with the BRR, whose mission is to represent rights holders who will almost certainly press for higher prices. Samuelson even speaks of a potential "nirvana" for publishers, with new opportunities to obtain monopoly rents from out-of-print books through revenue-maximising pricing in collaboration with Google. Such price hikes, however, would substantially limit the GBS equalising consequences.

- Among higher education institutions, early resource-rich partners of Google such as the University of Michigan, which will get its subscription for free for twenty-five years for allowing the scanning of its books, could end up being subsidised by the premium subscription prices of book-poor and late-to-partner institutions. This, of course, would turn the equalisation promise upside down.
- Users of the public access terminals at higher education and public libraries will be charged a fee for every page of every GBS book that patrons print out, and this fee will go to the BRR. While photocopying the same pages from a book taken off a library bookshelf would have been free as fair use in the US or as a private copy in Europe, publishers could treat this as a "precedent" for charging libraries per-page-copying fees more generally. (Here, I would even go beyond Samuelson's point and agree with Lawrence Lessig, who fears that this might even be the outset of creativity impeding, pay-per-usage models for any copyrighted work.)
- As GBS ebooks will only be available online, readers are not able to lend their books to friends, resell their books or make private copies – all these are free uses of traditional books and of at least some other ebook formats.
- Similarly to libraries, consumers also run the risk of paying monopoly prices, as Google intends to sell out-of-print ebooks at an average price of $8.65; a rather high price given that in-print ebooks are currently selling for $9.99 and sometimes less, and are not bound to Internet access and server availability as in the GBS model.
- Google's unqualified right to sell the corpus to anyone without getting consent from BRR or anyone else, as well as Google's technological monopoly raise doubts across stakeholder groups with regard to the quality and sustainability of GBS. Even more, Google can exclude books from GBS for editorial reasons, creating a risk of censorship. This risk is particularly salient as GBS searches cannot be conducted on removed books, even for the purposes of letting a prospective reader know at which library the removed book can be found; Google is not planning to make a list of removed books available for public inspection and it need not say which books have been left out.
- For readers, inadequate guarantees of privacy protection could have a chilling effect on the willingness of users to read controversial materials, and consequently, may diminish the ability of authors of controversial books to earn money from them.

- As only non-profit researchers are eligible to engage in research on the GBS corpus, the settlement will preclude them from becoming next-generation entrepreneurs capable of developing radically new information services arising from their non-consumptive uses of the GBS corpus. Moreover, GBS as a platform technology will probably be integrated with other Google products and services, making them more "sticky" for users.
- Some concerns deal with the question whether a class action procedure is the appropriate way of balancing the many public interests at stake and whether the settlement could release Google from acts of infringement in which it has not yet engaged, such as selling institutional subscriptions to out-of-print books.

Summing up her comparison, Samuelson arrives at the following conclusion (p. 44):

> *This article has shown that although there are some reasons to be optimistic about the future of books in cyberspace if the GBS settlement is approved, there are even more reasons to be worried about the settlement and its consequences for competition and innovation down the line, as well as for sustained public access to knowledge, and to doubt that the bright promise proclaimed by GBS proponents is likely to be achieved.*

For Samuelson, excessive pricing, the lack of a backup plan if Google decides to discontinue GBS, and inadequate privacy protection are of particular concern, while there are presently too few checks and balances in the settlement agreement to protect the public's strong interests in this corpus of books. She nevertheless admits that "a pragmatic argument can be made in favour of the settlement, for it would 'cut the Gordian knot' of very high transaction costs that would inhibit clearing rights necessary to digitize millions of out-of-print books and make them available for institutional subscriptions and consumer purchases".

From a European perspective, at least two points can be added: first, in the amended GBS settlement foreign rights holders – with the exception of the UK, Canada and Australia – are excluded from the settling class, restricting any opportunities and advantages of GBS effectively to English works and English-speaking recipients. This language bias is already a concern for the European Commission, which sees major disadvantages for education and research in Europe[489]. Second and related to this concern, approval of the settlement would create enormous pressure on European authorities and rights holders to find solutions for problems related to orphan works and the digital availability of out-of-print books.

489 See Traynor, Ian (2009): Brussels Tries to Fight Google Book Plan by Overhauling EU Copyright Law. *The Guardian Online*. September 7, 2009. **http://www.guardian.co.uk/business/2009/sep/07/brussels-google-copyright-law-campaign**

Regarding Samuelson's dismissive conclusions – "especially over the long run" (p. 34) –, I would be more cautious. On the one hand, some of the most important

points of criticism are contradictory: either there will be the problem of too low – from a publisher's and professional author's perspective – or of too high prices – from a reader's and library perspective – but there can hardly be both at the same time. On the other hand, and here particularly in the long run, the outcomes depend on the resolution of these conflicts of interests and related collective action processes, which are very difficult, if not impossible to predict. In this context, having Google as a single powerful and visible player may be both problematic and beneficial to different groups of stakeholders: while Google as a monopolist may misuse its market power, it may function at the same time as a highly visible target, inspiring regulatory efforts and competition by other initiatives such as the "Open Book Alliance" of Microsoft, Amazon and Yahoo.

'Why Doesn't Microfinance Work?' by Milford Bateman

Philip Mader, 2010/07/22

Milford Bateman, 2010: Why Doesn't Microfinance Work? The destructive rise of local neoliberalism. London: Zed Books.

A few full-fledged books critiquing present microfinance practices may have been published to date, but they have addressed themselves mainly to microfinance insiders and development experts. Milford Bateman's brand-new book (released this summer), however, is the first critical book capable of crossing the border between academia and the lay world; it reaches out to convince a wider audience to question those accepted wisdoms that underlie the first big development hype of the 21st century.

Now, in plain English: "Microfinance does not work."

Bateman faces the multi-billion dollar industry head-on, systematically and in plain English debunking the misconceptions about the techniques, impacts and politics on which the public image of microfinance is based. The story he tells is as bald and bold as its title, painting as it does a bleak picture of a first world-driven financialisation of the poorest sections that serves the interests of donors more than those of its intended beneficiaries, and which does – at best – nothing for the poor. As Bateman writes, "put simply, microfinance does not work".

The British economist, who recently joined the Overseas Development Institute in London and is himself something of an industry insider, starts from the unease about small finance that grew in him during fieldwork and research missions in the

1990s. While the growth success stories of the East Asian economies hinged on intelligent policies supporting industrial growth and job-creation, the microfinance projects Bateman encountered in his work put money into the simplest no-growth enterprises; loans that were taken up by poor people out of pure necessity, not with any prospect. Worse still, increasingly small loans were going towards financing consumer lending to the poor, as Bateman found, which offered high profits but no promise at all of poverty alleviation.

The book first traces the rise of the modern phenomenon "microfinance" from the oft-told legend of Muhammad Yunus' near-accidental "discovery" of the creditworthiness of the poor in rural Bangladesh in the 1970s, followed by the growth of the Grameen Bank and its emulators, to the "neoliberalisation of microfinance" under the auspices of an ideologically motivated network of academics and international organisations. However, since the eve of the latest global economic crisis, microfinance has begun to fall into a crisis of its own, defined by a lack of funds, faltering repayment schedules, and the failure to see its premises confirmed by even the most sympathetic major studies[490].

490 Banerjee, Abhijit, et al. (2009): The Miracle of Microfinance? Evidence from a Randomised Evaluation. *Abdul Latif Jameel Poverty Action Lab*. May 4, 2009. **http://www.povertyactionlab.org/sites/default/files/publications/The Miracle of Microfinance.pdf**

Microfinance brings de-industrialisation and de-development

Bateman proceeds to debunk the range of "myths" underlying the "public narrative" of microfinance as a weapon against poverty, from the naive presupposition that business loans will only be used for income-generating activities, to the deliberately deceptive usage of the concept of empowerment. He deals separately with the myths underlying the new-wave (i.e. profit maximising) microfinance model, challenging the "win-win" story of profits and impact and refuting the claim that commercialised microfinance will alter the financial system in favour of the poor.

Instead, as an entire chapter shows, microfinance constitutes a poverty trap rather than an escape route. Not only do most existing impact studies ignore key downside factors; many *still* fail to show a positive impact. This is because microfinance leads to the oversaturation of low-end, low-value added markets where microenterprises systematically fail to reach economies of scale. The net result is that microloans actually bring about de-industrialisation and 'de-development'.

On the other side of the story, Bateman unveils the push factors behind microfinance. The allure of becoming a "microfinance millionaire", rich and proud of one's social investment profile, may attract some investors and 'philanthrocapitalists'. But with consumer lending at the low end of the market, a highly profitable (if perhaps unethical) investment opportunity was discovered, more difficult to dress up in altruistic language. In his section on the politics underlying microfinance, Bateman finally brings the radical critique of microfinance as a promoter of grassroots neo-lib-

eralism (which has remained confined to marginal academic circles up until now) within the reach of a mainstream audience. This may be regarded as the most valuable single achievement of his book, and even more space could have been dedicated to this theme. Microfinance is (and always has been) a tool for pushing back the state and for privatising social welfare, and it has proved a convenient vent for political pressures at a key moment in history by "bringing capitalism to the poor to make capitalism safe for the rich".

As Bateman's incisive work shows, there are many alternatives to microfinance, or at least microfinance as it is presently practised. Channeling finance to the poor is not harmful *per se*, but it must be socially (re-)embedded within developmentalist policy frameworks and/or systems of community management. Perhaps most fundamentally, modern-day microfinance is an undemocratic, even an anti-democratic development project, as it hands the control of development policy over to a small moneyed (and usually foreign) élite.

Milford Bateman has indeed written the proverbial 'book' on why (this) microfinance is not an adequate response to the vast poverty that still underlies the affluence of western capitalist societies. It would take some very surprising new arguments (backed by systematic, not anecdotal evidence) for the microfinance industry and its supporters to protect their "sacred cow" against his bold, convincing, and ultimately constructive, message.

'Where Good Ideas Come From' by Steven Johnson

Leonhard Dobusch, 2010/12/01

Steven Johnson, 2010: Where Good Ideas Come From: The Natural History of Innovation. New York: Riverhead Books.

Steven Johnson is all about crossing borders. His books deal with a great variety of topics, ranging from London's most terrifying cholera epidemic to a praise of popular culture[491]. And in his most recent book as well, Steven Johnson crosses disciplinary and historical borders when he, in his own words[492], "analysed 300 of the most influential innovations in science, commerce and technology – from the discovery of vacuums to the vacuum tube to the vacuum cleaner".

491 See Johnson, Steve (2006): *Everything Bad Is Good for You*. London: Penguin; Johnson, Steve (2007): *The Ghost Map*. New York: Riverhead Books.

492 Johnson, Steven (2010): Innovation: It Isn't a Matter of Left or Right. *The New York Times*. October 31, 2010: BU7. **http://www.nytimes.com/2010/10/31/business/31every.html?_r=2&adxnnl=1&pagewanted=all&adxnnlx=1291215714-rAmN32gF6LJgks/cWpKQLQ&**

The list of reviews and summaries of the book available online is endless, including a great video by the author himself[493]. So I am not going to reproduce any of those but very selectively refer to one of the examples presented in the book, one that relates most to the issues discussed in this blog. This example is the web-based patent marketplace GreenXChange, where Nike publicly released more than 400 of its patents that involve environmentally friendly materials or technologies. Johnson describes the rationale and realisation of the project as follows (p. 125):

> *By keeping its eco-friendly ideas behind a veil of secrecy, Nike was holding back – without any real commercial justification – ideas that might, in another context, contribute to a sustainable future. In collaboration with Creative Commons, Nike released its patents under a modified license permitting use in 'non-competitive' fields. (They also created a standardised, pre-negotiated contract for patents, thereby reducing the transaction costs of haggling over each patent license individually.)*

This is the first example, at least to my knowledge, whereby Creative Commons was active in standardising licenses outside the field of copyright regulation[494]. Moreover, it demonstrates how similar problems and solutions might be, after all, in both so-called "hemispheres" of intellectual property – patents and copyright. Hopefully, I will soon find the time to make some comparative studies on private regulation in both these fields.

493 Johnson, Steven (2010): Where Good Ideas Come from. TED Talk. *ted.com*. September 2010. **http://www.ted.com/talks/steven_johnson_where_good_ideas_come_from.html**

494 Thaney, Kaitlin (2010): GreenXchange – A Project of Creative Commons, Nike and Best Buy. *creativecommons.org*. February 10, 2009. **http://creativecommons.org/weblog/entry/12734**

'Just Give Money to the Poor' by Joseph Hanlon, Armando Barrientos and David Hulme

Philip Mader, 2011/02/10

Joseph Hanlon, Armando Barrientos, David Hulme, 2010: Just Give Money to the Poor: The Development Revolution from the Global South. Sterling: Kumarian Press.

If it sounds novel to suggest that if you want the poor to have more money, you could just give them money, these are strange times. What could be more straightforward than giving money to people in need? But cost recovery, self-help, and "financial deepening" are such essential tenets of the current development ethos that someone must go out and make the argument – as Joseph Hanlon, Armando Barrientos and David Hulme do – that simply handing out cash may be easier, and better, than anything else.

Cash transfers are a rising idea in development policy. Even *The Economist* likes them[495]. Still, they are far from a hype, and little is known to most people about the successful programmes implemented by Brazil, Mexico or Indonesia, for example. This book aims to change that. Perhaps its greatest strength and weakness is its simplicity. But hard science can be discussed elsewhere. *Just Give Money to the Poor* introduces a broader audience to, and gives impetus to the simple but still-controversial idea that redistribution works.

495 Give the Poor Money. *The Economist Online*. July 29, 2010. **http://www.economist.com/node/16693323**

The authors recap evidence from two decades of experimental and pragmatic progress on social transfer programmes in the developing world. They argue that no-strings-attached, widespread systems of cash distribution are far more effective and cheaper than other models, such as vouchers, food subsidies (where monitoring creates costs) or microcredit. The key is that the money must be a dependable, substantial and easy source of income for the poor. Assured regular cash transfers – not charity or philanthropy – are the key, even on a relatively small scale, to achieving impressive outcomes:

> *In the short term they reduce poverty levels and ameliorate suffering. In the medium term, they enable many poor people to exercise their agency and pursue micro-level plans to increase their productivity and incomes. In the longer term, they create a generation of healthier and better educated people who can seize economic opportunities and contribute to broad-based economic growth.*

The target groups could be particularly vulnerable demographics – children, the elderly – or simply everyone. Programmes can be expanded gradually as experience grows, since it is key to garner political support by demonstrating impact, fairness and adequacy.

> *It does appear that cash transfers can start small, but successful ones are not narrowly targeted at groups with whom most voters cannot identify.*

I would definitely have appreciated more of an explanation from co-author David Hulme, a long-standing microfinance researcher and early enthusiast, as to why microfinance is not an alternative. This section is painfully short, and his explanation that microfinance may benefit some people but not everyone is too shallow. But at least the book thoroughly dispenses of the idea that the poor are poor because of their laziness or foolishness:

> *Poor people, who have struggled to survive on tiny amounts of cash, are good economists who use additional money wisely.*

This is the same premise as the one on which microcredit is based. Microcredit, however, retains the basic suspicion that unless the poor are forced to repay, they may go out and squander the money. That's why the patronising caricature of the hard-working, caring, sensible woman who deserves a microloan instead of her happy-go-lucky, boozed-up husband is so popular.

But the essential difference between the cash transfers advocated in this book, and microcredit on the other hand, is the fact that cash transfers bring security – while microcredit brings risk. Microcredit requires those who are already in a precarious position to take on entrepreneurial risk. The events preceding the Indian microfinance crisis of 2010/11 remind us of what can happen to the poor when things do go wrong (see p. 353 *"The Journey of Indian Micro-Finance"* in this volume).

With the security granted by even a small transfer, those households who are willing and able to take on entrepreneurial risk can do so without risking complete destitution – something we *should* be worried about. Others may simply be able to get a decent job and send their children to school.

'Financing the American Dream' by Lendol Calder

Philip Mader, 2011/05/03

Lendol Calder, 1999: Financing the American Dream: A Cultural History of Consumer Credit. Princeton: Princeton University Press.

I knew I was opening an interesting book when I picked up Lendol Calder's "Financing the American Dream: A Cultural History of Consumer Credit". But I had no idea that, in reading the historical chapters, I would stumble onto the microfinance of the early 1900s. Published in 1999, Calder's book tracks the rise of consumer credit, from Victorian society's scorn for debt to credit as a practical life necessity in modern societies. It's a great read. And against the backdrop of the 2008–010 credit crisis, this book is as poignant as ever.

However, what astonished me most is that modern microfinance, it turns out, had an almost exact equivalent in North America in the early 20th century. The public of rich countries is currently enthralled by the notion that a supposedly innovative set of morally-driven credit institutions could create a better society, a world without poverty, more empowered individuals: microfinance ... This is so much an instance of history repeating itself, it's almost uncanny.

Calder writes how well-meaning people in America tried lending to the poor to help them escape poverty by building up the licensed small-loan industry – before World War I, before the Model T, before Morgan Stanley – and failed. As he explains on pp. 111–112, the licensed small-loan industry was created to help the poor take charge of their lives through small enterprise. But credit did not create more entrepreneurial, freer human beings; instead, as an unintended consequence it created the consumer culture of the USA that we know today.

> *The lenders and reformers who organised the licensed small-loan industry did not view themselves as advance agents for debt-based mass consumerism. On the contrary, through the mid-1920s small-loan lenders conscientiously resisted modern consumerism, at least what they could see of it. The business of personal finance was perceived as an exercise in philanthropy and social welfare, as a way of liberating workers from the clutches of poverty and the loan shark. In order to combat the odium attached to their business, small-loan lenders characterised themselves as upholders of the American dream. Not the consumerist dream of easy living on an increasingly high standard, but an older dream, one which pictured America as a country where wage labourers who worked hard and saved their money could rise up in the world and become independent producers [the dream of modern microfi-*

nance]. Small-loan lenders hoped that with an advance of "capital" and a little financial advice, some workers, at least, would be enabled to take charge of their lives and become "capitalists" themselves.

If the founders of the personal finance industry had known the consequences of their actions, if they had known that they were helping to lay the financial foundation for a culture of consumption, they might have stopped lending and moved into some other line of social work. In fact, when lenders realised what was happening, that is what a few of them did. The others continued to hope that their business directed borrowers onto the straight and narrow path of Victorian thrift, self-discipline, and productive independence. In this hope small-loan lenders were not being entirely selfless; the thrifty borrower made payments, the prodigal borrower did not.

But what they intended never materialised. Instead of building a society of independent, thrifty, and hardworking small businessmen, personal finance companies helped to build a debt-driven consumer culture.

This rise of debt-fueled consumerism occurred in the context of rapid growth and industrialisation in the USA, where jobs and rising incomes gave debtors the opportunity to pay off their consumer debt. If microfinance were to have the same consumerist effects in the growth-hampered, non-industrialising countries of the South, it seems it could well become a catastrophe.

Maybe microfinance is all about believing in the American dream – from rags to riches through hard work. That would explain why a few success stories can enthrall an entire community of educated people, to the extent that hard empirical evidence is discounted.

'The Master Switch' by Tim Wu

Leonhard Dobusch, 2011/05/18

Tim Wu, 2010: The Master Switch: The Rise and Fall of Information Empires. New York: Alfred A. Knopf.

The main theme of "The Master Switch" is the "oscillation of information industries between open and closed", a phenomenon Tim Wu finds and tracks in "any of the past century's transformative technologies, whether telephony, radio, television, or film", referring to it simply as *"the Cycle"* (p. 6). The historical description unsurprisingly culminates in an analysis of current battles around "net neutrality" and the openness of the internet.

Wu sees "a chasm opened between Google and its allies like Amazon, eBay, and nonprofits like Wikipedia on the one side and Apple, AT&T, and the entertainment conglomerates on the other" (p. 289). Those two coalitions, however, are not to be considered "one pack of wolves chasing another" but rather as "polar bears battling lions for domination of the world":

> *Each animal, insuperably dominant in its natural element – the polar bear on ice and snow, the lion on the open plains – will undertake a land grab where it has no natural business being. The only practicable strategy will be a campaign of climate change, the polar bears seeking to cover as much of the world with snow as they can, while the lion tries to coax a savannah from the edges of a tundra. (pp. 289-290)*

In what follows, Wu leaves little doubt that he sides with Google and its allies in this battle. What is missing in Wu's description, however, is at least a small account of Google's boldest attempt so far to provide content by itself: the Google Books project (for details, see p. 329 *"Pamela Samuelson on the Future of Books in Cyberspace"* in this volume). This, of course, would have made depicting Google as the antagonist to the content industry substantially harder, while it might still be true in areas other than books (see p. 150 *"Crazy Copyright Cartoon: The YouTube Copyright School"* in this volume).

As a solution to the problem described throughout the book as "the cycle", Wu suggests the "Separations Principle", which should be "more a constitutional than a regulatory framework" (p. 308). This resembles Braithwaite's distinction between "rules and principles", in that it should be "taken as axiomatic or generally accepted to such an extent that to the degree it regulates, the regulation is a matter of self-regulation"[496].

496 Braithwaite, John (2002): Rules and Principles: A Theory of Legal Certainty. In: *Australian Journal of Legal Philosophy*, 27: 47–82. **http://www.anu.edu.au/fellows/jbraithwaite/_documents/Articles/Rules_and_Principles 2002.pdf**

On the very last pages of "The Master Switch", Wu speculates about the upcoming dangers to the internet's openness:

> *Where might the next domineering empire come from? ... It could arise from a takeover of content by the great carriers of our time, a future whose harbinger might be the takeover of NBC-Universal by comcast. (p. 318)*

Ironically, exactly this merger has been approved recently by the U.S. Federal Communications Commission (FCC) in a decision that manages to integrate both tragedy and farce at once: Meredith Baker, a member of the FCC's five-member regulatory board that voted 4:1 to approve the merger, announced immediately after the decision that she would resign to become Comcast-NBC-Universal's senior vice-president of governmental affairs[497]; a move that makes Wu's book all the more important.

For all those interested in a more detailed presentation and discussion of Wu's ideas, I recommend the one-hour long video[498] provided by Harvard's Berkman Center.

PS: As an organisation theorist at a business school, I cannot help but comment on a small side-remark made by Wu in a lengthy footnote on page 284. There, Wu argues that "vertical integration serves as often as a means of corporate defense as efficiency" and asks "whether this defense function suggests an alternative explanation to the prevailing theory of the firm as shaped by the relative efficiency of internal and external contracting, which Ronald Coase articulated in 1937". Luckily though, organisation studies is not economics[499] and therefore comprises at least some variety of theoretical approaches. And one approach in particular deals with the defence function of vertical integration, namely the so-called "Resource Dependence Theory"[500].

497 See Dobusch, Leonhard (2011): Wu's Prophecy and Stewart's Commentary. *leonidobusch.blogspot.de*. May 18, 2011. **http://leonidobusch.blogspot.de/2011/05/wus-prophecy-and-stewarts-commentary.html**

498 The Berkman Center for Internet and Society at Harvard University (2011): Tim Wu on the Master Switch. *youtube.com*. January 12, 2011. **http://www.youtube.com/watch?v=LVZLl4EKQjs**

499 Dobusch, Leonhard, Kapeller, Jakob (2009): Why Is Economics Not an Evolutionary Science? New Answers to Veblen's Old Question. In: *Journal of Economic Issues*, 43 (4): 867–898. **http://www.dobusch.net/pub/uni/Dobusch-Kapeller(2009)Path-Dependent-Economics-WP.pdf**

500 Pfeffer, Jeffrey, Salancik, Gerald R. (1978): *The External Control of Organisations:* A Resource Dependence Perspective. New York: Harper and Row.

'Microfinance and Its Discontents' by Lamia Karim

Soumya Mishra, 2011/07/25

Lamia Karim, 2011: Microfinance and Its Discontents: Women in Debt in Bangladesh. Minneapolis: University of Minnesota Press.

Microfinance has built a significant part of its reputation on the assertion that small loans empower women. The assumption that every human being has entrepreneurship potential, but only lacks access to credit, underlies this "social business" intervention. The joint appeal of entrepreneurship and empowerment has cajoled many funders and donors to invest in microfinance. But critical research[501] has been shedding doubt on the assumptions of empowerment through microfinance entrepreneurship for quite some time. Can a direct transfer of credit rouse the dormant and innate entrepreneur which lies within every woman, or not?

501 Roy, Ananya (2010): The Democratization of Capital? Microfinance and Its Discontents. *The World Financial Review*. **http://www.worldfinancialreview.com/?p=401**

Lamia Karim's brave new book, "Microfinance and its Discontents: Women in Debt is Bangladesh", delves deep into the social realities within which microfinance operates in order to answer that question. As an Associate Professor of Cultural Anthropology at the University of Oregon, she performed research among the clientele of the four major microfinance NGOs in Bangladesh (Grameen Bank, Proshika, BRAC and ASA), first between 1998 and 1999, and following up in 2007.

Norms and obligations in a rural society are angled against women, as is demonstrated by a proliferation of ethnographic accounts in Karim's book. Take, for example, the incident of an elderly widow in Bangladesh, who was caught by her nephew on her way back home after taking a fresh loan from Grameen Bank. He pressured her into handing over the money to him because, he said, as his aunt it was *her duty* to *help him* start his business.

Neo-liberal assumptions and local power structures

The book's publication is well-timed with the growing skepticism about microfinance's impact after last year's crisis in Andhra Pradesh. The book explains women's continued marginalisation in spite of their increased access to credit through the mismatch that exists between microfinance's neo-liberal assumptions[502] and the ground reality of the post-colonial state of

502 Bateman, Milford, Chang, Ha-Joon (2009): The Microfinance Illusion. *Manuscript*, University of Cambridge, UK. **http://www.econ.cam.ac.uk/faculty/chang/pubs/Microfinance.pdf**

Bangladesh. The NGO bureaucrats operate under a donor-driven methodology, which ideologically ignores existing rural power structures, and therefore prompts unexpected reactions.

In one of her numerous examples, Karim cites a case where clergy from a local madrassah (Yunussia Madrassah, no relation to Dr Yunus) issued a fatwa against a "developmental fair" that was to be held by the microfinance NGO Proshika. Because fairs are associated with "un-Islamic activities", the madrassah sought to prohibit it – physical and verbal violence ensued against the women who attended anyway. At the very least, such anecdotes show the importance of understanding local customs, even (or especially) for market-oriented interventions like microfinance.

By analysing the social structures in which women are embedded, Karim's book carries forward the notion of women's "positional vulnerability" suggested by earlier ethnographic works on microfinance and gender, including Aminur Rahman's seminal work[503]. MFIs prefer lending to women borrowers because it is easier to shame them into repayment. Similarly, Goetz found in her interviews with NGO fieldworkers in Bangladesh that women can be more easily located and harassed near the home, making them easier to handle as borrowers[504].

503 Dowla, Asif (year unknown): Grameen Bank and Women's Empowerment in Bangladesh: A Review Essay. *Manuscript*, Department of Economics. St. Mary's College of Maryland. **https://ojs.lib.byu.edu/ spc/index.php/ESR/article/viewFile/1364/1325**

504 Goetz, Anne Marie (1997): Local Heroes: Patterns of Field Workers Discretion in Implementing GAD Policy in Bangladesh. *Discussion paper No. 358. Brighton: Institute of Development Studies*.

The key message in Karim's work is that microfinance is far from a panacea for gender disparities, and actually builds on women's vulnerable social position. Citing ethnographic evidence from her field research, the author provides vivid case narratives and points out how several conditions determine women's success:

> *NGOs operate within neoliberal principles of competition, profit, and entrepreneurship. I found that the women who benefited from the microfinance loans shared similar demographics – they were heads of households, their husbands granted them autonomy in financial matters, they lived independently from their in-laws, and many had married within their native village, which granted them more mobility. (p. 199)*

Karim suggests there is a gap between MFIs' perceptions of borrowers' capabilities and the actual constraints women face due to their position in the gender hierarchy.

> *On the one hand, we have the female borrower who is constrained by her kinship obligations and who has to transfer her loan to a male relative if he demands it. On the other hand, we have the bank manager who understands microfinance as a commercial venture and who imagines an autonomous and rational female subject who freely makes choices in the market. (p. xvi)*

Women are subject to many demands …

According to Karim, the gap between lenders' perceptions of women's autonomy and women's actual lack of autonomy is caused by MFIs' ignorance of the complex sets of obligations placed on women. Women are effectively subjected to two sources of authority in the microcredit relationship: the social authority of the borrower group, and the patriarchal authority of the household.

> *These borrowers are not isolated and autonomous subjects; rather, they are relational subjects who live in extended families in villages. Within these living arrangements, kinship ties control subordinated individuals, particularly women within the family …*
>
> *The woman as the loan-taking subject is now accountable to two forms of authority, her husband/family and the NGO/group borrowers who are jointly responsible for the timely repayment of her loan. Thus, if she fails to meet her debt obligations, it results in a breach of trust that extends to the kin group and the wider community. This is a very significant point in understanding how microfinance adversely affects the lives of women borrowers. (p. 37)*

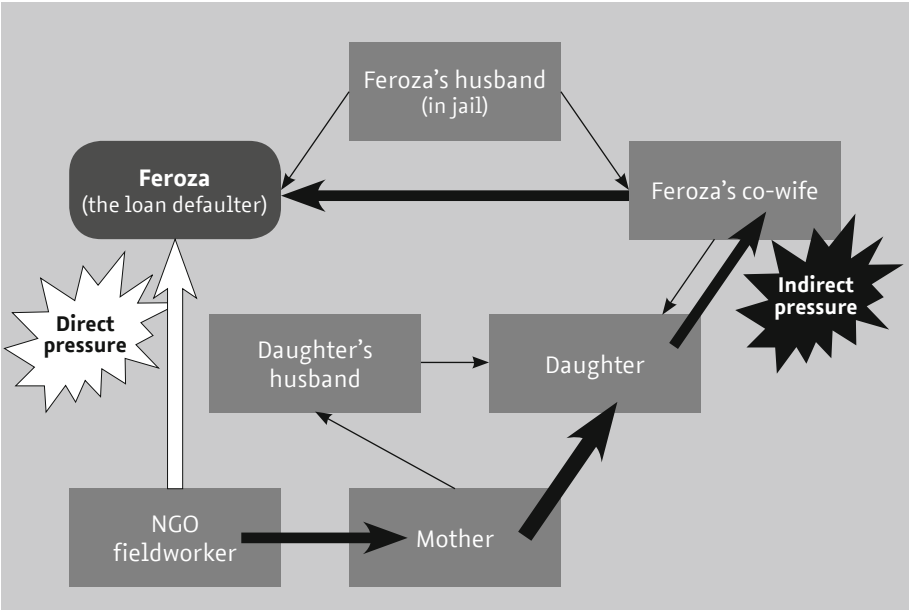
Karim questions whether the (prevalent) 98 % repayment rate, itself a great attraction for western funders to invest in microfinance NGOs, is actually a voluntary repayment; or whether the money is coercively recovered. She describes how the culturally specific "governmentality" of the NGOs is used to create an "Economy of Shame".

… which makes them more compliant borrowers

The author cites the practices that NGOs adopt against defaulters, which include breaking up houses *(ghar bhanga)* in order to recover loans by selling the components of the house. Karim's vivid descriptions make the gravity of such situations perceptible to the far-removed reader through the tool of ethnographic narrative. For example, she tells the story of a man who broke down a house along with other members of the borrowing group to recover the loan for the NGO, despite it being his brother's house.

The case of Feroza, whose default on *her* loans caused her co-wife's daughter to be sent back from her husband's village to her natal village, a deep source of shame, demonstrates the complicated pressure relationships which exist in a credit transaction between NGOs and borrowers. The NGO fieldworker who was in charge of both villages had refused to give loans to the girl's mother-in-law until Feroza (her step-mother) paid back her loan. This caused a complex pressure relationship to be put into action. It is these insights which the ethnographic richness of Karim's book drives home; something that statistical inquiries into microfinance effectiveness and NGO discourse can never relate.

Microcredit Pressure Relationships



Source: Author's composition.

Inside, as well as outside the village, microfinance NGOs' power in Bangladesh should not be underestimated. Karim provides evidence to show the rise of the NGOs as a shadow state, providing and controlling important public services like health, education and credit (see also p. 319 *"Microfinance Displacing the State"* in this volume). The preference of western donors for channelling their money through the networks of such NGOs has caused a bitter rivalry between the government and the NGO sector. The recent incident when Hillary Clinton[505] employed diplomatic pressure on Sheikh Hasina's democratically elected government to drop charges against Muhammad Yunus, founder of the Grammen Bank, is a case in point.

505 Bhagwati, Jagdish (2011): Grameen versus Bangladesh. *Al-Jazeera Online*. March 30, 2011. **http://www.aljazeera.com/indepth/opinion/2011/03/201132814193055586 5.html**. See also Mohammed, Arshad (2011): Clinton, in Gesture of Support, Speaks to Yunus. *Reuters*. **http://uk.reuters.com/article/2011/03/08/bangladesh-yunus-usa-idUKN0819981620110308**

Karim highlights the conflict of interest arising in MFI-sponsored research, as researchers can rarely criticize "their" institution's practices. The good will and obligations that exist in the social relationships between MFI leaders, bureaucrats and the educated elite make a critique of microfinance generally socially unacceptable. Karim criticises the construction of a hegemonic and technocratic discourse over poverty research led by the NGO community.

She describes two types of researcher working with the NGOs: one who is lesser "qualified", yet more knowledgeable in the field, and another who is more "qualified"

(with degrees from British and American universities) and apt at writing assessments, despite having little or no local knowledge and field experience. According to Karim, this discourse structure is reinforced by the nexus of NGOs, bureaucrats and English-language educated elites. They meet in seminars and conferences on poverty research, carried out in English, rendering microfinance inaccessible for critical scrutiny by the lay population. She likens the NGOs to "epistemic machines". The author claims that vernacular critique of the NGO does exist, but remains overshadowed[506] by the large body of NGO, donor and uncritical scholarly literature.

506 Cooper, Anne (2002): Contending Environmental Discourses: Multilateral Agencies, Social Movements and Water. *Occasional Paper*, No 58. SOAS Water Issues Study Group. London: University of London. **http://www.soas.ac.uk/water/publications/papers/file38401.pdf**

Caught short on alternatives

Luckily for the reader, Karim does not stop at an ethnographic diagnosis of the situation on the ground and a critique of the politics surrounding it. She also addresses the question which must arise in many readers' minds at the end of the book: "If not microfinance, then what alternatives are there?"

But sadly, Karim gives rather short shrift to these thoughts. She argues for job creation efforts like the Food for Work Programme[507], which seek to combat rural unemployment through public sector interventions. As prescribed by her, however, the general alternative to NGO discourses is a strong civil society movement from within the citizen population, devoid of bureaucrats, NGOs and educated elites. But such movements are not immune to the power structures and class hierarchies that exist in other institutions, either. The brevity of her analysis of why alternative systems might be better makes her outlook appear naïvely optimistic. Even civil society agitations face the obstacles of a heterogeneous society marked by class rifts in a post-colonial state.

507 Hyder, M. (1996): From Relief to Development: Food for Work in Bangladesh. In: *Disasters*, 20 (1): 21–33.

Such critique notwithstanding, the insights offered by Karim into the situation on the ground, which contrast with the optimism and success stories promoted through the NGO literature, are striking. Her book is a timely contribution to the debate on microfinance, and is a challenging and engaging read for the specialist as well as the lay reader. I believe that her ideas will serve as a guideline for future researchers' and policy-makers' inquiries into the gender aspect of microfinance. Optimistic claims about empowerment through microfinance will have a hard time standing up to her compelling argument.

'What Is the Evidence of the Impact of Microfinance ... ?' by Maren Duvendack et al.

Philip Mader, 2011/08/19

What is the evidence of the impact of microfinance on the well-being of poor people? Maren Duvendack, Richard Palmer-Jones, James G Copestake, Lee Hooper, Yoon Loke, Nitya Rao, August 2011, London: EPPI-Centre, Social Science Research Unit, Institute of Education, University of London[508].

A new systematic review of the evidence on microfinance, published last week, is dynamite to the world's most popular development policy. Madeleine Bunting of the Guardian has already referred to it as "microfinance's sober reckoning"[509], likening the findings to a "hangover after a big party". Bangladeshi news calls it a "damning report"[510]. Being co-published by the UK Department for International Development (DFID), previously a strong microfinance supporter, this "study of studies" comes from deep within the policy community – a first for a truly critical study of microfinance. The authors (economists and medical researchers mainly based at the University of East Anglia) looked at thousands of existing studies on microfinance. In their conclusions they do anything but mince words:

> *Our report shows that almost all impact evaluations of microfinance suffer from weak methodologies and inadequate data, thus adversely affecting the reliability of impact estimates. Nevertheless authors often draw strong policy conclusions generally supportive of microfinance. This may have lead to misconceptions about the actual effects of programmes, thereby diverting attention from the search for perhaps more pro-poor interventions and more robust evaluations (see "Policy Brief"*[511] *of the report).*

So, after 30-odd years and hundreds of billions of lending, there *still is no proof that microfinance actually works* (p. 273).

508 **http://www.dfid.gov.uk/R4D/PDF/Outputs/SystematicReviews/Microfinance2011Duvendackreport.pdf**

509 Bunting, Madeleine (2011): Microfinance Sober Reckoning. *The Guardian Online*. August 18, 2011. **http://www.guardian.co.uk/global-development/poverty-matters/2011/aug/18/microfinance-sober-reckoning-studies-question**

510 Microcredit Is a Mirage, Says UK Study. *bdnews24.com*. August 16, 2011. **http://ns.bdnews24.com/blog/en/index.php/bdnadmin/775**

511 Duvendack, Maren, et al. (2011): Policy Brief. What Is the Evidence of the Impact of Microfinance on the Well-Being of Poor People? **http://governancexborders.files.wordpress.com/2011/08/microfinance-2011duvendack-brief.pdf**

In itself, this finding is not new; it is what microfinance researchers have been debating for years, and particularly strongly since the two first Randomized Control Trials (RCTs) in 2009 found no evidence. But to have systematically evaluated all known studies on microfinance is a heroic achievement, a Herculean task, and Duvendack, Palmer-Jones, Copestake, Hooper, Loke and Rao deserve quite a bit of credit for it.

A Herculean task completed

Duvendack et al.'s review is exhaustive. The authors trawled through multiple databases to find all the studies ever done on microfinance, leaving them with a final list of 2,643 publications, which they systematically whittled down to a shortlist of the 58 highest-quality in terms of research design and methods of analysis. The studies they reviewed studied all types of microfinance: individual, group and mixed lending, and credit-only programmes as well as those offering a range of other services. They included studies looking for economic outcomes, social outcomes and women's empowerment. Disastrously, the authors of the review found that most relied on methods far too weak to support their conclusions; and those with strong methods found nothing conclusive:

> *There are only two RCTs of relevance to our objectives; neither has appeared in peer-reviewed form, and our judgement is that one has low-moderate and the other high risk of bias. Neither finds convincing impacts on well-being. We found nine pipeline studies, which have been reported in ten papers. All pipeline studies were based on non-random selection of location and clients, and most have only ex-post cross-sectional data, some with retrospective panel data information allowing (low validity) impact estimates of change in outcome variables. Thus, we deal with a set of relatively low validity papers, from which it would be unwise to draw strong conclusions. In contrast to some recent reviews, this is the conclusion we wish to emphasise, in large part perhaps because of a preference for avoiding type 1 errors. That is, we come down on the side of 'there is no good evidence for', rather than 'there is no good evidence against the beneficent impact of microfinance'. (p. 72)*

I can only read the last sentence as a remark directed at the authors of the two major 2009 RCT studies[512], who declined to interpret their results as evidence *against* microfinance, and have subtly changed their conclusions in successive versions to appear less negative. They have also indefinitely kept their studies from final publication in any journals. Indeed, the biggest surprise in Duvendack et al.'s review is their deeply critical conceptual treatment of RCTs, which are currently considered something of a gold standard in mi-

512 Banerjee, Abhijit, et al. (2010): *The Miracle of Microfinance? Evidence from a Randomized Evaluation*. Unpublished paper. Cambridge, MA. **http://econ-www.mit.edu/files/4162**. Karlan, Dean, Zinman, Jonathan (2010): Expanding Microenterprise Credit Access: Randomized Supply Decisions to Estimate the Impacts in Manila. *Economic Growth Center Discussion Paper* No. 976. New Haven: Yale University. **http://www.econ.yale.edu/ddp/ddp50/ddp0068.pdf**

crofinance evaluation. I'm really glad about this, since I have felt very uneasy about the RCT method for some time.

The dangerously flawed medical analogy

RCTs take the experimental design used in most medical research and apply it to microfinance: take a normal population afflicted by a certain problem (cancer/poverty), and randomly select a treatment group and a control group. Then administer the treatment to one group and statistically compare the change in dependent variables between the two groups (cancer cells/income, etc.).

The idea is that, by applying a sophisticated and internally valid research design to a large enough randomly-selected sample, the impact of microfinance could finally be proven conclusively. But the new sophisticated studies could not find anything. Even so, this translation of medical reasoning into the world of microfinance is incomplete and flawed for several reasons – this is my (non-exhaustive) list:

- The placebo effect is not accounted for, and is possibly even reversed. In medicine, both the treatment group and the control group are given a pill (figuratively); either one with an active ingredient, or a sugar pill. But in microfinance RCTs, one group gets a loan, while the other gets nothing. This process is not a double-blind, as in medical testing; both the "patients" and the "doctors" know who is being treated and who isn't. It is likely, therefore, that the placebo effect even runs in reverse: a loan recipient is likely to believe she must be objectively more entrepreneurial than her (identical) neighbour who was denied a loan. The neighbour in turn may be discouraged and underperform accordingly, even though both were just randomly selected.
- Programme placement bias is a problem, as Duvendack et al. briefly point out. That is, microfinance programmes are not randomly distributed. The fact that the two major RCT trials were administered in Hyderabad and Manila makes a potentially huge difference; these are growing cities with entrepreneurial opportunities, not "normal" places. And furthermore: in politics and economics, local *context matters*, while in medicine illnesses should be more or less uniform – cholera in India is the same as cholera in Ghana, but in terms of its causes and consequences, poverty in Hyderabad can be expected to be very different from poverty in rural Ghana.
- Microfinance RCTs don't test for medical equivalence. In medicine, a new treatment is always evaluated against the best existing treatment. But microfinance RCTs act as if the only alternative to microfinance is to do nothing. Perhaps ontologically this makes sense for organisations like the World Bank, but as scientific practice, it is disingenuous. The long-run effects of, say, investment in education funded via public borrowing should, for example, be compared with the effects of investment in microenterprises. This sort of comparative cost-benefit perspective is systematically lacking.

- Finally, the ethics are troubling. Economists are often frustrated by the impossibility of manipulating environments to create an experimental setting in the real world. Microfinance RCTs are one rare exception, where economists have found a practically dream case in which they can manipulate entire populations according to their methodological needs. While they are logically valid internally, there is something disturbing about research designs that depend on manipulating key variables in the lives of economically and socially imperiled, precarious populations. This type of research on a hypothesised tool for empowerment is only possible thanks to the powerlessness of the subjects.

As a reminder: despite all this, the RCTs could not prove any impact. Who knows what they would find if placebos could be implemented, placement were random, and the results were compared against other (perhaps less market-friendly) development project options.

But worse still, as Duvendack et al. argue, the RCT studies so far haven't even tasted their own medicine. Rather than acknowledge that a lack of evidence indicates a lack of positive impact, the RCT authors have chosen to portray the lack of evidence as proof that more research is needed (so that proof can finally be found). Duvendack et al. say:

> *Failing to contradict the alternate hypothesis encourages one to believe there is a positive effect and therefore to tend to (continue to) reject the null (no effect) hypothesis even though it (no effect) may be true. ... Even for critics of these evaluations the absence of robust evidence rejecting the null hypothesis of no impact has not led to a rejection of belief in the beneficent impacts of microfinance (Armendáriz de Aghion and Morduch 2010, p. 310; Roodman and Morduch 2009, p. 39–40), since it allows the possibility that more robust evidence (from better designed, executed and analysed studies) could allow rejection of this nul. However, given the possibility that much of the enthusiasm for microfinance could be constructed around other powerful but not necessarily benign, from the point of view of poor people, policy agendas (Bateman 2010, Roy 2010), this failure to seriously consider the limitations of microfinance as a poverty reduction approach amounts in our view to a failure to take seriously the results of appropriate critical evaluation of evaluations. (pp. 72–73)*

"Enthusiasm built on foundations of sand"

Given the lack of real evidence of microfinance's impacts, Duvendack et al. are right to raise the question of opportunity cost.

> *[I]t might have been more beneficial to explore alternative interventions that could have better benefitted poor people and/or empowered women. Microfinance activ-*

ities and finance have absorbed a significant proportion of development resources, both in terms of finances and people. Microfinance activities are highly attractive, not only to the development industry but also to mainstream financial and business interests with little interest in poverty reduction or empowerment of women, as pointed out above. There are many other candidate sectors for development activity which may have been relatively disadvantaged by ill-founded enthusiasm for microfinance. ...

However, it remains unclear under what circumstances, and for whom, microfinance has been and could be of real, rather than imagined, benefit to poor people. Unsurprisingly we focus our policy recommendations on the need for more and better research. ... But w]hile there is currently enthusiasm for RCTs as the gold standard for assessing interventions, there are many who doubt the universal appropriateness of these designs. Indeed there may be something to be said for the idea that this current enthusiasm is built on similar foundations of sand to those on which we suggest the microfinance phenomenon has been based. (p. 75)

The microfinance community, with its strong tendency to disqualify contradictory evidence via processes of groupthink, has yet to respond to Duvendack et al.'s review. Back in 2009, the RCT studies were at worst friendly fire, and were already greeted with considerable hostility from microfinance practitioners. Duvendack et al.'s review is, at the very least, a real challenge.

PS: On a side-note, I have no idea why David Roodman sees Duvendack et al.'s work as making "common cause with someone who views with nihilism the work to which they are devoting their careers"[513] – Milford Bateman that is. Bateman's book[514] is political economy, while Duvendack et al. are mainly about methodology. Not all criticisms of microfinance are the same.

513 Roodman, David (2011): I Failed to Seriously Consider the Limitations of Microfinance as a Poverty Reduction Approach. *Center for Global Development*. August 17, 2011. **http://blogs.cgdev.org/open_book/2011/08/i-failed-to-seriously-consider-the-limitations-of-microfinance-as-a-poverty-reduction-approach.php**

514 Bateman, Milford (2010): Why Doesn't *Microfinance Work? The Destructive Rise of Local Neoliberalism*. London: Zed Books. See also "The Bateman controversy continues ..." in this volume.

'The Journey of Indian Micro-Finance' by Ramesh S. Arunachalam

Philip Mader, 2011/10/22

Ramesh S. Arunachalam, 2011: The Journey of Indian Micro-Finance: Lessons for the Future. Chennai: Aapti Publications.

The microfinance crisis in India that broke out in autumn 2010, first imperiling numerous borrowers and then an entire industry, is the most fundamental event in the world of microfinance since the Nobel Peace Prize in 2006. With hindsight, it may even turn out to be the defining moment of microfinance history – never before has the dark side of microfinance, and the vulnerability of the industry, been so brutally exposed to a global audience.

Naturally, these events have attracted a host of opinions and analyses ranging from simply blaming the Andhra government[515] for bringing down a healthy microfinance industry, to accusing microfinance of having become worse than loan sharks[516]. And yet, so far, we understand very little of why India's vast microfinance sector went so far astray. Thankfully, people like Ramesh S. Arunachalam are out to change this.

Arunachalam has earned the respect of many a reader[517] with his candid and incredibly well-researched blogging[518] on the Indian microfinance sector. He posts prolifically, but despite (or perhaps because of) his over 20 years of work experience in development and rural finance, he has kept a low profile otherwise. He is not an outspoken critic.

Now Arunachalam has applied his sharp analytical approach and evident knack for writing to publishing the first book about the Indian microfinance crisis. The result is a meticulous, evidence-based piece of research, which brings clarity into what so far has been mostly an interest-driven and polemical battle of explanations.

In some ways what he has produced is, in fact, more than a book; it is a *dossier* of evidence and analysis showing how the Indian microfinance sector functions at the deepest levels, and where its errors lie. It is a biography of an industry in an identity crisis, and also a handbook on how Indian microfinance might (perhaps) still be

515 Rai, Vineet (2010): India's Microfinance Crisis Is a Battle to Monopolize the Poor. *HBR Blog Network*. November 4, 2010. **http://blogs.hbr.org/cs/2010/11/indias_microfinance_crisis_is.html**

516 Sharma, Devinder (2010): MFIs Are Loan Sharks, Not Saviours of the Poor. *Tehelka Magazine Online*. October 30, 2010. **http://www.tehelka.com/story_main47.asp?filename=Ne301010Proscons.asp**

517 Including us. We reviewed Arunachalam's blog in 2011, see: **http://governancexborders.com/2011/01/27/the-series-series-5-state-of-the-sector-microfinance-in-india/**

518 Candid Unheard Voice of Indian Microfinance. **http://microfinance-in-india.blogspot.de/**

saved. Above all, as the book's (wonderfully illustrative) cover implies, it is a search for the Faustian, troubled soul of Indian microfinance.

No review could adequately discuss the sheer wealth of information amassed in this book: 504 pages plus appendix can hardly be summarised. Here is an idea of what Arunachalam's work does that remains necessarily sketchy.

Naming the problem

The book begins by naming, in no uncertain terms, the problem that prompted it to be written:

> *Micro-finance, in the past, especially in the good old days, was widely regarded as a tool for poverty alleviation and MFIs were held in high esteem. However, in the light of the events of 2010, they began to be viewed as profiteers, who accumulated wealth at the expense of the poor. In fact, often times during the course of my interactions, in the latter half of 2010, I found the term "micro-finance" evoking sharp and negative reactions from civil society and the general public. ... That micro-finance in India is in a macro mess today is a sad truth. (p. 15)*

The book then delves into the events that predicated the crisis of 2010, starting with the localised crisis in the Krishna District of Andhra Pradesh in 2005/6, from which, as the author shows, lessons were never learned. After Krishna, the industry grew more quickly than before by focusing on the easily-accessible Andhra market and ignoring its internal weaknesses in order to offer high returns to equity investors, whose money poured in. Arunachalam even compiles his own database to track the equity capital flows, which increased more than four-fold from 2007 to 2008 alone – figures which, so far, were not being collected or tracked by anyone. Original data-work like this is among the greatest delights of the book.

The author then tracks the build-up to the euphoric year of 2010, which saw the public share issue (IPO) of SKS Microfinance as well as the outbreak of the deepest microfinance crisis so far. Along the way, he engages in such useful exercises as mapping the financial marketplace for low-income people in India (which extends far beyond microfinance); exposing the inside dealings and misuse of funds that took place in SKS leading up to the IPO (which have received scant attention so far); and charting the conflicts of interest in the microfinance sector's supervisory boards. He then follows the development of the 2010 crisis and its fallout and implications.

Exposing the secret agents

The second part of the book more systematically evaluates the causes of the crisis, mainly from the perspective of weaknesses within MFIs' internal systems and their corporate governance. Linking such issues as the rise in loan officer caseloads (us-

ing his field-level knowledge of the pitiable conditions in which loan officers actually work) to the growth in multiple lending/borrowing, Arunachalam makes the patterns at the ground level clear. In particular, he repeatedly discusses the implications of the "know your customer" principle being eroded to the point of practical non-existence.

Especially with regards to the sensitive issue of MFIs lending through "agents" or to "ringleaders", Arunachalam plays the role of whistleblower for a problem that has fallen on deaf ears for years, but which he claims is a systemic ground-level reality. The widespread use of agents is a well-kept secret of the sector.

> *As we go along, we are bound to see the agent problem cropping up in more places and states. Therefore, it is about time that we stopped pretending that there are no agents. The truth of the matter is that there are large numbers of agents, who have been (and are being) used to turbo charge the growth of micro-finance, and they are now turning into Frankenstein like monsters, created by the MFIs themselves (p. 312).*

He notes two main types of microfinance agents: local grassroots politicians, using loans to add to their political clout, and centre leaders (the heads of groups of borrower groups) making an additional profit by controlling or appropriating the flow of loans. He goes into great detail about how these two systems function, how MFIs have benefited from using these agents, and how they have created entirely new risks for the sector. The widespread use of these agents may even explain in part how so many MFIs can claim innocence about the wrongdoings they are accused of – perpetrated, after all, only by their arms-length agents – while simultaneously having profited from the same atrocities.

> *I see agents as the major cause of the present Indian micro-finance crisis. In my opinion, they are all pervading and powerful and they get clients for MFIs and they can make clients disappear from an MFI's horizon and put these clients onto another set of MFIs. They (can) stop client repayments. They indulge in coercive collection practices as many of them have backing of thugs and criminals (locally). (p. 320)*

Coming from as well-meaning a commentator as Arunachalam, sections like the one on agents are an urgent, stern call to action for an Indian microfinance sector for which it may perhaps be too late already. Furthermore, they are a warning to MFIs in other markets, and their backers.

Regulating and supervising the Indian Enrons

If Arunachalam is correct in the first two thirds of his book, then the Indian microfinance industry is in a far greater mess than most people are aware of, which MFIs

are neither willing to admit to the public nor to themselves. If he is correct in the last third of his book, not all is lost in Indian microfinance, but the changes required will be far more fundamental than those currently envisioned by the industry or its regulators.

The final third makes extensive suggestions for the future regulation of the Indian microfinance sector, an issue which has only been addressed with any seriousness since the crisis. Drawing parallels (as he often does throughout the book) between microfinance's crisis and the 2009 Satyam scandal ("India's Enron"[519]), Arunachalam pleads for serious and enforceable regulation; the kind that the microfinance sector has railed against and avoided for years; the kind that bites. While the practical recommendations he makes could be more detailed, they are at least the nuts and bolts of a regulatory framework. One very important point shines through clearly: regulation needs teeth in order to be actual regulation, with such means as randomised, unannounced field checks or portfolio audits.

519 NBC World Business (2011): Satyam Scandal Could Be "India's Enron". Video. *nbcnews.com*. **http://www.msnbc.msn.com/id/28539007/#.TqLIarKoM1c**

It is worth appreciating finally that his conclusions emphasize the need for far more than microfinance if India wants to achieve "inclusive growth". India absolutely needs policies which are "holistic, futuristic and yet practical" and a "truly bottom up and democratic process" for development, rather than a bigger (or even just a more stable/sustainable) microfinance sector. Microfinance may be India's latest economic scandal, but the actual social scandal is why a country growing at 7 to 9 percent a year has left a majority of its population behind, at the mercy of a profiteering microfinance sector.

Transparency, but at the expense of handiness

From the great depth of *The Journey of Indian Micro-Finance* it is evident that nobody knows as much about the sector as Arunachalam does – or at least nobody who is willing to share their knowledge. But Arunachalam, thankfully, also admits when he doesn't know something, and is frank about the margins of error in his estimations and evaluations.

In fact, the defining feature of the book – its greatest strength – is the total and meticulous transparency with which the author reports his findings. The chapters are riddled with excerpts from memos, e-mail exchanges, newspaper articles, balance sheets, data charts and graphs, and so on (in addition, there is a huge appendix). So if Arunachalam's book treads on anyone's feet, they certainly cannot complain about unsubstantiated claims. And despite the technical nature of many subjects he discusses, the author writes in a wholly accessible style – even if, at many times, he should have been more concise.

A book the size of an auto-rickshaw

Regarding brevity, to make one thing absolutely clear: this is probably the least handy book you will ever read (picture an A4 printing paper packet as a book). It weighs about as much as a full Hyderabad auto-rickshaw... but such is the price of comprehensiveness and transparency. Aside from its odd formatting, some other things are worthy of criticism. They have little to do with the content, and more to do with professional redacting.

The book occasionally suffers from poor structure; at times chapters take detours or get lost in detail, and the overall arrangement of the book – from history, to diagnosis, to recommendations – could have been improved by longer and more cohesive chapters. Hovering somewhere between a proper monograph and an analysis built around a scrapbook of documents and pieces of evidence, the work demands some patience from the reader. In my view, this mainly stems from a lack of professional editing, and not from the author's writing skill.

While it is great that the book is "out there" and has been published quickly, a better-equipped publishing house with more resources and more time could have moulded Arunachalam's material into a more solid and cohesive shape, making it accessible to a broader range of readers. An abridged and simplified version might be able solve this, in future.

Give it to me straight, doctor

My only critique with regards to substance is that the book retains a certain ambivalence with regards to underlying causes. It never becomes clear whether Arunachalam believes India's microfinance sector was destined (after a certain point) for disaster, or whether it could have been averted if certain actors (regulators, supervisors, MFI chiefs and investors) had done a better job in the years before the crisis.

In fact, I fear that his business-like focus on corporate governance and intra-organisational issues places too much emphasis on the micro-mechanisms of "mission drift", instead of asking *how and why* a sector supposedly out to do good could get this lost in as little as ten years. Frankly, given the type of knowledge which Arunachalam possesses, I would have liked some straight-up answers. Who else could they come from?

But in the author's defence, it is clear he needs to walk a tightrope, which is visible in the delicate way he phrases some criticisms, and readers are advised to read well between the lines. Part-insider and part-observer, he would be ill-advised to pass harsh judgment, and at times it is tangible that he has held things back. Furthermore, as I expect this won't be his last effort as a writer, future works may bring greater clarity.

The best parts of this larger-than-life book

To end this review on a critical note would be horribly wrong. *The Journey of Indian Microfinance* is truly an amazing book, and everyone who takes more than a lay interest in microfinance should read it. The inner workings of the most highly-developed microfinance market, which went completely astray, are exposed here in a meticulous, conscientious and transparent fashion. The book is full of original data and new perspectives. It is a treasure-trove, and development policy-makers, funders, aficionados and microfinance players around the world would learn much from studying the knowledge that Arunachalam has amassed.

Finally, at the risk of this being out-of-place in a review, I would suggest that readers focus on certain sections in particular if they find the full length and breadth of this larger-than-life book difficult to slog through:

- Chapters 1-12: introduction; an explanation of the Krishna crisis; the lessons that weren't learned from it; how the sector recovered so quickly; the early signs of new trouble; the IPO of SKS (and the very dodgy dealings that marked it); and who was (perhaps) responsible for the atrocities that caused the 2010 crisis.
- Chapters 18, 21-24: the corporate governance failures in MFIs which allow(ed) abuses to occur; the problems with internal controls in MFIs; how regulators could fix them; the very sensitive issue of agents; how loan officers became burdened with more and more clients.
- Chapters 34 & 35: the problems with consumer protection in Indian microfinance; detailed suggestions for a regulatory framework.
- Chapter 37: what India needs beyond microfinance.

To conclude, I congratulate Ramesh S. Arunachalam on having written not only the first book on the events of 2010 that shook microfinance, but also one that brings great clarity to those events. I sincerely hope it finds the wide, attentive readership it deserves.

'Confessions of a Microfinance Heretic' by Hugh Sinclair

Philip Mader, 2012/07/10

Hugh Sinclair, 2012: Confessions of a Microfinance Heretic: How Microlending Lost Its Way and Betrayed the Poor. San Francisco, CA: Berrett-Koehler Publishers.

Outside of the mainstream and microfinance's promotional campaigns, many academics, NGOs, critical journalists and also former microfinanciers have been quietly criticising microfinance for years – only to be ignored or dismissed as lunatics or ideologues. The problems in microfinance, however, are very real, and Hugh Sinclair's controversial new book *Confessions of a Microfinance Heretic* makes them impossible to ignore.

For the few independent researchers fortunately able to study microfinance without reporting to microfinance-supporting bodies or the major research groups (which happen to be mostly funded by the same organisations that fund microfinance), the problems of microfinance are not news. They include the fact that microfinance, by its very nature, supports only the simplest, least-productive and lowest growth-potential activities, as Milford Bateman argues[520]. They also include the fact that most loans are simply used for consumption, which even CGAP recognizes in its attempts to redefine microfinance in terms of "financial inclusion", ignoring the problem of these loans' non-sustainability. This is linked to the risk of over-indebtedness and debt traps researched bravely by Jessica Schicks[521], and evidenced most gruesomely in the Indian microfinance crisis. There is also the problem of microfinance building on and employing immense power asymmetries, particularly between men and women, as Lamia Karim has shown[522], rather than removing these symmetries through actual processes of empowerment. These are just a few issues.

520 See Milford Bateman (2010): *Why Doesn't Microfinance Work? The Destructive Rise of Local Neoliberalism*. London: Zed Books.

521 Schicks, Jessica (2010): Microfinance Over-Indebtedness: Understanding Its Drivers and Challenging the Common Myths. *Working Papers CEB 10-048. Brussels: Université Libre de Bruxelles* **http://ideas.repec.org/p/sol/wpaper/2013-64675.html**

522 Karim, Lamia (2011): The Fall of Muhammad Yunus and Its Consequences for the Women of Grameen Bank. *University of Minnesota Press Blog*. March 31, 2011. **http://www.uminnpress-blog.com/2011/03/lamia-karim-fall-of-muhammad-yunus-and.html**

In Hugh Sinclair, along comes someone who has extensive real-life experience, a fascinating story to tell – from his original belief in microfinance to his disillusionment and ultimate heresy against it – and a knack for writing. His book, as devastating as it is entertaining to read, presents a serious challenge to large elements of the microfinance industry. Sinclair adds a new problem to the list of reasons why micro-

finance cannot keep its promise of poverty reduction, showing that the incentives within the microfinance industry are structured in such a way that positive developmental outcomes can – at best – occur as an accidental by-product; and mostly won't occur at all.

Let us call this the "problem of industry structure" and investigate it. To begin with, contrary to many other critics, Sinclair assumes that the interests of the people at both ends of the microfinancial chain are actually aligned: that is, both the funders and the borrowers of microfinance loans actually want the loans to relieve the poverty of the borrowers. Be that as it may; in between the two sits a microfinance industry that controls the flows of both capital and information.

To simplify, this industry consists of two types of actors – MFIs (microfinance institutions) and funders – whose interest is usually to lend or invest money at the highest possible rate of return. For the MFIs, the only sources of revenue are the clients who pay interest (and often deliberately-hidden fees, as Sinclair alleges) on their loans. Rather than engage in costly screening of clients, it is easier for MFIs to charge excessive interest rates to everyone, through which they can absorb any losses on bad loans. To this scheme Sinclair adds the typical practice of not writing off failing loans, indefinitely postponing default with replacement loans instead, plus a general incompetence among MFIs at making good choices. As a result of these things, high interest rates are most MFIs' only possible survival strategy. The second set of actors, the investment funds, needs to find MFIs to invest in, which promise an assured return on their investment. To satisfy the fund's own fees and its investors' tastes, this return need not be particularly high, but funds (just like MFIs) find it costly and difficult to screen for the right partners to give money to. Their easiest and safest option, therefore, is to give it to the MFI with the highest returns, and preferably one in which other funds have already invested (the herd-instinct), so that at least some money will certainly be left over for the fund and its investors at the end.

The losers in this scheme, according to Sinclair, are the poor people who pay excessive interest rates – with all the imaginable effects, from business failure to over-indebtedness and worsened poverty – as well as the original investors and donors, who are duped. Industry control over information about microfinance (from glossy photo essays to heartwarming client stories to pseudo-regulation initiatives like the SMART campaign) keeps the investors in the dark about the bizarre ground realities of microfinance. Sinclair's main message, therefore, goes out to the investors and donors, warning them that they are being taken for chumps. No doubt his book will be vehemently opposed by the microfinance industry because it seeks to unsettle the industry's most valuable stakeholder: not the poor (who do the work) but the rich who give the money, from the casual Kiva "investors" to the committed long-term donors.

Sinclair isn't saying that the entire idea of microfinance was wrong, or that most people in the industry are in it to get filthy-rich (even though a few are getting so). Rather, his point is that the for-profit microfinance model, as promoted under the

auspices of the Washington institutions IMF, World Bank and USAID, which was intended to make microfinance more efficient and pro-poor, is having the opposite effect. By assuming there was no need for any real evidence-checking on social impact because "the market would solve it" through competition and clients' choice, the for-profit microfinance model created a comfortable environment for fraud, greed, and incompetence.

Others have launched more fundamental and principled critical investigations into microfinance before Sinclair. Nonetheless, this insider-turned-whistleblower's deeply personal account of how he realised that the industry he worked for with such commitment was unable to fulfil its promises may have a major impact on the public imagination of microfinance. How Sinclair realised that trying to reform microfinance from the inside via constructive criticism wasn't working, because it ran against the interests of everyone involved (except the poor), is an enthralling tale that interested readers will find difficult to put down. The story of how microfinance has been hijacked by corrupt, greedy and callous actors whose finest skills are self-praise at lavish conferences, promoting their own business as a cure-all for poverty (against all evidence[523]), and luring already-poor people into crippling debt traps presents a direct challenge to those actors. No doubt those who fail to recognise this challenge as an opportunity to reflect on the real mission of microfinance rather than denying the lack of systematic evidence to prove microfinance's beneficence (after 35 years!) and refusing to root out the bad players, will be enraged. The others should take the opportunity seriously.

523 Duvendack, Maren (2011): What Is the Evidence of the Impact of Microfinance on the Well-Being of Poor People? *EPPI-Centre, Social Science Research Unit.* Institute of Education. London: University of London. **http://www.dfid.gov.uk/R4D/PDF/Outputs/SystematicReviews/Microfinance2011Duvendackreport.pdf**

"Confessions" is a thrilling and chilling read. But while the book makes a powerful argument, and is meticulously referenced, allowing the reader to do her or his own background check, it does remain opaque in a few places. The evidence of funds engaging in active cover-ups, rather than just being pitiably incompetent at their job, is insider material that remains difficult to corroborate with public-domain information. How exactly the funds reacted to Sinclair's attempts at critique and reform is irrelevant, however, to the main point about the problem of industry structure in microfinance.

This book is extremely important for three reasons. First, it prompts a long-overdue questioning of whether the solution to poverty can actually be found in giving people more debt through an extension of Wall Street-style finance into the slums and villages of the Global South. Second, the book's critique may help to root out the bad players in microfinance, for whom social impacts are mere advertising stratagems, while making a quick buck on the backs of poor people is the bottom line. Third and finally, it offers some actual solutions beyond rhetoric and promises.

Deliberative Politics from Below? by Mundo Yang

***Sabrina Zajak*, 2012/09/13**

Mundo Yang, 2012: Deliberative Politik von unten. Eine diskursanalytische Feldstudie dreier politischer Kleingruppen. Baden-Baden, Germany: Nomos Verlag.

The question of whether and how NGOs or transnational social movements can be considered as productive parts of something like a global democratic governance or even an evolving cosmopolitical order has bothered many scholars to date. In the absence of a fixed nation state framework, including clear-cut geographical representation chains, some scholars even deny the attempt to understand transnational activism as a form of promoting democracy across borders.

"Deliberative Politik von unten" does not genuinely and specifically deal with transnationalism. However, I suggest the innovative research method is worth taking a serious look at for all those researchers who are interested in measuring deliberation in transnational, small-group settings; this book helps us to go transnational with Habermas.

On the theoretical level, deliberative democratic theory has been considered as a feasible type of solution. Most importantly because deliberative democratic theorists believe that good arguments – regardless of their geographical, national or other origins – are far more important for democratic legitimacy than vote-based representation within given political borders.

Yet some empirical studies have been undertaken in order to show that activists contribute democratically to global governance by bringing up deliberative discourses and public discussions, and pointing at problems not represented on the international agenda. Most prominent have been German research on communicative action on the global level. However, like on the local and national level, it turned out that studying deliberation is easier by far in the form of qualitative case studies than in actual detailed discourse analysis.

In this regard, Mundo Yang's book makes a new attempt to solve the many methodological problems in studying deliberation and its conditions. The first part deals with the question of how empirical deliberation research can be rooted better in a Habermasian variant of critical theory. In the second part, Yang presents his empirical analysis. While this part of the study deals predominantly with local activists' groups (trade unionists, left-wing party members) it nonetheless also entails an Attac-Group working on international financial markets. Yang proposes to study deliberation within activists' groups in order to reveal the value of their political work for democracy. Hereby, he has recorded group sessions as audiotapes and analysed more

than 1,800 utterances according to criteria like the use of arguments, communicative interaction, absence of interrupting other interlocutors, or variety of argumentation types (e.g. facts, norms, subjective impressions).

Moreover, the qualitative analysis of the varied motives, beliefs and schemata of interpretation articulated within these groups provides a thorough picture of the agency behind deliberative action. Yang reveals that seemingly non-deliberative motives of harsh denial and even angry critique of social inequality on the local as well as global level don't withstand the discursive elaboration of public critique. In other words, the notion deliberative agency summarizes the many conditions and motivations behind activists that also enter the transnational realm on a regular basis today. Given the intensive conceptual work behind its empirical approach, this book might also be used to do academic research on the rather essayistic proposals for more political indignation, discussed by authors like Hessel or Crouch.

Contributors

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Sigrid Quack is head of the research group "Institution-building across Borders" at the Max Planck Institute for the Study of Societies in Cologne. Her research focuses on the problem-solving capacity of different forms of transnational governance, and in collaboration with other members of the group she is currently comparing standard setting in the fields of accounting, labour, copyright and environment. Previous work dealt with the internationalisation of law firms (with Glenn Morgan), transnation-

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Governance crosses and blurs borders: disciplinary, geographical, thematic, conceptual. This collection of 127 articles from fourteen different authors assembles incisive contributions on a variety of urgent questions of our age. What is global and what is local in contemporary capitalism? What makes markets tick? How can we regulate finance? Who owns knowledge? What makes expertise? How can we protect the environment and fight poverty? And many more. Structured around different themes, the book invites readers to browse and delve deeper into the issues researched and analyzed over the course of four years on the *governance across borders* blog.

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