

# Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back

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## I. IN SEARCH OF LAW’S GLOBAL LANGUAGES

Today’s discourses about the nature, scope and regulatory reach of transnational law have far advanced from the time that Philip Jessup used the term in his

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Storrs Lectures at Yale Law School in 1956.<sup>1</sup> Written at a time when the Cold War was fast unfolding and the signs were hardly pointing towards any kind of united, globe-spanning legal order, Jessup's observations regarding the gaps left between public and private international law, at the time, did not seem to cause too much of a stir really, neither among international nor among private or commercial lawyers.<sup>2</sup> While the former were not particularly intrigued, private lawyers, especially those engaged in international commercial arbitration, seemed to have understood Jessup to state something rather quite obvious: by looking at the work of some of the great scholars in international and *transnational* commercial arbitration<sup>3</sup> we can find a common theme that has been running through these scholars' and practitioners' work for a long time. Connecting many of these scholars and practitioners, both in the past and today,<sup>4</sup> is the belief, that the ever-denser worldwide web of market relations has been generating its own rules of the game.<sup>5</sup> Pointing to the actual use of the rules in transnational commerce, such rules within this law merchant would be evaluated with regard to their practical functionality rather than on the basis of a jurisprudential test regarding their legal nature.<sup>6</sup>

Today, transnational legal ordering has moved far beyond the confines of commercial norm-creation. As a consequence, our conceptual as well as empirical

1. PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956), 2.

2. Inis L. Claude, Jr., Book Review, 51 *AM. POL. SCI. REV.* 1117, 1118 (1957) (arguing that Jessup offers more by way of stimulating questions than by satisfying answers); C.G. Fenwick, *Transnational Law*, 51 *AM. J. INT'L L.* 440, 444-45 (1957) (book review) (characterizing the question whether or not one should abandon the term international in favor of "transnational" as a practical rather than as a legal one); James N. Hyde, *Transnational Law*, 66 *YALE L. J.* 808, 813-16 (1957) (book review) (welcoming Jessup's 'surprising' questions to be giving rise to controversial debates); David Lehman, *Transnational Law*, 18 *LA. L. REV.* 219, 220 (1957) (book review) (describing Jessup as "Mr. Iconoclast", suffering from an illness typical amongst international lawyers, namely the over-conceptualization of International Relations); Eric Stein, *Transnational Law*, 56 *MICH. L. REV.* 1039, 1039 (1958) (characterizing *Transnational Law* as Jessup's most challenging volume and describing his concept as an "assault" on the traditional barriers and classifications separating legal systems).

3. See, e.g., Berthold Goldman, *Frontières du droit et "lex mercatoria"*, *ARCHIVES DE PHILOSOPHIE DE DROIT* 177 (1964); Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 *ICSID REV.—FOREIGN INV. L. J.* 208 (1995) (discussing Berthold Goldman's work and his contemporaries); see also the landmark study by FILIP DE LY, *INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA* (1992).

4. See De Ly and Gaillard, *supra* note 3; Graf-Peter Calliess, *Law, Transnational*, 6 *OSGOOD HALL L. SCH. COMP. RES. IN L. & POL. ECON.* (Res. Paper Series, Paper No. 35/2010, 2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1630348](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1630348).

5. For an elaboration of a theory of largely privately generated rules and principles of transnational commercial arbitration see EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* (2010), building, inter alia, on the pioneering work by Berthold Goldman, *supra* note 3, and Clive Schmitthoff, *International Business Law: A New Law Merchant*, in CLIVE M. SCHMITTHOFF'S *SELECT ESSAYS ON INTERNATIONAL TRADE LAW* 20 (Chia-Jui Cheng ed., 1988).

6. See Calliess, *supra* note 4; Goldman, *supra* note 3; Klaus-Peter Berger, *The New Law Merchant and the Global Market Place – A 21st Century View of Transnational Commercial Law*, in *THE PRACTICE OF TRANSNATIONAL LAW* 1, 21 (Klaus Peter Berger ed., 2001) ("Today, the question is not whether 'common sense and reason are rules of law'. The lawmaking force of the community of merchants grows out of their awareness for reasonable approaches and common sense solutions to the ever changing patterns and challenges of the transnational economy outside the ambit of domestic laws.").

interest in the phenomena of transnational law and transnational regulatory governance has considerably expanded.<sup>7</sup> However, a largely private-law oriented understanding of transnational law remains important for our renewed assessment of where the field is headed. Given the phenomenal expansion of transnational regulatory regimes and the attending challenges in socio-legal and normative terms, transnational law offers itself as much more than a mere label or short-hand for legal principles, instruments, codifications and border-crossing soft law. Instead, transnational law as a particular framing approach invites a host of questions with regard to its “true” nature<sup>8</sup>, its regulatory applications,<sup>9</sup> and its politics, as well as its dimensions of institutional agency and legitimacy.<sup>10</sup> This observation is of relevance for today’s investigations into different forms, manifestations, manifestos, or phenomena of transnational law, because it prompts an investigation of the normative stakes that arise with any attempt to rethink law’s relationship to particular constituencies. At the same time, it is important to remember that this effort of placing a legal norm in context is not unique to the present debates around transnational law. The invocation of a legal principle, the interpretation of a law or the demarcation of a right always and unavoidably involved the contextualization of the principle, law or right. Each time one legal interpretation is given priority over another, the norm itself is placed and situated in a particular way in relation to its environment. One such way of localizing a principle, a law or a right can occur by framing it as belonging either into the universe of private or of public law. Another localization can occur with regard to domestic or international law. The use of both these forms of contextualization plays a central role in the current debates around the nature and regulatory function of transnational law, but – even more importantly – around transnational law’s legitimacy. It is with regard to the legitimacy of transnational

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7. By any stretch, lawyers are not alone in this regard. *See, e.g.*, the impressive collection of case studies from the point of view of political science in *TRANSNATIONAL GOVERNANCE* (David Held & Thomas Hale eds., 2011); Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 *IND. J. GLOBAL LEG. STUD.* 447 (2007); *see also* SASKIA SASSEN, *STATE-AUTHORITY-RIGHTS* (2006); Sally Engle Merry, *New Legal Realism and the Ethnography of Transnational Law*, 31 *L. & SOC. INQ.* 975, 977 (2006) (“Human rights lawyers and activists worry about a lack of sanctions and the obstacles to implementing a transnational law within the framework of state sovereignty.”).

8. *See, e.g.*, Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 *IND. J. GLOB. LEG. STUD.* 447 (2007).

9. With regard to commercial, constitutional and international law, *see* Peer Zumbansen, *Transnational Law, Evolving in* *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* 898, 913 (Jan Smits ed., 2nd ed. 2012).

10. Claire Cutler, *Legal Pluralism as the “Common Sense” of Global Capitalism*, 3 *ONATI SOCIO-LEGAL SERIES* 719, 724 (2013); *see, from an International Relations perspective, the observation by HEVINA S. DASHWOOD, THE RISE OF GLOBAL CORPORATE SOCIAL RESPONSIBILITY. MINING AND THE SPREAD OF GLOBAL NORMS* (2012), 6 stating, “The point is not so much that there has been away in authority away from the state to the private sector, or that the state is in retreat (Strange 1996), but that the private sector has created a new transnational space (Ruggie 2004: 503). [ . . . ] The state still has a role to play, as this new global public domain is conceived as an ‘increasingly institutionalized transnational arena of discourse, contestation, and action concerning the production of global public goods, involving private as well as public actors’ (ibid: 504).”

regulatory regimes that their alignment and localization in either public or private law seems to play a crucial role.

For lawyers in continental Europe, the belief that there is in fact a real dividing line between public and private law is central to the way legal systems are operating and law is being taught in universities throughout.<sup>11</sup> Attempts to question this line were made, for example, by German interest jurisprudence as well as American legal realist scholars in the late nineteenth and early twentieth centuries as part of a more comprehensive critique of the underlying ideas of legitimacy and of the politics associated with either public or private law. This can be illustrated, briefly, through Morris Cohen's work in the 1920s and 1930s, which highlighted the intricate connection between property and sovereignty on the one hand,<sup>12</sup> and the socio-political roots of contract, on the other.<sup>13</sup> According to Cohen, property and sovereignty, notions which according to him are regularly associated with the respective and distinct realms of private and public organization<sup>14</sup>, are in fact intimately connected by the state's endorsement and application of property rights, which result in no less than "confer[ring] sovereign power on our captains of industry and even more so on our captains of finance."<sup>15</sup> In other words, property *rights*, as created, recognized and mediated through law, illustrate their political nature, which in turn subjects them and their interpretation to political critique.<sup>16</sup> As regards contract, Cohen found that "[c]ontractualism in the law, that is, the view that in an ideally desirable system of law all obligation would arise out of the will of the individual contracting freely, rests not only on the will theory of contract but also on the political doctrine that all restraint is evil and the government is best which governs least."<sup>17</sup> Against this view, Cohen famously posited that "mere freedom as absence of restraint, without positive power to achieve what we deem good, is empty and of no real value. The freedom to make a million dollars is not worth a cent to one who is out of work. Nor is the freedom to starve, or to work for wages less than the minimum of subsistence, one that any rational being can prize – whatever learned courts may say to the contrary."<sup>18</sup>

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11. Jan Smits, *European Legal Education, or: How to Prepare Students for Global Citizenship?* 13 (Maastricht European Private Law Inst., Working Paper No. 2011/02, 2011), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1719118](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719118).

12. See Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927).

13. See Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933).

14. Cohen, *Property and Sovereignty*, *supra* note 12, at 8 ("Property and sovereignty, as every student knows, belong to entirely different branches of the law. Sovereignty is a concept political or public law and property belongs to civil or private law.").

15. *Id.* at 29.

16. See, in this vein, also the critique by Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 471–73 (1923) (highlighting the role played by the state in furnishing a property right with distinctly different practical and economic effects, depending on whether the right-holder is rich or poor).

17. Cohen, *Basis of Contract*, *supra* note 13, at 558.

18. *Id.* at 560.

Cohen's calling into question of a neat divide between allegedly private-non-political and public-political dimensions of norms offers valuable insights for our navigation of present-day conceptual debates around the nature of transnational law and "transnational legal ordering." The prominence of private as well as public-private, so-called "hybrid" transnational regulatory regimes today<sup>19</sup> prompts our critical awareness of potentially one-sided presentations of alleged efficiency and practicality gains offered by private regulatory regimes in comparison to state-based, public government ones.<sup>20</sup> As the level of complexity in the organization of transnational governance regimes continues to increase, however, the importance of critical scrutiny with view to these regimes' accountability and legitimacy foundations grows as well, especially as the evidence regarding the effectiveness of transnational regulatory structures remains contested. As such, our current interest in transnational law must not be agnostic to these different camps of contestation.

The question then arises, where and, possibly, to which scholars we should turn in developing a conceptual framework. Whereas Jessup's 1956 book maintained an interesting balance between reflecting on the institutional changes that prompt our imagination beyond international law and international relations, on the one hand, and never fully articulated musings regarding the normative consequences of these changes,<sup>21</sup> on the other, the current discourse is considerably more charged and complex. The tension between an ever more complex socio-legal map of the institutional dimensions of transnational legal orders and the normative questions arising from them is even more accentuated than it was during the time Jessup wrote his book, as the interdisciplinary challenges arising from transnational law today relate to the complex institutional and procedural developments, which attract the attention of legal scholars, political scientists and international relations scholars, as well as sociologists, historians, anthropologists and even geographers. Meanwhile, transnational law's normative implications are debated among political theorists and political philosophers, democracy theorists and global justice and global ethics scholars.<sup>22</sup> This constellation illustrates the degree to which transnational law not

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19. See generally TIM BÜTHE & WALTER MATTLI, *THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY* 60–126 (2011); see also LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS 33–81, 101–21 (Christian Brüttsch & Dirk Lehmkühl eds., 2007).

20. Talia Fisher, *Nomos Without Narrative*, 9 *THEORETICAL INQ. L.* 473, 479 (2008) (stating, "The normative claim at the foundation of the privatization of law model is that, assuming conditions of perfect competition in the markets for legislation and adjudication, placing the power and means to create and supply the legal services . . . in private hands would lead to an efficient, high quality legal order, through voluntary interactions, amongst rational maximizers of their utilities."); see also the critical discussion in that regard by Colin Scott, Fabrizio Cafaggi & Linda Senden, *THE CHALLENGE OF TRANSNATIONAL PRIVATE REGULATION: CONCEPTUAL AND CONSTITUTIONAL DEBATES* 1-188 (Colin Scott et al. eds., 2011). This critique is shared by GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (Vaughan Lowe ed., 2008) (presenting a comprehensive attack on the public accountability lack in the currently existing investment arbitration system).

21. JESSUP, *supra* note 1.

22. See generally PAUL COLLIER, *THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING AND WHAT CAN BE DONE ABOUT IT* (2011) (proposing an approach towards the alleviation

only invites, but in fact urges us to connect current discussions about the institutional and normative challenges of border-crossing law and regulatory governance with deeper questions concerning the form and legitimacy of law. More than being merely another legal “field,” transnational law, then, might better be understood as a methodological lens through which to scrutinize the emerging and evolving actors, norms and processes both within and beyond the confines of the nation-state, a region or a municipality, a group or any other form of collective.<sup>23</sup>

Seen from this angle, the recent proposal made by Terence Halliday and Gregory Shaffer for a concept of “transnational legal ordering” emerges in the here described, contested realm of transnational law debates, which are, as we saw, part of a much larger investigation into law’s relationship to globalization.<sup>24</sup> In the following pages, I will attempt to draw out the implications of these debates for a project such as Halliday’s and Shaffer’s by showing how proposals of transnational legal-political order design require us to critically interrogate the underlying assumptions that inform our model building. I will argue that one of the most pertinent assumptions in the transnational legal order (TLO) model is the idea of the state not only as a still relatively stable institutional environment but also as a reliable guarantor of public good delivery. In light of the state’s historical and symbolic prominence in the Western legal and political imagination in both these respects<sup>25</sup>, there is a need to engage with the significance of the state, first, by revisiting a well-known story about the erosion of the welfare state under the conditions of globalization from the perspectives of both public and private law (II), before calling into question the alleged universality of the underlying assumptions regarding the state in that account (III). The next section will address concerns about the dominance of Rule of Law stories as they have been voiced by post-colonial scholars, before exploring the ways in which we trace the fragility of global law’s “intimations”<sup>26</sup> in the emerging spaces of global legal imagination, and intervention (IV). In the concluding section, we will engage with the methodological consequences of the foregoing analysis of transnational regulatory arrangements. Understanding transnational law less as a neatly demarcated field of law, but rather as a methodological framework through which it might be possible to keep the historical (however parochial) stories in play without universalizing them and with a view to drawing on diverse sources and backgrounds

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of world wide poverty); LEIF WENAR, *BLOOD OIL: TYRANTS, VIOLENCE, AND THE RULES THAT RUN THE WORLD* (2016) (arguing for the creation of a global initiative to address the resource curse).

23. See Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism*, 21 *TRANSNAT’L L. & CONTEMP. PROBS.* 305, 308 (2012) (elaborating on the idea of “actors, norms and processes”).

24. See *HANDBOOK OF TRANSNATIONAL GOVERNANCE INSTITUTIONS AND INNOVATIONS* (THOMAS HALE & DAVID HELD EDS., 2011) and in *TRANSNATIONAL LEGAL ORDERS 3* (Terence Halliday & Gregory Shaffer eds., 2015).

25. See MARTIN LOUGHLIN, *THE FOUNDATIONS OF PUBLIC LAW* (Oxford Univ. Press 2010); Armin Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 *GERMAN L. J.* 1375, 1381 (2008).

26. This term is used by NEIL WALKER, *INTIMATIONS OF GLOBAL LAW* (2015).

in the categorization and classification of emerging transnational governance structures, the article will suggest the triad of actors, norms and processes as a robust and promising conceptual framework to capture the institutional and normative challenges arising from the transnationalization of law (V).

## II. STATE TRANSFORMATION AND TRANSNATIONALIZATION: PUBLIC AND PRIVATE LAW STORIES

Considering how many ways there are to tell the story of law's globalization, a promising approach might be to distinguish between the angles from which we tell these stories. One such angle might be that of the state, and more precisely that of the Western nation-state as reference and model, against which and in distinction from which legal-political formations on the global level are being described, analyzed, and analogized. That seems the manner in which constitutional law scholars have been approaching the issue – and with good reason.<sup>27</sup> Whether the prominence of state-based legal ordering in the twentieth century in the West is enough of a justification to continue to develop theories of law in a global context in relation to an, after all, historically contingent and, as a result, symbolically charged, notion of the state is another question. What Halliday and Shaffer offer us in this context is more promising than the cliché public lawyer invoking “the state” each time a concern regarding a regulatory regime's legitimacy is called into question. In their extremely careful and empirically based conceptualization of transnational legal orders, we find, instead, a public law approach being put to a test, that is to say, that Halliday and Shaffer set out to complement in a convincing manner the otherwise private law-based narratives around transnational law through the development of a public law-oriented and socio-legally grounded, analytical framework. Not only has such a complementing analysis been much needed ever since both progressive and conservative legal theorists battled each other over the value of the law merchant. But, even more importantly, perhaps, is the public law orientation of TLOs that allows us to trace the normative and ideological underpinnings of the ways in which different scholars localize and situate norms with regard to “public” or “private” law.

At least partly echoing this approach, some administrative lawyers have been creatively thinking about transporting established and well-tested categories from the domestic into the global (administrative) realm.<sup>28</sup> Apart from preventing us from being “empty-handed” when looking for the “what” and “where” of law on the global level, an analysis through analogy might prove productive in allowing us to

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27. See BARDO FASSBENDER, *THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY* (2009); Anne Peters, *The Merits of Global Constitutionalism*, 16 *IND. J. GLOBAL LEGAL STUD.* 397, 400 (2009) (arguing that global constitutionalism is not just a ‘paper tiger’, but can be seen as “a perspective which might bring into focus the right questions of fairness, justice, and effectiveness.”).

28. Benedict Kingsbury et al., *Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, 68 *L. & CONTEMP. PROBS.* 1, 3-4 (2005).

identify gaps and shortcomings in the translation process. Such gaps, it seems, are the more obvious the higher the political stakes of the legal field are or the more precarious the interests that come into view. Surely, labour law has been an oft-cited example of a field the erosion of which on the domestic level in terms of labour market flexibilization and decreasing union density seems largely to become exacerbated in relation to multinational companies' apparently free-wheeling activities around the globe.<sup>29</sup>

In contrast to stories of translation or friction, as the case might be, accounts of “global law” might also arise in response to the proliferation of global phenomena and, indeed, globe-spanning regulatory challenges. The incredibly complex, multi-tiered and hyper-dynamic proliferation of so-called “9/11 law” might be a case in point. Created “in response,” as it was argued, to the attacks on September 11th, 2001, the global “war against terror” has since become permanent and, problematically, “unremarkable.”<sup>30</sup> Compare this to another *global* field of legal regulation, climate change law. Considering, in contrast to 9/11 law, a different set of contested and debated ideological and political stakes,<sup>31</sup> climate change governance has been at the center of attention, both domestically and globally.<sup>32</sup> The comparison between the “war against terror” and the equally unwieldy and multifaceted constellation of actors, norms and processes that make up transnational and global climate change governance,<sup>33</sup> illustrates the complexity of the legal architecture we

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29. This observation is not a new one. *See, e.g.*, David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transitional Arenas*, 44 CASE W. RES. L. REV. 407, 409–10 (1994); *see also* Harry W. Arthurs, *Labour Law Without the State*, 46 U. TORONTO L. J. 1, 1 (1996) (highlighting the historically long-existing ambivalence already within domestic law of the relationship between law and labour).

30. Frédéric Mégret, *‘War’? Legal Semantics and the Move to Violence*, 13 EUR. J. INT’L L. 361, 378 (2002) (stating, “There may still be a valid right to self-defence to the extent that it can be proved that further attacks are imminent. But, in seeking to justify the contours of a continuous right to self-defence beyond such specific attacks, there exists a real danger that, in a world of increasingly complex security dilemmas, one can end up justifying a permanent recourse to armed violence that is the precise antithesis of what self-defence was supposed to be.”); *see also* CLIVE WALKER, *TERRORISM AND THE LAW* 48 (Lord Carlile of Berriew QC, Lord Ken McDonald QC & Sir David Omand eds., 2011) (stating, “One [persistent trend] is the permanence of the special provisions against terrorism. This permanence is increasingly unremarkable.”).

31. Amanda Machin, *Rethinking Political Contestation over Climate Change* 7 (The Neth. Sci. Counsel for Gov’t Policy, Working Paper No. 10, 2015) (highlighting how the “socio-political atmosphere around this issue has intensified and diversified; it has heated up and dispersed out, garnering the attention of economists and philosophers, business and engineers, politicians and citizens. The world today features climate camps, climate marches, climate ribbons, climate refugees, climate summits, climate engineering [. . .], climate deniers and climate activists.”).

32. *See* Michal Nachmany, 2015 GLOBAL CLIMATE CHANGE LEGISLATION STUDY (2015), [http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2015/05/Global\\_climate\\_legislation\\_study\\_20151.pdf](http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2015/05/Global_climate_legislation_study_20151.pdf); Stephen Minas, *The Rise of Transnational Networks in Climate Change Governance: A Study in Hybridity* 2–3 (TLI *Think!* Paper No. 05, 2015) (arguing that the “diffusion and proliferation of climate governance necessitate a reconceptualization of the global response to climate change, informed by theoretical and empirical work on innovations in global governance.”), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2698561](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2698561).

33. Minas, *supra* note 32, at 3.



are faced with. At the same time, this complexity does neither come “out of nowhere” nor were (or, in fact, are) such forms of legal-regulatory differentiation unknown to the modern state.<sup>34</sup> The ensuing questions regarding the continuity, parallels or analogies between state-internal and transnational transformations of regulatory governance are an important part of the unfolding investigation into the nature and scope of transnational law. Even in the absence of comprehensive or all-satisfying answers to some of these questions, we need to recognize the depth of connection between a legal (as well as sociological and political) analysis that has been directed at the (domestic) Rule of Law and the welfare state, on the one hand, and the emerging formations of transnational regulatory governance, on the other.<sup>35</sup> It can hardly surprise, then, that we are today, in view of the dramatic changes that mark the transformation of the twentieth-century Rule of Law, interventionist and welfare state,<sup>36</sup> faced with complex phenomena of transnational *replay* of domestic regulatory and normative challenges on the global level.<sup>37</sup> This replay occurs in numerous, sometimes ambiguous, manners and requires critical theoretical responses we have been developing within the domestic context.

Considering the significant conceptual transplants on the one hand<sup>38</sup> and the dramatic changes of long-time prevalent geopolitical and economic power dynamics on the other,<sup>39</sup> a further challenge unfolds with regard to the frequent resorting to

34. See Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-regulatory State*, in THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE 145 (Jacint Jordana & David Levi-Faur eds., 2004), 148 (describing the features of a functionally differentiated administrative-regulatory state).

35. Saskia Sassen, *The State and Globalization*, in THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 91, 91 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002) (stating, “A key organizing proposition . . . is the embeddedness of much of globalization in national territory, that is to say, in a geographic terrain that has been encased in an elaborate set of national laws and administrative capacities.”).

36. For an excellent historical analysis with a focus on the U.S. see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); see also the comparative overview by Mark Bevir et al., *Traditions of Governance: Interpreting the Changing Role of the Public Sector*, Univ. of Cal. eScholarship Repository (2003), available at <https://escholarship.org/uc/item/0pv7z35s>.

37. See generally Alfred C. Aman Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379 (2001); Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 INT’L J. CONST. L. 415 (2008) (discussing the development that the twentieth-century rule of law is undergoing).

38. See generally Kingsbury, *supra* note 28, at 30; Katharina Pistor, *Of Legal Transplants, Legal Irritants, and Economic Development*, in CORPORATE GOVERNANCE AND CAPITAL FLOWS IN A GLOBAL ECONOMY 347 (Peter Cornelius & Bruce Kogut eds., 2003); Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, 76 L. & CONTEMP. PROBS. 117 (2013), at 128. <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4364&context=lcp>

39. Pablo Solon, *The Changing Geopolitics of Trade*, FOCUS ON THE GLOBAL SOUTH, <http://focusweb.org/content/changing-geopolitics-trade-old-and-new-players-slowdown> (last visited December 12, 2015) (stating, “In its 18 years of existence, the situation of the WTO has changed. China and recently Russia have become members of the WTO. Today, the old “big four” have reduced their share to 49.9 percent of global exports of goods while the BRICS countries now represent 17.4 percent of the global market of commodities.”).

“domestic” experiences with state transformation in trying to figure out adequate administrative solutions on the global level. With significant shifts occurring in terms of which domestic experiences—other than those of the U.S. or Europe as the usual suspects—one today would need to take seriously in order to get an adequate understanding of who does what in international political economy,<sup>40</sup> it is becoming clearer that traditional comparisons between the domestic state of things (regularly associated with the post-World War II nation and welfare state<sup>41</sup>) and a global sphere have become rather questionable. Seen in connection with concurring globalizing developments from health scares, over security to an increasing instantiation of a post-national criminal law,<sup>42</sup> the changes in international political economy prompt a serious reconsideration and remaking of the analytical framing devices with which we can hope to capture “global” lawmaking and governance processes. “This opening frontier stands at the borders of several scholarly fields that only recently are becoming aware of benefits to increased traffic across their intellectual boundaries: international law, jurisprudence, international organizations (IOs) and international relations (IR), comparative politics, law and development, economic development, international human rights, globalization of law, international political economy, institutional economics, political philosophy, world society and world systems theories, an anthropology of global institutions, and a social psychology of legitimacy.”<sup>43</sup>

The task at hand is two-fold: on the one hand, we need to effectively trace the *uploading* but also the already highlighted theoretical and ideological replay of Western-originating concepts of economic governance in the global context at a time, where “varieties of capitalism,” state-owned enterprises and the role of the state in governing the economy before, during and since the financial crisis are more contested than ever.<sup>44</sup> But, on the other hand, we will have to look elsewhere through the help of different conceptual lenses in order to learn from domestic administrative governance experiences of this or that country, without then being blind to novel institutional developments in the transnational realm. Comparative studies of transnationalized regulatory regimes as they are unfolding on the global level<sup>45</sup>

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40. See Roselyn Hsueh, *China and India in the Age of Globalization: Sectoral Variation in Postliberalization Regulation*, 45 *COMP. POL. STUD.* 32, 36 (2012).

41. See, e.g., John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 *INT'L ORG.* 379 (1982).

42. See the contributions by Jessica Roher et al., *Introduction, Transnational Criminal Law*, 6 *TRANSNAT'L LEGAL THEORY* 1 (2015).

43. Terence Halliday, *Recursivity of Global Normmaking: A Sociolegal Agenda*, 5 *ANN. REV. L. AND SOC. SCI.* 263, 264 (2009).

44. Anke Hassel, *Adjustments in the Eurozone: Varieties of Capitalism and the Crisis in Southern Europe*, (London Sch. of Econ. ‘Europe in Question,’ Paper No. 76, 2014), <http://www.lse.ac.uk/europeanInstitute/LEQS%20Discussion%20Paper%20Series/LEQSPaper76.pdf>; see, in historical perspective, the contributions to the groundbreaking collection *VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE* (Peter Hall & David Soskice eds., 2001).

45. See the impressive examples in *HANDBOOK OF TRANSNATIONAL GOVERNANCE INSTITUTIONS AND INNOVATIONS* (THOMAS HALE & DAVID HELD EDS., 2011) and in

through an interaction of domestic, global and reciprocal norm-creation would constitute important components of a toolkit fit for such a purpose.

In light, however, of this observation and with a view to the host of disciplines already employed to cast light on global norm-making processes, the potential of a legal positivist, state-centered model of law might be limited. Seen, by contrast, through a lens of long-standing socio-legal critiques of legal-positivist accounts, law's seat at the table of interdisciplinary global governance studies seems less uncertain. That could particularly be true, taking into account the pertinent analysis that the Legal Realists brought to bear upon the interaction between allegedly separate spheres of political and economic power under the rubric of "public" versus "private."<sup>46</sup> With a view to the pressing governance challenges in global economic regulation today, it appears as if a critique of the categories and qualifications with which different spheres of political authority and, thus, of legitimacy, are being distinguished along the lines of *public versus private* or *state versus market* is crucial in that it offers insight into the connections as well as the *continuities* between struggles over power and democratic agency within and beyond the nation state's confines.<sup>47</sup>

One way in which the already mentioned private law bias of some forms of transnational legal theory needs to be revisited is in relationship to the way in which we understand emerging transnational regulatory regimes on a normative level. It is important to recall that the transnational private and commercial lawyers of the 1960s saw little need to problematize the category "private" as such, because the main demarcating line was perceived to be running between (autonomous, transnational) "law" and the (potentially intervening, restraining) "state" rather than between "public" and "private" law. The relative triumph of this view on both the transnational and domestic levels<sup>48</sup> appears to continue to hold true today, if not unchallenged, then nevertheless undestroyed.<sup>49</sup> It is because of the pervasiveness of its characterization of transnational law as *private* law and the claim of it being an "autonomous" legal order<sup>50</sup> that we need to revisit the public/private distinction in

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TRANSNATIONAL LEGAL ORDERS 3 (Terence Halliday & Gregory Shaffer eds., 2015). For a concise analysis of how 'globalized' regimes originate on the level of the nation state, see Saskia Sassen, *The State and Economic Globalization: Any Implications for International Law?*, 1 CHI. J. INT'L L. 109 (2000) and Sassen, *supra* note 35.

46. See, e.g., Hale, *Coercion*, *supra* note 16; Cohen, *Property and Sovereignty*, *supra* note 12; for a powerful application in today's context of transnational governance see Fleur Johns, *Performing Power: The Deal, Corporate Rule, and the Constitution of Global Legal Order*, 34 J. L. & SOC'Y 116 (2007).

47. See A. Claire Cutler, *Artifice, Ideology and Paradox: the Public/Private Distinction in International Law*, 4 REV. INT'L POL. ECON. 261, 262 (1997); Johns, *Performing Power*, *supra* note 46, at 136 (highlighting the insight gained from the legal realist scholar, Robert Hale, into the value of addressing even the smallest questions of detail in the search for the space of political agency rather than trying to assert an overarching theory).

48. Berger, *supra* note 6 (arguing for the autonomy of transnational private law from the state). But see Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUR. L. J. 400 (2002), 410 (highlighting the limited review of arbitral awards by state courts).

49. See Cutler, *Common Sense*, *supra* note 10.

50. Berger, *supra* note 6; GAILLARD, *supra* note 3.

this context. On the level of historical development and symbolic weight, the distinction between public and private law remains significant, especially when we trace the power associated with each.<sup>51</sup> Meanwhile, scholars grounded in areas related to market governance such as contract, commercial or corporate law, considered private law as the appropriate governance framework when searching for a legal approach to address and structure emerging hybrid regulatory regimes.<sup>52</sup> This preference for private law occurs against the background of a long and contested history of demarcating spheres of public and private, state and market, as short-forms of normative universes,<sup>53</sup> and is, as such, tied to distinct associations regarding state order. In other words, the sympathies for a private law solution over a public law one make sense within the context of an established system of political references and routinized arguments that work so effectively precisely because what is at stake is presented as a practical choice,<sup>54</sup> while it is not openly making a statement about the nature (or the political value) of the legal order as such.

But, how does the public/private divide play out in what Halliday and Shaffer describe as a “transnational legal order”? While the norm-making processes between the domestic and global levels, in turn, give rise to patterns of “transnational legal ordering” in both institutional and normative respects,<sup>55</sup> the world-creating effects of references to “private” or “public” appear to have become infinitely more difficult to track down. Where we are left without clearly identifiable or applicable constitutional texts, clearly identifiable and historically situated actors of recognized ideological stance, and without a judiciary to provide a forum for the space of political critique of law, the public/private distinction is becoming strangely amorphous.<sup>56</sup>

Halliday and Shaffer, for the time being, seem to be able to escape both the need to having to choose between “public” and “private” as labels for particular TLOs and the challenge of satisfyingly responding to concerns around legitimacy,

51. See A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL ECONOMY* (2003).

52. Graf-Peter Calliess, *Reflexive Transnational Law The Privatisation of Civil Law and the Civilisation of Private Law*, 23 *Zeitschrift für Rechtssoziologie* 185 (2002); Christian Joerges, *The Science of Private Law and the Nation-State*, in *THE EUROPEANIZATION OF LAW. THE LEGAL EFFECTS OF EUROPEAN INTEGRATION* 47 (Francis Snyder ed., 2000).

53. David Campbell, *Reflexivity and Welfarism in the Modern Law of Contract*, 20 *OXFORD J. LEGAL STUD.* 477 (2000).

54. See the brilliant analysis by Duncan Kennedy, *The Political Stakes in 'Merely Technical' Issues in Contract Law*, 10 *EUR. REV. PRIV. L.* 7 (2001)

55. Gregory Shaffer, *Transnational Legal Ordering and State Change*, in *TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE* 1-23 (Gregory Shaffer ed., 2013), 7-10. See also Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 3-72 (Terence C. Halliday & Gregory Shaffer eds., 2015), 11: “To capture the dynamic of the formation and institutionalization of TLOs, we stipulate that a transnational legal order is *legal* when it involves international or transnational legal organizations or networks, and assumes a recognizable legal form.”

56. See Peer Zumbansen, *Introduction to Private Ordering in a Globalizing World: Still Searching for the Basis of Contract*, 14 *IND. J. GLOBAL LEGAL STUD.* 181 (2007); Peer Zumbansen, *Lochner Disembedded: The Anxieties of Law in a Global Context*, 20 *IND. J. GLOBAL LEGAL STUD.* 29 (2013).

because the model elegantly navigates the divide without ever having to reject or overcome it. To the degree that we would find ourselves applying the label “private” to, say, only a segment or a particular level of a transnational regulatory regime in the form of a TLO, we could justify that with reference to the nature of the actors involved. While to endorse the “private” nature of a TLO in part or altogether would surely raise concerns with regard to the significance of this labeling, the prevailing ambivalence in that regard somehow displaces the problem. Already within legal theory debates on the nation-state level, legal realists and, later, feminist legal scholars had effectively deconstructed the public/private distinction as an instrument of domination.<sup>57</sup> Similarly, critical private law scholars were able to show that in both modern, so-called “mixed economies” (characterized by Keynesian market-shaping policies)<sup>58</sup> and in transnational regulatory regimes<sup>59</sup> the public-private distinction was often used to mask the legally regulated and political nature of allegedly self-regulating markets.<sup>60</sup> Now, confronted with a largely descriptive mapping of multilevel and recursively structured TLOs, the distinction between public and private, as it emerged in the context of an evolving modern nation-state<sup>61</sup> and its attending political problems, we need to reconceptualize the prerequisites for a practical use of the public/private distinction. Transnational regulatory governance, including the examples depicted within the TLO research project, is of a complexity today that the burning question remains whether such regimes can be adequately

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57. Roscoe Pound, *Liberty of Contract*, 18 YALE L. J. 454 (1908); Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319 (1993) (describing three historical waves of feminist critique of the public/private distinction in U.S. law).

58. See ANDREW SHONFIELD, MODERN CAPITALISM. THE CHANGING BALANCE OF PUBLIC AND PRIVATE POWER (1965); Günter Frankenberg, *Why Care?—The Trouble with Social Rights*, 17 CARDOZO L. REV. 1365 (1996).

59. Fabrizio Cafaggi, *New Foundations of Transnational Private Regulation* (European Univ. Inst. Robert Schuman Ctr. for Advanced Stud., Working Paper No. 53, 2010), [http://cadmus.eui.eu/bitstream/handle/1814/15284/RSCAS\\_2010\\_53.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/15284/RSCAS_2010_53.pdf?sequence=1); Peer Zumbansen, *Law and Legal Pluralism: Hybridity in Transnational Governance*, in REGULATORY HYBRIDIZATION IN THE TRANSNATIONAL SPHERE 49 (Paulius Jurčys, Poul F. Kjaer & Ren Yatsunami eds., 2013).

60. Zumbansen, *Piercing the Legal Veil*, *supra* note 48, 412-414. See also GERALF-PETER CALLIENS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW (2010), 60:

As markets are believed to pick up where (exhausted) national governments have left off, they form an integral part of a narrative of natural evolution. In this narrative, conflicts over goals of regulation and principles of political market governance are transposed into strategic options put forward by states engaged in global regulatory competition, or into preferences and choices by market participants and (global) consumers. In these accounts, markets are promoted to assume the role of regulators, however, without any regard to their constituted, legal nature, an insight gained so long ago, that the general amnesia that seems to have taken hold of the market fundamentalists could almost be forgiven.

[footnotes omitted]

61. Randy E. Barnett, *Foreword: Four Senses of the Public Law-Private Law Distinction*, 9 HARV. J. L. & PUBL. POL'Y 267, 268 (1986) (arguing that the distinction is tied “to the kind of standard being applied to individual conduct”); see also contributions to PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY 204-68 (Jeff Weintraub & Krishnan Kumar eds., 1997) (exploring the public-private nature of ‘home’ and focusing on the intersection between private rights and public regulation in urban zoning).

mapped along the delineations of public or private law. Whether we are concerned with standard-setting in different areas considered “technical” such as forestry,<sup>62</sup> electricity,<sup>63</sup> accounting,<sup>64</sup> labor<sup>65</sup> and environmental conditions within global supply chains,<sup>66</sup> or with the complex arrangements around climate change governance,<sup>67</sup> the task of understanding and conceptualizing such regimes against the background of the blurred lines of public and private law seems daunting. This interim finding, however, needs to be further assessed to the degree that we explain the emergence of TLOs as, at least in part, a response to the inadequacy of state-based regulatory instruments in the face of globalized production and dissemination regimes.<sup>68</sup>

As a result, then, we are on shifting grounds when trying to mobilize the public/private distinction to highlight the ideological stakes in the context of transnational regime analysis. At the same time, however, the distinction continues to make its appearance in at least a number of the fast emerging and proliferating transnational regulatory regimes, for which an ever more differentiated vocabulary appears to be forthcoming. Notions such as “private authority”<sup>69</sup> or “Transnational Private Regulatory Governance” (TPRG)<sup>70</sup> illustrate the dynamics of this intriguing and fast-evolving laboratory of doctrinal and conceptual analysis, where much of the

62. Errol Meidinger, *The Administrative Law of Global Private-Public Regulation: the Case of Forestry*, 17 EUR. J. INT'L L. 47 (2006).

63. TIM BÜTHE & WALTER MATTLI, *THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY* (2011).

64. See generally Walter Mattli & Tim Büthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, 68 L. & CONTEMP. PROBS. 225 (2005); Dieter Kerwer, *Rules that Many Use: Standards and Global Regulation*, 18 Governance 611 (2005).

65. RICHARD M. LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY* (2013).

66. See Daniel J. Fiorino & Manjot Bhan, *Environmental Regulation with Supply Chains: Comparing Private and Public Regulation*, American Univ. Sch. of Pub. Affairs, Ctr. for Envtl. Policy Working Paper No. 4, 2013, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2317342](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2317342) (arguing that the increase in private environmental supply chain regulation has not fully displaced public regulation and benefits both the firm and society).

67. Daniel Bodansky, *Climate Change: Transnational Legal Order or Disorder?* in TRANSNATIONAL LEGAL ORDERS 287 (Terence Halliday & Gregory Shaffer, eds., 2015); Sigrid Boysen, *Grundfragen des transnationalen Klimaschutzrechts*, 50 Archiv des Völkerrechts 377 (2012).

68. This point is made repeatedly by scholars in TPRG and TLO. See Kenneth W. Abbott, *Engaging the public and the private in global sustainability governance*, 88 INT'L AFF. 543 (2012); see generally Halliday & Shaffer, *supra*, note 45.

69. A. Claire Cutler, Virginia Haufler & Tony Porter, *Private Authority and International Affairs*, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 3–28 (A. Claire Cutler, Virginia Haufler & Tony Porter, eds., 1999) (examining why the “framework of governance for international affairs increasingly is created and maintained by the private sector and not state or interstate organizations.” *Id.* at 3); see also Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501 (2009).

70. See, e.g., contributions to the Symposium, *Transnational Private Regulatory Governance: Regimes, Dialogue, Constitutionalization*, 13 GERMAN L. J. 1269–1578 (2012); see also Tim Bartley, *Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions*, 113 AM. J. SOC. 297 (2007).

ongoing conceptual analysis is directly tied to empirical field work,<sup>71</sup> while the resulting architecture along with the investigation of the arising normative challenges remain largely unsettled.<sup>72</sup> This is even more so the case when the emerging data sets complicate an analysis along the lines of public and private, because the constellations of actors defy a characterization according to such binaries. While that makes sense, arguably, when we think of public and private as adjectives to identify clearly allocated types of authority, the diffusion of public/private has an impact on our acquired routines of addressing the political stakes that the however contested application of the binary would regularly expose—domestically as well as transnationally.<sup>73</sup> The question, which poses itself with increasing urgency with the rise of more and more hybrid regulatory regimes from, say, the Equator Principles<sup>74</sup> to Private Military and Security Companies (PMSC),<sup>75</sup> concerns the ways in which the now available rich descriptive accounts of transnational governance may be exposed to a comprehensive normative critique.

Meanwhile, and the pervasiveness and timeliness of the TLO project is a powerful illustration of this, the evidence of the fast-evolving dynamics of transnational norm-creation not only speak for themselves but also provide a good deal of the substance of the ongoing theoretical enterprise. As a consequence, a lot of the current theory-design work, whether that is in the TLO project of Halliday and Shaffer, in Cassese's and his colleagues' impressive array of on-the-ground GAL studies, in Cafaggi's, Senden's and Scott's TPRG examples or in Eberlein's, Abbott's, Black's, Meidinger's and Wood's *Transnational Business Governance Interactions*,<sup>76</sup> is based on such a wealth of empirical data, that this tremendous contribution alone furthers our understanding of the actual operation of transnational regulatory regimes.

Engagements with many of the forms of transnational regulatory governance emerge from different starting points and with different, competing preferences, some of which express a deep-running concern about where to properly situate the

71. THE CHALLENGE OF TRANSNATIONAL PRIVATE REGULATION: CONCEPTUAL AND CONSTITUTIONAL DEBATES 1–188 (Colin Scott et al. eds., 2011); Gralf-Peter Calliess, Hermann Hoffmann & Jens M. Mertens, *The Transnationalisation of Commercial Law* (ZenTra Working Paper in Transnational Studies, No. 04, 2012) (<http://ssrn.com/abstract=2179563>).

72. See, e.g., Gregory Shaffer's reference to Steiner's, Vagts' and Koh's seminal 1994 casebook on Transnational Legal Problems, in Shaffer, TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE, *supra* note 55, at 5. Shaffer rightly observes that Steiner, Vagts and Koh 'conceptualize' (rather than define) transnational law. More remarkably, even, the 1994 casebook which the same authors in their 1996 volume on "Transnational Business Problems" reference as providing the foundation of their transnational legal theory work, does contain neither a definition of 'transnational law' nor is transnational law a self-standing index item in the book.

73. Compare Carol Harlow, "Public" and "Private" Law: Definition without Distinction, 43 MOD. L. REV. 241 (1980), with Cutler, *Artifice, Ideology and Paradox*, *supra* note 47.

74. See John M. Conley & Cynthia A. Williams, *Global Banks as Global Sustainability Regulators?: The Equator Principles*, 33 LAW & POL'Y 542 (2011).

75. *Private Military and Security Companies (PMSCs)*, GLOBAL POLICY FORUM, <https://www.globalpolicy.org/pmscs.html> (last visited Feb. 26, 2016).

76. Burkard Eberlein, Kenneth W. Abbott, Julia Black, Errol Meidinger & Stepan Wood, *Transnational business governance interactions: Conceptualization and framework for analysis*, 8 REG. & GOVERNANCE 1 (2014).

state in all of this,<sup>77</sup> while others place the question of politics in a still wider context of global ethics and democratic theory.<sup>78</sup> In Halliday's and Shaffer's concept of TLO, we find both a remarkable decentering of the state *and* its reconsideration as a crucial legal-political actor in a regulatory space marked by an interaction in between different levels of norm-making. Their depiction of recursivity provides us with a clearer view on the concrete forms of agency that are assumed by state and non-state actors in upward and downward oriented processes of norm creation. Instead of choosing in the debate between the state's "retreat"<sup>79</sup> or "return"<sup>80</sup>, Halliday and Shaffer use the TLO concept with the connections between state transformation (the concrete drivers and symptoms of which need to be illustrated in more detail, however) and the functionally driven regulatory regimes, rather than forcing a decision between dismissing or resurrecting the state on more or less ideological terms. In that respect, the proposed idea of TLOs as framing devices for recursive norm-creation by states, transnational regimes and between them keeps the state "in play" while it avoids bringing the state "back in" as a global lion tamer.

In that regard, our discussion of the challenges of evaluating normative implications of the TLO framework echoes the observations already made by the above-mentioned scholars and their work on different transnational regulatory governance formations. What we can see as a common theme throughout these investigations is the awareness of devising more fine-tuned analytical instruments to map the institutional dimensions much more effectively. But, what must interest us here are the ways in which these arrangements can be opened to normative critique. More directly, market-governance oriented regimes such as Equator Principles<sup>81</sup> or, say, corporate social responsibility frameworks built around the collaboration between IOs and private business<sup>82</sup> point to basic questions regarding justice, inequality, and distribution in a capitalist global system more directly than approaches that remain seemingly more attached to an analysis of geopolitical state agency.<sup>83</sup> But, at the same time, it is the growing complexity of transnational governance regimes, particularly in their elusiveness with regard to the public/private divide that renders

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77. Martin Loughlin, *What is Constitutionalisation? in THE TWILIGHT OF CONSTITUTIONALISM?* 47, 47 (Petra Dobner & Martin Loughlin eds., 2010) (examining "whether the emerging phenomenon of constitutionalisation signals the global triumph of constitutionalism, its demise, or its transmutation.").

78. Regina Kreide, *The Ambivalence of Juridification. On Legitimate Governance in the International Context*, 2 *GLOBAL JUST.* 18 (2009).

79. See SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (Steve Smith et al. eds., 1996).

80. See José E. Alvarez, *The Return of the State*, 20 *MINN. J. INT'L L.* 223 (2011).

81. See, in that regard, the contributions to the Symposium on Equator Principles, Isabel Feichtner & Manuel Wörsdörfer, *10 Years Equator Principles: A Transdisciplinary Inquiry*, 5 *TRANSNAT'L LEGAL THEORY* 409-416 (2014).

82. Wesley Cragg, *Human Rights and Business Ethics: Fashioning a New Social Contract*, 27 *J. Bus. Ethics* 205 (2000); John G. Ruggie, *Just Business. Multinational Corporations and Human Rights* (2013).

83. Halliday & Shaffer, *TRANSNATIONAL LEGAL ORDERS*, *supra* note 45, at 40.



their normative evaluation increasingly difficult. As we have seen, the way we attach labels of “private” or “public” to different forms of regulatory governance might still say more about their institutional and normative entanglements in particular domestic regulatory contexts than effectively advance our understanding of proliferating patterns of transnational governance. Nevertheless, as these regimes reflect extensive forms of decentered, multi-tiered regulatory arrangements which result in flexible, evolving and fluid combinations of hard and soft, formal and informal regulatory elements,<sup>84</sup> the task of both mapping and critiquing them remains ever more urgent.

Unsurprisingly, then, the observation that the current transnationalization of regulatory regimes in a globally functionally-differentiated society is only partially receptive to the same normative critique that the waning welfare states in Western democracies prompted in the 1980s,<sup>85</sup> is hardly novel. Instead, a timely critical project today is itself in need of a comprehensive grounding of its premises and starting points in a post-national, post-democratic context.<sup>86</sup> In other words, without the chess piece of the regulatory state and its redistributive politics as bargaining token, there is now a much greater need to develop a contextual critique within transnational regulatory regimes such as labour and human rights law. These fields require our attention for their normative and institutional stakes are particularly high, while the traditional, nation-state based reference points of “state” vs. “market” or “public” vs. “private” are of only limited value in mobilizing an effective normative assessment.<sup>87</sup> And so we must allow ourselves to take a step away from the “state” as reference point for modern political and legal theory. Stepping away, then, might

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84. Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *Int'l Org.* 421 (2000); *THE CHALLENGE OF TRANSNATIONAL PRIVATE REGULATION: CONCEPTUAL AND CONSTITUTIONAL DEBATES* 1-188 (Colin Scott et al. eds., 2011).

85. See the analysis in JÜRGEN HABERMAS, *THE NEW OBSCURITY: THE CRISIS OF THE WELFARE STATE AND THE EXHAUSTION OF UTOPIAN ENERGIES*, IN *THE NEW CONSERVATISM: CULTURAL CRITICISM AND THE HISTORIANS' DEBATE* 48-70 (SHERRY WEBER NICHOLSEN ED. AND TRANS., 1989).

86. Steven Bernstein & Benjamin Cashore, *Can Non-State Global Governance be Legitimate? An Analytical Framework*, 1 *Reg. & Governance* 347 (2007); COLIN CROUCH, *THE STRANGE NON-DEATH OF NEOLIBERALISM* 138 (2011) (drawing on John Ruggie's work as Special Representative of the United Nations' Secretary General, charged with the elaboration of norms for Multinational Corporations, to argue that “[g]lobal firms have become so powerful that they cannot avoid political attention even if political actors can exercise little direct leverage over them.” See also Zumbansen, *Transnational Private Regulatory Governance*, *supra* note 38, at 117 (observing that the proliferation of private norm-making illustrates the pressure on the state to redefine its regulatory abilities); *THE INVISIBLE COMMITTEE: TO OUR FRIENDS* (Robert Hurley trans., 2015) (2014).

87. 1 U.C. IRVINE J. INT'L TRANSNAT'L AND COMPL. (2016) See Kevin Kolben, *Transnational Labor Regulation and the Limits of Governance*, 12 *THEORETICAL INQ. L.* 403 (2011); Katherine Van Wezel Stone, *Labour in the Global Economy: Four Approaches to Transnational Labour Regulation*, in *INTERNATIONAL REGULATORY COMPETITION AND COORDINATION: PERSPECTIVES ON ECONOMIC REGULATION IN EUROPE AND THE UNITED STATES* 445-477 (Joseph McCahery et al. eds., 1996); Harry Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 *BERKELEY J. EMP. & LAB. L.* 271 (2001).

open the vista on different starting points for such theorizing, more problem-oriented than institution-based, more responsive than prescriptive, and more receptive to the wide range of world depictions than “inclusive” towards other disciplines’ insights as if that there was much left of a safe ground to stand on. A legal theory thus conceived would take very little for granted, but instead attempt to embrace the complexity of globalized human affairs with little prejudice. We only need to turn our attention to the complex implications and legal challenges that have been arising from the tragic building collapse of the Rana Plaza garment factory outside Dhaka in 2013,<sup>88</sup> the workers’ suicides of Apple Inc’s Chinese contracting partner, Foxconn,<sup>89</sup> and from migrant workers’ rights abuses and deaths during the stadium constructions for Fifa’s 2022 Qatar World Cup,<sup>90</sup> to make us appreciate the need to think about the newly emerging *spaces* of interaction and of reflection, which cut across jurisdictional boundaries. The emergence of such spatialized cases calls into question any legalistic attempt to delineate institutional frameworks housed, in part, in the domestic sphere and, in part, in a transnational realm. Instead, as the example of the regulatory aftermath after the Spring 2013 building collapse of Rana Plaza highlights, the regimes here in question are “neither here nor there.”<sup>91</sup> Alone, the range of actors who were involved in creating or otherwise shaping the Accord, from global and local unions, to governments, business representatives and the ILO, labor and human rights activists and advocacy, does not fit neatly on the traditional legal map.<sup>92</sup>

### III. REGULATORY GOVERNANCE: “EMBEDDED,” “DISEMBEDDED,” “TRANSNATIONALIZED,” AND “WESTERN”

A striking feature of many of the currently circulating stories about the transformation of “the state” is that they are predominantly anchored in traditions of the

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88. *Bangladesh: 2 Years After Rana Plaza, Workers Denied Rights*, HUM. RTS. WATCH (Apr. 22, 2015), <http://www.hrw.org/news/2015/04/22/bangladesh-2-years-after-rana-plaza-workers-denied-rights>; see also *Aftermath of the Rana Plaza Tragedy: Social and Health Issues Emerge Amid Struggle for Workers’ Rights*, LAW MARGINS, <http://lawatthemargins.com/aftermath-of-the-rana-plaza-tragedy-social-and-health-issues-emerge-amid-struggle-for-workers-rights/> (last visited Mar. 11, 2016).

89. Joel Johnson, *1 Million Workers. 90 Million iPhones. 17 Suicides. Who’s to Blame?*, WIRED (Feb. 28, 2011), [http://www.wired.com/2011/02/ff\\_joelinchina/](http://www.wired.com/2011/02/ff_joelinchina/).

90. Rory Jones, *Qatar Called to Publish World Cup Worker Death Figures: Gulf country’s human-rights record in spotlight following launch of FIFA investigations*, WALL ST. J. (June 4, 2015), <http://www.wsj.com/articles/qatar-called-to-publish-world-cup-worker-death-figures-1433421740>.

91. Amy Kazmin, *Bangladesh Factory Collapse a Catalyst for Workers’ Rights*, FIN. TIMES (May 3, 2013), <http://www.ft.com/intl/cms/s/0/8c72524e-b3e1-11e2-ace9-00144feabdc0.html#axzz3RSI6uHEB>; see generally, Gary Gereffi & Stacey Frederick, *The Global Apparel Value Chain, Trade and the Crisis: Challenges and Opportunities for Developing Countries* (The World Bank, Policy Research Working Paper No. 5281, 2010) <https://openknowledge.worldbank.org/bitstream/handle/10986/3769/WPS5281.pdf?sequence=1>.

92. *Signatories*, ACCORD, <http://bangladeshaccord.org/signatories/> (last visited Mar. 11, 2016).

Western nation-state.<sup>93</sup> As a result, the lessons we are likely to draw on when imagining the emerging global legal order, might turn out to be quite skewed towards experiences with “modernization”<sup>94</sup> and “civilization”<sup>95</sup> in the West and, as such, of only limited use with regard to the actually existing governance challenges that face a pluralist and diverse global world today.<sup>96</sup> More specifically, as scholars engage in sketching the institutional and normative challenges attending to an emerging, however fragmented global or transnational legal order, there is considerable risk that such efforts remain closely tied to a particular historical, socio-economic and political development. Emerging propositions, while embedded in a particular, Western reference system, become elevated to the level of universality. Unsurprisingly, after a long, protracted history of colonization and decolonization<sup>97</sup> and the establishment of a conflicted post-World War II order<sup>98</sup>, after the “Washington Consensus”<sup>99</sup> and in the context of the endless global “war against terror,”<sup>100</sup> we need to turn our attention to the ideological and conceptual blind spots of these narratives, especially with regard to the implicit claims to universality of the depicted developments as well as to the potential transplantability of core concepts of the Rule of Law to “developing” countries.<sup>101</sup> Questioning the universality of the Western Rule

93. See generally, NEIL WALKER, *INTIMATIONS OF GLOBAL LAW* 23-28 (2015); ANDREW HURRELL, *ON GLOBAL ORDER: POWER, VALUES, AND THE CONSTITUTION OF INTERNATIONAL SOCIETY* 95-116 (2007); *THEORISING THE GLOBAL LEGAL ORDER* (Andrew Halpin & Volker Roeben eds., 2009); *PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION* (Karl-Heinz Ladeur ed., 2004) (offering reflections on the role of the state in ongoing attempts to theorize the impact of globalization on law from different starting points in law, including legal theory, philosophy of law, administrative and competition law, EU law and public international law).

94. RUMU SARKAR, *INTERNATIONAL DEVELOPMENT LAW: RULE OF LAW, HUMAN RIGHTS, AND GLOBAL FINANCE* 46-53 (2009) (stating that, “The modernization theory of development, the predominant post-World War II school of thought, holds out the belief that modernization is a progressive, evolutionary process that should result in the transformation of less developed societies into Western political, social, and legal institutions.”).

95. Antony Anghie, *Western Discourses of Sovereignty*, in *SOVEREIGNTY: FRONTIERS OF POSSIBILITY* 19, 22-23 (Julie Evans, Ann Genovese, Alexander Reilly & Patrick Wolfe eds., 2013).

96. In that vein, see BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* 85-98 (2nd ed. 2002); FRANCIS DENG, ABDULLAHI AN-NA’IM, YASH GHAI & UPENDRA BAXI, *HUMAN RIGHTS: SOUTHERN VOICES* 161 (William Twining ed., 2009) (introducing Upendra Baxi’s interpretation of human rights from the lived experiences of ‘human suffering’, particularly in the Global South); *HUMAN RIGHTS FROM A THIRD WORLD PERSPECTIVE: CRITIQUE, HISTORY AND INTERNATIONAL LAW* 256-309 (José-Manuel Barreto ed., 2013).

97. Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 *N.Y.U. J. INT’L L. & POL.* 513 (2002).

98. SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* 44-95 (JAMES CRAWFORD & JOHN S. BELL EDS., 2011).

99. Joseph E. Stiglitz, *The Future of Global Governance*, in *THE WASHINGTON CONSENSUS RECONSIDERED: TOWARD A NEW GLOBAL GOVERNANCE* 309 (Narcis Serra & Joseph E. Stiglitz, eds., 2008).

100. See Jothie Rajah, *Sinister Translations: Law’s Authority in a Post-9/11 World*, 21 *IND. J. GLOBAL LEGAL STUD.* 107 (2014); see also Mégret, *supra* note 29.

101. SARKAR, *supra* note 92; see also John Gillespie, *Developing a Theoretical Framework for Evaluating Rule of Law Promotion in Developing Countries*, in *RULE OF LAW DYNAMICS: IN AN ERA OF*

of Law story undermines the assumption that there is an “off-the-shelf,” rule-of-law framework that lends itself in any quasi-scientific and pragmatic-technical sense as an export item for the various governance woes that are plaguing developing countries, post-conflict societies, and “failed” states around the world.<sup>102</sup> This critique, which emerges out of a wide array of critical theory,<sup>103</sup> post-colonial studies<sup>104</sup> and Third World Approaches to International Law<sup>105</sup> (TWAIL), posits the self-confident rendering of the rule-of-law account depicted above as an impressive illustration of benign ignorance and, in effect, arrogance.

In response, post-colonial scholars and, among them, TWAIL and other critical jurists have been hard at work at uncovering the discriminatory, exclusionary patterns of subordination, on the one hand, and the powerful routines of “normalizing” the exception, on the other.<sup>106</sup> Such resistance has been directed against the expansion of so-called “humanitarian interventions”<sup>107</sup> against the rhetorically entangled and institutionally immensely powerful “war against terror”<sup>108</sup> and against the flagrant global disparities that survive and continue to deepen – in spite of universal acclaims to the principle of sovereign equality.<sup>109</sup> As with other innovative theoretical advances, TWAIL’s exact foundations and starting points are as elusive as the confines or boundaries of the project itself. Evolving as an internal critique

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INTERNATIONAL AND TRANSNATIONAL GOVERNANCE 233, 240–241 (Michael Zürn, André Noellkaemper & Randall Peerenboom eds., 2012) (stressing the role of sociolegal and regulatory theory to more effectively capture what nonstate actors [operating in developing countries] think about rule of law (“RoL”) promotion in developing countries).

102. B.S. Chimni, *Global Capitalism and Global Democracy: Subverting the Other?*, in GLOBAL DEMOCRACY: NORMATIVE AND EMPIRICAL PERSPECTIVES 233–253 (Danicle Archibugi et al. eds., 2012).

103. David Kennedy, *International Legal Structures* (1987).

104. ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* (Sherry Ortner et al eds., 2012); DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (Sherry B. Ortner et al eds., 2000).

105. James Thuo Gathii, *TWAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26 (2011); Makau Mutua, *A Critique of Rights in Transitional Justice: The African Experience*, in RETHINKING TRANSITIONS: EQUALITY AND SOCIAL JUSTICE IN SOCIETIES EMERGING FROM CONFLICT 31-45 (Gaby Oré Aguilar & Felipe Gómez Isa eds., 2011).

106. See the seminal work by Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005); see also Makau Mutua, *What is TWAIL?*, 94 AM. SOC. INT’L L. PROC. 31, 31 (2000) (explaining “The regime of international law is illegitimate. It is a predatory system that reproduces and sustains the plunder and subordination of the Third World by the West.” *Id.*).

107. See Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New Interventionism*, 10 EUR. J. INT’L L. 679, 680–81 (1999); Martti Koskenniemi, *The Lady Doth Protest Too Much’ Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159, 160 (2002) (arguing “that the obsession to extend the law to such crises, while understandable in historical perspective, enlists political energies to support causes dictated by the hegemonic powers and is unresponsive to the violence and injustice that sustain the global everyday.” *Id.*)

108. Mégret, *supra* note 30; Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004).

109. M. Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 SING. Y.B. INT’L L. 19 (2006); Jothie Rajah, *The Gulf between Promise and Claim: Understanding International Law’s Failure to Decolonise*, 3 TRANSNAT’L LEGAL THEORY 285 (2012).

to universalist stances in public international law, human rights law or the still dominant development concepts in association with promoting the Rule of Law as a globally applicable governance framework, TWAIL offers its greatest potential as a theoretically rigorous and empirically based undertaking that is both scholarly and activist, historically informed and at the same time not shying away from concrete political intervention. Even more remarkably then does it continue in being absent from most regular international law debates, let alone classroom curricula.

Despite its fluid center,<sup>110</sup> TWAIL's contribution to a provincialization of the Western narrative of the rise and subsequent fall of the democratic welfare state cannot be underestimated. The skewed nature of the account becomes only too obvious, once it is contrasted with parallel accounts of the passing of (international) time,<sup>111</sup> or with an expression of alienation or frustration regarding the alleged universality of ordering models based on the distinction between public and private, the state and the market, and so forth.<sup>112</sup> It is here that we (in the West) are only beginning to catch glimpses of what the world might actually look like. Building on these reflections, we must concern ourselves with an infinitely more complex and pluralist story, which engages questions of social, economic, political and legal order, but do so without choosing as a backdrop the allegedly sacrosanct story of the Rule of Law's adventurous time travel. Inevitably, such a story must be one about political agency and the conditions of its operation. But, what are the forms of such stories, and from which angle, and from whose perspective can they be told? How and, importantly, by whom?

#### IV. LOCATING THE RULE OF LAW: HOW EXPECTATIONS CREATE, ENACT AND FILL SPACES

To illustrate these challenges more clearly, we need to recognize the degree to which many of today's dominant globalization and Rule of Law narratives, as they emanate from public law and public international law discourses in the West, are in fact creating their own reference system. In other words, certain narratives become so powerful and rhetorically persuasive that they contribute to the design and furnishing of regulatory, argumentative, and epistemological spaces, which become material in the way that they house and govern future conversations about the ends and means of legal ordering. Because such discursively constructed spaces furnish iterations of legal order in general or of the Rule of Law in particular with elements of both legality and legitimacy usually in response to an in itself undeniable "problem" (security, climate change, risk, poverty), they are to a large degree immune

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110. See Gathii, *supra* note 104, at 27 (highlighting the 'decentralized' nature of TWAIL as a network).

111. Sundhya Pahuja, *Laws of Encounter: a Jurisdictional Account of International Law*, 1 LONDON REV. INT'L L. 63, 73 (2013).

112. Fernanda Pirie, *Law Before Government: Ideology and Aspiration*, 30 OXFORD J. LEGAL STUD. 207-228 (2010); Boaventura de Sousa Santos, *Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges*, Eurozine (June 29, 2007) <http://www.eurozine.com/articles/2007-06-29-santos-en.html>.

against any internal critique. The three spaces depicted in the following illustrate three exemplary cases in which a rhetoric of “obvious necessity” serves to constitute a comprehensive order and internally coherent reference system. These examples include the debate over the use of force in the face of a perceived “humanitarian crisis” (and, ensuing, a global terrorist “threat”). At the center of this debate is the juxtaposition of constitutionalism and administration rhetorics that drive much of lawyers’ present engagement with the conundrum of “global governance.” Another ingredient in the debate is, however, the fight over an adequate role of the state in governing global markets. In order to deconstruct these material reference spaces—humanitarian intervention (1), global constitutionalism and global administrative law (2), and *lex mercatoria* versus state intervention (3)—we need to first clarify the starting points as well as the anchors of such a deconstruction. It should be obvious by now that the identified three spaces draw their oxygen from the Rule of Law trajectories outlined above. In other words, each of the here-discussed rhetorical spaces opens up against the backdrop of conventional rule-of-law narratives going unchallenged. In response, the proposal here is the following: if there is to be any chance for an effective deconstruction of the global world order imaginations which these three spaces inhabit, we need to provincialize the history and trajectory of the Western state and its laws by decentering and relativizing the existing accounts. One way of doing that might be to pay particular attention to what can be conceived as the significance of “our time,” directing, in other words, our interest to the moments and the places in which questions about the evolving legal-political order are being asked so that, in turn, the bias of chosen perspectives, alleged landmark moments and key “events” can be made visible<sup>113</sup> and theories, perceptions and commitments may be engaged in dialogue from different perspectives.<sup>114</sup>

The first step in this regard is an illumination of *context*, something that has an impressively long tradition and is testified to with encouraging intensity today in fields such as history<sup>115</sup> and political theory,<sup>116</sup> but continues to enjoy a weaker status in law and mainstream legal scholarship. With regard to the usual stories about the Rule of Law’s trajectory towards a welfare state before being torn apart by the forces of economic globalization, the particularity of perspective becomes quite apparent once we place this trajectory in larger geopolitical context, allowing the internal story of Western state consolidation, industrial revolutions, economic growth

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113. See the contributions to *EVENTS: THE FORCE OF INTERNATIONAL LAW* 91-106, 117-30 (FLEUR JOHNS, RICHARD JOYCE & SUNDHYA PAHUJA EDS., 2010); see also ISSA G. SHIVJI, *WHERE IS UHURU? REFLECTIONS ON THE STRUGGLE FOR DEMOCRACY IN AFRICA* (Godwin R. Murunga ed., 2009).

114. See, for such an exposition, for example, the work by Jean Comaroff & John L. Comaroff, *THEORY FROM THE SOUTH: OR, HOW EURO-AMERICA IS EVOLVING TOWARD AFRICA* (2012); see also Santos, *Beyond Abyssal Thinking*, *supra* note 111.

115. JÜRGEN OSTERHAMMEL, *THE TRANSFORMATION OF THE WORLD: A GLOBAL HISTORY OF THE NINETEENTH CENTURY* (Patrick Camiller trans, 2014).

116. DAVID ARMITAGE, *FOUNDATIONS OF MODERN INTERNATIONAL THOUGHT* (2012).

and the “rights revolution”<sup>117</sup> to become an intimate dimension of the West’s global history.<sup>118</sup> The contextualization of the most frequently referenced Rule of Law narratives allows a better understanding of where certain assertions are grounded. Against the background of alternative timelines and perspectives of storytelling, it becomes apparent that the commonly offered narratives of the relationship between the state and law are only “true” *as long as* we accept the following premises:

1. The 20<sup>th</sup> century history of the state is correctly depicted as a progression from a formalist Rule of Law to a jurisgenerative, substantive law-issuing social and welfare state—prior to its demise in a competitive global market. In other words, this development can be described as one “*from government to governance*”.
2. The nation-state’s fate under the conditions of globalization is one of erosion and of “de-juridification.”
3. There is a logical historical progression of modern state formation, consolidation of sovereignty, social modernization, emancipation of formerly unfree constituencies, juridification of all areas of societal activity (for better or worse), globalization of economic, cultural and social relations, the “end of history” (1989 ff) and, recently, “9/11” as “exception.”
4. As far as non-Western populations are concerned, their history is appropriately captured in an account that traces the accession of former colonized peoples and nations to international statehood, governed by the principle of sovereign equality under the UN Charter.

But, what if these premises were altogether traced back to a very particular, biased, and skewed way of historical narrative? How should we engage in critically revisiting the ways in which we used to narrate the story? A possible approach might be in identifying and highlighting not what keeps these narratives apart but what they share. In the context of investigating the meaning and operation of the Rule of Law, we may ask about the relationship between “legality” and “legitimacy” which might be, in perhaps very different manners, terminologies and associations nevertheless inherent to both dominant and alternative accounts?

*Space 1: Humanitarian Intervention: The End of International Law, or Its Reinvention*

The here-identified space is created and constituted by cutting through limitless, unbounded spheres that are depicted as the real world. In this world, because we have before been living in a dream and now need to wake up, everything is

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117. CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING OF THE REGULATORY STATE* (1990); Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 19 (2006).

118. Chakrabarty, *supra* note 103; C.A. BAYLY, *THE BIRTH OF THE MODERN WORLD 1780–1914* (2004); JÜRGEN OSTERHAMMEL & NIELS P. PETERSSON, *GLOBALIZATION: A SHORT HISTORY*, (Dona Geyer trans., 2004).

possible, you (who? someone? anyone?) only need to ask.<sup>119</sup> This space is, for example, that which is constituted in responding to a crisis. It is a space where Neo, quickly overcoming his shock, notes: “We need guns, lots of them.” Trinity<sup>120</sup> will reply that “no one has ever tried this before.” We all know Neo’s answer: “That’s why it’s going to work.”<sup>121</sup> This constellation is a tragic illustration of the Kosovo “crisis” of international law, of the stretching of law’s imagination in the name of legitimacy and of law’s pushing back in the name of legality.<sup>122</sup> Thus, the ground had been laid for what Koskenniemi aptly coined international law’s “turn to ethics.”<sup>123</sup> what Anne Orford brilliantly deconstructed as international law’s normalization of its exception<sup>124</sup> and what would eventually provide much of the slippery justificatory basis for repeated invocations of Kosovo as “precedent,” whether in Iraq,<sup>125</sup> Syria<sup>126</sup> or elsewhere. The rhetorical avenues opened for international law’s normalization, the embrace of a “war against terror” within the confines of international law would eventually not seem such a stretch anymore, only a few years later.<sup>127</sup> But, the problem is bigger still. As “law reform” and “assistance” crusades are on their way, growing day by day, the disconnection between law’s legality and its imagined legitimacy, invoked by those who can due to their status, influence and power, continues to widen. By consequence, chances for a true provincialization of the rhetoric informing those efforts remain slim and skepticism or, at the least, caution appears warranted. After all, invocations of rule-of-law promotions in either developed or developing countries are not, nor could they ever be, objective accounts of existing conditions. Instead, all efforts of tracking, measuring, or accounting for the Rule of Law, historically, in comparison or along seemingly objective or merely technical yardsticks, are inevitably entangled in constructions of normative models of social order. Again, this is probably a very obvious observation, but one

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119. Galactic Archive, “*The Matrix*” (1999) – ‘Construct’ Scenes, YOUTUBE (Feb. 6, 2009), <http://www.youtube.com/watch?v=AGZiLMGdCE0> (demonstrating an impressive use of a void space, in which—as we can see through the course of the next minutes—anything is possible. As the authors discussed in this part of my paper illustrate, the space of ‘humanitarian intervention’ was created through similar uses of the imagination, with the employment of human rights language and the use of justifications based on an assumed and claimed responsibility to intervene).

120. Bulletproof, *The Matrix: Neo Meets Trinity*, YOUTUBE (Apr. 13, 2010), <https://www.youtube.com/watch?v=jXeF1rMkpQw>.

121. Sprish00, *The Matrix—Follow the White Rabbit*. . . , YOUTUBE (Apr. 1, 2009), <https://www.youtube.com/watch?v=Smwrw4sNCxE>.

122. See Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1 (1999); see also Antonio Cassese, *Ex inuiriā ius oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT’ L. 23 (1999).

123. Koskenniemi, *supra* note 106, at 160-61 (explaining that, “The ‘turn to ethics’ is profoundly conservative in its implications.” *Id.*).

124. Orford, *supra* note 106.

125. See Andreas L. Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICH. J. INT’L L. 691 (2004).

126. Jack Goldsmith, *What happened to the rule of law?*, N.Y. TIMES (Aug. 31, 2013), [http://www.nytimes.com/2013/08/31/opinion/what-happened-to-the-rule-of-law.html?\\_r=0](http://www.nytimes.com/2013/08/31/opinion/what-happened-to-the-rule-of-law.html?_r=0).

127. Mégrét, *supra* note 30, at 3 (highlighting the ‘magnitude’ of the assumed ‘war’).



that merits being retained, particularly where assertions of the Rule of Law are embedded in narratives of growth, modernization, development, or legal reform, where they are, in other words, at the root of theory and policy design—debatable, implementable, and measurable.<sup>128</sup>

At a time where public lawyers continue to mull over the implications of a transnational version of “government without governance,” an abundance of comprehensive “assistance” programmes has been under way, invoking just about every challenge of liberal rights theory—now poignantly re-emerging in a context of intervention<sup>129</sup>, legal aid,<sup>130</sup> transitional justice and development.<sup>131</sup> But, does the undeniable existence of bias, power asymmetry and perverse effects rule out the validity of employing a formula such as the Rule of Law in order to create a discursive space where different background assumptions may be voiced? Is that not the gist of EP Thompson’s famous last chapter in *Whigs and Hunters*?<sup>132</sup> And does this not illustrate the merits of a continued engagement with the Rule of Law as reference framework for competing understandings of legal, political and normative ordering, so that “. . .transnational Rule of Law discourse may be seen as Meta-TLO that frames and contextualizes all efforts to manage and regulate law, legitimacy, and conceptions of legality in the sphere of the transnational. . . .”?<sup>133</sup>

*Space 2: Global Constitutionalism: Looking for the Wizard*

Among the more recent proposals in the area of political-legal Global Governance theory, *Global Constitutionalism* has been attracting considerable attention and increasing pedigree. Debates around, in favor of, and against global constitutionalism regularly play out on two battlefields that echo, as it were, the already mentioned transnational replay of conceptual and doctrinal rhetoric and regulatory dilemmas between the nation state and the global sphere. For global constitutionalism, the battlefield is, on the one hand, the nation state, which serves as yardstick

128. For a critical discussion, see Jothie Rajah, ‘Rule of Law’ as Transnational Legal Order, in TRANSNATIONAL LEGAL ORDERS 340 (Terence Halliday et al. eds., 2015).

129. Compare Thomas Carothers, The Rule-of-Law Revival, in Promoting the Rule of Law Abroad 3 (Thomas Carothers ed., 2006), with Rory Stewart & Gerald Knaus, CAN INTERVENTION WORK? 91 (2011); STEPHEN HUMPHREYS, THEATRE OF THE RULE OF LAW: TRANSNATIONAL LEGAL INTERVENTION IN THEORY AND PRACTICE (2010).

130. Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT’L L. 199 (2004).

131. Rama Mani, *Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development*, in 2 INT’L J. TRANSITIONAL JUST. 253 (2008).

132. E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 266 (1975) (stating, “I am not starry-eyed about this at all. This has not been a star-struck book. I am insisting only upon the obvious point, which some modern Marxists have overlooked, that there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath this law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims, seems to me to be an un-qualified good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error of intellectual abstraction.”).

133. Rajah, *supra* note 127, at 343.

and ultimate arbiter for any conception, thick or thin, substantive or procedural, of globe-spanning constitutionalism.<sup>134</sup> On the other hand, it is the global sphere itself, variably depicted as a space for which either we have no appropriate maps<sup>135</sup> or one, which by its inchoate, violent nature would be immune to any attempt of constitutionalization. In between and in counter-point to such assessments, we find sophisticated interventions that argue for a critical understanding of a constitutionalism that has come undone from the Western nation-state's edifice and must, instead, be searched for in the autopoietic, self-constitutive processes of functionally-differentiated social organization.<sup>136</sup> For the most part, however, these accounts still remain outside the mainstream discussion. Here, by contrast, it appears as if one could still hope to get away with line-drawing and by insisting that what should not be cannot be.<sup>137</sup> And so, similarly to Dorothy leading the way for a host of improbable hero impersonators, we might have to understand the walk along the yellow brick road to find the wizard as a necessary process to come to terms with our conflicted emotions of insecurity and hubris.<sup>138</sup> There might be more to say, especially as global constitutionalism appears to have become a mostly internal debate amongst a small number of international law scholars and even fewer political philosophers. Meanwhile, the same fate might just be in store for global administrative law.<sup>139</sup>

*Space 3: Who Needs the Rule of Law? The Global Market Space and its lex mercatoria*

The last rhetorical realm we look at is that of the infamous *lex mercatoria*, an allegedly autonomous legal order in its own right and, arguably, mostly bereft of politics. *Lex mercatoria* is the pure heaven (but on land and sea) of global commercial exchange, which is governed only by those rules that are accepted by those running the show.<sup>140</sup> Even against the background of tenacious, even tedious historical accounting of the degree of state agency in this entire circus,<sup>141</sup> the relevant parties

134. Peters, *supra* note 27, at 398.

135. See Neil Walker, *Taking Constitutionalism Beyond the State*, 56 POL. STUD. 519 (2008); Neil Walker, *Out of Place and Out of Time: Law's Fading Coordinates*, 14 EDINBURGH L. REV. 13 (2010).

136. Gunther Teubner, *Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?*, in CONSTITUTIONALISM AND TRANSNATIONAL GOVERNANCE 3 (Christian Joerges et al. eds., 2004); GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (Gareth Norbury trans., 2012); Christopher Thornhill, *National Sovereignty and the Constitution of Transnational Law: A Sociological Approach to a Classical Antinomy*, 3 TRANSNAT'L LEGAL THEORY 394 (2012).

137. Nico Krisch, *Global Administrative Law and the Constitutional Ambition*, in THE TWILIGHT OF CONSTITUTIONALISM? 245 (Petra Dobner et al. eds., 2010).

138. Robert Magee Productions, *We're Off to See the Wizard*, YOUTUBE (Oct. 1, 2013), <http://www.youtube.com/watch?v=26lhb05cV6g>.

139. Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance*, in LAW IN TRANSITION: RIGHTS, DEVELOPMENT AND TRANSITIONAL JUSTICE (Peer Zumbansen et al. eds., 2014).

140. Berthold Goldman, *Frontières du droit et 'lex mercatoria'*, 13 ARCHIVES DE LA PHILOSOPHIE DE DROIT 177 (1964); Yves Dezalay & Bryant Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, 29 LAW & SOC'Y REV. 27 (1995).

141. Albrecht Cordes, *The Search for a Medieval Lex Mercatoria*, 5 OXFORD U. COMP. L. F., (2003) <http://ouclf.iuscomp.org/articles/cordes.shtml>.

could not seem to care less, whether it is in light of invocations of public law and accountability concerns<sup>142</sup> or claims pertaining to private law's inherent public protective and ultimately cosmopolitan dimensions.<sup>143</sup> And even the global financial crisis appears not to have put a dent into what continues to be, after all, just a big gamble, in Cincinnati and elsewhere.<sup>144</sup>

Despite their apparent differences, there is something that cuts across our exposition of these spaces. Investigations into the confines, jurisdictions and demarcations of such spaces, for example, by those for or against humanitarian intervention, or those enthusiastic or horrified over a war against terror, as well as those intrigued or bored by invocations of global constitutionalism and, lastly those who think they can domesticate global capitalism, are mostly driven by a concern with the controlling agency, in our case with the laws (conventions, standards, agreements, and so forth) that govern a particular realm, a set of human interactions and institutional constellations. Our brief look at three such scenarios shows that the beauty continues to lie in the eyes of the beholder—and that is not just anyone.

#### V. METHODOLOGICAL CONSEQUENCES

But, where does this leave us in our attempt to develop a critique of transnational legal ordering? Much of the prevailing anxiety seems to result from a certain starting presumption that somewhere and somehow it could all be organized differently. That is, of course, a very *public* law perspective. This observation, however, is not just of idiosyncratic relevance, but one with considerable critical potential. As we have seen much of what governs is an almost pathological belief in the state as guarantor of (both negative and positive) rights, a facilitator of democratic public discourse, a schizophrenic protector of free markets and social welfare. It is on the rhetorical battleground of the Rule of Law that the competing contentions of law's role vis-à-vis society (encompassing individual rights bearers such as rich land owners or weak bargaining parties, transnational corporations, religious associations as well as divorcees, prison inmates, welfare recipients, and the terminally ill with or

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142. GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2006). See also the biting analysis offered by Claire Cutler, *Human Rights Promotion through Transnational Investment Regimes: An International Political Economy Approach*, 1 *POLITICS AND GOVERNANCE* 16 (2013) and Claire Cutler, *Legal Pluralism as the 'Common Sense' of Transnational Capitalism*, 3 *ONATI SOCIO-LEGAL STUDIES* 4, 719 (2013).

143. Robert Wai, *The Cosmopolitanism of transnational economic law*, in *COSMOPOLITAN JUSTICE AND ITS DISCONTENTS* 153 (Cecilia M. Bailliet et al. eds., 2011); Robert Wai, *Private v Private*, in *PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE* 34 (Horatia Muir-Watt et al. eds., 2014).

144. Tyrolobo, *"The Cincinnati Kid" (ending)*, YOUTUBE (Aug. 19, 2013), [http://www.youtube.com/watch?v=UI6pSkls\\_tc](http://www.youtube.com/watch?v=UI6pSkls_tc). Half seriously, but half seriously, at least, compare JOHN MAYNARD KEYNES, *A TRACT ON MONETARY REFORM* 80 (1923) ("But this *long run* is a misleading guide to current affairs."), with Leah Spiro, *In Defense of the Fat Cats*, *INSTITUTIONAL INVESTORS' ALPHA* (May 1, 2012), <http://www.institutionalinvestorsalpha.com/Article/3017777/Blogs-Unhedged-Commentary/In-Defense-of-the-Fat-Cats.html> (quoting ROBERT J. SHILLER, *FINANCE AND THE GOOD SOCIETY* (2012)) ("Ironically, better financial instruments, not less activity in finance, is what we need to reduce the probability of financial crises in the future.").

without a death wish) become entangled and the endless subject of negotiation. But, as long as the invocation of the concept of the Rule of Law retains even the slightest hint of a can-all, do-all institutional framework, there is in fact little hope that we may ever gain an even remotely adequate understanding of “laws and societies in global contexts.”<sup>145</sup> As long as we conceive of the Rule of Law automatically (rather than ironically, historically self-consciously, and critically) as an institutionally evolved public law arrangement with particular institutional, procedural, and normative features, many of today’s transnational law challenges—from climate change, human trafficking, workers’ rights as human rights to corporate, commercial and contract governance standards—will remain outside the ambit of a routinized engagement with law. We will not be able to look at those regulatory challenges through the lens of legality/legitimacy as long as the conception of the Rule of Law as institutionalized, authoritative institutional arrangement to generate, enforce and adjudicate law dominates our imagination.<sup>146</sup>

### 1. *Embracing the Political Economy of Transnational Legal Ordering*

Let us now try to draw some practical lessons from the work thus far. One could be that we ought to reverse or switch the perspective away from imagining (the rule of) law as an institutionalized form with a particular historical trajectory and normative aspiration. Such a switch in perspective can be achieved by radically moving away from a public law conception of the Rule of Law. But, what happens if you take the Rule of Law out of the hands of public lawyers? You are bound to find a much more sober, even hands-on account of the plurality and diversity of worldwide existing order-by-rules (law, non-law, not-yet law) systems which each require a close, contextual scrutiny to be properly assessed.<sup>147</sup> Such an approach might take you away from the apparent safeguard of a model of order and its (historically evolved, fought over and consolidated) institutional architecture and its (eternally contested and tirelessly disputed) normative underpinnings. In fact, such a socio-legal and legal pluralist engagement with and in the world reveals several surprising insights. Above all, what becomes apparent is a (potentially rather) unsettling continuity between accounts of fragmentation of legal orders promising certainty and predictability which are associated with globalization,<sup>148</sup> on the one hand, and an in fact quite longstanding critical engagement with the relationship of law to

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145. EVE DARIAN-SMITH, *LAWS AND SOCIETIES IN GLOBAL CONTEXTS: CONTEMPORARY APPROACHES* (2013).

146. See Fleur Johns, *Performing Power: The Deal, Corporate Rule, and the Constitution of Global Legal Order*, 34 J. L. & SOC’Y 116 (2007); FLEUR JOHNS, *NON-LEGALITY IN INTERNATIONAL LAW*. UNRUPLY LAW (2013).

147. Sally Falk Moore, *Legal Systems of the World: An Introductory Guide to Classifications, Typological Interpretations, and Bibliographical Resources*, in *Law and the Social Sciences* 11, 19ff, 24ff, 29ff (Leon Lipson et al. eds., 1986) (arguing for a distinctly legal-sociological analysis not only of the pluralism of legal system among states, but *within* states themselves, as well as for a decentering of a Eurocentrist categorization of legal systems and their attributes)

148. Martti Koskenniemi & Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT’L L. 553 (2002).

society, on the other hand.<sup>149</sup> What becomes apparent as well, when looking at the way in which stories of a large-scale, globalization-induced loss of coherence, unity, and universality of the Rule of Law are being told, are the parallels between such discursive framings and the *interests* at stake, both in the domestic and the international context.<sup>150</sup> In light of the previous observations it is of course trite to remind us of the fact that stories of both success or failure are always told from a particular perspective and against the background of a specific, even if only implicit, understanding of what *mattered*, and what was *at stake* and *for whom*.

All this suggests, at least, that there is something very wrong with just about any attempt to neatly separate the spheres of the Rule of Law before and after or under the conditions of globalization. There is no fresh starting point; there are only competing justifications of why we, or anyone, should care. Instead, we are thrown back onto ourselves and both our prejudices and ignorance. We are, in other words, forced to appreciate the very ways in which we conceive of law and its relation to social ordering—while realizing that we must urgently enter into a dialogue with those who have been at the colonial and post-colonial receiving end of the Rule of Law’s magic formula. Once we adopt a contextual and dialogical approach, narratives of before and after likely give way to more adequate analyses of the different, intersecting forms of institutional and normative ordering which we can find in different places at different times. As Frank Upham emphasized in an essay on the Rule of Law in the context of law & development, “. . . law is deeply contextual and [. . .] cannot be detached from its social and political environment. This is just as true in developed countries as it in developing countries, but this truth is absent from the new rule-of-law orthodoxy.”<sup>151</sup> Upham’s suggestion has significant consequences for the way in which we treat existing accounts of what has worked and what has not. Because it turns out that, in a context of extensive human resources and massive funds still being poured into development projects worldwide, the way in which we draw connections between domestically focused investigations into changes to the Rule of Law and the transnational employment of the concept in hundreds of development projects worldwide becomes crucial.

Context matters. As emphasized at various instances so far, the assertion of both the needs of a robust Rule of Law, stripped of all technicalities, as Hayek remarked, as well as of the challenges that might impede its achievement occurs—for the most part—in an abstract, ideological space. The Rule of Law is associated with processes and rights, with principles and values, and most often these can only be

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149. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927).

150. Martti Koskenniemi, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005); Kerry Rittich, *Functionalism and Formalism: Their latest Incarnations in Contemporary Development and Governance Debates*, 55 U. TORONTO L. J. 853, 855 (2005) (observing how functionalist interpretations of state action has come to mean economic efficiency-enhancing).

151. Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, in PROMOTING THE RULE OF LAW ABROAD 75, 76 (Thomas Carothers ed., 2006) (stating, “Law, in other words, is seen as technology when it should be seen as soci-ology or politics.”).

asserted in a heaven of pure legal concepts.<sup>152</sup> What is wanting, at least within the core confines of lawyers' day-in, day-out, teaching and research business, is the engagement with the endlessly messy, inchoate and inconsistent operation of norms, institutions, governance patterns—after<sup>153</sup> and before government<sup>154</sup> on the ground. Despite lawyers' quotidian interaction with the coincidental, accidental, and unpredictable, there still seems to be an unerring belief in the law somehow being above it all, supplying us with guidance, refuge and the promise that in the future all can be good.

By consequence, regardless of whether we try to trace back the fragile regulatory arrangement post-Rana Plaza to existing (and, dwindling) trajectories of labour law,<sup>155</sup> or make sense of corporate governance discourses before and after the 2008-2009 financial crisis,<sup>156</sup> it seems as if there is little value in carrying out such debates in abstract conceptual spaces alone. Instead, in both cases the real-world implications of the evolving regimes in labour and corporate law point to the importance of looking at the facts in play. Meanwhile, we see that such an interest in widening the conceptual range of one's field is driven by concrete interests, and those are different in labour and corporate governance. At the height of the debate over the global convergence or divergence of corporate governance standards, the opportunity to apply a sound political economy analysis to the fast-changing landscape of corporations and the law that governed them was not taken up by many company lawyers, while the material, the research, and the analysis were all right there—practically in front of them. Political economists, economic sociologists, even geographers, anthropologists and comparative legal sociologists had been hard at work to illustrate the way in which corporations can be seen as “institutions that pervade the social and material fabric of everyday life [. . .]” and how they “shape human experience not only in spectacular and disastrous ways but also in mundane, every day, ambivalent, and positive ways,”<sup>157</sup> thus providing ample substance to decentre and de-polemise the convergence vs. divergence debate. Meanwhile, no one would deny the fact that corporate governance is an important part of transnational norm-making and that we need to pay attention to the development of transnational actors, norms and processes in that regard. Meanwhile, however, there is little that suggests today that we could see any time soon a revival of interest in corporate

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152. See the famous engagement with Ihering by Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. R. 809 (1935).

153. Simon Roberts, *After Government? On Representing Law Without the State*, 68 MODERN L. R. 1 (2005).

154. See Fernanda Pirie, *Law before Government: Ideology and Aspiration*, 30 OXFORD J. LEGAL STUD. 207 (2010).

155. See Harry W. Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 BERKELEY J. EMP. & LAB. L. 271 (2001).

156. Simon Deakin, *Corporate Governance and Financial Crisis in the Long Run*, in THE EMBEDDED FIRM: CORPORATE GOVERNANCE, LABOUR AND FINANCIAL CAPITALISM (Peer Zumbansen et al. eds., 2011).

157. Marina Welker et al., *Corporate Lives: New Perspectives on the Social Life of the Corporate Form*, 52 CURRENT ANTHROPOLOGY S3, S3–S4 (2011).

governance theory that would be comparable to that of the late 1990s and early 2000s,<sup>158</sup> a debate that petered onwards for a while with a focus on issues such as executive compensation, “say on pay” as well as director versus shareholder primacy. So, in terms of being a popular field of critical, socio-legal analysis; it does not appear as if corporate governance today is “where the action is,” if by action we mean hard-hitting analysis and critique of regulatory development in a crucial governance area with transnational impact. But, that is where the Rule of Law must be searched for today—just like we have to build labour law in and from cases such as Rana Plaza.

## *2. Territories and Spaces of the Transnational Rule(s) of Law*

In light of these findings, what makes up the Rule of Law in a global context? How are we to imagine a transnational Rule of Law? The space in which this transnational variation of Rule of Law analysis occurs is multilayered; it is a construct to the degree that its architects evoke a governable, confined realm of human agency, institutional dynamics, and rule obedience.<sup>159</sup> But, it is also a discursive space of contention over values and, in the background of such disputes, over the power structures that inform, sustain, and control this space. Political scientists<sup>160</sup> and geographers<sup>161</sup> alike criticize the non-death of the neoliberal mantra that—seemingly unbroken since the “roaring Nineties”—continues to hold strong persuasive stance while legal sociologists ponder over the strange mix of institutional ambiguity and concrete impact of transnational power.<sup>162</sup> Lawyers have a lot of catching up to do in their effort to adequately penetrate and theorize these evolving transnational regulatory structures. Clearly, an important step would be to critically reflect on the role that one’s own placement in either a private or public law universe is playing in the way we categorize and interpret transnational governance forms. With both international and domestic public lawyers-turned-global engaged in tireless and detail-rich analyses of iterations of public authority, on the one hand,<sup>163</sup> and emerging

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158. See, e.g., the excellent collection, *COMPARATIVE CORPORATE GOVERNANCE. THE STATE OF THE ART AND EMERGING RESEARCH* (Klaus J. Hopt et al. eds., 1998), and the comprehensive, critical analysis by John W. Cioffi, *State of the Art: A Review Essay on Comparative Corporate Governance: The State of the Art and Emerging Research*, 48 *AM. J. COMP. L.* 501 (2000).

159. Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 *EUR. J. INT’L L.* 15 (2006).

160. See COLIN CROUCH, *THE STRANGE NON-DEATH OF NEO-LIBERALISM* (2011).

161. DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* (2005).

162. Dan Danielsen, *Local Rules and a Global Economy: An Economic Policy Perspective*, 1 *TRANSNAT’L LEGAL THEORY* 49 (2010); Roger Cotterrell, *Spectres of Transnationalism: Changing Terrains of Sociology of Law*, 36 *J. L. & SOC’Y* 481 (2009); Roger Cotterrell, *What is Transnational Law?*, 37 *L. & SOC. INQUIRY* 500 (2012); Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, 76 *L. & CONTEMP. PROBS.* 117 (2013).

163. Armin Von Bogdandy et al., *Developing the Publicness of Public International Law*, 9 *GERMAN L. J.* 1375 (2008); ARMIN VON BOGDANDY ET AL., *INTERNATIONAL JUDICIAL LAWMAKING ON PUBLIC AUTHORITY AND DEMOCRATIC LEGITIMATION IN GLOBAL GOVERNANCE* (Armin Von Bogdandy et al. eds., 2012).

forms of global administrative law structures, on the other,<sup>164</sup> private lawyers need to move beyond Hayek, but also Fuller,<sup>165</sup> in order to start asking (again<sup>166</sup>) the hard questions as to *who* does *what how* and *in whose interests*. Maybe the regulatory aftermath of the global financial crisis and its continuing permutations can, for a little longer, still offer one of the much needed opportunities for a comprehensive political economy analysis of transnational financial law that takes the available historical factual accounts by finance experts<sup>167</sup> and banking and securities law scholars<sup>168</sup> as well as regulatory governance theorists<sup>169</sup> seriously. Yet, this space is not one for the specialists or planners against whom Hayek displayed such abhorrence. It is not a space that ought to be left to experts.<sup>170</sup> If it is true that transnational regulatory spaces are construction sites of an emerging, however fragmented legal order, then we are in need of a more sophisticated methodological approach. By showing continuities between legal realist, anti-formalist, and other alternative law critiques in the domestic context, on the one hand, and fragmentation anxieties in the global arena, on the other, we managed to emphasize the need to recognize law as always precarious, as always in danger of being hijacked, instrumentalized, silenced, or perverted. If transnational regulatory spaces bear the mark of the absence of well-known (and often romanticized) institutional safeguards, then it appears obvious that neither a turning away from the transnational law project nor its appropriation through domestic transplants are an option. Instead, what is needed are means of relating the domestic and the global by conceiving of transnational law not as a distinct legal field, but as a reflective framework to consider different, co-existing and intersecting models of normative ordering.

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164. Benedict Kingsbury, et al., *Global Governance as Administration—National And Transnational Approaches to Global Administrative Law*, 68 L. & CONTEMP. PROBS. 1 (2005); Sabino Cassese, *New Paths for Administrative Law: A Manifesto*, 10 INT'L J. CONS. L. 603 (2012).

165. *But see* Thomas Schultz, *The Concept of Law in Transnational Arbitral Legal Orders and Some of its Consequences*, 2 J. INT'L DISP. SETTLEMENT 59, 71 (2011) (highlighting Fuller's contribution to a procedural theory of justice).

166. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); David Campbell, *The End of Posnerian Law and Economics*, 73 MOD. L. REV. 305 (2010).

167. *See* GILLIAN TETT, *FOOL'S GOLD: HOW UNRESTRAINED GREED CORRUPTED A DREAM, SHATTERED GLOBAL MARKETS AND UNLEASHED A CATASTROPHE* (2009); NOURIEL ROUBINI & STEPHEN MIHM, *CRISIS ECONOMICS: A CRASH COURSE IN THE FUTURE OF FINANCE* (2010).

168. Steven Schwarcz, *Systemic Risk*, 97 GEO. L. J. 193 (2008); Cristie Ford, *Principles-Based Securities Regulation in the Wake of the Global Financial Crisis*, 55 MCGILL L. J. 257 (2010).

169. Julia Black, *Seeing, Knowing, Regulating Financial Markets: Moving the Cognitive Framework from the Economic to the Social* (LSE Law, Society and Economy Working Paper No. 24, 2013), <http://ssrn.com/abstract=2346098>.

170. *See* David Kennedy, *Challenging Expert Rule: The Politics of Global Governance*, 27 SYD. L. REV. 5, 6 (2005) ("Indeed, to say the world is covered in law is also to say we are increasingly governed by experts.").



As argued elsewhere,<sup>171</sup> the triad of A(ctors), N(orms) and P(rocesses) might offer possible *translation* and *interaction categories* to bridge different governance experiences and practices in a transnational context. The triad attempts not only to draw on, but to critically engage and provincialize, the insights, including the dominant and contesting narratives, regarding success, progress, as well as parochialism from Western Rule of Law traditions in the light of a much wider recognition of authority-bearing norms. Complementing this dimension is a complication of transnational regulatory spaces through law's confrontation with other disciplines' efforts of world-making. Building on long-standing advances in socio-legal studies, including the most welcome revival of a transnationally minded economic sociology of law<sup>172</sup> as well as drawing inspiration from historical and social theory research into transnational histories, lawyers are called upon to conceive of transnational regulatory spaces not as sites of emergency and ad-hoc regulation or crisis management, but as sites of interdisciplinary engagement and reflection. Through such an engagement, lawyers are likely to uncover the various political blind-spots and parochial associations of legal world construction as offered under the headings, for example, of global constitutionalism or global administrative law. Inevitably, such an approach will shake up vocabularies, terminology and conceptual frameworks<sup>173</sup>; and, at the same time, such engagement very likely cannot remain descriptive or analytical, but will have to get its hands dirty in one way or the other.

What, then, is Transnational Law in relation to the ongoing search for a new, global Rule of Law, a global administrative law, global constitutionalism or calls for transnational legal order? Transnational Law is, we might say now, to a large degree an encounter of the familiar, but forgotten, or often not explicit, in unfamiliar, seemingly new contexts. In those contexts, we revisit the omissions, the blind spots, the exclusions and silenced voices, the failed protests and the aborted reforms. Half seriously, but that at least, legal positivism for our time must learn from and engage with a historically and geographically conscious pluralism—to be rightfully called legal positivism. For the time being, though, it seems that there is neither transnational law as law, nor legal positivism as transnational legal positivism. Instead, what we have is a candle burning on both ends. By critically reflecting on our way of applying “what we know” (from domestic law, from our cases and our jurisprudence) to a “different,” “global” context, it becomes apparent that we are also calling into question the basis on which the application occurs. In that process, we likely grow insecure not only as to the solid foundations we are purportedly standing on,

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171. Peer Zumbansen, *Lochner Disembedded: The Anxieties of Law in a Global Context*, 20 IND. J. GLOBAL LEGAL STUD. 29 (2013); Peer Zumbansen, *What Lies Before, Behind and Beneath a Case? Five Minutes of Transnational Lawyering and the Consequences for Legal Education*, in STATELESS LAW. EVOLVING BOUNDARIES OF A DISCIPLINE 215 (Helge Dedek & Shauna Van Praagh eds., 2015).

172. See, e.g., Prabha Kotiswaran, *Do Feminists Need an Economic Sociology of Law?*, 40 J. L. SOC'Y 115 (2013), as well as the other contributions by Perry-Kessaris, Craven and others in the same symposium.

173. See Elizabeth Mertz & Jothie Rajah, *Language-and-Law Scholarship: An Interdisciplinary Conversation and a Post-9/11 Example*, 10 ANN. REV. L. & SOC. SCI. 169, 169-83 (2014).

the norms, institutions, processes and actors, but also the laws, principles and values we think we can rely on as the DNA of our legal system. And, then, to the degree that we let skepticism about the existing legal order's firmness sneak in, are we pulling away the ladder on which we stand?

### *3. Dinner Won't Be Ready*

For the time being, then, we find ourselves in the grip of a growing fear of falling into an abyss of neo-liberal nightmares of market-made norms, voluntary and consumer-monitored compliance mechanisms, of soft law and codes, of strangely intransparent but increasingly ubiquitous and influential expert committees and of just too much state-bashing in the name of an emerging autonomous legal order for world society. But, where to stop? Is going "back" to the domestic world of the (established, practiced and egalitarian) Rule of Law a serious option?

Would we really find it, waiting there for us—like Max finds his dinner when returning from where the Wild Things were?