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Transnational Fiduciary Law: Spaces and Elements

Thilo Kuntz*

In recent years, fiduciary law has increasingly moved to the center of scholarly attention in the common law world. Even a cursory review shows ample evidence of the importance of fiduciary-related norms; not only both in common law and civil law jurisdictions, but also beyond the nation state. Although civil law countries have no tradition of the trust as a legal institution, courts and scholars alike term relationships based on some kind of personal or professional trust “fiduciary”. Additionally, the trust as a legal institution is gaining ground in civil law countries, either following a national recognition of the Hague Trust Convention (e.g., Italy, the Netherlands) or because they have introduced trust legislation (Japan and other countries in East Asia). A number of more sector-specific rules and regulations issued by institutions and initiatives such as the OECD Principles of Corporate Governance and the UN report on “Fiduciary Duty for the 21st Century” are shaping legal norms and legislation.

In other areas of the law with regulations and rules spreading beyond the nation state, scholars have been trying to spell out a concept of “transnational law”, determined to embrace the notion of “something being there” which doesn’t quite fit the bill of the traditional dichotomy of national law or international law. Given the phenomena described above, the question driving this Article is subsequently: Is there such a thing as transnational fiduciary law? Answering this question and mapping a research agenda prove to be a thorny issue, however. Not only is fiduciary law itself “elusive”. The same is true for transnational law and transnational legal theory. Methodologically, this makes thinking about transnational fiduciary law a daunting task.

Grappling with all these issues, this Article aims to make a twofold contribution: First and foremost, it tries to lay a ground stone for transnational fiduciary law as a field, existing at the intersection of transnational law and fiduciary law. Second, it expands both transnational law and fiduciary law by establishing new perspectives on both fields. It explores how transnational law may evolve out of national norms. Additionally, the Article shows the possibility of crossing the common law-civil law divide in fiduciary law and demonstrates that, compared to the traditional common-law view, the fiduciary duty of loyalty may develop different kinds of distinctiveness in transnational settings. It builds on two main examples: horizontal transnational ordering of the trust in East Asia and vertical ordering of fiduciary law with respect to standards and principles concerning environmental, social and governance (ESG) issues.

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I. INTRODUCTION

In recent years, fiduciary law has increasingly moved to the center of scholarly attention in the common law world. In spite of its “elusive” nature, enough instances of fiduciary relationships occur across a wide variety of legal areas that many—good cause—describe it as a distinctive field. Although civil law countries have no tradition of the trust as a legal institution, courts and scholars alike term relationships based on some kind of personal or professional trust “fiduciary.” German law subjects guardians, trustees in bankruptcy, attorneys, and others to a specific set of duties, the most

1 The increasing number of volumes on fiduciary law bears testimony to this; see PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew S. Gold & Paul B. Miller eds., 2014); RESEARCH HANDBOOK ON FIDUCIARY LAW (D. Gordon Smith & Andrew S. Gold eds., 2018); THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle, Paul B. Miller, Robert H. Sitkoff eds., 2019).


important of which is a duty of loyalty. France has introduced “la fiducie,” Additionally, the trust as a legal institution is gaining ground in civil law countries, following a national recognition of the Hague Trust Convention (e.g., Italy, the Netherlands). Courts across common law jurisdictions and common law legal scholarship deal concepts and ideas concerning fiduciary law back and forth. Moreover, civil law countries combined property and contract law in order to fashion substitutes for the common law trust. Contract-based Treuhandverhältnisse, i.e. relationships of trust, have been part and staple of the German legal discourse for several decades, if not centuries.

Some scholars even argue for progressing towards a hybrid system of fiduciary law, built on unified principles applicable both in common law and civil law jurisdictions. East Asian countries with a strong civil law background such as Japan created the trust as a legal institution. Mixed legal systems in the United States (Louisiana) and Canada (Quebec) did the same. On top of that, a number of more sector-specific rules and regulations issued by institutions and initiatives such as the Organization for Economic Co-operation and Development (OECD) and the United Nations Environment Programme (UNEP) Finance Initiative (e.g., the OECD Principles of Corporate Governance and the UN report on “Fiduciary Duty for the 21st Century”) are shaping legal norms and legislation, without having the force of law themselves—at least viewed from traditional Hartian or Kelsenian accounts of law.

In short, even a cursory review shows ample evidence of the importance of fiduciary-related norms; not only both in common law and civil law jurisdictions, but also beyond the nation state. Additionally, many norms are not only created through national or quasi-national legislation on a supranational level as, e.g., in the European Union, but also by non-governmental actors.

In other areas of the law with regulations and rules spreading beyond the nation state, scholars have been trying to spell out a concept of transnational law, determined to embrace the notion of “something being there” which doesn’t quite fit the bill of the

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9 See Kuntz, supra note 5, at 762 et seq.
12 See infra IV.2, for more on this.
15 See infra III.1.b.i, for more on this.
17 Background, UNITED NATIONS ENVIRONMENT PROGRAMME FINANCE INITIATIVE, https://www.unepfi.org/about/background/ (last visited Oct. 21, 2019).
traditional dichotomy of national law or international law. In the well-known words of Philip Jessup:

’T’he term “international” is misleading since it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states). . . . Part of the difficulty in analyzing the problem of the world community and the law regulating them is the lack of an appropriate word or term for the rules we are discussing. Just as the word “international” is inadequate to describe the problem, so the term “international law” will not do. . . . I shall use, instead of “international law,” the term “transnational law” to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.

Given the phenomena described above, the rather obvious question driving this Article is subsequently: is there such a thing as transnational fiduciary law? Answering this question and mapping a research agenda proves to be a thorny issue however. Not only is fiduciary law itself “elusive.”\textsuperscript{23} The same is true for transnational law and transnational legal theory. More than one scholar attempting to capture the concept of transnational law ends up with playing a fugue in minor: “Transnational law remains an imprecise notion.”\textsuperscript{23} Anyone slogging through the heap of literature on transnational legal theory ends up in “a jungle without a map.”\textsuperscript{24}

Moreover, some lawyers, especially those with a common law background, may question if the project is not seriously limited from the start. If the trust is a creature born and bred in the common law, how can a transnational fiduciary law framework encompass both civil law and common law countries? This is a question traditionally allocated to the comparativist’s breadbasket. But again, the scholar seeking to stand on the shoulders of others is in danger of misstepping. It seems that comparative law and transnational law seem to have a lot in common. Not even the latest edition of the Oxford Handbook of Comparative Law,\textsuperscript{25} arguably one of the most sophisticated and far-reaching volumes on the subject, contains a distinct section on either comparative law or transnational law, let alone one on comparative fiduciary law.\textsuperscript{26} Methodologically, this makes thinking about transnational fiduciary law a daunting task. It cuts across transnational law, fiduciary law, and comparative law with only one certainty: even fundamental issues are unclear, elusive, and hotly debated. At least at first glance, the endeavor of finding a vantage point puts the author in a legal cockleshell without oars in the middle of the Atlantic, drifting along on an ocean of literature.

Grappling with all these issues, this Article aims to make a twofold contribution: first and foremost, it lay a ground stone for transnational fiduciary law as a field, existing at the intersection of transnational law and fiduciary law. Second, it expands both transnational law and fiduciary law by establishing new perspectives on both fields. It explores how transnational law may evolve out of national norms. Additionally, the Article shows the possibility of crossing the common law–civil law divide in fiduciary law and demonstrates that, compared to the traditional common law view, the fiduciary duty


\textsuperscript{21} PHILIP C. JESSUP, TRANSNATIONAL LAW (1956).

\textsuperscript{22} See DeMott, supra note 2.

\textsuperscript{23} Cotterrell, supra note 20, at 522.

\textsuperscript{24} Shaffer, supra note 20, at 232.

\textsuperscript{25} The Oxford Handbook of Comparative Law (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019).

\textsuperscript{26} On this blind spot of comparative law, see Mathias Reimann, Beyond National Systems: A Comparative Law for the International Age, 75 TUL. L. REV. 1103, 1108 et seq. (2001).
of loyalty may develop different kinds of distinctiveness in transnational settings. The Article proceeds along the following lines of argument:

Section two deals with a significant preliminary. According to many a common lawyer’s intuition, the divide between common law and civil law with respect to equity and the trust as a legal institution gives cause to question the project as a whole. From a functional perspective, however, the different legal traditions do not present a significant obstacle. Both civil law and common law countries have to deal with the phenomenon of one person enjoying some sort of discretionary power over the interests or position of another. Comparatively speaking, this establishes a common tertium comparationis and therefore a point of entry for transnational fiduciary law.

Given that “[t]here is no unicity of its sources and no systemic form of justification” and that “it does not conform to a general or universal model,” it is no wonder that definitions of transnational law have multiplied over the years. Anyone talking about transnational law needs to take a stand and clearly set out their premises, otherwise they run into the danger of becoming incoherent. Accordingly, the third section (III) takes a deeper look into the methodological toolbox and scrutinizes the horizontal and vertical ordering of fiduciary law. On the horizontal level, transnational fiduciary law may come into existence as a consequence of entangled national legal orders. The starting point is a blind spot left by conventional transnational legal theory. Concentrating on “norms beyond the nation state,” most scholars neglect that national laws themselves might be a suitable basis for the emergence of a transnational legal order. Drawing on the theory of histoire croisée and connected histories, this Article argues that transnational law may come into existence through the entanglement of national laws. Spreading out from Japan, the trust has been diffused over South Korea, Taiwan and China—all countries with a strong civil law background. Close historical ties and traditions shared among the “East Asian four” have established connections between the legal systems and a strong sense of awareness as to how the respective others develop their national laws—allowing legal reforms in one country to echo changes in the laws of the other East Asian Four. Going far beyond standard comparative fare, these co-evolutions make it impossible to understand national norms without taking into account this background of entangled laws.

Vertical ordering of fiduciary law occurs whenever norms “beyond the state” become implemented in multiple national systems. A good example are the standards and principles concerning environmental, social, and governance (ESG) issues. These standards and principles, generated by the United Nations, the OECD and other non-state actors, contain a rich body of norms on fiduciary law, aiming at integrating stakeholder interests into the fiduciary duties of corporate boards and investment managers. They address policy makers and legislators all over the world and purport to provide benchmarks for the creation of legal norms on the national level. Given their intended scope of application and transformation into laws within multiple nation states, such frameworks potentially provide the basis for transnational legal orders and, in the present context, for transnational fiduciary law. The question remains, however, as to whether and how these norms turn from non-binding standards and principles into law, at least from a socio-legal perspective. Pundits close to the Delaware approach in corporate law and traditional US investment managers’ fiduciary law are quick to deny the legal relevance of ESG standards. Both the loi PACTE, a recent piece of French

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29 See, e.g., OECD, *supra* note 18, at 9 (“On the basis of the *Principles*, it is the role of government, semi-government or private sector initiatives to assess the quality of the corporate governance framework and develop more detailed mandatory or voluntary provisions that can take into account country-specific economic, legal, and cultural differences.”).
 legislation, and EU ESG-reporting standards prove them wrong, however. Nation-states with stakeholder-oriented governance systems provide doors which allow so-called “soft law” to enter and settle down as hard fiduciary law.

However, merely looking at the spaces of legal ordering is not enough, however. Transnational legal orders “articulate … a set of norms for legal subjects over a given territory.” 30 Consequently, a transnational legal order is not only defined by its regional extension or geographic scope, but also by its normative elements or what may be called its intension. In other words, talking about “orders” implies being able to define a legal scope. 31 This can only be done by identifying the relevant norms at play in a specific area of legal ordering spanning a certain geographic space. Therefore, the fourth section engages with different elements in the transnational ordering of fiduciary law. Viewing fiduciary law(s) through the lens of transnational legal theory helps to shed some light on its confines, even within the common law world. It is defined by specific elements, specific traditions and the extent to which it binds social relationships. Whereas the duty of loyalty serves as the distinctive marker of fiduciary relationships in the common law, set apart from contract and contract-law principles, it cannot do comparable work in civil law countries. Many of contract law’s shortcomings in the common law do not exist in a civil law regime. Therefore, the duty of loyalty is not distinctive in the way it is in England, the United States of America and other regions on the globe resting on equity traditions. It is distinctive, however, in that it separates fiduciary relationships from other agreements by implementing an obligation unknown to “regular” contracts. Again, the trust in East Asia illustrates how this plays out in legal reality. As the example of communication between Australian and English courts shows, different transnational orders of fiduciary law evolve even in the common law world. Whereas, e.g., the United States recognizes the duty of care as a fiduciary obligation, English and Australian courts explicitly deny this possibility. Courts communicating across the borders of nation states have built an entangled regime of national fiduciary law, producing a transnational version of fiduciary law to a certain extent set apart from other nations of the common law. Finally, the last section summarizes the main findings.

II. THEORIZING TRANSNATIONAL FIDUCIARY LAW AND THE CIVIL LAW/COMMON LAW DIVIDE

Anyone theorizing about transnational fiduciary law has to grapple with a challenge absent from the conventional legal material that transnational legal theory deals with. A strong line in transnational legal theory relates to contract practice beyond the nation state. For Western nation states, freedom of contract is a core principle of their respective private laws; thus talking about contract law and contractual models does not encounter significant obstacles with respect to methodology. Fiduciary law with its strong roots in equity traditions not known in civil law jurisdictions is different. As shown in Sub-section 1., comparative law and the functional method it relies on 32 provides tools for overcoming differences in doctrine and legal traditions. What remains to be elucidated, however, is the relationship between transnational law and comparative law. It will be argued below in Sub-section 2. that transnational law necessarily involves comparability. After these methodological preliminaries, Sub-section 3. puts the tools to use. Given that the comparative literature is sparse and views civil law regimes through a

30 Terence C. Halliday & Gregory Shaffer, Transnational Legal Orders, in TRANSNATIONAL LEGAL ORDERS 3, 28 (Terence C. Halliday & Gregory Shaffer eds., 2015).
31 Id.
32 At least according to the still-prevailing view in the literature on comparative law. This Article is not the place for a discussion, but rather must build on what the majority of scholars in comparative law still uses as the methodological standard. For a (critical) review, see Ralf Michaels, The Functional Method of Comparative Law, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 345 (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019).
bird’s eye, and, alas, is not always very precise, it seems useful to discuss a specific example in greater detail in order to show the mechanisms at work. Regarding Germany’s position as one of the major and most traditional civil law orders, it seems especially suitable as the basis for a case study.

A. The Challenge of Theorizing Transnational Fiduciary Law

Many of those thinking about transnational legal theory take their cue from commerce practice and the web of social norms fostered and stabilized by standardized contractual arrangements. The staple examples looming large in the literature emanate from what many coin “law merchant” or lex mercatoria. Examples abound, such as, the Uniform Customs and Practices for Documentary Credits and the INCOTERMS both issued by the International Chamber of Commerce in Paris, the International Swaps and Derivatives Association’s master agreements for derivatives, Internet Regulation by ICANN, or standards set by the International Organization for Standardization (ISO). An important factor driving the success story of transnational private legal ordering is freedom of contract. At least in Western capitalist democracies, market participants enjoy considerable leeway to shape their relations with others and act under obligations they choose to undertake. Discrepancies in detail notwithstanding, most common law and civil law countries share a baseline. As a consequence, there is no need to build a bridge between the legal systems in order to have a scratch line to start a research project from.

Fiduciary law is different. Common law lawyers may question the endeavor of transnational fiduciary law from the start because of their own fiduciary law’s specific background and history. It evolved on a general level out of equity and equitable remedies and is tightly bound to the trust as a legal institution. Civil law systems traditionally lack both. They have never had an equity tradition and therefore know no equitable remedies. Moreover, the trust in its common law form as dual ownership either is unknown (e.g., Germany, Switzerland), even though a number of civil law countries

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34 May it be real or imagined, see Graft-Peter Calliess, Transnationales Verbrauchervertragsrecht, in 68 Rabelsz 244, 254 (2004); Calliess & Zumbansen, supra note 20, at 28; Gunther Teubner, ‘Global Bukowina’: Legal Pluralism in the World Society, in Global Law Without a State 3, 8 et seq. (Teubner ed., 1997), on the one hand; and Halliday & Shaffer, supra note 30, at 15 (with note 8), on the other.
39 “Most,” considering that some families may deviate. China, to give one example, is a civil law country. Freedom of contract in a Western sense, however, seems not to be the all-foundational principle of its legal order, judged from the outside.
40 But see Frankel, supra note 14.
41 On the importance of both equity and the trust for common fiduciary law: Joshua Getzler, Fiduciary Principles in English Common Law, in The Oxford Handbook of Fiduciary Law 471 (Evan J. Criddle et al. eds., 2019). That is not to say that today trust is the only foundation of fiduciary law. The second pillar, especially in the U.S., is agency law. On agency law as a source of fiduciary law: Deborah DeMott, The Fiduciary Character of Agency and the Interpretation of Instructions, in Research Handbook on Fiduciary Law 321 (D. Gordon Smith & Andrew S. Gold eds., 2018); Deborah DeMott, Fiduciary Principles in Agency Law, in The Oxford Handbook of Fiduciary Law, supra, at 23.
42 Gelter & Helleringer, supra note 10, at 585.
recognize the trust as a matter of private international law (e.g., Italy, Netherlands) or have even implemented the trust (e.g., Japan). How can there be “real” transnational fiduciary law if the latter group lacks equity and traditionally does not know the trust as a core institution? Furthermore, fiduciary duties, especially the duty of loyalty, have a strong anchor in national law and may, at least according to conventional wisdom, not be contracted out of by the parties. Establishing some kind of framework constituting fiduciary standards beyond the nation state thus apparently is much more challenging in jurisdictions putting fiduciary relationships in the vicinity of contract law. Evidence lies right at hand, or so it seems, with major players like Germany not having ratified it; the Hague Trust Convention has not met much approval in the civil law world.

On the other hand, however, no one can deny the successful diffusion of the trust in East Asia. Starting out in Japan, the trust as a legal institution spread via South Korea and Taiwan to China. Regardless of their legal family background, the respective trust laws include a duty of loyalty or at least duties requiring a trustee’s loyal behavior. There are attorneys, corporate directors, trustees in bankruptcy, guardians, and a plethora of other persons working in positions and exercising functions similar to their counterparts in Australia, England, or the United States of America—which are all deemed fiduciaries in the common law. German courts and scholars, to give one example from perhaps one of the most “civilistic” of the civil law countries, employ the rhetoric of fiduciary law, even though, for lack of an established model such as the trust in common law jurisdictions, it is impossible to go forward by analogy to an archetype serving as a guide post. In many instances, there is something called “fiduciary duty” and “fiduciary law” in the United States mirrored by Treuhand in Germany. The fact remains, however, that many of the relationships deemed “fiduciary” in Germany and other civil law countries are governed by contract or quasi-contractual mechanisms. At first glance, this contrasts starkly with the majority opinion in common law fiduciary law scholarship according to which fiduciary law is not contract. Before pondering whether comparative law’s functional approach may help to resolve this predicament (infra 3), an intermediate step has to be taken. Resorting to comparative law in the context of transnational law requires exploring the relationship between these two.

B. Transnational Law and Comparative Law

The relationship between transnational law or transnational legal theory and comparative law and its methodology has mostly evaded scholarly attention so far. Although to the mind of this author many scholars of transnational law heavily invest in exercises in comparative law, the methodological premises are rarely made explicit. Two books on transnational legal theory which have been (justifiably) widely perceived as important contributions to the field do not put their finger on the issue. Pertinent

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44 On the trust in East Asia infra III.1.b.i.
48 See infra IV.3.
49 See, e.g., Smith, supra note 45, at 1450–83 (listing types of relationships courts have concluded are fiduciary in nature).
50 See RUSCH, supra note 6, at 193 et seq.
51 See the examples supra at notes 6–9.
52 E.g., DeMott, supra note 2, at 887–88; FitzGibbon, supra note 45; Smith, supra note 45, at 1492.
53 See CALLIESS & ZUMBAUSSEN, supra note 20; Halliday & Shaffer, supra note 30.
journal articles accepting conventional premises about transnational law are at least not so easy to find.54 The rare article here and there pointing to comparative law as a necessary tool for transnational law55 sketches an idiosyncratic definition of the latter that stands square to conventional theory. Others tackle the rapport between transnational law and comparative law from the direction of the latter and either declare comparative law to be transnational law,56 or want to enrich comparative law by integrating insights from transnational legal theory.57

In sum, this Article cannot rely on established wisdom, but has to take a stand on its own and explore the issue a little bit further. The starting point is a definition of transnational law accepted by the majority of authors working in the field. According to many pundits, it transcends national law, but is not international law—or at least not limited to it.58 Additionally, there has to be some connection of the transnational norm to national law or national lawmaker.59 If transnational legal orders unfold through “the adoption, recognition, or enforcement of the norms” by legal institutions within multiple nation states,60 tracing these various instances of norm-acceptance must employ the conceptual apparatus of comparative law. As not all legal orders are alike, not even within one legal family, the means by which the process of norms being “uploaded” from or “downloaded” into national legal orders61 are unique to the environment they originate in or are received by. Different conceptions of public and private law, diverging boundaries of contract and tort—these and other rifts in the legal landscape inevitably lead to a broad variety of instruments and strategies for placing transnational norms within a given national legal order. Locating the transnational norm in question thus presupposes an exercise in comparative law and searching for functional equivalence of legal institutions.62 Institutions are comparable if they serve similar purposes (function) in the systems compared.63 A function, at least according to a popular definition in the comparatist’s methodological quiver, is the relation between institutions and problems.64

54 This author conducted several searches in databases and search engines, to no avail. He concedes that this might be due to flawed research strategies. Even if someone has written on the subject—apologies, the contribution at least has not made such an impact that it could be regarded as seminal literature accepted to provide the common wisdom for the field.


58 See, e.g., Halliday & Shaffer, supra note 30, at 4, 19; Viellechner, supra note 28, at 167.

59 Callies & Zumbansen, supra note 20, at 110; Halliday & Shaffer, supra note 30, at 13.

60 Halliday & Shaffer, supra note 30, at 13.


62 Whereas German law knows a pre-contractual liability norm, the “culpa in contrahendo,” and puts it under a quasi-contractual roof, common law deals with similar situations under tort law (if at all), see, for example, the classical essay of Friedrich Kessler & Edith Fine, Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study, 77 HARV. L. REV. 401 (1964). See Nadia E. Nedzel, A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability, 12 TUL. EUR. & CIVIL L. F. 97 (1997), for a more recent take.

63 See Michaels, supra note 32, for a (critical) review of the functional method in comparative law.

64 See Hugh Collins, Methods and Aims of Comparative Law, 11 OXFORD J. COMP. L. 396 (1991), and UWE KISCHEL, RECHTSVERGLEICHUNG, 93–94 (2015) (in German), for a strong commitment to the function method.

65 Michaels, supra note 32, at 371.
Therefore, one first has to nail down the problem which then may serve as the constant for the comparative work.\(^\text{66}\)

As a result, the fact that relevant relationships in civil law countries are governed wholly or in part by contract law does not take them out of the equation \textit{a priori}. The heart of the problem lies in the question as to whether, e.g., the German contract law provisions serve the same purpose as the rules of fiduciary law in the United States or in England. Similitude or difference in remedies may well count as circumstantial evidence. From a methodological point of view, however, neither the one nor the other is decisive. Factual or purely descriptive methods do “not tell us whether these [similarities or differences] are accidental or necessary, or how they relate to society.”\(^\text{67}\) They “simply” have to fulfill the same purpose.\(^\text{68}\) How this all plays out is shown in the next sub-section.

\section{C. Fiduciary Law in Civil Law Jurisdictions: Germany as a Case Study}

Even though the exact confines and definitions of a fiduciary relationship are still subject to a lively debate,\(^\text{69}\) nearly all theories agree on the core problem: the other-regarding powers conferred or taken by one person over another’s interests (broadly construed), combined with an element of discretion.\(^\text{70}\) In the language of law and economics, this gives rise to a principal-agent problem.\(^\text{71}\) The person having the interests in question, i.e. the principal, is vulnerable. They cannot sufficiently observe the agent’s actions and, in many situations, will lack the skill for monitoring the agent.\(^\text{72}\) That creates an opportunity to engage in opportunistic behavior or, in the famous phrase coined by Oliver Williamson, “self-interest seeking with guile.”\(^\text{73}\) The agent may engage in hidden actions under conditions of moral hazard.\(^\text{74}\) They can, e.g., misappropriate assets belonging to the principal or act despite having a conflict of interests. This leads into the question as to whether and how a given legal systems addresses these risks. In the common law system, it is first and foremost the duty of loyalty. It prohibits incurring profits other than those agreed upon when the parties entered the relationship and requires the agent to avoid conflicts of interest.\(^\text{75}\) These “no conflict” and “no profit” rules build the fiduciary loyalty’s core in the common law.\(^\text{76}\) They serve as entry points for more specific duties such as to ask for consent in conflicted transactions and remedies such as disgorgement of profits.\(^\text{77}\) German law reacts to a similar set of real-world problems by means of functionally equivalent rules:

\(^\text{66}\) Id.
\(^\text{67}\) Id. at 369.
\(^\text{68}\) Dubious therefore Gelter & Helleringer, \textit{supra} note 10, at 595–96.
\(^\text{70}\) See Paul B. Miller, \textit{The Identification of Fiduciary Relationships}, in \textit{THE OXFORD HANDBOOK OF FIDUCIARY LAW} 367, 379 (Evan J. Criddle et al. eds., 2019). Critics interpret some instances of fiduciary relationships as lacking the element of discretion, for example, when an investment adviser is either not given discretionary power to act on their client’s behalf or refuses to assume discretion. See Arthur Laby, \textit{Book Review}, 35 L. & PHIL. 123, 132–34 (2016) (reviewing \textit{PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW} (Andrew S. Gold & Paul B. Miller eds., 2014)).
\(^\text{72}\) Id. at 199.
\(^\text{74}\) Sitkoff, \textit{supra} note 71, at 199.
\(^\text{76}\) Gold, \textit{supra} note 75, at 386.
\(^\text{77}\) Id. at 387, 394.
Contracts between attorneys, investment advisors, tax consultants and their clients, distribution agreements (Vertriebsbündervertrag), commercial agency agreements (Handelsvertretervertrag), construction management contracts (Baubetreuungsvertrag), the duties of corporate directors vis-à-vis the corporation, duties of trustees in bankruptcy (Insolvenzverwalter) to creditors, to name but a few examples—they all create the problems sketched above. In these relationships, one person enjoys discretionary powers over the interests of another, followed by the danger of the agent acting opportunistically. In Germany, just as in other civil law countries, the knot tying these and comparable relationships together is primarily the mandate contract.78

The German Civil Code (Bürgerliches Gesetzbuch — “BGB”) provides default rules for an agreement to act on another person’s behalf79 in the shape of a mandate contract, (Auftrag)80 subjecting the agent to a regime of contract law rules governing, inter alia, the agent’s duty to notify the mandator if they want to deviate from instructions and then to wait for a decision,81 a duty to provide the mandator with information on the status of the transaction and, after carrying out the mandate, to render account for it,82 the disgorgement of profits,83 and a penalty in case the agent misappropriates assets under his management.84 Generally, it is an accepted (if unwritten) basic rule that the agent has to put the principal’s interests before their own and avoid conflicts of interest.85

These rules are not important owing to the significance of the mandate contract in itself, but because they form a nucleus other provisions piggyback on. One example is section 675(1) of the BGB, a linchpin of German contract law regulating what — reluctantly — may be called agency agreements:86

Nongratuitous management of the affairs of another

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78 See generally Gelter & Helleringer, supra note 10, at 588–90.
79 German law distinguishes the agent’s authority to act from the agreement to act between agent and principal. See Basil S. Markesinis, Hannes Unberath & Angus Johnston, The German Law of Contract: A Comparative Treatise 109, 158 (2d ed. 2006).
80 The mandate contract is a contract in which one person takes on a duty to act on behalf of another without receiving remuneration. See Markesinis et al., supra note 79, at 158.
81 Section 665 of the BGB: “The mandatary is entitled to deviate from the instructions of the mandator if he may assume in the circumstances that the mandator would approve of such deviation if he were aware of the factual situation. The mandatory must make notification to the mandator prior to such deviation and must wait for the decision of the latter unless postponement entails danger.” Bundesministerium der Justiz und für Verbraucherschutz, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934 (last visited Oct. 15, 2019).
82 Section 666 of the BGB: “The mandator is obliged to provide the mandator with the required reports, and on demand to provide information on the status of the transaction and after carrying out the mandate to render account for it.” Bundesministerium der Justiz und für Verbraucherschutz, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934 (last visited Oct. 15, 2019).
83 Section 667 of the BGB: “The mandatary is entitled to deviate from the instructions of the mandator if he may assume in the circumstances that the mandator would approve of such deviation if he were aware of the factual situation. The mandatory must make notification to the mandator prior to such deviation and must wait for the decision of the latter unless postponement entails danger.” Bundesministerium der Justiz und für Verbraucherschutz, https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934 (last visited Oct. 15, 2019). See also Graziaei, supra note 33, at 287, 295 (discussing disgorgement of profits under civil law).
84 Bürgerliches Gesetzbuch [BGB] [Civil Code], § 668, translated in https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934 (last visited Oct. 15, 2019) (Ger). (“If the mandator spends money for himself that he must return to the mandator or spend for the mandator, then he is obliged to pay interest on it from the time of spending onwards.”).
86 “Reluctantly” because of the content any common lawyer will immediately think of in connection with agency. Although there is an overlay of agency agreements in the common law and those of the German civil law variety as to content, significant differences remain, such as the difference between the authority to act and the agreement to act. See Markesinis et al., supra note 79, at 158–60. See also BGB § 675(1), translated in https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934 (last visited Oct. 15, 2019).
(1) The provisions of sections 663, 665 to 670 and 672 to 674 apply to a service contract or a contract to produce a work dealing with the management of the affairs of another to the extent that nothing else is provided in this subtitle and, if the person obliged is entitled to terminate without complying with a notice period, the provisions of section 671 (2) also apply with the necessary modifications.

This—if read out of context admittedly slightly cryptic—piece of legislation contains an essential set of duties. An agreement in the sense of section 675(1) of the BGB is a contract for services or work and labor in exchange for remuneration. “[D]ealing with the management of the affairs of another” is understood by the BGH, the Federal Court in private law matters, as an independent activity on of an economic character by of another within a foreign sphere of interest. This section does not define the duties applying to agency agreements, but refers to provisions of the mandate contract, inter alia those governing notification and information duties and disgorgement of profits. Moreover, the agent is subject to a duty of loyalty, which is deemed to be the decisive characteristic distinguishing a Geschäftsbegungsvertrag from other contracts, e.g. regular service contracts and contracts for work and labor.

German scholars observe that Geschäftsbegungsverträge fit well into concepts of economic contract theory and demand a specific set of duties in order to counter the various problems discussed under the rubric of agency theory and in the incomplete contracts literature. The rules governing mandate contracts and agency agreements address exactly those problems fiduciary law reacts to in the United States. Therefore, from a functional point of view, it is completely legitimate to categorize the German contract law provisions just discussed as fiduciary law from a comparative perspective. The mandate contract, however, is not the only way to establish a fiduciary relationship and a duty of loyalty. In addition to contract law, other parts of German law also provide for fiduciary obligations.

Examples already mentioned in this article’s introduction are the relationship between guardian and ward and the trustee in bankruptcy (Insolvenzverwalter). A director on the executive board of a public corporation (Vorstand der Aktiengesellschaft) owes specific fiduciary duties to the corporation itself. These duties are not grounded in the employment contract, but in the corporate relationship of the director and the corporation. Moreover, public law enriches and subjects several relationships to a special fiduciary law regime, even though the parties are bound by contract, as is the case with

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87 As opposed to an employment relationship.
88 In contrast to a mandate in the sense of section 662 of the BGB, which is a similar contract without consideration. Additionally, this criterion excludes contracts related to activities traditionally considered having a non-economic purpose from section 675’s scope, e.g. contracts between doctors and patients, teacher and pupil, and artists and “customer.” See Martinek & Omlor, supra note 85, § 675 margin no. A 16.
89 As opposed to one’s own sphere of interest.
90 See, e.g., Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 25, 1966, 45 Entscheidungen des Bundesgerichtshof in Zivilsachen [BGHZ] 223 (228) (Ger.).
91 Christoph Benicke, in Soergel, 10 BÜRGERLICHES GESETZBUCH MIT EINFÜHRUNGSGESETZ UND NEBENGESETZEN (BGB) § 675 margin no. 5 (13th ed. 2011); Klaus J. Hopt, Interessenwahrung und Interessenkonflikte im Aktien-, Bank- und Berufsrecht, 33 ZGR 1, 20 (2004).
92 Kuntz, supra note 5, at 766; see also CHRISTOPH KUMPAN, DER INTERESSENKONFLIKT IM DEUTSCHE PRIVATRECHT 59–63 (Mohr Siebeck Tübingen, 2014) (discussing in the context of conflicts of interests); Martinek & Omlor, supra note 85, VORBEM ZU §§ 662 ff margin no. 77.
93 Kuntz, supra note 5, at 766.
94 BGHZ, supra note 6; RUSCH, supra note 6; Zimmerman, supra note 6.
95 BGHZ, supra note 7; BECKER, supra note 7.
regard to investment advisors\(^7\) and attorneys\(^8\) towards their clients. Several courts and authors even underscore that fiduciary duties are stricter than those flowing from the covenant of good faith and fair dealing,\(^9\) echoing the well-known adage coined by Judge Cardozo who famously expected a trustee to show the “punctilio of an honor the most sensitive.”\(^10\) Even though the relationships just mentioned are not mandate contracts in terms of legal doctrine, this does not mean that the trustee in bankruptcy or a guardian enjoys the privilege of a more lenient regime. Either the relevant specific regulations contain supplementary rules or courts draw from the rules governing mandate contracts by analogy.

The no-profit rule may serve as an example: in cases where no express reference is made to this rule, courts apply the relevant section 667 of the BGB\(^9\) by way of analogy, e.g. in case of a guardian letting entailed land after receiving a “commission”\(^3\) or an insolvent trustee holding monies in an escrow account on behalf of the debtor.\(^10\) Should the fiduciary engage in illegal competition, German law provides another set of norms serving as no-profit rule, e.g. in section 88 of the German Stock Corporation Act (Aktiengesetz)\(^5\) with respect to the board of directors of a stock corporation (Aktiengesellschaft).\(^4\) These and other prohibitions to engage in competition with the principal are also applied analogously, e.g. to the directors of a limited liability company (Gesellschaft mit beschränkter Haftung)\(^5\) or a trustee in bankruptcy appropriating the debtor’s corporate opportunities.\(^6\)

In the end, German contract law and other legal institutions address problems arising out of relationships in which one party enjoys other-regarding powers over another’s interests, combined with an element of discretion. From a comparative perspective, this establishes the functional equivalence of these solutions to the common law approach. That means that the differences between equity-based common fiduciary law and German civil law, as significant as they are in general, do not stand in the way of the current project. Given the same set of problems both civil law and common law have to solve, the differences in the regulatory “technique” are irrelevant as far as the establishment of transnational law is concerned. Everyone knows that many, if not all, roads lead to Rome.

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\(^7\) See Wertpapierhandelsgesetz [WpHG] [German Securities Trading Act] § 63(1) (“Investment firms shall be required to provide investment services and ancillary services honestly, candidly and with the requisite degree of expertise, care and diligence in the best interests of their clients.”) (Thilo Kuntz trans. 2020); see also Hopf, supra note 91, at 1, 6–8; Kumpian, supra note 92, at 119–21.

\(^8\) Oberlandesgericht [OLG] [Court of Appeal] Brandenburg, Mar. 5, 2012, Neue Juristische Wochenschrift – Rechtsprechungsbericht [NJW-RR] 1191 (1193) (Ger.).

\(^9\) See Oberlandesgericht [OLG] [Higher Regional Court] Nov. 18, 2019, DIE AKTIENGESELLSCHAFT [AG] 462, 463, 2011 (Ger.); Fleischer, supra note 96, § 93 margin no. 115.


\(^11\) See supra note 83.

\(^12\) Reichsgericht [RG] [Federal Court of Justice] May 30, 1940, 164 ENTSCHEIDUNGEN DES REICHSGERICHTS IN Zivilsachen [RGZ] 98 (103) (Ger.).

\(^13\) BGH Dec. 15, 2011, NEUE ZEITSCHRIFT FÜR INSOLVENZRECHT [NZI] 135 (136), 2012 (Ger.).

\(^14\) Aktiengesetz [AktG] [German Stock Corporation Act] § 88 (Ger.) (“(1) Members of the executive board may not engage in any trade or enter any transactions in the line of the corporation’s business without prior approval by the supervisory board. They may not be member of another corporation’s executive board, director of a limited liability company or general partner of another commercial enterprise. […] (2) The corporation may claim damages from a member of the executive board who violates this prohibition. In lieu thereof, the corporation may require said member to treat any transaction made on his own behalf as if he had acted on behalf of the corporation and deliver up any remuneration received for actions on behalf of another, or assign his rights to such remuneration. (3) […]” (2) The corporation may claim damages from a member of the executive board who violates this prohibition. In lieu thereof, the corporation may require said member to treat any transaction made on his own behalf as if he had acted on behalf of the corporation and deliver up any remuneration received for actions on behalf of another, or assign his rights to such remuneration. (3) […]” (Thilo Kuntz trans. 2020).

\(^15\) BGH Oct. 26, 1964, WERTPAPIERMITTEILUNGEN [WM] 1320 (1321), 1964 (Ger.).

\(^16\) BGH Mar. 16, 2017, WERTPAPIERMITTEILUNGEN [WM] 776 (779), 2017 (Ger.).
III. SPACES OF TRANSNATIONAL FIDUCIARY LAW

Transnational law exists in different spaces and so does transnational fiduciary law. Notwithstanding the ubiquity of fiduciary law, there is no “world” or “global” fiduciary law, as will be discussed in Sub-section 3. Legal ordering of fiduciary law rather occurs in two dimensions. Entanglement of national laws can entail the emergence of transnational legal orders on the horizontal level (Sub-section 1.). On the vertical plane, norms created “beyond the state” may trickle down into national legal systems either because legislators and courts transform them in national laws or actors make use of them in enforcing rights and remedies (Sub-section 2.).

A. Horizontal Transnational Ordering of Fiduciary Law

The horizontal transnational ordering of fiduciary law is a consequence of several national legal orders becoming entangled through norms flowing back and forth between the respective systems. Notwithstanding, this claim rests on a non-trivial premise; namely, the assumption that national law can provide a basis for transnational legal ordering. Considering national law’s uncertain status in transnational legal theory, this is a point in need of some elaboration as a first step (a). Having cleared the ground, a second step then helps to chart the territory, taking up the example of the diffusion of the trust as a legal institution in East Asia (b).

1. National Law’s Uncertain Status in Transnational Legal Theory

Workers in the vineyard of transnational legal theory have long been underlining that transnational law has a distinctive geographic component. Contrary to traditional national law, it reaches beyond the nation-state and expands beyond the confines of a legally defined territory and scope of application—international private law excluded for a moment. Its extension varies and remains to be determined case by case, depending on the market participants, legislators, courts, and other institutions applying and subjecting themselves to transnational law. Pointing this out, many scholars conclude that transnational orders vary in geographic scope. This geographic approach is rooted in the idea of transnational law being based on norms “beyond” the nation state as a starting point. Building their theories on normative arrangements like the contract models typically collected under the umbrella term lex mercatoria, the overwhelming majority of writers, while stressing the importance of national laws, take this as a given.

Whatever their respective position on what transnational law actually “is” may be, these scholars—at least implicitly—carve out orders exclusively based on national laws.

At first glance, this strategy of erecting a dichotomy not only provides for a definition of transnational law which proves to be manageable in research, but also sensibly divides labor between transnational law on the one hand and comparative law on the other. Just having two or more national legal orders look alike does not imply norms reverberating across borders and beyond the nation state. Legal transplants are not

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107 See Halliday & Shaffer, supra note 30, at 18–19.
108 See id. at 18–19, 28. See also Shaffer, supra note 20, at 232.
109 That is not to say that national law can never have extraterritorial reach, to the contrary. But as this is the exception rather than the rule, this issue does not alter the thrust of the argument developed above. On the status of international private law, see text cited infra note 124.
110 Id. at 12–13.
111 Id. at 18–19.
112 See supra note 32 and accompanying text. For a broader view, see, for example, Halliday & Shaffer, supra note 30, at 13–15.
113 CALLIEN & ZUMBAUSEN, supra note 20, at 19; Glenn, supra note 27, at 839; Halliday & Shaffer, supra note 30, at 13.
transnational law either, at least according to the traditions of the profession. Even though such repotting of a legal rule or legal institution from one national system and into another national bed refers to a border-crossing movement, the issue is not so much the creation of an additional point of reference. The question is rather whether the receiving system accepts or rejects the transplant. Legal transplants thus appear “as elements of local law reform.” Even though transnational law cannot forego exercises in comparative law, the latter remains reduced to the status of an auxiliary discipline to the former. Methodologically speaking, comparative law does not gain anything or grow just by being employed for the purposes of the transnational enterprise.

And still, there is a curious ambiguity in many established narratives on how transnational law comes into being and which role national law may play. One does well to bring to mind that riding the transnational train does not add value in


118 Supra II.2.

119 Halliday & Shaffer, supra note 30, at 37–38; Harold Koh, Transnational Legal Process, 75 NEB. L. REV. 181, 183–84 (1996); Shaffer, supra note 20, at 237; Peer Zumbansen, Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back, 1 UC IRVINE J. INT’L TRANSNT’L & COMP. L. 161, 166 (2016). The extent to which these views are all purely procedural is subject to debate. See, e.g., Halliday & Shaffer, supra note 30; Michaels, supra note 117, at 144. See JESSUP, supra note 21, at 2, for a differing view, putting emphasis on substantive law rather than process.

120 Shaffer, supra note 20, at 237.

121 Id.

122 On this problem, see Halliday & Shaffer, supra note 30, at 11.

123 Michaels, supra note 117, at 154.


125 Michaels, supra note 117, at 153.

126 E.g., Wai, supra note 124, at 473.

127 See Michaels, supra note 117; Wai, supra note 124.
or so some propose, through national judges developing common private international law principles.\textsuperscript{128}

Delving into the debate’s details is not of interest for the purposes of this text.\textsuperscript{129} What is of interest, however, is the fact that scholars are able to attribute international private law—state law—to a popular definition of transnational legal orders. To this author’s mind, this undergirds the conjecture of conventional accounts of transnational law having blind spots with respect to the “transnational potential” of national laws. Entanglement of national laws is another entity, highly relevant for fiduciary law, as will be argued in the next sub-section.

2. Transnationalization Through Entanglement of National Laws

The starting point for the following discussion of the meaning and consequences of entanglement is the diffusion of trust law in East Asia (a). The legal systems of Japan, South Korea, Taiwan, and China have a civil law core. Nevertheless, Japan introduced the trust as a legal institution, which then spread over East Asia for various reasons. It would be a mistake, however, to qualify this as a problem of transplanting law from one national legal system to another. Doing so would seriously neglect the fact that these East Asian countries’ laws are in many ways connected and intertwined. As a consequence, to truly understand trust law in East Asia—and with it large portions of fiduciary law—presupposes an understanding of the trajectories these national legal orders share. Building on the case study of trust law in East Asia, the section moves forward by exploring the consequences for transnational fiduciary law more generally in part (b). It constructs the theoretical framework for understanding how entanglement and 

\textit{histoire croisée} establish a process of transnationalization.

\textbf{a. Introductory Example: The Diffusion of Trust Law in East Asia}

Japan, South Korea, Taiwan, and China not only share a rich history as a region,\textsuperscript{130} they also share a common legal framework as they are all civil law jurisdictions with strong historical roots in the German civil code (\textit{Bürgerliches Gesetzbuch}).\textsuperscript{131} As a consequence, these East Asian countries not only lack equity courts, but are historically situated within a framework built around the concept of single ownership running counter to a core element of trust architecture: dual ownership.\textsuperscript{132} This distinguishes them from their common law siblings: Hong Kong, Singapore, and Malaysia.\textsuperscript{133} Nevertheless, after the Secured Bond Trust Act of 1905 was introduced as a piece of specific legislation, Japan followed through with the enactment of the Trust Business Act of 1922.\textsuperscript{134} As part of its colonial rule over Taiwan, acquired from China in 1895, and Korea, annexed in 1910,\textsuperscript{135} Japan imposed its trust legislation.\textsuperscript{136} China, the latest addition to the East Asian civil law and trust family, included the trust as an institution only after the Opening Up policy

\textsuperscript{128} Craig Scott, “Transnational Law” as Proto-Concept: Three Conceptions, 10 GER. L. J. 859, 870–71 (2009); see also Shaffer, supra note 20, at 244 (“legal Esperanto”).

\textsuperscript{129} Apart from the question if the analysis in general stands up to closer scrutiny, there is a further debate within that group whether in addition to the rules of international private law the applicable substantive law should be part of transnational law as well. See Michaels, supra note 117, at 153.

\textsuperscript{130} See \textit{CHARLES HOLCOMBE}, A HISTORY OF EAST ASIA (2d ed. 2017).


\textsuperscript{133} Ho & Lee, supra note 131, at 10.

\textsuperscript{134} See Tamaruya, supra note 47, at 2231, for a detailed description of the Japanese reception of trusts and trust law.

\textsuperscript{135} See HOLCOMBE, supra note 130, at 273 (on Korea); \textit{id.} at 384 (on Taiwan), for a concise introduction into this period of East Asian history and Japanese imperialism.

\textsuperscript{136} Tamaruya, supra note 47, at 2242.
implemented by Deng Xiaoping in 1979, the legal institution based on the Trust Act entered into force only in 2001.\textsuperscript{137} Both Taiwan and South Korea kept the trust after Japanese colonial rule ended.\textsuperscript{138} What did not end, however, was the influence of Japanese trust law. Given its status as the root of modern trust regulation in these two jurisdictions, it still oftentimes served as a pacemaker for Taiwanese and South Korean trust law and exercises some influence on the 2001 Chinese legislation.\textsuperscript{139} At the same time, the trust laws of the group members echo US models on trust.\textsuperscript{140} The implementation of a common law institution into a jurisdiction with a solid civil law background led to shared problems and points of departure for doctrinal development. There is no constructive trust on traceable assets.\textsuperscript{141} Additionally, even though there are functional equivalents of the duty of loyalty in the respective trust laws, the content and extent of these rules awaits further clarification compared to their common law counterparts.\textsuperscript{142} Reviewing these common points of departure, it comes as no surprise to find solutions closely resembling each other.\textsuperscript{143}

Bearing in mind the historical development of trust legislation of the “East Asian Four” means that a traditional comparative approach is not enough. The individual legal orders do not simply stand alongside each other nor did they each on their own “simply” accept a legal transplant which now becomes part of the national body of law.\textsuperscript{144} They rather interlace on several levels and form a discernible space of trust law and fiduciary regulation. Trust legislation in South Korea, China, Taiwan, or Japan moves also with a view to the respective other(s). Comparative studies typically neglect this element of interaction and the accompanying echo-chamber effect. This case leads to a challenging methodological issue: does the obvious and persistent connection between national laws and national legal institutions give rise to a transnational legal order, even though there is no set of rules or standards “produced by, or in conjunction with, a legal organization or network that transcends or spans the nation-state”?\textsuperscript{145} As will be shown below, the answer is affirmative.

b. Entanglement, Histoire Croisée and Transnational Legal Spaces

The evolution of the legal frameworks over time and the historical intersections generated what historians writing about transnational history term histoires connectées,\textsuperscript{146} connected histories,\textsuperscript{147} and histoire croisée.\textsuperscript{148} Moving forward from comparative history, these scholars put emphasis on the element of interaction and echo-chamber effects

\textsuperscript{137} On the trust in China see, e.g., Ho, supra note 131; Charles Zhen Qu, The Doctrinal Basis of the Trust Principles in China’s Trust Law, 38 REAL PROP. PROB. & TR. J. 345 (2003); see also Tamaruya, supra note 47, at 2245; HOLCOMBE, supra note 130, at 369 (on the Opening Up policy).
\textsuperscript{138} Ho & Lee, supra note 131, at 12; Tamaruya, supra note 47, at 2246.
\textsuperscript{139} See Tamarunya, supra note 47, at 2246.
\textsuperscript{140} Id.
\textsuperscript{141} Ho, supra note 132, at 301.
\textsuperscript{142} Id. at 297; see Tamaruya, supra note 47, at 2251, for a more detailed analysis; see also infra IV.3.
\textsuperscript{143} See also infra IV.3.
\textsuperscript{144} On this effect of transplanting law, see Michaels, supra note 117, at 148.
\textsuperscript{145} Halliday & Shaffer, supra note 30, at 12.
\textsuperscript{148} Foundational: Michael Werner & Bénédicte Zimmermann, Penser l’histoire croisée: entre empirie et réflexivité, 58 ANNALES HSS 7 (2003) (in French; for an English version see Michael Werner & Bénédicte Zimmermann, Beyond Comparison: Histoire Croisée and the Challenge of Reflexivity, 45 HIST. & THEORY 30 (2006)). The methodological differences between histoires connectées and histoire croisée are minor and negligible for the purposes of this Article. They share a common interest in going beyond comparative history—this is the important point for the text above. Histoire croisée complements comparative history, it does not supplant it, see Jürgen Kocka, Comparison and Beyond, 42 HIST. & THEORY 39, 43–44 (2003).
resulting from shared narratives and histories. What historians working in this methodology’s ambit want to achieve is a transnational view on history, not by adding another layer on top of regional, local or national history, but rather through readjusting the focus on how the interaction and connections came into being, which specific logic lies behind them, and how they structure space. Apparently, there is something unique in these histoires croisées worth looking at in its own right. All the issues and vantage points just mentioned surface in East Asian trust regulation, making it a fine example for a transnational phenomenon.

A historian researching the entangled developments and evolution of trust law and trust-related fiduciary law in East Asia has to retrace the “construction, flow . . . and settlement of legal norms,” the production of national laws and the latter’s interaction with “different levels of social organization, from the transnational to the local,” including “the migration across borders, . . . contestation and homologies among the transnational, national, and local levels.” This is where histoire croisée and transnational legal theory meet. Even though historical methods do not operate in the shadow of questions of legal normativity, historians grapple with issues surprisingly similar to what legal scholars have to deal with. Conventional comparative history and comparative law both follow a static approach and tend to neglect interactive processes. Insofar, historical methodology undergirds the claim that the entanglement of national laws may constitute transnational law. It adds a vertical dimension to comparative law’s horizontal plane. Paying close attention to how norms gain transnational character according to leading legal theorists proves the point.

Transnational norms are norms “adapted transnationally.” They do not necessarily have to originate outside the nation state. Transnational legal orders are transnational if they (at least) have social effects in more than one jurisdiction and “engage legal institutions within multiple nation-states.” The ways in which legal institutions engage with the norms—bottom-up, top-down, or horizontally—does not matter, at least not for their qualification as parts of transnational legal orders, because the concept of transnational law comprises processes in all directions. What is important is that multiple nation states lace into each other as a consequence of recognizing norms with an international scope. Law enacted by a foreign state and then transplanted into and adapted to the needs of another nation state’s legal system fits the description of “rules of extrastate origin.” From the transplanting nation state, this foreign state law is just as non-binding as any model law or framework drafted by an international organization or informal network of private actors. Furthermore, leading theorists increasingly point out the importance of persuasive authority in transnational law, such as engagement with and references to foreign law and judicial opinions. According to these criteria, trust regulation in Japan, Taiwan, South Korea, and China spawns transnational fiduciary law insofar as trust law contains fiduciary norms.

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149 See Werner & Zimmermann, supra note 148, at 12 (2003); id. at 35 (2006).
150 Id. at 16 (2003); id. at 38 (2006).
151 Id. at 22 (2003); id. at 43 (2006).
152 For the quotations, see supra at notes 120-121.
153 C.f. Reimann, supra note 26, at 1116 (Traditional model of comparative law operates “on the horizontal plane.”).
154 Halliday & Shaffer, supra note 30, at 19. But see also id. at 15 (the requirement of “recognition” in the context of religious norms), and the justified criticism by Michaels, supra note 117, at 150.
155 Halliday & Shaffer, supra note 30, at 19.
156 Id.
157 Id. at 13.
158 See id. at 16; Kob, supra note 61, at 745–46.
159 See Michaels, supra note 117, at 154.
160 Shaffer, supra note 20, at 244.
Critics might ask what is added by the transnational approach as developed in the preceding sections. The answer is the answer given by many scholars of transnational legal theory: it shows the flow, diffusion and construction of norms across national borders, fostering a deeper understanding of the process of lawmaking in a globalized world.161

B. Vertical Transnational Ordering of Fiduciary Law

The vertical transnational legal ordering involves norms, as some scholars succinctly put it, “downloaded” from a domain beyond the nation state into national legal systems or “uploaded, then downloaded.”162 In the course of their voyage, norms created by non-state actors may gain normative force comparable to state law. This is one of the basic insights of transnational legal theory, not only true for lex mercatoria,163 but also for fiduciary norms. Given that the floating of norms stands at the center of transnational legal theory,164 the following section can forego another exercise in theorizing transnational law. Instead, it explores the issue based on a case study centering on fiduciary law. Specifically, it discusses the potential of transnational legal ordering in the area of environmental, social and (corporate) governance (ESG) matters165 in corporate law.166 ESG regulation unfolds normative force from a socio-legal perspective. This is true even for the United States, regardless of critiques pointing to the requirements of national law. Standards and principles on ESG relevant for corporate law have been floating around for a while now (Sub-section a). Even though they are “soft law,” (i.e., not law in the sense of classical positivist accounts of law) these norms find their way into national legal systems, either by way of legislation or through enforcement by private actors (Sub-section b).167

1. Standards and Principles

Two important international organizations, the United Nations (UN) and the OECD, have been setting standards for corporate law and corporate fiduciaries for quite a while now. The UN Environment Program joined with more than 200 private institutions to form the UNEP Finance Initiative (UNEP/FI),168 which delivered a report on “Fiduciary Duty for the 21st Century” in 2015169—a follow-up on an earlier report delivered in 2005.170 The report lays out a framework under which it would be not only legal to take ESG-matters into account, but which even requires fiduciaries to pay attention to ESG. A broader perspective is employed by the 2011 UN Guiding Principles on Business and Human Rights (UN Guiding Principles), holding business enterprises

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161 See supra III.1.a.
162 See Koh, supra note 61.
163 See supra II.1.
164 See supra III.1.a.
165 See supra I, text before note 30.
167 Bearing in mind the heated debate on ESG, a proviso seems in order: This article is neutral on the question whether this is a laudable or deplorable development. The only issue of interest is to show that these principles are at work. To decide if this is for better or for worse is up to the reader.
168 See supra note 17.
169 See supra note 19.
obliged to respect human rights. These UN Guiding Principles aver that the responsibility to respect human rights “is a global standard of expected conduct for all business enterprises wherever they operate.” According to the UN Guiding Principles, this responsibility “exists independently of States’ abilities and/or willingness to fulfill their own human rights obligations and does not diminish those obligations.” The guideline commentary positions it “over and above compliance with national laws and regulations protecting human rights.”

The G20/OECD 2015 principles on corporate governance recommend that corporate boards should take stakeholder interests into account.

2. Normative Effects of Non-binding Rules

Notwithstanding the purported softness and the non-binding character of the rules alluded to in the beginning of this section, it would be a mistake to discard them as politics or mere wishes of non-governmental actors, thereby carving them out of transnational fiduciary law. They are highly influential in shaping practice and legislation, especially in the last twenty years and increasingly so after the financial crisis of 2007/2008. As a consequence, they stand at the beginning of what appears now as the emergence of a transnational legal order. It is somewhat beside the point to argue that actions like a self-commitment to invest in line with ESG standards of various sorts of “soft law” run counter to actual law requiring directors to maximize shareholder wealth. Clearly, *Dodge v. Ford Motor Co.*’s progeny seems to prove these critics right, especially its modern Delaware offspring. Two things have to be borne in mind, however. Regardless of the “strictly legal point of view,” the critique carries only so far. It does not reach beyond state law pursuing the Delaware take on corporate directors’ fiduciary duties. Many jurisdictions outside the United States do follow a different path, among them major economies like France and Germany, to name but two. Even in the United States, a number of state corporate laws establish a stakeholder-oriented model of corporate governance, which at least makes it possible to take stakeholder-interests into account on the same footing with those of the shareholders.

Three examples may help to undergird the general claim expressed above that “soft law” on ESG exercises a normative thrust which has to be reckoned with, both from a more technical legal perspective and as a matter of socio-legal impact. The first example relates to recent French legislation on corporate law, the *loi PACTE* (Sub-section ii); the second one to ESG-disclosure rules in the EU (Sub-section iii), and the third to acknowledgment through enforcement of rights and remedies and the exercise of power (Sub-section iii).

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172 Id. at 13.
173 OECD, supra note 18, at 46.
176 See infra i.
179 See McDonnell, supra note 175, at 8, 16.
180 See, e.g., OECD, supra note 18, at 11 (“The Principles are widely used as a benchmark by individual jurisdictions around the world. They are also one of the Financial Stability Board’s Key Standards for Sound Financial Systems and provide the basis for assessment of the corporate governance component of the Reports on the Observance of Standards and Codes of the World Bank.”).
a. The French “Loi PACTE:”

One example is the French law on the growth and the transformation of businesses, known in shorter form as the loi PACTE. It contains, inter alia, new provisions on fiduciary duties. Pursuant to the reformed article 1833 of the French Code Civil, a corporation has to be managed in its social interest, taking into consideration its activities’ social and environmental effects, replacing the old focus on the common interest of the shareholders. PACTE relies to a considerable extent on the Notat-Sénard report, prepared by two high-profile individuals—one representing an ESG- and Union-perspective (Nicole Notat), the other “big business” (Jean-Dominique Sénard). Notat and Sénard explain their ESG-led reform proposals, inter alia, with reference to UN frameworks. Even though these and other international guidelines and principles are not the sole reason or even the main driving force behind the French bill, they serve as an important reference point and anchor linking national French law and transnational perspectives. PACTE firmly integrates these into national legislation and corporate fiduciary law.

b. EU ESG-reporting Standards

EU law requires large companies to disclose certain information on the way they operate and manage social and environmental challenges. The relevant Directive 2014/95/EU goes back to a strategy paper of the EU Commission. It grounds its policy approach, inter alia, in the UN Guiding Principles, qualifying them to be one element of “authoritative guidance . . . provided by internationally recognised principles and guidelines” and belonging to a “core set of internationally recognised principles and guidelines represents an evolving and recently strengthened global framework for CSR [i.e., corporate and social responsibility].” Companies subject to the Directive’s reporting and disclosure regime may rely on international frameworks in order to

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182 “PACTE” is an acronym for the “plan d’action pour la croissance et la transformation des entreprises”, a plan developed by the French government to give business the means to innovate, to transform, to grow and to create jobs (“donner aux entreprises les moyens d’innover, de se transformer, de grandir et de créer des emplois”). La loi PACTE adoptée par le Parlement, REPUBLIQUE FRANCAISE, https://www.economie.gouv.fr/plan-entreprises-pacte (last accessed Oct. 15, 2019).
183 See Pierre-Henri Conac, The Reform of Articles 1833 on Social Interest and 1835 on the Purpose of the Company of the French Civil Code: Recognition or Revolution?, in 1 Festschrift fur Karsten Schmidt Zum 80, for an overview in English.
184 “La société est gérée dans son intérêt social, en prenant en considération les enjeux sociaux et environnementaux de son activité.”
185 Conac, supra note 183, at 231. “Replace” concerns mainly the wording, in essence that stakeholder approach has long been the French law of the land. See id. at 230.
187 Nicole Notat is president of Vigeo Eiris, a rating firm specializing on ESG and former head of the Union CFDT, Jean-Dominique Sénard was the CEO of Michelin at the time the report was delivered.
188 Conac, supra Note 183, at 34, 41.
191 Id. at 6.
structure their non-financial disclosure document, among them the UN Guiding Principles. The EU regulation partly builds on a French role model on ESG reporting, enacted in its earliest form in 2001. Even if these reporting requirements, as the more reserved-minded argue, are just that and not fiduciary duties in the narrow sense, fiduciaries still have to explain themselves. Whereas this might not affect the legal grid of the fiduciary’s obligations directly, the normative expectations it has to cater to will change. This clearly is the EU’s idea, describing the disclosure requirements as part of a broader agenda.

Inhabitants of the planets Hart and Kelsen may still stress that legally, the fiduciary duties in a technical sense have not changed at all. But this argument does not prove much in the context of transnational law (and thus transnational fiduciary law) which conceives “norm” in a broader sense. What is relevant here is that the EU legislator clearly acts based on an understanding of the UN Guiding Principles and other international ESG standards as “authoritative” and “internationally recognised” principles for CSR and CSR-related duties in general. Disclosure rules concerning non-financial information are just one element of a broader strategy to push “enterprises [to adopt] a process to integrate social, environmental, ethical, human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders . . .” They represent an expression of this broader conception rather than being an exception to the rule. From a policy point of view, these guidelines and principles unfold normative thrust, especially in countries with already more stakeholder-oriented approaches in corporate law.

c. Acknowledgment Through the Enforcement of Rights, Remedies and Exercise of Power

Even in nation states without comprehensive ESG legislation such as the United States, ESG standards start becoming influential in shaping fiduciary law, at least from a socio-legal perspective. Institutional investors increasingly put ESG on the corporate policy agenda, calling for boards to disclose and act according to established international frameworks such as the UN Guiding Principles. BlackRock, one of the world’s largest investment firms, professes to monitor and engage “with companies to encourage them to adopt business practices consistent with sustainable long-term value creation,” citing ESG as a prime example. BlackRock has been a signatory to the United Nations-backed Principles for Responsible Investment (PRI) since 2008. Given this changing environment, corporate boards not dealing with ESG matters will more likely slide between a rock and a hard place, with non-governmental organizations such as Oxfam as additional watchers on the wall.

194 See Conac, supra note 183; Geburtstag, supra note 5, at 229, 230.
195 E.g., Holger Fleischer, Vermessung eines Forschungsfeldes aus rechtlicher Sicht, in CORPORATE SOCIAL RESPONSIBILITY 1, 31 (Holger Fleischer, Susanne Kalss & Hans-Ueli Vogt eds., 2018). Some German scholars have argued to the contrary, i.e., that the reporting standards indirectly alter the board members’ fiduciary duties under German law, e.g., Peter Hommelhoff, Nichtfinanzielle Ziele in Unternehmen von öffentlichem Interesse – Die Revolution übers Bilanzrecht, in FESTSCHRIFT FÜR BRUNO KÜBLER 291 (Reinhard Bork, Godehard Kayser & Frank Kebekus eds., 2015).
196 See Communication from the Commission, supra note 190, at 7.
197 Halliday & Shaffer, supra note 30, at 11.
198 See Communication from the Commission, supra note 190.
199 Id. at 6–7.
201 Id. at 19.
Institutional investors like BlackRock and other groups hold a rich set of cards in their hands. They can submit shareholder proposals, initiate campaigns against incumbent directors at annual meetings or divest of their holdings in a corporation, to name but a few examples. Imagine Carl Icahn “tweeting” not that he had a “cordial dinner with Tim” (Cook),203 but his dissatisfaction with management’s approach to environmental issues—“will divest US$ 1 bill. in shares tomorrow.”204 Publicly asking management to explain why poultry workers—not in Bangladesh, but in the United States—have to wear diapers at work205 will not slip away unattended on a corporate board agenda’s backside. In these and other circumstances, reality in the boardroom will prevail over the courtroom, even in Delaware. Notwithstanding the Delaware creed of shareholder primacy and shareholder value only,206 measures like those mentioned before have to be addressed by corporate directors. Not doing so creates more bad publicity and, at least in many cases, causes stock prices to take a dive. Recent surveys suggest that the majority of corporate boards engage seriously and regularly with ESG-issues.207 One hundred eighty-one CEOs signed the 2019 statement of the “Business Roundtable” in the United States, proclaiming publicly a commitment to all stakeholders.208 There is good cause to question the motives behind corporate ESG-commitment.209 But there is also no denying the fact that companies are implementing and debating ESG-policies following the standards and principles outlined above.

Moreover, most pundits agree that shareholder primacy statutes such as the Delaware General Corporation Law leave room for paying attention to stakeholder interests in the course of ordinary business decisions.210 Whereas the norms in their purest form—“shareholders only” versus mandatory inclusion of stakeholders—grind against each other, the business judgment rule typically works as the sheet anchor, “though [management] may have to be just a bit careful about what they say.”211 Change of control and corporate takeovers are the scenarios in which Delaware courts require boards to act single-mindedly in the interests of shareholders.212 They do not happen on a daily basis.


205 See McDonnell, supra note 175, at 8, 18, for a recent overview.


208 Early stakeholder-friendly statutes in the U.S. just mirrored anti-takeover provisions in the articles of association, thereby giving cause to believe that the motive was protecting incumbent management, not protecting workers or the environment. See Jonathan D. Springer, Corporate Constitution Statutes: Hollow Hopes and False Fears, 1999 ANN. SURV. AM. L. 85, 94 (1999); with respect to Minnesota, see McDonnell, supra note 175, at 18.

209 See McDonnell, supra note 175, at 20, 28.

210 Id. at 20.

211 See the crisp analysis by McDonnell, supra note 175, at 18–22.
C. Transnational, Not Global Fiduciary Law

Not a few authors mining the veins of transnational legal theory posit the emergence of “world law” 212 or “global law.” 213 Tamar Frankel, arguably the mother of the field of fiduciary law in the common law world, sees universal fiduciary principles at work and argues for the adoption of a hybrid system of fiduciary law. 214 Whereas the functional approach builds a bridge over the troubled waters separating common law and civil law, unifying the two worlds with respect to fiduciary law may appeal to many as a matter of legal politics, but is likely to run into serious trouble in practice. In light of the remaining differences between civil law and common law systems (and the considerable differences between legal systems within the respective families), a more cautious approach allowing for the emergence of several transnational legal orders 215 seems the more promising road to travel.

This is corroborated by the fact that, as Clifford Geertz famously put it, law is local knowledge. 216 Searching for and then comparing abstract legal principles therefore does not amount to much, 217 especially in transnational law or so-called “global” law. “[G]lobal doctrine becomes clothed in local knowledge.” 218 It is enmeshed in prior customs and legal traditions. Different legal systems may co-exist side by side or tie the knot, leading to a hybrid, neither common law nor civil law, built on layers upon layers of regime changes and shifting political environments. 219 There is no peeling off the eggshells of common law or civil law and out comes the global fiduciary law chick. Acknowledging and accepting principles of fiduciary duty or, more generally, fiduciary law in any given system, no matter whether bred within it or transplanted from the outside, will work only if the relevant rules and principles latch on to what is there already. Transnational legal orders most likely arise based on pre-existing bonds and shared traditions.

IV. ELEMENTS OF TRANSNATIONAL FIDUCIARY LAW

As already stated in the introduction, transnational legal orders unfold in terms of geographic and legal scope. 220 Until now, this Article has dealt with the geographic scope as the first prong of transnational legal ordering. The following section takes up the second prong, i.e. the elements of transnational legal orders.

Employing a transnational perspective not only ushers in delineating multiple spaces of transnational legal ordering of fiduciary law. It also reveals how fiduciary law on the transnational plane develops elements different from national legal orders, either as variations on common themes such as the duty of loyalty or because the content of fiduciary obligations diverges from national law. First of all, as Sub-section I. will show, the distinctiveness of the duty of loyalty, an issue of the highest importance in national common law legal orders, may play out differently, depending on the scope of contract.

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212 Harold J. Berman, World Law, 18 FORDHAM INT’L L.J. 1617, 1619 (1995) (“[T]he word ‘transnational’ refers back to the era of sovereign national states and indicates that it is to be transcended. It does not, however, give a new name to the new era that all humanity has entered. The right name for the new era, I submit, is ‘emerging world society,’ and the right name for the law by which it is governed is ‘world law.’”).
213 Tümpner, supra note 34, at 4 (“Thus we see a number of inchoate forms of global law, none of which are the creations of states.”).
214 Frankel, supra note 14, at 432–34.
215 See, e.g., Halliday & Shaffer, supra note 30, at 18–21.
216 CLIFFORD GEERTZ, LOCAL KNOWLEDGE 167 (1993) (“[L]aw and ethnography are crafts of place: they work by the light of local knowledge.”).
217 See id. at 218; see also Andrew Harding, Global Doctrine and Local Knowledge: Law in South East Asia, 51 INT’L & COMP. L. Q. 35 (2002).
218 Harding, supra note 217, at 45.
219 This has been demonstrated for South East Asia. See, e.g., Harding, supra note 217; Carol G.S. Tan, Law and Legal Systems in South East Asia: Three Paths to a Viewpoint, in TRADING ARRANGEMENTS IN THE PACIFIC RIM – ASEAN AND APEC, Commentaries, 1 (Paul J. Davidson ed., 1998).
220 See Halliday & Shaffer, supra note 30.
Secondly, Sub-section 2. demonstrates that even within the common law, court communication between individual nation states may engender several fiduciary legal orders. Thirdly, Sub-section 3. argues that the duty of loyalty does not necessarily become manifest in a single norm which, when applied to a fact-pattern, unfolds in more fine-grained specific rules, but may also be the result of bundling together a number of particular rules. In other words, different legal orders may construct the duty of loyalty differently. Again, East Asia provides an example at hand.

A. The Fiduciary Duty of Loyalty and the Scope of Contract in Common Law and Civil Law

Given the peculiarities of fiduciary obligations compared to contract law in the common law world, the outcome of a case hinges on which drawer a judge pulls open. It is most importantly the duty of loyalty where fiduciary law and contract law part ways. Loyalty “is one of the most prominent features of fiduciary law[,] . . . often considered essential to fiduciary relationships . . .”  

It “is a part of what gives the field its distinctive qualities.” 222 Millet J, in the seminal decision Bristol & West Building Society v Moughton, held it to be the “distinguishing obligation of a fiduciary . . .

Embracing a particular obligation as part of the duty of loyalty224 is of double import in the common law. At least historically, it helps to overcome several shortcomings of contract law. Fiduciary duties arise without having to follow a certain set of rules governing formalities of forming an enforceable agreement.225 Other than a party to a contract, the beneficiary of a fiduciary obligation may compel the fiduciary to specific performance and not only claim damages.226 Beneficiaries have rights against the fiduciary, whereas (English) contract law did protect only the parties of the contract.227

When contract law provides for specific performance, does not require consideration, and knows third-party beneficiaries, as is the case in civil law jurisdictions, the coordinates change. To a certain extent, speaking of a duty of loyalty and fiduciary obligation(s) loses its significance. Sorting a breach into the register of “contract” instead of “loyalty” then does not make much of a difference, as long as the judge qualifies the fiduciary’s behavior as a breach of their obligations.

What makes this interesting from the perspective of transnational legal theory is not the comparative insight. Rather, it is important as a potentially constitutive feature of a transnational legal order. In the end, loyalty keeps pride of place as the distinctive feature of fiduciary law in its transnational version. But it is distinctive first and foremost viewed from an overarching functional perspective—wherever the law specifically requires a person enjoying discretionary other-regarding powers to act loyally towards a beneficiary, transnational fiduciary law emerges. Consequently, transnational fiduciary law knows different shades of loyalty and therefore offers room for different transnational fiduciary legal orders.

B. Contents of Fiduciary Obligations

Speaking of transnational fiduciary law in the common law world can mean two different things. First, all jurisdictions hold the duty of loyalty near and dear to the heart of the fiduciary relationship.228 Commonwealth courts frequently cite and discuss decisions of courts in other nation states belonging to the same legal family. Sharing the

222 Gold, supra note 75, at 386.
224 On the varying accounts of the duty of loyalty’s contents see Gold, supra note 75, at 387–89.
226 Id. at 150.
227 Id. at 150. In the United States, the situation is different. See Langbein, supra note 45, at 653.
228 See supra II.3.
common law background, traditions and history of the British colonial empire, there is a strong degree of connected history and entanglement.\(^{229}\) Perhaps somewhat counter intuitively, especially for the civil lawyer dabbling in matters of equity law, it is not only English law and English courts influencing courts in the former dominion. Starting with an Australian case, court communication between Australian and English courts across national borders has led to at least two transnational legal orders in fiduciary law, one including the United States of America, the other excluding it. They overlap insofar the duty of loyalty is concerned. But as far as the duty of care is at issue, there are different transnational legal spaces of fiduciary law.

Second, in the seminal case Permanent Building Society (in liq) v Wheeler, the Australian Supreme Court, led by Ipp J, denied the duty of care having a fiduciary character, qualifying only the duty of loyalty as truly fiduciary in nature.\(^{230}\) That was taken up by the English High Court and Millet J in the also seminal decision Bristol & West Building Society v Mathew.\(^{231}\) Just like the example of trust legislation in East Asia, courts in the United Kingdom and Australia watch each other and, sometimes, communicate in their reasoning. This establishes another example of connected histories as the development of the law–fiduciary law in this case–is the product of shared experiences and legal reasoning across national borders.

A skeptic might argue that even those who think of the duty of care as a fiduciary obligation doubt its quality as a distinctive feature of fiduciary relationships\(^{232}\) or even deny it.\(^{233}\) Starting with this critical view as a premise, one might deny the existence of two transnational orders of fiduciary law in the common law world. Nevertheless, the question remains relevant. Where the duty of care kept its place under the fiduciary roof, it interacts with the duty of loyalty.\(^{234}\) Put differently, courts seem to construe the demands of loyalty in light of how the duty of care works, inside or outside the fiduciary relationship–defined narrowly. Vice versa, as the Japanese example shows,\(^{235}\) duties of care can gobble up parts of what in Australia is defined in terms of loyalty.

It is open to further research to assess court practice and see to what extent judges following the Australian and English approach allocate issues to the duty of loyalty their US counterparts would solve referring to the duty of care.

C. Constructing the Duty of Loyalty

Anyone looking for a duty of loyalty as the distinctive feature of transnational law has to consider that not all jurisdictions construct this duty comparable to the common law approach, i.e. as a single rule which then is divided into several sub-norms depending

\(^{229}\) See supra III.1.b.ii, for theoretical background on connected history and entanglement.


\(^{231}\) Millet J, Bristol & West Building Society v Mathew [1996] EWCA (Civ) 33, [1996] 4 All ER 698 [711]–[712] (Eng.). This is not to say that the issue has been definitely settled either in the United Kingdom or in Australia. The line of cases mentioned above is subject to severe criticism. See, e.g., Dyson Heydon QC, Modern Fiduciary Liability: The Sick Man of Equity?, 20 TRUST & TRUSTEES 1006 (2014). In recent years, several court decisions may well be interpreted as scaling back on the issue and at least propagating a more nuanced view. The courts are carefully citing cases of the pre-1994 era. See, e.g., Pitt v Holt [2011] EWCA (Civ) 197 and [2013] UKSC 26 (Eng.); Ancient Order of Foresters in Victoria Friendly Society Limited v Lifespan Australia Friendly Society Limited [2018] HCA 43 (Austl). For the purposes of this Article, however, these criticisms and newer developments in the case law do not change the fact that—at least for more than a decade—English and Australian courts developed a distinct concept of fiduciary law by communicating across borders.


\(^{233}\) Peter Birks, The Content of Fiduciary Obligation, 34 ISRAEL L. REV. 3, 35 (2000) (The duty of care “is a fiduciary obligation, but is not, as such, distinguishable from any contractual or non-contractual duty of care.”).

\(^{234}\) Goldberg, supra note 232, at 407.

\(^{235}\) See infra 3.
on the fact pattern in case. Alternatively or in addition, the duty of care bears the potential of solving loyalty-related issues. Again, the functional perspective governs the analysis of fiduciary law on the transnational level. Once more, the “East Asian Four” provide an example at hand.

Until recently, China, Japan, Taiwan, and South Korea did not have an open-ended standard establishing a fiduciary duty of loyalty in trust law. They have implemented a more diverse set of rules, each addressing a more specific aspect of the trustee’s obligation. Combined in a bundle, however, they yield the idea of loyalty. Moreover, they “impose the core trust obligations on a trustee.” This turns the common law doctrine on its head; instead of loyalty as a ground rule from which courts extract more specific duties, they generate a general rule by induction. As in Germany and other civil law jurisdictions, these duties add to the regular set of contractual obligations without having fundamentally different remedies.

One should hasten to add that, in 2006 and 2011 respectively, Japan and South Korea introduced generic duties of loyalty. What remains to be seen, however, is the extent to which these duties will be able to lead a life on their own. Taking into account the other and more specific rules on a trustee’s obligations, it is likely that courts will construe a much narrower scope of application and judge cases referring to the more specific duties and other sets or rules.

Experiences with Japanese corporate law corroborate this assumption. Under US military rule, Japan introduced a duty of loyalty in its corporate law in 1950, in addition to an older provision on agency law, also applicable on corporate directors, which imposes a duty of care. Nevertheless, the Japanese Supreme Court held the general agency provision to comprise a duty of loyalty, rendering the later corporate law provision superfluous. It was only later, in 1989, that the Supreme Court switched gears in corporate law and now solves at least some loyalty issues by relying on the specific corporate law provision. Nevertheless, Japanese courts do not use this provision extensively and still seem to cling to the old Supreme Court decision. Corporate and comparative law scholars weigh different reasons for this reluctancy. One of these reasons, however, unsurprisingly seems to be the legal environment the duty of loyalty was transplanted into. The idea was already there and found its way into court practice by other normative means. Outside the corporate law arena, Japanese judges solve loyalty issues based on the general agency provision until this day.

V. SUMMARY

Viewing fiduciary law from the perspective of transnational legal theory provides important insights into the emergence of legal orders and processes of legal ordering transcending the boundaries of nation states. All legal systems have to deal with problems

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236 See supra II.2.
237 On East Asia see supra III.b.i.
238 Ho, supra note 132, at 296–98. On China, see Ho, supra note 131, at 210–17.
239 Ho, supra note 132, at 297–98.
240 Id. at 297.
241 See Gold, supra note 75, at 386.
242 Tamaruya, supra note 47, at 2250.
244 Id. at 648.
246 Id. at 898–901.
247 Id. at 651, 651 n.6 and accompanying text.
248 See Kanda & Milhaupt, supra note 245, at 898–901.
249 Id. at 900.
250 Id. at 899.
251 Ramseyer & Tamaruya, supra note 243, at 649, 657.
arising out of relationships in which one person enjoys discretionary powers over the interests of another. Interestingly, but perhaps not surprisingly, both common law and civil law jurisdictions have developed a set of tools subjecting the person having powers under loyalty constraints in various ways. Regardless of their differences in traditions and technical approaches, from a functional perspective the divide between common law and civil law may be crossed.

On the one hand, this perspective makes it possible to paint a picture of fiduciary law outside the common law. It helps to understand how norms and institutions taken from the common law (such as the trust) may survive and profligate in civil law systems, which lack an equity tradition. On the other hand, using the example of trust law as an instance of fiduciary law shows that conventional transnational legal theory leaves a blind spot, because it concentrates too much on norms “beyond” the nation state being incorporated or acknowledged in national legal institutions.

Transnational fiduciary law develops in different spaces and may develop in horizontal and vertical dimensions. Horizontal transnational ordering concerns the flow of norms between nation states. The example of the trust in four East Asian countries, Japan, Taiwan, South Korea, and China, demonstrates that legal orders may evolve in reaction to each other, using and implementing norms created in other nation states. This recursive process is not captured by traditional accounts of comparative law. Transnational legal theory offers a methodological toolbox which allows one to better focus on the process of norm creation beyond nation states. The case study of so-called “soft law” on ESG is an example of vertical transnational ordering of fiduciary law. Exploring fiduciary law from a transnational angle and its socio-legal point of view adds value, because it lays bare several ways in which non-binding norms created by international organizations like the UN or the OECD unfold normative thrust, even in legal systems resting on legal concepts like shareholder value.

Last, but not least, employing a transnational perspective provides insights into how the contents of fiduciary obligations may be conceptualized differently in different (transnational) legal orders. Even though the duty of loyalty remains distinct, its import may differ from order to order. Moreover, the contents of fiduciary obligations may vary. Communication between courts in Australia and England led to a transnational fiduciary legal order where the duty of care is no longer considered having the quality of a fiduciary obligation.