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## Transnational Fiduciary Law: Spaces and Elements

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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 proves 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.<sup>1</sup> In spite of its "elusive" nature,<sup>2</sup> enough instances of fiduciary relationships occur across a wide variety of legal areas that many—with good cause—describe it as a distinctive field.<sup>3</sup> Although civil law

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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).

2. Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 79 DUKE L.J. 879, 879 (1988).

3. Groundbreaking: Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795 (1983); *see also* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 1 (Andrew S. Gold & Paul B. Miller eds., 2014)

countries have no tradition of the trust as a legal institution,<sup>4</sup> courts and scholars alike term relationships based on some kind of personal or professional trust “fiduciary.”<sup>5</sup> German law subjects guardians,<sup>6</sup> trustees in bankruptcy,<sup>7</sup> attorneys,<sup>8</sup> and others to a specific set of duties, the most important of which is a duty of loyalty.<sup>9</sup> France has introduced “*la fiducie*.”<sup>10</sup> 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).<sup>11</sup> Courts across

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(“Whether it is viewed from the perspective of relationships, rights and duties, or wrongs and remedies, fiduciary law is a distinctive body of law.”).

4. See, e.g., Richard Helmholz & Reinhard Zimmermann, *Views of Trust and Treuhand: An Introduction*, in ITINERA FIDUCIAE: TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE 27 (Richard Helmholz & Reinhard Zimmermann eds., 1998).

5. See Thilo Kuntz, *Das Recht der Interessenwahrungsverhältnisse und Perspektiven von Fiduciary Law in Deutschland*, in I FESTSCHRIFT FÜR KARSTEN SCHMIDT ZUM 80. GEBURTSTAG 761 (Katharina Boele-Woelki et al. eds., 2019) (in German).

6. E.g., Bundesgerichtshof [BGH] [Federal Court of Justice], Mar. 30, 1955, 17 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN [BGHZ] 108 (116); KONRAD RUSCH, GEWINNHAFTUNG BEI VERLETZUNG VON TREUEPFLICHTEN, 191 (2003); Walter Zimmermann, in SOERGEL, 20 KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 1833 margin no. 1, 3 (13th ed. 2000).

7. 214 BGHZ 220 (margin no. 12) (Ger.); Udo Becker, *Insolvenzverwalterhaftung bei Unternehmensfortführung* 40 (2017).

8. E.g., Oberlandesgericht [OLG] [Court of Appeal] Brandenburg, Mar. 5, 2012, *Neue Juristische Wochenschrift – Rechtsprechungsreport* [NJW-RR] 1191 (1193). The legal basis for fiduciary duties of a German attorney (*Rechtsanwalt*) is to be found in Section 43a of the Federal Lawyer’s Act (*Bundesrechtsanwaltsordnung*): “The basic duties of a Rechtsanwalt: (1) A Rechtsanwalt may not enter into any ties that pose a threat to his/her professional independence. (2) A Rechtsanwalt has a duty to observe professional secrecy. This duty relates to everything that has become known to the Rechtsanwalt in professional practice. This does not apply to facts that are obvious or which do not need to be kept secret from the point of view of their significance. (3) A Rechtsanwalt must not behave with lack of objectivity in professional practice. Conduct which lacks objectivity is particularly understood as conduct which involves the conscious dissemination of untruths or making denigrating statements when other parties involved or the course of the proceedings have given no cause for such statements. (4) A Rechtsanwalt may not represent conflicting interests. (5) A Rechtsanwalt must exercise the requisite care in handling any assets entrusted to him/her. Monies belonging to third parties must be immediately forwarded to the entitled recipient or paid into a fiduciary account. (6) A Rechtsanwalt has a duty to engage in continuing professional development.” *Translated in* [http://www.brak.de/w/files/02\\_fuer\\_anwaelte/ brao\\_engl\\_090615.pdf](http://www.brak.de/w/files/02_fuer_anwaelte/ brao_engl_090615.pdf) (last accessed Oct. 15, 2019).

9. See Kuntz, *supra* note 5, at 762 et seq.

10. Loi 2007-211 du 19 février 2007 instituant la fiducie [Law 2007-211 of Feb. 19, 2007 on Instituting the Trust], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] Feb. 21, 2007, p. 3052. On open questions concerning concept and doctrine, e.g., Yaëll Emerich, *Les Fondements Conceptuels de la Fiducie Française Face au Trust de la Common Law: Entre Droit des Contrats et Droit des Biens*, 61 REVUE INTERNATIONALE DE DROIT COMPARE 49 (2009) (comparing the French *fiducie* with the common law trust); see also the short overview in Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law Systems*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 583, 594 (Evan J. Criddle et al. eds., 2019).

11. Hague Conf. on Priv. Int’l L. [HCCH], *Convention on the Law Applicable to Trusts and on Their Recognition* (July 1, 1985), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=59>; for a list of signatories and the status of ratification: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=59> (both internet sources last accessed Oct. 15, 2019). See also COMMERCIAL TRUSTS IN EUROPEAN PRIVATE LAW: THE INTEREST AND SCOPE OF THE ENQUIRY (Michele Graziadei, Ugo

common law jurisdictions and common law legal scholarship deal concepts and ideas concerning fiduciary law back and forth.<sup>12</sup> Moreover, civil law countries combined property and contract law in order to fashion substitutes for the common law trust. Contract-based *Treuhänderverhältnisse*, i.e. relationships of trust, have been part and staple of the German legal discourse for several decades, if not centuries.<sup>13</sup>

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.<sup>14</sup> East Asian countries with a strong civil law background such as Japan created the trust as a legal institution.<sup>15</sup> Mixed legal systems in the United States (Louisiana) and Canada (Quebec) did the same.<sup>16</sup> 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<sup>17</sup> (e.g., the OECD Principles of Corporate Governance<sup>18</sup> and the UN report on “Fiduciary Duty for the 21<sup>st</sup> Century”<sup>19</sup>) 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

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Mattei, Lionel Smith eds., 2005); RE-IMAGINING THE TRUST: TRUSTS IN CIVIL LAW (Lionel Smith ed., 2012).

12. See *infra* IV.2, for more on this.

13. See Stefan Grundmann, *The Evolution of Trust and Treuhand in the 20<sup>th</sup> Century*, in Helmholz & Zimmermann, *supra* note 4, at 469.

14. Tamar Frankel, *Toward Universal Fiduciary Principles*, 39 QUEEN’S L.J. 391 (2014).

15. See *infra* III.1.b.i, for more on this.

16. On Louisiana, see Michael McAuley, *Truth and reconciliation: Notions of property in Louisiana’s Civil and Trust Codes*, in RE-IMAGINING THE TRUST: TRUSTS IN CIVIL LAW 119 (Lionel Smith ed., 2012).

On Quebec, see JOHN B. CLAXTON, *STUDIES ON THE QUEBEC LAW OF TRUST* (2005).

17. *Background*, UNITED NATIONS ENV’T PROGRAMME FINANCE INITIATIVE, <https://www.unep.fi.org/about/background/> (last visited Oct. 21, 2019).

18. ORG. FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], G20/OECD PRINCIPLES OF CORPORATE GOVERNANCE (2015), <https://www.oecd.org/corporate/principles-corporate-governance.htm> (last visited Oct. 21, 2019).

19. *Fiduciary Duty in the 21<sup>st</sup> Century*, <https://www.fiduciaryduty21.org/> (last visited Oct. 21, 2019).

fit the bill of the traditional dichotomy of national law or international law.<sup>20</sup> In the well-known words of Philip Jessup:<sup>21</sup>

[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.”<sup>22</sup> 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.”<sup>23</sup> Anyone slogging through the heap of literature on transnational legal theory ends up in “a jungle without a map.”<sup>24</sup>

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,<sup>25</sup> 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.<sup>26</sup> 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

20. See, e.g., GRALF-PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW (2010); Roger Cotterrell, *What is Transnational Law?*, 37 L. & SOC. INQUIRY 500, 500 (2012); Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 ANN. REV. L. & SOC. SCI. 231, 232 (2016).

21. PHILIP C. JESSUP, TRANSNATIONAL LAW (1956).

22. See DeMott, *supra* note 2.

23. Cotterrell, *supra* note 20, at 522.

24. Shaffer, *supra* note 20, at 232.

25. THE OXFORD HANDBOOK OF COMPARATIVE LAW (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019).

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).

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 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,"<sup>27</sup> it is no wonder that definitions of transnational law have multiplied over the years.<sup>28</sup> 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

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27. H. Patrick Glenn, *A Transnational Concept of Law*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 839, 860 (Mark Tushnet & Peter Cane eds., 2005).

28. Excellent overviews are provided by Cotterell, *supra* note 20; Shaffer, *supra* note 20; LARS VIELLECHNER, TRANSNATIONALISIERUNG DES RECHTS 159 (2013) (in German). See also Glenn, *supra* note 27, at 849.

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.<sup>29</sup> 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 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.”<sup>30</sup> 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.<sup>31</sup> 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

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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.”).

30. Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS* 3, 28 (Terence C. Halliday & Gregory Shaffer eds., 2015).

31. *Id.*

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<sup>32</sup> 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 bird's eye,<sup>33</sup> 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.

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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).

33. See Gelter & Helleringer, *supra* note 10; Michele Graziadei, *Virtue and Utility: Fiduciary Law in Civil Law and Common Law Jurisdictions*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 287 (Andrew S. Gold & Paul B. Miller eds., 2014).

*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*.<sup>34</sup> 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,<sup>35</sup> the International Swaps and Derivatives Association’s master agreements for derivatives,<sup>36</sup> Internet Regulation by ICANN,<sup>37</sup> or standards set by the International Organization for Standardization (ISO).<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> It evolved on a general level out of equity and equitable remedies and is tightly bound to the trust as a legal institution.<sup>41</sup> Civil law

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34. May it be real or imagined, see Graf-Peter Calliess, *Transnationales Verbrauchervertragsrecht*, in 68 RABELSZ 244, 254 (2004); CALLIESS & ZUMBANSEN, *supra* note 20, at 28; Gunther Teubner, ‘Global Bukovina’: 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.

35. See, e.g., Gregory Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147 (2009).

36. INTERNATIONAL SWAPS AND DERIVATIVES ASSOCIATION, INC., [www2.isda.org](http://www2.isda.org) (last visited Oct. 24, 2019). See, e.g., Johan Horst, *Lex Financiarum. Das transnationale Finanzmarktrecht der International Swaps and Derivatives Association (ISDA)*, 53 ARCHIV DES VÖLKERRECHTS 461 (2015) (in German).

37. See Lars Viellechner, *Governing Through Transnational Arrangements: The Case of Internet Domain Allocation*, in SOCIETY, REGULATION AND GOVERNANCE: NEW MODES OF SHAPING SOCIAL CHANGE? 106 (Regine Paul et al. eds., 2017).

38. See, e.g., TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORD ECONOMY 162 (2011).

39. “Most,” considering that some members of each family 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.

systems traditionally lack both. They have never had an equity tradition and therefore know no equitable remedies.<sup>42</sup> Moreover, the trust in its common law form as dual ownership either is unknown (e.g., Germany, Switzerland),<sup>43</sup> even though a number of civil law countries recognize the trust as a matter of private international law (e.g., Italy, Netherlands) or have even implemented the trust (e.g., Japan).<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> In many instances, there is something called “fiduciary duty” and

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42. Gelter & Helleringer, *supra* note 10, at 585.

43. See Bundesgericht [BGer] [Federal Supreme Court] Jan. 29, 1970, 96 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] II 79, 88 (Switz.), for Switzerland.

44. On the trust in East Asia *infra* III.1.b.i.

45. DeMott, *supra* note 2, at 885–86; Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 MARQ. L. REV. 303 (1999); TAMAR FRANKEL, *FIDUCIARY LAW*, 229–35 (2011). For an opposing view, for example, Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & ECON. 425 (1993); with certain reservations John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 671 (1995); see also D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1492 (2002).

46. See Hague Conf. on Priv. Int’l L. [HCCH], *Status Table 30: Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=59> (Oct. 19, 2017).

47. Masayuki Tamaruya, *Japanese Law and the Global Diffusion of Trust and Fiduciary Law*, 103 IOWA L. REV. 2229 (2018).

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.

“fiduciary law” in the United States mirrored by *Treuepflicht* in Germany.<sup>51</sup> 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.<sup>52</sup> 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<sup>53</sup> do not put their finger on the issue. Pertinent journal articles accepting conventional premises about transnational law are at least not so easy to find.<sup>54</sup> The rare article here and there pointing to comparative law as a necessary tool for transnational law<sup>55</sup> 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<sup>56</sup> or want to enrich comparative law by integrating insights from transnational legal theory.<sup>57</sup>

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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 & ZUMBANSEN, *supra* note 20; Halliday & Shaffer, *supra* note 30.

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.

55. Mathias Lehmann, *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*, 42 COLUM. J. TRANSNAT’L L. 753, 753–54, 763 (2004) (defining transnational law as “general principles of law that are recognized by a significant number of national laws” and demanding “converge[nce] on the same solution to a particular problem”); in the same vein and relying on Lehmann’s definitions, see Reza Dibadj, *Panglossian Transnationalism*, 44 STAN. J. INT’L L. 253, 289–97 (2008).

56. Russel A. Miller & Peer C. Zumbansen, *Introduction – Comparative Law as Transnational Law*, in *COMPARATIVE LAW AS TRANSNATIONAL LAW: A DECADE OF THE GERMAN LAW JOURNAL* 3 (Russel A. Miller & Peer C. Zumbansen eds., 2011).

57. Mathias Reimann, *Beyond National Systems: A Comparative Law in the International Age*, 75 TUL. L. REV. 1103, 1115–19 (2001). Reimann’s approach did not generate a large following. See Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOK. J. INT’L L. 385, 424 (2011). In the ensuing ten years, to be fair, comparativists did not rush to engage with what Reimann called “vertical comparisons.”

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.<sup>58</sup> Additionally, there has to be some connection of the transnational norm to national law or national lawmaking.<sup>59</sup> If transnational legal orders unfold through “the adoption, recognition, or enforcement of the norms” by legal institutions within multiple nation states,<sup>60</sup> 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 orders<sup>61</sup> 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<sup>62</sup>—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.<sup>63</sup> Institutions are comparable if they serve similar purposes (*function*) in the systems compared.<sup>64</sup> A function, at least according to a popular definition in the comparatist’s methodological quiver, is the relation between institutions and problems.<sup>65</sup> Therefore, one first has to nail down the problem which then may serve as the constant for the comparative work.<sup>66</sup>

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 *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

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

59. CALLIESS & ZUMBANSEN, *supra* note 20, at 110; Halliday & Shaffer, *supra* note 30, at 13.

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

61. Harold H. Koh, *Why Transnational Law Matters*, 24 PENN STATE INT’L L. REV. 745–46 (2006).

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.

66. *Id.*

whether these [similarities or differences] are accidental or necessary, or how they relate to society.”<sup>67</sup> They “simply” have to fulfill the same purpose.<sup>68</sup> How this all plays out is shown in the next sub-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,<sup>69</sup> 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.<sup>70</sup> In the language of law and economics, this gives rise to a principal-agent problem.<sup>71</sup> 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.<sup>72</sup> That creates an opportunity to engage in opportunistic behavior or, in the famous phrase coined by Oliver Williamson, “self-interest seeking with guile.”<sup>73</sup> The agent may engage in hidden actions under conditions of moral hazard.<sup>74</sup> 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.<sup>75</sup> These “no conflict” and “no profit” rules build the fiduciary loyalty’s core in the common law.<sup>76</sup> They serve as entry points for more specific duties such as to ask for consent in conflicted transactions and remedies such as disgorgement of

67. *Id.* at 369.

68. Dubious therefore Gelter & Helleringer, *supra* note 10, at 595–96.

69. Compare, to name just three recent attempts at a general definition and theory: Paul B. Miller, *The Fiduciary Relationship*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 63 (Andrew S. Gold & Paul B. Miller eds., 2014), developing a “fiduciary powers theory;” Smith, *supra* note 45, testing a “critical resource theory” and; Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 TEX. L. REV. 993 (2017).

70. See Paul B. Miller, *The Identification of Fiduciary Relationships*, in 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, Book Review, 35 L. & PHIL. 123, 132–34 (2016) (reviewing PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew S. Gold & Paul B. Miller eds., 2014)).

71. See Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 197, 198 (Andrew S. Gold & Paul B. Miller eds., 2014).

72. *Id.* at 199.

73. Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J. L. & ECON. 233, 234 n.3 (1979).

74. Sitkoff, *supra* note 71, at 199.

75. Andrew S. Gold, *The Fiduciary of Loyalty*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 385, 387, 389 (Evan J. Criddle et al. eds., 2019); Paul B. Miller, *A Theory of Fiduciary Liability*, 6 MCGILL L.J. 235, 257 (2011). See Sitkoff, *supra* note 71, at 201, from a law and economics point of view.

76. Gold, *supra* note 75, at 386.

profits.<sup>77</sup> German law reacts to a similar set of real-world problems by means of functionally equivalent rules:

Contracts between attorneys, investment advisors, tax consultants and their clients, distribution agreements (*Vertriebshändlervertrag*), 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*.<sup>78</sup>

The German Civil Code (*Bürgerliches Gesetzbuch* – “BGB”) provides default rules for an agreement to act on another person’s behalf<sup>79</sup> in the shape of a mandate contract, (*Auftrag*)<sup>80</sup> 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,<sup>81</sup> 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,<sup>82</sup> the disgorgement of profits,<sup>83</sup> and a penalty in case the agent misappropriates assets under his management.<sup>84</sup> Generally, it is an accepted (if

77. *Id.* at 387, 394.

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 mandatary 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](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934) (last visited Oct. 15, 2019).

82. Section 666 of the *BGB*: “The mandatary 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](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 obliged to return to the mandator everything he receives to perform the mandate and what he obtains from carrying out the transaction.” BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ, [https://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p2934](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934) (last visited Oct. 15, 2019). *See also* Graziadei, *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](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934) (last visited Oct. 15, 2019) (Ger.) (“If the mandatary 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.”).

unwritten) basic rule that the agent has to put the principal's interests before their own and avoid conflicts of interest.<sup>85</sup>

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:<sup>86</sup>

Nongratuitous management of the affairs of another

(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<sup>87</sup> of an economic character<sup>88</sup> on behalf of another within a foreign<sup>89</sup> sphere of interest.<sup>90</sup> 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 *Geschäftsbesorgungsvertrag* from other contracts, e.g. regular service contracts and contracts for work and labor.<sup>91</sup>

German scholars observe that *Geschäftsbesorgungsverträge* fit well into concepts of economic contract theory and demand a specific set of duties in order to counter

85. Michael Martinek & Sebastian Omlor, in STAUDINGER, KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, BUCH 2, VORBEMERKUNGEN ZU §§ 662 ff margin no. 28 (14th ed. 2017).

86. “Reluctantly” because of the content any common lawyer will immediately think of in connection with agency. Although there is an overlap 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](https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934) (last visited Oct. 15, 2019).

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 BUNDESGERICHTSHOFS 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).

the various problems discussed under the rubric of agency theory and in the incomplete contracts literature.<sup>92</sup> 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.<sup>93</sup> 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<sup>94</sup> and the trustee in bankruptcy (*Insolvenzverwalter*).<sup>95</sup> 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.<sup>96</sup> 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 regard to investment advisors<sup>97</sup> and attorneys<sup>98</sup> 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,<sup>99</sup> echoing the well-known adage coined by Judge Cardozo who famously expected a trustee to show the "punctilio of an honor the most sensitive."<sup>100</sup> 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.

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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.

96. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 20, 1995, 129 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN [BGHZ] 30 (34) (Ger.); 1 HOLGER FLEISCHER, KOMMENTAR ZUM AKTIENGESETZ § 93 margin no. 117 (Gerald Spindler & Eberhard Stolz eds., 4th ed. 2019).

97. *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* Hopt, *supra* note 91, at 1, 6–8; KUMPAN, *supra* note 92, at 119–21.

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

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

100. Meinhard v. Salmon, 249 N.Y. 458, 464 (1928).

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*<sup>101</sup> by way of analogy, e.g. in case of a guardian letting entailed land after receiving a “commission”<sup>102</sup> or an insolvency trustee holding monies in an escrow account on behalf of the debtor.<sup>103</sup> 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*) with respect to the board of directors of a stock corporation (*Aktiengesellschaft*).<sup>104</sup> 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*)<sup>105</sup> or a trustee in bankruptcy appropriating the debtor’s corporate opportunities.<sup>106</sup>

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.

### III. SPACES OF TRANSNATIONAL FIDUCIARY LAW

Transnational law exists in different spaces<sup>107</sup> 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

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101. See *supra* note 83.

102. Reichsgericht [RG] [Federal Court of Justice] May 30, 1940, 164 ENTSCHIEDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN [RGZ] 98 (103) (Ger.).

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

104. 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).

105. BGH Oct. 26, 1964, WERTPAPIERMITTEILUNGEN [WM] 1320 (1321), 1964 (Ger.).

106. BGH Mar. 16, 2017, WERTPAPIERMITTEILUNGEN [WM] 776 (779), 2017 (Ger.).

107. See Halliday & Shaffer, *supra* note 30, at 18–19.

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.<sup>108</sup> 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.<sup>109</sup> Its extension varies<sup>110</sup> 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.<sup>111</sup> Pointing this out, many scholars conclude that transnational orders vary in geographic scope.<sup>112</sup> 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*,<sup>113</sup> the overwhelming majority of writers, while stressing the importance of national laws,<sup>114</sup> take this as a

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108. See *id.* at 18–19, 28. See also Shaffer, *supra* note 20, at 232.

109. That is not to say that national law never can 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. Halliday & Shaffer, *supra* note 30, at 18.

111. *Id.* at 12–13.

112. *Id.* at 18–19.

113. See *supra* note 32 and accompanying text. For a broader view, see, for example, Halliday & Shaffer, *supra* note 30, at 13–15.

114. CALLIESS & ZUMBANSEN, *supra* note 20, at 19; Glenn, *supra* note 27, at 839; Halliday & Shaffer, *supra* note 30, at 13.

given.<sup>115</sup> 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 transnational law either, at least according to the traditions of the profession.<sup>116</sup> 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.”<sup>117</sup> Even though transnational law cannot forego exercises in comparative law,<sup>118</sup> 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 generating another substantive body of norms. What makes the voyage worth the while is the methodological aspect of giving process pride of place.<sup>119</sup> Theorizing transnational legal ordering moves the “construction, flow . . . and settlement of legal norms”<sup>120</sup> into the spotlight and helps to understand how the production of national laws interacts with “different levels of social organization, from the transnational to the local”, e.g. “the migration across borders, . . . contestation and homologies among the transnational, national, and local levels.”<sup>121</sup>

115. See, e.g., CALLIESS & ZUMBANSEN, *supra* note 20, at 63 (noting “contested relationship between *lex mercatoria* and the state legal order”); Terence C. Halliday & Pavel Osinsky, *Globalization of Law*, 32 ANN. REV. SOC. 447, 450 (2006); Halliday & Shaffer, *supra* note 30, at 12; VIELLECHNER, *supra* note 28, at 180–85.

116. A couple of authors beg to differ, see, e.g., Jonathan Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27 ECOLOGY L.Q. 1295 (2001); Anna Dolidze, *Bridging Comparative and International Law: Amicus Curiae Participation as a Vertical Legal Transplant*, 26 EUR. J. INT’L L. 851 (2015).

117. Ralf Michaels, *State Law as a Transnational Legal Order*, 1 UC IRVINE J. INT’L. TRANSNT’L. & COMP. L. 141, 148 (2016).

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. TRANSN’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.*

Nation states create “true” legal norms in the sense of classical legal theory. Consequently, contrary to what is the case concerning norms of transnational law, the theoretical puzzle to ponder is not normativity in a legal sense,<sup>122</sup> but this: if several nation states generate trust law, and this process of norm production is interdependent, because legislators and courts of each of the states look at what the other is doing, does this not also constitute *transnational* law? After all, transnational law is “transnational” not because of the norm-giving involved or because the norm-producing institutions are non-state actors, but because of its reach in terms of geography.<sup>123</sup>

In a more recent turn of events, a group of scholars has already started moving into this direction, grounding their approach in international private law.<sup>124</sup> (National) international private law, so their argument goes, “engage[s] institutions in foreign states, too.”<sup>125</sup> Stressing the political—and therefore regulatory—nature of international private law,<sup>126</sup> these authors conclude that international private law and cross-border litigation engender transnational (private) law.<sup>127</sup> National law can also turn into transnational law, or so some propose, through national judges developing common private international law principles.<sup>128</sup>

Delving into the debate’s details is not of interest for the purposes of this text.<sup>129</sup> 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

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

123. Michaels, *supra* note 117, at 154.

124. See, e.g., Michaels, *supra* note 117; Robert Wai, *Transnational Law and Private Ordering in a Contested Global Society*, 46 HARV. INT’L L. J. 471 (2005).

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.

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”).

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.

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 *histoire croisée* establish a process of transnationalization.

*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,<sup>130</sup> they also share a common legal framework as they are all civil law jurisdictions with strong historical roots in the German civil code (*Bürgerliches Gesetzbuch*).<sup>131</sup> 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.<sup>132</sup> This distinguishes them from their common law siblings: Hong Kong, Singapore, and Malaysia.<sup>133</sup> 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.<sup>134</sup> As part of its colonial rule over Taiwan, acquired from China in 1895, and Korea, annexed in 1910,<sup>135</sup> Japan imposed its trust legislation.<sup>136</sup> 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 implemented by Deng Xiaoping in 1979, the legal institution based on the Trust Act entered into force only in 2001.<sup>137</sup> Both Taiwan and South Korea kept the trust after Japanese colonial rule ended.<sup>138</sup> 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 pacesetter for Taiwanese and South

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130. See CHARLES HOLCOMBE, *A HISTORY OF EAST ASIA* (2d ed. 2017).

131. See Lusina Ho & Rebecca Lee, *Reception of the trust in Asia: an[sic] historical perspective*, in *TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS* 10–11 (Ho and Lee eds., 2013). China did not directly adopt and adapt German law, but took it over from the Soviet legal system. Lusina Ho, *Trust laws in China*, in *RE-IMAGINING THE TRUST: TRUSTS IN CIVIL LAW* 183 (Lionel Smith ed., 2010).

132. See Lusina Ho, *The Reception of Trust in Asia: Emerging Asian Principles of Trust*, 2004 *SING J. LEGAL STUD.* 287, 289 (2004).

133. Ho & Lee, *supra* note 131, at 10.

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

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

136. Tamaruya, *supra* note 47, at 2242.

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).

138. Ho & Lee, *supra* note 131, at 12; Tamaruya, *supra* note 47, at 2246.

Korean trust law and exercises some influence on the 2001 Chinese legislation.<sup>139</sup> At the same time, the trust laws of the group members echo US models on trust.<sup>140</sup>

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.<sup>141</sup> 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.<sup>142</sup> Reviewing these common points of departure, it comes as no surprise to find solutions closely resembling each other.<sup>143</sup>

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.<sup>144</sup> 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”?<sup>145</sup> 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

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139. See Tamaruya, *supra* note 47, at 2246.

140. *Id.*

141. Ho, *supra* note 132, at 301.

142. *Id.* at 297; see Tamaruya, *supra* note 47, at 2251, for a more detailed analysis; see also *infra* IV.3.

143. See also *infra* IV.3.

144. On this effect of transplanting law, see Michaels, *supra* note 117, at 148.

145. Halliday & Shaffer, *supra* note 30, at 12.

*histoires connectées*,<sup>146</sup> connected histories,<sup>147</sup> and *histoire croisée*.<sup>148</sup> Moving forward from comparative history, these scholars put emphasis on the element of interaction and echo-chamber effects resulting from shared narratives and histories.<sup>149</sup> With this changed perspective comes an interest not in the merger of institutions or hybridizations of formerly singular institutions, but in how the crossings affect the parties involved and create something new.<sup>150</sup> 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.<sup>151</sup> 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 homologues among the transnational, national, and local levels.”<sup>152</sup> 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.<sup>153</sup> Paying close attention

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146. See, e.g., Caroline Douki & Philippe Minard, *Histoire globale, histoires connectées: un changement d'échelle historiographique?*, 54 REVUE D'HISTOIRE MODERNE & CONTEMPORAINE 7 (2007) (in French), translated in [https://www.cairn-int.info/article-E\\_RHMC\\_545\\_0007—global-history-connected-histories.htm](https://www.cairn-int.info/article-E_RHMC_545_0007—global-history-connected-histories.htm)).

147. ROBERT W. STRAYER, *THE MAKING OF THE MODERN WORLD: CONNECTED HISTORIES, DIVERGENT PATHS: 1500 TO THE PRESENT* (Strayer ed., 2d. ed. 1995); Sanjay Subrahmanyam, *Connected Histories: Notes towards a Reconfiguration of Early Modern Eurasia*, 31 MODERN ASIAN STUD. 735 (1997).

148. Foundational: Michael Werner & Bénédicte Zimmermann, *Penser l'histoire croisée: entre empire 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).

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.”).

to how norms gain transnational character according to leading legal theorists proves the point.

Transnational norms are norms “adapted transnationally.”<sup>154</sup> They do not necessarily have to originate outside the nation state.<sup>155</sup> Transnational legal orders are transnational if they (at least) have social effects in more than one jurisdiction<sup>156</sup> and “engage legal institutions within multiple nation-states.”<sup>157</sup> 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.<sup>158</sup> What is important is that multiple nation states lace into each other as a consequence of recognizing norms with an international scope.<sup>159</sup> 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.<sup>160</sup> According to these criteria, trust regulation in Japan, Taiwan, South Korea, and China spawns transnational fiduciary law insofar as trust law contains fiduciary norms.

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.<sup>161</sup>

#### 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.”<sup>162</sup> 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*,<sup>163</sup> but also for fiduciary norms. Given that the floating of norms stands

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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; Koh, *supra* note 61, at 745–46.

159. *See* Michaels, *supra* note 117, at 154.

160. Shaffer, *supra* note 20, at 244.

161. *See supra* III.1.a.

162. *See* Koh, *supra* note 61.

163. *See supra* II.1.

at the center of transnational legal theory,<sup>164</sup> 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) matters<sup>165</sup> in corporate law.<sup>166</sup> 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).<sup>167</sup>

### 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),<sup>168</sup> which delivered a report on “Fiduciary Duty for the 21<sup>st</sup> Century” in 2015<sup>169</sup>—a follow-up on an earlier report delivered in 2005.<sup>170</sup> 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 obliged to respect human rights.<sup>171</sup> 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

164. See *supra* III.1.a.

165. See *supra* I, text before note 30.

166. On investment managers and the “sole interests rule,” see Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731 (2019) (on the one hand); Max M. Schanzenbach & Robert H. Sitkoff, *The Law and Economics of Environmental, Social, and Governance Investing by a Fiduciary*, 72 STAN. L. REV. (forthcoming 2020) (Northwestern Law & Econ Research Paper No. 18-22) (2019) (on the other).

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.

170. U.N. Env’t Programme [UNEP] Finance Initiative, *A Legal Framework for the Integration of environmental, social and governance issues into institutional investment*, [https://www.unepfi.org/fileadmin/documents/freshfields\\_legal\\_resp\\_20051123.pdf](https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf) (last accessed Oct. 15, 2019).

171. U.N. Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. HR/PUB/11/04 (2011), [https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf).

obligations and does not diminish those obligations.” The guideline commentary positions it “over and above compliance with national laws and regulations protecting human rights.”<sup>172</sup> The G20/OECD 2015 principles on corporate governance recommend that corporate boards should take stakeholder interests into account.<sup>173</sup>

## 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<sup>174</sup> progeny seems to prove these critics right, especially its modern Delaware offspring.<sup>175</sup> 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<sup>176</sup> and Germany,<sup>177</sup> to name but two.<sup>178</sup> 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.<sup>179</sup>

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.<sup>180</sup>

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172. *Id.* at 13.

173. OECD, *supra* note 18, at 46.

174. 204 Mich. 459, 170 N.W. 668 (Mich. 1919).

175. *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010). *See* Brett McDonnell, *The Corrosion Critique of Benefit Corporations*, 1, 18 (Sept. 9, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3450747&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3450747&download=yes) (last accessed Oct. 15, 2019), for a recent review of the Delaware case law.

176. *See infra* i.

177. *See, e.g.*, Jens Koch, *Commentary on the German Stock Corporation Act*, in AKTIENGESETZ, § 76 margin no. 30 (Uwe Hüffer & Jens Koch, 13th ed., 2018).

178. On the many twists and turns in the UK, for example, Marc T. Moore, *Shareholder primacy, labour and the historic ambivalence of UK company law*, in RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW 142 (Harwell Wells ed., 2018).

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

The first example relates to recent French legislation on corporate law, the *loi PACTE* (Sub-section i); the second one to ESG-disclosure rules in the EU (Sub-section ii), and the third to acknowledgment through enforcement of rights and remedies and the exercise of power (Sub-section iii).

a. *The French “Loi PACTE”*

One example is the French law on the growth and the transformation of businesses,<sup>181</sup> known in shorter form as the *loi PACTE*.<sup>182</sup> It contains, inter alia, new provisions on fiduciary duties.<sup>183</sup> 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,<sup>184</sup> replacing the old focus on the common interest of the shareholders.<sup>185</sup> *PACTE* relies to a considerable extent on the Notat-Sénard report,<sup>186</sup> prepared by two high-profile individuals—one representing an ESG- and Union-perspective (Nicole Notat), the other “big business” (Jean-Dominique Sénard).<sup>187</sup> Notat and Sénard explain their ESG-led reform proposals, inter alia, with reference to UN frameworks.<sup>188</sup> 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.

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governance component of the Reports on the Observance of Standards and Codes of the World Bank.”).

181. LOI NO 2019-486 DU 22 MAI 2019 RELATIVE A LA CROISSANCE ET LA TRANSFORMATION DES ENTREPRISES, J. OFFICIEL DE LA REPUBLIQUE FRANÇAISE (May 23, 2019), [https://www.cjoint.com/do\\_c/19\\_05/IExhRKuGrQh\\_joe-20190523-0119-0002.pdf](https://www.cjoint.com/do_c/19_05/IExhRKuGrQh_joe-20190523-0119-0002.pdf) (last visited Oct. 15, 2019).

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 FRANÇAISE, <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 für 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.

186. Nicole Notat & Jean-Dominique Sénard, *L’entreprise, objet d’intérêt collectif*, MINISTRES DE LA TRANSITION ECOLOGIQUE ET SOLIDAIRE, DE LA JUSTICE, DE L’ÉCONOMIE ET DES FINANCES DU TRAVAIL (Mar. 9, 2018), <https://www.vie-publique.fr/sites/default/files/rapport/pdf/184000133.pdf> (last accessed Oct. 15, 2019) [hereinafter Notat-Sénard Report]. On the influence of this report, see, Conac, *supra* note 183, at 231 (“The Notat-Sénard report [. . .] served as the “intellectual” basis for the PACTE Bill”).

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. See Notat-Sénard Report, *supra* note 186, at 34, 41.

*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.<sup>189</sup> The relevant Directive 2014/95/EU goes back to a strategy paper of the EU Commission.<sup>190</sup> 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[*sic*] principles and guidelines” and belonging to a “core set of internationally recognised[*sic*] principles and guidelines represents an evolving and recently strengthened global framework for CSR [i.e., corporate and social responsibility].”<sup>191</sup> Companies subject to the Directive’s reporting and disclosure regime may rely on international frameworks in order to structure their non-financial disclosure document,<sup>192</sup> among them the UN Guiding Principles.<sup>193</sup> The EU regulation partly builds on a French role model on ESG reporting, enacted in its earliest form in 2001.<sup>194</sup> 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.<sup>195</sup> 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.<sup>196</sup>

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.<sup>197</sup> 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

189. Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34 as regards disclosure of non-financial and diversity information by certain large undertakings and groups, 2014 O.J. (L 330) 1.

190. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A renewed EU strategy 2011-14 for Corporate Social Responsibility, COM (2011) 681 final (Nov. 25, 2011) [hereinafter Communication from the Commission]. Recital (2) of the Directive 2014/95/EU (*supra* note 189) explicitly refers to this document.

191. *Id.* at 6.

192. Directive 2014/95/EU, *supra* note 189, at 6–8.

193. Communication from the Commission: Guidelines on non-financial reporting (methodology for reporting non-financial information), C/2017/4234, 2017 O.J. (C 215) 1.

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.

recognised[*sic*] principles” for CSR and CSR-related duties in general.<sup>198</sup> 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 . . .”<sup>199</sup> 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.<sup>200</sup> BlackRock has been a signatory to the United Nations-backed Principles for Responsible Investment (PRI) since 2008.<sup>201</sup> 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.<sup>202</sup>

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),<sup>203</sup> but his dissatisfaction with management’s approach to environmental issues—“will divest US\$ 1 bill. in shares tomorrow.” Publicly asking management to explain why poultry workers—not in Bangladesh, but

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198. See Communication from the Commission, *supra* note 190.

199. *Id.* at 6–7.

200. See BlackRock Investment Stewardship: *Protecting our clients’ assets for the long-term*, BLACKROCK 1, 4, <https://www.blackrock.com/corporate/literature/publication/blk-profile-of-blackrock-investment-stewardship-team-work.pdf> (last accessed Oct. 15, 2019).

201. *Id.* at 19.

202. See, e.g., Chloe Christman, *PepsiCo is moving from policy to practice*, OXFAM: THE POLITICS OF POVERTY (Feb. 6, 2018), <https://politicsofpoverty.oxfamamerica.org/2018/02/pepsico-from-policy-to-practice/> (last accessed Oct. 15, 2019).

203. Carl Icahn (@Carl\_C\_Icahn), TWITTER (Oct. 1, 2013, 7:23 AM), [https://twitter.com/carl\\_c\\_ica hn/status /385047418284158976](https://twitter.com/carl_c_ica hn/status /385047418284158976) (last visited Oct. 15, 2019). On the market reaction, see, for example, Steven Russolillo, *Carl Icahn Tweets About ‘Cordial Dinner’ With Tim Cook*, WALL ST. J.: MONEYBEAT (Oct. 1, 2013), <https://blogs.wsj.com/moneybeat/2013/10/01/carl-ica hn-tweets-about-cordial-dinner-with-tim-cook/> (last accessed Oct. 15, 2019).

in the United States—have to wear diapers at work<sup>204</sup> 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,<sup>205</sup> 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.<sup>206</sup> One hundred eighty-one CEOs signed the 2019 statement of the “Business Roundtable” in the United States, proclaiming publicly a commitment to all stakeholders.<sup>207</sup> There is good cause to question the motives behind corporate ESG-commitment.<sup>208</sup> 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.<sup>209</sup> 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.”<sup>210</sup> Change of control and corporate takeovers are the scenarios in which Delaware courts require boards to act single-mindedly in the interests of shareholders.<sup>211</sup> They do not happen on a daily basis.

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204. See *U.S. poultry workers wear diapers on job over lack of bathroom breaks*, THE GUARDIAN, (May 12, 2016, last modified Jul 14, 2017), <https://www.theguardian.com/us-news/2016/may/12/poultry-workers-wear-diapers-work-bathroom-breaks> (last visited Oct. 15, 2019).

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

206. See, e.g., *Pearl Meyer Quick Poll: Environmental and Social Governance (ESG) and its Potential Link to Incentives*, PEARL MEYER, (March 2017), <https://www.pearlmeier.com/knowledge-share/research-report/pearl-meyer-quick-poll-environmental-and-social-governance-esg-and-its-potential-link-to-incentives> (last visited Oct. 15, 2019).

207. Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans,’ Business Roundtable: Corporate Governance (Aug. 19, 2019), <https://www.busin essroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> (last accessed Oct. 15, 2019).

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 Constituency 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”<sup>212</sup> or “global law.”<sup>213</sup> 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.<sup>214</sup> 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<sup>215</sup> seems the more promising road to travel.

This is corroborated by the fact that, as Clifford Geertz famously put it, law is local knowledge.<sup>216</sup> Searching for and then comparing abstract legal principles therefore does not amount to much,<sup>217</sup> especially in transnational law or so-called “global” law. “[G]lobal doctrine becomes clothed in local knowledge.”<sup>218</sup> 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.<sup>219</sup> 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.

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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. Teubner, *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).

## IV. ELEMENTS OF TRANSNATIONAL FIDUCIARY LAW

As already stated in the introduction, transnational legal orders unfold in terms of geographic and legal scope.<sup>220</sup> 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 1. 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. 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 . . .”<sup>221</sup> It “is a part of what gives the field its distinctive qualities.”<sup>222</sup> Millet J, in the seminal decision *Bristol & West Building Society v Mothew*, held it to be the “distinguishing obligation of a fiduciary . . .”<sup>223</sup>

Embracing a particular obligation as part of the duty of loyalty<sup>224</sup> 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.<sup>225</sup>

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220. See Halliday & Shaffer, *supra* note 30.

221. Andrew S. Gold & Paul B. Miller, *Introduction to THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 5 (Andrew S. Gold & Paul B. Miller eds., 2014).

222. Gold, *supra* note 75, at 386.

223. Millet J, *Bristol & West Building Society v Mothew* [1996] EWCA (Civ) 33, [1996] 4 All ER 698 [711]–[712] (Eng.).

224. On the varying accounts of the duty of loyalty’s contents see Gold, *supra* note 75, at 387–89.

225. See Sarah Worthington, *The Commercial Utility of the Trust Vehicle*, in *EXTENDING THE BOUNDARIES OF TRUST AND SIMILAR RING-FENCED FUNDS* 135, 147, 150 (David Hayton ed., 2002).

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.<sup>226</sup> Beneficiaries have rights against the fiduciary, whereas (English) contract law did protect only the parties of the contract.<sup>227</sup>

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.<sup>228</sup> Commonwealth courts frequently cite and discuss decisions of courts in other nation states belonging to the same legal family. Sharing the common law background, traditions and history of the British colonial empire, there is a strong degree of connected history and entanglement.<sup>229</sup> 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

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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.

229. *See supra* III.1.b.ii, for theoretical background on connected history and entanglement.

character, qualifying only the duty of loyalty as truly fiduciary in nature.<sup>230</sup> That was taken up by the English High Court and Millet J in the also seminal decision *Bristol & West Building Society v Mothewe*.<sup>231</sup> 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<sup>232</sup> or even deny it.<sup>233</sup> 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.<sup>234</sup> 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,<sup>235</sup> 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 on the fact pattern in case. Alternatively or in addition, the duty

230. Ipp J, *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187, 239 (Austl.); see also *Breen v Williams* (1996) 186 CLR 71 (Austl.).

231. Millet J, *Bristol & West Building Society v Mothewe* [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 Ljefplan 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.

232. On the fiduciary duty of care and its precarious status in the United States, see John C.P. Goldberg, *The Fiduciary Duty of Care*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 405 (Evan J. Criddle et al. eds., 2019).

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.

of care bears the potential of solving loyalty-related issues. Again, the functional perspective governs the analysis of fiduciary law on the transnational level.<sup>236</sup> Once more, the “East Asian Four” provide an example at hand.<sup>237</sup>

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.<sup>238</sup> Combined in a bundle, however, they yield the idea of loyalty.<sup>239</sup> Moreover, they “impose the core trust obligations on a trustee.”<sup>240</sup> This turns the common law doctrine on its head; instead of loyalty as a ground rule from which courts extract more specific duties,<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup> Nevertheless, the Japanese Supreme Court held the general agency provision to comprise a duty of loyalty, rendering the later corporate law provision superfluous.<sup>244</sup> 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.<sup>245</sup> Nevertheless, Japanese courts do not use this provision extensively<sup>246</sup> and still seem to cling to the old Supreme Court decision.<sup>247</sup> Corporate and comparative law scholars weigh different reasons for this reluctance.<sup>248</sup> One of these reasons, however, unsurprisingly seems to be the legal

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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.

243. See J. Mark Ramseyer & Masayuki Tamaruya, *Fiduciary Principles in Japanese Law*, in *THE OXFORD HANDBOOK OF FIDUCIARY LAW* 643, 646–47 (Evan J. Criddle et al. eds., 2019).

244. *Id.* at 648.

245. Hideki Kanda & Curtis J. Milhaupt, *Re-examining Legal Transplants: The Director’s Fiduciary Duty in Japanese Corporate Law*, 51 *AM. J. COMP. L.* 887, 895 (2003).

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.

environment the duty of loyalty was transplanted into.<sup>249</sup> The idea was already there<sup>250</sup> 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.<sup>251</sup>

#### 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 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

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249. *Id.* at 900.

250. *Id.* at 899.

251. Ramseyer & Tamaruya, *supra* note 243, at 649, 657.

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.