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## Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism

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# Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism\*

Peer Zumbansen†

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## I. INTRODUCTION

In an era of dramatic globalization, legal inquiries into the future of law often result in accounts of law’s alleged weakness to extend beyond national jurisdictions. At the same time, lawyers are certainly not the only scholars reflecting on today’s regulatory challenges often summarized under the heading of, “global governance.” An investigation into the nature and scope of legal regulation in this context unavoidably exposes questions of origin and function on one hand, and of relations, compatibility, and interdisciplinary aspects on the other. In this often polemic and heated discourse of disciplines and narratives, an effort to reconstruct a discipline’s approach and methodology offers insights into the trajectories and characteristics of the problems at stake for that discipline, in an increasingly fragmented, highly asymmetric global arena.

With these considerations in mind, the following article takes seriously the concerns among international lawyers about “legal fragmentation,”<sup>1</sup> if

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\* This paper is based on the Keynote Address delivered at the occasion of the 20th Anniversary Celebration of the University of Iowa College of Law’s TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS in March 2011. It is a significantly revised and expanded version of a chapter appearing in *Beyond Territoriality. Legal Authority in an Age of Globalization* (Günther Handl, Joachim Zekoll and Peer Zumbansen eds., The Hague: Brill 2012) I am very grateful to the journal editors and to Dean Agrawal and Professor Somek at the College of Law for the honoring invitation. The article draws in small part from and builds on my article, *Transnational Legal Pluralism*, 1 TRANSNAT’L LEGAL THEORY 141 (2010).

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only to contrast and to compare them with the evolution of law at the state level. Such mirroring offers a respite in what has otherwise too quickly been offered as a swan song about law's fading light and impact under the duress of globalization.<sup>2</sup> Drawing out the analogies between legal sociological insights from the late 19th and early 20th Century into pluralistic legal systems, and today's lament about the law's loss of unity in the global context, we can take a better look at the ambivalent nature and *role* of law itself in an evolving transnational regulatory landscape. What emerges through this lens is that our analytical focus ought not to be *how law performs* in the context of globalization, but how we theorize the *relation between law and society*. In other words, the advent of globalization prompts an investigation into the theory(ies) of society which inform(s) our—and competing—understandings of law.

A powerful illustration of this nexus is provided by the current debate on global constitutionalism and the complementary constitutionalization of international law.<sup>3</sup> Running through the majority of analyses in this context is the contention that the absence of a world government radicalizes the governance dilemma facing modern societies. Accordingly, this invites reflections on the way in which the improvement of participatory elements can strengthen the democratic foundations of global governance institutions on the one hand,<sup>4</sup> while the gradual acceptance of core human rights values may eventually foster the emergence of a global set of values on the other.<sup>5</sup> Such contentions, however, seem to remain surprisingly isolated from legal theory and governance discourses that have long been pursued within the

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<sup>1</sup> See generally Martti Koskenniemi/Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002) (NE) (providing an insightful and critical analysis of the legal fragmentation problem).

<sup>2</sup> See Alfred C. Aman Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379 (2001) (rejecting the idea that law is a victim to globalization from a legal perspective); see also, SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS: ESSAYS ON THE NEW MOBILITY OF PEOPLE AND MONEY* (1998) (rejecting the idea that law is a victim to globalization from a sociological perspective).

<sup>3</sup> Compare Christian Walter, *Constitutionalizing (Inter)national Governance - Possibilities and Limits to the Development of an International Constitutional Law*, 44 GERMAN YB INT'L L. 170 (2001) (taking a cautious stance with regard to an emerging global constitutional order), and Anne Peters, *The Merits of Global Constitutionalism*, 16 IND. J. GLOBAL LEGAL STUD. 397 (2009) (highlighting the analytical insights and conceptual promises of the concept of global constitutionalism), with Antje Wiener, *Global Constitutionalism: Mapping an Emerging Field*. Background paper for the Conference: *Constitutionalism in a New Key?*, Berlin 28-29 January 2011 ([http://cosmopolis.wzb.eu/content/program/conkey\\_Wiener\\_Mapping-Field.pdf](http://cosmopolis.wzb.eu/content/program/conkey_Wiener_Mapping-Field.pdf)) (Berlin, 2011) (emphasizing the overarching nature of the term global constitutionalism, which combines elements of political science (international relations) with those of international law and legal theory in addressing global governance challenges). See also Peer Zumbansen, *Comparative, global and transnational constitutionalism: The emergence of a transnational legal-pluralist order*, 1 GLOBAL CONSTITUTIONALISM 16 (2012).

<sup>4</sup> See, e.g., Nico Krisch/Benedict Kingsbury/Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. (2005).

<sup>5</sup> For a critical discussion see UPENDRA BAXI, *THE DEATH OF HUMAN RIGHTS* (2d ed. 2005).

framework of the nation-state. The separate tracks of inquiry in this case—one focusing on the future of law and law's fragmentation in an era of globalization, and the other concerned with the transformation of law in the context of radically transformed statehood<sup>6</sup>—prevent us from taking a closer look at the ways in which law has changed over time. Certainly, scholars in law, political science, or sociology have long been interested in the connections between the evolution of state institutions and the development of a global political economy.<sup>7</sup> However, inquiries focusing on the entanglements between political and legal institutions on the one hand, and on the myriad forms of “state-market” relations from a political economy perspective on the other,<sup>8</sup> are too rarely included in current contentions about global “legal fragmentation.” As a result, the challenges of global governance are addressed with too little connection to ongoing attempts to trace their origins in, or their connections with, prior governance discourses through which modern societies have long been described. In this article, I propose to describe the perspective between national and global governance challenges as “transnational” in order to offer a bridge between these separately pursued research agendas. Going beyond early work in international legal theory<sup>9</sup> and partly drawing on the insights from transnational commercial law,<sup>10</sup> we can begin to understand transnational law primarily as a methodological approach and less as a distinctly demarcated legal field, such as contract or administrative law. Transnational law, from this perspective,<sup>11</sup> emerges foremost as a *methodological* lens through which we can study the particular transformation of legal institutions in the context of an evolving complex society. The contention that society works as the other side of the state runs

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<sup>6</sup> A case in point is the transformation of the “welfare state.” See generally Paul Pierson, *The New Politics of the Welfare State*, 48 *WORLD POL.* 143 (1996).

<sup>7</sup> See Philip Manow, *Welfare State Building and Coordinated Capitalism in Japan and Germany*, in *THE ORIGINS OF NONLIBERAL CAPITALISM* 94 (Streeck & Yamamura eds., 2001); Fritz W. Scharpf, *The Viability of Advanced Welfare States in the International Economy: Vulnerabilities and Options*, 7 *J. EUR. PUB. POL'Y.* 190 (2000) (UK).

<sup>8</sup> See generally KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (1944); PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* (2004); Harry W. Arthurs, *Governance After the Washington Consensus: The Public Domain, the State and the Microphysics of Power in Contrasting Economies*, 24 *MAN & DEV.* 85 (2002).

<sup>9</sup> See generally PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956); Harold J. Berman, *World Law*, 18 *FORDHAM INT'L L.J.* 1617 (1995).

<sup>10</sup> See generally Berthold Goldman, *Arbitrage International et Droit Commun des Nations*, *REVUE DE L'ARBITRAGE* 115 (1956) (Fr.); Clive M. Schmitthoff, *International Business Law: A New Law Merchant*, 2 *CURRENT L. & SOC. PROB.* 129 (1961); Roy Goode, *Usage and Its Reception in Transnational Commercial Law*, 46 *INT'L & COMP. L.Q.* 1 (1997); Ross Cranston, *Theorizing Transnational Commercial Law*, 42 *TEX. INT'L L.J.* 597 (2007).

<sup>11</sup> For a more extensive discussion see Peer Zumbansen, *Transnational Law*, in *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* 738–54 (Jan M. Smits ed., 2006) [hereinafter Zumbansen, *Transnational Law*], and Peer Zumbansen, *Neither 'Public' nor 'Private', 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective*, 38 *J.L. & SOC'Y* 50 (2011) [hereinafter *Corporate Governance*].

deep within the continental legal imagination.<sup>12</sup> As we relativize this contention, we recognize the need to define society as such, rather than merely assuming it as a given background, against which we may freely theorize about the future of the law.<sup>13</sup>

The sociology of law and, more specifically, the work on “legal pluralism,”—promulgated by scholars such as Eugen Ehrlich<sup>14</sup> or Georges Gurvitch<sup>15</sup> and later built upon in works by Sally Falk Moore,<sup>16</sup> John Griffiths,<sup>17</sup> Sally Merry,<sup>18</sup> Gunther Teubner<sup>19</sup> or Boaventura de Sousa Santos<sup>20</sup>—provides a powerful pathway towards a transnational legal methodology. This pathway traces the emergence of legal regulatory institutions in the context of an evolving society—on the national and the international level. Focusing on the coexistence and competition between hard and soft, official and unofficial, public and private norms, this Article’s proposed approach—labelled transnational legal pluralism—suggests studying law from a methodological angle in the context of evolving theories of societal ordering, rather than as a contained discipline. Central to this undertaking is a shift in perspective, which leads to a focus on *actors*, *norms*, and *processes* as building blocks of a methodology of transnational law.<sup>21</sup>

This approach suggests a relativization of a number of assumptions commonly associated with law. One assumption is its territorial connection with a politically institutionalized system of rule creation, implementation, and adjudication; which in Europe has, for a relatively long time, been framed as the state-law nexus. From a transnational perspective, this nexus

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<sup>12</sup> For a powerful discussion of this assumption see JÜRGEN HABERMAS, *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS* (2001).

<sup>13</sup> This is forcefully argued in THOMAS VESTING, *RECHTSTHEORIE* (2007).

<sup>14</sup> See generally EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (Walter L. Moll trans., Harvard Univ. Press 1936) (1913).

<sup>15</sup> See generally GEORGES GURVITCH, *SOCIOLOGY OF LAW* (Alan Hunt trans., Transaction Publishers 2001) (1947).

<sup>16</sup> See generally Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Field as an Appropriate Subject of Study*, 7 *LAW & SOC’Y REV.* 719 (1973) [hereinafter Moore, *Social Change*]; SALLY FALK MOORE, *LAW AS PROCESS* (1978).

<sup>17</sup> See generally John Griffiths, *What is Legal Pluralism?*, 24 *J. LEGAL PLURALISM & UNOFFICIAL L.* 1 (1986).

<sup>18</sup> See generally Sally Engle Merry, *Legal Pluralism*, 22 *LAW & SOC’Y REV.* 869 (1988) [hereinafter Merry, *Legal Pluralism*]; Sally Engle Merry, *New Legal Realism and the Ethnography of Transnational Law*, 31 *LAW & SOC. INQUIRY* 975 (2006).

<sup>19</sup> Gunther Teubner, *After Legal Instrumentalism? Strategic Models of Post-regulatory Law*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 299 (Gunther Teubner ed., 1986) [hereinafter *DILEMMAS*]; see generally Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 *CARDOZO L. REV.* 1443 (1992) [hereinafter *Rethinking Legal Pluralism*].

<sup>20</sup> BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE* (2d ed. 2002).

<sup>21</sup> For an application of this approach for a law school course, see ALFRED C. AMAN, JR. & PEER ZUMBANSEN, *TRANSNATIONAL LAW: ACTORS, NORMS, PROCESSES* (forthcoming 2012).

becomes questionable in a global context, but also in Europe itself the legal sociological lens reveals an impressive array of non-state originating norms that have long held influence over both individual and organizational behavior.<sup>22</sup> This observation has prompted sociologists to perceive law primarily from a functional perspective, emphasizing its particular operation in the context of a differentiated modern society.<sup>23</sup> From the vantage point of this theory, society is no longer validly represented as a sphere defined primarily in contrast from the state. Rather, in a society “without peak or centre,” some scholars have been describing law as but one of several societal forms of communication, unfolding according to its own rationality and by use of its own particular vocabulary (“code”).<sup>24</sup>

Even if one does not go so far as to reduce law to a particular form of societal communication, the contention of a specific nexus between law and a theory of society—in which law emerges and operates—promises to render insights into the evolving forms of law. These insights appear to be more adequate in depicting the particular quality of law today than the ambivalent attempts to reconcile the assumption of a strong state-law nexus with the proliferation of numerous, non-state based, rule generating processes and institutions.

Beyond the relativization of the law versus non-law distinction, which is inherent to the legal sociological versus legal pluralist approach to legal regulation, there is the other significant challenge arising out of this approach: the relativization of a territorial grounding of law in a particular jurisdiction. As we study law in its societal context, the confines of society can no longer adequately be drawn with reference to specific states, nations, or regions; instead, one must view society as a world society.<sup>25</sup> Within this world society, the study of law (and of regulatory governance more generally) refers to “territory,” “jurisdiction,” or the “state” in order to appreciate specific, historically grown or politically constituted, frameworks of legal evolution at a particular time and place—no more and no less. The “no less” deserves particular emphasis today, where scholars frequently make assertions of a

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<sup>22</sup> See generally HARRY W. ARTHURS, *WITHOUT THE LAW: ADMINISTRATIVE JUSTICE AND LEGAL PLURALISM IN NINETEENTH CENTURY ENGLAND* (1988); EHRlich, *supra* note 14. For an insightful summary see Marc Galanter, *Farther Along*, 33 *LAW & SOC'Y REV.* 1113 (1999), and Marc Galanter, *In the Winter of Our Discontent: Law, Anti-Law, and Social Science*, *ANN. REV. L. & SOC. SCI.* 1 (2006).

<sup>23</sup> See generally NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* (1985) [hereinafter LUHMANN, *SOCIOLOGICAL THEORY*]; Niklas Luhmann, *Law as a Social System*, 83 *NW. U. L. REV.* 136 (1989) [hereinafter Luhmann, *Social System*]; Niklas Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, 13 *CARDOZO L. REV.* 1419 (1992).

<sup>24</sup> See generally NIKLAS LUHMANN, *POLITICAL THEORY IN THE WELFARE STATE* (John Bednarz Jr. trans., de Gruyter 1990).

<sup>25</sup> See generally Niklas Luhmann, *The World Society as a Social System*, 8 *INT'L J. GEN. SYSTEMS* 131 (1982); see also John W. Meyer et al., *World Society and the Nation-State*, 103 *AM. J. SOC.* 144 (1997).

de-territorialized<sup>26</sup> or “autonomous” legal order.<sup>27</sup> From this suggested methodological perspective, such assertions are of lesser interest with regard to their explanatory value than as to their motives. To unpack the claims of regulatory governance that have an increasingly de-territorialized or autonomous nature, it is necessary, on the one hand, to revisit the arguments of some scholars who connect the claim of an “exhaustion” of law and of the nation state’s regulatory power with an emphasis on social norms.<sup>28</sup> On the other hand, we need to study the arguments of scholars who describe transnational law as grounded in what they refer to as global legal pluralism.<sup>29</sup> As this Article will explain, both groups of scholars emphasize the limits of traditional legal regulation and question whether the state-law nexus captures the dynamics of regulatory governance today. A closer look at the arguments, however, appears to reveal that the shared interest in a legal pluralist description of governance originates from differing political standpoints. The scholars who argue that the state is increasingly reaching its regulatory capacity view such arguments as driven by a rejection of so-called “interventionist” state policy. This type of policy is reminiscent of discussions regarding the U.S. Supreme Court’s *Lochner* jurisprudence.<sup>30</sup> By contrast, scholars in legal sociology and legal theory, who have a strong interest in questions of access to justice and the problem of the legal system’s closeted nature to wide sections of society, have mobilized a limits-of-law critique from an opposed political perspective.<sup>31</sup> Given the evolving forms of regulatory institutions, the “availability” of legal pluralist thinking to different, even juxtaposed, political projects<sup>32</sup> forms a crucial background to

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<sup>26</sup> See Ralf Michaels, *Territorial Jurisdiction after Territoriality*, in GLOBALISATION AND JURISDICTION 105 (Piet J. Slot & Mielle K. Bulterman eds., 2004).

<sup>27</sup> See, e.g., EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* (2010); see also Gunther Teubner, ‘*Global Bukowina: Legal Pluralism in the World Society*, in GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed., 1997).

<sup>28</sup> See generally ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000) [hereinafter POSNER, *SOCIAL NORMS*].

<sup>29</sup> See generally Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007) [hereinafter Berman, *Global Legal Pluralism*]; Paul Schiff Berman, *The New Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 225 (2009); and now his monographic treatment: GLOBAL LEGAL PLURALISM. A JURISPRUDENCE OF LAW BEYOND BORDERS (2012); Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 243 (2009) [hereinafter Michaels, *Global Legal Pluralism*].

<sup>30</sup> *Lochner v. New York*, 198 U.S. 45 (1905). For an insightful history of the case’s reception and legacy, see Sujit Choudhry, *The Lochner Era and Comparative Constitutionalism*, 2 INT’L J. CONST. L. 1 (2004).

<sup>31</sup> See e.g., Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) [hereinafter Galanter, ‘*Haves’ Come Out Ahead*]; Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937 (2007) [hereinafter Lobel, *Paradox*].

<sup>32</sup> See generally Peer Zumbansen, *Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law*, 56 AM. J. COMP. L. 769 (2008) [hereinafter Zumbansen, *Law*].

today's assertions about the nature and aspiration of law in a global context.<sup>33</sup>

On that basis, it becomes possible to read the currently dominant narrative of the autonomization of law, or of an end of (state-based) law in an era of globalization, in a different light. Rather than describing the advent of globalization as an end-point of legal development, a transnational perspective requires one to deconstruct the various law–state associations. This allows a better understanding of the evolution of law in relation to—as well as in response to—the development of what must be described as “world society.” The currently lamented lack of democratic accountability, for example, in international economic governance,<sup>34</sup> can then be perceived as a further development in a highly differentiated and de-territorialized society. This Article rejects the attempts by lawyers to re-align transnational governance actors with traditional concepts of the state or a territoriality bounded civil society and instead contrasts them with various advances in sociology and anthropology with regard to the evolution of social norms and “spaces” of governance and regulation. Such spaces are always more than geographical realms, as they are constituted, discursive and symbolic spaces. They are open to being unpacked through an empirically informed engagement with the scales on which local and ‘global’ governance processes as well as the differences between legal and non-legal forms of social ordering are being demarcated.<sup>35</sup> These perspectives effectively challenge present attempts to conceptualize a hierarchically structured global legal order while they question the association of legal rule creation with a territorially fixed place. As such, this Article’s proposed concept of “transnational legal pluralism” (“TLP”) goes beyond Philip Jessup’s 1956 idea of transnational law, through which he sought to complement and challenge Public and Private International Law;<sup>36</sup> TLP brings together insights from legal sociology and legal theory with research on global justice, ethics, and regulatory governance to illustrate the transnational nature of law and regulation, as well as constantly challenges the various claims to legal unity and hierarchy made over time.

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<sup>33</sup> See e.g., Adrienne Héritier & Dirk Lehmkuhl, *The Shadow of Hierarchy and New Modes of Governance*, 28 J. PUB. POL’Y 1 (2008); Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes*, 16 IND. J. GLOBAL LEGAL STUD. 621 (2009); Christiana Ochoa, *The Relationship of Participatory Democracy to Participatory Law Formation*, 15 IND. J. GLOBAL LEGAL STUD. 5 (2008); Peter Evans, *Is an Alternative Globalization Possible?*, 36 POL. & SOC’Y 271 (2008).

<sup>34</sup> See generally David Schneiderman, *Realising Rights in an Era of Economic Globalisation: Discourse Theory, Investor Rights, and Broad-Based Black Economic Empowerment*, in REDEFINING SOVEREIGNTY IN INTERNATIONAL ECONOMIC LAW 429 (Wenhau Shan, Penelope Simons & Dalvinder Singh eds., 2008); see also Alexander Somek, *The Argument from Transnational Effects II: Establishing Transnational Democracy*, 16 EUR. L.J. 375 (2010).

<sup>35</sup> See Mariana Valverde, *Jurisdiction and Scale: Legal ‘Technicalities’ as Resources for Theory*, 18 SOC. & LEGAL STUD. 139 (2009).

<sup>36</sup> See generally JESSUP, *supra* note 9.



The remainder of this Article is structured as follows: section II revisits the legal pluralist insights into the tension between law and non-law. Against this background, this Article will trace the emergence of border-crossing regulatory regimes as a challenge to state-oriented legal reasoning in section III. It illustrates the parallels between the impasses of legal theorizing about global or transnational governance with those that marked the evolution of law in the nation state. Section IV revisits the frequently asked question of whether globalization marks the end of law. Attempting a negative answer, this section proposes to read the emergence of transnational law not as the advent of a new field—similar to the way that environmental law or Internet law were considered as *new* legal fields only relatively recently. Instead, the central assumption is that transnational law constitutes a methodological shift in legal theory—an attempt to bridge the experience of legal pluralism in the nation-state with that of the emerging transnational space. Section V pursues this argument and applies it to the initial paradox between law and non-law. Transnational law can now be understood as a lens through which to perceive the argumentative parallels between the impasses, roadblocks, and impossibilities of law that recur, both inside and outside of the nation-state. As the borders of the state are reconstructed as historically contingent reference points for the evolution of legal reasoning, transnational law becomes the legal theoretical engagement with the law/non-law distinction in (world) society. The concluding section, section VI, sets out the framework of transnational legal pluralism.

## II. THE ANXIETIES OF GLOBAL GOVERNANCE AND THE AMBIVALENT NATURE OF LAW

Today, many regulatory areas are examples of transnational norm-creation. Supply chains that connect regional and global markets<sup>37</sup>, commercial arbitration,<sup>38</sup> food safety and food quality standardization regimes,<sup>39</sup> as well as internet governance,<sup>40</sup> but also environmental

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<sup>37</sup> See generally Francis Snyder, *Global Economic Networks and Global Legal Pluralism*, in TRANSATLANTIC REGULATORY CO-OPERATION (George A. Bermann et al. eds., 2001); Francis Snyder, *Economic Globalisation and the Law in the 21st Century*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 624 (Austin Sarat ed., 2004).

<sup>38</sup> See generally Clive M. Schmitthoff, *The New Sources of the Law of International Trade*, 15 INT'L SOC. SCI. J. 259 (1963); Filip De Ly, *Lex Mercatoria (New Law Merchant): Globalisation and International Self-Regulation*, in RULES AND NETWORKS: THE LEGAL CULTURE OF GLOBAL BUSINESS TRANSACTIONS 159 (Richard Appelbaum et al. eds., 2001).

<sup>39</sup> See generally Patrycja Dabrowska, *GM Foods, Risk, Precaution and the Internal Market: Did Both Sides Win the Day in the Recent Judgment of the European Court of Justice?*, 15 GERMAN L.J. 151 (2004); Dayna Nadine Scott, *Nature/Culture Clash: The Transnational Trade in GMOs* (Global Law, Working Paper No. GLWP 06/05, 2005), available at [http://www.nyulawglobal.org/GLWP\\_0605.htm](http://www.nyulawglobal.org/GLWP_0605.htm); Antonia Eliason, *Science versus Law in WTO Jurisprudence: The (Mis)Interpretation of the Scientific Process and the (In)sufficiency of Scientific Evidence in EC-Biotech*, 41 N.Y.U. J. INT'L L. & POL. 341 (2009).

<sup>40</sup> See generally David D. Clark, *A Cloudy Crystal Ball: Visions of the Future*, in PROCEEDINGS OF THE TWENTY-FOURTH INTERNET ENGINEERING TASK FORCE 539-544 (Megan Davies et al. eds.,

protection,<sup>41</sup> crime,<sup>42</sup> and terrorism<sup>43</sup>—are key examples of increasingly expanding spaces of individual, organizational, and regulatory activity that evolve with little regard for jurisdictional boundaries. The denationalization of norm production in these areas with such far-reaching impact on the affected segments of society raise pressing questions regarding agency, representation and participation. These have to be seen as elements of an evolving transnational order, which we observe as much as help construct. Through the application of concepts such as legitimacy, rule of law or, constitutionalism to unpack the nature of this evolving order, scholars engage in bridging and translation efforts between domestic experiences with law and governance and the stark unruliness and incoherence of global governance patterns today. It is of little surprise then, that conceptual work such as that of Karl Polanyi is being revisited today in search of a better understanding of the unravelling of frameworks of socio-political and economic dynamics.<sup>44</sup>

But, a focus on 'embeddedness' can only partially capture the dynamics of scale which characterize transnational regulatory governance today. This can be illustrated by looking at a number of other fields such as company, insolvency, and even labor law that have long been understood as embedded in historically evolved political and regulatory economies.<sup>45</sup> Today, these

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1992), available at <http://www.ietf.org/old/2009/proceedings/prior29/IETF24.pdf>; Christoph Engel, *The Role of Law in the Governance of the Internet*, 20 INT'L REV. L. COMPUTERS & TECH. 201–16 (2006); Jack Goldsmith, *The Internet, Conflicts of Regulation, and International Harmonisation*, in GOVERNANCE OF GLOBAL NETWORKS IN THE LIGHT OF DIFFERING LOCAL VALUES 197 (Christoph Engel & Kenneth Keller eds., 2000); Jochen von Bernstorff, *The Structural Limitations of Network Governance: ICANN as a Case in Point*, in TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM 257 (Christian Joerges et al. eds., 2004).

<sup>41</sup> See generally Jutta Brunnée, *Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection*, 53 INT'L & COMP. L.Q. 351 (2004); OREN PEREZ, ECOLOGICAL SENSITIVITY AND GLOBAL LEGAL PLURALISM: RETHINKING THE TRADE AND ENVIRONMENT CONFLICT (2004); TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION (Rebecca M. Bratspies & Russell A. Miller eds., 2006); Andrew P. Morriss & Roger E. Meiners, *Borders and the Environment*, 39 ENVTL. L. 141 (2009); John M. Conley & Cynthia A. Williams, *Global Banks as Global Sustainability Regulators?: The Equator Principles*, 33 LAW & POL'Y 542 (2011).

<sup>42</sup> See generally Tomer Broude & Doron Teichman, *Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity*, 62 VAND. L. REV. 795 (2009).

<sup>43</sup> See generally Ulrich Beck, *Living in the World Risk Society*, 35 ECON. & SOC'Y 329 (2006); Ulrich Beck, *Critical Theory of World Risk Society: A Cosmopolitan Vision*, 16 CONSTELLATIONS 3 (2009); ULRICH BECK, *WORLD AT RISK* (Ciaran Cronin trans., Polity Press 2009) (2007).

<sup>44</sup> Marc Amstutz, *Globalising Speenhamland: On the Transnational Metamorphosis of Corporate Social Responsibility in GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS* 359, 373–74 (C. Joerges & J. Falke eds., 2011)

<sup>45</sup> See generally Sigurt Vitols, *Varieties of Corporate Governance: Comparing Germany and the UK*, in VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 337 (Peter A. Hall & David Soskice eds., 2001); Klaus J. Hopt, *Common Principles of Corporate Governance in Europe?*, in CORPORATE GOVERNANCE REGIMES: CONVERGENCE AND DIVERSITY 175 (Joseph A. McCahery et al. eds., 2002).

fields display a distinctly transnational character.<sup>46</sup> Constituted through a complex overlapping of different national, international, public, and private norm-creation processes, these fields underscore the conundrum of the proliferating global regulatory space. In response, state-based categorizations such as the hierarchy of norms, the idea of a separation of powers, or of a “unity of law”<sup>47</sup> continue to fall short of grasping the nature of the evolving transnational normative order.<sup>48</sup> Yet, the transnational scale of regulatory fields is in itself the result of a construction. Understood by lawyers foremost as areas of legal regulation with a particular, associated set of functionalities, addressees and remedies, distinctions between different legal fields can also be understood as cartographic demarcations of domains of social order and of social meaning. In other words, legal fields capture contested claims to sovereignty. This constitutive dimension of distinguishing between various legal fields becomes strikingly apparent in areas that are characterized by an intentional pulling apart of different parts of the regulated object and their respective association with a distinct legal regulatory apparatus and rationality. An impressive example of such a fragmentation of the regulated social unit can be identified through the lens of corporate or, company law, where relations between investors and management are considered to be at the core of the legal field, while relations between the company and its employees are considered to be lying outside of the purview of corporate law. As a result, different aspects, different dimensions of the corporation are captured through particular functionalist lenses. As we will see, this fragmentation of social reality and its reconstitution through different mappings as legal fields unfolds in a radical way in the transnational space.

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<sup>46</sup> See generally Harry Arthurs & Claire Mummé, *From Governance to Political Economy: Insights from a Study of Relations between Corporations and Workers*, 45 OSGOODE HALL L.J. 439 (2007); Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007); Peer Zumbansen, *New Governance in European Corporate Governance Regulation as Transnational Legal Pluralism*, 15 EUR. L.J. 246 (2009) [hereinafter Zumbansen, *New Governance*]; Horst Eidenmüller, *Recht als Produkt*, 64 JURISTENZEITUNG [JZ] 641 (2009) (Ger.).

<sup>47</sup> For an inspiring discussion, see Klaus Günther, *Legal Pluralism or Uniform Concept of Law?*, 5 NO FOUND. J. EXTREME LEGAL POSITIVISM 5 (2008); Florian F. Hoffmann, *In Quite a State: Trials and Tribulations of an Old Concept in New Times*, in PROGRESS IN INTERNATIONAL LAW 263 (Russell A. Miller & Rebeca M. Bratspies eds., 2008); WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* (2000).

<sup>48</sup> See generally Oren Perez, *Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law*, 10 IND. J. GLOBAL LEGAL STUD. 25 (2003); Zumbansen, *Transnational Law*, *supra* note 11; T. Alexander Aleinikoff, *Transnational Spaces: Norms and Legitimacy*, 33 YALE J. INT'L L. 479 (2008); Sweet, *supra* note 33; Craig M. Scott, *'Transnational Law' as Proto-Concept: Three Conceptions*, 10 GERMAN L.J. 859 (2009) [hereinafter Scott, *Proto-Concept*].

One can sense a certain sense of urgency<sup>49</sup> in the current search for appropriate labels, concepts, and instruments for this regulatory space today. Lawyers have long been forming alliances with scholars in a wide range of social sciences including: sociology, political science, economics, and geography. Such interdisciplinary collaboration in practice and methodology is anything but new to law and legal theory. But, the decisive quality of interdisciplinary research on global governance today is an increasingly articulate interest in drawing lessons of such interdisciplinary collaboration. Building on insights by social scientists that emphasize the importance of social facts and empirical findings,<sup>50</sup> the study of law has, for the longest time, been carried out in close proximity and in the constant shadow of social studies.<sup>51</sup> The previously mentioned sociology-based legal projects from the end of the 19th and the beginning of the 20th Century can be seen today as eminent precursors to an intensifying study into the institutional foundations of legal systems: a constellation of systems marked by the erosion of boundaries between domestic legal orders and the continuing contestation of the normative-conceptual foundations, but also the practice of the “rule of law”<sup>52</sup>, the social and the welfare state, and their ambiguous promises, legacies and aftermaths.<sup>53</sup> The Legal Realist attack on formalism,<sup>54</sup> the Post War natural law/legal positivism debate,<sup>55</sup> the emergence of legal pluralism

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<sup>49</sup> See generally Rebecca Bratspies, *Regulatory Trust*, 51 ARIZ. L. REV. 575 (2009); GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION (Edward J. Balleisen & David A. Moss eds., 2010).

<sup>50</sup> See generally ADAM FERGUSON, AN ESSAY ON THE HISTORY OF CIVIL SOCIETY (Fania Oz-Salzberger ed., 1995) (1767); EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY (W.D. Halls trans., Free Press 1984) (1893).

<sup>51</sup> See generally HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (1861); FERDINAND TÖNNIES, COMMUNITY AND SOCIETY (Ch. P. Loomis trans., Michigan State Univ. Press 1957) (1887); MAX WEBER, ON LAW IN ECONOMY AND SOCIETY (Max Rheinstein trans., Touchstone 1967) (1925).

<sup>52</sup> JOTHIE RAJAH, AUTHORITARIAN RULE OF LAW: LEGISLATION, DISCOURSE AND LEGITIMACY IN SINGAPORE (New York, NY: Cambridge University Press 2012)

<sup>53</sup> See generally David Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1 (1972); DILEMMAS, *supra* note 19; Zumbansen, *Law, supra* note 32.

<sup>54</sup> See generally Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT (1975). A very worthwhile discussion and analysis with a stunning treatment of the literature is provided by NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995).

<sup>55</sup> See generally H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *American Jurisprudence through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977); Stanley L. Paulson, *On the Background and Significance of Gustav Radbruch's Post-War Papers*, 26 OXFORD J. LEGAL STUD. 17 (2006).

in the wake of post-colonialism,<sup>56</sup> and the rise of “law & society”—both from the left<sup>57</sup> and the right<sup>58</sup>—as well as the critique of *juridification*<sup>59</sup> today yield to a cacophonous contestation of the merits and limits of law’s knowledge and its evolving nature and role.<sup>60</sup>

Seen in this light, the search for the nature of law has always been carried out with the pretentious assumption that it is or *must be*—that law, in the end, *can be*—different from religion, morality, and economics. But the 20th Century has left the emerging body of law battered and torn, scarred and violated.<sup>61</sup> In turn, our attempts to rehabilitate it risk being either naïve or incredulously courageous, as the definition of law has become elusive. Should law be understood as a means of oppression, corruption, and domination; or as an instrument of hope, liberation, and emancipation? Can we recognize and understand law only from its existence within a particular institutional setting, or do we see law by its *function* in society?<sup>62</sup> Its multifaceted and fragile constitution has been associated with its paradoxical foundation<sup>63</sup> and creation out of an act of violence.<sup>64</sup>

Roger Cotterrell remarked in this context that the difficulty of answering these questions has to be seen against the background of a blurring of

<sup>56</sup> See generally Moore, *Social Change*, *supra* note 16; Boaventura de Sousa Santos, *Law: A Map of Misreading Toward a Postmodern Conception of Law*, 14 J.L. & SOC’Y 279 (1987); Merry, *Legal Pluralism*, *supra* note 18.

<sup>57</sup> See generally Trubek, *supra* note 53; Galanter, *‘Haves’ Come Out Ahead*, *supra* note 30.

<sup>58</sup> See generally GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1973).

<sup>59</sup> See generally PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* (1978); Gunther Teubner, *Juridification—Concepts, Aspects, Limits, Solutions*, in *JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST AND SOCIAL WELFARE LAW 3* (Gunther Teubner ed., 1987) [hereinafter *Juridification*].

<sup>60</sup> See generally Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19* (David M. Trubek & Alvaro Santos eds., 2006); BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* (2002); Peer Zumbansen, *Law’s Effectiveness and Law’s Knowledge: Reflections from Legal Sociology and Legal Theory*, 10 GERMAN L.J. 417 (2009) [hereinafter Zumbansen, *Law’s Effectiveness*].

<sup>61</sup> See generally REINHART KOSELLECK, *Geschichte, Recht und Gerechtigkeit*, in *ZEITSCHICHTEN: STUDIEN ZUR HISTORIK 336* (2000); BAXI, *supra* note 5.

<sup>62</sup> See generally LUHMANN, *SOCIOLOGICAL THEORY*, *supra* note 23.

<sup>63</sup> See generally Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC’Y REV. 727 (1989); Gunther Teubner, *Dealing With Paradoxes: Derrida, Luhmann, Wiethölter*, in *PARADOXES AND INCONSISTENCIES IN LAW 41* (Oren Perez & Gunther Teubner eds., 2005).

<sup>64</sup> See generally Walter Benjamin, *The Critique of Violence* (Edmund Jephcott trans.), reprinted in *REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS* (Peter Demetz ed., 1978); Jacques Derrida, *Force of Law*, 11 CARDOZO L. REV. 919 (1990). For an excellent discussion and homage, see Petra Gehring, *Force and “Mystical Foundation” of Law: How Jacques Derrida Addresses Legal Discourse*, 6 GERMAN L.J. 151 (2005), and the contributions to the same issue.

boundaries between law and society.<sup>65</sup> Law, Cotterrell wrote, “constitutes society in so far as it is, itself, an aspect of society, a framework and an expression of understandings that enable society to exist. A sociological perspective on legal ideas is necessary to recognise and analyse the intellectual and moral power of law in this respect.”<sup>66</sup> Understanding law this way—as a social phenomenon<sup>67</sup>—blurs the distinction between law and society: the internal/external distinction is “replaced by a conception of partial, relatively narrow or specialised, participant perspectives on (and in) law, confronting and being confronted by, penetrating, illuminating, and being penetrated and illuminated by, broader, more inclusive perspectives on (and in) law as a social phenomenon.”<sup>68</sup> Such a perspective on law must be understood as an attempt to respond to law’s own alleged lack of methodology: “Law does not have a ‘methodology of its own’ and borrows methodologies from any discipline that can supply them.”<sup>69</sup> A sociological analysis on legal ideas would be to reflect “methodologically law’s own fragmentary varied methodological characteristics.”<sup>70</sup>

Shifting our analytical focus beyond the boundaries of the nation-state that has been providing the stage for the study of law in the recent past,<sup>71</sup> the proposed framework of transnational legal pluralism<sup>72</sup> seeks to capture the methodological challenge arising for law and social theory to make sense of the emerging transnational normative order. In situating this concept in dialogue with theoretical approaches of transnational law,<sup>73</sup> transnational commercial law,<sup>74</sup> global law,<sup>75</sup> law and globalization,<sup>76</sup> transnational spaces<sup>77</sup>

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<sup>65</sup> Roger Cotterrell, *Why Must Legal Ideas Be Interpreted Sociologically?*, 25 J.L. & SOC’Y 171, 176 (1998) [hereinafter Cotterrell, *Legal Ideas*].

<sup>66</sup> *Id.* at 182.

<sup>67</sup> *Id.* at 187. “Sociological interpretation of legal ideas is not a particular, specialized way of approaching law, merely co-existing with other kinds of understanding. Sociology of law in this particular context is a transdisciplinary enterprise and aspiration to broaden understanding of law as a social phenomenon.” *Id.*

<sup>68</sup> *Id.* at 188.

<sup>69</sup> *Id.* at 178, noted in Jack M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949 (1996).

<sup>70</sup> Cotterrell, *Legal Ideas*, *supra* note 65, at 189.

<sup>71</sup> See generally JAMES C. SCOTT, SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED (1998); Niklas Luhmann, *Metamorphosen des Staates*, in 4 GESELLSCHAFTSSTRUKTUR UND SEMANTIK. STUDIEN ZUR WISSENSSOZIOLOGIE DER MODERNEN GESELLSCHAFT 101 (1995).

<sup>72</sup> See generally Zumbansen, *New Governance*, *supra* note 46; GRALF-PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW (2010); Zumbansen, *Transnational Legal Pluralism*, 2 TRANS. L. THEORY 141 (2010).

<sup>73</sup> See generally JESSUP, *supra* note 9; Scott, *Proto-Concept*, *supra* note 48.

<sup>74</sup> See generally Goode, *supra* note 10; Cranston, *supra* note 10.

<sup>75</sup> See generally GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997).

and communities,<sup>78</sup> global legal pluralism,<sup>79</sup> hard versus soft law,<sup>80</sup> law and social norms,<sup>81</sup> or law as product,<sup>82</sup> these parallel endeavors constantly relativize and challenge the conceptual boundaries of the approach pursued in this Article.

Importantly, this trajectory of legal evolution can be studied as a process of law's transnationalization. Despite its prima facie appearance as being relevant exclusively within the nation-state's framework of legal ordering,

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<sup>76</sup> See generally Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005); Mathias Reimann, *From the Law of Nations to Transnational Law: Why We Need a New Basic Course for the International Curriculum*, 22 PENN ST. INT'L L. REV. 397 (2004); Peer Zumbansen, *Globalization and the Law: Deciphering the Message of Transnational Human Rights Litigation*, 5 GERMAN L.J. 1499 (2004); Craig Scott, *A Core Curriculum for the Transnational Legal Education of JD and LLB Students: Surveying the Approach of the International, Comparative and Transnational Law Program at Osgoode Hall Law School*, 23 PENN ST. INT'L L. REV. 757 (2005).

<sup>77</sup> See generally Richard Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999); SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006) [hereinafter SASSEN, TERRITORY, AUTHORITY, RIGHTS]; Saskia Sassen, *The Places and Spaces of the Global: An Expanded Analytic Terrain*, in GLOBALIZATION THEORY: APPROACHES AND CONTROVERSIES 79 (David Held & Anthony G. McGrew eds., 2007); Shaunnagh Dorsett & Shaun McVeigh, *Questions of Jurisdiction*, in JURISPRUDENCE OF JURISDICTION 1 (Shaun McVeigh ed., 2007); Aleinikoff, *supra* note 48.

<sup>78</sup> See generally Roger Cotterrell, *A Legal Concept of Community*, 12 CANADIAN J.L. & SOC'Y 75 (1997); Roger Cotterrell, *Transnational Communities and the Concept of Law*, 21 RATIO JURIS 1 (2008).

<sup>79</sup> See generally Berman, *Global Legal Pluralism*, *supra* note 29; Michaels, *Global Legal Pluralism*, *supra* note 29.

<sup>80</sup> See generally Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); Christine Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989). See generally HARD CHOICES, SOFT LAW: VOLUNTARY STANDARDS IN GLOBAL TRADE, ENVIRONMENT AND SOCIAL GOVERNANCE (John J. Kirton & Michael J. Trebilcock eds., 2004); Gregory Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010).

<sup>81</sup> See generally POSNER, SOCIAL NORMS, *supra* note 28; NORMS AND THE LAW (John N. Drobak ed., 2006); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998); David Charny, *Illusions of a Spontaneous Order: "Norms" in Contractual Relationships*, 144 U. PA. L. REV. 1841 (1996); Symposium, *Law, Economics, and Norms*, 144 U. PA. L. REV. 1643 (1996). With regard to the norms versus regulation conflict, for example, in the current debate over a common frame of reference for European private law, compare Jan Smits, *European Private Law: a Plea for a Spontaneous Legal Order*, in EUROPEAN INTEGRATION AND LAW 85 (Deirdre M. Curtin et al. eds., 2006), with Martijn W. Hesselink, *A Spontaneous Order for Europe? Why Hayek's Libertarianism is Not the Right Way Forward for European Private Law*, in EUROPEAN PRIVATE LAW AFTER THE COMMON FRAME OF REFERENCE (Hans-W. Micklitz & Fabrizio Cafaggi eds., 2010).

<sup>82</sup> See generally Roberta Romano, *Law as Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225 (1985); ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET (2009); Graf-Peter Calliess & Hermann B. Hoffmann, *Judicial Services for Global Commerce—Made in Germany?*, 10 GERMAN L.J. 115 (2009); Graf-Peter Calliess & Hermann B. Hoffmann, *Effektive Justizdienstleistungen für den globalen Handel*, 42 ZEITSCHRIFT FÜR RECHTSPOLITIK 1 (2009) (Ger.); Eidenmüller, *supra* note 46.

the above mentioned scholarly projects in legal sociology, legal theory and anthropology, and political theory reflect the changing environment of legal systems. This transformation is perceived foremost as one of eroding boundaries, boundaries between form and substance,<sup>83</sup> between public and private<sup>84</sup> (“states” and “markets”<sup>85</sup>), but at its core is concerned with the contestation, deconstruction, and relativization of the boundaries between law and non-law.<sup>86</sup> At the height of the regulatory state with its (perhaps primary?) belief in juridification, and in law, as social engineering,<sup>87</sup> law today is often seen as having become irrelevant in the face of global challenges. It is from this vantage point that the study of law must be rethought and reasserted as social science, as one among other conceptual approaches to the study of modern societies.<sup>88</sup>

In the absence of world government, attempts to demarcate a legal system adequate to the “post-national constellation”<sup>89</sup> primarily display a deep-running anxiety in the face of a perceived lack of unity, coherence, and an institutional and normative hierarchy.<sup>90</sup> The procedural and substantive architectures of fast-emerging transnational regulatory regimes<sup>91</sup> raise

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<sup>83</sup> See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form"*, 100 COLUM. L. REV. 94 (2000).

<sup>84</sup> See generally Carol Harlow, *"Public" and "Private" Law: Definition without Distinction*, 43 MOD. L. REV. 241 (1980); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992).

<sup>85</sup> See generally Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). For a historical discussion, see VIKTOR VANBERG, *MARKT UND ORGANISATION: INDIVIDUALISTISCHE SOZIALTHEORIE UND DAS PROBLEM KORPORATIVEN HANDELNS* (1982).

<sup>86</sup> *Rethinking Legal Pluralism*, *supra* note 19; Gunther Teubner, *The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy*, 31 LAW & SOC'Y REV. 763 (1997); DE SOUSA SANTOS, *supra* note 60.

<sup>87</sup> For a discussion of the U.S. development, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); for Germany, see *Juridification*, *supra* note 55.

<sup>88</sup> Zumbansen, *Law's Effectiveness*, *supra* note 60, at 10; see generally Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 239 (1983); DE SOUSA SANTOS, *supra* note 60.

<sup>89</sup> See generally HABERMAS, *supra* note 12; Jürgen Habermas, *A Political Constitution for the Pluralist World Society?*, in *BETWEEN NATURALISM AND RELIGION: PHILOSOPHICAL ESSAYS* 312 (Jürgen Habermas ed., 2008).

<sup>90</sup> See generally TWINING, note 47.

<sup>91</sup> In the world of transnational governance, “[t]he usual panoply of constitutional mechanisms of accountability and legitimacy which characterises liberal democratic constitutional systems is not necessarily available.” Julia Black & David Rouch, *The Development of Global Markets as Rule-Makers: Engagement and Legitimacy*, LAW & FIN. MARKETS REV. 218, 224 (2008) (depicting the system of international financial governance to be distinct from nation state based understandings of governance); see generally Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113 (2009), and for the intriguing debate



questions that go to the heart of any legal theory.<sup>92</sup> Legal scholars have addressed these issues mostly through the lens of the state.<sup>93</sup> These questions arise around the “politics of private law making,”<sup>94</sup> and, as such, concern primarily the *constitutional* dimensions of private ordering: issues of accountability, legitimacy, and democratic control.<sup>95</sup> What makes these accountability and legitimacy issues—which have in part been driving the important work in global administrative law<sup>96</sup>—particularly intriguing is that they underscore the degree to which the evolving transnational regulatory regimes illustrate the *constitutionalization* challenges facing the global legal order today.<sup>97</sup> As increasingly specialized, functionally differentiated problem areas and spheres of human and institutional conduct evolve in response to a combination of external impulses and their own

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following this paper, see David Zaring, *Response to Transnational Regulatory Networks and Their Limits*, OPINIO JURIS (Apr. 9, 2009, 10:46AM), <http://opiniojuris.org/2009/04/09/transnational-regulatory-networks-and-their-limits/>.

<sup>92</sup> See generally WILHELM VON HUMBOLDT, *THE SPHERE AND DUTIES OF GOVERNMENT (THE LIMITS OF STATE ACTION)* (Joseph Coulthard trans., 1854) (1792); JEAN-BERTRAND AUBY, *LA GLOBALISATION, LE DROIT ET L'ÉTAT* 95 (2003); Hoffmann, *supra* note 44; STEPHEN BELL & ANDREW HINDMOOR, *RETHINKING GOVERNANCE: THE CENTRALITY OF THE STATE IN MODERN SOCIETY* (2009).

<sup>93</sup> See generally HUMBOLDT, *supra* note 92 (1792); AUBY, *supra* note 92; Hoffmann, *supra* note 44.

<sup>94</sup> See generally Daniela Caruso, *Private Law and State-Making in the Age of Globalization*, 39 N.Y.U. J. INT'L L. & POL. 1 (2006).

<sup>95</sup> For an insightful discussion, see Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501 (2009), and Colin Scott, *Reflexive Governance, Meta-Regulation and Corporate Social Responsibility: The "Heineken Effect"*, in PERSPECTIVES ON CORPORATE SOCIAL RESPONSIBILITY 170 (Nina Boeger et al. eds., 2008); see also Amiram Gill, *Corporate Governance as Social Responsibility: A Research Agenda*, 26 BERKELEY J. INT'L L. 452, 471–74 (2008) (“Corporate self-regulation and meta-regulation, read against the New Governance literature, capture a central element in the complexity of business law. That is, these regulatory patterns accompany socio-legal changes in market economies, highlighted by the fall of state authority and the rise of private ordering.”); Christopher M. Bruner, *States, Markets, and Gatekeepers: Public-Private Regulatory Regimes in an Era of Economic Globalization*, 30 MICH. J. INT'L L. 125, 129, 165 (2008) (discussing credit rating agencies and the Internet Corporation for Domain Names and Numbers—ICANN—as examples of “public-private gatekeepers” and their government-like exercise of regulatory authority).

<sup>96</sup> See generally Benedict Kingsbury et al., *Forward: Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, 68 LAW & CONTEMP. PROB. 1 (2005); Kalypto Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 68 LAW & CONTEMP. PROB. 263 (2005). For critical comments on this project, see Carol Harlow, *Global Administrative Law: The Quest for Principles and Values*, 17 EURO. J. INT'L L. 187 (2006); B.S. Chimni, *Co-option and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 799 (2005); Susan Marks, *Naming Global Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 995 (2006).

<sup>97</sup> See generally Walter, *supra* note 3; Christian Joerges, *The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline*, 14 DUKE J. COMP. & INT'L L. 149 (2004); David Kennedy, *A New World Order: Yesterday, Today, Tomorrow*, 4 TRANSNAT'L L. & CONTEMP. PROB. 329 (1994).

particular logic,<sup>98</sup> the law governing these constellations becomes deeply entwined in these complex, layered constitutions.<sup>99</sup> Where does this definition of law leave us? Obviously, law's proximity to self-destruction became apparent long *before* globalization, was in fact always part of law's constitution.<sup>100</sup> Globalization, understood differently, thus provides a label depicting another stage of reflection on the relationship between law and its Other. The law's predominant institutionalization in the state during the 19th and 20th Centuries casts a long shadow over our present attempts to imagine law as embodying a particular form of ordering rationality. The challenge of law *after*, and in the shadow of the 20th Century welfare state, lies in its functional diffusion and normative evaporation. This temporalization ("after") indicates a shift of paradigm, a conclusion and abdication of a dominant concept, rather than a historical development of a series of institutional frameworks that comprehensively replace preceding models of the state and modes of legal thinking.<sup>101</sup>

When referring to "global governance," scholars often associate a dramatic disembedding of law and its institutional architecture.<sup>102</sup> But, the relative loss of a reliable and comprehensive legal infrastructure accompanies an increasingly intense debate around an evolving global legal consciousness, in particular with regard to human rights.<sup>103</sup> Global governance further opened the windows to a world beyond—one of injustice, unequal distribution, and grave rights abuses;<sup>104</sup> a claim, however, fiercely contested

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<sup>98</sup> See the examples in *EMERGING LEGAL CERTAINTY: EMPIRICAL STUDIES ON THE GLOBALIZATION OF LAW* (Volkmar Gessner & Ali Cem Budak eds., 1998); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004).

<sup>99</sup> Gunther Teubner & Peter Korth, *Two Kinds of Legal Pluralism: Collision of Laws in the Double Fragmentation of World Society*, in *REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION* (2009) (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1416041](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1416041). Teubner and Korth further explain:

unitary global law reproduces itself through legal acts which are guided by different programs but are in the end oriented towards the binary code legal/illegal. The unity of global law is just not, as in the nation state, based on the consistency of legal norms structurally secured by the hierarchy of the courts; rather, it is process-based, deriving simply from the modes of connection between legal operations, which transfer binding legality between even highly heterogeneous legal orders.

*Id.*

<sup>100</sup> *But see* TWINING, note 47.

<sup>101</sup> For a parallel application of such a perspective, see *supra* note 53.

<sup>102</sup> See, e.g., Ulrich Sieber, *Rechtliche Ordnung in einer Globalen Welt*, 41 RECHTSTHEORIE 151 (2010) (Ger.).

<sup>103</sup> See Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 INT'L J. CONST. L. 415 (2008); Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUD. 499 (2000).

<sup>104</sup> See generally BAXI, *supra* note 5.

from scholars and practitioners on the ground.<sup>105</sup> As illustrated, for example, in the continued interest in the constitutionalization of international law,<sup>106</sup> the question whether there is any pervasive role for law in a globalised world remains at the core of the present engagement with global governance issues. As suggested above, the complexity inherent to the differentiation of law and non-law in regulatory governance and for which the evolution of modern states give ample illustration, is further exacerbated in the global context. This means that a crisis, or exhaustion, of law cannot be depicted as a consequence of globalization, but as an inherent feature of law's evolution in its relation to society.

To reiterate the central thesis of this Article: the alleged crisis of law and legal regulation, whether depicted as a loss of state sovereignty or as a problem of lacking democratic and political accountability<sup>107</sup> and legitimacy<sup>108</sup> in the global context, has to be understood as a particular amplification of a problem with law that has long been coming. In that respect, many of our present concerns about the fate of law in relation to a continuing transformation of the state and the related changes to models of democracy and issues of legitimacy and accountability<sup>109</sup> must be assessed against the background of a reconstruction of legal evolution in the national and local context. Without suggesting that the legitimacy and regulatory challenges connected with the amorphous concept of global governance<sup>110</sup> are

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<sup>105</sup> See, e.g., Boaventura de Sousa Santos, *The Processes of Globalisation*, EUROZINE (Aug. 22, 2002), <http://www.eurozine.com/pdf/2002-08-22-santos-en.pdf>; Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance*, 52 CURRENT ANTHROPOLOGY 583 (2011).

<sup>106</sup> For a critical discussion, see Theodor Schilling, *Constitutionalization of General International Law—An Answer to Globalization? Some Structural Aspects* (NYU Jean Monnet Program, Working Paper 2005), available at <http://centers.law.nyu.edu/jeanmonnet/archive/fellowsforum/documents/schillingForumPaper020405.pdf>; Sol Picciotto, *Constitutionalizing Multilevel Governance?*, 6 INT'L J. CONST. L. 457 (2008); Martin Loughlin, *What is Constitutionalization?*, in *THE TWILIGHT OF CONSTITUTIONALISM?* 47 (Petra Dobner & Martin Loughlin eds., 2010).

<sup>107</sup> See generally Jerry Louis Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance* (Yale Law Sch. Research Paper No. 116, 2006), available at <http://papers.ssrn.com/abstract=924879>.

<sup>108</sup> See generally Julia Black, *Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes* (LSE Law, Society and Economy, Working Paper No. 2, 2008), available at <http://ssrn.com/abstract=1091783> (associating legitimacy and accountability concerns of transnational regulatory regimes with a set of "functional, democratic, normative" challenges).

<sup>109</sup> See generally David Held, *Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective*, 39 GOV'T & OPPOSITION 364 (2004).

<sup>110</sup> For a lament of the concept's shortcomings in providing guidance for the development of sustainable and effective regulatory instruments, compare Armin Bogdandy, Philipp Dann, & Matthias Goldmann, *Developing the Publicness of Public International Law*, 9 GERMAN L.J. 1375 (2008), with David Held, *Reframing Global Governance: Apocalypse Soon or Reform?*, in *GLOBALIZATION THEORY: APPROACHES AND CONTROVERSIES* 240, 245–46, 249–254 (David Held & Anthony McGrew eds., 2007), and Mathias Koenig-Archibugi, *Global Governance*, in *THE*

exact mirror reflections of locally experienced moments of exhaustion,<sup>111</sup> there is a particular role to be played by local, domestic regulatory experiences for the conceptualization of global governance regimes. The role of law occupies a particularly challenging place in this inquiry, particularly because the rise of globalization is so often associated, if not with the demise of law,<sup>112</sup> then with an immense pressure on law and legal institutions.

In contrast, globalization processes should be understood as an invitation to reflect on the connections between our attempts to make sense of a fragmented global, transnational normative order, and our particular, yet anything but homogenous, experiences with law and regulation on the national level. In short, the contention is that globalization does not pose the first advent of a crisis of law, understood as a tool of regulation. Instead, the varied history of law reveals the intricate combination of hubris, fragility, violence, and vulnerability that underlies the idea and experience of law.

### III. METHODOLOGICAL CONSEQUENCES

A study of law in the context of evolving global governance debates, then, prompts parallel efforts of introspection (say, regarding the definition and the function of law) and of demarcation (for example, regarding the different qualities between legal, political, and economic governance). Such efforts, however, are being pursued against the background of a still-tentative description of the transnational regulatory landscape. From the perspective of comparative law there is much to learn from studying law against the background of a particular, national, historical context.<sup>113</sup> However, the transnational dimension challenges the tendency in comparative law to study distinct legal cultures.<sup>114</sup> Much research suggests that the particular nature of the transnational arena defeats our attempts at understanding the relation between the national and the post-national constellation<sup>115</sup> as a linear one,

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HANDBOOK OF GLOBALISATION 318 (Jonathan Michie ed., 2003) (highlighting the interdisciplinary challenges that are captured in the term).

<sup>111</sup> Jürgen Habermas, *The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies, (1985) in THE NEW CONSERVATISM: CULTURAL CRITICISM AND THE HISTORIANS' DEBATE* (Shierry Weber Nichol森 ed. & trans., 1989) [hereinafter Habermas, *New Obscurity*].

<sup>112</sup> See NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM 49 (Fatima Kastner et al. eds., Klaus A. Ziegert trans., 2004) [hereinafter LUHMANN, SOCIAL SYSTEM].

<sup>113</sup> In this regard, see the helpful comparative reconstructions of public and private law concepts in Nils Jansen & Ralf Michaels, *Private Law and the State; Comparative Perceptions and Historical Observations*, 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT [RabelsZ] 345 (2007), reprinted in BEYOND THE STATE: RETHINKING PRIVATE LAW 15 (Nils Jansen & Ralf Michaels eds., 2008).

<sup>114</sup> This is elaborated in Peer Zumbansen, *Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance*, in THEORY AND PRACTICE OF COMPARATIVE LAW (Jacco Bomhoff & Maurice Adams eds., 2012).

<sup>115</sup> HABERMAS, *supra* note 12.

either on a chronological or a systematic level.<sup>116</sup> But, at the same time, the evolving transnational nature of regulatory regimes as, for example, in labor<sup>117</sup> or corporate law,<sup>118</sup> mentioned earlier, presents itself not as an opposition or negation, but as a challenge to reassert the place and role of law. Reconceiving law as transnational suggests that domestic experiences with law are crucial points of orientation. Yet, they cannot provide reliable frameworks of institutional or normative design, which we could simply employ and transpose into the transnational arena. Instead, this approach must point towards two investigative strands. One is that the inquiry into the evolution and, eventually, the so-called crisis of law as regulation of social activity, has to attempt the reconstruction as an ironic project that is concerned with the meaning and aspiration of law over time and space.<sup>119</sup> This constellation can be grasped as the relation or tension between law and non-law, between legality and legitimacy, between law and justice, society, or other.<sup>120</sup> The reconstruction of local (e.g., national) experiences with law as constantly challenged by its opposite or its foundations, embeddedness, or contestations forms one strand of the following inquiry.<sup>121</sup>

The second investigative strand is to return to the original point of our reflections on how globalization can be said to prompt a renewed reflection on the particular nature of *legal* regulation. In this dimension we are concerned with the task of adequately recognizing the gap between the particular context in which norms and normative environments have evolved locally, and the emerging, allegedly unruly spaces of normative order on the global level. Against this background, the methodological dimension of transnational law reasserts itself. Approaching transnational law from a methodological perspective should help us from too quickly depicting the “transnational” as a distinct regulatory space, which would differ from the national and the international due to its de-territorial scope and its hybrid,

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<sup>116</sup> See the succinct observations by TWINING, note 47 (regarding the challenges to jurisprudence); JÜRGEN OSTERHAMMEL & NIELS P. PETERSSON, *GLOBALIZATION: A SHORT HISTORY* (Dona Geyer trans., 2004) (regarding the interdisciplinary challenges of studying and deciphering globalization). “The fact that historians assert with calm detachment that this phenomenon has existed for a long time does not preclude the need to make a political assessment of its impact on the present.” *Id.* at 150.

<sup>117</sup> See generally Adelle Blackett, *Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct*, 8 *IND. J. GLOBAL LEGAL STUD.* 401 (2001); Harry W. Arthurs, *Labor Law Without the State*, 46 *UNIV. TORONTO L.J.* 1 (1996).

<sup>118</sup> See generally Simon Deakin, *Reflexive Governance and European Company Law*, 15 *EUR. L.J.* 224 (2009); Larry Cata Backer, *Private Governance, Soft Law, and the Construction of Polycentric Networks for the Regulation of Transnational Corporations*, 17 *IND. J. GLOBAL LEGAL STUD.* 751 (forthcoming 2012).

<sup>119</sup> See generally Zumbansen, *Law*, *supra* note 32.

<sup>120</sup> See generally Trubek, *supra* note 53; Robert M. Cover, *Nomos and Narrative*, 97 *HARV. L. REV.* 4 (1983); Derrida, *supra* note 64; Gunther Teubner, *Self-Subversive Justice: Contingency or Transcendancy Formula of Law?*, 72 *MODERN L. REV.* 1 (2009).

<sup>121</sup> See, e.g., DE SOUSA SANTOS, *supra* note 60.

public-private constitution. Instead, as alluded to already, transnational law emerges as a particular perspective on law as part of a society that itself cannot sufficiently be captured by reference to national or de-nationalized boundaries. The transnational dimension does not arise with respect to territorial or jurisdictional confines, but from a reconstruction of the forms and functions of law deep within highly specialized areas of societal activity.

While this uncoupling of social systems from a state-associated framework of the political, economic, and legal order certainly presents a dramatic challenge to state-based theories of law, its real gist lies elsewhere. The uneasy relationship between national society and world society should not be seen as a threat, but as an element which is inherent to the constitution of legal spaces. From this perspective, transnational refers to the “other” of the law, which challenges, but simultaneously recognizes, its locally-learned relations to concrete structures of embeddedness and particular experiences of historical evolution and contextual differentiation.<sup>122</sup> Inspired by the analysis that was offered by the sociologist Saskia Sassen,<sup>123</sup> we can now posit that transnational law can be perceived as a way of questioning and reconstructing the project of law *between places and spaces* precisely because it helps to relativize law’s association with particular institutional frameworks.<sup>124</sup> At the same time, the tension between law’s grounding in concrete geographical and historical places and its evolution in spatial terms<sup>125</sup> warrants a careful look at the evolving relation between law, critique, and politics.<sup>126</sup>

#### IV. THINGS WE LOST—THINGS WE OUGHT TO REMEMBER

This look back at “places” reveals intriguing parallels between current global governance concerns and older debates about the effectiveness of legal

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<sup>122</sup> For a comparative approach from the perspective of legal geography, see Ford, *supra* note 77; Mariana Valverde, *Jurisdiction and Scale: Legal ‘Technicalities’ as Resources for Theory*, 18 SOC. & LEGAL STUD. 139 (2009).

<sup>123</sup> See generally Saskia Sassen, *The State and Globalization*, in THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 91 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002); SASSEN, TERRITORY, AUTHORITY, RIGHTS, *supra* note 77.

<sup>124</sup> See generally Gunther Teubner, *Fragmented Foundations: Societal Constitutionalism Beyond the Nation State*, in THE TWILIGHT OF CONSTITUTIONALISM? 327 (Petra Dobner & Martin Loughlin eds., 2010). See also his recent monograph: VERFASSUNGSFRAGMENTE. GESELLSCHAFTLICHER KONSTITUTIONALISMUS IN DER GLOBALISIERUNG (Frankfurt: Suhrkamp 2012)

<sup>125</sup> See, e.g., Saskia Sassen, *The Embeddedness of Electronic Markets: The Case of Global Capital Markets*, in THE SOCIOLOGY OF FINANCIAL MARKETS 17 (Karin Knorr Cetina & Alex Preda eds., 2005) [hereinafter Sassen, *Embeddedness of Electronic Markets*].

<sup>126</sup> See generally Hauke Brunkhorst, *Constitutionalism and Democracy in the World Society*, in THE TWILIGHT OF CONSTITUTIONALISM? 179 (Petra Dobner & Martin Loughlin eds., 2010); Petra Dobner, *More Law, Less Democracy? Democracy and Transnational Constitutionalism*, in THE TWILIGHT OF CONSTITUTIONALISM? 141 (Petra Dobner & Martin Loughlin eds., 2010).

regulation in complex societies.<sup>127</sup> Clearly, the hybridity of regulatory instruments that many global governance scholars observe today was a well-known feature of legal regulation as studied by legal sociologists and legal pluralists decades ago. In that regard, Sally Moore's analysis of law as being constituted in part by social norms, routines, customs, and practices and, at the same time, by hard legal regulation, proved of vital importance in opening our eyes to the intricate relations between the regulator and concrete, local, intimate social spaces.<sup>128</sup> Foreshadowing later calls for recognition of the regulatory powers of social norms,<sup>129</sup> scholars disenchanted with rights-based interventionism called for extralegal activism<sup>130</sup> and delegalization.<sup>131</sup> Meanwhile, this analysis has received further accentuation through the critical rejection of the assertion of pre-colonial 'customary' and traditional' law.<sup>132</sup>

On both sides of the Atlantic, the responses to the financially and normatively exhausted welfare state<sup>133</sup> soon split into progressive<sup>134</sup> and conservative<sup>135</sup> camps. These alternative perspectives provide the context for today's academic and political proposals following the 2008 financial crisis, and the law's role in global governance more generally. During the late 1970s and early 1980s, when social-democratic policy faltered and scepticism toward Keynesian economics increased, a fairly ambitious theoretical proposal was made that aimed at resituating law into a more accentuated model of society.<sup>136</sup> In this model, which did not lend itself to a straightforward ideological appropriation, society is composed of intersecting, but separated communications that are each constituted by a distinct terminology. Law was to be understood as one of these social systems along with economy, politics, religion, or art.<sup>137</sup> On the basis of this position, the concept of reflexive law was proposed as a form of law that stressed a crucial

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<sup>127</sup> See generally Moore, *Social Change*, *supra* note 17.

<sup>128</sup> See generally Griffiths, *supra* note 18.

<sup>129</sup> See generally POSNER, *SOCIAL NORMS*, *supra* note 28.

<sup>130</sup> For a brief historical account, see Lobel, *Paradox*, *supra* note 31..

<sup>131</sup> See generally Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 *J. LEGAL PLURALISM* 1 (1981) [hereinafter Galanter, *Justice in Many Rooms*].

<sup>132</sup> See, e.g., the contributions to *THE INVENTION OF TRADITION* (Eric Hobsbawm and Terence Ranger eds., 1992), and Martin Chanock, *A Peculiar Sharpness: An Essay on Property in the History of Customary Law in Colonial Africa*, 32 *J. AFRICAN HIST.* 65 (1991).

<sup>133</sup> See generally Habermas, *New Obscurity*, *supra* note 111.

<sup>134</sup> See generally Hubert Rottleuthner, *The Limits of Law: The Myth of a Regulatory Crisis*, 17 *INT'L J. SOC. L.* 273 (1989).

<sup>135</sup> See generally FRIEDRICH A. HAYEK, *THE MIRAGE OF SOCIAL JUSTICE* (1976).

<sup>136</sup> Gunther Teubner, *Substantive and Reflexive Elements of Modern Law*, 17 *LAW & SOC'Y REV.* 239 (1983) [hereinafter Teubner, *Substantive*]; see also NONET & SELZNICK, *supra* note 59.

<sup>137</sup> See generally Luhmann, *Social System*, *supra* note 23; LUHMANN, *SOCIAL SYSTEM*, *supra* note 112.

exposure and immersion into its surrounding systems while it remained operationally closed.<sup>138</sup>

Due to its cognitive openness, however, law must constantly receive impulses, “irritations” and, relying on its autopoietic nature, formulate legal responses, i.e., continue its systematic operation. In the face of the weakening welfare state and the growing frustration with ineffective, un-democratic, over-generalizing, and paternalistic regulatory laws, the concept of reflexive law was offered to explain the particular challenge and form of legal regulation in a complex world.<sup>139</sup> Its controversial core consisted of understanding law as being taken out of a learned institutional context made up of official institutions authoritatively creating state-originating laws and, instead, forced to reassert itself in highly diversified complex environments. This radicalization of law’s functional orientation constitutes a new stage in the assessment of law’s institutional form, as it has been learned over time. Whereas the general public today associates law most often with the state, the legal sociological work at the turn of the century, as well as the legal pluralist work during the 1960s and 1970s, had long questioned this tight coupling of law with the state.

Yet, the exuberant turn away from the state and to the market at the end of the 20th Century can be seen as smartly employing the very methodological orientations that had informed the reconstructive legal projects in the face of a financially and normatively exhausted welfare state in the 1980s.<sup>140</sup> The fragile reconstructions of law through the concepts of responsive or reflexive law on both sides of the Atlantic eventually fed into a large-scale rejection of state intervention throughout the 1980s and 1990s.<sup>141</sup> The politically progressive scholars in the 1970s and 1980s turned to alternative modes of legal regulation seeking to translate law’s generality into contextual, learning forms of socio-legal regulation.<sup>142</sup> Their hope had been to save the political ambitions of the welfare state while continuing the socio-political debate over the substance and direction of political intervention.<sup>143</sup> In contrast, today’s neo-formalism and neo-functionalism threatens to cut the ties between the current quest to answer the challenges of globalization and the previous struggles over law and politics.<sup>144</sup> Its proponents characterize legal regulation as inappropriately policy-driven and

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<sup>138</sup> See generally, Luhmann, *Social System*, *supra* note 23.

<sup>139</sup> Teubner, *Substantive*, *supra* note 131; see also Gunther Teubner, *Autopoiesis in Law and Society: A Rejoinder to Blankenburg*, 18 *LAW & SOC’Y REV.* 291, 295 (1984).

<sup>140</sup> Habermas, *New Obscurity*, *supra* note 111.

<sup>141</sup> See Ronald Dore, William Lazonick & Mary O’Sullivan, *Varieties of Capitalism in the twentieth century*, 15. *OXF. REV. ECON. POL’Y* 102 (1999).

<sup>142</sup> NONET & SELZNICK, *supra* note 136.

<sup>143</sup> *Id.*; see also Jürgen Habermas, *Paradigms of Law*, 17 *CARD. L. REV.* 771, 776 (1996).

<sup>144</sup> See, e.g., POSNER, *SOCIAL NORMS*, *supra* note 28.



as undue infringement on the societal actors' capacity to regulate their own affairs autonomously.<sup>145</sup>

In the clout of neo-formalism and neo-functionalism, which has largely characterized legal policy in recent years, a heavy reliance on arguments of necessity, objectivity, and naturalness came to prepare the ground for a functionalist interpretation and application of legal norms in politically-charged contexts experiencing fundamental shifts from public to private regulation. The attack on contract adjudication and governmental intervention that accompanied these developments and regularly depicted a market as originally existing without politics, without government regulation.<sup>146</sup> This depiction of the market and the state as separate worlds formed troubling alliances with policy recommendations, promoting the privatization of public services that were often fueled by arguments over efficiency and cost reduction.<sup>147</sup> Yet, whether, and in which forms, private actors assume formerly public regulatory functions represents the outcome of political choices and of other socio-economic developments that are unfolding at both the national and transnational level.<sup>148</sup> The alleged available fresh start for societal self-regulation without state interference—at least as it was widely perceived until the fall of 2008—stood in stark contrast to the observation already made decades ago that when market actors are enabled and empowered to exercise their private autonomy, they are exercising this freedom based on public deliberation and consensus.<sup>149</sup>

While there is considerable reason to believe that we have entered a stage in the assessment of state and market where we have to carefully turn our attention again to the long and winded history of this relationship,<sup>150</sup> identifying a starting point is far from obvious.<sup>151</sup> As the treacherous

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<sup>145</sup> See, e.g., *id.* at 156; Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006).

<sup>146</sup> Frank H. Knight, *Some Fallacies in the Interpretation of Social Cost*, 38 Q.J. ECON. 582, 606 (1924) (explaining “[t]he system as a whole is dependent on an outside organization, an authoritarian state, made up also of ignorant and frail human beings, to provide a setting in which it can operate at all.”).

<sup>147</sup> For a critique, see Aman Jr., *supra* note 2.

<sup>148</sup> This led Philip Jessup to his capturing three dramas about constellations within and beyond the nation state that involve parallel questions of democracy and participation. See generally JESSUP, *supra* note 9.

<sup>149</sup> See generally Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

<sup>150</sup> See generally PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008* (2009); ROBERT SKIDELSKY, *KEYNES: THE RETURN OF THE MASTER* (2009).

<sup>151</sup> See generally Jens Beckert, *The Great Transformation of Embeddedness. Karl Polanyi and the New Economic Sociology*, Max-Planck-Institut für Gesellschaftsforschung/Max-Planck-Institute for the Study of Societies, MPiFG Discussion Paper 07/1 (2007), available at [http://www.mpifg.de/pu/mpifg\\_dp/dp07-1.pdf](http://www.mpifg.de/pu/mpifg_dp/dp07-1.pdf); Michael J. Piore, *Second Thoughts: On Economics, Sociology, Neoliberalism, Polanyi's Double Movement and Intellectual Vacuums*, Society for the Advancement of Socio-Economics, Presidential Address July 22 (2008), available at <http://web.mit.edu/ipc/publications/pdf/08-004.pdf>.

denationalization<sup>152</sup> of regulatory areas continues to pose tremendous conceptual problems for state-based theories of law, we must aim at combining our methodological inquiry into the nature of transnational law with a bold reconstruction of critical perspectives. Out of that combination we can then discuss the need for stronger, more efficient, or more thorough regulation, a discussion that is critically important today in the face of what continues to unfold as a dramatic financial and economic crisis.

## V. THE EVOLVING NATURE OF TRANSNATIONAL GOVERNANCE REGIMES

Concrete examples of spatial regulatory regimes amply illustrate the ambivalent politics of the shift between national and transnational perspectives. We identify those regulatory regimes, which originate from a combination of institutional and normative formation, that transcend jurisdictional borders and combine national and international, public and private actors.<sup>153</sup> This is apparent, for example, in the case of corporate governance regulation; as we continue to study corporate governance norms through nationally-oriented textbooks and case law, we soon learn how the rules and instruments we are dealing with are products of a far-reaching, fundamental transformation of previously jurisdictionally defined regulatory landscapes.<sup>154</sup> As a complex mix of public, private, state- and non-state-based norms, principles and rules, generated, disseminated, and monitored by a diverse set of actors<sup>155</sup> and experts,<sup>156</sup> shape corporate law, even the most casual look at today's corporate governance debates reveals two important aspects. First, the analysis of contemporary corporate governance regulation can help us become sensitive to the emerging framework within which corporate governance rules are evolving—a framework which is constituted

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<sup>152</sup> See generally Saskia Sassen, *Globalization or Denationalization?*, 10 REV. INT'L POL. ECON. 1 (2003); Sassen, *Embeddedness of Electronic Markets*, *supra* note 125.

<sup>153</sup> For an illustration in the case of corporate law, see *Corporate Governance*, *supra* note 11.

<sup>154</sup> For a brilliant overview, see generally Thomas Hale and David Held, *Mapping Changes in Transnational Governance*, in HANDBOOK OF TRANSNATIONAL GOVERNANCE: INSTITUTIONS AND INNOVATIONS 1, 1–36 (Hale & Held eds., 2011); see also Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, in THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE 145, 145–74 (Jacint Jordana & David Levi-Faur eds., 2004).

<sup>155</sup> See generally EUR. CORP. GOVERNANCE INST., [www.ecgi.org](http://www.ecgi.org) (last visited July 7, 2012).

<sup>156</sup> Johannes Köndgen, *Privatisierung des Rechts. Private Governance zwischen Deregulierung und Rekonstitutionalisierung*, 206 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS [AcP] 477 (2006) (Ger.); Thomas M.J. Möllers, *Europäische Methoden- und Gesetzgebungslehre im Kapitalmarktrecht. Vollharmonisierung, Generalklauseln und soft law im Rahmen des Lamfalussy-Verfahrens zur Etablierung von Standards*, ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 480, 485 (2008) (Ger.); Peer Zumbansen, *The Privatization of Corporate Law? Corporate Governance Codes and Commercial Self-Regulation*, JURIDIKUM 136 (2002).

by a combination of local and transnational actors and norms connected through networks and migrating standards.<sup>157</sup>

The contested political dimensions and the high degree of technicality of the regulatory subjects of transnational regulatory areas<sup>158</sup> present a formidable challenge to traditional regulatory theories of law.<sup>159</sup> As alluded to above, it is this intricate combination of political ambivalence and technical specialization of transnational regulation which prompts a renewed reflection on the relation between regulatory law and differentiated areas of societal activity. Legal sociology and legal pluralism, in particular, have long been developing tools to scrutinize the tension between official and unofficial norm creation, between hard and soft law, and between what at least in the West has often been depicted as a juxtaposition of state law-making on the one hand and private ordering or social norms on the other. This constellation prompted legal sociologists “to investigate the correlations between law and other spheres of culture.”<sup>160</sup> Revisiting the legal pluralist work in the second half of the 20th Century provides a rich background for contemporary assessments of hybrid legal spaces<sup>161</sup> that cannot sufficiently be captured through references to local or national contexts. A distinctly transnational legal pluralist lens allows us to study such regimes not as entirely detached from national political and legal orders, but as emerging out of and reaching beyond them. The transnational dimension of hybrid regulatory actors and newly emerging forms of norms radicalizes their semi-autonomous nature and we begin to conceive of regulatory spaces as being marked by a dynamic tension between formal and informal norm-making processes.

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<sup>157</sup> See generally NILS BRUNSSON & BENGT JACOBSSON, *A WORLD OF STANDARDS* (2000); Robert Wai, *Transnational Private Law and Private Ordering in Contested Global Society*, 46 HARV. INT'L L.J. 471 (2005).

<sup>158</sup> For a recent overview, see the excellent collection in *THE TRANSNATIONAL STUDIES READER: INTERSECTIONS & INNOVATIONS* (Sanjeev Khagram & Peggy Levitt eds., 2008); see also Janet Joven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393 (2007). Also see the contributions by Alexia Herwig, *Transnational Governance Regimes for Food Derived from Bio-technology and Their Legitimacy*, at 199; Oren Perez, *The Many Faces of the Trade-Environment Conflict: Some Lessons for the Constitutionalisation Project*, at 233; Bernstorff, *supra* note 38, at 257; Karl-Heinz Ladeur, *ICANN and the Illusion of a Community-Based Internet: Comments on Jochen von Bernstorff*, at 283; and Craig Scott & Robert Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation*, at 287, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM*, *supra* note 39.

<sup>159</sup> See generally Colin Scott, *Regulating Everything*, Inaugural Lecture, University College Dublin School of Law (Feb. 26, 2008) (unpublished manuscript), available at <http://geary.ucd.ie/mapping/images/Documents/RegEverything.pdf>.

<sup>160</sup> See EUGEN EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 486–506 (1962); GURVITCH, *supra* note 15; Max Rheinstein, *Review: Two Recent Books on Sociology of Law*, 51 ETHICS 220, 221–22 (1941) (reviewing Timasheff's "Introduction" and Gurvitch's "Elements").

<sup>161</sup> See generally Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

But what about the politics of transnational regulation?<sup>162</sup> Again, an example taken from the corporate law context may serve as an illustration: the much lamented regulatory failure of traditional state-based legal-political intervention into multinational corporations<sup>163</sup> has long served as an argument for the need to develop either distinctly national, institutionalized governance forms or to further strengthen the grip of self-regulatory and soft instruments, which have only voluntary binding nature.<sup>164</sup> Mirroring the complex, hard-to-navigate landscape of border-crossing corporate activity, the proposed conceptual approaches vary greatly. Instead of pointing towards the creation of a coherent regulatory framework, theoretical proposals for transnational regulation range from ideas concerned with world courts (global jurisdiction),<sup>165</sup> torture as tort, and transnational civil human rights litigation,<sup>166</sup> to scandalization (global shaming)<sup>167</sup> and soft law instruments like self-binding norms, codes of conduct, and best practices.<sup>168</sup>

These efforts illustrate the frustration with the lack of accountability, access to justice, and democratic legitimacy of the evolving regulatory frameworks.<sup>169</sup> This frustration has become increasingly accentuated in the context of a seemingly irreversible shift from government to governance<sup>170</sup> as transnational governance regimes, fields such as corporate governance, labor law,<sup>171</sup> capital market law, and consumer protection law<sup>172</sup> are increasingly

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<sup>162</sup> See David Schneiderman, *Transnational Legality and the Immobilization of Local Agency*, 2 ANN. REV. L. & SOC. SCI. 387 (2006); see also Peter Fitzpatrick, *Terminal Legality? Human Rights and Critical Being*, in CRITICAL BEINGS: LAW, NATION AND THE GLOBAL SUBJECT 119 (Peter Fitzpatrick & Patricia Tuitt eds., 2004).

<sup>163</sup> See generally David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931 (2004); David Vogel, *The Private Regulation of Global Corporate Conduct*, in THE POLITICS OF GLOBAL REGULATION 151 (Walter Mattli & Ngaire Woods eds., 2009); Backer, *supra* note 114.

<sup>164</sup> Blackett, *supra* note 117; Harry W. Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 BERKELEY J. EMP. & LAB. L. 271, 289 (2001).

<sup>165</sup> Paul Schiff Berman, *Towards A Cosmopolitan Vision Of Conflict Of Laws: Redefining Governmental Interests In A Global Era*, 153 U. PA. L. REV. 1819, 1852 (2005).

<sup>166</sup> Craig M. Scott, *Introduction to Torture as Tort: From Sudan to Canada to Somalia*, in TORTURE AS TORT 3 (Craig M. Scott ed., 2001); Craig M. Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms*, in TORTURE AS TORT 45 (Craig M. Scott ed., 2001).

<sup>167</sup> Andreas Fischer-Lescano, *Globalverfassung, Verfassung der Weltgesellschaft*, 88 ARCHIV FÜR RECHTS UND SOZIALPHILOSOPHIE 349 (2002) (Ger.).

<sup>168</sup> See generally PEREZ, *supra* note 40.

<sup>169</sup> See Ochoa, *supra* note 33, at 18.

<sup>170</sup> Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 855–56 (2008).

<sup>171</sup> See generally ALAIN SUPIOT, *AU-DELÀ DE L'EMPLOI, TRANSFORMATION DU TRAVAIL ET DEVENIR DU DROIT DU TRAVAIL EN EUROPE: RAPPORT POUR LA COMMISSION EUROPÉENNE* (1999); Robert O'Brien, *The Difficult Birth of a Global Labour Movement*, 7 REV. INT'L POL. ECON. 514 (2000); Claire Methven O'Brien, *Reframing Deliberative Cosmopolitanism: Perspectives on*

marked by the existence of opt-out clauses and self-regulation mechanisms rather than being defined by enforceable hard-law rules. Meanwhile, it seems evident that a simple return to calls for more state interventionism is not a viable option in light of the transnational nature of regulation today. Such a return is elusive, as the state can no longer be depicted as the last safe haven, which statist, such as Carl Schmitt and his pupils in administrative law,<sup>173</sup> often made it out to be. As Saskia Sassen recently reiterated, there is an intimate connection between both the search for and the critique of law and the nation-state.<sup>174</sup> Her observation is particularly astute. As already highlighted, Sassen's work over the years<sup>175</sup> has greatly contributed to a better understanding of how supposedly external and overwhelming processes of globalization actually co-evolve within the nation-state. Rather than positing globalization as a process, event, or development that imprisons nation-states, national economies, and domestic political processes, Sassen prompts us to take a closer look at how the *local* is the dominant place of decision-making.<sup>176</sup> Yet, she doesn't suggest a simple return to statism; instead, she suggests that there is a dynamic relation between locally identifiable processes of institutional and normative formation, and the emergence of spatial regulatory regimes.<sup>177</sup> It is through this relation that elements of physical and intellectual texture emerge to produce border-crossing "global assemblages."<sup>178</sup> These constitute distinct spheres that, famously fuelled by the dramatic development of information technology,

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*Transnationalisation and Post-National Democracy From Labor Law*, 9 GERMAN L.J. 1007 (2008).

<sup>172</sup> See generally Graf-Peter Calliess, *Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law*, 23 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 185 (2002); GRAF-PETER CALLIESS, GRENZÜBERSCHREITENDE VERBRAUCHERVERTRÄGE: RECHTSSICHERHEIT UND GERECHTIGKEIT AUF DEM ELEKTRONISCHEN WELTMARKTPLATZ (2006).

<sup>173</sup> CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (George Schwab trans., 1986) (1922); Ernst Forsthoff, *The Administration as Provider of Services*, in WEIMAR: A JURISPRUDENCE OF CRISIS 326 (Arthur Jacobson & Bernhard Schlink eds., 2000).

<sup>174</sup> SASSEN, TERRITORY, AUTHORITY, RIGHTS, *supra* note 77, at 1 (explaining "[w]e are living through an epochal transformation, one as yet young but already showing its muscle. We have come to call this transformation globalization, and much attention has been paid to the emerging apparatus of global institutions and dynamics. Yet, if this transformation is indeed epochal, it has to engage the most complex institutional architecture we have ever produced: the national state.").

<sup>175</sup> See generally SASKIA SASSEN, THE MOBILITY OF LABOR AND CAPITAL: A STUDY IN INTERNATIONAL INVESTMENT AND LABOR FLOW (1988); Saskia Sassen, *The Global City* (1991); Saskia Sassen, *Globalization and Its Discontents: Essays on the New Mobility of People and Money* (1998); Saskia Sassen, *Globalization or Denationalization?*, 10 REV. INT'L POL. ECON. 1 (2003); Saskia Sassen, *The City: Its Return as a Lens for Social Theory*, Keynote Presentation at the International Conference for Integrating Urban Knowledge & Practice, Gothenburg, Sweden, (May 29–June 5, 2005), available at <http://www.columbia.edu/~sjs2/PDFs/Lens.pdf>.

<sup>176</sup> Saskia Sassen, *The State and Economic Globalization*, 1 CHI. J. INT'L L. 109 (2000).

<sup>177</sup> *Id.*

<sup>178</sup> See generally SASSEN, TERRITORY, AUTHORITY, RIGHTS, *supra* note 77.

integrate territorial and de-territorial, vertical and horizontal ordering patterns to produce a structured regime of societal activities.<sup>179</sup>

Meanwhile, continental public lawyers remain tempted to depict transnationalization processes primarily as challenges to the reassertion of public authority<sup>180</sup> in a world of disaggregated state power.<sup>181</sup> Similarly, European private lawyers continue to coyly attempt an escape from the reach of the juridification/intervention thrust by demarcating “traditionalists” from “transnationalists”—in the hope of positing the latter as heroes of an autonomous legal order, distinct from the nation-state.<sup>182</sup> Such intellectual efforts occur side-by-side with continuing discussions and the untiring production of legislative proposals around a European private law.<sup>183</sup> Both projects provide telling illustrations of how transnational economic and commercial activities continue to challenge a state-based model of interventionist law to adapt itself to a sphere structured by private self-regulation and political regulatory competition.<sup>184</sup> The lack of real dialogue between public and private lawyers in this regard is remarkable. While the conceptual and political problems arising around emerging and proliferating regulatory regimes in the transnational sphere are obvious, public and private lawyers appear to pursue distinct and isolated paths. Public lawyers are interested in further scrutiny of sovereignty and authority,<sup>185</sup> while private lawyers are re-directing their interests to longstanding questions of regulatory competition.<sup>186</sup> There is a real opportunity here for public and private lawyers to join forces in order to unpack the intricate combination of state/non-state and public/private dimensions inherent in the emerging

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<sup>179</sup> *Id.* For a discussion, see Florian F. Hoffmann & Peer Zumbansen, *Review Essay: Saskia Sassen, Territory – Authority – Rights* (2006), 46 OSGOODE HALL L.J. 665 (2008).

<sup>180</sup> See generally *Special Issue, The Exercise of Public Authority by International Organizations: A Research Project of the Max Planck Institute for International Law*, 9 GERMAN L.J. 1375 (2008), [hereinafter *Special Issue*], available at <http://www.germanlawjournal.com/index.php?pageID=13&vol=9&no=11>.

<sup>181</sup> See generally Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 GOV'T & OPPOSITION 159 (2004); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

<sup>182</sup> See generally KLAUS PETER BERGER, *THE CREEPING CODIFICATION OF THE LEX MERCATORIA* (1999); Klaus Peter Berger, *The New Law Merchant and the Global Market Place: A 21st Century View of Transnational Commercial Law*, in *THE PRACTICE OF TRANSNATIONAL LAW 1* (Peter Berger ed., 2001); but see Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUR. L.J. 400 (2002).

<sup>183</sup> For an excellent overview and analysis, see Reinhard Zimmermann, *The Present State of European Private Law*, 57 AM. J. COMP. L. 479 (2009).

<sup>184</sup> See generally Geraint Howells & Thomas Wilhelmsson, *EC Consumer Law: Has it Come of Age?*, 28 EUR. L. REV. 370 (2003); Ugo Mattei & Fernanda Nicola, *A 'Social Dimension' in European Private Law? The Call for Setting a Progressive Agenda*, 41 NEW ENG. L. REV. 1 (2006).

<sup>185</sup> See *Special Issue*, *supra* note 180.

<sup>186</sup> See generally O'HARA & RIBSTEIN, *supra* note 82; Eidenmüller, *supra* note 43.

transnational regulatory landscape.<sup>187</sup> The opportunity arises out of the rich theoretical and doctrinal memories of public and private law with regard to the schematization of exclusion and inclusion, participation and representation.<sup>188</sup> The danger, however, is that the current efforts of studying the particular dynamics of fast-evolving transnational regulatory regimes by legal practitioners is carried out with little interest in the national pasts of legal regimes.

Against this background, Sassen's idea of global assemblages allows us to structure the sphere between the national and the international/transnational/global that has been plaguing legal imagination for some time now.<sup>189</sup> Sassen's work reflects an unerring commitment to simultaneously emphasize and relativize the national in the emerging cartography of a globalized world. This emphasis on national systems, local decisions, and institutions that give rise to globalization processes has gone a long way in allowing us to identify the concrete places where policies are prepared, taken and implemented and later become identified as phenomena of globalization.<sup>190</sup> This new understanding of the national basis of globalization proceeds in relation to the well-known institutions, reference points, and established procedures such as states, parliaments, administrative agencies, and, importantly, courts. These actors have long structured the economic, political, and legal order and are now struggling to re-ascertain their previously held roles and positions of power—but in a transnational context.<sup>191</sup> This relativization of the local results in the discovery of a newly emerging spatial category; the focus on space promises to more adequately capture the exhaustion of concretely localized places of legal and political regulation from the perspective of the rise in importance of hybrid institutional structures and normative orders. This constellation presents tremendous challenges to both an analytical and prescriptive framework that was developed with reference to a more or less well-defined regulatory framework. The central challenge of this move from place to space consists of developing an appropriate language with which to communicate over the institutional and normative challenges in a world that cannot

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<sup>187</sup> See generally Caruso, *supra* note 94.

<sup>188</sup> See generally Rudolf Wiethölter, *Materialization and Proceduralization in Modern Law*, in *DILEMMAS OF LAW IN THE WELFARE STATE* 221 (Gunther Teubner ed., 1986).

<sup>189</sup> See generally *GLOBAL LAW WITHOUT A STATE*, *supra* note 75.

<sup>190</sup> Sassen's work on global cities is particularly relevant in this regard: she has been arguing for decades that global cities gain autonomy from their local environments both by adapting real-time collaborative and networking capacities with other cities and operative centers and by successfully demanding and implementing a facilitating, supportive infrastructure (electricity, broadband, digitization, 24/7 service, access, and maintenance). For a concise restatement of her long-term, monographical work on global cities, see Saskia Sassen, *The Global City*, in *READINGS IN URBAN THEORY* 61 (Susan Fainstein & Scott Campbell eds., 1996).

<sup>191</sup> See Symposium, *Beyond Dispute: International Judicial Institutions as Lawmakers*, 12 *GERMAN L.J.* 979–1370 (2011), available at <http://www.germanlawjournal.com/index.php?pageID=2&vol=12&no=5>.

effectively be governed through domestic and domestically minded rules. In the emerging spaces of global societal activity, the specifically legal perspective that informs our present inquiry is challenged by a multitude of contrasting investigations into the form, nature, and quality of the global order.<sup>192</sup> Beyond the obvious need for irony on the part of the lawyer in his or her quest to make sense of law in a globalizing world and to accept the relativity of the legal perspective, lies, of course, the need to understand the continuing proliferation of pluralist normative orders.

## VI. OUTLOOK

The study of transnational governance has produced important insights into the complex relations between the emergence of hybrid institutions and the ambivalent, hard/soft norms produced in that context. There can be no doubt that these analytical efforts will continue to be carried out through various collaborations and exchanges between legal scholars, sociologists, political scientists, anthropologists, and geographers, to name just a few of the participating disciplines. The emergence of transnational regulatory theory, however, is not necessarily a straightforward or smooth process. Within each discipline one must identify points of departure toward a new perspective or theoretical construct. The advent of “governance” as an overarching term to capture the shift from state-based, nationally defined regulation to transnational processes of norm creation and institutionalization contributes to a further inter-disciplinization of research, but it remains crucial to continue to unpack the meaning of this shift to governance within different disciplines themselves. This article has hopefully offered a number of helpful observations regarding the adaptation of legal scholarship and doctrine to the process of transnationalization.

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<sup>192</sup> See the still excellent exposition of the interdisciplinary nature of globalization studies in *Introduction*, in *THE GLOBAL TRANSFORMATIONS READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE* (David Held & Anthony McGrew eds., 2d ed. 2003).



