

DEFINING THE SPACE OF TRANSNATIONAL LAW:  
LEGAL THEORY, GLOBAL GOVERNANCE & LEGAL PLURALISM

*Peer Zumbansen*<sup>\*</sup>

**I. INTRODUCTION**

Legal inquiries into the future of law in an era of globalisation are regularly confronted with accounts of law's alleged weakness to extend itself effectively beyond national, jurisdictional boundaries. At the same time, lawyers are not the only scholars by far who reflect on the regulatory challenges of today, which are often summarised under the heading of "global governance". An investigation into the nature and scope of legal regulation in this context is unavoidably exposed to questions of origin and function, on the one hand, and to questions of relations, compatibility and inter-disciplinarity, on the other. In this often polemic and heated discourse of disciplines and narratives, an effort to re-construct a discipline's approach and methodology offers insights into both the trajectories and the characteristics of a particular discipline's "take" on the problems which are at stake in a fast evolving highly asymmetric global arena.

With these considerations in mind, the paper takes the concerns among international lawyers about "legal fragmentation" seriously<sup>1</sup> if only to contrast and to compare these with the evolution of legal orders at state level. Such mirroring offers a respite in what has otherwise too quickly been offered as a swansong about the fading light and impact of law under the duress of

---

\*

Professor of Law and Canada Research Chair, Osgoode Hall Law School, York University, Toronto. Email: PZumbansen@osgoode.yorku.ca. This chapter builds on Zumbansen, "Transnational Legal Pluralism", (2010) 1 *Transnational Legal Theory*, pp 141-189, and has grown out of the research project on "Extra-territoriality" between the Law Schools of Tulane University in New Orleans and Johann Wolfgang Goethe-University in Frankfurt, Germany. This project also serves as one of the foundations for international research collaboration between scholars from Canada and the United States on Transnational Governance and Norm Production. Financial support from the Social Sciences and Humanities Research Council of Canada (Grant # 864-2007-0265) is gratefully acknowledged.

<sup>1</sup>

See the insightful and critical analysis by M. Koskenniemi/P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', (2002) 15 *Leiden Journal of International Law* 553-579.

globalisation.<sup>2</sup> Drawing out the analogies between legal sociological insights from the late Nineteenth and early Twentieth century into pluralistic legal orders and the lament about the law's loss of "unity" in the global context, we can take a better look at the ambivalent nature of law itself. What emerges through this lens is that our analytical focus ought not to be upon *how law performs* in the context of globalisation, but how we are, in fact, theorising the *relation between law and society*. In other words, the advent of globalisation prompts an investigation into the theory or theories of society which informs or inform our - and competing - understandings of law.

A powerful illustration of this nexus is provided by the current debate on "global constitutionalism" and the alleged or complementary "constitutionalisation" of international law.<sup>3</sup> Running through the majority of analyses offered in this context is the contention that the absence of a "world government" radicalises the governance dilemma facing modern societies, and, in turn, invites reflections upon 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, occur in surprising isolation

---

<sup>2</sup> For a rejection of the idea that law is a victim to globalisation, see, from the perspective of law, A. C. Aman Jr., 'The Limits of Globalization and the Future of Administrative Law: From Government to Governance', (2001) 8 *Indiana Journal of Global Legal Studies* 379-400, and, from sociology, S. Sassen, *Globalization and Its Discontents. Essays on the New Mobility of People and Money* (The New Press, 1998).

<sup>3</sup> See, for example, C. Walter, 'Constitutionalizing (Inter)national Governance - Possibilities and Limits to the Development of an International Constitutional Law', (2001) 44 *German Yearbook of International Law* 170-201, A. Peters, 'The Merits of Global Constitutionalism', (2009) 16 *Indiana Journal of Global Legal Studies* 397-411. Compare with A. 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)) 2011

<sup>4</sup> See, for example N. Krisch/B. Kingsbury/R. B. Stewart, 'The Emergence of Global Administrative Law', (2005) 68 *Law and Contemporary Problems* 15.

<sup>5</sup> For a very insightful exploration of the challenges, see M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in J. L. Dunoff and J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009), 258-324. From a different angle and with great scepticism: U. Baxi, *The Death of Human Rights, 2nd ed.* (Oxford University Press, 2005).

from both legal theory and governance discourses, which have long been pursued within the 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 globalisation, 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 been changing 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> But, such inquiries which focus 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,<sup>8</sup> on the other, are too rarely included in the current contentions of 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 connections *with*, previous "governance" discourses through which modern societies have long been described. In the present paper, I am suggesting to coin the perspective between "national" and "global" governance challenges as *transnational*, in order to offer a bridge between these separately pursued research agendas. Going beyond the 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", above all, as a

---

<sup>6</sup> A case in point is the transformation of the "welfare state" – see, for example, P. Pierson, 'The New Politics of the Welfare State', (1996) 48 *World Politics* 143-179.

<sup>7</sup> See P. Manow, 'Welfare State Building and Coordinated Capitalism in Japan and Germany', in W. Streeck and K. Yamamura (eds), *The Origins of Nonliberal Capitalism* (Cornell University Press, 2001), 94-120, F. W. Scharpf, 'The viability of advanced welfare states in the international economy: vulnerabilities and options', (2000) 7 *Journal of European Public Policy* 190-228.

<sup>8</sup> See, for example, K. Polanyi, *The Great Transformation. The Political and Economic Origins of our Time* (Beacon Press, 1944), (Boston MA, Beacon Press, 1957); P. Pierson, *Politics in Time. History, Institutions, and Social Analysis* (Princeton University Press, 2004); H. W. Arthurs, 'Governance After the Washington Consensus: The Public Domain, the State and the Microphysics of Power in Contrasting Economies', (2002) *Man & Development* 85-112.

<sup>9</sup> See P. C. Jessup, *Transnational Law* (Yale University Press, 1956), and H. J. Berman, 'World Law', (1995) 18 *Fordham International Law Journal* 1617-1622.

<sup>10</sup> B. Goldman, 'Arbitrage International et droit commun des nations', (1956) *Revue de l'Arbitrage* 115, C. M. Schmitthoff, 'International Business Law: A New Law Merchant', (1961) 2 *Current Law and Social Problems*

methodological *approach*, and less as a distinctly demarcated legal “field”, such as, say, contract law, or administrative law. Transnational law, from the perspective taken here,<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. As we relativise contentions of society being the “other” side of the “state”,<sup>12</sup> which are running deep within the continental legal imagination, we begin to recognise the necessity of “defining” society as such, rather than merely assuming it as a given background, against which we may freely theorise about the “future of law”.<sup>13</sup> Emphasizing both the co-existence and the competition between hard and soft, official and unofficial, public and private norms, this paper suggests to draw on concepts of legal pluralism in the attempt to address the challenges presented by transnational governance regimes for law and legal theory. The here proposed concept of “transnational legal pluralism” suggests that law be studied from a methodological angle in the context of the evolving theoretisations 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 the building blocks of a methodology of transnational law.<sup>14</sup>

This approach suggests a relativisation of a number of assumptions commonly associated with law. One is its territorial connection with a politically institutionalised 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 becomes

---

129-153, R. Goode, 'Usage and Its Reception in Transnational Commercial Law', (1997) 46 *International and Comparative Law Quarterly* 1-36, R. Cranston, 'Theorizing Transnational Commercial Law', (2007) 42 *Texas International Law Journal* 597-617.

<sup>11</sup> For a more extensive discussion, see ; cf. P. Zumbansen, 'Transnational Law', in J. Smits (ed) *Encyclopedia of Comparative Law* (Edward Elgar, 2006), 738-754 and *idem* P. Zumbansen, 'Neither `Public' nor `Private', `National' nor `International': Transnational Corporate Governance from a Legal Pluralist Perspective', (2011) 38 *Journal of Law & Society* 50-75.

<sup>12</sup> For a powerful discussion of this assumption, see J. Habermas, *The Postnational Constellation* (MIT Press, 2001).

<sup>13</sup> This is forcefully argued by T. Vesting, *Rechtstheorie* (C.H. Beck, 2007).

<sup>14</sup> For an application of this approach for a law school course, see Alfred C Aman Jr & Peer Zumbansen, *Transnational Law: Actors, Norms, Processes*, (Charlottesville VA, Lexis-Nexis, 2012, forthcoming).

questionable, as, not only around the world, but also in Europe itself, the legal sociological lens reveals an impressive array of non-state originating norms that have long been binding human and organisational behaviour.<sup>15</sup> This observation has prompted sociologists to perceive of law primarily from a functional perspective, emphasising its particular operation in the context of a differentiated modern society.<sup>16</sup> From the vantage point of this theory, society is no longer validly represented as a sphere defined primarily in contrast from the state; instead, in a society “without peak or centre” (Luhmann), law is but one of several societal forms of communication, which unfolds according to its own rationality and by use of its own particular vocabulary (“code”).<sup>17</sup>

Even if one does not go so far as to represent law as nothing but 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, which appear to offer more adequate depictions of law 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 relativisation and problematization of the law/non-law distinction, which is inherent to the legal sociological/legal pluralist approach to legal regulation, there is the other significant challenge arising out of the law-society approach taken here, namely, the already mentioned relativisation 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

---

<sup>15</sup> H. W. Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (University of Toronto Press, 1988); Ehrlich, *Fundamental Principles of the Sociology of Law*, note **Error! Bookmark not defined.** above; for an insightful resumé, see M. Galanter, 'Farther Along', (1999) 33 *Law & Society Review* 1113-1123, and M. Galanter, 'In the Winter of our Discontent: Law, Anti-Law, and Social Science', (2006) *Annual Review of Law & Social Sciences* 1-16.

<sup>16</sup> N. Luhmann, *A Sociological Theory of Law* (Routledge Kegan & Paul, 1985); *idem*N. Luhmann, 'Law as a Social System', (1989) 83 *Northwestern University Law Review* 136-150; *idem*N. Luhmann, 'Operational closure and structural coupling: the differentiation of the legal system', (1992) 13 *Cardozo Law Review* 1419-1441.

<sup>17</sup> N. Luhmann, *Political Theory in the Welfare State [1981, transl. by John Bednarz Jr.]* (Walter de Gruyter, 1990).

reference to specific states, nations or regions. Instead, society must be perceived as world society.<sup>18</sup> Within 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 given time and in a particular space - no more and no less. The “no less” deserves particular emphasis in the context of frequently made assertions of an allegedly de-territorialised<sup>19</sup> or “autonomous” legal order.<sup>20</sup> From the methodological perspective suggested here, such assertions are of lesser interest with regard to their explanatory value as to their motives. In order to unpack the claims of an increasingly de-territorialised or, autonomous nature of regulatory governance, it is necessary, on the one hand, to re-visit the arguments which were launched by some scholars who connected the claim of an “exhaustion” of law and of the nation-state’s regulatory power with an emphasis on “social norms”.<sup>21</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>22</sup> As we will see in the following, both groups of scholars put a particular emphasis on the limits of traditional legal regulation, and question the adequacy of the state-law nexus to capture the dynamics of regulatory governance today. But, a closer look at the arguments appears to reveal that the shared interest in a legal pluralist description of governance originates from different political standpoints. With regard to the scholars who argue that the state is increasingly reaching its

---

<sup>18</sup> N. Luhmann, 'The World Society as a Social System', (1982) 8 *International Journal of General Systems* 131-138; see, also, J. W. Meyer/J. Boli/G. M. Thomas/F. O. Ramirez, 'World Society and the Nation-State', (1997) 103 *American Journal of Sociology* 144-181.

<sup>19</sup> See R. Michaels, 'Territorial Jurisdiction after Territoriality', in J. P. Slot and M. Bulterman (eds), *Globalisation and Jurisdiction* (Kluwer Law International, 2004), 105-130.

<sup>20</sup> See, for example, E. Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers, 2010); see, also, G. Teubner, 'Global Bukowina: Legal Pluralism in the World Society', in G. Teubner (ed) *Global Law Without A State* (Ashgate, 1997), 3-28.

<sup>21</sup> E. A. Posner, *Law and Social Norms* (Harvard University Press, 2000).

<sup>22</sup> P. S. Berman, 'Global Legal Pluralism', (2007) 80 *Southern California Law Review* 1155-1237; *idem* P. S. Berman, 'The New Legal Pluralism', (2009) *Annual Review of Law and Social Sciences* 225-242; R. Michaels, 'Global Legal Pluralism', (2009) *Duke Public Law & Legal Theory Research Paper No. 259* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1430395](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1430395).

regulatory capacity, such arguments mainly seem to be driven by a rejection of so-called “interventionist” state policy, reminiscent as such from the discussions around the US Supreme Court’s *Lochner* jurisprudence.<sup>23</sup> In contrast, scholars in legal sociology and legal theory with a strong interest in questions of “access to justice” and the problem of the legal system’s closedness to wide sections of society mobilised a limits-of-law critique from an opposed political perspective.<sup>24</sup> This “availability” of legal pluralist thinking to different, even juxtaposed, political projects<sup>25</sup> forms a crucial background to today’s assertions of the nature and aspiration of law in a global context, given the evolving forms of regulatory institutions.<sup>26</sup>

Upon this basis, it becomes possible to read the currently dominant narrative of the autonomisation of law or of an “end of (state-based) law” in an era of globalisation in a different light. Rather than describing the advent of globalisation as an end-point of legal development, from a transnational perspective, it becomes necessary to de-construct the various law-state associations in order to gain a more adequate understanding of the evolution of law in relation and response to the development of what must be described as “world society”. The currently lamented lack of democratic accountability, say, in international economic governance,<sup>27</sup> can

---

<sup>23</sup> *Lochner v New York* (198 US 45) – 1905); for an insightful history of the case’s reception and legacy, see S. Choudhry, ‘The Lochner Era and Comparative Constitutionalism’, (2002) *University of Toronto Faculty of Law, Public Law and Legal Theory Research Paper No. 02-22*.

<sup>24</sup> See, for example, M. Galanter, ‘Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change’, (1974) 9 *Law & Society Review* 95-160; see the retrospective discussion by O. Lobel, ‘The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics’, (2007) 120 *Harvard Law Review* 937-988.

<sup>25</sup> For more background, see P. Zumbansen, ‘Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law’, (2008) 56 *American Journal of Comparative Law* 769-805.

<sup>26</sup> See, for example, A. Héritier/D. Lehmkuhl, ‘The Shadow of Hierarchy and New Modes of Governance’, (2008) 28 *Journal of Public Policy* 1-17; A. Stone Sweet, ‘Constitutionalism, Legal Pluralism, and International Regimes’, (2009) 16 *Indiana Journal of Global Legal Studies* 621-645; C. Ochoa, ‘The Relationship of Participatory Democracy to Participatory Law Formation’, (2008) 15 *Indiana Journal of Global Legal Studies* 5-18.

<sup>27</sup> D. Schneiderman, ‘Realising Rights in an Era of Economic Globalisation: Discourse Theory, Investor Rights, and Broad-Based Black Economic Empowerment’, in W. Shan, P. Simons and D. Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing, 2008), 429-444; see, also, A. Somek, ‘The argument from transnational effects II: Establishing transnational democracy’, (2010) 16 *European Law Journal* 375-395.

then be perceived as a further development in a highly-differentiated and de-territorialised society. The paper thus rejects the attempts by lawyers to re-align transnational governance actors with traditional concepts of the state or of 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. These perspectives, on the one hand, effectively challenge the present attempts to conceptualise a hierarchically-structured global legal order, while they question the association of legal-rule creation with a territorially-fixed place, on the other. As such, the concept of “transnational legal pluralism” (TLP) proposed here goes beyond Philip Jessup’s 1956 idea of “transnational law”, through which he sought to complement and challenge Public and Private International Law. TLP brings together insights from legal sociology and legal theory with research on global justice, ethics and regulatory governance in order to illustrate the transnational nature of law and regulation, which always push against the various claims to legal unity and hierarchy made over time.

The remainder of the paper is structured as follows: the next section (II) re-visits the legal pluralist insights into the tension between law and non-law. Against this background, the paper will trace the emergence of border-crossing regulatory regimes as a challenge to state-oriented legal reasoning (III). It illustrates the parallels between the *impasses* of legal theorising about “global” or “transnational” governance with those that marked the evolution of law in the nation state. Section IV re-visits the frequently asked question of whether globalisation marks the end of law: attempting a negative answer (“law is dead - long live law!”), this section proposes to read the emergence of “transnational law” not as the advent of a “new” field - similar to the way in which, say, environmental law or Internet law were considered to be “new” 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 re-constructed as historically-contingent reference-points for the evolution of

legal reasoning, transnational law becomes the legal theoretical re-construction of law/non-law in the world society. The concluding 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 can be understood as instantiations of transnational norm-creation. Supply chains that tie regional and global markets together,<sup>28</sup> commercial arbitration,<sup>29</sup> food-safety and food-quality standardisation regimes,<sup>30</sup> Internet governance,<sup>31</sup> but also environmental protection,<sup>32</sup> crime<sup>33</sup> and terrorism<sup>34</sup> are key examples of the fast expanding spaces of individual,

---

<sup>28</sup> F. Snyder, 'Global Economic Networks and Global Legal Pluralism', in G. A. Bermann, M. Herdegen and P. L. Lindseth (eds), *Transatlantic Regulatory Co-operation* (Oxford University Press, 2000), ([http://cadmus.iue.it/dspace/bitstream/1814/151/1/law99\\_6.pdf](http://cadmus.iue.it/dspace/bitstream/1814/151/1/law99_6.pdf)); *idem* F. Snyder, 'Economic Globalisation and the Law in the 21st Century', in A. Sarat (ed) *The Blackwell Companion to Law and Society* (Blackwell, 2004), 624-640.

<sup>29</sup> C. M. Schmitthoff, 'The New Sources of the Law of International Trade', (1963) 15 *International Social Science Journal* 259-264; F. D. Ly, 'Lex Mercatoria (New Law Merchant): Globalisation and International Self-Regulation', in V. Gessner, R. P. Appelbaum and W. F. Felstiner (eds), *Rules and Networks. The Legal Culture of Global Business Transactions* (Hart Publishing, 2001), 159-188.

<sup>30</sup> P. Dabrowska, 'Risk, Precaution and the Internal Market: Who Won the Day in the Recent Monsanto Judgement of ECJ on GM foods', (2004) 5 *German Law Journal* 151-166; D. N. Scott, 'Nature/Culture Clash: The Transnational Trade in GMOs', (2005) *Global Law Working Paper Series* [http://www.nyulawglobal.org/GLWP\\_0605.htm](http://www.nyulawglobal.org/GLWP_0605.htm); A. Eliason, 'Science versus Law in WTO Jurisprudence: The (Mis)Interpretation of the Scientific Process and the (In)sufficiency of Scientific Evidence in Ec-Biotech', (2009) 41 *New York University Journal of International Law & Politics* 341-406.

<sup>31</sup> D. D. Clark, 'A Cloudy Crystal Ball: Visions of the Future', (1992) *Plenary Presentation at 24th meeting of the Internet Engineering Task Force, Cambridge, Massachusetts, 13-17 July 1992* ([http://ietf20.isoc.org/videos/future\\_ietf\\_92.pdf](http://ietf20.isoc.org/videos/future_ietf_92.pdf)); C. Engel, 'The Role of Law in the Governance of the Internet', in: Preprints of the Max Planck Project Group Law of Common Goods 2002/13, Bonn available at: [http://www.mpp-rdg.mpg.de/pdf\\_dat/2002\\_13.pdf](http://www.mpp-rdg.mpg.de/pdf_dat/2002_13.pdf) 24 November 2011; J. Goldsmith, 'The Internet, Conflicts of Regulation and International Harmonisation', in C. Engel and K. H. Keller (eds), *Governance of Global Networks in the Light of Differing Local Values* (Nomos, 2000), 197-206; J. v. Bernstorff, 'The Structural Limitations of Network Governance: ICANN as a Case in Point', in G. Teubner, C. Joerges and I.-J. Sand (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, 2004), 257-281-281.

<sup>32</sup> J. Brunnée, 'Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection', (2004) 53 *International and Comparative Law Quarterly* 351-367; O. Perez, *Ecological Sensitivity and Global Legal Pluralism. Rethinking the Trade and Environment Conflict* (Hart Publishing, 2004); R. Miller/R. Bratspies (eds), *Transboundary Harm: Lessons from the Trail Smelter Arbitration* (Cambridge University Press, 2006), pp 240-253; A. P. Morriss/R. E. Meiners, 'Borders and the Environment', (2009) 39

organisational and regulatory activities that evolve with little regard for jurisdictional boundaries. Similarly, fields such as company insolvency and even labour law, which had long been understood as embedded in historically-evolved political and regulatory economies,<sup>35</sup> today display a distinctly transnational character.<sup>36</sup> Constituted through a complex overlapping of different national, international, public and private norm-creation processes, these fields underscore the conundrum nature of the proliferating global regulatory space: in response, state-based categorisations of normative hierarchy, the separation of powers and the unity of law<sup>37</sup> fall short of grasping the nature of the evolving transnational normative order.<sup>38</sup>

---

*Environmental Law* 141-192; see, also, J. Conley/C. Williams, 'Global Banks as Global Sustainability Regulators? The Equator Principles', (2011) 33 *Law & Policy* forthcoming.

<sup>33</sup> T. Broude/D. Teichman, 'Outsourcing and Insourcing Crime: The Political Economy of Globalized Criminal Activity', (2009) 62 *Vanderbilt Law Review* 795-848.

<sup>34</sup> U. Beck, 'Living in the world risk society', (2006) 35 *Economy and Society* 329-345; U. Beck, 'Critical Theory of World Risk Society: A Cosmopolitan Vision', (2009) 16 *Constellations* 3-22; *idem* U. Beck, *World at Risk [orig. German "Weltrisikogesellschaft" (Frankfurt: Suhrkamp); Ciaran Cronin, transl.]* (polity, 2009).

<sup>35</sup> See, for example, S. Vitols, 'Varieties of Corporate Governance: Comparing Germany and the UK', in P. A. Hall and D. Soskice (eds), *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001), 337-360, and K. J. Hopt, 'Common Principles of Corporate Governance in Europe?', in J. A. McCahery, P. Moerland, T. Raaijmakers and L. Renneborg (eds), *Corporate Governance Regimes. Convergence and Diversity* (Oxford University Press, 2002), 175-204.

<sup>36</sup> H. Arthurs/C. Mummé, 'From Governance to Political Economy: Insights from a Study of Relations between Corporations and Workers', (2007) 45 *Osgoode Hall Law Journal* 439-470; J. Gordon, 'Transnational Labor Citizenship', (2007) 80 *Southern California Law Review* 503-587; P. Zumbansen, 'New Governance' in European Corporate Governance Regulation as Transnational Legal Pluralism', (2009) 15 *European Law Journal* 246-276 [available at <http://ssrn.com/abstract=1128145>]; H. Eidenmüller, 'Recht als Produkt', (2009) 64 *Juristenzeitung [JZ]* 641-653.

<sup>37</sup> For an inspiring discussion, see K. Günther, 'Legal Pluralism or uniform concept of law?', (2008) 5 *no foundations [NoFo]* 5-21; F. F. Hoffmann, 'In Quite a State: Trials and Tribulations of an Old Concept in New Times', in R. A. Miller and R. Bratspies (eds), *Progress in International Law* (Martin Nijhoff, 2008), 263-288; W. Twining, *Globalisation and Legal Theory* (Northwestern University Press, 2000).

<sup>38</sup> O. Perez, 'Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law', (2003) 10 *Indiana Journal of Global Legal Studies* 25-64; Zumbansen, "Transnational Law", note 11 above; T. A. Aleinikoff, 'Transnational Spaces: Norms and Legitimacy', (2008) 33 *Yale Journal of International Law* 479-490; A. Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes', (2009) 16 *Indiana Journal of Global Legal Studies* 621-645; C. M. Scott, 'Transnational Law' as Proto-Concept: Three Conceptions', (2009) 10 *German Law Journal* 859-876.

It is easy to recognise a certain sense of urgency<sup>39</sup> in the current search for appropriate labels, concepts and instruments for this regulatory space, for which lawyers have long been forming alliances with scholars in a wide range of social sciences including sociologists, political scientists, economists and geographers. Such inter-disciplinary collaboration both in practice and in methodology is anything but new to law and legal theory; building on early beginnings made by social scientists who emphasised the importance of social facts and increasingly incorporated empirical findings,<sup>40</sup> the study of law has, for a long time, been carried out in close proximity to, and in the constant shadow of, social studies.<sup>41</sup> The already alluded to legal sociological projects at the end of the Nineteenth and the beginning of the Twentieth century can today be seen as the eminent precursors of an evermore intensifying study into the institutional foundations of legal systems in a constellation marked by the erosion of boundaries between domestic legal orders and the continuing contestation of the normative-conceptual foundations of the Rule of Law, the welfare state and its ambiguous aftermath.<sup>42</sup> The Legal Realist attack on formalism,<sup>43</sup> the post-War natural law/legal positivism debate,<sup>44</sup> the emergence of legal pluralism in the wake of post-

---

<sup>39</sup> R. Bratspies, 'Regulatory Trust', (2009) 51 *Arizona Law Review* 575-631; see the contributions to E. Balleisen/D. Moss (eds), *Government and Markets: Toward a New Theory of Regulation* (Cambridge University Press, 2009).

<sup>40</sup> A. Ferguson, *An Essay on the History of Civil Society [1767]* (Cambridge University Press, 1995); E. Durkheim, *The Division of Labor in Society [1893; transl. by W.D. Halls]* (Free Press, 1984).

<sup>41</sup> H. S. Maine, *Ancient Law. Its connection with the early history of society, and its relation to modern ideas* (John Murray, 1861); F. Tönnies, *Community and Society [Gemeinschaft und Gesellschaft, orig. German 1887, transl. Ch. P. Loomis, Michigan State University Press, 1957]* (Transaction Publishers, 1988); M. Weber, *On Law in Economy and Society (transl. from the German Wirtschaft und Gesellschaft, 2nd ed., 1925, by E. Shils and M. Rheinstein, edited/annotated by M. Rheinstein)* (Simon Schuster, 1967).

<sup>42</sup> D. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development', (1972) 82 *Yale Law Journal* 1-50; G. Teubner (ed) *Dilemmas of Law in the Welfare State* (Walter de Gruyter, 1986) note **Error! Bookmark not defined.** above; Zumbansen, "Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law", note 25 above.

<sup>43</sup> See, for example, O. W. J. Holmes, 'The Path of the Law', (1897) 10 *Harvard Law Review* 457, and F. Cohen, 'Transcendental Nonsense and the Functional Approach', (1935) 35 *Columbia Law Review* 809-849; D. Kennedy, *The Rise and Fall of Classical Legal Thought (1975)* (Beard Books, 2006); a very worthwhile discussion and analysis with a stunning treatment of the literature is provided by N. Duxbury, *Patterns of American Jurisprudence* (Oxford University Press, 1995).

<sup>44</sup> H. Hart, 'Positivism and the Separation of Law and Morals', (1958) 71 *Harvard Law Review* 593; L. Fuller, 'Fidelity to Law - A Reply to Professor Hart', (1958) 71 *Harvard Law Review* 629-672; H. L. A. Hart, 'American

colonialism,<sup>45</sup> the rise of “law & society” – both from the left<sup>46</sup> and from the right<sup>47</sup> – as well as the critique of *juridification*<sup>48</sup> have today given way to a cacophonous contestation of the merits and limits of “law’s knowledge”, its evolving nature and its role.<sup>49</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* different, that law is – or, in the end *can be* – different from religion, morality, and economics. But the short Twentieth century has left the emerging body of law battered and torn, scarred and violated.<sup>50</sup> In turn, our attempts at resurrecting 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, of corruption and domination, or as a promise of hope, as an instrument of liberation and emancipation? Can we recognise and understand law only in its embeddedness in a particular institutional setting, or do

---

Jurisprudence Through English Eyes: The Nightmare and the Noble Dream', (1977) 11 *Georgia Law Review* 969-989; S. L. Paulson, 'On the Background and Significance of Gustav Radbruch's Post-War Papers', (2006) 26 *Oxford Journal of Legal Studies* 17-40.

<sup>45</sup> Moore, “Law and Social Change: the semi-autonomous field as an appropriate subject of study”, note **Error! Bookmark not defined.** above; B. d. Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law', (1987) 14 *Journal of Law & Society* 279-302; S. E. Merry, 'Legal Pluralism', (1988) 22 *Law & Society Review* 869-901.

<sup>46</sup> D. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development', (1972) 82 *Yale Law Journal* 1-50; M. Galanter, 'Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change', (1974) 9 *Law & Society Review* 95-160.

<sup>47</sup> G. Calabresi, *The Cost of Accidents. A Legal and Economic Analysis* (Yale University Press, 1970); R. A. Posner, *Economic Analysis of Law* (Little Brown, 1973).

<sup>48</sup> P. Nonet/P. Selznick, *Law and Society in Transition. Toward Responsive Law* (Octagon Books, 1978); G. Teubner, 'Juridification - Concepts, Aspects, Limits, Solutions', in G. Teubner (ed) *Juridification of Social Spheres* (Walter de Gruyter, 1987), 3-48.

<sup>49</sup> D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in D. Trubek and A. Santos (eds), *The New Law and Economic Development* (Cambridge University Press, 2006), 19-73; B. d. Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press, 2002); P. Zumbansen, 'Law's Effectiveness and Law's Knowledge: Reflections from Legal Sociology and Legal Theory', (2009) 10 *German Law Journal* 417-438.

<sup>50</sup> R. Koselleck, 'Geschichte, Recht und Gerechtigkeit (1986)', (2000) Frankfurt: Suhrkamp *ders., Zeitschichten. Studien zur Historik* 336-358; U. Baxi, *The Death of Human Rights, 2nd ed.* (Oxford University Press, 2005) note 5 above.

we see law by its *function* in society?<sup>51</sup> Its multi-faceted and, as such, fragile constitution has been associated with its paradoxical foundation<sup>52</sup> and its impossible creation out of an act of violence.<sup>53</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 the boundaries between “law” and “society”.<sup>54</sup> “Law”, he writes, “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>55</sup> Understanding law, then, as a “social phenomenon”,<sup>56</sup> the distinction between law and society does indeed blur: 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>57</sup>

“*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

---

<sup>51</sup> See N. Luhmann, *A Sociological Theory of Law* (Routledge Kegan & Paul, 1985).

<sup>52</sup> G. Teubner, 'How the Law Thinks: Toward a Constructivist Epistemology of Law', (1989) 23 *Law & Society Review* 727-758; G. Teubner, 'Dealing With Paradoxes: Derrida, Luhmann, Wiethölter', in O. Perez and G. Teubner (eds), *Paradoxes and Inconsistencies in Law* (Hart Publishing, 2006), 41-64.

<sup>53</sup> W. Benjamin, 'The Critique of Violence [Zur Kritik der Gewalt, Edmund Jephcott trans.]', in P. Dementz (ed) *Reflections: Essays, Aphorisms, Autobiographical Writings* (Schocken, 1978), ; J. Derrida, 'Force of law', (1990) 11 *Cardozo Law Review* 919-1045; for an excellent discussion and homage, see P. Gehring, 'Force and “Mystical Foundation” of Law: How Jacques Derrida Addresses Legal Discourse', (2005) 6 *German Law Journal* 151-169, and the contributions to the same issue (edited by Cornelia Vismann & Florian Hoffmann).

<sup>54</sup> R. Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?', (1998) 25 *Journal of Law & Society* 171-192, at 176.

<sup>55</sup> *Ibid.*, p 182.

<sup>56</sup> *Ibid.*, p 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.”

<sup>57</sup> *Ibid.*, p 188.

in this particular context is a transdisciplinary enterprise and aspiration to broaden understanding of law as a social phenomenon.”

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>58</sup>

A sociological reflection on legal ideas would be to reflect “methodologically law’s own fragmentary varied methodological characteristics”.<sup>59</sup>

Shifting our analytical focus beyond the boundaries of the nation state, which has been providing the stage for the study of law in the recent past,<sup>60</sup> the framework of transnational legal pluralism proposed here<sup>61</sup> seeks to capture the methodological challenge arising for law and social theory in making sense of the emerging transnational normative order. In situating this concept in dialogue with theoretical approaches regarding “transnational law”,<sup>62</sup> “transnational commercial law”,<sup>63</sup> “global law”,<sup>64</sup> “law and globalisation”,<sup>65</sup> “transnational spaces”<sup>66</sup> and

---

<sup>58</sup> *Ibid.*, p 178, with reference to J. M. Balkin, 'Interdisciplinarity as Colonization', (1996) 53 *Washington & Lee Law Review* 949-970.

<sup>59</sup> *Ibid.*, p 189.

<sup>60</sup> J. C. Scott, *Seeing like a State. How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1998); N. Luhmann, 'Metamorphosen des Staates', (1995) in: *Luhmann, Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der modernen Gesellschaft* 101-137.

<sup>61</sup> Zumbansen, “‘New Governance’ in European Corporate Governance Regulation as Transnational Legal Pluralism”, note 36 above; G.-P. Calliess/P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing, 2010, Pb. 2012), Chapter 2.

<sup>62</sup> P. C. Jessup, *Transnational Law* (Yale University Press, 1956); C. M. Scott, 'Transnational Law' as Proto-Concept: Three Conceptions', (2009) 10 *German Law Journal* 859-876.

<sup>63</sup> R. Goode, 'Usage and Its Reception in Transnational Commercial Law', (1997) 46 *International and Comparative Law Quarterly* 1-36; R. Cranston, 'Theorizing Transnational Commercial Law', (2007) 42 *Texas International Law Journal* 597-617.

<sup>64</sup> G. Teubner (ed) *Global Law Without A State* (Ashgate, 1997), note 20 above.

<sup>65</sup> P. S. Berman, 'From International Law to Law and Globalization', (2005) 43 *Columbia Journal of Transnational Law* 485-556; M. Reimann, 'From the Law of Nations to Transnational Law: Why We Need a New Basic Course

“communities”,<sup>67</sup> “global legal pluralism”,<sup>68</sup> “hard *versus* soft law”,<sup>69</sup> “law and social norms”<sup>70</sup> and, “law as product”,<sup>71</sup> the conceptual boundaries of the approach pursued here are constantly relativised and challenged by these parallel endeavours.

---

for the International Curriculum', (2004) 22 *Penn State International Law Review* 397-415; P. Zumbansen, 'Globalization and the Law: Deciphering the Message of Transnational Human Rights Litigation', (2004) 5 *German Law Journal* 1499-1520; C. 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', (2005) 23 *Penn State International Law Review* 757-773.

<sup>66</sup> R. Ford, 'Law's Territory (A History of Jurisdiction)', (1999) 97 *Michigan Law Review* 843; S. Sassen, *Territory - Authority - Rights. From Medieval to Global Assemblages* (Princeton University Press, 2006); S. Sassen, 'The Places and Spaces of the Global: An Expanded Analytic Terrain', in D. Held and A. McGrew (eds), *Globalization Theory. Approaches and Controversies* (Polity, 2007), 79-105; S. Dorsett/S. McVeigh, 'Questions of jurisdiction', in S. McVeigh (ed) *Jurisprudence of Jurisdiction* (Routledge-Cavendish, 2007), 1-18; T. A. Aleinikoff, 'Transnational Spaces: Norms and Legitimacy', (2008) 33 *Yale Journal of International Law* 479-490.

<sup>67</sup> R. Cotterrell, 'A Legal Concept of Community', (1997) 12 *Canadian Journal of Law & Society* 75-91; R. Cotterrell, 'Transnational Communities and the Concept of Law', (2008) 21 *Ratio Juris* 1-18; see also R. Cotterrell, 'What is Transnational Law?', (2012) 37 *Law & Social Inquiry* <http://ssrn.com/abstract=2012088>.

<sup>68</sup> P. S. Berman, 'Global Legal Pluralism', (2007) 80 *Southern California Law Review* 1155-1237; R. Michaels, 'Global Legal Pluralism', (2009) *Duke Public Law & Legal Theory Research Paper No. 259* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1430395](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1430395).

<sup>69</sup> K. W. Abbott/D. Snidal, 'Hard and Soft Law in International Governance', (2000) 54 *International Organization* 421-456; C. Chinkin, 'The Challenge of Soft Law: Development and Change in International Law', (1989) 38 *International and Comparative Law Quarterly* 850-866; see, further, the contributions to J. J. Kirton/M. J. Trebilcock (eds), *Hard Choices, Soft Law. Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate, 2004); G. Shaffer/M. A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance', (2009) *University of Minnesota Legal Studies Research Paper No. 09-23* <http://ssrn.com/abstract=1426123>.

<sup>70</sup> See Posner, *Law and Social Norms*, note 21 above; J. N. Drobak (ed) *Norms and the Law* (Cambridge University Press, 2006); for a critical perspective, see the author of *Order without Law: How Neighbors settle Disputes*, (Cambridge MA, Harvard University Press, 1991), R. C. Ellickson, 'Law and Economics Discovers Social Norms', (1998) 27 *Journal of Legal Studies* 537-565; see, also, the pertinent analysis of the inherent depoliticising effects of the anti-regulatory efficiency claim advanced by norm proponents, by D. Charny, 'Illusions of a Spontaneous Order: 'Norms' in Contractual Relationships', (1996) 144 *University of Pennsylvania Law Review* 1841-1858, and Symposium Issue on “Law, Economics, and Norms”, published in 144 *University of Pennsylvania Law Review* 1643-2339 (1996); with regard to the “norms vs regulation” conflict for example in the current debate over a Common Frame of Reference for European Private Law, see, on the one hand: J. Smits, 'European Private Law: a Plea for a Spontaneous Legal Order', in D. Curtin, J. Smits, A. Klip and J. McCahery (eds), *European Integration and Law* (Intersentia, 2006), 85-107, and, on the other: M. W. Hesselink, 'A spontaneous order for Europe? Why Hayek's libertarianism is not the right way forward for European private law', (2008) *Centre for the Study of European Contract Law, Working Paper Series No. 2008/07* <http://ssrn.com/abstract=1270566>.

Importantly, this trajectory of legal evolution can be studied as a process of law's *transnationalisation*. Despite its *prima facie* appearance as being relevant exclusively within the nation state's framework of legal ordering, the just alluded-to scholarly projects in legal sociology, legal theory and anthropology, and philosophy of law are reflective of the changing environment of legal systems. This transformation is foremost perceived as one of eroding boundaries, boundaries between form and substance,<sup>72</sup> between public and private<sup>73</sup> ("states" and "markets"<sup>74</sup>), but is, at its core, concerned with the contestation, de-construction and relativisation of the boundaries between law and – non-law.<sup>75</sup> At the height of the regulatory state with its climactical belief in juridification and in law as social engineering,<sup>76</sup> law today is often seen as having become irrelevant in the face of global challenges. It is from this vantage

---

<sup>71</sup> R. Romano, 'Law as Product: Some Pieces of the Incorporation Puzzle', (1985) 1 *Journal of Law, Economics and Organizations* 225-283; E. A. O'Hara/L. E. Ribstein, *The Law Market* (Oxford University Press, 2009); G.-P. Calliess/H. B. Hoffmann, 'Judicial Services for Global Commerce - Made in Germany?', (2009) 10 *German Law Journal* 115-123; G.-P. Calliess/H. B. Hoffmann, 'Effektive Justizdienstleistungen für den globalen Handel', (2009) 42 *Zeitschrift für Rechtspolitik* 1-4; H. Eidenmüller, 'Recht als Produkt', (2009) 64 *Juristenzeitung [JZ]* 641-653.

<sup>72</sup> D. Kennedy, 'Form and Substance in Private Law Adjudication', (1976) 89 *Harvard Law Review* 1685-1778; D. Kennedy, 'From the Will Theory to the Principle of Private Autonomy: Lon Fuller's 'Consideration and Form'', (2000) 100 *Columbia Law Review* 94-175.

<sup>73</sup> M. J. Horwitz, *The Transformation of American Law 1870-1960* (Oxford University Press, 1992); C. Harlow, "'Public" and "Private" Law: Definition without Distinction', (1980) 43 *Modern Law Review* 241-265.

<sup>74</sup> R. L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State', (1923) 38 *Political Science Quarterly* 470-494; F. E. Olsen, 'The Family and the Market: A Study of Ideology and Legal Reform', (1983) 96 *Harvard Law Review* 1497-1578; for a historical discussion, see V. Vanberg, *Markt und Organisation. Individualistische Sozialtheorie und das Problem korporativen Handelns* (Mohr Siebeck, 1982).

<sup>75</sup> Teubner, "The Two Faces of Janus: Rethinking Legal Pluralism", note **Error! Bookmark not defined.** above; G. Teubner, 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy', (1997) 31 *Law & Society Review* 763-787; B. d. Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press, 2002), note 49 above.

<sup>76</sup> For a discussion of the US development, see O. Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought', (2004) 89 *Minnesota Law Review* 342-469; for Germany, see G. Teubner, 'Juridification - Concepts, Aspects, Limits, Solutions', in G. Teubner (ed) *Juridification of Social Spheres* (Walter de Gruyter, 1987), 3-48.

point that law must be re-thought and re-asserted as social science, as one among other conceptual approaches to the study of modern societies.<sup>77</sup>

In the absence of world government, attempts to demarcate a legal system which is adequate to the “post-national constellation”<sup>78</sup> display, above all, a deep-running anxiety in the face of a perceived lack of unity, coherence and institutional and normative hierarchy.<sup>79</sup> The procedural and substantive architectures of fast-emerging transnational regulatory regimes<sup>80</sup> raise questions which go to the heart of any legal theory and which we have accepted to address mainly through the lens of the state.<sup>81</sup> These questions arise around the “politics of private law-making”,<sup>82</sup> and, as such, primarily concern the *constitutional* dimensions of private ordering, to

---

<sup>77</sup> G. Teubner, 'Substantive and Reflexive Elements in Modern Law', (1983) 17 *Law & Society Review* 239-285; Santos, “Law: A Map of Misreading. Toward a Postmodern Conception of Law”, note 45 above; P. Zumbansen, 'Law's Effectiveness and Law's Knowledge: Reflections from Legal Sociology and Legal Theory', (2009) 10 *German Law Journal* 417-438.

<sup>78</sup> J. Habermas, *The Postnational Constellation* (MIT Press, 2001); J. Habermas, 'A Political Constitution for the Pluralist World Society?', in J. Habermas (ed) *Between Naturalism and Religion. Philosophical Essays* (Polity, 2008), 312-352.

<sup>79</sup> W. Twining, *Globalisation and Legal Theory* (Northwestern University Press, 2000), note 37 above; a comprehensive discussion from a systems theory perspective is provided by G. Teubner, *Verfassungsfragmente. Gesellschaftlicher Konstitutionalismus in der Globalisierung* (Suhrkamp, 2012).

<sup>80</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.” J. Black/D. Rouch, 'The development of global markets as rule-makers: engagement and legitimacy', (2008) *Law and Financial Markets Review* 218-233-233, (depicting the system of international financial governance to be distinct from nation-state based understandings of governance), p 224; see, also, P.-H. Verdier, 'Transnational Regulatory Networks and Their Limits', (2009) 34 *Yale Journal of International Law* 113-172, and the intriguing debate following this paper, available at: <http://opiniojuris.org/2009/04/09/transnational-regulatory-networks-and-their-limits>.

<sup>81</sup> W. von Humboldt, *The Sphere and Duties of Government (The Limits of State Action)* [orig. German, 1792, transl. Joseph Coulthard jun.] (John Chapman, 1854); J.-B. Auby, *La globalisation, Le Droit et l'État* (Montchrestien, 2003), p 95; Hoffmann, “In Quite a State: Trials and Tribulations of an Old Concept in New Times”, note 37 above; S. Bell/A. Hindmoor, *Rethinking Governance. The Centrality of the State in Modern Society* (Cambridge University Press, 2009).

<sup>82</sup> See, only, D. Caruso, 'Private Law and State-Making in the Age of Globalization', (2006) 39 *New York University Journal of International Law & Politics* 1-74.

wit, issues of accountability, legitimacy and democratic control.<sup>83</sup> What makes these accountability and legitimacy issues, which have, in part, been driving the important work in “global administrative law”,<sup>84</sup> particularly intriguing is that they underscore the degree to which the evolving transnational regulatory regimes are impressive illustrations of the *constitutionalisation* challenges that the global legal order faces today.<sup>85</sup> As increasingly specialised, functionally-differentiated problem areas and spheres of human and institutional conduct evolve in response to a combination of external impulses and their own particular logic,<sup>86</sup> the law governing these constellations becomes deeply entwined in these complex,

---

<sup>83</sup> For an insightful discussion, see K. W. Abbott/D. Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit', (2009) 42 *Vanderbilt Journal of Transnational Law* 501-578, and C. Scott, 'Reflexive governance, meta-regulation and corporate social responsibility: the 'Heineken effect'', in N. Boeger, R. Murray and C. Villiers (eds), *Perspectives on Corporate Social Responsibility* (Edward Elgar, 2008), 170-185-185; see, also, A. Gill, 'Corporate Governance as Social Responsibility: A Research Agenda', (2008) 26 *Berkeley Journal of International Law* 452-478, 471-475 & 471: “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.” See, also, C. M. Bruner, 'States, Markets, and Gatekeepers: Public-Private Regulatory Regimes in an Era of Economic Globalization', (2008) 30 *Michigan Journal of International Law* 125-176 (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 - *ibid.*, p 129, at 165).

<sup>84</sup> B. Kingsbury/N. Krisch/R. B. Stewart/J. Wiener, 'Global Governance as Administration--National And Transnational Approaches to Global Administrative Law', (2005) 68 *Law & Contemporary Problems* 1-13; K. Nicolaidis/G. Shaffer, 'Transnational Mutual Recognition Regimes: Governance without Global Government', (2005) 68 *Law & Contemporary Problems* 263-317; for critical-sympathetic comments on this project, see C. Harlow, 'Global Administrative Law: The Quest for Principles and Values', (2006) 17 *European Journal of International Law* 187-214, B. S. Chimni, 'Co-option and Resistance: Two Faces of Global Administrative Law', (2005) 37 *New York University Journal of International Law & Politics* 799-827, and S. Marks, 'Naming Global Administrative Law', (2006) 37 *New York University Journal of International Law and Politics* 995-1001.

<sup>85</sup> C. Walter, 'Constitutionalizing (Inter)national Governance - Possibilities and Limits to the Development of an International Constitutional Law', (2001) 44 *German Yearbook of International Law* 170-201; C. Joerges, 'The Challenges of Europeanization in the Realm of Private Law: A Plea for a New Legal Discipline', (2004) 14 *Duke Journal of Comparative & International Law* 149-196.

<sup>86</sup> See the examples in V. Gessner/A. C. Budak (eds), *Emerging Legal Certainty: Empirical Studies on the Globalization of Law* (Ashgate, 1998), and A. Fischer-Lescano/G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', (2004) 25 *Michigan Journal of International Law* 999-1046.

layered constitutions.<sup>87</sup> Where does this definition of law leave us? Clearly, law's self-destruction began *before* globalisation.<sup>88</sup> Globalisation, differently understood, would provide for a label depicting another stage of reflection on the relationship between law and its other. The predominance of law's institutionalisation in the state during the Nineteenth and Twentieth centuries casts a long shadow over our present attempts to imagine law. The challenge of law *after*, in the shadow of the Twentieth century welfare state, is its functional diffusion and normative evaporation. To be sure, this temporalisation ("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 replaces the preceding models of the state and modes of legal thinking.<sup>89</sup>

When referring to "global governance", scholars often associate a dramatic disembedding of law and its institutional architecture.<sup>90</sup> But, the - relative - loss of a reliable and comprehensive legal infrastructure is accompanied by an increasingly intensifying debate around an evolving global legal-consciousness, in particular with regard to human rights.<sup>91</sup> Global governance is, as such, understood to have further opened the windows to a world "out there" of injustice, unequal

---

<sup>87</sup> G. Teubner/P. Korth, 'Two Kinds of Legal Pluralism: Collision of Laws in the Double Fragmentation of World Society', in M. Young (ed) *Regime Interaction in International Law: Theoretical and Practical Challenges* (2009), *forthcoming*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1416041](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1416041) Ms. p 5, (available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1416041](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1416041)): "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."

<sup>88</sup> But see W. Twining, *Globalisation and Legal Theory* (Northwestern University Press, 2000), note 37 above.

<sup>89</sup> For a parallel application of such a perspective, see D. Kennedy, *The Rise and Fall of Classical Legal Thought (1975)* (Beard Books, 2006), note 43 above.

<sup>90</sup> See, for example, U. Sieber, 'Rechtliche Ordnung in einer Globalen Welt', (2010) 41 *Rechtstheorie* 151-198.

<sup>91</sup> See M. Rosenfeld, 'Rethinking constitutional ordering in an era of legal and ideological pluralism', (2008) 6 *International Journal of Constitutional Law* 415-455, and C. McCrudden, 'A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights', (2000) 20 *Oxford Journal of Legal Studies* 499-532.

distribution and grave rights abuses,<sup>92</sup> a claim, however, fiercely contested from scholars and practitioners “on the ground”.<sup>93</sup> As illustrated, for example, in the continued interest in the “constitutionalisation” of international law,<sup>94</sup> the question of 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 which is inherent to the differentiation of law and non-law in regulatory governance, and for which the evolution of modern states gives ample illustration, is further exacerbated in the global context. This means that a crisis, or the “exhaustion” of law, cannot be depicted as a consequence of globalisation, but as an inherent feature of law’s evolution in its relation to society. To re-iterate the central thesis of this paper: the alleged crisis of law and legal regulation, whether it be depicted as a loss of state sovereignty or as a problem of a lack of (democratic, political) accountability<sup>95</sup> and legitimacy<sup>96</sup> in the global context, has to be understood as a particular amplification of a problem with law that has been a long time coming. In this regard, it can be shown that many of our present concerns about the fate of law in relation to a continuing transformation of the state and the herewith connected

---

<sup>92</sup> U. Baxi, *The Death of Human Rights*, 2nd ed. (Oxford University Press, 2005) note 5 above.

<sup>93</sup> See, for example, B. d. Sousa Santos, 'The Processes of Globalisation', (2002) *Eurozine* <http://www.eurozine.com/pdf/2002-08-22-santos-en.pdf>, and S. E. Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance', in P. Zumbansen and R. Buchanan (eds), *Law in Transition: Rights, Development and Transitional Justice* (Hart Publishing, 2009), *forthcoming*.

<sup>94</sup> For a critical discussion, see T. Schilling, 'Constitutionalization of General International Law — An Answer to Globalization? Some Structural Aspects', (2005) *NYU Jean Monnet Program Working Paper* <http://www.jeanmonnetprogram.org/fellowsforum/documents/SchillingForumPaper020405.pdf>, S. Picciotto, 'Constitutionalizing Multilevel Governance?', (2008) 6 *International Journal of Constitutional Law* 457-479, and M. Loughlin, 'What is Constitutionalization?', in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (Cambridge University Press, 2010), 47-69.

<sup>95</sup> J. L. Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance', (2007) *Yale Law School Research Paper No. 116* <http://papers.ssrn.com/abstract=924879>.

<sup>96</sup> J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', (2008) *LSE Law, Society and Economy Working Papers 2/2008* <http://ssrn.com/abstract=1091783>, associating legitimacy and accountability concerns of transnational regulatory regimes with a set of “functional, democratic, normative” challenges.

challenges to “models of democracy” and issues of legitimacy and accountability<sup>97</sup> must be assessed against the background of a re-construction of legal evolution in the national, local context. Without suggesting that the legitimacy and regulatory challenges connected with the “amorphous” concept of global governance<sup>98</sup> are exact mirror reflections of locally-experienced moments of exhaustion,<sup>99</sup> there is a particular role to be played by local, domestic regulatory experiences for the conceptualisation of global governance regimes. The *role of law* occupies a particularly challenging place in this inquiry, in particular because the rise of globalisation is so often associated, if not with the demise of law,<sup>100</sup> then with an immense pressure on law and legal institutions. In contrast, what is argued here is that globalisation processes can 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 at national level. In short, then, the paper contends that globalisation 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 and fragility, violence and vulnerability, that underlies the idea and experience of law.

---

<sup>97</sup> D. Held, 'Democratic Accountability and Political Effectiveness from a Cosmopolitan Perspective', (2004) 39 *Government and Opposition* 364-391.

<sup>98</sup> For a lament of the concept's shortcomings in providing guidance for the development of sustainable and effective regulatory instruments, see A. Bogdandy/P. Dann/M. Goldmann, 'Developing the Publicness of Public International Law', (2008) 9 *German Law Journal* 1375-1400; in contrast, see D. Held, 'Reframing Global Governance: Apocalypse Soon or Reform!', in D. Held and A. McGrew (eds), *Globalization Theory. Approaches and Controversies* (Polity, 2007), 240-260, at 245-6 & 249-254, and M. Koenig-Archibugi, 'Global governance', in J. Michie (ed) *The Handbook of Globalisation* (Edward Elgar, 2003), 318-330, highlighting the interdisciplinary challenges that are captured in the term.

<sup>99</sup> J. Habermas, 'The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies [1985]', in J. Habermas (ed) *The New Conservatism. Cultural Criticism and the Historians' Debate [ed. and transl. by Shierry Weber Nicholsen]* (MIT Press, 1989), 48-70.

<sup>100</sup> See, for example, the intriguing melancholic observation by N. Luhmann, *Law as a Social System* (K Ziegert transl., F Kastner, D Schiff, R Nobles, R Ziegert eds.) (Oxford University Press, 2004), p 497.

### III. METHODOLOGICAL CONSEQUENCES

A study of law in the context of the 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. While, for example, from the perspective of comparative law, there is much to learn from studying law against the background of a particular, national, historical context,<sup>101</sup> the transnational dimension challenges the tendency, in comparative law, to study distinct legal cultures.<sup>102</sup> Much suggests that the particular nature of the transnational arena defeats our attempts to understand the relation between the national and the “post-national constellation”<sup>103</sup> as a linear one – either on a chronological or at a systematic level.<sup>104</sup> But, at the same time, the evolving transnational nature of regulatory regimes as, for example, in labour<sup>105</sup> or corporate law,<sup>106</sup> presents itself not as an opposition or negation, but as a

---

<sup>101</sup> In this regard, see the helpful comparative reconstructions of public and private law concepts by N. Jansen/R. Michaels, 'Private Law and the State. Comparative Perceptions and Historical Observations', (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht [RabelsZ]* 345-397, reprinted in: Nils Jansen & Ralf Michaels (eds), *Beyond the State: Rethinking Private Law*, (Tübingen, Mohr Siebeck, 2008), pp 15-67.

<sup>102</sup> This is elaborated in P. Zumbansen, 'Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance', in J. Bomhoff and M. Adams (eds), *Theory and Practice of Comparative Law* (Cambridge University Press, 2011), *forthcoming*.

<sup>103</sup> J. Habermas, *The Postnational Constellation* (MIT Press, 2001), note 78 above.

<sup>104</sup> See the succinct observations by W. Twining, *Globalisation and Legal Theory* (Northwestern University Press, 2000), note 37 above, with regard to the challenges to jurisprudence and by J. Osterhammel/N. P. Petersson, *Globalization: A Short History* (Princeton University Press, 2004), with regard to the interdisciplinary challenges of studying and deciphering “globalisation”. “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.” *Ibid.*, p 150.

<sup>105</sup> A. Blackett, 'Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct', (2001) 8 *Indiana Journal of Global Legal Studies* 401-447; H. W. Arthurs, 'Labor Law Without the State', (1996) 46 *University of Toronto Law Journal* 1-45.

<sup>106</sup> S. Deakin, 'Reflexive Governance and European Company Law', (2007) *CLPE Research Paper Series* (<http://www.comparativeresearch.net/papers.jsp>) & *Cambridge Centre for Business Research, Working Paper No. 346* <http://www.cbr.cam.ac.uk/pdf/wp346.pdf>; L. C. Backer, 'Private Governance, Soft Law, and the Construction of Polycentric Networks for the Regulation of Transnational Corporations', (2011) 17 *Indiana Journal of Global Legal Studies* *forthcoming*.

challenge to re-assert the *place* and role of law. Re-conceiving of law as transnational suggests that domestic experiences with law are crucial reference points. Yet, they cannot serve as reference points 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 re-construction as an *ironic* project that is concerned with the meaning and aspiration of law - over time and space.<sup>107</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>108</sup> The re-construction of local (for example, national) experiences with law as constantly challenged by its opposite or its foundations, embeddedness or contestations forms only one strand of the following inquiry.<sup>109</sup>

The second investigative strand is to return to the original starting-point of our reflections of how globalisation can be said to challenge law. In this dimension, we are concerned with the task of adequately incorporating or, perhaps even acknowledging, the gap between the particular context in which norms and the normative environments have evolved locally, on the one hand, and the emerging, allegedly unruly spaces of normative order on the global level, on the other. Against this background, the methodological dimension of transnational law re-asserts itself. Approaching transnational law from a methodological perspective should help us to refrain 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, public-private constitution. Instead, transnational law emerges as a particular *perspective on law* as part of a

---

<sup>107</sup> Hereto, in more detail: Zumbansen, “Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law”, note 25 above.

<sup>108</sup> See, for example, D. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development', (1972) 82 *Yale Law Journal* 1-50; R. M. Cover, 'Nomos and Narrative', (1983) 97 *Harvard Law Review* 4-68; J. Derrida, 'Force of law', (1990) 11 *Cardozo Law Review* 919-1045. See, also, G. Teubner, 'Self-subversive Justice: Contingency or Transcendence Formula of Law?', (2009) 72 *Modern Law Review* 1-23.

<sup>109</sup> See, for example, Santos, “Law: A Map of Misreading. Toward a Postmodern Conception of Law”, note 45 above.

society that itself cannot sufficiently be captured by reference to national or de-nationalised boundaries. The transnational dimension does not arise with regard to territorial, or jurisdictional, confines, but from a re-construction of the form and function of law deep within highly-specialised areas of societal activity.

While this uncoupling of social systems from a state-associated framework of political, economic and legal order certainly presents a dramatic challenge to state-based theories of law its real gist lies in fact elsewhere. The uneasy relationship between “society” and “world society”, between the national and the global, 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 recognises, its locally-learned relations to concrete structures of embeddedness, to particular experiences of historical evolution and contextual differentiation.<sup>110</sup> Inspired by the analysis offered by the sociologist Saskia Sassen,<sup>111</sup> transnational law can be conceived of as a way of questioning and re-constructing the project of law between places and spaces, precisely because it helps to relativise law’s association with particular institutional frameworks.<sup>112</sup> At the same time, the tension between law’s grounding in concrete geographical and historical places and its evolution in spatial terms<sup>113</sup> prompts a careful look at the evolving relation between law, critique and politics.<sup>114</sup>

---

<sup>110</sup> For a comparative approach from the perspective of legal geography, see R. Ford, 'Law's Territory (A History of Jurisdiction)', (1999) 97 *Michigan Law Review* 843, and M. Valverde, 'Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory', (2009) 18 *Social & Legal Studies* 139-157.

<sup>111</sup> S. Sassen, 'The State and Globalization', in J. S. Nye and J. D. Donahue (eds), *Governance in a Globalizing World* (Brookings Institution, 2000), 91; S. Sassen, *Territory - Authority - Rights. From Medieval to Global Assemblages* (Princeton University Press, 2006).

<sup>112</sup> For further discussion, see G. Teubner, 'Fragmented Foundations: Societal Constitutionalism beyond the Nation State', in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (Cambridge University Press, 2010), 327-341.

<sup>113</sup> See, for example, S. Sassen, 'The Embeddedness of Electronic Markets: The Case of Global Capital Markets', in K. K. Cetina and A. Preda (eds), *The Sociology of Financial Markets* (Oxford University Press, 2005), 17-37.

<sup>114</sup> Very helpful in this regard: see H. Brunkhorst, 'Constitutionalism and Democracy in the World Society', in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (Cambridge University Press, 2010), 179-

#### IV. THINGS THAT WE LOST – THINGS THAT WE OUGHT TO REMEMBER

Such a look back at “places” reveals intriguing parallels between current global governance concerns and older debates around the effectiveness of legal regulation in complex societies.<sup>115</sup>

Clearly, the hybridity of regulatory instruments, which 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 Falk 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>116</sup> Foreshadowing successively calls for a recognition of the regulatory powers of “social norms”,<sup>117</sup> and scholars disenchanted with “rights”-based interventionism called for extra-legal activism<sup>118</sup> and de-legalisation.<sup>119</sup>

On both sides of the Atlantic, the responses to the financially- and normatively-*exhausted* welfare state<sup>120</sup> soon split into progressive<sup>121</sup> and conservative<sup>122</sup> camps, and this context is worth bearing in mind when assessing, for example, not only today’s academic and political proposals

---

198, and P. Dobner, 'More Law, less Democracy? Democracy and Transnational Constitutionalism', in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (Cambridge University Press, 2010), 141-161.

115 S. F. Moore, 'Law and Social Change: the semi-autonomous field as an appropriate subject of study', (1973) *7 Law & Society Review* 719-746.

116 For a discussion and elaboration, see, only, J. Griffiths, 'What is Legal Pluralism?', (1986) *24 Journal of Legal Pluralism and Unofficial Law* 1-55.

117 E. A. Posner, *Law and Social Norms* (Harvard University Press, 2000), note 21 above.

118 For a brief historical account, see O. Lobel, 'The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics', (2007) *120 Harvard Law Review* 937-988.

119 M. Galanter, 'Justice in many rooms: Courts, Private Ordering and Indigenous Law', (1981) *19 Journal of Legal Pluralism* 1-47.

120 J. Habermas, 'The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies [1985]', in J. Habermas (ed) *The New Conservatism. Cultural Criticism and the Historians' Debate* [ed. and transl. by Shierry Weber Nicholsen] (MIT Press, 1989), 48-70.

121 H. Rottleuthner, 'The Limits of Law: The Myth of a Regulatory Crisis', (1989) *17 International Journal of the Sociology of Law* 273.

122 F. A. Hayek, *The Mirage of Social Justice [Law, Legislation and Liberty. A new statement of the liberal principles of justice and political economy, vol. 2]* (The University of Chicago Press, 1976).

in the wake of the 2009 financial crisis, but also law's role in global governance more generally. In the context of the late 1970s and early 1980s, which saw a far-reaching crumbling of social-democratic policy and a growing scepticism with Keynesian economics, a fairly ambitious theoretical proposal was made that aimed at the re-situating of law into a more accentuated model of society: in this model, which did not lend itself to a straightforward ideological appropriation, society is composed of intersecting, but separated, communications, which are each constituted by a distinct terminology ("code"). Law was to be understood as one of these social systems - along with "economy", "politics", "religion", or "art".<sup>123</sup> Upon the basis of this position, the concept of "reflexive law" was proposed as a form of law marked, above all, by a crucial exposure to, and immersion into, its surrounding systems, while it remained "operationally" closed. 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, undemocratic, and over-generalising and paternalising regulatory laws, the concept of reflexive law was offered to explain the particular challenge and form of legal regulation in a complex world. Its - not uncontested - 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, being forced to re-assert itself in highly-diversified complex environments. This radicalisation 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 law is still today most often associated with the state, already the legal sociological work at the turn of the century as well as the legal pluralist work since 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 Twentieth century can be seen as smartly employing the very methodological orientations that had

---

<sup>123</sup>

N. Luhmann, *Rechtssoziologie (1980)*, 3. Aufl. (Westdeutscher Verlag, 1987); N. Luhmann, 'Law as a Social System', (1989) 83 *Northwestern University Law Review* 136-150; N. Luhmann, *Law as a Social System* (K Ziegert transl., F Kastner, D Schiff, R Nobles, R Ziegert eds.) (Oxford University Press, 2004) note 100 above.

informed the re-constructive legal projects in the face of a financially- and normatively-exhausted welfare state<sup>124</sup> in the 1980s. The fragile re-constructions 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 whole of the 1980s and 1990s. The politically progressive scholars in the 1970s and 1980s had turned to alternative modes of legal regulation in seeking to translate law’s generality into contextual, learning forms of socio-legal regulation. Their hope had been thereby to save the political ambitions of the welfare state, while continuing the socio-political debate over the substance and direction of political intervention. In contrast, today’s neo-formalism and neo-functionalism threatens to cut the ties between current quest to respond to the challenges of globalisation and the previous struggles over law and politics. Its proponents characterise legal regulation as inappropriately policy-driven and as undue infringement of the societal actors’ capacity to regulate their own affairs autonomously.<sup>125</sup>

Following a self-confident period of law’s embeddedness in a comprehensive welfare state, legal policy in recent years has been marked by a much more accentuated spirit of precariousness, which expresses itself in a heavy reliance on arguments of “necessity”, of “objectivity” and “naturalness”. This development has prepared the ground for a functionalist interpretation and application of legal norms in politically-charged contexts which were experiencing fundamental shifts from public to private regulation, often informed by economic reasoning. The attack on contract adjudication and governmental “intervention” that accompanied these developments regularly depicted a market as originally existing without politics, without government regulation.<sup>126</sup> This depiction of the market and the state as separate

---

<sup>124</sup> J. Habermas, 'The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies [1985]', in J. Habermas (ed) *The New Conservatism. Cultural Criticism and the Historians' Debate* [ed. and transl. by Shierry Weber Nicholsen] (MIT Press, 1989), 48-70.

<sup>125</sup> See, for example, R. E. Scott/G. G. Triantis, 'Anticipating Litigation in Contract Design', (2006) 115 *Yale Law Journal* 814-879.

<sup>126</sup> F. H. Knight, 'Some Fallacies in the Interpretation of Social Cost', (1924) 38 *Quarterly Journal of Economics* 582-606. “The 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.” *Ibid.*

worlds created troubling alliances with policy recommendations which promoted the privatisation of public services, and which were often fuelled by arguments of efficiency and cost reduction.<sup>127</sup> Yet, whether or not, and, if so, in which forms, private actors assume formerly public regulatory-functions represents the outcome of both the political choices and of other socio-economic developments which are unfolding at both the national *and* the transnational level.<sup>128</sup> The allegedly available “fresh start” for societal self-regulation without state interference - at least as it was widely perceived until the autumn 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 upon public deliberation and consensus.<sup>129</sup>

While there is considerable reason to believe, today, that we have entered a stage in the assessment of the state and the market in which we carefully have to turn our attention again to the long and winding history of this relationship,<sup>130</sup> the identification of starting-points for a re-constructive project is far from clear.<sup>131</sup> As the treacherous *de-nationalisation*<sup>132</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 re-

---

<sup>127</sup> For a critique, see A. C. Aman Jr., 'The Limits of Globalization and the Future of Administrative Law: From Government to Governance', (2001) 8 *Indiana Journal of Global Legal Studies* 379-400.

<sup>128</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 Jessup, *Transnational Law*, note 9 above.

<sup>129</sup> M. R. Cohen, 'Property and Sovereignty', (1927) 13 *Cornell Law Quarterly* 8-30.

<sup>130</sup> P. Krugman, *The Return of Depression Economics and the Crisis of 2008* (Norton, 2009); R. Skidelsky, *Keynes. The Return of the Master* (Allen Lane, 2009).

<sup>131</sup> See, for example, J. Beckert, 'The Great Transformation of Embeddedness. Karl Polanyi and the New Economic Sociology', (2007) *Max-Planck-Institut für Gesellschaftsforschung/Max-Planck-Institute for the Study of Societies, MPIfG Discussion Paper 07/1* ; M. J. Piore, 'Second Thoughts: On Economics, Sociology, Neoliberalism, Polanyi's Double Movement and Intellectual Vacuums', (2008) *Society for the Advancement of Socio-Economics, Presidential Address* July 22.

<sup>132</sup> S. Sassen, 'Globalization or denationalization?', (2003) 10 *Review of International Political Economy* 1-22; see, also, S. Sassen, 'The Embeddedness of Electronic Markets: The Case of Global Capital Markets', in K. K. Cetina and A. Preda (eds), *The Sociology of Financial Markets* (Oxford University Press, 2005), 17-37.

construction of the critical perspectives from which to discuss the need for “better”, “more efficient”, “tougher”, *etc.*, regulation, as is demanded today in the face of what continues to unfold as a dramatic financial and economic crisis.

## V. THE EVOLVING NATURE OF TRANSNATIONAL GOVERNANCE REGIMES

The ambivalent politics of this shift between “national” and “transnational” perspectives is today amply illustrated by concrete examples of *spatial* regulatory regimes, by which we identify those regulatory regimes which originate through a combination of institutional and normative formation that transcends jurisdictional borders and combines national and international, and public and private actors.<sup>133</sup> This is evidenced, 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 with which we are dealing are products of a far-reaching, fundamental transformation of previously jurisdictionally-defined regulatory landscapes. As corporate law is being shaped by a complex mixture of public, private, state- and non-state-based norms, principles and rules, generated, disseminated and monitored by a diverse set of actors<sup>134</sup> and experts,<sup>135</sup> even the most casual look at today’s corporate governance debates reveals two important aspects: one is the way in which the analysis of contemporary corporate governance regulation can help us become sensitive to the emerging, new framework within which corporate governance rules are evolving, a framework which is

---

<sup>133</sup> For an illustration, see L. C. Backer, 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order', (2011) 18 *Indiana Journal of Global Legal Studies* 751-802.

<sup>134</sup> See, for example, the overview at: [www.ecgi.org](http://www.ecgi.org).

<sup>135</sup> J. Köndgen, 'Privatisierung des Rechts. *Private Governance* zwischen Deregulierung und Rekonstitutionalisierung', (2006) 206 *Archiv für die zivilistische Praxis [AcP]* 477-525; T. M. J. Möllers, 'Europäische Methoden- und Gesetzgebungslehre im Kapitalmarktrecht. Vollharmonisierung, Generalklauseln und soft law im Rahmen des Lamfalussy-Verfahrens zur Etablierung von Standards', (2008) *Zeitschrift für Europäisches Privatrecht* 480-505, at 485; P. Zumbansen, 'The Privatization of Corporate Law? Corporate Governance Codes and Commercial Self-Regulation', (2002b) *Juridikum* 136-145.

constituted by a combination of local and transnational actors and norms, connected through “networks” and “migrating” standards.<sup>136</sup>

The contested political dimensions as well as the high degree of the technicality of the regulatory subjects of transnational regulatory areas<sup>137</sup> present a formidable challenge to traditional, regulatory theories of law.<sup>138</sup> As alluded to above, it is this intricate combination of political ambivalence and technical specialisation 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 scrutinise the tension between “official” and “unofficial” norm creation, between “hard” and “soft” law, 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>139</sup> Re-visiting the legal pluralist work in the second half of the Twentieth century, for example the contributions from scholars such as Sally Falk Moore,<sup>140</sup> Marc

---

<sup>136</sup> See N. Brunsson/B. Jacobsson, *A World of Standards* (Oxford University Press, 2000); R. Wai, 'Transnational Private Law and Private Ordering in Contested Global Society', (2005) 46 *Harvard International Law Journal* 471-486.

<sup>137</sup> For an overview, see the excellent collection in: S. Khagram/P. Levitt (eds), *The Transnational Studies Reader. Intersections & Innovations* (Routledge, 2008); see, also, J. J. Levit, 'Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law', (2007) 32 *Yale J. Int'l L.* 393-420, and the contributions by Alexia Herwig, Oren Perez, Jochen von Bernstorff, Karl-Heinz Ladeur, and Craig Scott & Robert Wai in: C. Joerges/I.-J. Sand/G. Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, 2004), note 31 above.

<sup>138</sup> See C. Scott, 'Regulating Everything', (2008) *Inaugural Lecture, University College Dublin, School of Law*, 26.2.2008 <http://geary.ucd.ie/mapping/images/Documents/RegEverything.pdf>.

<sup>139</sup> E. Ehrlich, *Fundamental Principles of the Sociology of Law* (orig. published in German as *Grundlegung der Soziologie des Rechts*, 1913) (Russell & Russell, 1962), pp 486-506, “The Study of the Living Law”; G. Gurvitch, *Sociology of Law* (orig. published in French as *Problèmes de la sociologie du droit*) (Routledge and Kegan Paul, 1947); M. Rheinstein, 'Review: Two Recent Books on Sociology of Law [reviewing Timasheff's 'Introduction' and Gurvitch's 'Elements']', (1941) 51 *Ethics* 220-231, at 221-2.

<sup>140</sup> Moore, “Law and Social Change: the semi-autonomous field as an appropriate subject of study”, note **Error! Bookmark not defined.** above.

Galanter,<sup>141</sup> Stewart Macaulay,<sup>142</sup> Boaventura de Sousa Santos,<sup>143</sup> and Gunther Teubner,<sup>144</sup> provides a rich background for contemporary assessments of “hybrid legal spaces”<sup>145</sup> that cannot be sufficiently 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 the newly emerging forms of norms radicalises their “semi-autonomous” nature (Moore), and we begin to conceive of regulatory spaces as being marked by a dynamic tension between formal and informal norm-making processes.

But, what about the *politics* of transnational regulation?<sup>146</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 multi-national corporations (MNC)<sup>147</sup> has

---

<sup>141</sup> M. Galanter, 'Justice in many rooms: Courts, Private Ordering and Indigenous Law', (1981) 19 *Journal of Legal Pluralism* 1-47.

<sup>142</sup> S. Macaulay, 'Private Government', in L. Lipson and S. Wheeler (eds), *Law and the Social Sciences* (Russell Sage, 1986), 445-518.

<sup>143</sup> Santos, “Law: A Map of Misreading. Toward a Postmodern Conception of Law”, note 45 above.

<sup>144</sup> Teubner, “The Two Faces of Janus: Rethinking Legal Pluralism”, note **Error! Bookmark not defined.** above; G. Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?', in C. Joerges, I.-J. Sand and G. Teubner (eds), *Constitutionalism and Transnational Governance* (Hart Publishing, 2004), 3-28.

<sup>145</sup> P. Schiff Berman, 'Global Legal Pluralism', (2007) 80 *S. Cal. L. Rev.* 1155-1237, at 1155.

<sup>146</sup> See, only, D. Schneiderman, 'Transnational Legality and the Immobilization of Local Agency', (2006) 2 *Annual Review of Law and Social Sciences* 387-408, and P. Fitzpatrick, 'Terminal Legality? Human Rights and Critical Being', in P. Fitzpatrick and P. Tuitt (eds), *Critical Beings. Law, Nation and the Global Subject* (Ashgate, 2004), 119-136. Gunther Teubner’s latest book offers a differentiated discussion of the challenges of developing a non-traditional, non-statist concept of politics for transnational governance: see G. Teubner, *Verfassungsfragmente. Gesellschaftlicher Konstitutionalismus in der Globalisierung* (Suhrkamp, 2012)

<sup>147</sup> D. Kinley/J. Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law', (2004) 44 *Va. J. Int'l L.* 931-1022; D. Vogel, 'The Private Regulation of Global Corporate Conduct', in W. Mattli and N. Woods (eds), *The Politics of Global Regulation* (Cambridge University Press, 2009), 151-188; L. C. Backer, 'Private Governance, Soft Law, and the Construction of Polycentric Networks for the Regulation of Transnational Corporations', (2011) 17 *Indiana Journal of Global Legal Studies* forthcoming

long been serving as an argument for the need to develop either distinctly “post-national”, institutionalised governance forms or to strengthen further the grip of self-regulatory and soft instruments, which have only a voluntary binding nature.<sup>148</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>149</sup>), and “torture as tort” as well as “transnational civil human rights litigation”,<sup>150</sup> to “scandalisation” (global shaming<sup>151</sup>) and soft-law instruments, self-binding norms, codes of conduct and best practices.<sup>152</sup>

These efforts illustrate the frustration with the lack of accountability, access to justice and democratic legitimacy of the evolving regulatory frameworks,<sup>153</sup> a frustration which has become increasingly accentuated in the context of a seemingly irreversible shift “from government to governance”.<sup>154</sup> As transnational governance regimes, fields such as corporate governance, labour law,<sup>155</sup> capital market law, and consumer protection law<sup>156</sup> are increasingly marked by the

---

<sup>148</sup> Blackett, “Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct”, note 105 above; H. W. Arthurs, ‘Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture’, (2001) 22 *Berkeley Journal of Employment and Labor Law* 271-294.

<sup>149</sup> P. S. Berman, ‘Towards A Cosmopolitan Vision Of Conflict Of Laws: Redefining Governmental Interests In A Global Era’, (2005) 153 *U. Pa. L. Rev.* 1819-1882.

<sup>150</sup> C. M. Scott, ‘Introduction to Torture as Tort: From Sudan to Canada to Somalia’, in C. M. Scott (ed) *Torture as Tort* (Hart Publishing, 2001), 3-44; C. M. Scott, ‘Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms’, in C. M. Scott (ed) *Torture as Tort* (Hart Publishing, 2001), 45-63.

<sup>151</sup> A. Fischer-Lescano, ‘Globalverfassung, Verfassung der Weltgesellschaft’, (2002) 88 *Archiv für Rechts- und Sozialphilosophie [ARSP]* 349-378.

<sup>152</sup> O. Perez, *Ecological Sensitivity and Global Legal Pluralism* (Hart Publishing, 2004), note 32 above.

<sup>153</sup> See C. Ochoa, ‘The Relationship of Participatory Democracy to Participatory Law Formation’, (2008) 15 *Indiana Journal of Global Legal Studies* 5-18.

<sup>154</sup> J. M. Solomon, ‘Law and Governance in the 21st Century Regulatory State’, (2008) 86 *Texas Law Review* 819-856.

<sup>155</sup> A. Supiot, *Au-delà de l'emploi. Transformation du travail et devenir du droit du travail en Europe. Rapport pour la Commission européenne*. (Flammarion, 1999); R. O'Brian, ‘The difficult birth of a global labour

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 the 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 *étatistes* – such as Carl Schmitt and his pupils in administrative law<sup>157</sup> – had often made it out to be. As Saskia Sassen has recently re-iterated, both dryly and irrefutingly, there is an intimate connection between both the search for and the critique of law and the nation state.<sup>158</sup> Her observation is particularly astute as Sassen has, over the years,<sup>159</sup> greatly contributed to our better understanding of how allegedly “external” and overwhelming processes of “globalisation” should, instead, be seen as distinctly co-evolving with and as being produced, constructed and conceived of *within* the nation state. Rather than positing globalisation 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-

---

movement', (2000) 7 *Rev. Int'l Pol. Econ.* 514-523; C. M. O'Brien, 'Reframing Deliberative Cosmopolitanism: Perspectives on Transnationalisation and Post-national Democracy from Labor Law', (2008) 9 *German Law Journal* 1007-1042.

<sup>156</sup> G.-P. Calliess, 'Reflexive Transnational Law. The Privatisation of Civil Law and the Civilisation of Private Law', (2002) 23 *Zeitschrift für Rechtssoziologie* 185-216; G.-P. Calliess, *Grenzüberschreitende Verbraucherverträge. Rechtssicherheit und Gerechtigkeit auf dem elektronischen Weltmarktplatz* (Mohr Siebeck, 2006).

<sup>157</sup> C. Schmitt, *Political Theology: Four Chapters on the concept of sovereignty [1922]* (transl. George Schwab) (The MIT Press, 1986); E. Forsthoff, 'The Administration as Provider of Services (transl. from *Der Staat der Daseinsvorsorge*, 1938)', in A. J. Jacobson and B. Schlink (eds), *Weimar. A Jurisprudence in Crisis* (University of California Press, 2000), 326-327.

<sup>158</sup> S. Sassen, *Territory - Authority - Rights. From Medieval to Global Assemblages* (Princeton University Press, 2006), p 1: “We 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>159</sup> See, for example, S. Sassen, *The Mobility of Labor and Capital. A Study in international investment and labor flow* (Cambridge University Press, 1988); S. Sassen, *The Global City* (Princeton University Press, 1991); S. Sassen, *Globalization and Its Discontents. Essays on the New Mobility of People and Money* (The New Press, 1998), note 2 above; S. Sassen, 'Globalization or denationalization?', (2003) 10 *Review of International Political Economy* 1-22; S. Sassen, 'The City: Its Return as Lens for Social Theory. Keynote presentation at the International Conference for Integrating Urban Knowledge & Practice, Gothenburg, Sweden, May 29 to June 5, 2005', (2005) [http://www.urbanlife2005.com/proceedings/keynotes/Saskia\\_Sassen.pdf](http://www.urbanlife2005.com/proceedings/keynotes/Saskia_Sassen.pdf)

making. Yet, she does not 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. It is through this relation that elements of physical and intellectual texture emerge to produce border-crossing “global assemblages”. These constitute distinct spheres that, famously fuelled by the dramatic development of information technology, integrate territorial and de-territorial, vertical and horizontal ordering patterns to produce a structured regime of societal activities.<sup>160</sup>

Meanwhile, continental public lawyers remain tempted to depict transnationalisation processes primarily as challenges to the re-assertion of “public authority”<sup>161</sup> in a world of disaggregated state power.<sup>162</sup> Similarly, European private lawyers continue coyly to attempt an escape from the reach of the juridification/intervention thrust by demarcating “traditionalists” from “transnationalists” – in the hope of positing the latter as the heroes of an autonomous legal order, distinct from the nation state.<sup>163</sup> Such intellectual efforts occur side-by-side with the continuing discussions and the untiring production of legislative proposals around a European private law.<sup>164</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

---

<sup>160</sup> S. Sassen, *Territory - Authority - Rights. From Medieval to Global Assemblages* (Princeton University Press, 2006).

<sup>161</sup> See, for example, the Special Issue “The Exercise of Public Authority by International Organizations”, by Armin von Bogdandy, Philip Dann & Matthias Goldmann (eds), (2008) 9 *German Law Journal*, available at: <http://www.germanlawjournal.com/index.php?pageID=13&vol=9&no=11>.

<sup>162</sup> A.-M. Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks', (2004) 39 *Government and Opposition* 159-190; A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004).

<sup>163</sup> K. P. Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International, 1999); K. P. Berger, 'The New Law Merchant and the Global Market Place. A 21st Century View of Transnational Commercial Law', in K. P. Berger (ed) *The Practice of Transnational Law* (Kluwer Law International, 2001), 1-22; for a critical discussion, see P. Zumbansen, 'Piercing the Legal Veil: Commercial Arbitration and Transnational Law', (2002) 8 *European Law Journal* 400-432.

<sup>164</sup> For an excellent overview and analysis, see R. Zimmermann, 'The Present State of European Private Law', (2009) 57 *American Journal of Comparative Law* 479-512.

itself to a sphere structured by private self-regulation and political regulatory competition.<sup>165</sup> What is remarkable is the lack of real dialogue between “public” and “private” lawyers in this regard. While the conceptual and political problems arising around the emerging and proliferating regulatory regimes in the transnational sphere are obvious, public and private lawyers appear to pursue distinct and isolated paths, the former being interested in further scrutiny of “sovereignty” and “authority”,<sup>166</sup> while the latter re-direct their interests towards the longstanding questions of regulatory competition.<sup>167</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 to the emerging transnational regulatory landscape.<sup>168</sup> The opportunity arises out of the rich theoretical and doctrinal memories of public and private law with regard to the thematisation of exclusion and inclusion, participation and representation.<sup>169</sup> But, the danger is that the current efforts to study the particular dynamics of fast-evolving transnational regulatory regimes will be performed 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>170</sup> Sassen’s work reflects an unerring commitment to emphasise and relativise the national in the emerging cartography of a globalised world

---

<sup>165</sup> G. Howells/T. Wilhelmsson, 'EC Consumer Law: Has it Come of Age?', (2003) 28 *European Law Review* 370-388; U. Mattei/F. Nicola, 'A 'Social Dimension' in European Private Law? The Call for Setting a Progressive Agenda', (2006) 41 *New England Law Review* 1-66.

<sup>166</sup> See von Bogdandy *et al.*, “The Exercise of Public Authority by International Organizations”, note 161 above.

<sup>167</sup> E. A. O'Hara/L. E. Ribstein, *The Law Market* (Oxford University Press, 2009); H. Eidenmüller, 'Recht als Produkt', (2009) 64 *Juristenzeitung [JZ]* 641-653.

<sup>168</sup> Caruso, “Private Law and State-Making in the Age of Globalization”, note 82 above.

<sup>169</sup> R. Wiethölter, 'Materialization and Proceduralization in Modern Law', in G. Teubner (ed) *Dilemmas of Law in the Welfare State* (Walter de Gruyter, 1986), 221-249.

<sup>170</sup> G. Teubner (ed) *Global Law Without A State* (Ashgate, 1997), note 20 above.

simultaneously. This emphasis on national, *local* decisions and institutions that give rise to globalisation processes has gone a long way in allowing us to identify the concrete places at which policies, which later become identified as phenomena of globalisation, are prepared, taken and implemented.<sup>171</sup> This new understanding of the national basis of globalisation proceeds in relation to the well-known institutions, reference points and established procedures, such as states, parliaments, administrative agencies and, importantly, courts. These 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>172</sup> This relativisation of the local results in the discovery of a newly-emerging spatial category: the focus on space promises to capture more adequately the exhaustion of concretely-localised 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 lies in developing an appropriate language with which to address the institutional and normative challenges in a world that cannot effectively be governed through domestic- and domestically-minded rules. In the emerging spaces of global societal activity, the specifically legal perspective, which informs our present inquiry, is challenged by a multitude of contrasting investigations into the form, nature and quality of the global order.<sup>173</sup> Beyond the obvious need of irony on the part of the

---

171

Her work on global cities is of particular relevance in this regard: here, Sassen 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 centres and by successfully demanding and implementing a facilitating, supportive infrastructure (electricity, broadband, digitisation, 24/7 service, access and maintenance). For a concise restatement of her long-term, monographical work on global cities, see S. Sassen, 'The Global City', in S. Fainstein and S. Campbell (eds), *Readings in Urban Theory* (Blackwell, 1999), 61-71.

172

See the Symposium "Beyond Dispute: International Judicial Institutions as Lawmakers", edited by Armin von Bogdandy & Ingo Venzke, (2011) 12 *German Law Journal*, pp 979-1370, available at: <http://www.germanlawjournal.com/index.php?pageID=2&vol=12&no=5>.

173

See the still excellent exposition of the inter-disciplinary nature of globalisation studies: D. Held/A. McGrew (eds), *The Global Transformations Reader. An Introduction to the Globalization Debate (2000)*, 2nd ed. (Polity, 2003), Introduction, pp 1-50.

lawyer in his or her quest to make sense of law in a globalising world in order 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 continuing studies of transnational governance promise important insights into the complex relations between the emergence of hybrid institutions and the ambivalent, hard/soft norms produced in this 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. It is within each discipline that one has to identify points of departure towards 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 institutionalisation contributes to a further “inter-disciplinarianisation” of research, but it remains crucial to continue to unpack the meaning of this shift to governance within the different disciplines themselves. This paper has offered a number of observations regarding the adaptation of legal scholarship and doctrine to the process of transnationalisation, and, at every corner, we were able to see that, while we may no longer just be merely “shooting in the dark”, it would clearly be too early to say that “we see the light”.