

# Law & Society and the Politics of Relevance: Facts and Field Boundaries in ‘Transnational Legal Theory in Context’

Peer Zumbansen\*

## 1. Introduction, or: why most cases are not just a ‘local’ affair

Two recent decisions of the United States Supreme Court, handed down in June 2013, have been attracting considerable attention—most presumably because of their ‘bigger picture’ significance in the context of public political debate in the area of equal protection. The Court’s pronouncement in *United States v. Windsor*<sup>1</sup> was concerned at its center with the contested constitutionality of the federal Defence of Marriage Act [DOMA] of 1996,<sup>2</sup> according to which marriage was defined as a ‘bond between one man and one woman.’<sup>3</sup> The Court struck down sec. 3 of the Act, holding it to be a violation of the equal protection clause under the 5th amendment. Decided the same day, in *Hollingsworth v. Perry*, the Court ruled that a petitioner group that defended the constitutionality of a California constitutional amendment rendering same-sex marriages illegal had no standing, where the government

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\* Professor of Law and Canada Research Chair, Osgoode Hall Law School, Toronto. As of July 2014, Dickson Poon School of Law, King’s College London.

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1 *United States v. Windsor*, 570 U.S. 12 (2013), arg. 27 March, dec. 26 June 2013.

2 Pub.L. 104–199, 110 Stat. 2419, enacted September 21, 1996, 1 U.S.C. § 7 and 28 U.S.C. § 1738C.

3 Defence of Marriage Act, Sec. 3.

had opted not to stand trial to defend this amendment (the so-called Proposition 8).<sup>4</sup> These two decisions stand squarely within a much belabored context of legal, political and cultural battles over equal protection and privacy rights.<sup>5</sup> Yet, if we wanted to clearly demarcate different legal fields touched upon by these cases, we would very soon find ourselves enumerating one regulatory regime after another. As the author of the opinion in *Windsor*, Justice Kennedy, noted, the enactment of DOMA put into place a statute that would directly and indirectly have an impact on ‘over 1,000 federal statutes’, with the consequence that the decision, on its face concerned with a particular legal definition operated in fact in many different legal arenas simultaneously, ranging from constitutional to social insurance law, from housing to trusts and estates, from tax law to family and adoption law as well as landlord and tenant law. At the same time, all of these fields would be mobilized in a context, which gives rise to intriguing questions of procedural law and federalism.

It would seem, then, that both decisions are ‘local’ in that they arise out of a particularly U.S. American regulatory and adjudicatory context and can be read, understood and appreciated against this very background. And yet, taking just one step ‘aside’, we can see how the issues at work in *Windsor* as well as in *Perry* are by no means exclusively proprietary to the American constitutional discourse. Instead, we can easily discern a number of comparative connections to similarly situated legal disputes in foreign jurisdictions where the question of same sex marriage has long become a hot topic of legal and public deliberation. As becomes clear already in *Windsor* from the fact that the plaintiff, Edith Schlain Windsor, and her late partner, Thea Clara Spyer, had entered a relationship in the 1960s and then been married under newly enacted law in Ontario, Canada in 2007, they had ‘shopped’ for a legal regime that would accommodate their aspiration for formal legal recognition of their relationship before such norms would become available in the U.S.<sup>6</sup> The case arose out of the tax levied onto Ms Windsor to whom Ms Spyer had bequeathed her entire estate, a tax that the IRS had justified with reference to DOMA, despite the fact that the state of New York had formally recognized the legality of the marriage concluded under Canadian law, when Windsor and Spyer returned to their residency in New York—two years before Ms Spyer deceased in 2009. A growing number of other countries, then, including Canada of course, has seen comparable developments in the granting, expansion or limitation of equal protection guarantees in the area of same sex relationships.<sup>7</sup>

This observation would place the otherwise ‘American’ set of cases that we just referred to in a context of so-called comparative constitutional law, an area of legal research with a considerably young and yet already significant pedigree,<sup>8</sup> both as

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4 *Hollingsworth et al. v. Perry et al.*, 570 U.S. \_\_\_\_ (2013), arg. 26 March 2013, dec. 26 June 2013.

5 See *Romer v. Evans*, 517 U.S. 620 (1996); *Lawrence v. Texas*, 539 U.S. 558 (2003).

6 For more background on the concept of ‘shopping’ for law, see O’Hara & Ribstein 2009.

7 See e.g., Kollman 2007; more recent data may be retrieved at: <[http://en.wikipedia.org/wiki/Same-sex\\_union\\_legislation](http://en.wikipedia.org/wiki/Same-sex_union_legislation)>.

8 Cappelletti & Cohen 1979; Das Basu 1984; Jackson & Tushnet 2006; Dorsen et al. 2010, 36 ff.

regards its impressive theoretical progress<sup>9</sup> as well as its practical-political importance in the context of transnational judicial dialogue (Slaughter 2000; Kemmerer 2003). Seen through the lens of comparative law, we are able to study a 'local' jurisprudential event such as the U.S. Supreme Courts' decisions of June 2013 as illustrations of a change in legal (political, cultural) perception under way in other countries as well. Indeed, many areas often considered exclusively in a local, domestic context, reveal their transnational dimension<sup>10</sup> once we begin to trace more carefully the trajectories and impacts of 'migrating' norms, principles and standards (Choudhry 2006). But, once we direct our attention to such changes in the law across a growing range of jurisdictions, we can begin to discern the particular nature in which such changes grow out of debates and legal, jurisprudential developments that are local and transnational at the same time.<sup>11</sup>

A 'field' such as comparative constitutional law or, as authors have convincingly been arguing, *constitutionalism* (Dorsen et al. 2010, 36 ff), appears inherently unstable, both as regards its substantive content and its analytical contours. Indeed, as we become witnesses of ever more proliferating ways and forms of legal 'transplants' in hard and soft, formal and informal shapes, it appears as if what we can here perceive resembles in many ways the types of a transnationalization of law, which in particular commercial lawyers have long been highlighting as a promising laboratory to study the modern evolution of legal norm generation and dissemination.<sup>12</sup> Likewise, as in our present example, in areas where we are concerned with sensitive societal questions of regulatory intervention, we will increasingly find dynamics of 'borrowing', 'mimicking', 'impregnation' and other forms of 'travelling' norms and principles, promulgated by courts in one country citing courts in other countries, by judges (and other officials) engaging in transnational judicial dialogue, or by a form of legal transplant that in itself merits very close attention.

Complementing, sometimes trailing, but most frequently driving states' action, private transnational actors can be seen to significantly engage in processes of norm development and generation. In the here used example of the Supreme Court's same sex decisions, the importance of the just announced business policy on the part of Wal-Mart to extend its employee-directed health care benefits package to same sex partners is of particular interest (D'Innocenzio 2013). Considering the fact that the country's single largest employer with about 1.3 million employees in the U.S. (with a total of 2.2 million worldwide<sup>13</sup>) adopts such a policy without a legal obligation to do so, points to the particular relations between 'public' and 'private' norm making processes. The sheer factual size of this regulatory program prompts a closer scrutiny

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9 La Forest 1996; Arbour & Lafontaine 2007; Choudhry 1999, 888: 'A court's choice of interpretive methodology will affect more than the outcome the particular case before it. It will also likely affect the broader constitutional culture of the interpreting court's jurisdiction.'

10 For more background, see Zumbansen 2012.

11 This is the perspective taken by legal scholars and political scientists interested in the 'spatial turn': for an insightful illustration and engagement, see Liste & Wiener 2014.

12 See e.g., Dalhuisen 2006; Calliess & Renner 2009.

13 <<http://corporate.walmart.com/our-story/locations>> (visited 21 June 2014).

as to the ‘legal’ nature of such a set of self-imposed obligations. Closely related to such questions of how to demarcate the legal nature of the processes before the Supreme Court and the purported non-law character of Wal-Mart’s newly enacted policy are concerns with the character of the institutions involved in norm-generation as such. To some degree, such questions are still hypothetical, as a corporation such as Wal-Mart is not considered an entity granted with the authority to issue binding legal norms. And yet, the tight integration of ‘private’ actors in various, wide-spread norm producing and implementing contexts in the area of environmental (Bartley 2007), commercial (Wüstemann & Kierzek 2007) or financial regulation (Bradley 2005) suggests that the lines between private actors (without law making authority) and public ones (with such authority) are not as neatly drawn as some might think. Depending on whether we would attribute a legal character to Wal-Mart the next question would be indeed to rethink the status of such a norm-producing actor or entity, its public or private character. As Legal Realists argued long ago, such a reflection is especially important where real social consequences follow from such ‘abstract’ legal categorization (Dewey 1926).

In this essay I am interested in this particular constellation of what I want to call a ‘transnational legal theory in context’<sup>14</sup> and the today fast proliferating field of ‘transnational regulatory governance’<sup>15</sup>, both of which I hope to eventually integrate and conceptualize as a conceptual framework with the title of *Transnational Sociological Jurisprudence*. In the following, I argue for the need to engage in particular processes of ‘translation’, dialogue and reciprocal engagement in order to more adequately grasp the dynamics as well as consequences of allegedly clearly defined legal-regulatory areas with their corresponding epistemologies (captured through their depiction as legal ‘fields’). In previous work, I have been interested in the identification of ‘translation categories’—using the triad of *Actors, Norms, and Processes* (ANP)—to capture the theoretical and conceptual challenges arising in a context where we are called upon to offer legal analysis and doctrinal assessments in a framework very different from that of a (Western) nation state, marked by evolving conceptions of the state, the rule of law, notions of the separation of powers and a system of normative hierarchy, with some form of constitutional text or order at the pinnacle of the pyramid (compare Zumbansen 2013b, 54-60). In the present context, this *translation* or engagement is seen to occur in two ways: first in the form of the Legal Realist confrontation of legal norms with their invisibilised social realities, secondly through a close study of the ways in which the content and boundaries of legal fields are being drawn and justified. The key here is a contextualization of lawyers’ demarcation discourses as concerns the function and boundaries of particular legal areas (‘fields’) in a never fully disclosed or disclosable realm of epistemological conceptualization. What—in the domestic context—would, for example, justify

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14 Here, I am much inspired by Rudolf Wiethölter’s longstanding analysis of the correlation between political, sociological and economic analysis of law. See e.g., Wiethölter 1986b and 1986a.

15 A landmark contribution to this debate continues to be Claire Cutler’s study of the institutional and political dimensions of *lex mercatoria* (Cutler 2003).

a strict separation between labor law on the one hand and corporate law, on the other? We should know and did already know for a long time (Berle 1954), that the justification of distinguishing between these two legal fields, despite its 'functional' persuasiveness (Dewey 1926; Bratton 1989), is at its core *political*. As will be shown later in this article, similar justificatory moves occur in both emerging and maturing transnational legal fields: the here chosen examples of law & development and transitional justice do poignantly mirror the same thrust of arguments mobilized to distinguish their respective regulatory function. It is by approximating these fields that we can see more clearly how the construction of a legal field results in the creation of a tightly structured realm of purported internal logical coherence.

But, as I want to show in the following, this attention to politics does not go far enough. What today is most frequently being associated with the need to expand law's interdisciplinary capacity,<sup>16</sup> is in fact only the surface of a more comprehensive crisis of law's epistemological foundations. On the one hand, from a legal-sociological perspective, we find an increasingly fuzzy relationship between allegedly 'public' and 'private' actors involved in the formulation and implementation as well as enforcement of norms. But, while this proliferation of private regulatory actors is as such not a novelty given its historical precursors (see e.g., Jaffe 1937), its particular appearance in the context of the continuing crisis and transformation of the New Deal's and the post-war Welfare State's regulatory aspirations requires a comprehensive analysis that would effectively revisit and reinvigorate the Legal Realists' pondering on the hidden politics of de-politicizing markets (Hale 1923), contracts (Dalton 1985; Hart 2009) and families (Olsen 1983). The first strand of analysis in this article is thus an attempt to connect the contemporary politics over post-Welfare State regulatory governance with earlier contentions as to the ideological basis of market-state demarcations. On the other hand, such analysis must prove adequate in the face of a fundamentally transformed institutional environment as it presents itself in the form of today's 'disembeddedness' of the nation state's regulatory and adjudicatory apparatus (Zumbansen 2013b, 54–60). The disaggregation of a wide range of state regulatory functions and processes (Verdier 2009) presents, thus, a formidable challenge and laboratory for the study of the doctrinal, conceptual as well as ethical and political dimensions of norm creation and implementation.<sup>17</sup>

At the heart of this article is thus the correlation between a 'political' critique of legal theory and an analysis of the relationship between law and governance in a transnational context. It is through the mobilization of the idea of 'translation' that I hope to be able to show how contemporary calls for a more interdisciplinary study of law can barely scratch the surface of what is in fact a far deeper-reaching political crisis of law, a crisis that is one of law's epistemological basis. The here suggested use of the term translation, however, is not obvious and thus needs to

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16 See e.g., NYU's 2012-2013 Hauser Colloquium program, focusing on an interdisciplinary analysis to place legal theory in the interdisciplinary context of global governance: [www.law.nyu.edu/academics/colloquia/hauserglobal](http://www.law.nyu.edu/academics/colloquia/hauserglobal) (last visited 28 August 2013).

17 See contributions to Scott et al. 2011.

be explained. For anyone working under the umbrella of ‘law in context’ or ‘law and society’, the challenge of how to adequately correlate the complexity of social ‘facts’ (observations, judgments, perceptions) to the ‘language’ of the law (Constable 2012), brings together a wide range of epistemological and conceptual challenges. These can be looked at through the lens of ‘knowledge’, in other words, by asking the question of what the law ‘knows’ of the reality it seeks to depict. Another, related dimension of such inquiry is to ask what it *should* know, which shifts the attention to the problem that law might not be the appropriate tool to adequately represent social facts, conflicts, relationships, voices as well as silence. A further dimension, still, is to problematize law’s translation capacity from a normative stance, which is to ask in whose name and to whose benefit a social constellation is turned into a legal ‘case’. For the interest jurisprudes of late-nineteenth century Germany or the American Legal Realists of the early twentieth century, these dimensions were already present, in one way or the other. For the legal sociologists during the interwar period (Ehrlich) as well as the 1960s and ’70s, they were amended and complemented by an emphasis on implementation and an investigation into the ‘consequences’ of legal regulation. And, during the latter part of the twentieth century, post-colonialism and literary criticism slowly began to influence legal theory and legal sociology, preparing the ground for a renewed, but now significantly interdisciplinary radical self-reflection on the historical and ideological underpinnings of law .

The following observations immodestly pursue the goal of keeping these three dimensions ‘in play’ while focusing, in the core part of this paper, on an analysis of two ‘fields’ in contemporary legal debate, ‘law and development’ and ‘transitional justice’. Each of these can illustrate how field boundaries function as arguments to concretize and synergize ongoing and continuing discourses of legal theoretical and legal sociological inquiry against the background of the just alluded-to genealogies. As such, legal fields can be seen as ‘law in context’ or ‘law and society’ laboratories, in which the correlation of social ‘reality’ and law is problematized. At the same time, such laboratories are contestation sites for struggles over meaning, purpose and value orientation—just like ‘labor law’ or ‘corporate law’, alluded to above. By comparison to those, the here suggested fields have the advantage of being still ‘new’ in the sense that their ‘tradition’ is not yet canonical, and their trajectory particularly contested. They thus offer a formidable opportunity to engage with the way in which lawyers (continue to) debate over what it is they are doing, and what it can mean to apply legal language as well as the ‘force of law’ to social relations and phenomena.

Against this background, the agenda is an apparently straightforward one. Once the importance of the Realists’ political critique of legal formalism is reintroduced, the task consists in reflecting on the challenges arising in the attempt to apply their lessons to contemporary arenas of transnational governance. The just described idea of translation will be unfolded in two ways: the first is to revisit the ubiquitous reference to ‘public’ and ‘private’ in a by now well-established ‘law & society’ mode, which builds on legal realism and places law as a social theory enterprise in an ever-further differentiated social science context. But, we need to look at the challenges

of a thus operating law & society approach that risks simultaneously fetishizing and diffusing the 'political' thrust that drove the Legal Realists' project. In light of this challenge, the present frontier of a renewed law & society approach in the light of already made advances in sociology, philosophy, and Science and Technology Studies (STS) lies, in my understanding, in how to more effectively engage legal doctrine and legal theory in a dialogue with those disciplines that place the questionable, fragmentary and precarious nature of knowledge at the center of their inquiry. This 'turn to knowledge' as a task for legal theory turns practical when we study the establishment and demarcation of legal fields in contexts that are above all marked by the absence of the earlier available reference points for nation-state embedded legal governance (courts, normative hierarchies, constitutional adjudication, etc.). In other words, to the degree that fields such as law & development and transitional justice are being constructed and distinguished from one another by using the old, traditional conceptualizations of (a-political) markets, (interventionist and, as such, market processes disrupting) states, (self-interested) individuals, (private) corporations and (contractualised) employees in the realm of the first field (L&D) and the rule of law, reconciliation, prosecution and healing in that of the other (TJ), a Legal Realist inspired critique of the 'hidden politics' might not prove sufficient to grasp what really lies at the center of these fields. Ultimately, I will argue that both L&D and TJ are mere facets of the way in which legal theory today engages with a complex regulatory as well as normative-ethical reality in a transnational context. Using the concept of translation will allow us to see more clearly how distinctions between public and private, political and non-political elements of this reality are closely linked to distinctions between legal and non-legal forms of social ordering. Underlying these distinctions is a fierce struggle over different utopia, over competing and likely mutually exclusive models of society and human community,<sup>18</sup> a struggle about the violence of which the lawyers' distinction between 'relevant' and 'irrelevant' social facts in court proceedings gives little to no indication.

A central contention of this article is that the future development of 'law and globalization' will significantly be shaped by the way that scholars in law and other social sciences are able to further integrate the respective investigations into foundations and methodology, that are under way in each discipline, as we speak. The prospect of updating and adapting a primarily nation-state focused legal discipline to its operation in a global context includes the initiations of concentrated thought exchanges about the different, recognizable approaches to verbalize, from a variety of perspectives, the challenges posed by globalization for law and other social sciences. For a conversation across disciplinary boundaries to start, it is advisable to give a better picture of the particularities and idiosyncrasies of law and the current state of legal research (and contemporary developments in legal education). The following list identifies a number of thematic clusters that capture the different aspects of contemporary debates around law and globalization. My contention is

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<sup>18</sup> For a brilliant depiction of this point, see Cotterrell 2009, and for an insightful engagement with Cotterrell's approach (building on Georges Gurvitch), see Dedek 2014.

that, taken together, these clusters constitute elements of an emerging *legal theory of global governance*. Such a theory, to be sure, is no longer a legal theory in its own right, but a particular segment of ‘social theory’. In other words, building on Legal Realism and the sociology of law in this vein, we can hope to contribute to a social theory of law in a transnational context. And it is in that light, that we are now experiencing a strange mixture of both déjà-vu and innovation in the engagements between legal theory and social sciences. If we dared to apply a label to these developments, we could venture that of a transition from ‘law & society’ to ‘law & globalization’, with the term ‘transition’ marking less a substitute and replacement than an evolution, a maturing and continuing differentiation. That said, however, it is clear that the challenges arising from the first phase of law & society are likely to echo in the current iteration of law & globalization. In other words, the pressing questions as to the methodology to unfold the relation between ‘law’ and ‘society’ cannot be considered obsolete. What remains the same, is the need to demarcate and motivate the contours of each and the boundaries between them. This brings us back to the rediscovery of legal sociology in the 1960s and 1970s, the rise of a scientifically driven criminology as one of the launching pads and benchmarks for what result in a fast proliferating field of victimology, critical criminal law theory, implementation and context studies etc. At the same time, ‘legal pluralism’, while echoing a lot of the early legal anthropologists’ and legal sociologists’ interests in indigenous legal orders or customary law (Ehrlich 1962; Durkheim 1984), became a very ambitious theoretical and practical endeavor in the critical analysis of regulatory regimes in mature welfare states (Moore 1973; Teubner 1983). Today, the resurgence of law & society through the prism of law & globalization reminds us of these demarcation efforts while pushing us to recontextualise such concerns in a newly expanded environment—jurisdictionally and geographically (Ford 1999; Handl et al. 2012), geopolitically and from an epistemological standpoint (Sousa Santos 2007a, Chakrabarty 2007). What has changed in comparison between the 1960s/1970s constellation and the present time, is that the target areas of much of the just mentioned legal sociological, anthropological and critical work have become de-centred, as it were, shifting from a largely state-centred analytical universe to one of hybrid regulatory arenas, described, variably as international ‘regimes’ (Krasner 2001), transnational ‘spaces’ (Sassen 2006), fragmented legal orders (Koskenniemi & Leino 2002) or ‘collisions’ (Fischer-Lescano & Teubner 2004). This shift results in what might be called a ‘disembedding’ of nation-state or jurisdiction-oriented analytical and conceptual approaches. Explanatory frameworks employed to structure and analyze core institutional features of state-based legal regimes such as the ‘rule of law’, the ‘separation of powers’ principle or the ideas of a constitutional order or, simply, normative hierarchy threaten to miss the unique architectural structure of emerging global governance regimes. It is this disembedding of state-based conceptual toolkits that prompts not so much a full-blown crafting of a ‘new’

language,<sup>19</sup> but a constant exercise in adaptation, building on reflexive exercises in (discourse-regime-system) translation,<sup>20</sup> as well as the continuing engagements with the tension between ‘government’ and ‘governance’ discourses in different social science disciplines.

Such developments form the backdrop for the next stages of ‘globalization studies’, which will in all likelihood lead to an ever higher degree of interdisciplinary pollination. For the purposes of the present project it is necessary to keep this rich background in mind, while continuing the efforts to draw more concrete lessons from this engagement for one’s own discipline. This interest in ‘one’s own’ may be justified in light of the consideration that disciplinary frameworks evolve both internally and externally and as such have an inherent quality of *instability* that needs to be kept in mind when employing its tools and concepts—however critically such employment may be occurring. What evolutionary theorists have referred to as the tension between ‘routine’ and ‘innovation’ (see, for example, Luhmann 1975), legal scholars have depicted as a state of ‘critical instability’, for example in the case of a normative framework that is rich in its conceptual and, as a result, symbolic aspiration, while being under constant threat of being demasked as farcical or worse in light of the unlegitimizable environment its norms have helped creating (Pahuja 2011; Rajah 2012b). While this instability of theoretical frameworks which results from internal and external challenges might be identified and recognized, the necessary ‘next’ step is often much harder to formulate. Law’s relationship to (global) society is one such constellation in which a crisis of law is widely acknowledged, yet nothing like a consensus is emerging in terms of how to *respond* to, let alone, conceptualize that crisis. Despite this, it is possible to identify a number of thematic clusters which are constantly recurring in related debates about law’s status in a global context. These clusters are helpful in distinguishing different dimensions of the law-globalization relationship which the present article seeks to address. Among these clusters we find:

- the *state-law nexus* and the frequently associated distinction between a (legally structured and operating) state and a (purportedly self-regulatory) society.
- the alleged elusiveness of *transposing nation state-based concepts* such as the ‘Rule of Law’, ‘Separation of Powers’ or ‘Normative [Constitutional] Hierarchy’ into the global sphere [the distinction of domestic and global law].
- the *relationship between* (formal, institutionalized) *law and* (informal, ‘social’) *norms* [the law/non-law distinction].
- the fate of the concept of *legitimacy* in an evolving global legal order [the normative status of global law].

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19 In this context, see the program description of ‘Language and Globalization’ at Tilburg University in The Netherlands: <[www.tilburguniversity.edu/research/humanities/language-and-globalization/](http://www.tilburguniversity.edu/research/humanities/language-and-globalization/)> (last visited 30 August 2013).

20 See e.g., Carayannis, Pirzadeh & Popescu 2012, esp ch 2 (‘Globalization, Nation-States, and Global Governance’).

- the *politics* of global law [e.g., the tension between progressive and conservative endorsements of concepts such as the Rule of Law].
- the legal-philosophical *foundations of law* in distinction from law seen through the lens of *sociological or regulatory theory* [the interdisciplinary understanding of law].

Bullet-pointed lists are always meant to reduce complexity by enumeration, yet omitting an explicit ranking or ordering by priority. The above list is just like that in that the different bullet points are meant to illustrate, in no particular order, the earlier observation that the relationship of ‘law and globalization’ is in fact a label for how law depicts and ultimately begins to translate a multi-layered and multi-tiered theoretical analysis of contemporary social order that is offered by a host of disciplines other than law, into legal language. This translation bears tremendous risks for the translator—as well as for the translated. As for the lawyer as translator, the risk is one of destabilization of learned and established ways of seeing, understanding, judging. And it is this dimension I am here interested in. In order to trace such destabilization experiences in the law, some reconstruction of legal intellectual history is necessary. Thus, part II of the article will set the stage of the following analysis by initiating an investigation into the evolution of law and ‘socio-legal studies’. Part III will build on this account and then look more closely at one of the currently most vibrant discursive playgrounds in socio-legal studies ‘gone global’, namely Transnational Law [TL], which is here studied above all from a methodological perspective. This means that the emergence of this ‘field’ is understood as an attempt to make sense of law’s doctrinal, conceptual and interdisciplinary adaptations to globalization. The following two parts (IV, V) will then analyze the role of information and knowledge in the context of this emerging legal-regulatory concept of TL by looking more closely at both ‘facts’ and ‘norms’. The core contention in this part of the article is that while there is an inherently *political* dimension to the identification and selection of relevant/irrelevant facts on the one hand and the recognition versus dismissal of legal/non-legal norms, on the other, it remains frustratingly difficult to adequately capture or address the nature of this political dimension. It is the ambiguous, elusive nature of both the political status and framework that I am here most interested in—an interest that is shared, obviously, with many others (Teubner 2012; Liste 2012). Part VI, then, will finally focus on the two, already mentioned legal ‘fields’, ‘arenas’, ‘sub-disciplines’—‘law & development’ on the one hand, ‘transitional justice’, on the other—which may illustrate how law has become an increasingly interdisciplinary, ‘unstable’ discipline, the merits of which can be realized only in accepting its unstable nature as an unavoidable consequence from law’s engagement with its environment. Part VII deepens this analysis by revisiting the earlier findings regarding the role of knowledge in legal governance, but now scrutinizing the particular role in these two overarching, dynamic areas. Finally, part VIII reiterates the argument for an understanding of TL not as a field, but as a contemporary methodological engagement. This, in consequence, leads to the emergence of a differentiated analytical framework—under the label of ‘transnational legal sociology’—with the help of

which it might be possible to think further about the connections and intersections between legal doctrine, legal sociology and social sciences in the present era.

## 2. Strange bedfellows, or: a cohabitation with uncertain effects: ‘socio-legal studies’

Under the constant nagging at the conceptual citadels of legal coherence and unity by social-scientific insights, law eventually morphed into an unbound universe of ‘socio-legal’ studies. Similar to other hybrid scholarly endeavors,<sup>21</sup> the ambiguity of the politics that are at work in the generation, formation and consolidation of such fields follows from the difficulty to identify clear reference points (‘right’ vs. ‘left’) on the one hand and something similar to traditional (to be sure, Western) hierarchizing categories (‘state’ vs. ‘society’), on the other. More fundamentally, politics become ambiguous when it is no longer clear what they can be attached to, people, actions, and even things (Latour 2005). The here pursued interest in ‘translation’ is central to such a political perspective on socio-legal studies. Today, however, the translations between different realms and universes of knowledge have become especially complex, as the centrality of purportedly ‘technical’ knowledge in legal norm creation and decision making is likely to complicate otherwise well-reasoned attempts to separate doctrinal from ‘ethical’, ‘moral’, ‘political’ dimensions of law. With this in mind, the article is interested in both the trajectories and the politics of conceptual change in law’s efforts to adapt to globalization. As such, our interest must reach beyond the obvious political categorization of assertions that globalization has (rightly or regrettably) put an end to state sovereignty. Instead, the more important task seems to be to better understand the discursive universe in which globalization is associated either with the death of law (as collateral damage from the decline of the state) or the resurgence of law as a flexible regulatory asset in globalizing markets. Such an understanding cannot be gained from a single vantage point. While the analysis of the contested status and role of law in global governance is partly an important concern of sociologists and political scientists, the *motivations* as well as underlying *assumptions* that guide regulatory scholars—as *de facto* political philosophers—in their confidence in law in a domestic context as opposed to the frequently voiced fear of falling into a global void might be better understood through the lenses of (however crude behavioral) psychology (Guzman 2008) or political philosophy (Pogge 1992). But only in a combination of these different disciplinary lenses does it seem possible to arrive at halfway appropriate observations of the emerging global regulatory order. That said, the contention here is that a legal theory of global governance cannot escape its interdisciplinary reformulation, precisely because its categories have come under such close scrutiny.

Meanwhile, the analysis of law’s engagement with globalization seems to rest, at least for the time being, on a number of reference points. One of these is the distinction

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<sup>21</sup> The fitting example often being that of ‘cultural studies’, see e.g., Terdiman 2001; from the standpoint of legal sociology, see Nelken & Feest 2001.

between ‘domestic’ and ‘international’, which—despite its questionable explanatory status in the long run (Zumbansen 2013a, 506)—serves as a productive framework to identify differently bounded regulatory discourses. Against that background, it is possible to get closer to the ‘politics’ that accompany the emergence of legal fields, which are in themselves neither ‘here’ nor ‘there’, in that they are constantly transgressing the boundaries between the nation-state and the global realm. Two such fields will be in the centre of the forthcoming analysis, namely the in themselves unruly and seemingly boundary-less fields of Law & Development and Transitional Justice. By looking more closely at the continuing conceptualization of these areas, including their trials and tribulations as law school curriculum entities, it can be shown how the conflict between progressive and conservative politics, well-known from nation state-based disputes over the aims of legal governance in different regulatory areas, is repeating itself in the transnational arena. This *transnational replay* of domestic tensions between progressive versus conservative politics in the global arena short-circuits related debates within the nation-state context on the one hand and within transnational or global governance discourses, on the other. Because the latter is often described as distinctly different from the domestic sphere in light of the absence of a functioning, institutionalized rule of law, a normative-constitutional framework or hierarchy or an adequately designed system of norm-enforcement, the politics of global law are often depicted as being fatally troubled with questions of legitimacy, access to justice, or human rights universalism. Meanwhile, it is within the nation-state that the political dimension of legal theory is most frequently associated with crude demarcations of ‘public’ versus ‘private’ spheres of regulatory sovereignty or with claims over contested territory, associated either with state ‘interventionism’ or societal ‘self-regulation’. Law reconceived as ‘socio-legal studies’ can be seen as a continuing effort to formulate this dependency of law’s meaning (its ‘politics’) from the context in which it is being evoked. It is this sense of *embeddedness* that was crucial in the formation of legal sociological analysis of law over time. The task at this point in time is how to adequately capture the challenge arising from law’s globalization, how to build on or reject categories and instruments internal to law as a scholarly discipline, how to relate and, possibly, adapt its conceptual framework to other disciplines’ insights into the nature of global governance and what lessons to draw from such engagements for law—as a field of doctrine, practice, education and research.

### **3. Transnational law as an engagement with globalization**

In a recent chapter for an essay collection on ‘Law and Social Theory’, Ralf Michaels, a prominent participant in the discussions around ‘global legal pluralism’, surmises that globalization has become the definitive framing operative of the ‘law of our time’ (Michaels 2013, 1). An informed, cursory overview of the challenges arising for law and legal theory from globalization—above all law’s ties to the concept and the institutions of the Western nation-state—then follows this assumption. At the end of the chapter, Michaels appears to simultaneously dismiss and endorse a reading of

‘transnational law’ [TL] as a theory or a methodological framework in its own right. Instead, he suggests that ‘if anything, transnational law is a description of what we find empirically as law beyond the state, and a theoretical conceptualization of law after the breakdown of methodological nationalism. Transnational law describes a starting point, not an endpoint, of thinking about law’ (Michaels 2013, 18).

I take the apparent ambiguity of this position as an expression of a dilemma, which we—as legal scholars and *de facto* social scientists—are facing almost at every turn in our attempt to adapt the conceptual and theoretical instruments of our discipline to the unruly phenomena of globalization. In turn, ‘globalization’, as Gunther Teubner noted almost twenty years ago, should rightly be seen as the ultimate deconstructor, which in fact turns every dearly held assumption and foundation of law as a discipline on its head (Teubner 1997). As Michaels observes, globalization ‘has remained a remarkably vague concept in general discourse’ (Michaels 2013, 1). While this observation seems to be on point when we take into consideration the wide-ranging assessments and appropriations of the term, conceptually, politically, theoretically, we still must ask whether the problem is this lack of definition. After all, if it is true, to the least, that ‘we are all realists now’ (Singer 1988), why then further invest our energy into definition games. We know well enough that these only raise further questions as to who does the defining, to which purpose and to which effect? In that light, it appears perhaps more productive to embrace the phenomena which are being associated, for a number of reasons, with ‘globalization’, as *challenges* to the foundations of established epistemologies and ways of seeing the world.

From such a starting point, Michaels’ assertion of TL merely capturing what we ‘find empirically’ can be qualified further to hint at the very problem of *how* we ought to use frameworks such as a particular theory, an analytical concept or—as in the case of TL—a ‘field’ within a discipline, to describe (and, to construct) reality. Apart from the question of epistemology and the status of empirical socio-legal studies, the other part of Michaels’ statement deserves equal attention, namely where he refers to ‘law beyond the state’ (Michaels 2013, 1). If anything, law’s engagement with globalization has been determined by the category of the state and its significance for our understanding of law. That is precisely what Michaels depicts as (the need to question and, eventually, overcome) law’s ‘methodological nationalism’. So far, so good. But, now, where do we ‘start’, as Michaels suggests at the end of his paper, that we should?

I want to suggest that whether or not TL is a theory in its own right or whether legal pluralism [LP], that shares with TL a keen interest in social norms and in the tension between ‘law’ and ‘non-law’ (Moore 1973), should be seen as helpful (Michaels 2013, 14), we ought to acknowledge frameworks and approaches such as TL or LP as elements in what Michaels appropriately, in my view, describes as a *reconstruction*, of ‘law as social science’. As such, the boundaries of law as a discipline tend to be drawn and redrawn in light of challenges, whose status is inevitably going to be as contested and open for further deconstruction as the *nature* of law itself. In other words—but it might just be a theoretically obviously and trite point—there is no fixed point

from which it would be possible to treat law as a 'given' and then to analyze how it changes under the influence of outside pressures. The problem of law's boundaries, its content, scope and nature has always already been part of law's definition. Michaels' suggestion to capture the scope of law as it unfolds under conditions of globalization through the study of three determinants or, anchor points—'territory', 'population/citizenship' and 'government' is well-suited to explore the inchoate ways in which legal categories become intertwined social scientific depictions. Building on these three mini-excursions, we are able to see how a set of reference points that play an important role in law, are revisited and, in turn, reconfigured and expropriated by an immensely rich assembly of non-legal analytics that capture their sociological, philosophical, political, anthropological or geographical dimensions. Again, the ensuing question is what the consequences are for law. That question in itself is new only with regard to the context, in which it is posed. That this context is labeled as globalization suggests that it is a different context from that (of the nation state) in which questions regarding the relationship between law and social developments or, more generally, between law and society, have previously been asked.

Globalization and the various conceptual steps that have been taken by lawyers and socio-legal scholars towards making sense of globalization's impact on law appear to place the investigation on an entirely new and distinct foundation. It is against such a background that we might be able to appreciate the anxiety that shines through proclamations such as 'If everything is transnational law, nothing really is' (Michaels 2013, 18). Michaels qualifies this statement by referring to a use of TL as encompassing 'all legal (and non-legal!) rules',<sup>22</sup> while underlining that his preferred reading of TL, as we alluded to earlier, is one of a description of empirically found instantiations of 'law beyond the state' and as a 'theoretical conceptualization of law after the breakdown of methodological nationalism' (Ibid.).

The problem with these qualifications is that they tend to abbreviate and curtail necessary inquiries rather than productively draw on the different already existing investigative strands that have been developing in recent years and that have been benefitting from an increasingly serious engagement across different disciplinary boundaries. The level of complexity that the work carried out under the label of 'socio-legal studies' has reached up to this point, strongly suggests that we should no longer hope for any 'easy scores' or apodictic truths in this theoretical game. In that vein, it is important to point out and to acknowledge that definitions of otherwise unbound, experimental frameworks—such as TL—always carry the risk of inadequately reducing complexity. But, they nevertheless have to be taken seriously as evolutionary steps in theory-building that is driven by a coalescence of factors. In the area of legal 'fields', such factors comprise the constant tension

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<sup>22</sup> Michaels 2013, 18 (emphasis not added). See the expression of a similar anxiety in Zamboni 2013, 2, referring to the 'black hole represented by legal globalization (and its legal pluralism), a black hole where the distinction between law and non-law (i.e. the major tenant of legal positivism and, I would dare say, of the modern Western legal culture) seems to vanish, putting the very existence and legitimacy of the legal phenomenon under question.'

between the ‘law on the books’ and the ‘law in action’ (see e.g., Pound 1910), the ‘exhaustion’ of conceptual, analytical and doctrinal categories and instruments in the face of competing interpretations of social ‘facts’ (Galanter 2006), as well as the recognized need to adapt or expand an existing legal framework to a burgeoning set of technological, social, cultural developments. Because law that does not adapt to its times will wither away, we can see these tensions as well as the attempts to address them to have been marking any field of law—including contract, tort, property or civil procedure: all of these have seen such sieges to their citadels of purported coherence and rationality. As keen observers have pointed out for example in the case of private law, the politics of this game of constant change were not first prompted by the emergence of globe-spanning regulatory regimes, but started long before (Caruso 2006). Against that background, who wants to still *define* what contract (property, constitutional law etc. etc.) law really are, aim for and are designed to demarcate, protect and empower?

Transnational law [TL] is just one result of such ongoing attempts to update law and its categorical architecture to fast-moving societal developments. From that viewpoint, the ‘body’ of TL is driven by the tension as well as by the co-existence of law [legal] and non-law [non-legal rules] as they characterize contemporary regulatory regimes. But that does not define TL; rather, it is but one element of the concept that gives rise to the field. Understood, instead, as a theoretical platform, or laboratory, TL allows us to study the ways in which this tension actually unfolds, the forms and instances through which this coexistence occurs and the instances where legal categories become infiltrated by meanings from other disciplinary discourses. In other words, TL should be seen as doing the exact opposite of equating or leveling legal and non-legal rules. The contention is that TL, instead, *problematizes* the correlation between both normative universes<sup>23</sup> in that it opens up an increasingly diffused and complex regulatory landscape to a comprehensive assessment of the status and the function of norms (legal or non-legal) inside but also outside legal doctrine. For example, rather than contending that the transnational law merchant—the ‘lex mercatoria’—encompasses the entire universe of legal and non-legal rules in the field of transnational commercial regulation and governance, TL highlights the *interaction* between legal and non-legal rules in the governance of transnational societal activity, at the root of which lies nothing else but the challenge of the distinction itself.

#### **4. The transnational law project scrutinizes law’s ‘knowledge’ problem 1: facts**

This leads us to the second contention: if TL is a framework to investigate the correlation between legal and non-legal norms, then it is not just more, but also something different from a mere ‘description’ of norms that can empirically be ‘found’, as alluded to by Michaels. TL problematizes the way in which such *finding*

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23 See the fascinating engagement with these universes by Cover 1983.

occurs each time. For example, it is from this perspective that we can recognize the factor of agency in identifying and selecting ‘applicable’ norms in transnational constellations.<sup>24</sup> Meanwhile, from the perspective of TL it becomes possible to revisit established as well as emerging interpretations of jurisdictional norms: for example, the contested applicability of the U.S. American Alien Tort Statute of 1789 in the context of transnational human rights litigation is squarely situated in the nexus between ‘legal’ norms and TL’s concerns with the identification and interpretation of norms in accordance to the transnational nature of the underlying issues.<sup>25</sup>

A further contention as regards the ‘finding’ of law’s instantiation beyond the state can be made with reference to the ways in which judges in cases—be they domestic or involve transnational reach—distinguish between *relevant* and *irrelevant* facts. For example, Judge Posner’s opinion in the 2011 *Flomo* decision is a case in point in that regard. Reviewing the applicability of several ILO conventions to the labor practices ‘found’ at the Firestone Rubber Plantation in Liberia, Judge Posner at various points acknowledged the lack of sufficient ‘information’ or ‘knowledge’ with regard to the labor practices on the ground, but did not hesitate to still decide on the inapplicability of the conventions.<sup>26</sup> From the perspective of TL the question of the factual basis on which decisions regarding the qualification of norms as applicable or non-applicable are made is crucial. The importance here lies distinctly no longer alone in the question whether or not a particular ILO convention is applicable, but how the decision of a norm’s applicability is shaped by a more comprehensive and adequate understanding of the regulatory regime that in fact governs the scenario on the ground, which gave rise to the ‘case’ in the first place. In other words, the application of a legal norm never occurs in a vacuum, but instead must be seen as an intervention into an already existing normative system, made up of both ‘official’ and ‘unofficial’ norms. But, the significance of this rudimentary legal pluralist assertion becomes recognizable even from a cursory look behind the obvious facts in a case. In the example of the rubber plantation at the center of the *Flomo* decision, one quickly begins to wonder about the consequences for the legal assessment of the case’s facts that follow from a consideration of the history of the corporate defendant’s almost century-long involvement in the country. The facts about which the deciding judge recognized to know ‘too little’ were in fact available (namely who worked for the

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24 For an illustration of such norm selection in the fields of consumer contract law and corporate governance, see Calliess & Zumbansen 2010, chapters 3 and 4.

25 Arguably, the U.S. Supreme Court’s decision of April 17, 2013, has further decreased the likelihood of consolidating a transnational human rights jurisprudence in the tradition of the decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980): see *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. \_\_\_\_ (2013). On *Filártiga*, see e.g., Aceves 2007.

26 *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (2011), e.g., 1023: ‘They can assure fulfillment by hiring other poor Liberians to help them; and because Firestone’s Liberian employees are paid well by local standards, they can hire helpers cheaply. But alternatively they can dragoon their wives or children into helping them, at no monetary cost; and this happens, though how frequently we don’t know’. See also *Ibid.*: ‘We don’t know how many supervisors Firestone has deployed on the plantation, and hence whether there are enough of them to prevent employees from using their children to help them. We don’t know the supervisors’ routines, or how motivated they are to put a stop to any child labor they observe.’

plant in which capacity and under which conditions), but only if one began to see the case at hand in a broader context, namely in a context that was rich in relevant *data* and *facts*. The crucial element of contrasting the *case* that the Judge had before him with a case 'study' of the actually existing context and environment of the 'case' lies in the recognition of the limits of the epistemological categories that informed the construction of the case. The case study, by contrast, does not simply apply established categories to first depict and then to legally assess the *interests* found to be in obvious conflict (as, for example, between employee and employer, worker and factory owner, or two contracting parties). Instead, its purpose is to highlight the gap between the categories (employee, worker, contractor) and the reality that shapes the case.

This gap has long ago been identified as law's legitimacy deficit from a range of theoretical-political viewpoints, with the Interest Jurisprudence's attack on legal positivism in late 19th century Germany and the Legal Realists' attack on legal formalism merely being early instantiations of such efforts. In the attempt to better understand this context it is necessary to begin to recognize it as being itself the result of both a detailed field study of work and life conditions on the ground and a comprehensive *reconstruction* of the historical, socio-economic as well as political factors that have shaped the 'conditions' of the existing labor practices. While this dimension encompasses what we might call the political economy of the company's actual operation in the region, the community as well as government and stakeholder relations (see e.g., Rodriguez-Garavito 2011), what also becomes visible then is how the labor practices at a plantation such as Firestone's in Liberia are shaped by a multitude of regulatory norms that shape the employees', their dependents', and their peers' relations with regard to the company. Without taking into account this reality of these complex relationships between the company and its various stakeholders, a label now attached to a group significantly broader than that encompassing the company's official employees, no adequate assessment regarding the 'labor practices' on the ground can in fact be made. As ethnographic and political science accounts have shown, the regulatory universe of multinational operations in certain locales is itself transnational in its reach and its local effects can only be studied by understanding this complex relation between the local and transnational normative sphere. Simultaneously, this is the reason why there is never a moment where we can refer to norms that we 'find empirically as law beyond the state'. While, on the one hand, we may identify, collect and categorize norms of different status and quality as shaping a particular regulatory area, the selection and ranking of those norms we find applicable and determinative in a given context, on the other, remains a matter of agency and choice.

## **5. The transnational law project scrutinizes law's 'knowledge' problem 2: norms**

The previous section has ended in a reference to the intersecting local and transnational, official and in-official, hard and soft norms which characterize regulatory

arenas such as contemporary labor governance of multinational companies' operations in the third world. We have applied this lens to commence an investigation into the ways in which the lawyer in such situations can identify, choose and mobilize norms of different origin and status (compare Rodriguez-Garavito 2011). A striking feature of this selection process, however, is the effusiveness of the boundaries between (hard or soft) *norms* and the *facts* which constitute a social reality. The distinction between actual *facts*, allegedly standing for an objective materiality or a state of things, and norms and normativity, by which we refer to the idealistic and symbolic dimensions of the world, is always a constructed one: in pointing to a particular 'fact', selections and choices have been made, which ultimately rest on value judgments regarding the status being accorded to the 'facts' in question (e.g. Latour 2005).

In light of these observations, we now need to further flesh out the proposal in the previous section; the suggestion just made pertained to the development a richer concept of 'context' in order to gain a more adequate understanding of the complex qualities and dimensions of the *facts* that have given rise to cases such as the transnational human rights litigation in the Bridgestone or Firestone cases. Taking up the just made distinction between *political economy* and a *normative* dimension, we now need to ask about the nature of the relationship between both. The here made contention is that the former takes up the challenge of critically investigating the origin, the nature and selectivity of the 'facts' being considered in establishing the *factual* basis of a case, while the latter refers to the idealization and utopia of fact selection and establishment. The task becomes one of going beyond a narrow reading of the facts, one that is driven by incomplete testimony and typification, while avoiding to be lured down an alluring path that promises to lead us to what can only be an outrageously unbounded 'history of everything'. In other words, we need to identify the moment *when* and the ways *in which* lawyers, litigants and judges lose sight of the relevant facts and instead consolidate a manageable, i.e. justiciable factual basis, which from that point on serves as a complete snapshot of the 'facts of the case'. It is here where lawyers will increasingly engage with and allow themselves to be challenged by the advances made in anthropological and ethnographic methodological research, given that these areas currently display a forceful commitment to revisit and to scrutinize long established research routines and to update methodologies to new circumstances.<sup>27</sup> But such a perspective on engagement should not make us blind to the possibility that the goals of the lawyer may not only diverge from those of the anthropologist she 'relies' or 'draws' on, but that, in fact, the lawyer might entirely misinterpret the analysis offered by the anthropologist or the critical theorist. The task, then, for interdisciplinary analysis is to foster a mutual introspection into the starting points, normative (as well as theoretical, conceptual) underpinnings of this dialogue and engagement. When 'Waiting for the Barbarians' (Coetzee 1980), there must come the moment of realizing that it is no longer clear

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27 See the contributions to Hardin & Clarke 2012.

who is who. A particular challenge for lawyers arises from the way in which they are now being pressured into acknowledging and processing numerous research that questions law's epistemological basis, but to do so without the proper awareness of the historical traits of this inquiry into the factual basis of legal notions. In other words, lawyers today are thrown into a legal sociological discourse that has greatly advanced from its early beginnings and is today no longer merely concerned with the sort of 'gap critique' (between law on the books and law in action), as it formed the centre of early 20th century legal sociological analysis. While much of early legal sociology aimed at showing how judges were prone to ignore both the (socio-economic as well as cultural) basis of legal norms and the effects of legal-regulatory intervention, the current reiterations of legal sociological analysis is distinctly more interdisciplinary and encompassing in nature. It is in that sense that we can speak of the challenge of *legal sociology 2.0* for the majority of lawyers, who were trained in either the Ehrlichian spirit of recognizing the undeniable parallels between official and in-official regulatory regimes or the Dworkinian mindset with an all-else dismissing focus on legal adjudication as key to unlock law's mystery. Moving beyond early legal sociologists' analytical interest in the politics of legal formalism and the rising importance of expert knowledge and scientific governance, intermediate legal sociologists between the 1960s and 1980s decisively pushed for an interdisciplinary re-orientation of socio-legal studies (Blankenburg et al. 1980; Nonet & Selznick 1978). A similar differentiation of a primarily social-justice focused legal critique into an ever expanding series of critical engagements with developments in race, gender, environment, science or international affairs was witnessed among schools of thought with a significant progressive and legal reformist orientation such as the Critical Legal Studies movement. In comparison, current legal sociology, if it even still exists in the form of designated law school positions or curricular components, is prone to form alliances with an increasingly far-ranging array of intersections between law and social, media, behavioral, environmental, indigenous, religious, or cultural studies. While it is impossible to fully capture the potential consequences of this development, it is obvious how the convergence of social science fields that gave rise to hybrid and 'cross-over' academic realms such as 'cultural' or 'media' studies cannot ultimately leave a discipline such as law untouched. Developments such as Transitional Justice, Global South Epistemology and Third World Approaches to International Law (TWAAIL), illustrate these translation, engagement and introspection processes.

From this perspective, it appears as if a richer account of the *relevant* facts in a case will above all depend on a more contextual identification and reading of the data that can be accounted for as being of an explanatory nature for the case at hand. The bulk of this work still needs to be done in terms of showing how legal sociology 2.0 must now consist of lawyers' serious engagement with the advances in ethnographic research methodology, with the critique of facts and truth in 'science & technology studies' and with critical historiography as it has become pertinent in selected areas of law.

At the same time, while a more comprehensive approach to an analysis of the *facts* in a concrete case promises to assist in getting a clearer picture of the actual situation that characterized the conflict between the litigating parties, there will likely always remain a significant gap between a richer factual account of the actual interests and conditions present and the deeper structural frameworks of which a particular conflict scenario is part of. It is here, where for example scholars involved in the so-called Third World Approaches to International Law [TWAIL] have been able to unveil powerful connections between current governance conflicts and historical pathways, political choices and particular historical, socio-economic as well as geo-political circumstances—precisely by emphasizing that a critique of the facts employed in legal argument is inseparable from mobilizing a particular normative perspective. Contesting the facts, in other words, is a contestation, a struggle over values.<sup>28</sup> Another important development that promises to shed more light on the historically grown dimensions of the context in which many of the currently litigated human rights cases involving multinationals' operations in third world countries are unfolding, is the convergence of 'law & development' and 'transitional justice'.

## 6. Converging fields, intersecting epistemologies

Law and Development has always been an area which can neither be neatly and clearly defined nor boxed into clear-cut categories. The field has long been a battle field for opposing concepts of law, political and economic order and the role of institutional governance, and as such has always been a laboratory for audacious experiments with explosive material. Categories such as 'progress', 'development' or 'order' are invariably contentious, and in the context of L&D are employed as bargaining chips in a high-stakes game over political and economic influence, autonomy and, emancipation (see Pahuja 2011). While specific local contexts of L&D became the loci of such contestation, often enough under the magnifying glass of international and national development agendas, market integration and state reform, one of the most striking discoveries to be made here relates to the fact that the contentious items in the L&D context are also those which have long informed a critical analysis of law and governance in the context of the nation state. As such, the boundaries between the developing and the developed world, between those countries receiving and those exporting or providing legal (or economic) aid become porous, and a legal theory of L&D can fruitfully build on its older domestic sisters, such as critical legal studies, economic law, economic sociology of law or critical private law theory.

Among the important scholarly projects pursued by L&D scholars has been the discovery and analysis of the *legal pluralist* nature of the governance orders in the context of development. With a growing awareness of the different, existing ordering structures 'on the ground' in the development context came the realisation that *any*

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28 See e.g., Sundhya Pahuja's critique of the Bretton Woods Institutions embrace of a political sovereignty of post-war nation states without duly recognizing the continuing unfulfilment of economic emancipation and sovereignty (Pahuja 2011); see for an insightful engagement with this analysis, Rajah 2012b.

legal order challenges the observer to acknowledge the parallels between and the co-existence of formal and informal, hard and soft law, of legal and non-legal norms (Arthurs 1985; Macdonald & MacLean 2005). This realisation prompted L&D scholars to acknowledge but also to build on the idea that many of the challenges pertaining to a law/non-law distinction that had been identified as specific to the development context, were in fact detachable from any legal governance framework. Indeed, the inadequacy of existing legal governance thinking pointed to the need for a different theoretical—but also, doctrinal—attention.

It is this realisation that allows for a better appreciation of the questionable foundations of a legal ‘order’, of the embeddedness of legal governance in a particular institutional setting (e.g., the ‘state’) and at a particular moment in (geo-political) time. To the degree that the struggle over law ‘reform’ in the context of development is seen as not entirely removed from contestations of legal (political, economic) order in the domestic context, L&D emerges as a field, which is just as much concerned with the relationship of law to its (particular, local) social environment and context as that has been the case for any other legal theoretical or legal sociological inquiry (Cotterell 1998; Zumbansen 2009a). But, accepting this perspective also implies accepting the loss of an outside observer’s standpoint. Precisely, by acknowledging the inseparability of critical legal analysis in the domestic and the ‘development’ context, we lose the comfort of being ‘outside’ of the sphere which we are purporting to study and to examine in a disinterested manner (Trubek & Galanter 1974; Trubek 1972). Instead, the demarcation of the L&D context from that of one’s home legal system and jurisdiction becomes questionable in itself, because the assertions of law’s precariousness in the development context apply to the domestic home context with equal force. On that basis, the distinction between governance challenges ‘there’ and ‘here’ appears artificial. Indeed, the distinction seems designed to insulate the domestic context from critique while depicting the development context as deficient and requiring ‘aid’ and assistance. The identification of a series of legal governance questions as arising from within the context of a ‘developing country’ inevitably leads to these questions having to be seen as already pertinent much ‘earlier’, namely already present and evident in the context of domestic legal critique.

A striking feature of this contextualisation of L&D as part of a larger exercise in investigating law’s relationship to and its role in society, is the way, in which the field opens itself up to an engagement and exchange with complementary discourses about regulatory places and spaces. Both legal scholars and sociologists have been scrutinising the conceptual and constituted nature of such regulatory spaces; spaces which escape a straight-forward depiction from a single discipline’s vantage point. Just as this critique has become pertinent with regard to the analysis of different, specialised regulatory arenas, ranging from labour to corporate, from environmental to criminal law, altogether suggesting a methodological shift away from comparative and towards transnational law, L&D has become a very active laboratory for a renewed engagement with a critical and contextual analysis of law in a fast-changing and volatile environment.

This aspect can be underlined, perhaps most tellingly, by an approximation of L&D with the field of ‘transitional justice’ [TJ], in order to highlight the close connections between investigations into the ‘legacies’ of past injustices with programs of future-directed legal and economic aid (see e.g., Mani 2008; Greiff & Duthie 2009; Buchanan & Zumbansen 2014). Closely connected to and oftentimes overlapping with this very vivid scholarly engagement has, of course, been an equally vibrant ‘literary’<sup>29</sup> and cultural engagement with ‘transition’ periods. After the seminal (inevitably colonial) portrayals by Joseph Conrad in *An Outpost of Progress* (1897) or *Heart of Darkness* (1899), ‘post-colonial’ novels such as Chinua Achebe’s *Things Fall Apart* (1958) or JM Coetzee’s *Waiting for the Barbarians* (1980) again poignantly scrutinised the slippery slope between ‘us’ and ‘them’ that inescapably pervades any ‘intervention’ or ‘development’ context. How in the context of public international law’s attempts to address transnational military and civil conflict, this slope has become painfully obvious again, was powerfully illustrated in Anne Orford’s critique of the hidden, hegemonic aspirations of recent instances of ‘humanitarian intervention’ (Orford 1999). Excavating the challenges of concepts such as ‘change’, ‘reform’ and ‘progress’, as they have been central to seminal transitional justice debates as those concerning South Africa (Corder 2001; Gross 2004) or Sri Lanka (Derges 2012), Achmat Dangor’s *Bitter Fruit* (2001) or films such as Vithanage’s *Death on a Full Moon Day* (1998), have become inseparably intertwined with the scholarly, ‘expert’ discourse around these instances of transitional justice.

But, what can this intersection of scholarly, literary, and cultural engagement tell us about the methodological challenges arising in the L&D (and, transitional justice) context? To the degree that we can already build on a host of critical work to scrutinise the orientation, method, and contentions of L&D and TJ theory, an additional aspect of this enterprise concerns the acknowledgement of and engagement with non-scholarly content. But, on whose terms? And, with which goal in mind? To the degree that a lawyer inquiring about the stakes in a particular conflict scenario ‘reaches out’ to non-legal depictions of the problem, s/he runs the high risk of assuming the qualification of the ‘stakes’ is the same for the legal and the ‘other’ perspective. But, should this be so? And what could law learn in fact if it opened itself up to the possibility that another perspective on the problem ends up defining the problem itself differently? The central contention here must be that a use of ‘non-legal’ materials as complementary or supportive of legal analysis likely results in a misreading and in an abuse of the literary text. Instead, the question must be how to create a dialogue and a better understanding between different reconstructions of reality, different narratives and determinations of meaning.

Another question concerns the demarcation of places and spaces in this context. What, we may ask, distinguishes the focus of Achmat Dangor’s poignant analysis of family relations in post-Apartheid South Africa (Dangor 2011) from the haunting account of Mourid Barghouti’s return to Palestine after an involuntary 30-year

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<sup>29</sup> See the insightful discussion of the prose/poetry debate in India around the work of Rabindranath Tagore, in Chakrabarty 2007.

exile (Barghouti 2004)? Emerging, from these accounts, is a powerful illustration of what we might call the ‘transnational human condition’, marked by multilayered and multi-tiered relations of belonging and ‘citizenship’. It is this dimension of the ‘human condition’ that could arguably be seen as the fourth dimension of Hannah Arendt’s depiction of labour-work-action (Arendt 1958), scrutinising the possibilities of political, social belonging in a post-national environment, which is marked by the fragility of political communities and, again, an increased precariousness of political voice (Cotterrell 2009; Fraser 2009).

Chinua Achebe, the author of the seminal novel *Things Fall Apart* (1958), recounts in his 2009 collection of short stories, *The Education of a British-Protected Child*, numerous instances in which he and the audiences he speaks before, are confronted with the porosity of the lines that divide ‘home’ and ‘abroad’, the ‘here’ and the ‘there’. In Achebe’s rendering, these experiences illustrate the tensions in people’s lives when trying to make sense of their deeply felt attachments to places of origin, places of meaning, when, at the same time, they find themselves on an inchoate and often swirling trajectory, which takes them through different places, communities, spheres of interaction, places of engagement and confrontation with others, who have come to these places through similar patterns of predictable unpredictability. Achebe’s stories recount numerous instances of frustration in the face of alienation, cliché and stereotype that seem to repeat themselves, over and over again. The author presents them in an uncompromisingly and tirelessly analytical manner, the various accounts underlining the importance of difference in that which seems to be the same, the varying conjectures of people’s meetings, confrontations and clashes of viewpoints and observations that cannot be so simply traced back, as emerges from story to story, to one particular stance, one easily demarcated political viewpoint or a comprehensively founded moral choice. Instead, Achebe highlights the numerous cross-roads in people’s perceptions and judgments, the complex overlapping of context and intent that shape the moment where one formulates and utters one’s view. He seems to say ‘Look again’, ‘Think again’ and ‘Look again’, and it is this back and forth wandering of our gaze, which may help to better grasp the challenges in contemporary L&D and TJ contexts. These contexts are intricately marked by the simultaneous existence of the ‘new’ and the ‘old’. And yet we are asked to reject this (overly neat) juxtaposition for the ways in which it imposes an evolutionary narrative of progress onto a sphere that needs to be studied through its complex relationship between local and global consciousness (Chakrabarty 2007). Similarly, both L&D and TJ become mere instantiations of a renewed effort to reflect critically on the methodological basis of legal-political governance.

As such, both L&D and TJ can be seen as efforts undertaken from within law as scholarly discipline and practical endeavour to illustrate how law is constantly prompted to adapt to its changing environment—both substantively and normatively. This adaptation of law occurs in often unmapped, unchartered and undomesticated ‘spaces’. As in Achebe’s accounts, these spaces are both geographical and intellectual, both real and constructed. And, as is highlighted by the scholarship in the areas of

L&D and TJ, the critical engagement with these allegedly *dividing* lines between ‘real’ and ‘constructed’, between, say, field work, empirical data, news reports and statistics on the one hand and description, critique, deconstruction, and argument, on the other, are at the core of what these two ‘fields’ are really all about. To both emphasise and simultaneously question the categories by which we draw lines between ‘here’ and ‘there’, ‘home’ and ‘abroad’, ‘ours’ and ‘theirs’, becomes an existential question for law and for the lawyer employing its label and toolkit. Seen, studied, theorised and practiced in this critical way, L&D and TJ become instantiations of a much more comprehensive engagement with the ‘concept of law’, with the categories by which in research and curriculum lines are drawn between ‘domestic’ and ‘foreign’ laws and legal cultures. Thus, the scholarship of L&D and TJ of such ambitious calibre is likely perceived as a threat to the standards and routines of parochially focused scholarship as it still dominates law reviews and conferences and as it, in myriad ways, continues to influence and shape law school course design and the programming of legal education. The particular approach here taken to defend L&D and TJ as both critical engagements *with* and representations *of* contemporary law threatens the daily routine of law schools that profess to teach their fee-paying clients to ‘learn to think like a lawyer’: the here embraced approach critically challenges this entire routine and suggests that it could all be in fact very different if only we cared to reflect more on the connections between ‘here’ and ‘there’. In other words, are the legal conflicts we are concerned with domestically really so much different from the ones we identify in ‘foreign’ places? If that were true, then the question is how we can develop an adequate epistemological framework for law in a transnational context. As is clear from Achebe’s stories, to think about these connections is a tiresome business, one that must remain cautious, self-critical and never-satisfied, one that continues to draw on a wide spectrum of information, data, accounts—in other words, on a complex body of ‘knowledge’, on which one draws and to which one already and constantly contributes.

## **7. The crucial role of knowledge in development and transitional justice**

The vibrant and increasingly intersecting intellectual discourses around the conceptual and normative foundations of L&D and of TJ are increasingly complemented and contextualised by a critical engagement with the North’s<sup>30</sup> legal regulatory as well as epistemological interventions in the ‘South’ (Sousa Santos 2007b and 2007a; D’Souza 2012). Arising from this attention to L&D and TJ is an intensified interest in the nature of *knowledge, perspective, viewpoint* implicated in these different engagements. Knowledge becomes a crucial variable as it applies to a host of divergent conceptual and normative programs. For example, *knowledge* is at the heart of the expertise and ‘know-how’ retained by a governing body or

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30 This depiction is used to mark both economic and ideological characteristics rather than a geographic region.

drawn upon by governmental actors when crafting regulatory instruments and interventions. At the same time, knowledge as a variable and an unknown enters both sides of regulatory interventions—pertaining to what the regulator knows and what is known within the sphere acted upon. This double contingency of what law should know but can never *know* for certain, has long been a concern of legal regulatory theory, and of legal sociology and criminology in particular (Llewellyn 1940; Luhmann 1992, 389; Zumbansen 2009a). Given the complex interplay of domestic and transnational governance discourses and the centrality of knowledge in both, the intensified interest in scrutinising *what we know* when unleashing programs of aid, reform as well as ‘technical’ and legal assistance has to be central to any future engagement with L&D and TJ as part of a larger, interdisciplinary theory of global governance. At the heart of this investigation, then, is the realization that our interest in knowledge cannot be just ‘practical’ in the way that we seek to widen the basis and the origins of knowledge. Instead, we become aware of the relativity and fragility of one’s knowledge positions and perspectives. One may then touch at the possibility that some knowledges are not just not translatable, but that they are incompatible. From the vantage point of such a self-critical engagement with knowledge, such an enterprise will seek to develop a methodology that is able to open up, rather than eclipse avenues of contestation and mutual learning, but it must do so with greatest humility and without hubris. We can already see, how the parallels and shared interests in contemporary L&D and TJ discourses are echoed by the connections between domestic and transnational governance discourses. Where we find that L&D discourses are inseparably intertwined with TJ-related questions regarding the appropriate and non-universalising, legal/non-legal *response* to legacies of suppression, exploitation and domination, we are confronted with the co-evolutionary dynamics of legal/non-legal, hard/soft, formal/informal. In short, attending to *knowledge* points us to the *legal pluralist modes of governance* characteristic in settings which we have hitherto tended to study through conventional notions of jurisdiction, that is, through legal *spatial* lenses. However, these co-evolutionary dynamics between L&D and TJ support the emergence of regulatory regimes which can no longer adequately be captured through categories of state sovereignty or jurisdiction. Instead, the emerging transnational regulatory landscape follows to a large degree the fragmenting dynamics of a functionally differentiated world society, prompting, in turn, an intensified investigation as to the legitimacy, that is, the normative and political implications of the systems theory’s world society model.<sup>31</sup>

These debates provide a formidable background to the continuously evolving debate around L&D in that they complement and expand the highly charged economic and political stakes in this arena. ‘Knowledge’ occupies a crucial place in

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31 This tension characterises the interchange between, say, Gunther Teubner and Emiliios Christodoulidis. See Teubner 2010 and the contributions by Emiliios Christodoulidis, Gert Verschraegen, Bart Klink, and Wil Martens in *Netherlands Journal of Legal Philosophy* (2011), issue 3. For Gunther Teubner’s most recent, comprehensive attempt to engage with the challenge of normativity, see his monograph, Teubner 2012.

L&D scholars' longstanding, persistent engagements with bridging both national and development governance discourses. Taking a closer look at the role of knowledge in the L&D context promises important insights into the future trajectory of this field in the above-sketched context of interdisciplinary global governance studies. What drives and motivates developments such as the World Bank's self-description as a 'Knowledge Bank'<sup>32</sup> becomes a matter of critical concern, and prompts our reflection on the origins as well as the experiences that have already been made with such data-driven governance approaches in other places and times. In other words, the question regarding the role of knowledge in today's development agendas—in theory and practice—invites us to take a closer look at the connections and differences between the prominence of knowledge in this context and in domestic contexts in the past. To do so seems especially opportune in light of the crudeness of assertions, distinctions and categories that continue to characterise global governance discourses; particularly in terms of the descriptions and analysis of constellations that really deserve a more comprehensive and sophisticated conceptual treatment. Indeed, the persistence of inadequate analytic categories in the field of global governance is at considerable odds with contemporary analysis of knowledge-driven governance (Ladeur 2011).

The overriding challenge arising from a critique of knowledge in the development context, however, is how to choose a frame of reference. Every employed conceptual, analytical and doctrinal toolkit itself has a history of its own, the way it came to be put together, the order of instruments that are stored and arranged on its inside, and the use that has been made of them over time. The L&D context in particular prompts a host of questions regarding the origin, adequacy and transferability of regulatory models. Similar to the seemingly never-ending self-inspection and critique of comparative law (Adams & Bomhoff 2012), L&D is a field forever belaboured and challenged on a complex methodological basis, which underscores the relevance of approaching a study of a local regulatory culture from a more comprehensive perspective, eventually allowing for a scrutiny of the actors, norms and processes, which shape the development context.<sup>33</sup> But, how are we to account for inevitable baggage and background assumptions, that accompany and shape the governance as well as desired policy ideas transplanted from one context—which in the 20th century L&D context has been the post-Industrialist and post-Welfare constitutional state— into another context with institutional and normative dimensions which we might not be able to map with the cartography we are used to. This seems to be of particular importance with regard to the implicit assumptions informing an endorsement of regulatory models such as decentralisation, innovation and regulatory competition. In political and regulatory theory discourses of the last two to three decades, these terms emerged in an intricate intellectual space between economic and political theories and have by now attained an almost sacrosanct character, be that with regard to federal structures in complex polities

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32 See <<http://siteresources.worldbank.org/WBI/Resources/KnowledgeBankOct2004.pdf>> (visited 19 June, 2014).

33 For more background on the A-N-P approach, see Zumbansen 2013b.

(Rose-Ackerman 1980; Howse & Nicolaidis 2001) or in the context of searching for growth models in path-dependent economies (Lazonick 2007; Murmann 2003). However, as examples of transatlantic transplants already illustrate, the effects of policies that endorse a fine-tuned subsidiarity-federalist framework and that place hope into the regulated self-regulatory dynamics of actors on different levels (Sabel & Zeitlin 2008) greatly depend on the historically and politically evolved context in which they are implemented. What might be in itself a very promising conceptual approach to the study of multi-level and multi-polar regulatory systems—and the EU certainly represents just that—will eventually unfold through highly intricate and unpredictable dynamics in a continuously evolving complex environment (Teubner 2001; Zumbansen 2009b).

To be sure, it is no more than trivial insight that these experiences suggest the need to pay close regard to the locally existing rules and regulatory practices—the challenge consists in determining the form and process of ‘context sensitive’ regulation. It is with this challenge in mind, that we are finding ourselves torn between opening our toolbox of well-worn and tested tools and concepts on the one hand and starting ‘fresh’, with open eyes and without prejudice on the other. What is remarkable in this context is the impossibility of ‘breaking free’ even from the semantic and symbolic stronghold of certain categories, regardless of the degree to which these have been subjected to critique, deconstruction and demystification. This is as true today as it was in the 1970s: in our search for appropriate regulatory approaches to be taken with regard to development contexts (as well as other, similarly complex regulatory spaces, we strive to critically reflect on the usability of the rule of law, learned lessons with regard to democratic accountability, public deliberation or the separation of powers. Meanwhile, we realize how none of these principles can be lifted out of their context without losing some explanatory capacity, leading us back to the motivation of why we intended to draw on a particular regulatory experience in the first place. Again and again, we are confronted with the *particularity* of an evolutionary process in a specific space that seemingly frustrates all attempts at translation or transplantation. And yet, precisely because of this confrontation, we return, again and again, to a critical reflection on the categories through which we seek both to explain and to shape spaces of vulnerability and precariousness. There appears to be a crucial difference, however, between an earlier, progressive, critical exercise of such reflection and the more inchoate, interdisciplinary approach that seems to be forming today out of a combination of legal, political, sociological, economic and anthropological theory on the one hand and historical and linguistic study on the other (Rajah 2012a, 37-52, 58-60, 288). While this difference is still hard to pinpoint or to make fruitful, it becomes ever more evident that in close proximity to the continuing stand-offs between conservative and progressive struggles over development policies, the range of theory, vocabulary and categories, frameworks and imaginations is expanding. In that context, the astutely recorded accounts by Achebe of his interactions with ‘third world experts’ (Achebe 2009), the extermination of interview protocols and legislative materials of law-making processes in Singapore’s

‘authoritarian’ Rule of Law (Rajah 2012a, 181-212) or the anthropological scrutiny of the World Bank’s human rights programs (Merry 2014)—they are all and each one of them crucial elements that help draw a richer and more sophisticated picture of the development context today. In other words, we see a significant analytical expansion and deepening of our ‘knowledge’ basis vis-à-vis the developmental state and the transnational ‘aid and development’ apparatus that is staring at it. The challenge remains in understanding and drawing the adequate lessons from such an expanding epistemic framework.

## **8. En lieu of a conclusion: the surprise that is not: all law is transnational**

In an effort to connect the preceding sections on the status of knowledge in hybrid legal fields such as L&D and TJ with the opening parts of this essay on law’s general relationship to globalization, let us briefly come back to the idea that a project such as Transnational Law can function as a ‘theoretical conceptualization of law after the breakdown of methodological nationalism’ (Michaels 2013, 18). The contention here would be that such a characterization bears considerable promise. It is in that spirit that I suggest to re-open the discussion of concepts or proposals such as TL or LP, rather than dismissing them prematurely, and perhaps under the impression that their ‘deliverables’ are not yet as clearly defined as one would hope. My contention is that TL and LP are mutually intertwined precisely because both struggle with the ‘how’ of distinguishing between legal and non-legal rules. The answer cannot be a jurisprudential one alone. Instead, what appears to follow from discussions of TL and LP is, foremost, a growing awareness of the epistemological as well as normative fragility of any attempt at boundary drawing between different norm universes in the sense evoked by Cover (Cover 1983). This fragility has become a central concern in the context of debates around the ‘whats’ and ‘hows’ of global governance. In concluding, I want to suggest that proposals such as TL or LP should be seen as necessary steps in the development of theoretical approaches to a legal theory (or, *legal theories*<sup>34</sup>) of global governance [GG]. GG appears to operate in current debates as an umbrella term that is employed to capture the still open-ended and non-linear transformation of a nation state-based model of political rule. One way to address these changes with uncertain outcome has been through ambitious assessments of the nature and status of law and its tight linkages with Western notions of (different notions, stages and representations of) the state (e.g., Grimm 2010). One reason why TL appears to have gained temporary currency might relatively easily be found in the fact that it operates as a manageable label to depict, as suggested already by Jessup (1956), both overlaps of and blind spots between categorically distinguished fields (in that case *public* and *private* international law). Another reason can be identified to lie in TL’s interdisciplinary nature, in that it operates against a variety of theoretical and disciplinary backgrounds precisely to capture a multitude of assertions relating

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34 I am grateful to Morag Goodwin for her insistence on that point.

to the transformation of jurisdictional (geopolitical, geographical) boundaries (e.g., Harvey 2005; Sassen 2006), shifts in norm-making competence between nationally based and spatially operating actors, as well as the nature of ‘communities’, polities, and peoples (Berman 2012; Benhabib 2004; Dauvergne 2008). A similarly positive assessment seems to be in order with regard to LP, given that legal pluralists’ concern with the demarcation and politics of as well as with the tension between official and in-official bodies of norms, rules, recommendations, guidelines and standards does not—arguably—result in placing ‘everything’<sup>35</sup> on the same level, but seeks to expose, again and again, the often questionable and contestable basis on which the distinction between law and non-law is drawn in the first place (Galanter 2006).

While the apparent frustration among many legal scholars today with the slippery nature of concepts such as TL or LP is understandable, the task of making sense of this multidisciplinary and multi-vocal engagement with globalization will eventually get easier as we all move through such stages of trial and error, exploitation, application and engagements with theory. Revisiting established legal fields, mostly thought of in their domestic, nation-state context but now reflected upon against the background of a globalization of law, we can see that the above described dilemma is in fact inherent to every area of law, long before we began inventing new names and setting novel boundaries. Examples of labor, corporate or constitutional law illustrate legal fields as epistemological and normative laboratories, through the study of which we can shed more light on the way in which law can only be understood against the background of society. And as such legal theory is inevitably caught up in the multi- and interdisciplinary efforts to adequately depict the contours and nature of today’s world society.

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35 But, see Michaels 2013, 18: ‘If everything is transnational law, nothing really is.’

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