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Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power

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Abstract: The continuing proliferation of transnational private regulatory governance challenges conceptions of legal authority, legitimacy and public regulation of economic activity. The transnational law merchant or, lex mercatoria, is a case in point in this context, as it represents a laboratory for the exploration of “private” contractual governance in a context, in which the assertion of public or private authority has itself become contentious. The ambiguity surrounding many forms of today’s contractual governance in the transnational arena echoes that of the far-reaching transformation of public regulatory governance, which has been characteristic of Western welfare states over the last few decades. What is particularly remarkable, however, is the way in which the depictions of “private instruments” and “public interests” in the post-welfare state regulatory environment have given rise to a rise in importance of social norms, self-regulation and a general anti-state affect in the assessment of judicial enforcement or administration of contractual arrangements. The paper suggests the need to short-circuit and to read in parallel the justifications offered for a contractual governance model, which prioritizes and seeks to insulate “private” arrangements from their embeddedness in regulated market contexts, on both the national and transnational level.

Key words: Lex mercatoria, global governance, contractual governance, social norms, transnational law, globalization, knowledge society, legal pluralism, political governance

♣ This paper is based on a lecture at the “Public Dimensions of Contract” Conference, Villa Vigoni, Italy, 9-10 November 2011. Expanded versions were presented at the “Legitimacy of Private Transnational Governance by Contract” Workshop, organized by Claire Cutler and Fabrizio Cafaggi under the auspices of the Hague Institute for the Internationalisation of Law [Hiil], the European University Institute and the University of Victoria and at the “Postnational Rulemaking” Conference at the University of Amsterdam in September 2012. I am grateful to Marc Amstutz, Fabrizio Cafaggi, Daniela Caruso, Ed Cohen, Hugh Collins, Claire Cutler, Isabel Feichtner, Hanoch Dagan, Bertram Keller, Ralf Michaels, Dan Wielsch, and Cynthia Williams for generous feedback. All errors remain mine.

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A. Introduction

This paper addresses the legitimacy concerns around a fast expanding transnational landscape of private, non-state regulatory actors and regimes. Such concerns arise in response to the apparent absence of much of the institutional and normative architecture which have often been associated, at least, with the Western welfare and nation state narrative. These ‘post-modern anxieties’, as keen observers have once noted\(^1\), seem to accompany and to inform a considerable number of engagements with the impact of globalization on law. Arguably, law, as discipline, theory and practice can today hardly be imagined outside of the context of globalization. Central to globalization’s powerful impact on law is its radical challenge to the nexus between state and law, that is to the assumption that law emanates from authoritative institutionalized processes grounded in a state-based system of norm-creation, -implementation and adjudication. It is this nexus that has come under broad scrutiny, a development that finds expression in numerous iterations under titles such as Law and Globalization\(^2\), Global Legal Pluralism\(^3\), or say, Transnational Law.\(^4\)

Notwithstanding their analytical and conceptualizing function, such frameworks are often called into question for allegedly failing to provide definitive answers regarding the nature,  


form and scope of law ‘in a global context’. Interestingly, then, we see the analytical interest move away from law itself and towards the processes in which law appears to be caught up. The question then becomes whether law should be seen as a victim of globalization, which itself is associated – tout court – with an all-encompassing force that overwhelms and subdues nationally existing legal orders. Another labelling marks globalization as a ‘transformation science’, through which to study the continuing differentiation processes of modern society.

It is in this discursive context, that the phenomenon of ‘transnational private regulatory governance’ [TPRG] attracts much attention. Part of the reason for the lively scholarly interest in these processes might be found in the way, that TPRG appears to enunciate and embody all these transformations which are associated today with the nation state in a globalized setting. The state’s alleged retreat, its loss of regulatory ability, reach and implementation are frequently invoked as mere mirror effects of a widely encompassing privatization and autonomization of regulatory regimes, themselves defined by their capacity to effectively promote non-state rule creation as well as adjudication.

The proliferation of private norm-making, that is the creation of legally binding rules outside of the institutional, state-based systems of rule-setting, very forcefully further accentuates this perceived dilemma of the state. Seen against the background of the law-as-victim thesis, the ubiquitous forms of ‘private ordering’, both inside and outside of the nation state, are regularly read as – further – signs of the erosion processes, which allegedly characterize the general fate of the sovereign state in the global era and are now seen to find a particularly striking illustration in the relativization of the state’s authority to

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5 Consider the parallels between this scenario and that drawn up by Carl Schmitt with regard to the state falling victim to society, an approach powerfully taken up by one of his most gifted pupils, Ernst Forsthoff: see Thomas Vesting, 'Die Sprengkraft des Heterogenen', (1995) 81 ARSP 92-101; and Ilse Staff, 'Die Wahrung staatlicher Ordnung. Ein Beitrag zum technologischen Staat und seinen rechten Propheten Carl Schmitt und Ernst Forsthoff', (1987) Leviathan 141-162.

administer and to control the institutions of norm-creation.\textsuperscript{7} However, from a sociological perspective, the current interest of so-called governance theories\textsuperscript{8} in ‘social norms’ falls squarely into the discipline’s concerns with the study of societal differentiation processes. Such accounts then play a crucial role in informing legal scholars’ inquiries into the nature and the consequences of private norm creation processes for the study of law in general.\textsuperscript{9}

Compressed into a relatively small space then, we can discern some of the central challenges to current legal thinking: under the impression of an unquestionably deep-running transformation of forms of public and private ordering, lawyers seek explanations by contextualizing these developments. What they find are impressive accounts of globalization processes, which have been prompting a considerable number of social science disciplines to fundamentally rethink their analytical categories and conceptual frameworks. In this context, legal scholars find that their own accounts of the growing limits of regulatory capacity in view of, say, border crossing environmental or security concerns, coalesce with observations made by political scientists, sociologists, geographers or anthropologists regarding a fundamental decentralization and privatization of norm-creation and legal-political decision making.

For law, to be sure, there is much at stake, as this multidisciplinary diagnosis strongly points to the need for lawyers to rethink the proper foundations, boundaries and – in fact – the nature of their object itself. In other words, the rich accounts of legal pluralism and non-


state based norm creation, which are central to current depictions of the shift ‘from government to governance’ can be read as strong signals that law itself has an identity crisis, a crisis regarding its own nature and function. What is important to note, however, is that accounts of a co-existence of legal and non-legal forms of social regulation, while proliferating under the impression of reduced state capacity to effectively regulate transnational issues, have always been part of the central make-up of legal theory. Early anthropological and legal theoretical accounts of the extensive efficacy of ‘informal’ orders should have alerted lawyers already a long time ago to the tension between law and non-law, which arguably lies at the heart of any legal system.

This paper suggests a revisiting of the field of lex mercatoria, that is of the however much contested body of norms associated with a transnational ‘law merchant’. These norms and their surrounding institutions and processes have forever assumed a prominent place in studies of ‘private ordering’, driven particularly by the fact that the lex mercatoria reaches far, far back into past centuries of economic globalization and is thus seen to testify to both reality and viability of transnational law ‘beyond the state’. In light of the concerns raised by lawyers as regards the limits of law and legal norm creation in a context of globalization, the pressing question being raised with regard to the lex mercatoria, appears to be that of the possibility of an ‘autonomous’ legal order, that is a of a functioning legal system, which is itself not grounded in the nation state’s institutionalized norm creation processes. And it is against this background of the still contested consequences of globalization for law, that it becomes clear how much of the debate around the lex mercatoria, and around the autonomy and scope of this transnational law merchant, is ill-directed and of little analytical value. In fact, much of the polemics that surround the ‘legal’ nature of the lex mercatoria, its

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‘true’ independence, autonomy from the nation state, seem to prevent us from turning our attention to something arguably much more important, namely why we should even care so much about all this.

What follows here, should not be read as a continuation of or as yet another contribution to what has grown into a highly differentiated and detailed debate concerning the legal quality of the lex mercatoria. Instead, the task is here to position the lex mercatoria – once again – in the context of a still inconclusive investigation into the consequences of globalization for law. From this perspective, our interest in the lex mercatoria is driven by a more general concern with the nature and the politics of law and legal norm creation in the ‘post-national’ constellation. Thus, the much disputed connection between the multidisciplinary study of globalization and legal theory are

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17 Jürgen Habermas, Die postnationale Konstellation (1998)
meriting further attention (B).\textsuperscript{18} Part of this inquiry will be to connect concerns within the legal discourse with concurring investigations by other disciplines into the changed role of the state.\textsuperscript{19} Under the impression of a forcefully emerging sociological discourse around the specific quality of a world knowledge society, a particular task lies in critically revisiting some of the long-standing theoretical categories and distinctions such as that between public and private, state and society, national and international.\textsuperscript{20} In the context of a knowledge society, distinctions, demarcations and boundary-settings are the foremost instruments of creating reality through meaning. In an argumentative, discursive context, meaning is constructed, de- and reconstructed and reconstituted through language and contestation. The lex mercatoria offers a welcome opportunity in this context, as a closer scrutiny of the arguments made against it (including its ‘legal’ nature, its autonomous status etc) as well as in its defence, promises insights into the constitutive functions of such arguments. In other words, an analysis of the arguments made against and in favour of the lex mercatoria should allow us to better ascertain the constitution of the societal spheres of action as well as of the legal spaces associated with and constituted by such arguments.

Characterizing the lex mercatoria as ‘private law’, then, has particular connotations and consequences for its overall situation in a legal-regulatory context. The connotations of the qualification ‘private’ need to be unfolded in order to better understand the place and function of this body of norms in a larger framework of legal (and, arguably, political) ordering. In particular, because a legal theory of globalization is still outstanding, it is necessary to critically analyze and to contextualize those concepts that, for better or for worse, are relied upon in the process of applying established legal frameworks within the transnational realm (C). A concluding section of this paper will sketch the outline of a

\textsuperscript{18} For an analysis from the perspectives of criminal and public law, see the observations by Ulrich Sieber, ‘Rechtliche Ordnung in einer Globalen Welt’, (2010) 41 Rechtstheorie 151-198.


sociologically informed method of legal thought under the heading of ‘transnational legal pluralism’. One the one hand, such an approach, it is hoped, might offer some insights into the larger connotations of categories applied to the lex mercatoria, such as public/private, or law/non-law. On the other hand, transnational legal pluralism might facilitate a better understanding of the nature of law in the continuously unfolding context of globalization (D).

B. Law and Globalization: Victim, Collateral Damage, or Motor?

It is striking that the formula ‘law and globalization’ contains not one, not two, but altogether at least three unknowns. First off, it is undisputed that notwithstanding numerous, often quite fruitful definitions of globalization, the term still operates as a conundrum, as a term depicting an analytical and conceptual framework, that is grounded in several disciplines and discourses at once and as such resists a clear definition. And yet, against the background of the continuously growing literature around the concept, emerging from a host of different disciplinary starting points and perspectives21, our interest shall here be focused in particular on law and legal categories. From that perspective, however, a second unknown comes into view in a prominent way, namely the relationship between globalization and law. For the law, the advent of globalization, arguably, raises questions of existential significance. In other words, under the spectre of globalization, law is faced with the prospect of its own demise22, most definitely due to the modern association of law with the state, a state that in the present era of globalization has come under great pressure. This association results in the making of an argument de maiore ad

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22 An impressive testament from the point of view of a state-based theory of law is provided by Stephan Hobe, Der offene Verfassungsstaat zwischen Souveränität und Interdependenz. Eine Studie zur Wandlung des deutschen Staatsbegriffs der deutschsprachigen Staatslehre im Kontext internationaler institutionalisierter Kooperation (1998)
minus, whereby the perceivably dramatic impact of globalization processes on the state is seen to directly predetermine the transformation of law, itself resulting in nothing less than a far-reaching weakening, if not implosion of law.\(^{23}\) Law, put in relation to globalization, is then portrayed as a unified body ‘under attack’, a body of norms, institutions and processes in need of either being protected against or adapted to the pressures of globalization.

Much suggests, however, that the formula holds a third, regularly neglected unknown. With view to the longstanding sociological insights into the parallel worlds of legal and non-legal forms of social regulation, of formal and informal systems of ‘legal’ ordering, there are good reasons to read the present iterations concerning the significance of globalization processes as illustrative of a new phase of legal evolution. This would characterize law itself as an object of investigation and scrutiny.\(^{24}\) Such scrutiny would have to rescue law from two dominant claims regarding law’s fate in an era of globalization. One view insists on emphasizing and lamenting the alleged weakness of (the state’s) regulatory law that finds its most persuasive illustration in the triumphant proliferation of private norm setting\(^ {25}\) and suggests that law cannot escape death of suffocation in the oxygen-free atmosphere of globalization. The competing view presents a radicalized version of the first: it holds up an idealized image of the nation state and its legal order as unified, hierarchical and coherent – only to suffer from the undermining and corrosive effects of globalization. From this perspective, globalization is depicted as a process that emerges in (a particular)

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time and from outside the nation state to destroy the state-based legal order.\textsuperscript{26} Such depictions of law ‘as it lay dying’ suggest, above all, that law would enjoy blissful health and strength if only it had been protected from globalization. What happened?

The remainder of this paper will seek to unfold the following three working hypotheses:

1. Law as an unknown must be understood and reconstructed in the context of globalization.
2. Law, as thought of in conjunction with the nation state, must today be understood as law after the welfare state, but not as law without the state.
3. The question regarding the future of law in a context of globalization is one of legal methodology.

As suggested, the lex mercatoria – depicted by some as ‘shining example’ and proof of the existence of an ‘autonomous arbitral legal order’\textsuperscript{27} and as ‘whipping boy’ for legal theories that cling to the irresolvable nexus between law and the state\textsuperscript{28} - shall offer an anchor point for a closer analysis and discussion of the three just-offered hypotheses.

\textbf{C. The treacherously ‘private’ nature of autonomous legal orders}

\textit{I. Lex mercatoria: ‘Intervention’ versus ‘Autonomy’}

In the context of international commercial arbitration, references to the lex mercatoria regularly target the rules and conflict resolution mechanisms of border crossing commercial

\textsuperscript{26} See the discussion of this description by Thomas Vesting, 'Die Staatsrechtslehre und die Veränderung ihres Gegenstandes: Konsequenzen von Europäisierung und Internationalisierung', (2003) 63 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 41.

\textsuperscript{27} Emmanuel Gaillard, \textit{Legal Theory of International Arbitration} (2010)

transactions. A particular emphasis is placed hereby on the flexibility, relevance and discretion as the main characteristics of a system of arbitration tribunals that has been initiated and constituted by the commercial partners themselves.\(^{29}\) This classification hints at a number of significant differences between state and non-state based rules and conflict resolution institutions. The implied qualification of the lex mercatoria as autonomous is based, in part, on the argument that the contracting partners themselves bring the arbitration order into being\(^{30}\), and in part on the thesis that these parties are themselves the authors of the applicable rules.\(^{31}\) The underlying, general implication, however, reaches higher: the claim that the lex mercatoria constitutes an autonomous legal order contains itself the argument that there can and should be privately constituted regulatory systems, independent from the state.\(^{32}\) We shall see that this claim, which is altogether not very different from positions taken by legal pluralists, is ultimately vulnerable to ideological hijacking and instrumentalization.

From the perspective of a politically progressive law & society approach, the claim for an autonomous legal order can be read as a plea for a more context-sensitive and ultimately ‘learning’ interaction between formal and informal norm-creating processes. Such an approach would not necessarily have to imply the existence of a law-less realm of societal interaction, but would still remember the insights from early institutional economics and legal realism, namely that markets never exist ‘as such’, but are legally constituted spheres


\(^{31}\) Margaret L. Moses, The Principles and Practice of International Commercial Arbitration (2008), 1: “Arbitration is a private system of adjudication. Parties who arbitrate have decided to resolve their disputes outside of any judicial system.”

of exercised power.\textsuperscript{33} At the same time, the assertion of an autonomous legal order in the context of embracing ‘social norms‘ as legitimate expressions of private ordering and conflict resolution among sovereign market participants implies a different understanding of the relationship between public and private, and between the state and the market. The latter position is wrapped up in an elaborate and far-reaching critique of judicial ‘interventions‘ into the allegedly consensual and arguably private dealings among market participants, a critique that harks back to the US Supreme Court’s 1905 decision in Lochner v New York, itself evoking a century’s worth of ideological struggle over the place of courts in market regulation. In this contemporary, anti-judicial discourse, courts are rejected to the degree that they do aspire to social engineering, social policy and law making. More recently, courts are dismissed for their alleged lack of technical expertise, especially as regards the intricate details of modern-day commercial and corporate contracting usages. Hence, judges should best stick to the application of simple default rules and otherwise defer to the private autonomy of the contracting parties.\textsuperscript{34}

In particular, this last position raises the question as to how we are to think of rights as instruments available to market actors. Where should these emerge from if not from an encompassing legal order, which results in contract and property rights that regulate relations between members of a legal community? By contrast, the implied image of a (Hayekian) framework order, which holds on reserve a legal enforcement system for the occasion that private ordering fails, continues to rest on the assumption that rights can emerge out of nowhere. The notion of the state and the legal system as emergency mechanisms is based on the belief, that the legal system can be invoked only where the


\textsuperscript{34} See eg Eric Posner, Law and Social Norms (2000), at 159.
market-interaction – including the exercise of property rights - defaults.\textsuperscript{35} Perhaps suffice it to recall, that the demarcation of rights is inseparable from the understanding of markets as legally constituted spheres of societal interaction. The surprising emergence of rights in a professedly self-regulatory system described as a natural and private order is part of an argument that wants it all. A quasi-natural sphere of uninhibited societal interaction, disturbed only in cases of emergency (of which kind, we may ask?) when the judicial system is called upon to intervene, remains a strangely impossible beast. But, an intriguing and, as implied by the discourse around the autonomous nature of the lex mercatoria, a highly suggestive one.

The distinction between law and non-law, which emerges in the context of the lex mercatoria, thus appears as directly tied to competing understandings of market order and “intervention“. But, as noted, the legal sociological/legal pluralist recognition of informal legal orders\textsuperscript{36} and of the prevalence of a vast amount of binding commercial rules and customs\textsuperscript{37} not created by the state renders the opposition between progressives and conservatives ambivalent. While both may emphasize the existence of norms ‘outside’ of the state, they draw different conclusions from this finding for their understanding of legal systems as such, and this makes even the demarcation between progressives and conservatives considerably more difficult than in the context of allegedly clear ideological confrontation.\textsuperscript{38}


\textsuperscript{37} An excellent summary is provided by Berger 2010.

II. Contract Redux

Seen in this light, then, our interest in the lex mercatoria directs us deep into legal sociological accounts of ‘official’ and ‘in-official’ legal orders\footnote{See also Annelise Riles, 'A New Agenda for the Cultural Study of Law: Taking on the Technicalities', (2005) 53 Buffalo Law Review 973.}, while – at the same time – leading us back to legal-political tensions that have long characterized the evolution of law within the nation state. These tensions are associated with demarcations between public and private spaces, between state and society, politics and market. But, underneath these demarcations are conceptualizations of autonomy and intervention\footnote{Moritz Renner, Zwingendes Transnationales Recht (2011), ch. 1}, egotism and altruism\footnote{Duncan Kennedy, ‘Form and Substance in Private Law Adjudication’, 89 Harvard Law Review 1685 (1976).}, distance and care\footnote{Günter Frankenberg, ‘Why Care? – The Trouble with Social Rights’, 17 Cardozo Law Review 1365 (1996); Jürgen Habermas, ‘Paradigms of Law’, 17 Cardozo Law Review 771 (1996).} – all of which point to deeper-running questions of legitimate social ordering. In other words, ordering paradigms such as public/private or state/society distinctions function as constituting frameworks within which questions of legitimacy are being addressed.

This background goes a long way in explaining the obvious stakes in the debate around the lex mercatoria. The contestation of the field’s ‘autonomous’ nature, the authorship and quality of its norms and its adjudication mechanisms point to the much more contentious views regarding the competence and legitimacy of private actors to initiate and institutionalize a proper system of legal regulation. As we have seen, the conceptual embrace of a purportedly autonomous, transnational order may too quickly cut the ties between the unavoidably recurring conflicts over power, bargaining asymmetry and third party interests\footnote{This point is emphasized by Gunther Teubner, “Global Bukowina’: Legal Pluralism in the World Society’, in: G. Teubner ed., Law without the State (1997).} and long-standing reflections on the relationship between state and society – as representations of a particular, historical constellation of public/private ordering.
This is particularly noticeable in the area of contractual governance, a field of societal interaction which is central to the liberal paradigm of Western law\textsuperscript{44} and which offers the dominant ordering paradigm for the lex mercatoria. The forgetfulness characterizing the euphoria of many of those adhering to the autonomy theory of the lex mercatoria\textsuperscript{45}, perpetuates itself into their theories of contract governance. Allegedly freed now from decades of judicial “interventions“ into contractual bargains among sovereign private actors\textsuperscript{46}, a promising space of inhibited private ordering is opening up, far away from conflicts over the social context of contracting. But because contract is so central to the liberal model of law, its simplified reception and conceptualization in the transnational context has significant consequences for the encompassing understanding of law’s relation to society as such. Rather than building on the wealth of historical\textsuperscript{47}, sociological\textsuperscript{48}, anthropological\textsuperscript{49}, economic\textsuperscript{50} and ‘legal-critical’ analysis of contractual governance\textsuperscript{51}, what is received in this reading of the “new” transnational order is an oversimplified, stripped-down, mechanical concept of contracting. This reductionist reception of contract theory is guilty not just of ignoring the just-mentioned theoretical legacies but also of bypassing more recent engagements with the intricate functions of contractual governance in complex societal settings.\textsuperscript{52} Little, indeed, suggests that we should simply go back to an ideal of a

\begin{thebibliography}{99}
\item Franz Wieacker, \textit{Privatrechtsgeschichte der Neuzeit unter Berücksichtigung der deutschen Entwicklung} (1967); Karl Renner, \textit{The Institutions of Private Law and their social functions} [1929] (1949)
\item Emmanuel Gaillard/John Savage (eds), \textit{Fouchard Gaillard Goldman On International Commercial Arbitration} (1999)
\item Renner, above note 43
\item Hale, above note 32
\end{thebibliography}
‘private law society’, which itself would be determined, above all, by the free bargains amongst free agents.  

Considering the historically evolved complexity of the ‘embeddedness of contract’, such idealizations of the market as a naturally evolving sphere carry a particularly provocative scent. Central to the reductionist model of contractual governance is the emphasis on governing contracts, or ‘governance through contract’ as key instrument of private ordering relations; the blind spot of this bias is the practice, within the judiciary and in theory, of ‘governance of contracts’. The latter expresses itself, on the one hand, through the legal embeddedness of contracts in judicial materialization processes, and through the function of contract in an embedding political and societal economy, on the other. The plea for an autonomous transnational legal order thus seems part of an exaggerated demarcation of the transnational space from that of the nation state and results in a wholesale rejection of the learning experiences that have been

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made over time within the complex relationship between state and society, public and private, law and non-law. Another consequence of the simplification of contract is, as we have seen, an endorsement of an oversimplified idea of markets, which itself results in problematic assessments of the nature and the causes of ‘crisis’.\(^{59}\)

Even today, in the sobering presence of unmanageable private (and public) debt, brought about in a frenzy of financial liberalization and credit taking, the skepticism vis-à-vis the ‘interventionist’ state looms large\(^{60}\), and even development discourses still appear to be endorsing a simple world view of contractual freedom and property rights.\(^{61}\) Such an unbroken belief in the self-regulatory abilities of market actors forgoes the opportunity of learning from the critical-historical evidence regarding legally constituted markets. In their place, we find ‘social norms’.\(^{62}\)

But rather than reconnecting the proliferation of private ordering – which is doubtless occurring inside and outside of the nation state – with the already available and highly effective legal-sociological and normative critique\(^{63}\), what is offered are simplified renderings of transnational private ordering. Lost are the insights into the recurring challenges of demarcating between public and private spaces of societal interaction and the

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‘stakes’ of such demarcations. The overwhelming challenges resulting from an emerging transnational legal, economic and political order make the need to translate and to rethink national, historical learning experiences quite urgent.

A mediating, bridging perspective might be forthcoming through attempts at further scrutinizing the ‘public’ dimensions of transnational private ordering, that themselves bear important parallels with concurring efforts among public (international) lawyers to more concretely identify the public nature of international governance. Another promising opportunity might lie in a distinctly multi- and interdisciplinary analysis, above all, of the function of evolving rules, norms and standards that have increasingly been taking the place of formal laws in the context of an irreversible shift from government to governance. Rather than trying to reattach these evolving regulatory forms to the (nation) state or to qualify them as examples of “private” ordering regimes, a particular focus on the different functional forms and dynamics of transnational governance appears to more adequate, be they public, private, hard or soft, official or in-official.


65 See eg the observations by Nico Krisch, Beyond Constitutionalism (2010), and Paul Schiff Berman, Global Legal Pluralism (2012).


III. Lex mercatoria: Contexts II – Knowledge in World Society and the Shift from normative to cognitive expectations

The foregoing observations suggest that the competing views regarding the nature of the lex mercatoria are but stand-ins or echoes of much deeper-running concerns with the fundamental transformation of legal regulation today. The contentions regarding the lex mercatoria’s autonomy as well as the legal nature of its norms then illustrate the pressure of legal semantics, doctrine and terminology to keep pace with societal evolution, with the fact of continuing societal differentiation and the increasingly fragmented regulatory texture in relation to social differences and conflicts. This suggests, then, that questions such as those pertaining to the legal versus non-legal nature of norms, which govern transnational commercial relations – which are central to the lex mercatoria discourse – are pointers to the more pressing need to rethink the relationship between law and society. From this perspective, it becomes a necessity for legal scholars to consider theories of society when making statements about the quality and function of legal norms.

Such questions, however, are not in any way new to law and legal scholars. Over time, the need to adapt the law, its theory, doctrine and instruments to a however interpreted, ever-changing context, in which the depictions of the role of the state shifted between ruler and protector, mediator and facilitator, was widely acknowledged, even if with significantly different ideological underpinnings.71 The continuing evolution of legal theory, then, underscores the importance of taking into consideration the lessons of the nation-state for an emerging transnational legal theory, given that the nation state provided – in the West – the institutional, but also the discursive context in which law’s role was negotiated, contested and continually re-defined. The content and reach of such lessons, however, depends on the degree to which it is possible to simultaneously reflect on the

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underlying theory of society. The difference between a state/society model, on the one hand, and that of a functionally differentiated (world) society, which replaces the hierarchy between the state and society with the coevolving presence of different rationality systems (such as the economy, politics, religion, art, or law) is significant as it helps us to better understand how much of the current legal language is shaped by the former theory, while the changes in governance, so often exclusively associated with the advent of globalization, are mostly explained against the background of the characteristics of the latter theory. To adequately understand the present state of legal theorizing of transnational governance, it might be helpful, then, to consider both the persistence of the former and the promise of the latter theoretical model of society.

Against this background, the assumption of a functionally differentiated world society appears less threatening to the long-held views of law’s relation to the state. At the same time, to theorize the role of law in world society implies quite a radical shift in perspective. To the degree that law is now seen as one among other societal forms of communication, its alleged hierarchical and ordering function appears in a new light. While in the context of the nation state and its associated legal systems, law was charged with the tasks of stabilizing expectations and meeting normative needs, its role in a differentiated world society appears to both undermine and expand this ‘legal mindset’ in a radical manner. Central to this shift is a reorientation of the function foremost ascribed to law: rather than stabilizing normative expectations, the law is now seen as having to stabilize cognitive expectations. In other words, law becomes a broker, mediator, translator of competing, intersecting knowledge bodies. One consequence of this reorientation is its turn to an openness of goals, as law’s primary function is no longer defined as one of bringing about desired (normative) results, but to open up, to facilitate and to institutionalize and

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73 Zumbansen, supra, note 71
consolidate learning opportunities.\textsuperscript{74} Seen through this lens, the primary task for law is to reflexively facilitate the mediation of and between possibly very diverse and complex societal rationalities, without being able, in that process, to rely on previously established, hierarchically structured ordering patterns.\textsuperscript{75}

It is difficult to overstate the methodological consequences of this shift of perspective, from which law is seen to assume a fundamentally different role than that, which we would ascribed to it on the basis of both a positivist, Kelsenian, or a normative, Fullerian or Dworkinian, model. If law’s function were adequately described as one of mediating, translating, and brokering competing and conflicting societal rationalities and meanings, the question regarding law’s proper core would become urgent. This concern with an allegedly fundamental and inherent normative orientation of law becomes the more pressing the more law is placed on the same level as other forms of societal communication – as a systems theory approach would suggest. A brief return to the Lochner decision may illustrate this point.\textsuperscript{76} Lochner’s legacy is deeply embedded in the particular discursive trajectory that marked or, marks, the conflict between progressive and conservative, left and right positions vis-à-vis market governance. The cornerstones of such conflicts are easily identified within the nation state’s history of constitutional rights, materialization of private law, pros and cons of welfarism and the eternal anxiety of how best to promote societal


freedom. And, while no one would claim that all was ever good in the nation state, the proliferation of private governance regimes presents us with a formidable challenge to identify a global or, transnational framework within which the conflicts associated with Lochner would be debatable. The emergence of a vast transnational regulatory landscape, the absence of a world constitutional framework (let alone, text) and the volatile, context-specific public participation opportunities, which give only a meager echo of democratic processes, point to the degree to which Lochner has become disembedded.

D. The Politics of Legal Theory and Transnational Legal Pluralism

I. Normative Conflicts in World Society
In light of the foregoing, it would appear that there are significant obstacles for a political, "critical" engagement with the ideological underpinnings of the purportedly market-oriented thinking that still characterizes much of today’s discourse around transnational economic governance. Not only are many of the avenues of political will formation and contestation which have developed in the state’s constitutional system unavailable in the context of transnational regulatory regimes\(^7\), but the interest constellations of ‘affected’ parties and stakeholders in many of the instances alluded to before are of such complexity that traditional political discourse does not seem adequately equipped to give consequential voice to this diversity.

This is so despite the fact that the dramatic dimensions and repercussions of a crudely conceived (and, embraced) theory of market freedoms and private governance have

become so obvious\textsuperscript{78}, which would suggest that the concerns associated with Lochner can still be formulated and tabled today – as back when. This seems to be the case even more so, because a scrutiny of the origins of the current crisis makes it so abundantly clear, that the litany of the wide-spread ‘retreat of the market’ and of ‘deregulation’ serves more as an ideological foil than to capture the in reality very extensive forms of market regulation, which constituted the context out of which the crisis erupted.\textsuperscript{79}

Against this background, then, I want to argue, that there is a merit in drawing on learning experiences with legal-political critique and legal sociological insights from within the nation state as we ascertain the opportunities for a political critique of the fragmented, transnational regulatory governance landscape. In particular, the insights from ‘post-interventionist’, ‘post-regulatory’ law\textsuperscript{80} as these theoretical approaches evolved in response to the transformation of the Western welfare state\textsuperscript{81} during the last decades of the twentieth century, relate to the far reaching proliferation of alternative and hybrid forms of regulation. These transformations have left deep imprints in law in general, but particularly in the taught and practiced discipline of administrative law.\textsuperscript{82} At the same time, private law


\textsuperscript{81} Gunther Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg', (1984) 18 Law & Society Review 291-301

scholars have been very prolific in tracing and further theorizing the shifts between public and private governance forms, which have greatly increased over the past decades.\textsuperscript{83}

This constellation, arguably, offers considerable opportunities also for a critical-political engagement, which at first sight seemed elusive from the perspective of a sociological world society account.\textsuperscript{84} In the larger context of the field that has been selected in this paper – lex mercatoria – such opportunities for contestation have been identified and taken up for some time now in the context of international economic law. Prominent and lively fields of engagement include bilateral investment treaties\textsuperscript{85}, financial regulation\textsuperscript{86} and corporate law\textsuperscript{87}, in ‘law and development’\textsuperscript{88} as well as the growing intensification in transnational human rights litigation in the context, for example, of mining operations in Latin America or North Africa.\textsuperscript{89} These efforts are of particular importance in our context, as


they testify to both inroads and challenges in connecting discourses with a focus on nation-state based changes in regulatory governance with those which at first sight appear to be of a distinctly, if not exclusively global and transnational nature.

To be sure, “international” economic law is deeply impregnated by the socio-economic imagination of market governance and as such sits only uneasily with regard to a confinement to territorial boundaries or ‘levels’ of governance. To the degree, however that governance challenges are identified as emerging on either a national or a transnational, global level, the relevance of the alluded-to approximation of ‘national’ and ‘transnational’ governance discourses lies in making visible the parallels between the involved and affected interests, essentially that which is at stake – here and there. This placing of ‘what is at stake’ in the center of such a parallel reading of national and transnational governance discourses is, of course, outrageously ambitious, if not ill-directed in the first place. Because, what would the anchor or reference point be for the related assertion of those interests that testify to what is at stake?

In light of the complexity of the sociological account rendered by systems theory, with which this author has certain sympathies, the straight-forward identification of a normative goal as being pervasive in an encompassing social context is not an option. This suggests why attempts to identify universally shared value systems in the national as well as the global context must likely remain elusive. Interestingly, this – perhaps sobering – discovery has been one of the defining characteristics of the currently thriving discourse under the heading of ‘global constitutionalism’. The respective debates testify to the

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promising opportunities for a legal-political critique of governance changes that lie in a parallel reading of national and transnational constitutional experiences. Precisely the different sides taken within the global constitutionalism discourse – between those who are enthusiastic about the emergence of a global constitutionalist framework and those who remain skeptical\(^92\) – illustrate what are in fact rather ‘close ties’ between national and transnational, global constitutional discourses. Rather than aiming for an ascertainment of universally shared normative positions, let alone overriding global constitutional principles, a project of global constitutionalism appears to be more promising to the degree that it is able to direct its investigative energy deep into particular conflicts and contestation sites, while remaining skeptical vis-à-vis formulating any programmatic normative aspirations.\(^93\)

Harking back to the just-made reference to the number of areas in international economic law, we are able to witness a significant level of wide-ranging attempts of initiating and consolidating processes of political and legal advocacy, all of whom seem to be characterized above all by a focus on process, \textit{facilitation of discourse and contestation}, but not on a however narrowly defined set of principles or values.\(^94\) These examples testify to a significant opening up of opportunities for legal-political critique.

Compared to some of the just mentioned examples, the case of the lex mercatoria might not appear on its face as among the most obvious instances of legal-political critique. And, yet, a closer scrutiny of the debate around this field is clearly warranted in light of at least two considerations: one is that the lex mercatoria remains an arena that has seen conflicts between some the furthest-reaching theoretical and normative assertions as

\(^92\) See the contributions to Petra Dobner & Martin Loughlin (eds.), \textit{The Twilight of Constitutionalism}? (2010).


regards the scope and nature of the institutions and processes which constitute this field.\textsuperscript{95} The second consideration concerns the wide scope of transnational economic governance constellations which in fact are captured under the lens of the lex mercatoria, not least testified to by the staggering increase in cases brought before this system’s quintessential institutional forum, the International Chamber of Commerce in Paris.\textsuperscript{96} The field is further deserving of our attention because of the way in which disputes over the system’s merits have largely led to a primacy of a weighing of advantages (efficiency, discretion, costs) over an inquiry into the legal nature of the norms that are being invoked before transnational commercial arbitration tribunals. The impressive reality of this functioning of the system of the lex mercatoria feeds the enthusiasm of those who have long been arguing not only in support of the merits, but also of the purported autonomy of the lex mercatoria.\textsuperscript{97}

One way, then, to effectively undermine this harmony would be to approximate study these contexts in more comparison in which the respective justification arguments are being made. In that vein, the task would consist in searching for parallels between the particular regulatory and transactional context, in which this turn to ‘private justice’ is occurring\textsuperscript{98} on the one hand, and the calls for a de-judicialization of economic conflict resolution as they can be recorded within national debates about the roles of court\textsuperscript{99}, about the political ambiguities of access to justice guarantees\textsuperscript{100} and of the state in economic governance, on the other. As alluded to at the beginning of the paper, such a comparison

\textsuperscript{95} For a fitting capture, see Alec Stone Sweet, ‘The new Lex Mercatoria and transnational governance’, (2006) 13:5 Journal of European Public Policy, 627-646, at 637: “The rise of the new Lex Mercatoria raises deep questions about the nature of law, and about the relationship of law to state power.”

\textsuperscript{96} Numbers are provided by Stone Sweet, previous note, at 636.


between *national* and global discourses will likely show considerable parallels between an allegedly global, post-national context in which ‘autonomous’ commercial parties take refuge to a comparably more “efficient“, issue oriented and discrete dispute resolution system on the one hand and a national one, in which the complex economic nature of the commercial transaction before a court is being used as a justification to delegitimize undesired judicial “interventions”, on the other.

The resulting task at this point is to bring together the observations regarding the contestation sites in international economic law, the contribution of global constitutionalism and the critique of the hermeneutic justification strategies in the lex mercatoria on both the national and the global level. What emerges through a reading together of these three discourses is a confirmation that we are faced with a fundamental disembeddedness of law’s institutional and instrumental response mechanisms relation to social ‘problems‘ of a nature commonly associated with case law in the vein of *Lochner*. In fact, all three discourses give ample testimony to the precarious nature of law and legal regulation vis-à-vis (world) societal regulatory challenges. The question then becomes how to conceive of law in this situation as both a distinct discourse and as one among other societal rationalities. Clearly both the theoretical work around global constitutionalism and the lex mercatoria suggest that the boundaries of law have become porous: much of what (comparative and) global constitutionalists are concerned with, touches on the boundaries of law and non-law, law and politics, law and morality. The challenge for global constitutionalists is to imagine constitutionalism in very diverse settings, marked by different evolutionary stages of statehood, formal and informal order.\(^1\) Meanwhile, lex mercatoria scholars are asked to conceptualize a legal methodology which captures the intricate intersections and overlaps between public and private rule-setting processes and adjudication institutions. Finally, the

dilemmas that arise in international economic law cut straight across these constellations as they illustrate the manifold challenges of crafting legal responses to border crossing, self-regulatory activities, which are – as in the exemplary cases of investment law and mining – at the same time heavily marked by a conflict between private rights and public policy, between what David Schneiderman referred to as instantiations of a tension between ‘new constitutionalism’ and governmental regulatory prerogatives.\(^{102}\)

A striking impression from a parallel observation of global constitutionalism, the lex mercatoria and international economic law is how these sites of legal-political conflict illustrate together a number of challenges to law, which have long marked legal regulation in the Western evolution of rule of law to social state on to the ambivalent constellation, which has emerged from the decline of the welfare state. As noted earlier, the tension between formal and informal orders, between the state’s assumption of formulating overarching policies and the resulting tensions from conflicts with competing societal rationalities such as economics, religion or science are not distinct for the current constellation of world society. They have, instead marked the evolution of Western nation states for a long time. But world society today exposes the fragility of the overall frameworks, which find expression in references to constitutionalism and market regulation. These frameworks, recently still associated with the evolution of a particular, often nationally institutionalized constitutional order on the one hand and relatively recognizable frontiers between competing conceptions of ‘state’ and ‘market’\(^{103}\), are today no longer available except with references to particular, historically and locally conceived evolutionary narratives. In contrast, the world societal setting opens up a vista on endless confrontations and conflicts between different interest formations, rationalities and ‘stakes’, and it is against this background that the three legal discourses we identified illustrate the trials of law’s attempts to adapt to these changing conditions.


\(^{103}\) Compare Karl Polanyi’s The Great Transformation (1944) with Friedrich Hayek’s The Road to Serfdom (1944) and his The Constitution of Liberty (1960).
In other words, these three constellations prompt a reconsideration of legal methodology in light of the profound loosening of the state-law nexus in a global context. I want to suggest that we turn to a theoretical proposal made in the 1950s by Philip Jessup, who suggested the term ‘transnational law’ to identify a legal response to those border crossing activities which were not adequately captured by either conflict of laws (private international law) or public international law. Arguably, already for Jessup transnational law could be conceived of as a label for a legal ‘field’, as much as a conceptual framework within which to investigate the arguments used to demarcate ‘national’ and ‘transnational’ spheres of legal regulation. Today, with the context of such investigations having changed considerably, the juxtaposition of territorially confined and global spaces is just one among others, through which we try to make sense of the complex world societal relations with regard to which we re-ascertain the nature and the role of law.

As a result, a concept of transnational law must embrace this constellation in the hope of offering a methodology in response to it. In this process, transnational law might become but a short-hand for a methodological inquiry into the nature of law in a global context. Namely, from a methodological perspective, the tensions between national and global, between public and private, and between law and non-law can be understood as constitutive elements of an emerging understanding of the law of world society. These tensions are constitutive and inherent to world society law, because they illustrate the unavoidable ambivalence – politically, culturally, morally – of competing and colliding ordering paradigms, alongside of which law seeks to express and assert itself. And it is from

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a methodological perspective, that individual areas of law can be understood as a showcase of the struggle for law\textsuperscript{106} in the context of a radically changed institutional and regulatory landscape.\textsuperscript{107}

Transnational law, understood as a legal theoretical, legal methodological approach, prompts us to study the emergence of hybrid, unruly and messy regulatory regimes as instantiations of an evolving legal rationality in the context of world society. In other words, transnational law scrutinizes the nature of the distinction between law and non-law, which it understands as an expression of its own need to define its relation to society. In this vein, transnational law cannot remain confined to a study of legal theory alone, legal doctrine or legal history. Instead, the nature and role of law in world society must be ascertained through a multi- and interdisciplinary investigation into the forms and dynamics of societal regulation.

II. The Promise of Legal Pluralism

Such an investigation must draw on extensive empirical and ethnographic studies, as has long been standard in legal anthropological research. Through such an approach, the formation of norm-setting processes becomes visible from within highly specialized and localized contexts. From a legal anthropological perspective, the attribution of such processes and institutions to either a ‘national’ or ‘global’ level is of less significance than the illumination of the concrete context out of which norms are being formed and institutionalized. Legal pluralists, by drawing on anthropological and sociological accounts to more adequately capture the dynamics of norm creation and regulatory practice, scrutinize the distinction between a legal and a ‘social’ norm in order to better understand the concrete process through which a norms comes into existence, is adhered to or rejected. The distinction between law and non-law, then, doesn’t serve as a yardstick to differentiate between a ‘valid’ or ‘invalid’ norm, between binding or non-binding, but as one

\textsuperscript{106} Rudolf von Jhering, The Struggle for Law [orig. German 1874] (J.Lalor transl., 1915)

\textsuperscript{107} Stone Sweet, above note 95
which can explain the discursive context in which such qualities are being ascribed to either. As such a view radically relativizes an otherwise accepted connection between valid legal norms and a particular institutional framework to generate such norms\textsuperscript{108}, which are of interest mostly from a historiographical perspective\textsuperscript{109}, it holds great promise for a study of norm-generating processes in the global context. Rather than demarcating between ‘formal’ and ‘informal’, legitimate and illegitimate sources of law, global/transnational legal pluralist approaches\textsuperscript{110} start from the concrete context ‘on the ground’. Through this lens, the discursive constructions of the meaning of formal/informal, legitimate/illegitimate, public/private become discernible. As such it becomes possible to explain the emergence of particular connotations and attributions against the background of specific historical, evolutionary patterns, but such an inquiry does not answer the question how to distinguish between law and non-law in a categorical way. Instead, the legal pluralist and legal anthropological approach helps understand the circumstances and influences that contribute to the characterization of a norm in this way or another.\textsuperscript{111} Transnational ‘Law’ can thus be reconceived as transnational legal pluralism in that it methodologically responds to the fragmented, disembedded evolutionary dynamics of norm-creation in the context of world society.

\textit{III. The Elusive Status of the Political in World Society}

But, what about the politics? How can a transnational legal pluralist approach adequately respond to the conflicts that we have alluded to earlier with reference to global constitutionalism, international economic law and which are inherent to the lex

\textsuperscript{108} Adda B. Bozeman, \textit{The Future of Law in a Multicultural World} (1971)


\textsuperscript{111} See Arthurs, above note 36.
mercatoria? An answer depends on the degree to which the legal anthropological/pluralist lens allows for a better understanding of how ‘interests’ and ‘stakes’ find expression. In other words, the ‘deliverable’ of this approach is not to be seen in the formulation of a however programmatic or principled political (normative, or critical) viewpoint. Instead, the task is to lay bare the processes through which views are being formulated, through which they become dominant or defeated, institutionalized or squashed. The fast proliferating anthropological investigations into deeply contested conflict zones such as those alluded to earlier\textsuperscript{113} give ample testimony of the significance to further enrich and concretize the description of the site of conflict. It is only against this background that we may begin to understand the particular, evolving nature of ‘political’ struggles, claims and processes in a transnational context.

Let us return now, one last time, to our example of the lex mercatoria and to the significant political ambiguities underneath the surface of such a fast evolving regulatory regime. The already depicted hiatus between national discourses regarding overburdened, “incompetent” courts and the transnational aspiration to an autonomous, self-regulatory order is an interesting tale about the construction of meaning and the power of polemics. In light of the proposal to ‘short-circuit’ national and transnational regulatory discourses in the hope of thus identifying common challenges as well as insights (and, blind spots)\textsuperscript{114}, it appears that the here depicted hiatus results, above all, from an unwarranted demarcation of the two spheres when it comes to identify their respective constitutive qualities.

Arguably, the line-drawing between national and global assertions of the roles of courts in economic governance and market regulation results in a de-politicization of the respective governance constellations. The turn away from the national as ‘traditional’ and the turn towards the ‘transnational’\textsuperscript{115} in fact cuts the ties between a space associated with

\textsuperscript{112} See Cutler, above note 24.

\textsuperscript{113} See text around notes 90 ff.

\textsuperscript{114} See text around notes 95 ff.

\textsuperscript{115} See Berger, above note 10.
(endless\textsuperscript{16}) politics and one strangely untouched by such quarrels. Echoing Stone Sweet’s keen observation of lex mercatoria’s aspirations for an a-national regulatory regime\textsuperscript{17}, we can here find an intriguing illustration of how ‘denationalization’\textsuperscript{18} functions in fact as an immunization of a sphere of societal interaction from political critique. Taking arguments of expediency and economic efficiency at face value to prioritize private arbitration tribunals over national courts, an entire body of experience with evolving judicial systems, adjudication, conflicts over rights is declared as irrelevant.

Meanwhile, continuing national debates about the reform of the judicial system illustrate the ‘stakes’ and vulnerabilities in this context. These dimensions of the judicial system no longer come into view in the context of the lex mercatoria, as the entire system is understood to be available and of service only to those who engage in transnational economic activity and who have chosen to have a possible legal conflict with their business partner(s) resolved through an arbitration process. Such a narrow characterization of the transnational arbitration system, however, understates the significance of the arbitral system in a larger context of private transnational economic governance, which is brought about by a large-scale privatization of norm-generation, implementation and enforcement, which in turn raises pressing questions regarding the “public” dimensions, responsibilities and protections available to all those ‘affected’\textsuperscript{19}.


\textsuperscript{17} Stone Sweet, above note 99

\textsuperscript{18} Saskia Sassen, ‘Globalization or denationalization?’, (2003) 10 Review of International Political Economy, 1-22

Opening up such a comparative perspective on national and global sentiments with regard to the role of courts in economic governance, we may be able to see striking parallels between the resistance against ‘incompetent’ courts on the national level and the claim for an autonomous legal order in the transnational sphere. But, with these parallel insights, also the blind spots and intentional omissions of this embrace of private justice become visible—inside and outside of the nation state. Questions of context, externalities and stakeholders become ones which are of concern allegedly only from a policy perspective, which is seen as somehow external to both the conflict at hand and the institutional regime designed to handle it.

This isolation of a particular conflict between two competing rights position from the larger socio-economic and legal context, in which any assertion of rights and their scope must take place, is a well-known move in legal-political argument.\textsuperscript{120} The demands for a more ‘efficient’ judicial system to handle economic conflicts have dramatic consequences for the opportunities of verbalizing and thematizing the hereby neglected and invisibilized externalities and affected interests. Whereas debates about court reform in the context of the nation state would not be possible without a consideration of the historically evolved role of the courts as well as of the encompassing constitutional framework, the claim for private justice seeks to free itself from any such context. As a result, the underlying challenge of conceptualizing a judicial system which satisfies comprehensive demands for an ‘access to justice’\textsuperscript{121} is seen as having little relevance for the merchant client-oriented system of transnational commercial arbitration. By isolating and underscoring the advantages of a streamlined, privatized and expedient dispute resolution system, such calls for an autonomous arbitration order result in a more encompassing dismissal of a historically grown judicial culture, which has long been understood as an essential element of the evolution of the rule of law. An important dimension of this experience has for some time

\textsuperscript{120} See only Holmes’ dissent in Lochner v New York, 45 U.S. 198 (1905).

found expression in a renewed interest in questions of access, acceptance and compliance among those that a judicial system is designed to serve. Such concerns are formulated in the context of a far-reaching frustration with the inadequate functioning of rule-of-law institutions but also in new, emerging contexts of alternative conflict resolution in precarious post-conflict constellations.

Precisely these two examples underscore the importance of taking the larger context into view out of which norm-generating and adjudication processes are forming today – but out of which such processes have always been emerging. Rather than testifying to attempts at returning to ambitious programs of court-driven social engineering, the emphasis on context is motivated by the need for a much richer and better informed account of a problem to be turned into a ‘case’ – today as in the past. This context defies ‘political’, normative ‘answers’. Instead, it prompts an incessant inquiry into the different venues and fora through which stakes are being identified and expressed. In that regard, the focus shifts away from the normative focus on the content of a particular interest or stake to a scrutiny of the challenges in giving expression to all viewpoints and factors which inform and shape a particular problem. This observation allows us to connect the legal pluralist work, say, as it began to critically engage with the legal system in the Western welfare state of the 1970s, with the rich anthropological and legal-sociological work that is being carried out today. The ‘politics’, then, are in the process of making visible the competing interests and viewpoints. This is the background, against which we must henceforth look for ‘legal’ responses.

In other words, the legal pluralist focus on context complements the discursive analysis, which we have identified as being crucial to lay bare the otherwise hidden political

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assumptions of the calls for an ‘autonomous’ transnational legal order. A central concern of such scrutiny must be to question readily-found demarcations between ‘economic’ and ‘other’ issues or interests, as they inform many of the arguments made against judicial ‘incompetence’ and ‘intervention’. There are several fundamental problems with assertions such as these. A demarcation of economic and non-economic issues, the latter of which Gillian Hadfield labels ‘justice’, risks missing the complexity of just about any ‘economic’ problem. This would be true now as it was a long time ago.

To the degree that the legal depiction of a particular social situation or, ‘problem’ is always the result of an ‘alienation’ and complex form of translation of the social facts – by way of identification and construction of a specific constellation of interests - into the rationality of the law, this process itself must be accounted for in legal methodology. We thus need to take seriously the fact that any legal appropriation of a social conflict is always already impregnated by a number of competing societal rationalities (such as economics, politics, religion), which enrich, complement but also disturb the ‘legal’ account. The necessity to lay bare the way in which such different elements find their way into the legal depiction of a problem had long been identified by a sociological and pluralist legal theory, when asking what lies ‘behind a case’.

The coalescence of a wide-spread disillusionment with the promises of ‘free markets’, the significant insights from the ‘law & development’ movement along with a


129 For a critique, see Joseph Stiglitz, Globalization and Its Discontents (2002).
powerful, anthropologically informed human rights critique\textsuperscript{131} illustrates the promises of a legal theory, which places a distinct emphasis on a close study of the particular dynamics of societal norm-creation and conflict resolution. The lex mercatoria of the future still has to take that methodological step rather than stay confined to a world view shaped by distinctions between economic/non-economic or national/global. Only by reorienting its analytical focus towards the diverse contexts of legal conflict constellations will it be possible to unearth the liens between a ‘transnational legal theory’, so desired by the promoters of the lex mercatoria\textsuperscript{132}, and the actually ongoing efforts in search of a ‘better’ justice system – nationally, internationally, locally, globally.


\textsuperscript{131} Richard Ashby Wilson, 'Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law', in Mark Goodale and Sally Engle Merry (eds), The Practice of Human Rights: Tracking Law Between the Global and the Local (2006); Sally Engle Merry, 'New Legal Realism and the Ethnography of Transnational Law', (2006) 31 Law & Social Inquiry 975-995

\textsuperscript{132} Thomas Schultz, 'The Concept of Law in Transnational Arbitral Legal Orders and some of its Consequences', (2011) 2 Journal of International Dispute Settlement 59-85.