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Sociological Jurisprudence 2.0: Updating Law's Interdisciplinarity in a Global Context

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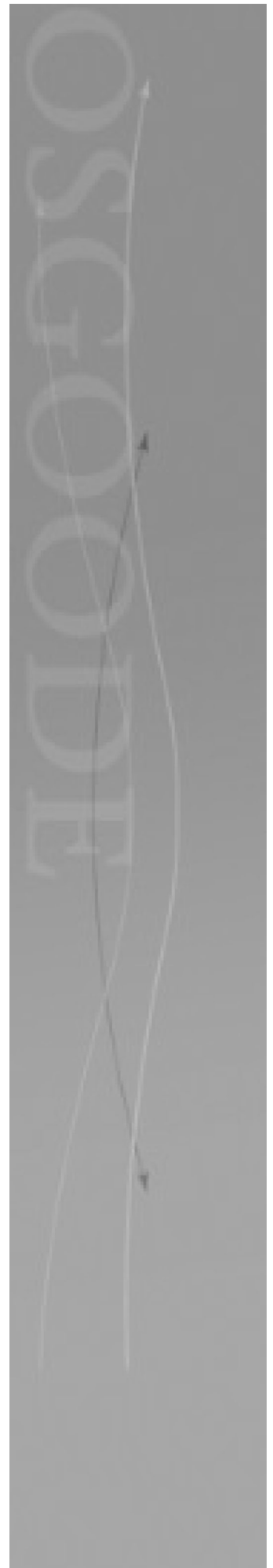
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Comparative Research in
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Sociological Jurisprudence 2.0: Updating Law's Interdisciplinarity in a Global Context

Peer Zumbansen*

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ABSTRACT: The gap between law's pronouncement of rules and their impact or failure in concrete social environments has long prompted efforts to make lawyers more responsive to the "realities on the ground". While this turn to sociological jurisprudence seemed a logical consequence of the Legal Realists' attack on formalism and positivism, it exposed legal theory to a never-ending series of questions concerning the limits of law in becoming an empirically informed social science. Even trailblazing Legal Realists themselves questioned the extent to which empirical knowledge might erode the core of law's claim to authority. Where are we today, after numerous transgressions à la "law & economics", "law & society", "law & psychology" etc? But, how should this question be answered in light of the globalization of social relations, that has brought about the rise of numerous, border-crossing regulatory regimes, comprised of national/international, hard/soft, official/in-official 'legal' norms? Do these developments merely suggest a reprise of last century's sociological turn?

The here proposed paper will suggest that there is a significant difference between the current interest of law in sociology (anthropology, geography) and the earlier instance of legal sociology. Whereas historically earlier stances responded, in no small degree, to legal positivism and, eventually, to both technological and societal change, the current social scientific engagement by lawyers appears driven by a differently articulated concern, even anxiety, about the viability of legal analytical, conceptual and semantic tools in a changed, transnational context. With the shift of law's bearings from the nation-state to globalization's strange land, law's need to learn anew and differently can be felt throughout: in textbooks, classrooms, professional ethics and legal practice. In light of interdisciplinarity, legal pluralism and globalization, law's new frontier might lie in its reconstitution as *transnational sociological jurisprudence*.

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I. Introduction

With a look at conference agendas and tables of contents of edited collections in law, one is tempted to assume that over the last twenty years or so, there has been a notable shift in legal scholars' theoretical interests away from domestic law towards a study of law in a global context. A fast growing number of symposia and legal scholarship suggests that legal scholars have been developing a lively interest in getting a better grasp and more solid understanding of globalization and its impact on law, legal research and legal education. And, yet, despite ever-increasing efforts among a growing number of lawyers to study the unquestionably complex relationship between domestic and global regulatory developments, the conceptual toolkit used in these undertakings still appears incomplete. The same seems true for legal education. While it is true that law schools around the world have been addressing the perceived need to adapt their curricula to the evolving prospects of a legal profession with an increasingly global reach, most of such institutional undertakings remain marked by a concern, above all, with how to provide their graduates with the skills to offer optimal legal services in still relatively confined, domestic settings. As a result, law school curricula, while occasionally including introductory courses (such as 'Law & Globalization', 'Ethical Lawyering in a Global Context', or 'Introduction to International Law') continue to be primarily structured around core, black letter, 'bread and butter' courses, with seminars in comparative or transnational law, legal culture or legal anthropology, and even international business transactions or international business law, taken only by a self-selected group of specialized students in their last year in law school. Law schools, in other words, are still not decided on the profile and prospective professional trajectories of their future graduates. As a result, curriculum programs are wavering between law schools' continued commitment to offer training in 'core skills', foundations and black letter law on the one hand, and inducing their future graduates to a fast-paced and complex transactional environment, on the other. The latter, in particular, is seen as a world in which lawyers are expected to navigate complex jurisdictional, cultural as well as epistemological divides.

How are these debates in legal education connected to legal research? In other words, we need to ask about the reciprocal impact of legal education and research in a context, where it has become obvious that there is much more to the training "to think like a lawyer" than has traditionally been taught in contract or tort law, constitutional law or civil procedure. The gap between law schools' curriculum design efforts and legal scholarship, however, still seems significant. Legal scholars, if the scope of research disseminated on the *Social Science Research Network* (www.ssrn.com) is any indication, still appear to be neatly split into 'traditionalists' and 'transnationalists'.¹ While the latter are divided again into those with a

¹ See already K. P. Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International, 1999).

keen interest in either maintaining or breaking down the boundaries between domestic and international law, the so-called traditionalists appear to focus their interests on matters of domestic significance – in the case of SSRN with an overwhelming focus on U.S. law. The world ‘outside’ the nation state remains one, in which the majority of legal scholars is simply not that interested. In contrast then, while the apparently ‘transnational’ scope of some research in the EU appears to be more obviously targeting processes of ‘Europeanization’ or, more generally, ‘Internationalization’ against the background of an undeniably European nature of numerous norms, laws and regulation in force in EU member states today, there is a distinct blind-side noticeable, here as well. Pushing the boundaries of the European legal imagination towards a greater appreciation of the significance of studying law from both a comparative and, specifically, from a European and ‘integrationist’ perspective, this energy-consuming effort almost pushes aside or invisibilizes important advances to study law’s historical and colonial pasts and to renew legal historical, international and comparative research agendas to grasp the inevitably interdisciplinary challenge of studying law in a global, colonial and post-colonial context.²

In what might appear to be almost a parallel universe to the core of basic legal education and mainstream legal research, however, an intense debate has been under way about the prospects of and about the forms in which legal analytical instruments and concepts, categories as well as basic understandings of legal institutions and processes, as they have been developed in the context of the nation state, might or might not be adaptable to the regulatory challenges in a global space. In that vein, scholarship on ‘law & globalization’ has arguably become an industry in its own right. Yet, the focal point of this burgeoning scholarship is far from precise. In other words, it doesn’t seem evident what the *question* is exactly that law & globalization scholars are trying to answer. What seems clear, at the same time, is legal scholars’ endeavors in this context have long become part of a multidisciplinary study of global governance. As such ‘law & globalization’ has become a field of scholarly inquiry belaboured by lawyers, political scientists, sociologists, anthropologists, geographers and political economists alike, which raises important questions how law should situate itself in relation to other disciplines’ approaches and methods.

Admittedly, such a reductionist stance on one discipline’s (law) perspective on what has rightly been identified as a multidisciplinary bears the risk of closing a door that has hardly been opened. But, the intention of choosing law as a starting point and platform for the study of globalization is to concretize the relation between a still under-defined phenomenon of social and historical processes and a distinct disciplinary framework in an

² Indications of such promising initiatives are the recently released *Oxford Handbook of The History of International Law* (B.Fassbender & A.Peters eds., Oxford University Press, 2013), as well as the forthcoming *Oxford Handbook of International Legal Theory* (F.Hoffmann & A.Orford eds., Oxford University Press, 2014).

exemplary fashion. In other words, the intention to focus on and to revisit law's and legal scholars' as well as practitioners' engagement with globalization phenomena is based on the assumption that we will be able to identify both specific as well as more generalizable aspects in the way that a social theory has been addressing such developments.

A central contention of the present paper 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 make sense, above all, of the challenges posed by globalization for law and other social sciences. For a conversation across disciplinary boundaries to take flight, it is advisable to give a better picture 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 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 social theory of law. 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 of 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 law³, became a very ambitious theoretical and practical endeavor in the critical analysis of regulatory regimes in mature welfare states.⁴ Today, the resurgence of law & society through the prism of law & globalization reminds us of these demarcation efforts

³ E. Ehrlich, *Fundamental Principles of the Sociology of Law* (orig. published in German as *Grundlegung der Soziologie des Rechts*, 1913) (Russell & Russell, 1962); E. Durkheim, *The Division of Labor in Society* [1893; transl. by W.D. Halls] (Free Press, 1984); A. B. Bozeman, *The Future of Law in a Multicultural World* (Princeton University Press, 1971).

⁴ S. F. Moore, 'Law and Social Change: the semi-autonomous field as an appropriate subject of study', (1973) 7 *Law & Society Review* 719-746; G. Teubner, 'Substantive and Reflexive Elements in Modern Law', (1983) 17 *Law & Society Review* 239-285.

while pushing us to recontextualize such concerns in a newly expanded environment – jurisdictionally and geographically⁵, geopolitically⁶ and from an epistemological standpoint.⁷ 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’⁸, transnational ‘spaces’⁹, fragmented legal orders¹⁰ or ‘collisions’.¹¹ 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’ language¹², but a constant exercise in adaptation, building on reflexive exercises in (discourse-regime-system) translation¹³ as well

⁵ R. Ford, 'Law's Territory (A History of Jurisdiction)', (1999) 97 *Michigan Law Review* 843; G. Handl/J. Zekoll/P. Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Brill, 2012).

⁶ D. Held, *Democracy and the Global Order* (Polity Press, 1995); M. Albert/R. Schmalz-Bruns, 'Antinomien der Global Governance: Mehr Weltstaatlichkeit, weniger Demokratie?', in H. Brunkhorst (ed) *Soziale Welt* (Sonderband 18): *Demokratie in der Weltgesellschaft* (Nomos, 2009), 57-74.

⁷ B. d. Sousa Santos, 'Beyond Abyssal Thinking. From global lines to ecologies of knowledge', (2007) *Eurozine* <http://www.eurozine.com/articles/2007-06-29-santos-en.html>; D. Chakrabarty, *Provincializing Europe. Postcolonial Thought and Historical Difference*, 2nd ed. [orig. 2000] (Princeton University Press, 2007); J. Comaroff/J. L. Comaroff, *Theory from the South: Or, How Euro-America is Evolving Toward Africa (The Radical Imagination)* (Paradigm Publishers, 2011), especially ch 1, where C&C lay out the different theoretical strands that inform their thesis.

⁸ S. D. Krasner (ed) *International Regimes* (Cornell University Press, 2001).

⁹ S. Sassen, *Territory - Authority - Rights. From Medieval to Global Assemblages* (Princeton University Press, 2006).

¹⁰ M. Koskeniemi/P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', (2002) 15 *Leiden Journal of International Law* 553-579.

¹¹ A. Fischer-Lescano/G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', (2004) 25 *Michigan Journal of International Law* 999-1046; G. Teubner, *Constitutional Fragments. Societal Constitutionalism and Globalization* (Oxford University Press, 2012), esp. ch 6, where GT analyses the consequences of a constitutional-political analysis arising from regime collisions on a global scale.

¹² In this context, see the program description of “Language and Globalization” at Tilburg University in The Netherlands: <http://www.tilburguniversity.edu/research/humanities/language-and-globalization/>.

¹³ See E. G. Carayannis, *Institutional Learning and Knowledge Transfer Across Epistemic Communities, Innovation, Technology, and Knowledge Management* (Springer, 2012), esp ch 2 (“Globalization, Nation-States, and Global Governance”), P. Liste, 'The Politics of (Legal) Intertextuality', (2010) 4 *International Political Sociology* 318-321, and P. Liste, *Völkerrecht-Sprechen. Die Konstruktion demokratischer Völkerrechtspolitik in den USA und der Bundesrepublik Deutschland* (Nomos, 2012), esp. Ch 1 where PL highlights the different ‘international law’ discursive spaces that are opening up between state and non-state actors, regimes, movements, and individuals.

as the continuing engagements with the tension between ‘government’ and ‘governance’ discourses from in different social science disciplines .¹⁴

Such developments can be seen as forming 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 as the tension between ‘routine’ and ‘innovation’¹⁵, 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.¹⁶ While this instability of theoretical frameworks which results from internal and external challenges¹⁷ 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 that crisis.¹⁸ 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 paper 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]

¹⁴ See eg J. N. Rosenau/E.-O. Czempiel, *Governance without government: order and change in world government* (Cambridge University Press, 1992); I. Ayres/J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); C. Scott/F. Cafaggi/L. Senden (eds), *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates. Symposium Issue of the Journal of Law and Society*, Vol. 38, No. 1, pp. 1-188 (Wiley-Blackwell, 2011).

¹⁵ Eg N. Luhmann, 'Evolution und Geschichte', (1975) in: *ders., Soziologische Aufklärung* 2 150-169.

¹⁶ S. Pahuja, *Decolonising International Law. Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011); J. Rajah, 'The Gulf Between Promise and Claim: Understanding International Law's Failure to Decolonise', (2012) 3 *Transnational Legal Theory* 285-296.

¹⁷ T. S. Kuhn, *The Structure of Scientific Revolutions* (University of Chicago Press, 1962).

¹⁸ T. Murphy, 'Globalization, Legal Pluralism, and the New Constitutionalism', (2007) 25 *Nordic Journal of Human Rights* 1-18; N. McCormick, 'Beyond the Sovereign State', (1993) 56 *Modern Law Review* 73-79.

- 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]
- the **politics** of global law [eg 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]

The identified clusters underscore the earlier made observation that the relationship of ‘law and globalization’ is in fact a label for a multi-layered and multi-tiered theoretical analysis of contemporary social order, as formulated from the in itself unstable epistemological position of law. The purposes of the present project are to further investigate the nature of this instability through a series of applications. Part II of the paper sets the stage of the following analysis by initiating an investigation into the evolution of law and ‘socio-legal studies’. Part III builds on this and looks more closely at one of the currently most vibrant discursive playgrounds in socio-legal studies ‘gone global’, namely Transnational Law [TL]. TL is here studied above all from a methodological perspective, understanding the emergence of this ‘field’ as an attempt to make sense of law’s doctrinal, conceptual and interdisciplinary adaptations to globalization. The next two parts (IV, V) 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 paper 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, illusive nature of both the political status and framework that I am here most interested in, as I am trying to further build on similar insights from other scholars.¹⁹ Part VI, then, introduces two 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.

¹⁹ Teubner 2012, above note 11; Liste 2012, above note 13.

II. Strange Bedfellows, or: A Cohabitation with Uncertain Effects: Socio-legal Studies

Under the constant nagging at the conceptual citadels of legal coherence and unity²⁰ by social-scientific insights, law eventually morphed into an unbound universe of ‘socio-legal’ studies. Similar to other hybrid scholarly endeavors²¹, the ambiguity of the politics that are at work in the generation, formation and consolidation of such fields results from both conceptualization and impact. The crushing of categories is no longer confined to the internal architecture of a theory, but attains explosive, uncontainable potential in the artificial ‘outside’.²² With this in mind, the paper 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 (rightly²³ or regrettably²⁴) 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) psychology²⁵ or political philosophy.²⁶ But only in a combination of these different disciplinary lenses does it seem possible to arrive at halfway appropriate observations of the emerging global

²⁰ See eg M. Baldus, *Die Einheit der Rechtsordnung. Bedeutungen einer juristischen Formel in Rechtstheorie, Zivil- und Staatsrechtswissenschaft des 19. und 20. Jahrhunderts* (Duncker & Humblot, 1995), D. Felix, *Einheit der Rechtsordnung. Zur verfassungsrechtlichen Relevanz einer juristischen Argumentationsfigur* (Mohr Siebeck, 1998), and A. Hanebeck, 'Die Einheit der Rechtsordnung als Anforderung an den Gesetzgeber? Zu verfassungsrechtlichen Anforderungen wie "Systemgerechtigkeit" und "Widerspruchsfreiheit" der Rechtsetzung als Maßstab verfassungsgerichtlicher Kontrolle', (2002) 41 *Der Staat* 429-451.

²¹ The fitting example often being that of ‘cultural studies’: see eg R. Terdiman, 'Globalization and Cultural Studies: Conceptualization, Convergence, and Complication', (2001) XXI *Comparative Studies of South Asia, Africa and the Middle East* 82-87; from the standpoint of legal sociology: D. Nelken/J. Feest (eds), *Adapting Legal Cultures* (Hart Publishing, 2001).

²² B. Latour, 'From Realpolitik to Dingpolitik, or How to make things public', in B. Latour and P. Weibel (eds), *Making Things Public. Atmospheres of Democracy* (ZKM Art and Media Centre, Karlsruhe/MIT Press, 2005), 14-41; M. Valverde, *Law's Dream of a Common Knowledge* (Princeton University Press, 2003).

²³ M. Wolf, *Why Globalization Works* (Yale University Press, 2004).

²⁴ D. Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World', in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (Cambridge University Press, 2010), 3-22.

²⁵ A. T. Guzman, *How International Law Works. A Rational Choice Theory* (Oxford University Press, 2008); E. A. Posner, *The Perils of Global Legalism* (Chicago University Press, 2009).

²⁶ T. Pogge, 'Cosmopolitanism and Sovereignty', (1992) 103 *Ethics* 48-75.

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 can rest, at least for the time being, on a number of reference points. One of these is the distinction between 'domestic' and 'international', which – despite its questionable explanatory status in the long run²⁷ – 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.²⁸ This *transnational replay* of domestic tensions between progressive versus conservative politics in the global arena can be shown by short-circuiting 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'.²⁹ 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

²⁷ P. Zumbansen, 'Administrative law's global dream: navigating regulatory spaces between 'national' and 'international'', (2013) 11 *ICoN International Journal of Constitutional Law* forthcoming.

²⁸ For a more extensive analysis along those lines see eg A. C. Cutler, 'Artifice, Ideology and Paradox: the Public/Private Distinction in International Law', (1997) 4 *Review of International Political Economy* 261-285; P. Zumbansen, 'Sustaining Paradox Boundaries: Perspectives on the Internal Affairs in Domestic and International Law', (2004) 15 *European Journal of International Law* 197-211, and P. Zumbansen, 'Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power', (2013) 76 *Law & Contemporary Problems* <http://ssrn.com/abstract=2252208>.

²⁹ See already the pertinent critique by R. L. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State', (1923) 38 *Political Science Quarterly* 470-494.

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.³⁰

III. 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'³¹, surmises that globalization has become the definitive framing operative of the 'law of our time'.³² 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.³³ 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."³⁴

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.³⁵ As Michaels

³⁰ On this theme, see the contributions to the Symposium on William Twining's Montesquieu Lecture, 'Globalization and Legal Scholarship', in (2013) 4:2 *Transnational Legal Theory*, *forthcoming*.

³¹ See, among his previous contributions to the debate: R. Michaels, 'The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism', (2005) 51 *Wayne Law Review* 1209-1259; R. Michaels, 'The True New Lex Mercatoria: Law Beyond the State', (2007) 14 *Indiana Journal of Global Legal Studies* 447-468; R. Michaels, 'Global Legal Pluralism', (2009) *Annual Review of Law & Social Science*, vol. 5 (also *Duke Public Law & Legal Theory Research Paper No. 259*) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1430395.

³² R. Michaels, 'Globalization and Law: Law Beyond the State', in R. Banakar and M. Travers (eds), *Law and Social Theory* (2nd ed.) (Hart Publishing, 2013), *forthcoming* (http://scholarship.law.duke.edu/faculty_scholarship/2862), ms. 1.

³³ P. Zumbansen, 'Transnational Comparisons: Theory and Practice of Comparative Law as a Critique of Global Governance', in J. Bomhoff and M. Adams (eds), *Theory and Practice of Comparative Law* (Cambridge University Press, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2000803; P. Zumbansen, 'Transnational Law, Evolving', in J. Smits (ed) *Elgar Encyclopedia of Comparative Law* (2nd ed.) (Edward Elgar, 2012), 898-925 [<http://ssrn.com/abstract=1975403>].

³⁴ Michaels, note 32, at 18.

³⁵ G. Teubner, 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy', (1997) 31 *Law & Society Review* 763-787.

observes, globalization “has remained a remarkably vague concept in general discourse”.³⁶ 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,³⁷ 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’ (W Singer), 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. Surely, the ability to “see”, and then to “know”, in and of itself is neither an asset nor a self-explanatory competence. That much, we ought to have learned.³⁸

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 studies³⁹, the other part of Michaels’ statement deserves equal attention, namely where he refers to ‘law beyond the state’.⁴⁰ 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?

In this paper I suggest that whether or not TL is a theory in its own right or whether legal pluralism [LP], sharing with TL a keen interest in social norms and in the tension between

³⁶ Michaels, note 32, at 1.

³⁷ See eg the tensions between accounts offered by B. d. Sousa Santos, 'The Processes of Globalisation', (2002) *Eurozine* <http://www.eurozine.com/pdf/2002-08-22-santos-en.pdf>, on the one hand, and M. Wolf, *Why Globalization Works* (Yale University Press, 2004), on the other.

³⁸ See eg M. Foucault, *The Archeology of Knowledge* (Gallimard, 1973), and B. Latour, *We have never been modern* (Catherine Porter transl.) (Harvard University Press, 1993). See also L. Adkins/C. Lury, 'What is the Empirical?', (2009) 12 *European Journal of Social Theory* 5-20 (discussing the different reasons for a perceived ‘crisis’ of sociology), on the one hand, and the insightful critique of the ways in which the World Bank has been instrumentalizing empirical data and human rights research, by G. A. Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Stanford University Press, 2012).

³⁹ See eg G. Teubner/J. Paterson, 'Changing Maps: Empirical Legal Autopoiesis', (1998) 7 *Social and Legal Studies* 451-486; see for the assessment of legal sociology’s contemporary challenges by T. Raiser, 'Sociology of Law in Germany', (2010) 11 *German Law Journal* 391-398, and P. Zumbansen, 'Law's Effectiveness and Law's Knowledge: Reflections from Legal Sociology and Legal Theory', (2009) 10 *German Law Journal* 417-438.

⁴⁰ Michaels, note 32, at 1.

'law' and 'non-law'⁴¹, should be seen as helpful⁴², 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 just 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."⁴³ Michaels qualifies this statement by referring to a use of TL as encompassing "all legal (and non-legal!) rules"⁴⁴, 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."⁴⁵

⁴¹ S. F. Moore, 'Law and Social Change: the semi-autonomous field as an appropriate subject of study', (1973) 7 *Law & Society Review* 719-746.

⁴² Compare Michaels, note 32, at 14.

⁴³ Michaels, note 32, at 18.

⁴⁴ *Id.*, [emphasis not added]. See the expression of a similar anxiety in M. Zamboni, 'A Legal Pluralist World'... or the Black Hole for Modern Legal Positivism', (2013) SSRN <http://ssrn.com/abstract=2251017>, available at: <http://ssrn.com/abstract=2251017>, ms. 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."

⁴⁵ *Id.*

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 from different disciplinary boundaries. The level of complexity that the work carried out under the label of 'socio-legal studies' has reached at 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 between the 'law on the books' and the 'law in action'⁴⁶, the 'exhaustion' of conceptual, analytical and doctrinal categories and instruments in the face of competing interpretations of social 'facts',⁴⁷ as well as the recognized need to adapt or expand an existing legal framework to a burgeoning set of technological, social, cultural developments.⁴⁸ 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 regimes⁴⁹, but started long before. 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.⁵⁰ But that does not

⁴⁶ See eg R. Pound, 'Law in Books and Law in Action', (1910) 44 *American Law Review* 12; K. Llewellyn, *Bramble Bush* (1928/29) (Oceana Publishing, 1950).

⁴⁷ M. Galanter, 'In the Winter of our Discontent: Law, Anti-Law, and Social Science', (2006) *Annual Review of Law & Social Sciences* 1-16; O. Lobel, 'The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics', (2007) 120 *Harvard Law Review* 937-988

⁴⁸ S. Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Harvard University Press, 1997).

⁴⁹ D. Caruso, 'Private Law and State-Making in the Age of Globalization', (2006) 39 *New York University Journal of International Law & Politics* 1-74.

⁵⁰ T. Bartley, 'Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions', (2007) 113 *American Journal of Sociology* 297-351; T. Bartley, 'Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards', (2011) 12 *Theoretical Inquiries in Law* Article 6; K. W. Abbott/D. Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit', (2009) 42 *Vanderbilt Journal of Transnational Law* 501-578; P. Zumbansen, 'The Ins and Outs of Transnational Private Regulatory Governance:

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 universes⁵¹ 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.⁵²

IV. 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* 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.⁵³ 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 1789⁵⁴ in the context of transnational human rights litigation⁵⁵ is squarely situated in the

Legitimacy, Accountability, Effectiveness and a New Concept of ‘Context’, (2012) 13 *German Law Journal* 1269-1281.

⁵¹ See for a theoretical account of these universes, R. M. Cover, 'Nomos and Narrative', (1983) 97 *Harvard Law Review* 4-68; see in this vein, I. Augsberg, 'Observing (the) Law: The 'Epistemological Turn' in Public Law and the Evolution of Global Administrative Law', in P. Jurcys, P. F. Kjaer and R. Yatsunami (eds), *Regulatory Hybridization in the Transnational Sphere* (Martinus Nijhoff Publishers, 2013), 11-27.

⁵² J. Dalhuisen, *Dalhuisen on Transnational, Comparative, Commercial, Financial and Trade Law. Volume 1: Introduction - The New Lex Mercatoria and its Sources* (Hart Publishing, 2010); E. Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers, 2010).

⁵³ For an illustration of such norm selection in the fields of consumer contract law and corporate governance, see G.-P. Calliess/P. Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing, 2010), pb. 2012, chapters 3 and 4.

⁵⁴ 28 U.S. C. §1350.

⁵⁵ For a recent overview, see C. I. Keitner, 'Transnational Litigation: Jurisdiction and Immunities', in D. Shelton (ed) *Oxford Handbook of International Human Rights* (Oxford University Press, 2013), *forthcoming* [http://ssrn.com/abstract_224000].

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.⁵⁶

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.⁵⁷ From the perspective of TL the question of the factual basis on which decisions regarding the qualification of norms as applicable, 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 ‘inofficial’ 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.⁵⁸ The facts about which the deciding judge recognized to know ‘too little’ were in fact available, 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

⁵⁶ 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 eg W. J. Aceves, *The Anatomy of Torture: A Documentary History of Filártiga v. Peña-Irala* (Brill, 2007).

⁵⁷ *Flomo v. Firestone Natural Rubber Co. LL.C.*, 643 F.3d 1013 (2011), eg at 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.”

⁵⁸ See eg C. M. Wilson, *Liberia* (William Sloane, 1947), 80ff.

employer, worker and factory owner, or two contracting parties⁵⁹). Instead, its purpose is to highlight the gap between the categories (employee, worker, contractor) and the reality that shapes the case. This gap has 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 Germany⁶⁰ and the Legal Realist attack on legal formalism⁶¹ 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 relations⁶², 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 dependants', 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.⁶³ 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.⁶⁴ 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.

⁵⁹ See the pertinent categorization of the interests at stake in *Lochner v New York*, 45 U.S. 198 (1905).

⁶⁰ See R.v. Ihering, *Der Kampf ums Recht* (1872); *ibid.*, *Law as a Means to an End* (Boston Book Company, 1913).

⁶¹ See the comprehensive treatment by N. Duxbury, *Patterns of American Jurisprudence* (Oxford University Press, 1995).

⁶² See eg C. Rodríguez-Garavito, 'Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields', (2011) 18 *Indiana Journal of Global Legal Studies* 263.

⁶³ For more on this point, see P. Zumbansen, 'The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of 'Context'', (2012) 13 *German Law Journal* 1269-1281, and P. Zumbansen, 'Lochner Disembedded: The Anxieties of Law in a Global Context', (2013) 20 *Indiana Journal of Global Legal Studies* forthcoming [<http://ssrn.com/abstract=2174017>]

⁶⁴ See T. Bartley, 'Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions', (2007) 113 *American Journal of Sociology* 297-351, for a discussion of the public and private rules governing labor relations; see also D. M. Trubek/J. Mosher/J. S. Rothstein, 'Transnationalism and the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks', (2000) *Law and Social Inquiry* 1187-1211, and D. J. Doorey, 'In Defense of Transnational Domestic Labor Regulation', (2010) 49 *Vanderbilt Journal of Transnational Law* 953-1009.

V. 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 unofficial, 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.⁶⁵ 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.⁶⁶

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 benefit from 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

⁶⁵ Compare Rodriguez-Garavito, note 62.

⁶⁶ See eg B. Latour, 'From Realpolitik to Dingpolitik, or How to make things public', in B. Latour and P. Weibel (eds), *Making Things Public. Atmospheres of Democracy* (ZKM Art and Media Centre, Karlsruhe/MIT Press, 2005), 14-41; see also B. Latour, *We have never been modern* (Catherine Porter transl.) (Harvard University Press, 1993), and B. Latour, *Science in Action. How to follow scientists and engineers through society* (Harvard University Press, 1987), in particular chapters 2 and 5; meanwhile, Jürgen Habermas has elaborated a comprehensive and ambitious socio-legal theory based on the critical investigation into the relationship "between facts and norms." See J. Habermas, *Between Facts and Norms* [transl. William Rehg] (MIT Press, 1996).

methodologies to new circumstances.⁶⁷ 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.⁶⁸ 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 intervention⁶⁹, 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.⁷⁰ Moving beyond early legal sociologists' analytical interest in the politics of legal formalism and the rising importance of expert knowledge and scientific governance⁷¹, intermediate legal sociologists between the 1960s and 1980s decisively pushed for an interdisciplinary re-orientation of socio-legal studies.⁷² 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.⁷³ In comparison, current legal sociology, if it even

⁶⁷ See the contributions to R. Hardin/K. M. Clarke (eds), *Transforming Ethnographic Knowledge* (Wisconsin University Press, 2012), and the monographic study by L. T. Smith, *Decolonizing Methodologies. Research and Indigenous Peoples* (2nd ed.) (Zed Books 2012), in particular 3 "Colonizing Knowledges".

⁶⁸ See eg E. Ehrlich, *Fundamental Principles of the Sociology of Law* (orig. published in German as *Grundlegung der Soziologie des Rechts*, 1913) (Russell & Russell, 1962); E. Durkheim, *The Division of Labor in Society* [1893; transl. by W.D. Halls] (Free Press, 1984).

⁶⁹ See eg M. Rheinstein, 'Review: Two Recent Books on Sociology of Law [reviewing Timasheff's 'Introduction' and Gurvitch's 'Elements']', (1941) 51 *Ethics* 220-231; G. Gurvitch, *Sociology of Law* (orig. published in French as *Problèmes de la sociologie du droit*) (Routledge and Kegan Paul, 1947).

⁷⁰ See eg R. Dworkin, *Law's Empire* (Harvard University Press, 1986); in this vein, see C. R. Sunstein, 'Lochner's Legacy', (1987) 87 *Columbia Law Review* 873-919.

⁷¹ A good illustration is the account given by J. W. Landis, *The Administrative Process* (Yale University Press, 1938).

⁷² E. Blankenburg/E. Klaus/H. Rottleuthner/R. Rogowski (eds), *Alternative Rechtsformen und Alternativen zum Recht* (Bertelsmann, 1980); P. Nonet/P. Selznick, *Law and Society in Transition. Toward Responsive Law* (Octagon Books, 1978)

⁷³ D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850-2000', in D. Trubek and A. Santos (eds), *The New Law and Economic Development* (Cambridge University Press, 2006), 19-73.

still exists in the form of designated law school positions or curricular components⁷⁴, 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 development⁷⁵, 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 can ultimately leave a discipline such as law untouched.

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. While 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 methodology⁷⁶, with the critique of facts and truth in ‘science & technology studies’⁷⁷ and with critical historiography as it has become pertinent in selected areas of law.⁷⁸

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.⁷⁹ Another important

⁷⁴ For an assessment of the relatively sobering institutional state of the discipline, see T. Raiser, 'Sociology of Law in Germany', (2010) 11 *German Law Journal* 391-398, and M. Galanter, 'Farther Along', (1999) 33 *Law & Society Review* 1113-1123.

⁷⁵ For a distinctly skeptical assessment from the perspective of law school curricular design, see A. D'Amato, 'The Interdisciplinary Turn in Legal Education', (2006) *bepress Legal Series. Working Paper* 1901. <http://law.bepress.com/expresso/eps/1901>.

⁷⁶ See Hardin & Camari Clarke and Smith, note 37. See also D. R. Holmes/G. E. Marcus, 'Cultures of Expertise and the Management of Globalization: Toward the Refunctioning of Ethnography', in A. Ong and S. J. Collier (eds), *Global Assemblages: Technology, Politics, and Ethics as Anthropological Problems* (Blackwell, 2005), 235-252, and A. Lowenhaupt Tsing, *Friction. An Ethnography of Global Governance* (Princeton University Press, 2005).

⁷⁷ See eg <http://sts.cornell.edu/>.

⁷⁸ See the example of the so-called Third World Approaches to International Law [TWAIL]. See O. C. Okafor, 'Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?', (2008) 10 *International Community Law Review* 371-378, and U. Natarajan, 'TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring', (2012) 14 *Oregon Review of International Law* 177-201.

⁷⁹ See eg 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: S. Pahuja, *Decolonising International Law. Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011); see for an insightful critique of this analysis, Jothie Rajah, ‘The

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'.

VI. 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,⁸⁰ 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.⁸¹ 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.⁸² 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 sister.

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.⁸³ With a growing awareness of the different, existing ordering structures 'on the ground' in the development context came the realisation that *any* legal order challenges the observer to acknowledge the parallels between and the co-existence of formal and

Gulf Between Promise and Claim: Understanding International Law's Failure to Decolonise' (2012) 3:3 *Transnational Legal Theory* 285; see also Natarajan, previous note.

⁸⁰ D Kennedy, 'Laws and Development' in J Hatchard and A Perry-Kessaris (eds), *Law and Development: Facing Complexity in the 21st Century - Essays in Honour of Peter Slinn* (London, Cavendish Publishing Limited, 2003), 17.

⁸¹ For a brilliant deconstruction of the post-war conceptual division between political and economic emancipation of former colonial states, see S Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge, Cambridge University Press, 2011).

⁸² The masterful analysis is still D. Trubek/M. Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', (1974) *Wisconsin Law Review* 1062-1101.

⁸³ K Pistor and D Berkowitz, 'Of Legal Transplants, Legal Irritants, and Economic Development' in P Cornelius and B Kogut (eds), *Corporate Governance and Capital Flows in a Global Economy* (Oxford, Oxford University Press, 2003), 347; K Pistor, 'The Standardization of Law and Its Effect on Developing Economies' (2002) 50 *American Journal of Comparative Law* 97.

informal, hard and soft law, of legal and non-legal norms.⁸⁴ 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.⁸⁵

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 (eg, the 'state') and at a particular moment in (geo-political) time.⁸⁶ 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.⁸⁷ 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.⁸⁸ 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.

⁸⁴ HW Arthurs, *Without the Law: Administrative Justice and Legal Pluralism in Nineteenth Century England* (Toronto, University of Toronto Press, 1988); RA Macdonald and J MacLean, 'No Toilets in Park' (2005) 50 *McGill Law Journal* 721; SF Moore, 'Law and Social Change: The Semi-Autonomous Field as an Appropriate Subject of Study' (1973) 7 *Law & Society Review* 719.

⁸⁵ Macdonald and MacLean, *ibid.* See also C Scott, 'A Core Curriculum for the Transnational Legal Education of JD and LLB Students: Surveying the Approach of the International, Comparative and Transnational Law Program at Osgoode Hall Law School' (2005) 23 *Penn State International Law Review* 757.

⁸⁶ Begoña Aretxaga, 'Maddening States' (2003) 32 *Annual Review of Anthropology* 393.

⁸⁷ R Cotterrell, 'Why Must Legal Ideas Be Interpreted Sociologically?' (1998) 25 *Journal of Law & Society* 171; R Banakar, 'Law Through Sociology's Looking Glass: Conflict and Competition in Sociological Studies of Law' in A Denis and D Kalekin-Fishman (eds) *The ISA Handbook in Contemporary Sociology* (London, Sage Publications Ltd, 2009); P Zumbansen, 'Law's Effectiveness and Law's Knowledge: Reflections from Legal Sociology and Legal Theory' (2009) 10 *German Law Journal* 417.

⁸⁸ DM Trubek and M Galanter (1974). See also DM Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development' (1972) 82 *Yale Law Journal* 1.

A striking feature of this contextualisation of L&D as part of a larger exercise in investigating law's relationship to and 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 scholars⁸⁹ and sociologists⁹⁰ 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 labour⁹¹ to corporate,⁹² from environmental⁹³ to criminal law,⁹⁴ altogether suggesting a methodological shift away from comparative and towards transnational law,⁹⁵ 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 has been underlined, perhaps most tellingly, by the recent approximation of L&D with the field of 'transitional justice' [TJ], which testifies to an increasing awareness among interested experts of the close connections between investigations into the 'legacies' of

⁸⁹ R Ford, 'Law's Territory (A History of Jurisdiction)' (1999) 97 *Michigan Law Review* 843.

⁹⁰ S Sassen, 'The State and Globalization' in JS Nye and JD Donahue (eds), *Governance in a Globalizing World* (Washington, Brookings Institution, 2000), 91; S Sassen, 'The Places and Spaces of the Global: An Expanded Analytic Terrain' in D Held and A McGrew (eds), *Globalization Theory. Approaches and Controversies* (Cambridge, Polity, 2007), 79; D Harvey, 'The Sociological and Geographical Imaginations' (2005) *International Journal of Politics, Culture and Society* 211.

⁹¹ DM Trubek, J Mosher and JS Rothstein, 'Transnationalism and the Regulation of Labor Relations'; G Mundlak, 'De-Territorializing Labor Law' (2009) 3 *Law & Ethics of Human Rights* 188; HW Arthurs, 'Extraterritoriality by Other Means: How Labor Law Sneaks across Borders, Conquers Minds, and Controls Workplaces Abroad' (2010) 21 *Stanford Law & Policy Review* 527.

⁹² LC Backer, 'Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order' (2011) 18 *Indiana Journal of Global Legal Studies* 751; P Zumbansen, 'Neither "Public" nor "Private", "National" nor "International": Transnational Corporate Governance from a Legal Pluralist Perspective' (2011) 38 *Journal of Law & Society* 50.

⁹³ L Gulbrandsen, S Andresen and JB Skjærseth, 'Non-State Actors and Environmental Governance: Comparing Multinational, Supranational and Transnational Rule Making' in B Reinalda (ed), *The Ashgate Research Companion to Non-State Actors* (Aldershot, Ashgate, 2011), 463; N Craik, 'Deliberation and Legitimacy in Transnational Environmental Governance' (2006) *ILLJ Working Paper 2006/10*, New York University, Global Administrative Law Series; C Kamphuis, 'Canadian Mining Companies and Domestic Law Reform: A Critical-Legal Account' (2012) 13 *German Law Journal* 1456; S Seck, 'Home State Regulation of Environmental Human Rights Harms As Transnational Private Regulatory Governance' (2012) 13 *German Law Journal* 1360.

⁹⁴ N Boister, 'Transnational Criminal Law?' (2003) 14 *European Journal of International Law* 953; N Boister, *An Introduction to Transnational Criminal Law* (Oxford, Oxford University Press, 2012); RJ Currie, *International and Transnational Criminal Law* (Toronto, Irwin Law, 2010).

⁹⁵ CM Scott, '"Transnational Law" as Proto-Concept: Three Conceptions' (2009) 10 *German Law Journal* 859; P Zumbansen, 'Transnational Legal Pluralism' (2010) 1 *Transnational Legal Theory* 141; P Zumbansen, 'Transnational Law, Evolving' in J Smits (ed) *Elgar Encyclopedia of Comparative Law* 2nd ed. (Cheltenham, Edward Elgar, 2012).

past injustices with programs of future-directed legal and economic aid.⁹⁶ Closely connected to and oftentimes overlapping with this very vivid scholarly engagement has, of course, been an equally vibrant ‘literary’⁹⁷ 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’.⁹⁸ 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 Africa⁹⁹ or Sri Lanka,¹⁰⁰ Achmat Dangor’s ‘Bitter Fruit’ (2001) or films such as Vithanage’s ‘Death on a Full Moon Day’, 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. 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 Africa¹⁰¹ from the haunting account of Mourid Barghouti’s return to Palestine after an involuntary 30-year exile?¹⁰² Emerging, from these accounts, is a powerful illustration of what we might call the ‘transnational human condition’, marked by

⁹⁶ See, eg, R Mani, ‘Dilemmas of Expanding Transitional Justice, or Forging the Nexus between Transitional Justice and Development’ (2008) 2 *International Journal of Transitional Justice* 253, and the contributions to P De Greiff and R Duthie (eds), *Transitional Justice and Development: Making Connections* (New York, Social Science Research Council, 2009). See also the forthcoming collection P Zumbansen and R Buchanan (eds) *Law in Transition: Development, Rights and Transitional Justice* (Oxford, Hart Publishing, 2013).

⁹⁷ See the insightful discussion of the prose/poetry debate in India around the work of Rabindranath Tagore, in D Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference*, 2nd ed. (first published 2000, Princeton, Princeton University Press, 2007).

⁹⁸ A Orford, ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’ (2003) 10 *European Journal of International Law* 679.

⁹⁹ H Corder, ‘Prisoner, Partisan and Patriarch: Transforming the Law in South Africa 1985-2000’ (2002) 118 *The South African Law Journal* 772; A Gross, ‘Reconciliation in South Africa’ (2004) 40 *Stanford Journal of International Law* 40.

¹⁰⁰ J Derges, *Ritual and Recovery in Post-Conflict Sri Lanka* (London, Routledge, 2012).

¹⁰¹ A Dangor, *Bitter Fruit* (Cape Town, Kwela Books, 2001).

¹⁰² M Barghouti, *I Saw Ramallah* (London, Bloomsbury, 2004).

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,¹⁰³ 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.¹⁰⁴

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.¹⁰⁵ 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

¹⁰³ H Arendt, *The Human Condition* (Chicago, Chicago University Press, 1958).

¹⁰⁴ See R Cotterrell, ‘Spectres of Transnationalism: Changing Terrains of Sociology of Law’ (2009) 36 *Journal of Law and Society* 481 and N Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (New York, Columbia University Press, 2009).

¹⁰⁵ D Chakrabarty, *Provincializing Europe*, ch. 5 ‘Birth of the Subject’.

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 is 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.

VII. 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&D¹⁰⁶ and of TJ¹⁰⁷ are increasingly complemented and contextualised by a critical engagement with the North’s¹⁰⁸ legal regulatory as well as

¹⁰⁶ See the contributions to DM Trubek and A Santos (eds), *The New Economic Law and Development* (2006).

¹⁰⁷ N Roht-Arriazza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia, University of Pennsylvania Press, 2005); N Roht-Arriazza and J Mariezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge, Cambridge University Press, 2006); R Nagy, ‘Transitional Justice as Global Project: Critical Reflections’ (2008) 29 *Third World Quarterly* 275; S Vieille, ‘Transitional Justice: A Colonizing Field?’ (2012) 4 *Amsterdam Forum* 58.

¹⁰⁸ This depiction is used to mark both economic and ideological characteristics rather than a geographic region.

epistemological interventions in the ‘South’.¹⁰⁹ Arising from this attention to L&D and TJ is an intensified interest in the nature of *knowledge* 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 drawn upon by governmental actors when crafting regulatory instruments and interventions.¹¹⁰ 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.¹¹¹ Given the complex interplay of domestic and transnational governance discourses and the centrality of knowledge in both,¹¹² 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.¹¹³ From the vantage point of a critical engagement with knowledge, such an enterprise must develop a methodology able to open up, rather than eclipse avenues of contestation and mutual learning.¹¹⁴ 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-

¹⁰⁹ B de Sousa Santos, 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledge' (*Eurozine*, 29 June 2007). See also the contributions to B de Sousa Santos (ed) *Another Knowledge is Possible: Beyond Northern Epistemologies* (London, Verso, 2007), and Radha D'Souza, 'Imperial Agendas, Global Solidarities, and Third World Socio-legal Studies: Methodological Reflections' (2012) 49:3 *Osgoode Hall Law Journal* 409.

¹¹⁰ S Jasanoff, *Science at the Bar: Law, Science, and Technology in America* (Cambridge MA, Harvard University Press, 1997); see also the contributions to G Edmond (ed) *Expertise in Regulation and Law* (Aldershot, Ashgate, 2004).

¹¹¹ KN Llewellyn, 'The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method' (1940) 49 *Yale Law Journal* 1355; N Luhmann, 'Some Problems with Reflexive Law' in G Teubner and A Febbrajo (eds), *State, Law and Economy as Autopoietic Systems* (Milan, Giuffrè, 1992) 389; P Zumbansen, 'Law's Effectiveness and Law's Knowledge: Reflections from Legal Sociology and Legal Theory' (2009) 10 *German Law Journal* 417.

¹¹² KW Abbott and D Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 *Vanderbilt Journal of Transnational Law* 501; P Zumbansen, 'The Ins and Outs of Transnational Private Regulatory Governance: Legitimacy, Accountability, Effectiveness and a New Concept of "Context"' (2012) 13 *German Law Journal* 1269.

¹¹³ D Held, 'Reframing Global Governance: Apocalypse Soon or Reform!' in D Held and A McGrew (eds), *Globalization Theory: Approaches and Controversies* (Cambridge, Polity, 2007) 240; FE Johns, 'Global Governance: An Heretical History Play' (2004) 4 *Global Jurist Advances* Art. 3.

¹¹⁴ See, eg, JN Pieterse, 'Globalization North and South: Representations of Uneven Development and the Interaction of Modernities' (2000) 17 *Theory, Culture & Society* 129; M-R Trouillot, *The Anthropology of the State in the Age of Globalization: Close Encounters of the Deceptive Kind* (2001) 42 *Current Anthropology* 125; J Ferguson and A Gupta, *Spatialising States: Toward an Ethnography of Neoliberal Governmentality* (2002) 29 *American Ethnologist* 981.

universalising,¹¹⁵ 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 of modes of governance* characteristic in settings which we have hitherto tended to study through conventional notions of jurisdiction, that is, through legal *spatial* lenses.¹¹⁶ 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.¹¹⁷

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 L&D scholars' longstanding, persistent engagements with bridging both national and development governance discourses.¹¹⁸ 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'¹¹⁹ 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

¹¹⁵ S Vieille, 'Transitional Justice: A Colonizing Field?' (2012) 4 *Amsterdam Forum* 58.

¹¹⁶ J Ferguson and A Gupta, 'Spatialising States'; A Mbembe, 'At the Edge of the World: Boundaries, Territoriality, and Sovereignty in Africa' (2000) 12 *Public Culture* 259.

¹¹⁷ This tension characterises the interchange between, say, Gunther Teubner and Emiliios Christodoulidis. See G Teubner, 'Fragmented Foundations: Societal Constitutionalism beyond the Nation State' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Cambridge, Cambridge University Press, 2010) and the contributions of Emiliios Christodoulidis, Gert Verschraegen, Bart Klink, and Wil Martens in (2011) *Netherlands Journal of Legal Philosophy*, no 3. For Gunther Teubner's most recent, comprehensive attempt to engage with the challenge of normativity, see his monograph, G Teubner, *Constitutional Fragments* (Oxford, Oxford University Press, 2012).

¹¹⁸ D. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development', (1972) 82 *Yale Law Journal* 1-50; D. Trubek/M. Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', (1974) *Wisconsin Law Review* 1062-1101.

¹¹⁹ <http://siteresources.worldbank.org/WBI/Resources/KnowledgeBankOct2004.pdf>

more comprehensive and sophisticated conceptual treatment.¹²⁰ Indeed, the persistence of inadequate analytic categories in the field of global governance is at considerable odds with contemporary analysis of knowledge-driven governance.¹²¹ Knowledge as an analytic category offers us a way forward.

The overriding challenge arising from a critique of knowledge in the development context, however, consists in the question of 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,¹²² 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.¹²³ 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 state¹²⁴ — 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 polities¹²⁵ or in the context of searching for growth models in path-dependent

¹²⁰ RA Posner, 'Creating a Legal Framework for Economic Development' (1998) 13 *The World Bank Research Observer* 1.

¹²¹ K-H Ladeur, 'Constitutionalism and the State of the "Society of Networks": The Design of a New "Control Project" for a Fragmented Legal System' (2011) 2 *Transnational Legal Theory* 463.

¹²² See now the contributions to M Adams and J Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge, Cambridge University Press, 2012).

¹²³ For more background on the A-N-P approach, see P Zumbansen, 'Lochner Disembedded: The Anxieties of Law in a Global Context' (2012) 20:1 *Indiana Journal of Global Legal Studies*, forthcoming, available at <http://ssrn.com/abstract=2174017>.

¹²⁴ R. Cranston, *Legal Foundations of the Welfare State* (Weidenfeld & Nicolson, 1985); F. G. Castles (ed) *The Disappearing State? Retrenchment Politics in an Age of Globalization* (Edward Elgar, 2007).

¹²⁵ S Rose-Ackerman, 'Risk Taking and Reelection: Does Federalism Promote Innovation?' (1980) 9 *Journal of Legal Studies* 593; GA Bermann, 'Harmonization and Regulatory Federalism' in I Pernice (ed) *Harmonization of Legislation in Federal Systems* (Baden-Baden, Nomos, 1996); R Howse and K Nicolaidis (eds), *The Federal Vision* (Oxford, Oxford University Press, 2001); B Galle and J Leahy, 'Laboratories of Democracy? Policy Innovation in Decentralized Governments' (2009) 58 *Emory Law Journal* 1333.

economies.¹²⁶ 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 levels¹²⁷ 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 that¹²⁸ — will eventually unfold through highly intricate and unpredictable dynamics in a continuously evolving complex environment.¹²⁹

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.¹³⁰ 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 today¹³¹ as it was in the 1970s:¹³² in our search for appropriate regulatory approaches to be taken with regard to development contexts (as well as other,

¹²⁶ W Lazonick, 'Varieties of Capitalism and Innovative Enterprise' (2007) 24 *Comparative Social Research* 21; JP Murmann, *Knowledge and Competitive Advantage: The Coevolution of Firms, Technology and National Institutions* (Cambridge, Cambridge University Press, 2003).

¹²⁷ CF Sabel and J Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU' (2008) 14 *European Law Journal* 271; see already MC Dorf and CF Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98 *Columbia Law Review* 267.

¹²⁸ See, eg, G Majone, 'The European Community Between Social Policy and Social Regulation' (1993) 31 *Journal of Common Market Studies* 153, and KA Armstrong, 'Governance and the Single European Market' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999).

¹²⁹ R Boyer and JR Hollingsworth, 'From National Embeddedness to Spatial and Institutional Nestedness' in JR Hollingsworth and R Boyer (eds), *Contemporary Capitalism: The Embeddedness of Institutions* (Cambridge, Cambridge University Press, 1997); R Dore, W Lazonick and M O'Sullivan, 'Varieties of Capitalism in the Twentieth Century' (1999) 15 *Oxford Review of Economic Policy* 102; G Teubner, 'Legal Irritants: How Unifying Law Ends Up In New Divergences' in PA Hall and D Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford, Oxford University Press, 2001); P Zumbansen, "'New Governance'" in *European Corporate Governance Regulation as Transnational Legal Pluralism*' (2009) 15 *European Law Journal* 246.

¹³⁰ See, eg, K Pistor, 'Of Legal Transplants, Legal Irritants, and Economic Development' in P Cornelius and B Kogut (eds), *Corporate Governance and Capital Flows in a Global Economy* (Oxford, Oxford University Press, 2003).

¹³¹ K Rittich, 'The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social' (2004) 26 *Michigan Journal of International Law* 199.

¹³² DM Trubek and M Galanter, 'Scholars in Self-Estrangement'.

similarly complex regulatory spaces¹³³), 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 its 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.¹³⁴ 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.¹³⁵ 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’,¹³⁶ the extermination of interview protocols and legislative materials of law-making processes in Singapore’s ‘authoritarian’ Rule of Law¹³⁷ or the anthropological scrutiny of the World Bank’s human rights programs¹³⁸ — 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 of such an expanding epistemic framework.

¹³³ N Krisch, *Beyond Constitutionalism. The Pluralist Structure of Post-national law* (Oxford, Oxford University Press, 2010), ch. 4.

¹³⁴ GA Sarfaty, 'Measuring Justice: Internal Conflict over the World Bank's Empirical Approach to Human Rights' in K Clarke and M Goodale (eds), *Mirrors of Justice: Law and Power in the Post-Cold War Era* (Cambridge, Cambridge University Press, 2009).

¹³⁵ J Rajah, *Authoritarian Rule of Law: Legislation, Discourse and Legitimacy in Singapore* (Cambridge, Cambridge University Press, 2012), 37-52, 58-60, 288.

¹³⁶ C Achebe, *The Education of a British-Protected Child* (New York, Knopf, 2009).

¹³⁷ J. Rajah, *Authoritarian Rule of Law. Legislation, Discourse and Legitimacy in Singapore* (Cambridge University Press, 2012), 181-212.

¹³⁸ SE Merry, 'Measuring the World: Indicators, Human Rights, and Global Governance' in P Zumbansen and R Buchanan (eds), *Law in Transition: Rights, Development and Transitional Justice* (Oxford, Hart Publishing, 2013 forthcoming); GA Sarfaty, *Values in Translation: Human Rights and the Culture of the World Bank* (Palo Alto, Stanford University Press, 2012).

VIII. 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 address the idea that a project such as Transnational Law can function as a “theoretical conceptualization of law after the breakdown of methodological nationalism.”¹³⁹ 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.¹⁴⁰ This fragility has become a central concern in the context of debates around the ‘whats’ and ‘hows’ of global governance. In the remainder, I want to argue 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*¹⁴¹) 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-linear¹⁴² transformation of a nation state-based model of political rule.¹⁴³ 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.¹⁴⁴ 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 Jessup¹⁴⁵, 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 is often times referenced from a variety of theoretical and disciplinary backgrounds

¹³⁹ Michaels, note 32, at 18.

¹⁴⁰ Cover 1982.

¹⁴¹ I am grateful to Morag Goodwin for her insistence on that point.

¹⁴² Compare C. Schreuer, 'The Waning of the Sovereign State: Towards a New Paradigm for International Law?', (1993) 4 *European Journal of International Law* 447-471, with A. L. Paulus, 'The War Against Iraq and the Future of International Law: Hegemony or Pluralism?', (2004) 25 *Michigan Journal of International Law* 691.

¹⁴³ See the contributions to J. L. Dunoff/J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009); see also the contributions to T. Hale/D. Held (eds), *Handbook of Transnational Governance. Institutions and Innovations* (Polity Press, 2011).

¹⁴⁴ See eg the interpretation by D. Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World', in P. Dobner and M. Loughlin (eds), *The Twilight of Constitutionalism?* (Cambridge University Press, 2010), 3-22.

¹⁴⁵ P. C. Jessup, *Transnational Law* (Yale University Press, 1956).

precisely to capture a multitude of assertions relating to the transformation of jurisdictional (geopolitical, geographical) boundaries,¹⁴⁶ shifts in norm-making competence between nationally based and spatially operating actors,¹⁴⁷ as well as the nature of ‘communities’, polities, and peoples.¹⁴⁸ 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’¹⁴⁹ 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.¹⁵⁰

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.

¹⁴⁶ See eg D. Harvey, 'The Sociological and Geographical Imaginations', (2005) *International Journal of Politics, Culture and Society* 211-256; S. Sassen, *Territory - Authority - Rights. From Medieval to Global Assemblages* (Princeton University Press, 2006).

¹⁴⁷ C. Scott/F. Cafaggi/L. Senden (eds), *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates. Symposium Issue of the Journal of Law and Society*, Vol. 38, No. 1, pp. 1-188 (Wiley-Blackwell, 2011).

¹⁴⁸ P. S. Berman, *Global Legal Pluralism. A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012); see also S. Benhabib, *The Rights of Others. Aliens, Residents and Citizens* (Cambridge University Press, 2004), and C. Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (Cambridge University Press, 2008).

¹⁴⁹ But, see Michaels 32, at 18: “If everything is transnational law, nothing really is.”

¹⁵⁰ See eg, M. Galanter, 'In the Winter of our Discontent: Law, Anti-Law, and Social Science', (2006) *Annual Review of Law & Social Sciences* 1-16.