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## Transnational Private Law and Private Ordering in a Contested Global Society

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# Transnational Private Law and Private Ordering in a Contested Global Society

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Robert Wai\*

This Article explores a social vision of global public order taken from transnational private law. It recasts the potential role of private law in the cross-border economic context as centrally concerned with private action as both the object and vehicle of substantive and procedural governance. Viewed in this way, private law is a venue for the contestation and regulation of private action by private action in the contemporary global system. With its distinctive strengths and weaknesses, transnational private law is viewed as one alternative among many regimes of global order and is understood to perform a social—indeed, “public”—function in the embedding of private behavior and relationships within a broader social order.

This Article identifies the function of transnational private law as not simply facilitation of transactions, but also compensation for harms and social regulation of transnational conduct. Further, it argues that transnational private law can serve an ideational function in generating communicative interventions into the sometimes normatively closed national and functional systems of contemporary society. In serving these regulatory and ideational functions, transnational private law offers a different vision of global public order in which the task for state law is not command and control to eliminate conflict either within or across systems, but rather governance within and between social systems, including through allowing and sometimes facilitating conflict and contestation. It is with this distinctive vision that this Article begins.

## I. THE VISION OF GLOBAL ORDER IN TRANSNATIONAL PRIVATE LAW

### *A. Isolating the Role of Private Law in Private Order*

By isolating the term “transnational private law,” this Article attempts to provide some focus in a field that is defined by unusually expansive objects and sources. Detlev Vagts’s pathbreaking casebook demonstrates the overwhelming range of knowledge considered relevant even for beginning stu-

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dents in the law of transnational business: basic rules of public international law, the law and institutions of the World Trade Organization (“WTO”), domestic public laws, domestic private laws, non-state norms of practice, and customized contractual norms.<sup>1</sup> For scholars such as Vagts, the designation “transnational” was used to signal this larger domain.<sup>2</sup> This Article, in contrast, focuses on “transnational private law” understood as private international law and national private laws. I deploy this narrower term to isolate the particular functions of private law inside the larger fields with the object of transnational economic activity,<sup>3</sup> including to distinguish private law from expansive (and vague) uses of *lex mercatoria*.<sup>4</sup>

### B. Private International Law and Real but Civil Conflicts

Private international law offers a distinctive vantage point for observing the transnational economic order. By private international law I mean the field of largely domestic rules principally concerned with applicable law, jurisdiction of courts, and recognition and enforcement of judgments in civil disputes with aspects that cross jurisdictional borders.

Private international law is an attractive starting point not only because of its object, but also because of its focus on “conflicts.” This focus avoids a stereotyped understanding of private law as concerned with natural market ordering or the creation of a frictionless economy.<sup>5</sup>

Private international law offers a different vision of the global order than do public international law and institutions. Traditionally private international law has not been burdened with the fixation on consent or cooperative benefits that marks subjects of public international law, including international trade regulation.<sup>6</sup> This is partly because private international law rules have largely been developed at the local level, by legislatures or courts not obliged to ground their legitimacy in a source based on international consensus.<sup>7</sup> It is also because the stakes of private international law are not the stakes of public international law. War and depression, the twin nightmares of of public international

1. See DETLEV VAGTS, *TRANSNATIONAL BUSINESS PROBLEMS* (2d ed. 1998).

2. See *id.* See also PHILIP JESSUP, *TRANSNATIONAL LAW* (1956).

3. Cf. JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000). This admirably broad volume treats private law briefly in a chapter on property and contract, although without identifying it as offering a distinctive regulatory and procedural approach to global business. Private international law hardly figures at all.

4. See, e.g., A. CLAIRE CUTLER, *PRIVATE POWER AND GLOBAL AUTHORITY: TRANSNATIONAL MERCHANT LAW IN THE GLOBAL POLITICAL ECONOMY* 16 (2003); Clive Schmitthoff, *International Business Law: A New Law Merchant*, 2 *CURRENT L. & SOC. PROBS.* 129 (1961).

5. CUTLER, *supra* note 4, at 54–59.

6. E.g., Robert Wai, *The Commercial Activity Exception to Sovereign Immunity and the Boundaries of Contemporary International Legalism*, in *TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION* 213, 228–39 (Craig Scott ed., 2001) [hereinafter *TORTURE AS TORT*].

7. See DICEY AND MORRIS ON THE CONFLICT OF LAWS 3 (Lawrence Collins ed., 12th ed. 1993) [hereinafter *DICEY & MORRIS*] (“The branch of English Law known as the conflict of laws is that part of the law of England which deals with cases having a foreign element.”).

lawyers and international trade lawyers, especially during the inter-war period,<sup>8</sup> are not the overriding concerns of private international law. Private law conflicts are instead disputes among private parties about a defective product, an accident, or a violated contract. Focusing away from the extremes of international anarchy permits a calmer view of the role of contestation and dissensus. Private international law is not about order above all other policy values. Instead it is about wrestling with real, but not system ending, conflicts among private parties.

That private international law concerns not just conflicts between private parties, but also conflicts among different state legal systems, has sometimes led to an exaggerated sense of the need for harmony and order. In the U.S. conflict of laws tradition, the legal realist deconstruction of formalist analysis clearly identified the public policy interests of societies with regard to the conflict of laws.<sup>9</sup> Governmental interest analysis remains important to U.S. conflict of laws analysis,<sup>10</sup> but in the most sophisticated understandings, relevant interests include individual concerns, social concerns, and institutional concerns.<sup>11</sup> This sensibility confuses the idea that the "interest" of states is simply in the application of their own law, or that conflicts are to be avoided at all costs. The complexity of the policy goals at stake also defies efforts to explain conflict of laws with any single-factor theory.<sup>12</sup>

Among these multiple goals, regulation and governance are a function of private international law in an era of globalization.<sup>13</sup> Varying the paradigmatic example of the Bhopal litigation,<sup>14</sup> if all jurisdictions with connections to transnational business activity readily accepted jurisdiction (which the New York court declined to do in the Bhopal case), applied a governing law with broad liability, and liberally recognized and enforced foreign civil judgments, the result would be a significantly different terrain for transnational business decisions. Actors with any cross-border contacts would face the highest applicable civil standards (driven by plaintiff choice) and might have to refrain from engaging in certain foreign conduct in order to protect against suits.

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8. *E.g.*, MICHAEL TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 20–21 (2d ed. 1999).

9. Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 *YALE L.J.* 457 (1924); E. G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 *YALE L.J.* 736 (1924).

10. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

11. *See* Joseph W. Singer, *A Pragmatic Guide to Conflicts*, 70 *B.U. L. REV.* 731 (1990); Joseph W. Singer, *Real Conflicts*, 69 *B.U. L. REV.* 3 (1989).

12. For instance, law and economics analyses of conflict of laws that focus on shared gains risk assuming away all of the main problems of conflicts. *See, e.g.*, MICHAEL WHINCOP, *POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS* (2001).

13. Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 *COLUM. J. TRANSNAT'L L.* 209 (2002).

14. *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec., 1984, 634 *F. Supp.* 842 (S.D.N.Y. 1986), *aff'd*, 809 *F.2d* 195 (2d Cir. 1987). *But see* *INCONVENIENT FORUM AND CONVENIENT CATASTROPHE: THE BHOPAL CASE* (Upendra Baxi ed., 1986); JAMIE CASSELS, *THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL* (1993).

Whatever the particular rules chosen, the point is that private international law involves policy choices with regulatory impact.

*C. Underlying Private Law: Policy Goals of Compensation and Contestation*

Identifying the regulatory function of private international law requires attention to underlying private law.

Private law encompasses many types of claims, including compensation for mass accidents through tort litigation, restitution for unjust enrichment, contractual remedies related to misrepresentation and breach of contract, and breaches of trust and fiduciary duties.<sup>15</sup> Private law claims may be an effective tool for individual or group claimants seeking compensation from other private (or public<sup>16</sup>) defendants for harm. Under the general rubric of compensation, private law serves a variety of purposes, such as restorative or corrective justice,<sup>17</sup> paternalistic protective functions,<sup>18</sup> and distributive justice among individuals.<sup>19</sup>

In addition to individual compensation, the policy goals of private law include social regulation: to provide public goods, to correct for market failure, and to contribute to social deterrence.<sup>20</sup> In the U.S. context, this potential function of private litigation is highlighted by the use of civil litigation and “private attorneys general” as a major and explicit supplement to public regulation in areas such as product safety, securities, and antitrust. Through the pursuit of their own interests, private litigants serve larger social purposes of regulation.

These compensatory and regulatory functions of underlying private law are often obscured in standard treatments of private law in a cross-border economic context, which tend to emphasize the consensual and cooperative nature of transnational relations. For example, tort law, unlike contract or property, is rarely discussed in the law and development work of the World Bank<sup>21</sup> or in studies of the new institutional economics.<sup>22</sup> Because tort harm is principally that of parties who have not been specifically anticipated and who have not had the chance to negotiate their relationship with a tortfeasor, tort is readily understood as about compensatory or restitutionary claims, and as concerned with regulation and deterrence. In Part II, I will argue that the coop-

15. For a restatement of the varied social purposes of private law, see Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: A Manifesto*, 10 EUR. L.J. 653 (2004).

16. This Article does not address private claims against foreign public actors, nor civil litigation pursued by public plaintiffs against private defendants, such as those pursued by U.S. state governments against tobacco companies.

17. See, e.g., ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

18. E.g., Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982).

19. E.g., HUGH COLLINS, *REGULATING CONTRACTS* 59 (1999).

20. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

21. E.g., WORLD BANK, *DOING BUSINESS 2004: UNDERSTANDING REGULATION* (2004).

22. See, e.g., DOUGLASS NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC GROWTH* (1990).

erative frames of contract law should also be understood as embedded in private law concerns about compensation and regulation.

A focus on underlying private law points to the importance of comparative law knowledge of foreign legal systems.<sup>23</sup> For example, one cannot really assess transnational private law in the context of the Bhopal litigation without a sense of the private laws and institutions of, at a minimum, both the United States and India.<sup>24</sup> This Article is focused on private law and litigation in U.S. venues. Partly this is for simplicity, but also because U.S. law and process have great practical relevance in the current global system.<sup>25</sup> This is not to defend the U.S. litigation regime as inherently better, nor to deny that U.S. courts' availability for transnational private litigation is subject to variation.<sup>26</sup> The "American way of law"<sup>27</sup> may be adopted because of its dominant economic, political, and ideological power, rather than inherent superiority.<sup>28</sup> Nonetheless, it seems appropriate to make transnational use of the regulatory tools of the most significant world economy and the home jurisdiction of many of the most powerful economic actors. More importantly, private law may be a necessary tool of regulation and governance in a transnational order that resembles the fragmented regulatory authority of the U.S. domestic order, as will be discussed below.

## II. TRANSNATIONAL PRIVATE LAW AND THE CONSTITUTION OF GOVERNANCE PROCESSES OF PRIVATE ORDERING

Transnational private law is one among multiple regimes of cross-border governance, but one distinguished by its particular mode of governance: indirect intervention through private contestation and ordering. Through private law, the state offers a set of background norms and processes that can be used by private parties to make claims against each other. The state has a necessary role in this plural system, but it forgoes dominant "command and control" regulation, and acts rather as a kind of indirect "facilitative" actor.<sup>29</sup>

23. There are significant forces pushing toward harmonization of underlying laws—through treaties, model laws, non-state customary standards, and judicial borrowing—but the process is very far from complete. See Mayo Moran, *An Uncivil Action: The Tort of Torture and Cosmopolitan Private Law*, in TORTURE AS TORT, *supra* note 6, at 662.

24. There was much dispute regarding these issues at the time of the Bhopal litigation and also among academic commentators since then. See, e.g., Marc Galanter, *Law's Elusive Promise: Learning from Bhopal*, in TRANSNATIONAL LEGAL PROCESSES 172 (Michael Likosky ed., 2002).

25. See, e.g., TORTURE AS TORT, *supra* note 6 (expanding the debate to consider venues other than the United States).

26. Restraints can come from courts, as in the cautious approach to the Alien Tort Statute. See *Sosa v. Alvarez-Machain*, 124 U.S. 2739 (2004). They can also originate in legislation, as in the recent bill passed by the U.S. Senate with respect to class actions. See Stephen Labaton, *Senate Approves Action to Curb Big Class Actions*, N.Y. TIMES, Feb. 11, 2005, at A1.

27. ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

28. In this sense the theories of Robert A. Kagan, a socio-legal scholar of U.S. adversarial legalism, meet the analysis of Robert Kagan, foreign policy commentator of U.S. power. See Robert Kagan, *Power and Weakness*, 113 POL'Y REV. 3 (2002).

29. COLLINS, *supra* note 19, at 65.

### A. Private Law and Reflexive Regulation Enabled

The role of private law as a background to private disputing softens the distinction between transactions and litigation. Both litigation of tort claims in state courts and contractual provisions that customize procedures between parties can be viewed as forms of regulatory procedures.

Contractual relations are exemplary of the idea of reflexive regulation.<sup>30</sup> Typically contract law mandates very little by way of the content of contractual relationships; rather the parties are left to negotiate and articulate for themselves the guiding norms of their relationship. This can be done through standards articulated specifically for these parties or by referencing some or all of the norms of customary practice—such as the customs of a particular trade, of an ethnic community, or of an expert body or institution.

In the cross-border context, this can be particularly important. Conflicts between different regimes or ambiguities in applicable state standards can be addressed through contractual negotiation.<sup>31</sup> Even the lacunae of applicable law can be dealt with through the work of parties and their attorneys.<sup>32</sup> More comprehensively, the governing law can be designated through a choice of law clause.

Similar contractual freedom exists with respect to procedures for monitoring and enforcement.<sup>33</sup> State law provides a background dispute settlement procedure involving the opportunity to make a claim in court for damages or equitable relief. However, even here parties in contemporary international transactions can customize further, for instance through the use of forum selection clauses to direct their dispute settlement to the courts of a particular jurisdiction. Finally, parties can choose alternative dispute settlement, ranging from conciliation to compulsory arbitration.

### B. Private Law and the Foundations of *Lex Mercatoria*

Reflexive measures of monitoring, dispute settlement, and enforcement can be as disciplinary or regulatory as state systems, and are sometimes more effective and efficient.<sup>34</sup> Moreover, negotiated relations can be a vehicle for the regulation of behavior with respect to third parties. For example, major retailers can be seen as advancing social regulation if they can negotiate or compel their subcontractors to comply with process production standards for environmental or labor conditions.<sup>35</sup>

30. *Id.* at 65–69; GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 115–19 (1993).

31. Doreen McBarnet, *Transnational Transactions: Legal Work, Cross-border Commerce and Global Regulation*, in *TRANSNATIONAL LEGAL PROCESSES* 98, 100 (Michael Likosky ed., 2002).

32. *Id.*

33. For example, a contract for the international sale of goods can set out procedures for examination, notice, and chance to cure with respect to non-conforming goods. *See, e.g.*, United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, art. 37–39, 48, 1489 U.N.T.S. 59, 65–68.

34. COLLINS, *supra* note 19, at 56–96.

35. *See, e.g.*, Francis Snyder, *Governing Economic Globalisation: Global Legal Pluralism and European Law*, 5 *EUR. L.J.* 334 (1999). Such regulation of contracting and sub-contracting relations can be linked to

The control of private actors over both the substance and process of regulatory relationships is central to the renewed focus on the separation from state processes of international business practice, the most recent version of the decades-old debate concerning *lex mercatoria*. In Teubner's striking analysis, the combination of the substance of merchant law with the processes of international commercial arbitration is viewed as a prime example of how global functional systems are generating "global law without a state."<sup>36</sup> Functional systems—such as business systems, human rights systems, and labor systems—replace state systems in primary social significance and develop a separate and autopoietic normative character in the generation and enforcement of regulating norms. For critics, this is an alarming turn, signaling the creation by business of a "global state of exception" from the rule of law.<sup>37</sup>

This is a useful theoretical insight as to the global pluralism of social systems and its implications for norm generation and application. As an empirical matter, however, the systems view of global society exaggerates the amount of sociological and normative separation among systems. There remains significant overlap in both membership and subject matter. For example, global labor is entwined with systems of global business. Moreover, functional systems are cut across by ethnicity and nationality, creating phenomena such as cross-border business networks of overseas Chinese actors.<sup>38</sup> It seems misleading to characterize global legal pluralism as anything other than a set of overlapping systems defined by functional, ethnic, and national lines.

Perhaps because the purity of such systems is exaggerated, the claimed normative separation of transnational business systems from state law is also exaggerated.<sup>39</sup> Even if merchant parties rarely litigate, they are aware of and act in accordance with background private law as well as merchant norms. In this sense, there has not been a transnational liftoff of global business from domestic legal orders.<sup>40</sup> In addition, private law, such as tort law, is used by parties affected by transnational business conduct, but not governed by the terms or processes of a negotiated private ordering. In sum, private law continues to play a significant role in the regulation of private orders, and in the normative contestation among private orders.

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NGO and civil society actions such as consumer boycotts. See NAOMI KLEIN, *NO LOGO: TAKING AIM AT THE BRAND BULLIES* (1999).

36. Gunther Teubner, "Global Bukovina": *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE* 3 (Gunther Teubner ed., 1997).

37. William Scheuerman, *Economic Globalization and the Rule of Law*, 6 *CONSTELLATIONS* 3, 6–8 (1999).

38. See, e.g., *RULES AND NETWORKS: THE LEGAL CULTURE OF INTERNATIONAL BUSINESS TRANSACTIONS* 325–420 (Richard Appelbaum et al. eds., 2001). It is notable that in the otherwise brilliant volume, *GLOBAL LAW WITHOUT A STATE*, *supra* note 36, that ethnicity is barely mentioned.

39. See Wai, *supra* note 13, at 265–68.

40. For more on transnational liftoff, see *id.*

### III. TRANSNATIONAL LITIGATION AS A REGULATORY PROCESS IN THE GLOBAL ORDER

Transnational private law in national courts may be able to leverage its role as a necessary "touchdown" point for international economic transactions into a transnational regulatory role. For example, transnational tort litigation seeking compensation from multinational corporations can be interpreted as an effort to "ground" processes of self-regulation that straddle national boundaries.<sup>41</sup> Transnational private law may have further significance as well because private law has procedural advantages over processes of public regulation and governance, particularly in a fragmented global society.

#### A. *Transnational Private Law and Problems of Global Representation*

A turn to private law processes can be understood in the context of broader problems of representation and governance in transnational society. The idea that private law processes may provide better tools of governance is highlighted by the work of Robert A. Kagan on adversarial legalism as a distinctively "American" way of law and politics.<sup>42</sup> For Kagan, U.S. policymaking and dispute resolution are characterized by contestation in the form of law (legal rights, duties, procedures, enforcement, penalties, litigation, and/or judicial review) combined with litigant activism (contestation dominated by disputing parties or interests, often acting through lawyers).<sup>43</sup> Kagan includes private litigation as a major form of adversarial legalism.

Kagan notes that adversarial legalism can be a costly, uncertain, and distributively problematic means of regulation.<sup>44</sup> But he connects its use in the United States to its appropriateness in a political culture that provides for extensive governmental protection but also mistrusts government; the result is fragmented governmental authority and relatively weak hierarchical control.<sup>45</sup> Kagan identifies some virtues of this system in empowering social interests and the excluded and in influencing public and private actors to act more effectively and justly.

The significance of private law as a regulatory tool depends on the comparative effectiveness of alternative processes. After decades of deregulation and privatization, private law has renewed significance as a form of regulation.<sup>46</sup> Moreover, pressures on public regulation are intensified by restraints on national regulatory powers contained in international agreements (most notably, international trade agreements such as those of the WTO or international investment treaties) as well as the broader forces of globalization.<sup>47</sup>

41. *Id.* at 265–66.

42. KAGAN, *supra* note 27.

43. *Id.* at 9.

44. *Id.* at 29–33.

45. *Id.* at 35.

46. CUTLER, *supra* note 4, at 28–29.

47. This issue is neatly, albeit problematically, summed up by the notion of "new constitutionalism,"

In addition to these recent pressures, the use of domestic public regulation for transnational regulation is hampered by the weak representation of foreign interests and values inside domestic public regulatory processes.<sup>48</sup> At the supranational level, there are few political processes or institutions with fully effective public regulatory authority. Comprehensive international regulation is consequently impeded by collective action problems such as regulatory gaps, free-rider problems, and regulatory competition, as well as genuine differences in regulatory preferences.<sup>49</sup> The result is a global “society” with a fragmented governmental authority and with relatively weak hierarchical control—the very conditions that Kagan identifies as explaining the turn to adversarial legalism as an alternative mode of governance.

*B. The Advantages of Transnational Private Law as a Representative Process*

Transnational private law claims might sometimes provide a more accessible and effective point of access for disadvantaged foreign groups or individuals than would domestic legislative or administrative processes. While claims under public processes such as human rights claims or appeals to public regulators to regulate corporate actors in their foreign conduct are also possible, there are often severe practical impediments to effective extraterritorial regulation by national regulators. Local regulators may not pursue the case because of industry capture, inefficiency, shortage of resources, or restrictive ideological conditions. It can be very difficult to convince public officials or local bureaucrats to devote time and resources to complaints concerning foreign interests or values.<sup>50</sup>

In such contexts, court-based private law strategies may offer better access to the regulatory process. Private law claims are initiated and articulated by the complaining party and not by public regulators. Civil damage awards, including awards of punitive damages where available, are potentially far larger than the maximum or realistic levels of fines imposed by state officials. The relative distance of the adjudicator from majoritarian politics may lead to different results.<sup>51</sup> For example, an adjudicator in a private law claim in na-

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which constrains state power from “above.” See, e.g., David Schneiderman, *Investment Rules and the New Constitutionalism*, 25 *LAW & SOC. INQUIRY* 757 (2000).

48. Eleanor Fox, *Global Markets, National Law, and the Regulation of Business—A View from the Top*, in *TRANSNATIONAL LEGAL PROCESSES* 135 (Michael Likosky ed., 2002).

49. *Id.* See also Wai, *supra* note 13, at 250–58.

50. Bypassing blocked local venues is a key strategic use of international human rights. See *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse et al. eds., 1999). See also Craig Scott & Robert Wai, *Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational Private Litigation*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 287 (Christian Joerges et al. eds., 2004) (describing such a use of international human rights both across national boundaries and between public and private systems of law).

51. COLLINS, *supra* note 19, at 84.

tional courts may have background, sentiments, or ideologies that are more liberal and internationalist than the general population.<sup>52</sup>

Furthermore, politics through private national courts may have different results because of the normative character of law as a realm of argumentation and justification. Adjudicators are typically required to hear and engage the evidence and arguments of both sides. In contrast, domestic regulators, politicians, and the general population rarely directly engage, or even encounter, injustices abroad, often because of geographical or other form of distance. Faced with detailed evidence of particular claims made by individuals, a domestic judge or a local jury may be more sympathetic than when the injustices or problems are too vast or not as salient.

Procedurally, private law may also offer helpful options, such as contingency fee arrangements and pro bono representation, to assist foreign parties with access to local venues.<sup>53</sup> Private litigation claims may be better able to make helpful connections to minority pockets of representative sympathies inside other states, for example among civil society groups. Transnational private law claims—whether a particular piece of litigation or the development of norms or standards—can clearly be part of the strategy of civil society groups. Moreover, such legal claims and campaigns can often help facilitate the building of transnational advocacy networks<sup>54</sup> and other countervailing transnational civil society groups, thereby fostering broader processes of transnationalism.

While not capable of overcoming fundamentally parochial attitudes, private law litigation might help to bridge a structural gap or historical lag between political processes and underlying popular attitudes and sympathies across borders. Public reactions to foreign disasters have often outstripped and pressured official governmental reactions.<sup>55</sup> Rising moral and political expectations of others and of ourselves may accompany increasing global material interdependence,<sup>56</sup> but puncturing entrenched interests and old habits of the heart may require additional venues for contestation. Law, including private law,

52. Robert Wai, *In the Name of the International: The Supreme Court of Canada and the Internationalist Transformation of Private International Law*, 39 CAN. Y.B. INT'L L. 117, 143–55 (2001). Of course, local judges may be biased against foreign parties. *But see* Kevin Clermont & Theodore Eisenberg, *Commentary: Xenophilia in American Courts*, 109 HARV. L. REV. 1120 (1996).

53. *SEE CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA* (Austin Sarat & Stuart Scheingold eds., 2001).

54. MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998).

55. *See, e.g.*, *A Surge in Donations Outpaces Expectations*, INT'L HERALD TRIBUNE, Jan. 3, 2005, at 5. A similar gap between popular sentiments and government positions can be seen in the mass protests against war in countries whose governments supported the recent intervention in Iraq. *See* Tariq Ali, *Recolonizing Iraq*, 21 NEW LEFT REV. 5 (May–June 2003).

56. Theorists of international justice have been arguing the normative relevance of actual increased interdependence for some time. *See, e.g.*, CHARLES BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* (1979).

might be part of that contestation and could perhaps contribute to the reconstruction of the emotive-sentimental foundations of our current world order.<sup>57</sup>

#### IV. COMMUNICATION, NORMS, AND INFORMATION: THE IDEATIONAL FUNCTION OF TRANSNATIONAL PRIVATE LAW IN A TRANSNATIONAL ORDER OF COMPETING NORMS

The last observation suggests a further “ideational” or “communicative” function of transnational private law in a fragmented transnational order. In this role, private law assists in the circulation of ideas and norms among social systems, be they different functional areas, different identity groups, or different jurisdictions. This accords with a Habermasian vision of global political order as embedded in a lifeworld that “forms, as a whole, a network composed of communicative actions.”<sup>58</sup>

##### *A. Litigation as Jamming or Branding*

Cases such as the Bhopal litigation or the litigation concerning Unocal’s oil production in Burma<sup>59</sup> are not solely concerned with obtaining an award for damages, or even imposing pressure for a settlement, but also with publicizing and exposing corporate conduct.<sup>60</sup> More generally, such cases are part of an effort to intervene in the broader political debate about corporate social responsibility in the global economic system. International relations scholars increasingly identify the importance of norms not just in narrow functional terms, but also in their role in framing and constructing national interests.<sup>61</sup> This function may be especially significant during the current period of flux in the processes of transnational governance.<sup>62</sup>

The communicative or ideational function of private action has been articulated with respect to the communicative acts of civil society groups such as peace and environmental movements. These methods include a diverse array of direct and indirect action that does not always involve public regulation, such as “culture jamming.”<sup>63</sup> The communicative nature of such civil

57. See COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION (Pheng Cheah & Bruce Robbins eds., 1998); Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993, at 111 (Stephen Shute & Susan Hurley eds., 1993).

58. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 354 (William Rehg trans., MIT Press 1996) (1992).

59. See, e.g., *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997).

60. Consider how litigation provided an important basis for the civil protest that emerged around the Nigerian oil activities of Shell or surrounding the defense against the McDonald’s libel action in Britain. See KLEIN, *supra* note 35, at 387–93; JOHN VIDAL, *MCLIBEL: BURGER CULTURE ON TRIAL* (1997).

61. See FRIEDRICH KRATOCHWIL, RULES, NORMS, AND DECISIONS ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS (1989).

62. See Scott & Wai, *supra* note 50.

63. There can also be intricate interplay between social protest and public action. See BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE (2003).

action is demonstrated clearly in anti-branding campaigns.<sup>64</sup> In this context, private law complaints, including litigation, can be, *inter alia*, a mechanism for shining light upon private conduct, convincing third parties to join a boycott, or publicizing state inaction.

### B. Litigation and Information Flow

An important part of litigation is its use in the circulation of information into global public spheres. Litigation can dislodge information from an otherwise inaccessible private party, for example through discovery obligations in civil procedure. Release of information may also occur where burdens of proof are reversed because of the difficulty for plaintiffs of ascertaining detailed evidence on internal or past procedures.<sup>65</sup> Information generated through litigation can also be useful for third parties.<sup>66</sup> The loss of this public information function is one of the costs of channeling private dispute resolution into arbitration, which is generally confidential.<sup>67</sup>

### C. Policy Argumentation and Contestation Within Private Law

Transnational private litigation can also be understood as performing a critical ideational function in global governance by generating challenges to dominant normative frameworks of world politics. In this vision, transnational private law may contribute to the contestation of insular normative systems, including (a) networks of business actors; (b) closed national legal and political regimes; and (c) international institutions with particular normative practices. This conception of private law actions fits with views of the contemporary transnational order as a system of countervailing networks and systems.<sup>68</sup>

Teubner's work on social systems as autopoietic normative systems highlights that different functional systems tend to be dominated by distinctive kinds of framing rationalities and argumentative discourses.<sup>69</sup> This picture of a world of multiple normative systems raises the question of how these different systems can come into contact and influence each other. In systems analysis,

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64. E.g., KLEIN, *supra* note 35; Mark Dery, *Culture Jamming: Hacking, Slacking, and Sniping in an Empire of Signs*, 25 OPEN MAG. PAMPHLET SERIES 1 (1993). See Robert Wai, *Countering, Branding, Dealing: Using Economic and Social Rights in and Around the International Trade Regime*, 14 EUR. J. INT'L L. 35 (2003) (making a similar argument about the use of international human rights law in the trade regime).

65. COLLINS, *supra* note 19, at 89–90.

66. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999).

67. Scheuerman, *supra* note 37, at 8.

68. See KECK & SIKKINK, *supra* note 54. See also ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (describing a web of transgovernmental networks, including the circulation of ideas and processes among private law judges).

69. Gunther Teubner, *Altera Pars Audiatur: Law in the Collision of Discourses*, in *LAW, SOCIETY AND ECONOMY: CENTENARY ESSAYS FOR THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE 1895–1995* 149, 152 (Richard Rawlings ed., 1997) (identifying discourses of "politicisation, moralisation, scientification and economisation").

the law, including private law, is one normative system where this contact occurs. Private law attempts to recognize the social reality of other systems, such as economy or science, in order to maintain its relevance, but this comes at the cost of challenges to its own normative coherence.<sup>70</sup> Elsewhere, I have argued that transnational private law can be viewed as having clashing structures of policy argumentation not unlike the collision of policy discourses that Teubner describes as characterizing law more generally.<sup>71</sup> No single rationality or discourse dominates private international law and private law; rather, there is an array of different goals and priorities that generate a force field of policy concerns.<sup>72</sup>

Because of this orientation toward plural values and interests, transnational private law is a venue for the contact and mutual influence of different systems. Like other forms of law, it may be a "sluice" for the communication of ideas.<sup>73</sup> In this role, private law as state law may claim the greater legitimacy of a system with a normative commitment to procedural fairness and justice among all of the various interests and values of society.<sup>74</sup>

At the same time, because private law depends on private initiative to bring, frame, and sustain claims, it may help to generate normative deliberation that cannot be achieved through pre-emptively managerial public regulation and paternalistic social welfare law.<sup>75</sup> In this respect, private law may contribute to the democratic opinion- and will-formation that depends on "supplies coming from the informal contexts of communication found in the public sphere, in civil society, and in spheres of private life."<sup>76</sup>

#### *D. Normative Contestation Among and Across Contemporary Normative Orders*

Beyond contestation inside private law, transnational private law should also be understood to encourage contestation among and across other normative orders. Although "collision of discourses" can occur inside open systems, Teubner emphasizes the separate and autopoietic aspect of functional systems other than the law, where there can be only indirect normative influence on each other through "co-evolution."<sup>77</sup> The result seems to be a "heterarchy" of norm-pro-

70. TEUBNER, *supra* note 30, at 100–06.

71. Scott & Wai, *supra* note 50, at 290–91. Cf. Teubner, *supra* note 69, at 156–59.

72. Cf. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 95 (2000).

73. HABERMAS, *supra* note 58, at 354–58.

74. For example, Habermas observes, "The constitutional structure of the political system is preserved only if government officials hold out against corporate bargaining partners and maintain an asymmetrical position that results from their obligation to represent the whole of an absent citizenry, whose will is embodied in the wording of statutes." *Id.* at 350. See generally *id.* ch. 8.

75. *Id.* at 407–08. Habermas refers to possible use of private law remedies, including in the liability area, although he seemingly concludes that private law is too narrow and inaccessible to the public. *Id.* at 411.

76. *Id.* at 352.

77. TEUBNER, *supra* note 30, at 61–65.

ducing systems, in which contestation would seem to rely principally on contestation among countervailing social processes.<sup>78</sup>

In contrast with this elegant model, I believe there is more cross-contamination at the normative level inside each social system, not just within state legal systems.<sup>79</sup> In a complex transnational context, any single normative system will involve contestation among cross-cutting interests of multiple actors and networks.<sup>80</sup> The cross-cutting and open texture of normative systems creates the possibility that transnational private litigation and transactions could act as linkage and transmission points for contesting dominant but problematically insular values inside other normative systems, whether those are functional systems, parochial national political systems, or other legal regimes. Transnational private law may frame normative challenges to policy frameworks that dominate other regimes, by specifying contradictions and ambiguities in those frameworks, by identifying legitimate but ignored social purposes, and by realizing workable alternatives that are not hampered by exaggerated traditional concerns, such as for state sovereignty. In this task, litigants may be able to align with and empower minority or latent critical normative strands of other systems. These functions of legal arguments are demonstrated by, for example, the use of international social and economic rights arguments by non-state actors in and around the trade regime<sup>81</sup> and the "migration" of human rights norms into and out of private law settings.<sup>82</sup>

#### V. DECENTRALIZED COORDINATION AND TRANSNATIONAL COMITY IN A PLURAL SYSTEM

By way of conclusion, this Article asks how transnational private law institutions should act in light of their distinctive regulatory and ideational functions in a world of plural normative fields.

Transnational private law institutions cannot assume total control, since private law depends on private ordering and private claims. Indeed, much of its distinctive strength for purposes of regulation and normative contestation comes from the reliance on private ordering and initiative. Effectiveness in such an indirect form of governance requires an intricate balancing of incentives for non-state actors. This is evident with respect to setting the rules for contractual bargaining (including special rules in particular sectors such as consumer contracts or employment contracts), but also in non-contractual con-

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78. Gunther Teubner, *Foreword: Legal Regimes of Global Non-State Actors*, GLOBAL LAW WITHOUT A STATE, *supra* note 36, at xiii.

79. I would thus apply Teubner's model of law as a conflict of rationalities or collision of discourses to the description of non-legal normative systems. See TEUBNER, *supra* note 30, at 104-06; Teubner, *supra* note 69.

80. In this regard, I would argue that Teubner takes a wrong (if productive) turn toward systems analysis and away from the more complex overlapping groups analysis of his mentor Rudolf Wietholter. See TEUBNER, *supra* note 30, at 108.

81. See Wai, *supra* note 64.

82. See Scott & Wai, *supra* note 50.

texts. For example, what mix of substantive and procedural rules will facilitate the best compensatory and social deterrence results with respect to products liability? Should punitive damages be added as a remedy? Treble damages? Reversed burdens of proof? Class actions?

The effectiveness of transnational private law also depends on what is happening in other regimes of regulation and governance at both the domestic and international level. The task for private law varies, for instance, depending on whether public regulation at the international or domestic level is working well. There are a number of ways to conceive of this task of private law. For example, transnational private law might be a kind of "jurisdictional interface."<sup>83</sup> Or we might again turn to conflict of laws for inspiration. Christian Joerges has for some time used a conflict of laws framework to understand the relation between multiple normative systems in European and global contexts; his work emphasizes the reality of the policy stakes of each system's norms, the need to avoid reducing the complex nature of the conflict of among system norms, and attention to the legitimacy of the different systems.<sup>84</sup> Teubner invokes the idea of "intersystemic" conflict of laws to capture the way in which negotiation and adjustment as between systems can occur even in the face of complexity. In Teubner's model, conflict of laws models suggest, for example, that state laws might resist juridification of conflicts between social subsystems, balance interests among social spheres rather than individuals, and resist the effort to unify emerging specialized subjects of law.<sup>85</sup>

Craig Scott and I have tried to argue for a more activist conception of the role of private law courts in a process of *transnational comity* with respect to transnational corporate liability and human rights concerns.<sup>86</sup> Courts would consider what is happening not only in other courts at other levels, but also in the different levels of political process. For example, we see transnational comity in the decision by U.S. courts to restrain civil tort actions against German companies for forced labor during World War II because of the negotiated agreement establishing the German "Foundation for Remembrance, Responsibility and the Future." But comity should not obscure that transnational private litigation was an important part of the overall social process. In this sense, comity is an awareness of the norms and processes of other systems (state or functional), not blanket deference.<sup>87</sup> Sometimes precisely what is needed is a domestic private law process in order to fill a regulatory or communications gap in the transnational society. And sometimes what is needed is to pro-

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83. David Leebron, *Lying Down with Procrustes: An Analysis of Harmonization Claims*, in HARMONIZATION AND CHANGE, TWENTY-FIFTH ANNUAL WORKSHOP ON COMMERCIAL AND CONSUMER LAW 1, 3 (Jacob Ziegel ed., 1995), cited in CUTLER, *supra* note 4, at 224–25. This recalls John Jackson's early characterization of the General Agreement on Tariffs and Trade as an "interface" system. JOHN H. JACKSON, THE WORLD TRADING SYSTEM 218–21 (1989).

84. See, e.g., Christian Joerges, *The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective*, 3 EUR. L.J. 378, 396–407 (1997).

85. TEUBNER, *supra* note 30, at 107–15.

86. Scott & Wai, *supra* note 50, at 309.

87. Cf. Joel Paul, *Comity in International Law*, 32 HARV. INT'L L.J. 1 (1991).

vide for a creative overlap of venues, not their perfect rationalization. A mix of regimes might then apply, and indeed there can be a need for the blending of provisions or processes among different systems.<sup>88</sup> The blend of applicable norms should be understood to include both state and other forms of "governing" norms.<sup>89</sup>

In this vein, transnational private law institutions cleverly strategize in light of other systems, blending elements of disaggregated systems and acting as flexibly and pragmatically as do parties in creating their private orders.<sup>90</sup> The wide-ranging and plural approach to transnational business problems thereby proves a promising approach not just for business actors, but for governance in transnational society more generally.

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88. In international business law, *dépeçage*, which refers to the situation in which different governing laws are applicable to different parts of a complex transaction, exemplifies such mixing. See, e.g., Rome Convention on the Law Applicable to Contractual Obligations, June 19, 1980, arts. 3(1), 4(1), 1605 U.N.T.S. 80, at 81-82; DICEY & MORRIS, *supra* note 7, at 1205-08 (on *dépeçage*).

89. A nascent form of this self-conscious mixing of processes may have been evidenced in the Bhopal litigation where the court, staying the action in New York for reasons of *forum non conveniens*, imposed a number of conditions on its stay, including that Union Carbide submit to the jurisdiction of the Indian courts and consent to the broad discovery procedures available under U.S. rules of civil procedure. *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in Dec. 1984, 634 F. Supp. 842, 852, 867 (S.D.N.Y. 1986), *aff'd*, 809 F.2d 195 (2d Cir. 1987).

90. See *McBarnet*, *supra* note 31.