

Post-Regulatory Law: Chronicle of a Career Foretold

Peer Zumbansen*

Faculty Seminar, McGill University Faculty of Law, February 18, 2009

Abstract: Casting a transatlantic, comparative glance at the legal theoretical discourse in both Germany and the United States first during the 1970s and 1980s, the paper traces the emergence and evolution of 'post-interventionist', 'post-regulatory' law, as expressed by concepts such as legal pluralism, 'responsive' and 'reflexive' law. The paper attempts to explore the strange turn and usurpation of these originally progressive projects into a market-oriented functionalist agenda towards the end of the 20th century by contrasting the intellectual project that fed into these theoretical and critical enterprises with the rise of 'law & economics' and the more recent turn to 'social norms', which form such disturbing heirs to an itself critically minded law reform project that had found its inspirations in anti-formalism, legal sociology, access to justice and legal pluralism. At present, when emotions over regulation, enforcement and oversight are running high, a formula such as 'more state, less market', offered in response to the current crisis, comes across as strangely oversimplified when compared to the efforts that have been informing the legal theoretical imagination in the past. As the paper's title plays with those of Gabriel Garcia Marquez' book 'Chronicle of a Death Foretold' (1981) and of Gunther Teubner's article 'Regulatory Law: Chronicle of a Death Foretold' (1992), it may be seen as an invitation to reflect on the promises and fate of legal sociological and legal theoretical thinking of law today.

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I. Introduction

In midst a rapidly unfolding and spreading financial crisis, which many hold to be the worst since the Great Depression of 1929¹, scholarly assessments of market regulatory instruments are prone to be highly volatile, experimental in nature at best. Not particularly well equipped to quip about 'I told you so's'² or 'I should have known's'³, lawyers, working in the primarily affected areas of banking and securities regulation, corporate governance and accounting, find themselves struggling with contradicting evidence from 'experts' right and left. Much of the retrospective wisdom presented by economists, accountants and market analysts, turns on the in/predictability of the current situation and there seems to be a collective, if increasingly coy⁴ remembering of the exaltation and 'irrational exuberance' of times and actions not so long ago. Those that have not (yet) lost house or job but instead, enjoy the privilege of observing and interpreting these 'interesting times'⁵, find themselves pondering, it seems, about responsibilities for the emphatically embraced views that, for example, house prices could only rise, or that markets could provide not only sufficient incentives to managers to keep stock performance on an upward surge but also provide for the necessary oversight and control. It is within these confinements that current thinking yearningly looks to the past, gloomily observes the present and – in a strangely heartened and resolved manner – sets out to dream up the future. And it is in the centre of the current attempts to address, explain and overcome the crisis, that conceptual and institutional suggestions are running high. Plus ça change, plus c'est la même chose?

The risks that lie at the heart of the current inquiry into the crisis present a particular set of challenges. In fact, the evidence is too strong that the current situation grows out of a larger complex of contributing elements, which are not adequately squeezed beneath the sub-prime & mortgage collapse alone. Financial innovation, as it skyrocketed over the last decades, a development that had begun hundreds of years ago with the brazen invention of insurance schemes⁶, set free a truly mind-boggling sphere of risk-taking opportunities. Taking stock today, mortgage lending, while tremendously concentrated and over-heated and thus prone to implosion⁷, only formed part of a seemingly insatiable expansion of borrowing and lending activities concerning commercial real estate, commodities and international equities.⁸ As the first 'lessons' are being drawn and the first sets of calls for speedy but comprehensive, swift but thorough reform made, it is fast becoming clear that the risk of the financial surge of the last 15 years has and will be borne by investors who in an absolutely disillusioning manner had everything 'on the line'. Yet, a closer look at the investors who are said to have lost their homes and their income soon reveals that in fact many of these investors had already been in a miserable position well before the bubble burst. The close linkage between so-called defined contribution (401-K) plans in the U.S. and the particular corporate finance/governance regime that exclusively focused on a company's short-term performance on the stock market, made of most employees de facto investors. As retirement savings were put into corporate stock, which became reinvested and commodified, these 'savings' became crucially exposed to the volatility of the market. The insecurity of employees' old age investments was only exacerbated through the increasingly aggressive role played by institutional investors, above all, by pension funds that are often plagued by short-term orientation and their fund managers' brief tenure.⁹ The current 'crisis', in fact, continues but does not constitute a long-term decline of retirement security.¹⁰ This has important repercussions for any identification and assessment of the risk(s) connected with the current financial situation.

Close up, the picture of the current crisis is in fact one of many layers and shades. This provides a formidably humbling context for any search for responses, remedies, solutions. Complementing the current inquiry into systemic risk and its management, just touched upon, *institutionally*, then, the talk today is concerned with the need for a 'strong' hand, and the inevitability of 'intervention', of 'more' and of 'better' control and oversight. It is this widely shared sense of emergency out of which grow the suggestions for general toughness and diligence. This paper takes issue with this enthusiasm for institutional responses, the creation of tougher rules, new monitoring agencies and more severe accountability. It does so for the simple reason that things are not that simple.¹¹ Striking evidence for the complexity of the situation and, correspondingly, of the regulatory concepts and instruments that we are in need of developing is provided by the history of the regulatory state itself. This paper will briefly touch on the development of regulatory law during and after the height of the regulatory state in Western Europe, if only to illustrate the deeply complex landscape of direct and indirect regulation, by government agencies, courts, private parties and numerous organizations that fit nicely neither in the public nor the private arena. While this is well known

generally¹², it is certainly true for the examples of financial regulation, capital market law and corporate governance¹³, just to mention a few from a fast evolving transnational regulatory landscape.

So, are Gunther Teubner and the idea of reflexive law¹⁴ to blame for the current financial crisis that many associate with the exorbitant degree of liberalization and deregulation? Are post-Welfare State approaches to a more responsive, adaptive and learning form of law¹⁵ responsible for the triumph of the market and the situation we find ourselves in now? Has the time come for a 'return of the state', and if so, what would we really mean by that? In an attempt to answer these questions, the paper takes its cue from an idiosyncratic debate in German legal-sociological scholarship in the 1970s and 1980s about an alleged 'regulatory crisis of law'. It takes this debate as a starting point to explore various contexts in which doubts about the place, role and function of law keep recurring. The aim of this exploration is to reflect on the generalizable elements of a particularly situated debate. In other words, the German debate about 'juridification'¹⁶, which soon gave way to a heated dispute about the merits of concepts such as 'autopoietic' and 'reflexive law', serves as a prism through which to study the 'whys' of this concrete debate in a larger context. That context is partly constituted in a comparative dimension. A glance at the contemporary legal theory developments in the U.S. reveals striking parallels between the German negotiations of a post-interventionist law and the American investigations into more 'responsive' modes of legal regulation.¹⁷ Beneath this fight over names, however, certainly lay a much more complexly woven texture of instruments and semantics that, in both of these examples of highly matured regulatory systems, were caught up in dramatic transformations.¹⁸ The fast evolving regulatory states of the WWI and Interwar era would only be the forerunners of the extremely fragile constitutional and administrative arrangements that would follow and that were and continue to be faced with the pressures of increasingly complex societies and a globally integrating economy. The evolving modes of regulation have been read to closely mirror the changing paradigms of state and society, so that much of our understanding of law remains caught up in these particular narratives.

With view to the contextual determinations and shapings of particular regulatory experiences, the interest of the lawyer in these narratives aims at trying to discern a better understanding of the project of law as studied through the trials and tribulations of legal regulation. Looking back in time and to the outside, the comparativist is tempted to ask whether there is any additional value in comparing regulatory experiences between country A and B beyond that to find what one was looking for in the first place.¹⁹ Yet, even if we understood the thrust of comparative legal theory to consist in allowing us to gain a better look at ourselves²⁰, this would perhaps still be only a limited view on how law evolves. A more intriguing perspective might be gained by looking at different legal systems from a transnational perspective. In that respect, law would have to be studied as a continuously evolving set of arrangements, questions, arguments and even regulatory patterns that, while observable as producing distinct

crystallizations with regard to semantics, institutionalisations and the formation and development of instruments in different 'places', could be traced across jurisdictional boundaries, without being confined by 'sharp boundaries and systemic features.'²¹ With differing degrees of emphasis on the normative weight of evolving regulatory patterns in a transnational realm²², a quest to understand the migration of legal ideas, the cross-pollination of rules and standards becomes the most promising perspective from which to study the relation between law and non-law.

The paper thus posits to move from a comparative to a transnational perspective when studying the evolution of law in a transforming regulatory landscape. A distinctly transnational perspective on legal regulation implies in a first step the recognition of local, determining and shaping features of particular legal-regulatory structures. In a second step, however, it implies a deconstruction of these features in two directions: one is taking its cue from a number of different disciplinary approaches, including legal sociology, legal pluralism, but also economic sociology and new institutionalism, in order to undermine the view that a regulatory crisis of law must be seen as an expression of law's failure or weakness. If we understand law as a particular mode of social regulation, its regulatory 'crisis' should more adequately be assessed as something, which is inherent to law, namely to its claim of bringing a particularly normative concept to bear on a social context. The 'crisis' is law's regular challenge to 'get it right', to convincingly claim that its legalizing grip of the problem is adequate. Whether or not we assert that there is a crisis of law, depends on our expectations of the law: it is here, where there occurs an intriguing congruence of critique of the legal project, say, by Eugen Ehrlich and Sally Merry, Max Weber or Richard Swedberg, but also by social norms theorists such as Eric Posner or Richard McAdams.

The different normative claims made with respect to law by these scholars, then, allow us to deconstruct the 'local' and 'contextual' in another sense: while the particular critique that legal sociologists, legal pluralists or social norms theorists are making with respect to the functioning of law is regularly developed in a very concrete reference framework²³, the transnational dimension unfolds precisely with respect to the particular functional boundaries of the areas out of which the concrete examples are taken. The case of contract law regulation provides a striking illustration of this: while particular, national histories of contract law doctrine form the reference points for heated disputes over formalism, functionalism, paternalism etc, the regulatory field of contractual governance is not confined to these boundaries at all. Contractual governance partakes in the ongoing transformation of market regulation on a truly transnational scale: it is against the prominence of contract as the law of the market²⁴ on both a national and global level²⁵ that we see how the regulation of contractual governance, through private and public, direct and indirect means, has long ceased to be a French, German or American concern. The transnational perspective on the study of law implies the combination of a stubbornly repeated closing in on particular learned local histories with all its noises and silences, inclusions and exclusions, on the one hand and the incessant opening up of these histories to parallels occurring around them.²⁶

In the following, I will briefly review the challenges of law as they are perceived through the lens of globalization (II). While it is in this context that the image is most pertinently being painted of a situation in which law is eroded in a process of globalization, along with the state's loss of sovereignty, I intend to read the ongoing investigation into the role of law in the context of 'global governance' as an invitation to reflect about the correlation between national and transnational law. The next part (III.) will provide a brief sketch of the parallel critiques mounted against regulatory law in Germany and the U.S.²⁷ before further investigating how these histories might be exploited for a better understanding of the evolving transnational regulatory landscape (IV).

II. Is there Room, Role or Need for Law in a Globalized World?

A. Places and Spaces, Whither Law?

The question whether there is any room, role or even a need for law in a globalized world lies, admittedly, at the bottom of much of the present engagement with global governance issues. As I want to argue in the following paper, this alleged crisis of law and legal regulation, whether depicted as a loss of state sovereignty or as a problem of lacking (democratic, political) accountability²⁸ and legitimacy²⁹, should be understood as a particular amplification of a problem with law that has long been in the coming. In that respect, it can be shown that many of our present concerns about the fate of law in relation to a continuing transformation of the state and the herewith connected challenges to 'models of democracy' and issues of legitimacy and accountability must be assessed against the background of a reconstruction of legal evolution in the national, local context. Without suggesting that the legitimacy and regulatory challenges connected with the 'amorphous' concept of global governance³⁰ are simple restatements or mirror reflections of locally experienced moments of exhaustion³¹, there is a particular role to be played by local, domestic regulatory experiences for the conceptualisation of global governance regimes. The role of law occupies a particularly challenging place in this inquiry, in particular because the rise of globalization is so often associated if not with the demise of law³², then with an immense pressure on law and legal institutions. What is argued in the following is that globalization can be understood as an invitation to reflect on the connections between our attempts to make sense of a fragmented global, transnational normative order and our particular, yet anything but homogenous experiences with law and regulation on the national level. In short, then, the paper contends that globalization does not pose the first advent of a 'crisis of law', understood as a tool of regulation. Instead, the varied history of law reveals the intricate combination of hubris and fragility, violence and vulnerability that underlies the idea and experience of law.

Yet, while there is arguably much to learn from studying law against the background of a particular, national, historical context³³, the transnational or, post-national constellation

(Habermas) further exacerbates the scope of this inquiry. Much suggests that the particular nature of the transnational arena defeats our attempts at understanding the relation between the national and the 'post-national constellation'³⁴ as a linear one – either on a chronological or a systematic level.³⁵ But, at the same time, the evolving transnational nature of regulatory regimes as, for example, in labour³⁶ or corporate law³⁷, presents itself not as an opposition or negation, but as a challenge to reassert the place and role of law. Reconceiving of law as transnational suggests that domestic experiences with law are crucial reference points. Yet, they cannot serve as reference points of institutional or normative design, which could simply be rediscovered in or transposed onto the transnational arena. This approach points towards two investigative strands. One is that the inquiry into the evolution and, eventually, crisis of law as regulation of social activity has to attempt the reconstruction as an ironic project concerned with the meaning and aspiration of law: it is here where the positing of law is directly challenged by its negation. This constellation can be grasped as the relation or tension between law and non-law, between legality and legitimacy, between law and justice, society, or other.³⁸ The reconstruction of local (e.g. national) experiences with law as constantly challenged by its opposite or its foundations, embeddedness or contestations forms one strand of the following inquiry.³⁹

The second investigative strand is to return to the original starting point of our reflections of law challenged by globalization. In this dimension we are concerned with the task of adequately incorporating or, perhaps even acknowledging the gap between the particular context in which norms and the normative environments have evolved locally on the one hand, and the emerging, allegedly unruly spaces of normative order on the global level on the other. In this context I want to suggest to reflect on the field of transnational law, which has been offered to capture the hybrid regulatory between the national and the international⁴⁰, as a methodological device rather than a more or less definable legal field. Approaching transnational law from a methodological perspective should help us in refraining from too quickly depicting the 'transnational' as a distinct regulatory space, which would differ from the national and the international due to its de-territorial scope and its hybrid, public-private constitution. Instead, transnational law could be perceived as a particular perspective on law as part of a society that can itself not sufficiently be captured by reference to national or de-nationalized boundaries. The lurking, systems theoretical element in this proposal does, however, not go far enough: whereas Luhmann famously questioned the fate of law in a global context⁴¹, other scholars in his footsteps have been making a number of constructive suggestions to think 'law without the state', fruitfully pointing to the normative evolutions occurring within emerging transnational regulatory regimes.⁴²

Yet, these advances can arguably be pushed even further. The attempts at understanding transnational law as a methodological inquiry into the nature of norms ties this inquiry directly back into a longstanding investigation into the nature of law – and its contestations. The transnational dimension, then, does not arise with respect to territorial or, jurisdictional confines, but purely from the perspective of following the

institutional modes of norm creation deep into highly specialized areas of societal activity. From the point of view of systems theory, these areas are constituted in functionalist terms. As the functional differentiation of society leads to a radical unfolding of *society as world society*, the challenge for law consists in existing and operating in a disembedded mode, without a known, sophisticated institutional and normative framework.⁴³ The current assertions on this and that side of the Atlantic of a global administrative or general public law speak volumes of this challenge.⁴⁴

While this uncoupling of social systems from a state-associated framework of political, economic and legal order certainly presents a dramatic challenge to state-based theories of law, its real gist lies in fact elsewhere. The uneasy relationship between 'society' and 'world society', between the national and the global or, transnational, should not be seen as a threat but as an inherent element in the constitution of legal spaces. From this perspective, transnational refers to the 'other' of the law, which challenges but simultaneously recognizes its locally learned relations to concrete structures of embeddedness, to particular experiences of historical evolution and contextual differentiation. Transnational law, then, is a way of questioning and reconstructing the project of law between places and spaces. This perspective, however, raises hopes for a realization of the project of law, which would necessarily have to be understood as having a recoverable, revivable emancipatory potential. What, if that were not the case? What, if the fragility of law would win the day, if law's corruptibility would prevail over its absurdly stubborn insistence on its existence, its *raison d'être*?

B. Law and the State: Reminisces, Lessons, Obsessions

As recently highlighted again by Florian Hoffmann, the state occupies a particular place in our legal imagination.⁴⁵ 'Our', however, refers to a particularly European context, in which the development of law has been tied to the evolution of the modern state.⁴⁶ It is against this background that Hoffmann observes that "the very omnipresence of the state both as a phenomenon and as a theory makes the quest to locate it all the more difficult, for there seems to be no way, at least within reasonable limits of time and space, to determine where to start, where to end, and which particular story of the state to tell. As hinted above, most of today's academic social science and some of the humanities disciplines are premised on it, most notably law, both in its domestic (constitutional) and international variant; political science with its political theory and comparative politics branches and its now mostly independent off spring of international relations; sociology and general social theory; (macro-) economics; and, of course, general history. It thus becomes almost impossible to localize *it* within this analytical cacophony; though, to some extent, it is precisely this omnipresence that makes the state rather ephemeral, deeply implicating the (social scientific) observer's perspective in the phenomenon to be observed, with all the limitations as to objectivity this implies."⁴⁷ This reflection provides a helpful perspective on the particularly state-oriented reading that lawyers in the European tradition have been giving the state.

From their perspective, the evolution of law as a regulatory tool in the latter half of the 20th century can provide ample opportunities to reflect on the way in which law has been asserting itself as a reformist, emancipatory, empowering tool on the one hand⁴⁸, and as a deeply violent, usurping, off-setting force on the other. Indeed, its contesting, opposing nature cannot be imagined without that which threatens to consume and suffocate it. The sobering fate of social-reformist legal theories in the aftermath of the regulatory welfare state and, in particular, their embrace of the functionalist enactment of the moderating or 'enabling state' at the end of the century⁴⁹ has given some reason to be sceptical towards placing too much hope in law as weapon, voice or as a tool of resistance. The turn of responsive, reflexive law programs in highly mature constitutional cultures into flexible regulatory programs that accompanied a growing distrust in state regulation and political-reformist legal theory in the name of efficiency⁵⁰ presents a formidable challenge to the post-Welfare State depictions of 'alternatives to law'.⁵¹

Again, the 'outside' perspective of globalization proves helpful in further sharpening our investigative focus: the extremely unsure fate of social and political rights in transnational spaces underscores the challenge that lawyers face in pursuing law as a critical project in an increasingly integrated world. In the emerging global spaces of highly specialized functional societal activities, both legal and political power have fared very differently from economic power. The weakness of the former in relation to the long undeterred success of the latter is reflected in the persistent absence of an effective global legal-political order. In this space, the transposition of legal instruments and concepts, which were developed on the domestic level, onto the level of regulating cross-border transactions – both public and private⁵² – occurs as a translation exercise. Not only is the institutional crystallization of the global space intimately interwoven into local structures while facilitating a disembedded self-regulatory, highly dynamic space, but the same tension between place and space repeats itself with regard to the normative dimension.⁵³

III. Things we lost?

The preceding observations point to an assessment of things we (allegedly) lost as a layered account that is informed by a double perspective on legal memory. One story of loss is directly linked to the difficulties of translating both institutions and concepts from the national to the transnational level. This well-known story, however, is not only not the only one, it is also quite misleading: it is misleading in the sense that it invisibilizes the inherent fragility of law that is existent 'before' globalization. The now lamented erosions of sovereignty, democracy or legitimacy, depicted as being closely connected to the state's loss of regulatory ability in particular to govern transnational activities, can be read as a reversal of what has been a longstanding critical stance towards law. The depiction of an allegedly external influence, globalization, coming over nation states, national governments and political actors from the outside to off-set previously existing

institutional and normative arrangements invisibilizes the degree to which all such arrangements had always been contestable and fragile from the beginning. Reminding us of Martti Koskenniemi's depiction of the reversal of emergency and normal in the justificatory debates over the Kosovo intervention⁵⁴, the image of globalization as threat to the sovereignty of the state and the unity of law washes over the highly contested grounds on which either has always been resting.⁵⁵ In order to explore this contention further, the next section briefly connects the current investigations about the fate of law in the transnational context back the critique levelled against the regulatory state during the 1970s and 1980s.

A. Law as Learning about Non-Law

Ongoing developments in transnational regulatory areas suggest an intriguing transformation of the role of legal regulation. While scholars in the different variations of new institutional economics⁵⁶ on the one hand and of behavioural economics on the other⁵⁷ provide for important insights into the sticky nature of institutions and mindsets that shape economic development, there has been relatively little attention given to the evolving forms and instruments of legal regulation. This is particularly regrettable as a more engaged dialogue between law and the named theoretical orientations in economics would likely result in more satisfying answers to the questions that seem to stubbornly seem to surround the institutionalist explanations of complex situations.⁵⁸ Where such dialogue is initiated on the part of open-minded economists, important insights have been gained with regard to the relevance of 'social norms', routines and practices that, due to their complex, context-driven nature, are not easily fitted into a legal rights regime as applied by a contract adjudicating judge.⁵⁹ This 'discovery of social norms by law & economics' scholars⁶⁰, however, has left some stones unturned. Namely, the economist bias in the identification of social norms that underlie parties' behaviour leads to a narrow view on the nature and scope of such norms. By contrast, it would seem more promising to take the inquiry into the social foundations of contract law, as Durkheim already early on circumscribed his investigative agenda⁶¹, further. A decisive step into this direction would be to reflect on the connections between the 'social norms' that govern business partners' behaviour now⁶² and then.⁶³ For one, such a drawing of connections would allow us to appreciate on the evolutionary character of the legal form. As the studies by Macaulay and others that eventually found their way into the famous Materials on 'Contract Law in Context' at Wisconsin⁶⁴ show, the discovery of informal agreements, routines and attitudes among 'contracting' parties was not understood as undermining or substituting law. Instead, the importance of these studies has to be seen in their authors' insistence that these findings must be taken to transform and, eventually, improve law. Instead of juxtaposing law and social norms, the 'relational contract' and 'law in context' scholars emphasized the intertwined nature of both. The current assessments of social norms that govern business people's behaviour are at great distance from these earlier findings.⁶⁵

As relational contract law sought to integrate the constantly changing and evolving nature of social relations into the legal form in order to understand law as relational (or, “social”⁶⁶), we are currently faced with the question how law adapts to or, more appropriately, how law formulates legal responses in a fast evolving, functionally differentiated, complex environment. There is another opportunity not yet grasped by contemporary ‘social norms’ scholars in the law and economics camp. This concerns the rediscovery of studies in ‘legal pluralism’ and ‘legal anthropology’ from the 1970s and 1980s. Such an exercise is promising in at least two respects. For one, the legal pluralists and anthropologists contributed greatly to a better understanding of the semi-autonomous nature of legal fields: as pioneered in her 1976 article⁶⁷, Sally Moore’s analysis of law being constituted in part by social norms, routines, customs and practices and in part by hard legal regulation, the notion of law as a semi-autonomous field proved of vital importance in opening our eyes for the intricate relations between the regulator and concrete, local, intimate social spaces.⁶⁸ Striving for alternatives to the at times heavy-handed social engineering by the legal machinery, scholars called for extra-legal activism⁶⁹ and delegalization.⁷⁰

Such a growing understanding of the tensions between ‘lifeworld and system’ (Habermas), ‘the raw and the cooked’ (Lévi-Strauss), or ‘core and periphery’ (Sousa-Santos) would soon become instrumental in the critical assessment of the role of legal regulation in a highly pluralistic society during the middle of the 20th century, which until then had remained very much within the intellectual and conceptual confines of Max Weber’s distinction between substantive and formal rationalities of law. In his astute analysis of law’s evolution from substantive to formal rationality along with the emergence of the bureaucratic rule of law, Weber identified on the one hand the stabilizing role of law for the conduct of commercial (and other) affairs, while, on the other, recognizing the potentially harmful effects of the ever-recurring anti-formal tendencies on the body and practice of law.⁷¹ Weber’s sensibility to the contestations, the anti-rational, material challenges to the allegedly formal edifice of law turned out to be foretelling of the ensuing evolution of legal regulation well into the highly sophisticated regulatory architectures of Western welfare states⁷², plagued by a purposive and intentional regulatory overdrive.⁷³ It comes as no surprise, then, that the reflection on the place of law in a canon of voices of social ordering that lawyers and social theorists in North America were concerned with⁷⁴, was somewhat echoed by the critique of ‘instrumental’ and ‘regulatory’ law in an overly zealous Welfare State apparatus in Western Europe.⁷⁵

On both sides of the Atlantic, the responses to the financially and normatively exhausted Welfare State⁷⁶ soon split into progressive⁷⁷ and conservative⁷⁸ camps, and this context is worth bearing in mind when assessing today’s academic and political proposals in the wake of the financial crisis. In the context of the late 1970s and early 1980s, that saw a far-reaching crumbling of social-democratic policy and a growing scepticism with Keynesian economics, a fairly ambitious theoretical proposal was made that aimed at the resituating of law into a more accentuated model of society: in this

model, which did not lend itself to a straight-forward ideological appropriation, society is composed of intersecting, but separated communications that are each constituted by a distinct terminology (“code”). Law was to be understood as one of these social systems – along with ‘economy’, ‘politics’, ‘religion’, or ‘art’.⁷⁹ On the basis of this position, Gunther Teubner introduced the concept of ‘reflexive law’, a form of law that would be characterized by a crucial exposure to its surrounding systems, while it remained ‘operationally’ closed. Due to its ‘cognitive’ openness, however, law must constantly receive impulses, ‘irritations’ and, relying on its autopoietic nature, formulate legal responses, i.e. continue its systematic operation. In the face of the weakening welfare state and the growing frustration with ineffective, undemocratic, and over-generalizing and paternalizing regulatory laws, the concept of reflexive law was offered to explain the particular challenge and form of legal regulation in a complex world. Its not uncontested⁸⁰ core consisted of understanding law as being taken out of a learned institutional context made up of official institutions authoritatively creating state-originating laws and, instead, to be forced to reassert itself in highly diversified complex environments.⁸¹ This radicalization of law’s functional orientation constitutes a new stage in the assessment of law’s institutional form, as it has been learned over time. Whereas law is still today most often associated with the state, already the legal sociological work at the turn of the century⁸² as well as the legal pluralist work since the 1960s and 1970s (Moore, Griffiths, Galanter, Merry, Sousa Santos) should long have undermined this stubbornly held belief in the law-state nexus.

Yet, the present turn away from the state and to the market crucially employs the very methodological orientations that informed the reconstructive legal projects in the face of a financially and normatively exhausted welfare state in the 1980s. The fragile reconstructions of law through the concepts of responsive or reflexive law on both side of the Atlantic eventually fed into a large scale rejection of state ‘intervention’ all throughout the 1980s and 1990s. The politically progressive scholars in the 1970s and 80s had turned to alternative modes of legal regulation seeking to translate law’s generality into contextual, learning forms of socio-legal regulation. Their hope had been thereby to save the political ambitions of the welfare state, while continuing the socio-political debate over the substance and direction of political intervention. In contrast, today’s neo-formalism and neo-functionalism threatens to cut the ties between current quest to answer the challenges of globalization and the previous struggles over law and politics. Its proponents characterize legal regulation as inappropriately policy-driven and as undue infringement of the societal actors’ capacity to regulate their own affairs autonomously.⁸³

In the clout of neo-formalism and neo-functionalism, which characterized legal policy making in recent years, a heavy reliance on arguments of “necessity,” of “objectivity” and “naturalness” prepared the ground for a functionalist interpretation and application of legal norms in politically charged contexts experiencing fundamental shifts from public to private regulation.⁸⁴ The attack on contract adjudication and governmental “intervention” that accompanied these developments, regularly depicted a market as

originally existing without politics, without government regulation.⁸⁵ This depiction of the market and the state as separate worlds formed troubling alliances with policy recommendations that promote the privatization of public services and are often fuelled by arguments of efficiency and cost reduction.⁸⁶ Yet, whether or not, and in which forms, private actors assume formerly public regulatory functions, represents the outcome of political choices and of other socio-economic developments, that are unfolding at both the national and transnational level.⁸⁷ The allegedly available “fresh start” for societal self-regulation without state interference stands in stark contrast to the observation already made decades ago - that when market actors are enabled and empowered to exercise their private autonomy they are exercising this freedom based on a public choice.⁸⁸

While there is some reason to believe, today, that we might be entering a stage in the assessment of state and market where we have to carefully turn our attention again to the long and winded history of this relationship⁸⁹, the identification of starting points for a reconstructive project is far from obvious. As the denationalization of regulatory areas continues to pose tremendous conceptual problems for state-based theories of law, we must aim at combining our methodological inquiry into the nature of transnational law with a bold reconstruction of critical perspectives from which to discuss the need for ‘better’, ‘more efficient’, ‘tougher’ etc regulation, as is demanded today in the face of what continues to unfold as a dramatic financial and economic crisis.

B. Transnational Corporate Governance as Case in Point of Post-Regulatory Law

As is evidenced, for example, in the case of corporate governance regulation, many of today’s regulatory regimes are inescapably transnational and hybrid in nature. While we continue to study them through nationally oriented textbooks and case law, we soon learn how the rules and instruments we are dealing with are products of a far-reaching, fundamental transformation of the regulatory landscape. As corporate law is being shaped by a complex mix of public, private, state- and non-state-based norms, principles and rules, generated, disseminated and monitored by a diverse set of actors⁹⁰ and experts⁹¹, even the most casual look at today’s corporate governance debates reveals two important aspects: one is the way in which the analysis of contemporary corporate governance regulation can help us become sensitive to the emerging, new framework within which corporate governance rules are evolving, a framework which is constituted by a combination of local and transnational actors and norms, connected through ‘networks’ and migrating standards.⁹² As the still breathless research on transnational regulatory areas shows⁹³, the high degree of technicality of the regulatory subjects presents a formidable challenge to traditional, regulatory theories of law.

It is in this light, that we come to our second observation: as we begin to understand the emerging regulatory frameworks in highly specialized areas as an illustration of contemporary rule-making, we can appreciate the legal pluralist deconstruction of formal and informal legal orders in a new light. Building, on the one hand, on early legal-

sociological work by Ehrlich ('living law') and Gurvitch ('social law'), there seems to be a great promise to revisit the core question of any sociology of law, namely 'to investigate the correlations between law and other spheres of culture.'⁹⁴ Expanding the spectrum, on the other, with a view to legal pluralist work by scholars such as Moore⁹⁵, Galanter⁹⁶, Macaulay⁹⁷, Sousa Santos⁹⁸ or Teubner⁹⁹, contemporary assessments of 'hybrid legal spaces'¹⁰⁰ that are not sufficiently captured with references to local or national contexts, might help us understand better the distinctly *transnational* emergence of regulatory regimes. Again, the distinctly transnational lens allows us to study such regimes not as entirely detached from national political and legal orders, but as emerging out of and reaching beyond them. As alluded to before, the transnational dimension of new actors and newly emerging forms of norms would be able to radicalize their 'semi-autonomous' nature (Moore) in the following way: we would conceive of regulatory spaces as being marked by a dynamic and often problematically instrumentalized tension between formal and informal norm-making processes.

But, in contrast to the ever-refining sociological perspective on this evolving transnational regulatory landscape, the question of politics continues to linger painfully.¹⁰¹ Again, an example taken from the corporate law context may serve as an illustration: the much lamented, regulatory 'failure' of traditional, state-based legal-political intervention into multinational corporations (MNC) has long been serving as an argument for the need to develop either distinctly 'post-national', institutionalized governance forms or to further strengthen the grip of self-regulatory and soft instruments with only voluntary binding nature.¹⁰² Mirroring the complex, hard-to-navigate landscape of border-crossing corporate activity, the proposed conceptual approaches vary greatly. Instead of emerging as a set of coherent regulation theories, they range from 'global jurisdiction'¹⁰³, 'torture as tort' and transnational civil human rights litigation¹⁰⁴, as well as from scandalization movements including global shaming¹⁰⁵, to soft law instruments, self-binding norms, codes of conduct and best practices¹⁰⁶, altogether suggesting an irreversible trend away from 'government' to 'governance'.¹⁰⁷

As transnational governance regimes, then, fields such as corporate governance, labour law¹⁰⁸, capital market law, contract law in general and consumer protection law in particular¹⁰⁹ are increasingly marked by the existence of opt-out clauses and self-regulation mechanisms rather than being defined by enforceable hard-law rules.

No longer, it would seem, would the legal pluralist depiction of regulatory spheres as 'semi-autonomous fields'¹¹⁰ be able to provide a sufficient starting point for a more comprehensive critique of the existing machinery of justice¹¹¹: today, the original legal pluralist sword might appear too dull to cut through the distinctly post-national constellation of regulatory regimes. The opposite is true: legal pluralism can forcefully build on its learned lessons in the aftermath times of the decaying Welfare state and 'legal centralism'. While not being able to directly translate the insights gained in those contexts onto the transnational sphere, they can nevertheless assist in depicting the multifaceted nature of transnational governance. This becomes particularly evident in a

context, where in the context of an evolving political governance system such as in Europe, claims about 'private autonomy' and 'market freedom' are advanced that seem to echo many of the previous contestations of market intervention and judicial activism within the nation state.¹¹² Our renewed interest in different meanings of embedded markets is of crucial importance at a time, where the financialist paradigm seems to have outrun itself and where, in our search for a new basis and framework for public policy¹¹³ in a highly interconnected transnational regulatory, post Welfare-state era, we cannot simply return to 'More State, less market' formulas.

IV. The Transnational Transformation of the Legal Order and the Argument for Transnational Legal Pluralism

As Saskia Sassen has recently reiterated, both dryly and unrefutingly, there is an intimate connection between both the search and critique of law and the nation state.¹¹⁴ Her observation is particularly astute as Sassen has, over the years¹¹⁵, much contributed to our better understanding of how the allegedly external, victimizing, sometimes ephemeral state of 'globalization' is distinctly co-evolving with and produced, constructed and conceived within the 'national'. Instead of positing globalization as a process, event or development that comes over nation states, national economies and domestic political processes to haunt, discipline and submerge, Sassen's depiction of globalization points back to the nation state and sub-national spheres of societal activity and decision-making. It is within these spheres that elements of physical and intellectual texture emerge that coalesce to produce border-crossing 'global assemblages'. These constitute distinct spheres that, famously fuelled by the dramatic development of information technology, integrate territorial and deterritorial, vertical and horizontal ordering patterns to produce a structured regime of societal activities.¹¹⁶

Sassen's concept of 'global assemblages' constitutes a fruitful contribution to our understanding of globalization as a challenge to study the dramatic transformation of institutional and semantic structures in an era of intensifying transnational communication and governance regimes, Whereas continental public lawyers continue to depict transnationalization processes as challenges to the reassertion of 'public authority'¹¹⁷ in a world of disaggregated state power¹¹⁸, private lawyers in the European tradition appear to continue to coyly attempt an escape from the reach of the juridification/intervention thrust by demarcating 'traditionalists' from 'transnationalists'.¹¹⁹ The infatigable discussion around a European private law in general, contract law in particular, provides a telling illustration of how transnational economic and commercial activities continue to challenge a state-based model of interventionist law to adapt itself to a sphere structured by private self-regulation and political regulatory competition.¹²⁰ We can trace these tensions throughout the emerging and proliferating regulatory regimes in the transnational sphere.¹²¹

Against this background, Sassen's idea of global assemblages allows us to structure the sphere between the national and the inter-/transnational/global that has been plaguing legal imagination for some time now.¹²² continues to be depicted we are invited to take a closer look at how the global world is constructed. Her contribution can be seen in her unerring commitment to simultaneously emphasize and relativize the national in the emerging cartography of a globalized world. Sassen's emphasis on the national, *local* processes and institutions has gone a long way in allowing us to identify the concrete places at which decisions are prepared, taken and implemented that result in globalization phenomena. Her work on global cities is of particular relevance in this regard: here, Sassen, has been arguing for decades that global cities gain autonomy from their local environments both by adapting real-time collaborative and networking capacities with other cities and operative centres and by successfully demanding and implementing a facilitating, supportive infrastructure (electricity, broadband, digitisation, 24/7 service, access and maintenance).¹²³ At the same time, the depiction of the particular embeddedness of the global city in a local environment to Sassen only makes sense in connection to an appreciation of the particular *spaces* that open up in and between these concrete cities as *places*. Highlighting, in particular, the crucial role played by the breathtaking advances in information technology, that fuel space-time compression through real-time collaboration, connection, and linking of formerly distant places, actors and centres, Sassen, again in her most recent work¹²⁴, recognizes the central challenge that these changes place on the "effectiveness of current framings for state authority and democratic participation."¹²⁵

The relativization of the national basis of globalization in Sassen's work proceeds in relation to the well-known institutions, reference points and established procedures such as states, parliaments, administrative agencies and, importantly, courts. Those have long structured the economic, political and legal order and that are now struggling to re-ascertain their previously held roles and positions of power. This relativization of the local results in the discovery of a newly emerging spatial category in order to adequately capture the exhaustion of concretely localized places of legal and political regulation from the perspective of the rise in importance of hybrid institutional structures and normative orders. This constellation presents tremendous challenges to both an analytical and prescriptive framework that was developed with reference to a more or less well defined regulatory framework. The central challenge of this move from place to space consists in developing an appropriate language with which to communicate over the institutional and normative challenges in a world that cannot effectively be governed through domestic and domestically minded rules. In the emerging spaces of global societal activity the specifically legal perspective, which informs our present inquiry is challenged by a multitude of contrasting investigations into the form, nature and quality of the global order.¹²⁶ Beyond the obvious need of irony on the part of the lawyer in his/her quest to make sense of law in a globalizing world to accept the relativity of the legal perspective lies, of course, the need to understand the continuing proliferation of pluralist normative orders.

There is much in the existing observations on the transformation of regulatory regimes that points to the need to better connect seemingly disparate research and policy agendas. The parallels between legal pluralist critiques of regulatory law and investigations in economic sociology into the evolving nature of the embeddedness of markets¹²⁷ can be found again between the methodological orientation of responsive/reflexive law and the recent interest in 'social norms'. For both of these comparative inquiries, the first task consists in continuing or even initiating a dialogue between law and economics, law and sociology, law and anthropology, law and political economy. The other task consists in effectively connecting the domestic critique of law under the guise of legal realism, critical legal studies, law and economics, feminist legal studies and critical race theory, responsive, reflexive law, as well as social norms with the current debates around global administrative law, regulatory networks and transnational law. A methodological perspective on the emerging regulatory patterns would allow us to both think of them as 'fields'¹²⁸ and as challenges to our methodological starting points into studying the relation between the national and the international.

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³ Edmund L. Andrews, "Greenspan 'shocked' that free markets are flawed", *International Herald Tribune*, 23 October 2008, <http://www.ihf.com/articles/2008/10/23/business/gspan.php>

⁴ Mathew Padilla, 'Things we lost in 2008', *Orange County Register*, 26 December 2008, <http://www.ocregister.com/articles/orange-county-year-2266691-percent-sales>

⁵ Alex Tokarev, 'Interesting Times', *WORLDmag.com*, Commentary, 30 December 2008, <http://online.worldmag.com/2008/12/30/interesting-times/>; see also George Packer's wonderful reminiscence on Edmund Wilson's Great Depression journalism in *The New Yorker*, 'Edmund Wilson on the Automobile Crisis', *The New Yorker*, 24 November 2008, <http://www.newyorker.com/online/blogs/georgepacker/2008/11/edmund-wilson-o.html>

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⁷ G. Soros, *The New Financial Paradigm. The Credit Crisis of 2008 and What It Means* (Public Affairs, 2008), XV

⁸ D. W. Arner, 'The Global Credit Crisis of 2008: Causes and Consequences', (2009) *University of Hongkong, Asian Institute of International Financial Law, AIIFL Working Paper No. 3*
<http://ssrn.com/abstract=1330744>, 1

⁹ S. Jacoby, 'Finance and Labor: Perspectives on Risk, Inequality and Democracy', (2008) *SSRN Working Paper*, available at <http://ssrn.com/abstract=1020843> (in P. Zumbansen & C. Williams eds., *The Embedded Firm: Labour, Corporate Governance, and Finance Capitalism*, 2009) forthcoming, 7

¹⁰ C. E. Weller, 'Lessons from the Financial Crisis for Retirement Security: Building Better Retirement Plans. Testimony before the U.S. House of Representatives Committee on Education and Labor "The Impact of the Financial Crisis on Workers' Retirement Security"', 7 October 2008', (2008)
<http://edlabor.house.gov/testimony/2008-10-07-ChristianWeller.pdf>, 1, 2 (listing, in particular, 'limited retirement plan coverage, little retirement wealth, and increasing risk exposure of the individual')

¹¹ See the intriguing plea for straight-forward, no-nonsense laws by R. A. Epstein, *Simple Rules for a Complex World* (Harvard University Press, 1995).

¹² See only C. Sunstein, *After the Rights Revolution. Reconceiving of the Regulatory State* (Harvard University Press, 1990); M. Stolleis, *A History of Public Law in Germany 1914-1945 (Thomas Dunlop transl.)* (Oxford University Press, 2004); A. C. Aman Jr., 'Administrative Law for a New Century', in M. Taggart (eds.), *The Province of Administrative Law* (Hart Publishing, 1997).

¹³ For a highly instructive account and analysis, see C. Bumke, 'Regulierung am Beispiel der Kapitalmärkte', in K. J. Hopt, R. Veil and J. A. Kämmerer (eds.), *Kapitalmarktgesetzgebung im Europäischen Binnenmarkt* (Mohr Siebeck, 2008); C. Bumke, 'Kapitalmarktregulierung. Eine Untersuchung über Konzeption und Dogmatik des Regulierungsverwaltungsrechts', (2008) 41 *Die Verwaltung [DV]* 227-257

¹⁴ G. Teubner, 'Substantive and Reflexive Elements in Modern Law', (1983) 17 *Law and Society Review* 239-285

¹⁵ P. Nonet/P. Selznick, *Law and Society in Transition. Toward Responsive Law* (Octagon Books, 1978)

¹⁶ See the contributions to G. Teubner, 'Juridification - Concepts, Aspects, Limits, Solutions', in G. Teubner (eds.), *Juridification of Social Spheres* (Walter de Gruyter, 1987), and to R. Voigt (eds.), *Verrechtlichung* (Athenäum, 1980)

¹⁷ P. Selznick, *Law, society, and industrial justice* (Yale University Press, 1969); Nonet & Selznick (1978), *supra*.

¹⁸ A glimpse into the parallels between the American and German cases of the rising regulatory state is provided by D. T. Rodgers, *Atlantic Crossings. Social Politics in a Progressive Age* (Belknap Harvard, 1998), and M. Stolleis, *A History of Public Law in Germany 1914-1945 (Thomas Dunlop transl.)* (Oxford University Press, 2004). Another striking example is the parallel publication of E. Forsthoff, 'The Administration as Provider of Services (transl. from *Der Staat der Daseinsvorsorge*, 1938)', in A. J. Jacobson and B. Schlink (eds.), *Weimar. A Jurisprudence in Crisis* (University of California Press, 2000), and J. W. Landis, *The Administrative Process* (Yale University Press, 1938).

¹⁹ K. Zweigert/H. Kötz, *An Introduction to Comparative Law*, 3rd ed. (Oxford University Press, 1996), Ch. 1; see already the poignant critique by J. Hill, 'Comparative Law, Law Reform and Legal Theory', (1989) 9 *Oxford Journal of Legal Studies* 101-115

²⁰ G. Frankenberg, 'Critical Comparisons: Re-Thinking Comparative Law', (1985) 26 *Harvard International Law Journal (Harv. Int'l L.J.)* 411-455; P. Zumbansen, 'Comparative Law's Coming of Age? Twenty Years after "Critical Comparisons"', (2005) 6 *German L. J.* 1073-1084

²¹ H. P. Glenn, 'Comparative Legal Families and Comparative Legal Traditions', in M. Reimann and R. Zimmermann (eds.), *Oxford Handbook of Comparative Law* (Oxford University Press, 2006), 432; see also

H. P. Glenn, 'A Transnational Concept of Law', in P. Cane and M. Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003)

²² Glenn (2006), *supra*, at 438 “current flows of legal normativity in the world”; for a powerful application of ‘Legal Realism’ to a transnational reconstruction of law, see S. E. Merry, 'New Legal Realism and the Ethnography of Transnational Law', (2006) 31 *Law & Soc. Inquiry* 975-995; in an intriguing contrast, we find the study by A. Fischer-Lescano/G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', (2004) 25 *Michigan J. Int'l L.* 999-1046, where the normative content of ‘law’ is not posited as an essential orientation, but as a structural determinant, expressed in law’s particular way of addressing issues through its legal/illegal code.

²³ This is true for the seminal pieces in legal pluralism by Moore, Merry and Griffiths just as it is true for the scholarship oriented against adjudication of contract law: see S. F. Moore, 'Law and Social Change: the semi-autonomous field as an appropriate subject of study', (1973) 7 *Law & Society Review* 719-746; S. E. Merry, 'Legal Pluralism', (1988) 22 *Law & Society Review* 869-901; J. Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1-55; R. E. Scott, 'The Case for Formalism in Relational Contract', (2000) 94 *Nw. U. L. Rev.* 847-876; R. E. Scott, 'The Death of Contract Law', (2004) 54 *UTLJ* 369-390; R. E. Scott, '*Hoffmann v. Red Owl Stores* and the Myth of Precontractual Reliance', (2007) 68 *Ohio St. L. J.* 1.

²⁴ R. A. Posner, 'The Law and Economics of Contract Interpretation', (2005) 83 *Tex. L. Rev.* 1581-1614

²⁵ For a nice illustration, see K. P. Berger, 'The New Law Merchant and the Global Market Place. A 21st Century View of Transnational Commercial Law', in K. P. Berger (eds.), *The Practice of Transnational Law* (Kluwer Law International, 2001).

²⁶ For such a perspective, see the contributions in: *Governing Contracts. Public and Private Dimensions.* 14 *Indiana Journal of Global Legal Studies* 181-483 (2007).

²⁷ I have attempted a more comprehensive discussion before: P. Zumbansen, 'Law After the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law', (2008) 56 *Am. J. Comp. L.* 769-805, <http://ssrn.com/abstract=1128144>

²⁸ See, recently, J. L. Mashaw, 'Accountability and Institutional Design: Some Thoughts on the Grammar of Governance', (2007) *Yale Law School Research Paper No. 116* <http://papers.ssrn.com/abstract=924879>

²⁹ See, for example, J. Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes', (2008) *LSE Law, Society and Economy Working Papers 2/2008* <http://ssrn.com/abstract=1091783>, associating legitimacy and accountability concerns of transnational regulatory regimes with a set of “functional, democratic, normative” challenges.

³⁰ For a lament of the concept’s shortcomings in providing guidance for the development of sustainable and effective regulatory instruments, see A. Bogdandy/P. Dann/M. Goldmann, 'Developing the Publicness of Public International Law', (2008) 9 *German Law Journal* 1375-1400; in contrast, see D. Held, 'Reframing Global Governance: Apocalypse Soon or Reform!' in D. Held and A. McGrew (eds.), *Globalization Theory. Approaches and Controversies* (Polity, 2007), at 245-6, 249-254, and M. Koenig-Archibugi, 'Global governance', in J. Michie (eds.), *The Handbook of Globalisation* (Edward Elgar, 2003), highlighting the interdisciplinary challenges that are captured in the term.

³¹ J. Habermas, 'The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies [1985]', in J. Habermas (eds.), *The New Conservatism. Cultural Criticism and the Historians' Debate* [ed. and transl. by Shierry Weber Nicholsen] (MIT Press, 1989)

³² See, for example, the intriguing melancholic observation by N. Luhmann, *Law as a Social System* (K.Ziegert transl., F.Kastner, D.Schiff, R.Nobles, R.Ziegert eds.) (Oxford University Press, 2004), 497.

³³ In this regard, see the helpful comparative reconstructions of public and private law concepts by N. Jansen/R. Michaels, 'Private Law and the State. Comparative Perceptions and Historical Observations', (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht [RabelsZ]* 345-397, reprinted in: Jansen & Michaels eds., *Beyond the State: Rethinking Private Law* (2008), 15-67

³⁴ J. Habermas, *The Postnational Constellation* (MIT Press, 2001)

³⁵ See the succinct observations by W. Twining, *Globalisation and Legal Theory* (Northwestern University Press, 2000) with regard to the challenges to jurisprudence and by J. Osterhammel/N. P. Petersson, *Globalization: A Short History* (Princeton University Press, 2004) with regard to the interdisciplinary challenges of studying and deciphering 'globalization'. "The fact that historians assert with calm detachment that this phenomenon has existed for a long time does not preclude the need to make a political assessment of its impact on the present." *Id.*, at 150.

³⁶ A. Blackett, 'Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct', (2001) 8 *Ind. J. Glob. Leg. Stud.* 401-447; H. W. Arthurs, 'Labor Law Without the State', (1996) 46 *University of Toronto Law Journal* 1-45

³⁷ S. Deakin, 'Reflexive Governance and European Company Law, in: *CLPE Research Paper Series 2007*', in: available at: www.comparativeresearch.net; P. Zumbansen, 'The Parallel Worlds of Corporate Governance and Labor Law', (2006) 13 *Indiana Journal of Global Studies* 261-312

³⁸ See, for example, D. Trubek, 'Toward a Social Theory of Law: An Essay on the Study of Law and Development', (1972) 82 *Yale L. J.* 1-50; R. M. Cover, 'Nomos and Narrative', (1983) 97 *Harv. L. Rev.* 4-68; J. Derrida, 'Force of law', (1990) 11 *Cardozo Law Review* 919-1045. See now also G. Teubner, 'Self-subversive Justice: Contingency or Transcendence Formula of Law?' (2008) *Modern Law Review forthcoming*

³⁹ See, for example, B. d. Sousa Santos, 'Law: A Map of Misreading. Toward a Postmodern Conception of Law', (1987) 14 *J. Law & Soc'y.* 279.

⁴⁰ P. C. Jessup, *Transnational Law* (Yale University Press, 1956)

⁴¹ N. Luhmann, *Law as a Social System* (K.Ziegert transl., F.Kastner, D.Schiff, R.Nobles, R.Ziegert eds.) (Oxford University Press, 2004), ch. 12

⁴² See the contributions to G. Teubner (eds.), *Global Law Without A State* (Aldershot, 1997); see also the tour d'horizon (de force?) by A. Fischer-Lescano/G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', (2004) 25 *Michigan J. Int'l L.* 999-1046 with regard to particular regulatory regimes.

⁴³ N. Luhmann, 'Die Weltgesellschaft', (1970) 57 *Archiv für Rechts- und Sozialphilosophie* 1; N. Luhmann, 'The World Society as a Social System', (1982) 8 *Int. J. General Systems* 131-138

⁴⁴ See von Bogdandy, Dann & Goldmann, *supra*, note 3, and N. Krisch/B. Kingsbury/R. B. Stewart, 'The Emergence of Global Administrative Law', (2005) 68 *Law and Contemporary Problems* 15; for challenging critiques, see C. Harlow, 'Global Administrative Law: The Quest for Principles and Values', (2006) 17 *Eur. J. Int'l L.* 187-214, and B. S. Chimni, 'Cooption and Resistance: Two Faces of Global Administrative Law', (2005) *IIJ International Law and Justice Working Papers 2005/16*

⁴⁵ F. F. Hoffmann, 'In Quite a State: Trials and Tribulations of an Old Concept in New Times', in R. A. Miller and R. Bratspies (eds.), *Progress in International Law* (Martin Nijhoff, 2008)

⁴⁶ H. Berman, *Law and Revolution. The Formation of the Western Legal Tradition* (Harvard University Press, 1983), Ch. 2; see also the succinct reconstruction by N. Luhmann, 'Metamorphosen des Staates', (1995) in: *Luhmann, Gesellschaftsstruktur und Semantik. Studien zur Wissenssoziologie der modernen Gesellschaft* 101-137, who ties the evolution of the state to the institutionalization of 'collectively binding decisions', for which the state was able to rely on a 'structured through' legal culture, originating from the Church.

⁴⁷ Hoffmann, *supra*, at 266

⁴⁸ See for example, G. Frankenberg, 'Down by Law: Irony, Seriousness, and Reason', (1988) 83 *Nw. U. L. Rev.* 360; G. Frankenberg, 'Why Care? - The Trouble with Social Rights', (1996) 17 *Cardozo Law Review* 1365-1390.

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- ⁴⁹ For a critique, see K. Rittich, 'Functionalism and Formalism: Their latest Incarnations in Contemporary Development and Governance Debates', (2005) 55 *UTLJ* 853-868.
- ⁵⁰ For a reminiscence, see O. Lobel, 'The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics', (2007) 120 *Harv. L. Rev.* 937-988
- ⁵¹ See, for example, the contributions to E. Blankenburg/E. Klaus/H. Rottleuthner/R. Rogowski (eds.), *Alternative Rechtsformen und Alternativen zum Recht* (Bertelsmann, 1980), and the famous debate between Teubner and Blankenburg about the political orientation of reflexive law: G. Teubner, 'Substantive and Reflexive Elements in Modern Law', (1983) 17 *Law and Society Review* 239-285; E. Blankenburg, 'The Poverty of Evolutionism: a critique of Teubner's case for 'reflexive law'', (1984) 18 *Law & Society Rev.* 273-289; G. Teubner, 'Autopoiesis in Law and Society: A Rejoinder to Blankenburg', (1984) 18 *Law & Society Rev.* 201-301.
- ⁵² See already P. C. Jessup, *Transnational Law* (Yale University Press, 1956).
- ⁵³ D. Schneiderman, 'Transnational Legality and the Immobilization of Local Agency', (2006) 2 *Annual Review of Law and Social Sciences* 387-408, 404: "What is called for here is an opening up, rather than concealment, of the spaces and places through which the legal order of economic globalization can be politicized, interrogated, and rolled back."
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- ⁵⁵ P. Fitzpatrick, 'Terminal Legality? Human Rights and Critical Being', in P. Fitzpatrick and P. Tuit (eds.), *Critical Beings. Law, Nation and the Global Subject* (Ashgate, 2004), 128: "With the rule of law, then, there can be no thing 'before' the law, nothing that rules with, through or instead of it. It presents itself as 'pure' or empty form devoid of 'significance' as to its content."
- ⁵⁶ E.g., D. C. North, *Understanding the Process of Economic Change* (Princeton University Press, 2005); D. C. North, 'Capitalism and Economic Growth', in V. Nee and R. Swedberg (eds.), *The Economic Sociology of Capitalism* (Princeton University Press, 2005); E. A. Posner, *Law and Social Norms* (Harvard University Press, 2000).
- ⁵⁷ See, e.g., C. Sunstein, 'Social Norms and Social Roles', (1996) 96 *Colum. L. Rev.* 903-968; C. Sunstein (eds.), *Behavioural Law & Economics* (University of Chicago Press, 2000); C. Jolls, 'Behavioral Law and Economics', in P. Diamond (ed.), *Economic Institutions and Behavioral Economics* (Princeton University Press, 2007), with responses by Ian Ayres and Christoph Engel.
- ⁵⁸ See, e.g., the discussion by P. A. David, 'Path Dependence and varieties of learning in the evolution of technological practice', in J. Ziman (eds.), *Technological Innovation as an Evolutionary Process* (Cambridge University Press, 2000); and by S. Deakin, 'Evolution for our Time: A Theory of Legal Memetics', (2002) *ESRC Centre for Business Research, University of Cambridge Working Paper No. 242 (also published in 55 Current Legal Problems 2002, pp.1-42)* at www.cbr.cam.ac.uk/pdf/WP242.pdf
- ⁵⁹ E. A. Posner, *Law and Social Norms* (Harvard University Press, 2000), 156; R. E. Scott, 'The Death of Contract Law', (2004) 54 *UTLJ* 369-390; R. E. Scott, 'Hoffmann v. Red Owl Stores and the Myth of Precontractual Reliance', (2007) 68 *Ohio St. L. J.* 1
- ⁶⁰ R. C. Ellickson, 'Law and Economics Discovers Social Norms', (1998) 27 *J. Leg. Stud.* 537-565
- ⁶¹ E. Durkheim, *The Division of Labor in Society [1893; transl. by W.D. Halls]* (Free Press, 1984)
- ⁶² R. E. Scott/G. G. Triantis, 'Anticipating Litigation in Contract Design', (2006) 115 *Yale L. J.* 814-879
- ⁶³ S. Macaulay, 'Non-contractual Relations in Business: A Preliminary Study', (1963) 28 *American Sociological Review* 55-67; S. Macaulay, 'Private Legislation and the Duty to Read – Business Run by IBM Machine, the Law of Contracts and Credit Cards', (1966) 19 *Vand. L. J.* 1051
- ⁶⁴ See, e.g., R. W. Gordon, 'Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law', (1985) *Wisconsin Law Review* 565-579

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⁶⁶ R. Wiethölter, *Rechtswissenschaft* (Fischer, 1968), 168

⁶⁷ S. F. Moore, 'Law and Social Change: the semi-autonomous field as an appropriate subject of study', (1973) 7 *Law & Society Review* 719-746

⁶⁸ For a discussion and elaboration, see only J. Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1-55

⁶⁹ For a brief historical account, see O. Lobel, 'The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics', (2007) 120 *Harv. L. Rev.* 937-988.

⁷⁰ M. Galanter, 'Justice in many rooms: Courts, Private Ordering and Indigenous Law', (1981) 19 *J. Leg. Pluralism* 1-47

⁷¹ M. Weber, *Rechtssoziologie. Aus dem Manuskript herausgegeben und eingeleitet von Johannes Winkelmann*, 2.A. (Hermann Luchterhand, 1967), § 8: (*Die formalen Qualitäten des modernen Rechts*)

⁷² G. Teubner, 'Substantive and Reflexive Elements in Modern Law', (1983) 17 *Law and Society Review* 239-285, 253: "Substantive rationality emerges in the processes of increasing state regulation. It is commonly associated with the growth of the welfare state and state intervention in market structures [...]. The justification of substantive law is to be found in the perceived need for collective regulation of economic and social activities to compensate for inadequacies of the market."

⁷³ Id., at 254: "Substantive Law is realized through purposive programs and implemented through regulations, standards, and principles."

⁷⁴ See, e.g., P. Selznick, *Law, society, and industrial justice* (Yale University Press, 1969).

⁷⁵ R. Voigt (eds.), *Verrechtlichung* (Athenäum, 1980); K.-H. Ladeur, "'Abwägung" - ein neues Rechtsparadigma? Von der Einheit der Rechtsordnung zur Pluralität der Rechtsdiskurse', (1983) 69 *ARSP* 463-483; G. Teubner, 'Regulatory Law: Chronicle of a Death Foretold', (1992) 1 *Social & Legal Studies* 451

⁷⁶ J. Habermas, 'The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies [1985]', in J. Habermas (eds.), *The New Conservatism. Cultural Criticism and the Historians' Debate* [ed. and transl. by Shierry Weber Nicholsen] (MIT Press, 1989)

⁷⁷ H. Rottluthner, 'The Limits of Law: The Myth of a Regulatory Crisis', (1989) 17 *Int'l J. Sociol. L.* 273

⁷⁸ F. A. Hayek, *The Mirage of Social Justice [Law, Legislation and Liberty. A new statement of the liberal principles of justice and political economy, vol. 2]* (The University of Chicago Press, 1976)

⁷⁹ N. Luhmann, *Rechtssoziologie* (1980), 3. Aufl. (Westdeutscher Verlag, 1987); N. Luhmann, 'Law as a Social System', (1989) 83 *Nw. U. L. Rev.* 136-150; N. Luhmann, *Law as a Social System* (K.Ziegert transl., F.Kastner, D.Schiff, R.Nobles, R.Ziegert eds.) (Oxford University Press, 2004)

⁸⁰ E. Blankenburg, 'The Poverty of Evolutionism: a critique of Teubner's case for 'reflexive law'', (1984) 18 *Law & Society Rev.* 273-289; I. Maus, 'Perspektiven "reflexiven Rechts" im Kontext gegenwärtiger Deregulierungstendenzen', (1986) 19 *KJ* 390-405; N. Luhmann, 'Einige Probleme mit "reflexivem Recht"', (1985) 6 *Zeitschrift für Rechtssoziologie* 1-18

⁸¹ G. Teubner, 'Substantive and Reflexive Elements in Modern Law', (1983) 17 *Law and Society Review* 239-285

⁸² E. Ehrlich, *Fundamental Principles of the Sociology of Law* (orig. published in German as *Grundlegung der Soziologie des Rechts*, 1913) (Russell & Russell, 1962); G. Gurvitch, *Sociology of Law* (orig. published in French as *Problèmes de la sociologie du droit*) (Routledge and Kegan Paul, 1947)

⁸³ See, for example, R. E. Scott/G. G. Triantis, 'Anticipating Litigation in Contract Design', (2006) 115 *Yale L. J.* 814-879.

84. A. C. Aman Jr., 'Administrative Law for a New Century', in M. Taggart (eds.), *The Province of*

Administrative Law (Hart Publishing, 1997).

85. See F. H. Knight, 'Some Fallacies in the Interpretation of Social Cost', (1924) 38 *Quarterly Journal of Economics* 582-606. "The system as a whole is dependent on an outside organization, an authoritarian state, made up also of ignorant and frail human beings, to provide a setting in which it can operate at all." *Id.*

86. For a critique, see A. C. Aman Jr., 'The Limits of Globalization and the Future of Administrative Law: From Government to Governance', (2001) 8 *Ind. J. Glob. Leg. Stud.* 379-400.

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88. M. R. Cohen, 'Property and Sovereignty', (1927) 13 *Cornell L. Q.* 8-30.

⁸⁹ See, for example, J. Beckert, 'The Great Transformation of Embeddedness. Karl Polanyi and the New Economic Sociology', (2007) *Max-Planck-Institut für Gesellschaftsforschung/Max-Planck-Institute for the Study of Societies, MPIfG Discussion Paper 07/1* ; M. J. Piore, 'Second Thoughts: On Economics, Sociology, Neoliberalism, Polanyi's Double Movement and Intellectual Vacuums', (2008) *Society for the Advancement of Socio-Economics, Presidential Address July 22*

⁹⁰ See, for example, the overview at www.ecgi.org, and www.transnationalcorporategovernance.net.

⁹¹ J. Köndgen, 'Privatisierung des Rechts. Private Governance zwischen Deregulierung und Rekonstitutionalisierung', (2006) 206 *AcP* 477-525; T. M. J. Möllers, 'Europäische Methoden- und Gesetzgebungslehre im Kapitalmarktrecht. Vollharmonisierung, Generalklauseln und soft law im Rahmen des Lamfalussy-Verfahrens zur Etablierung von Standards', (2008) *Zeitschrift für Europäisches Privatrecht* 480-505, 485; P. Zumbansen, 'The Privatization of Corporate Law? Corporate Governance Codes and Commercial Self-Regulation', (2002b) *Juridikum* 136-145

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⁹⁵ S. F. Moore, 'Law and Social Change: the semi-autonomous field as an appropriate subject of study', (1973) 7 *Law & Society Review* 719-746

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⁹⁹ G. Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism', (1992) 13 *Cardozo L. Rev.* 1443-1462; G. Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?' in C. Joerges, I.-J. Sand and G. Teubner (eds.), *Constitutionalism and Transnational Governance* (Hart Publishing, 2004)

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- ¹⁰⁴ C. Scott, 'Introduction to Torture as Tort: From Sudan to Canada to Somalia', in C. Scott (eds.), *Torture as Tort* (Hart Publishing, 2001); C. Scott, 'Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms', in C. Scott (eds.), *Torture as Tort* (Hart Publishing, 2001)
- ¹⁰⁵ A. Fischer-Lescano, 'Globalverfassung, Verfassung der Weltgesellschaft', (2002) 88 *Archiv für Rechts- und Sozialphilosophie [ARSP]* 349-378
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- ¹¹⁰ S. F. Moore, 'Law and Social Change: the semi-autonomous field as an appropriate subject of study', (1973) 7 *Law & Society Review* 719-746; J. Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 1-55; S. E. Merry, 'Legal Pluralism', (1988) 22 *Law & Society Review* 869-901
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- ¹¹⁴ S. Sassen, *Territory - Authority - Rights. From Medieval to Global Assemblages* (Princeton University Press, 2006), 1: "We are living through an epochal transformation, one as yet young but already showing its muscle. We have come to call this transformation globalization, and much attention has been paid to the emerging apparatus of global institutions and dynamics. Yet, if this transformation is indeed epochal, it has to engage the most complex institutional architecture we have ever produced: the national state."

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¹¹⁸ A.-M. Slaughter, 'Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks', (2004) 39 *Government and Opposition* 159-190; A.-M. Slaughter, *A New World Order* (Princeton University Press, 2004)

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¹²⁵ S. Sassen, *Territory - Authority - Rights. From Medieval to Global Assemblages* (Princeton University Press, 2006), 328

¹²⁶ See for this only the still excellent exposition of the interdisciplinary nature of globalization studies: D. Held/A. McGrew (eds.), *The Global Transformations Reader. An Introduction to the Globalization Debate (2000)*, 2nd ed. (Polity, 2003), Introduction.

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¹²⁸ See again P. Bourdieu, *Les structures sociales de l'économie* (Seuil, 2000), in particular ch. 2 "Principes d'une anthropologie économique", 233-251, and the Post-scriptum "Du champ national au champ international", 271-280.