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## REMARKS: TRANSNATIONAL LEGAL ORDERS AND GLOBAL REGULATORY NETWORKS

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I am grateful for the opportunity to participate in this year's Brussels Global Law Week and the International Francqui Symposium on "Global and Transnational Law Today." My thanks to the Perelman Center, the 50<sup>th</sup> anniversary of which we also celebrate, and to Gregory Lewkowicz and the Université libre de Bruxelles.

My task today is to consider transnational legal orders and global regulatory networks. I undertake this task with some trepidation. The subject of translational legal orders, of global governance, and of global regulatory networks, has captured the imaginations of academics and theorists—and that is an easy matter, indeed for an intellectual class easily diverted by new and shiny intellectual baubles with which to play. That is why we are assembled here. To some extent, the task is impossible. Usually the undertaking ends before it begins. We spend endless hours arguing over definitions. At some level this is important—not for the naming inherent in definition—but for the curious ability of definition, and the categories it creates, to affect the character of the reality of the thing defined, and so defined, ordered. Definitions produces categories, categories produce ordering, and ordering produces orthodoxy. The orthodoxies thus created give rise to the usual normative and methodological consequences—a hierarchy of values and a priesthood (now a bureaucracy) to maintain and protect the ordering framed. Legitimacy thus inhabits the heart of the project of definition, and reminds us of the fundamental importance of definition to the ordering of the reality that exists around us. The shiny baubles we intellectuals play with have many sharp edges and they can cut quite easily. We are willing to risk injury precisely because categorical analysis is societally useful for inventing the boundaries, rituals and rules of legitimacy through which, when appropriately socialized through education and institutionally protected through assertions of communal power, we organize well-functioning communities of individuals however arranged.

Definitional issues remain in flux, to some extent, because of the contemporary context in which definition is attempted. At its heart, all efforts to analyze contemporary approaches to transnational legal orders, or to global law or governance networks, requires us to indulge in academic futurism. It requires the articulation of theories and the descriptions of reality that are impossible to know or understand or predict precisely because they are not yet formed. *That exercise itself produces paradox.* Though articulation is impossible with any sort of certainty or rigor, *the act of articulation is itself an indispensable component—an instrument—that can be used to legitimate strategies that create or advance “realities on the ground.”* But those strategies are substantially beyond the control of the theorists on which strategy is based. This recalls Dwight D. Eisenhower’s famous suggestion that “plans are worthless, but planning is everything.”<sup>1[1]</sup> In these endeavors, we intellectuals and other guardians of communal orderings serve the indispensable planning function. Yet we also should plan with a high degree of humility; for our planning is ultimately worth *less* when it becomes action, action that may look for justification, but not necessarily for guidance, from a theory that has not itself borne the scars of operationalization and accounting. Indeed, it is far too easy, from the comfort of the academy or of the think tank, to overindulge a sense of our importance, or our independence, in the context in which we operate. Whether we know it or not, whether we will it or not, most of us wear the collar of one or more of the significant actors in the current dynamic process of moving from one fairly unstable point of economic, political and cultural equilibrium to another. The paradox is thus deepened; it is never clear that one can act beyond the context in which one is embedded—especially intellectuals.

It is in this perhaps less agreeable context that the pursuit of knowledge of transnational legal orders, and of global governance and regulatory networks becomes more interesting to others. Academics are not the only ones that have noted the potential of this intellectual bauble. Academics are not the only community of actors that have invested in the instrumental possibilities of paradox, of knowing “things” that are not yet formed. The possibilities inherent in the development and management of congenial normative premises have also captured the imaginations of those who control the apparatus of institutions with real influence in the management of popular will. Principal among these are *the state* and its apparatus, the *economic enterprise* and its production chains, and *non-governmental communities*, both civil and religious, and their ecclesia.

All of these actors, intellectual and institutional—our keepers of political, economic, intellectual, cultural and religious order—of which we form a part, have come to see in transnational legal orders, global governance, and global governance networks, both threat and opportunity. Each means to use some variation of an orthodox approach to the transnational or the global to project its power externally and to enhance its authority internally. And all mean to use their power—over ideas or practice—to resist the transformation of known or practiced reality in ways that undermine their place within systems in which they serve as the center. For the academic that means the preservation of orthodoxy and the protection of conceptual field boundaries; for states it means the protection of the primacy of politics and of territorially based governance organisms; for economic enterprises it means the imposition of the primacy of economics over politics, of management and governance over law and command; and for religion, that means the

reinstitution of a hierarchy of norms in which politics and economics serves as instruments of an order over which a magisterium presides.

Yet, like academics, these great institutional stakeholders of contemporary society operate *within arenas*—markets in the language of contemporary times—the object of which is to *ensure order* within the confines of normative constructs that set out the methodological and substantive constraints through which ordered society operates for and against itself. And these actors have not waited for the intellectuals to lead them by the hand: they have not waited for intellectuals and theory weavers to spin the threads of their fate, like the ancient Norns at the foot of Yggdrasil (the World Tree), or to explain to them the character of the thing they wish to use. But these actors do rely on the intellectuals to develop for them the structures of legitimacy within which these possibilities may be realized, and to give depth and breadth to these efforts as they are injected in political, economic and religious cultures—or to resist these actions.

It is to this later reality that I will focus the remainder of my remarks today. My object is to explore the possibility of extracting some measure of “truth” from “facts.” To that end, I will start with emerging practices of states and non-state actors that to my mind are helping to define the arenas in which norms and methods are now being transformed. These are the practices of production chains and enterprises, they are the practices of global civil society and governance, and they are the practices of states either using or being used by each. These practices serve as germinal events that may help illuminate the realities around which theory is built to serve or to challenge. Yet I am conscious as well that such an exercise must be undertaken under conditions of 21<sup>st</sup> century *intellectual instrumentalism* that itself converts theory into another story—one in which theory seeks to construct itself as ideology projected as innate in the world it proposes to explain. From these practices, I will seek to suggest the glimmerings of insights that may have some value in helping to provide a narrative—normative and methodological—through which the realities on the ground might be understood, and thus understood, generalized and recycled. That narrative is built on three trends; first, the privatization of the state; second, the governmentalization of the non-state sector; and third, the manifestation of governance systems beyond the state. That much is clear. But their meaning is less clear. These can produce persuasive and elegant theories of transnational legal ordering, of global ordering, or of the manifestation of the resilience of the state in new circumstances. Theory can contribute to all three; the evolving practices among actors and their ability to manage societal perception will ultimately shape a shared consensus of meaning.

## II. Is the State Dead?: What Do the Practices of States and Transactional Actors Tell us About Emerging Governance Orders?

In the late 19<sup>th</sup> century, Friedrich Nietzsche could look out at a world in which the state had finally emerged triumphant from the great sacrificial blood baths of religious wars, of anti-colonial struggles and of the construction of political communities from more ancient functionally derived societal orders. Especially in the *Deutsches Kaiserreich* he could behold, and with some horror, the apogee of the state and with some justification announce:

God is dead. God remains dead. And we have killed him. How shall we comfort ourselves, the murderers of all murderers? What was holiest and mightiest of all that the world has yet owned has bled to death under our knives: who will wipe this blood off us? What water is there for us to clean ourselves? What festivals of atonement, what sacred games shall we have to invent? Is not the greatness of this deed too great for us? Must we ourselves not become gods simply to appear worthy of it?2[2]

Most people focus on the provocative first part of this often quoted and misused passage from the *Gay Science*. Yet what comes after is more relevant to our task. The death of God marks not an end but a beginning—it requires a peculiar kind of expiation—the god killers must themselves ascend the throne. That part of the passage serves as the structure within which I will consider the condition of the state and of transnational legal and governable orders.

From the context of the ordering of society one might take Nietzsche a step further. The old order, one built around God, was indeed dead, and by the hand of its ministers. In its place those ministers offered themselves in the form of the state. The rituals and festivals of the state became our new gods, the ideology of the state became our new theology appearing in great variation. It was to the task of the invention and performance of these festivals and rituals that institutional and intellectual elites set themselves to work. Their inventions, of politics constrained by law, of popular will, of bureaucratic order, of *rechtssaar* and *sozialstaat* principles constrained within the bodies of state served by its apparatus became the means by which organized societies served their high purpose and maintained order. It was the state that acted as and for the people and in this sense assumed a super human character.

That was the great triumph of the 20<sup>th</sup> century, and also its undoing. The process of protecting the state from itself, also produced the forces that are now said to have killed the state as surely as the state had killed God. Today some of us look at the same world and with varying degrees of horror or glee announce that the state is dead, and remains so. The state was killed by pushing the logic of the state and state system to its limits. But what is rising in its place? Surely the murderer now must take the place of the murdered "God" simply to appear worthy of the act. But how do we know that such a murder has taken place, and indeed that the state is dead? It is here that theory is proving less useful except as an act of futurism and wishful thinking.

Let us look instead at the evidence of the death of the state as it currently appears in the practices of states themselves and of those actors that now have been accused of wielding the knife so effectively plunged into the heart of the state system. One can arrange these rituals in three broad groups. The first are the privatization rituals among states; the second the governmentalization rituals among enterprises and non-state actors; and the third are the systemizations of governance rituals.

*The Privatization Rituals of the State.* At the core of the transformation of the state is a fundamental change in the language of governance. That change suggests a decided move from the primacy of politics to that of economics as the operating language of states. This move is driven by the primacy and inherent logic of the global production chain, which has now become a central element of the organization of societal activity. Its strongest effects might be seen in the way in

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2[2] Friedrich Nietzsche, *The Gay Science*, Section 125, tr. [Walter Kaufmann](#).

which states approach law as the basis for societal ordering. Some of its most potent trending characteristics may be summarized as follows; (1) from law to contract; (2) from command to management; (3) from planning to markets; (4) from the primacy of the public to private spaces; (5) from norm making to technique; and perhaps most important for the diminution of politics, (6) from mass politics to consumer choice.

The change in the techniques of governance, especially when used by the state, also has important ramifications for state practice. States are refashioning the character of regulatory space as they increasingly engage in private market activity both as a commercial actor and as a means of projecting regulatory power within and beyond its territory.

*Sovereign Wealth Funds* provide a case in point. They serve as a means through which states can project their authority both internally and abroad through private markets. In the case of Norway such projection leverages financial power to inject Norway's version of international norms into the practices of the enterprises in which it invests specifically. More generally, its efforts to manage its investment universe through the application of these nationalized international standards is meant to affect the behaviors not only of enterprises in which Norway has an interest but all enterprises which might hope to participate in markets which are now more sensitive to such investment parameters. That privatized investment power is effected as well through shareholder activism. Where Norway can serve as an influential leader for institutional investors (both private and public) it can assert regulatory authority through market activity more effectively than through its traditional and territorially constrained efforts to enact and enforce "law." In the case of China, the sovereign wealth funds serve as an important element in the project of macro-economic objectives abroad. In the case of developing states, these funds serve as a means for projecting and managing internal development and effectuating changes in governance cultures that avoid the structures and practices of the state and its apparatus.

*State owned enterprises* serve a similar function. They represent the operational side of national private activity. SOEs are simultaneously usually characterized as instrumentalities of (foreign) states to which exceptions to rules of sovereign immunity may apply, and they also serve as conduits through which states may project their own laws, norms and policies by the exercise of their leadership of SOEs. Where states own a significant interest in enterprises that are domesticated in foreign states, the relationship becomes even more complex. Again, the use of this engine of private economic activity for public purposes differs depending on the national context. Under the so-called Nordic Model of SOEs, the SOE is used to project national (and perhaps internationalized) social policy through the organization and governance of the enterprise. These can reach downstream of any production chain of which the Nordic SOE is at the apex. Under the Chinese SOE model, the enterprise serves as a critical means of projecting state policies—especially socialist modernization—through its activities. For developing states, SOEs are a vehicle through which states may manage their resources in the old traditional sense, but also serve as the means of generating revenue through which private activity may be developed in other sectors. Privatization of governmental activity becomes more complex when states begin to use SOEs and SWFs the way they used to deploy their ministries in administering the private sector in another age. The use by many states of SWF to SWF joint ventures for development—for example the recent Russian-Korean joint venture, and the transformation of SWFs into holding companies,

as was recently effected when the Turkish state transferred many of its major SOEs into its SWF, point to a privatization trend—not of the state but of governance.

This trend is accentuated when international organizations begin to treat the private activities of states as the object of law making. Much of the recent conflict respecting the application of international norms to SWFs and SOEs revolve around not just the character of these instrumentalities, but also their governance effect. Thus, recent actions by the Norwegian National Contact Point respecting the obligations of the Norwegian SWF under the Guidelines for Multinational Enterprises, which include the substantive provisions of the U.N. Guiding Principles for Business and Human Rights, is one telling example. Another revolves around efforts by the Working Group for Business and Human Rights to consider the issue of the character of SOEs under international law as subject or objects—especially in the context of the application of the UNGP. International organizations seek out the state where it can be found. And increasingly it appears to be found along with private actors in economic markets from where it manages its populations and projects power.

But additional trends also point to privatization of states and their governance. Foremost among these are the movements, especially important for developing states, of the practices of *sovereign lending*. These have two related but distinct aspects. *The first* touches on sovereign lending by private entities. Sovereign lending exposes states to the vagaries of the law of loan agreements. At worst it serves to privatize the productive capacity of states, directing tomorrow's productivity to the repayment of yesterday's consumption. In this context sovereign rights are illusory. Repudiation carries its own consequences in the market for borrowing that no sovereign can long ignore—and less developed states not at all. *The second* touches on sovereign lending by international financial institutions. On the one hand, the generations old structures of conditionality by IFIs has been both controversial and deeply resented. It is both because at their extreme it makes a mockery of both *rechtsstaat* and *sozialstaat* notions with respect to the borrower. All, of course, is undertaken for a higher purpose. But that is the point here—the state (or at least those placed perennially in the position of borrower)—now appears displaced in their sovereign majesties. That displacement is either at the hands of the powerful super-states that control cultures of IFIs through which they project power; or at the hands of the IFIs themselves to the extent they represent the evolution of an autonomous culture of governance. On the other hand, IFI lending programs have been successful in reshaping the nature of the relationship between the state, politics, and money. When combined with the apparatus of technical assistance, it has also served as a critical venue for the socialization of states in the mores and practices that now animate these IFIs.

Lastly, states have increasingly privatized governance through disclosure and compliance regimes. This is dramatically evidenced in the rapid rise of disclosure and monitoring system requirements imposed on corporations at the apex of global production. The U.K. Modern Slavery Act of 2015, the [French Supply Chain Due Diligence Law of 2016](#), and the 2010 Dodd Frank Conflict Minerals disclosure regimes, all point to systems in which principles of conduct or standards of behavior are devolved to enterprises, which these enterprises are then entrusted to enforce within their own control chains. The law tends to focus on disclosure in a formal sense. But effectively its purpose is to devolve the implementation of regimes to monitor for and prevent

bad conduct on the enterprise. This form of privatization effectively converts the enterprise into a *private administrative agency*. Here again the state functions effectively through private markets and in private spaces, spaces sometimes well beyond the limits of its territory.

*The Governmentalization rituals of the Non-State Sectors.* If the state now appears to have developed a growing taste for operation through private markets, it appears also to have a growing appetite for the governmentalization of enterprises and other non-state institutions. That taste is usually papered over in the passive tense: governance gaps created by the construction of a global economic and societal order beyond the reach of any single state has created the need to localize governance within its emerging territory. Within economic systems, that territory is increasingly identified as the production chain. Within the territories of the production chain its critical stakeholders have increasingly been given or have taken on governance roles that rival those of states.

The classical model is that of the *self-constituting enterprise* within global production. I have suggested the constitution of the governance territories of multinational enterprises like Walmart. Here one encounters a well-functioning and autonomous governance order wrapped around an enterprise at the apex of a production chain. To some extent enterprises like Walmart, Nike, Target, Carrefour and Marks & Spencer have become governance organs with their respective domestic governance orders. With their tightly controlled supplier systems, these enterprises create and enforce standards for the operation of their partners down the supply chain. These contracts function like regulation and the relationship created is regulatory rather than classically contractual. NGOs help shape the standards that enterprises impose. They participate in their development. More importantly, they serve as the most significant outside mechanism for monitoring and accountability. They also work independently of the enterprise to help shape popular opinion and through that effort to help shape the context in which standards may be developed and implemented in ways that satisfy the “business case” for their adoption. Much of this communication between stakeholders and enterprise and consumers is undertaken through media outlets. They serve as the most vital link in the practice of transparency. Their reporting are legitimacy enhancing and lend weight and consequence to the actions of enterprises and the monitoring of NGOs, sometimes even producing action in the states within whose borders breaches of responsibility occur. Consumers and investors serve as the demos of this system. This role is consonant with the logic of globalization in which the primacy of economics over politics produces the discursive framework for governance. Citizens as consumers and consumers as critical factors for enterprise accountability make particular sense in systems that derive legitimacy through the language and premises of economics. Governments also play a role, but as stakeholders rather than as overseers. They memorialize the norms that are written into enterprise governance, and they supply political stability, police protection and a legal framework within which local transactions may take place at the smallest possible risk and cost. But even here the state’s role is reduced to the extent that the normative project is shifted from the domestic to the international sphere. The business and human rights governance project was a creature of international consensus rather than of national development. And the objects of all of this effort—like less developed states and weak governance zones, tend to count for little. They are the objects acted on, but not necessarily with a voice in determining what is good for them.



This model has found echoes elsewhere in transnational space. One touched on the system of internal accountability structures of IFIs. The [2014 World Bank reconsideration](#) of its controversial investment in Corporación Dinant, a palm oil company implicated in serious human rights abuses in Honduras provides a case in point. [The response](#) eventually produced a multi-point action plan for reform of Dinant, a majority of which was fulfilled by April 2016, and involved the World Bank, a coalition of a large number of international NGOs including Oxfam International, the Honduran state apparatus, and North American Universities providing technical assistance in negotiation skills. In addition, the governance construct of the self-reflexive enterprise is sometimes augmented by other sources of private legislation, monitoring and accountability. Among the most important are *private and public certification* and monitoring organizations and institutions. Particularly well known was the role of the [Fair Labor Organization](#), whose rules and imprimatur became essential for Apple Inc. after a series of labor scandals plagued its downstream multinational partner [Foxconn](#) in their plants in Shenzhen.

But critical new actors have emerged as well, actors that are increasingly treated with functional sovereign dignity. Principal among these are *private lenders*. These are not private lenders within sovereign debt markets, but private lenders who have undertaken responsibility for governance through their own conditionality programs directed to their borrowers. In some cases, these obligations are delegated from states; in others they may represent the product of an agreement among private lenders and states for the devolution of governance through banks. But also this governmentalization of the lending sector may come as a result of action taken through the mechanics of non-binding non-legal forums applying non-legal non-binding standards against enterprises with no obligation to comply. An important recent example comes from the Netherlands where Rabobank agreed to include as a condition to their lending for palm oil producers, some of the substantive standards of the Round Table for Sustainable Palm Oil in the wake of an OECD National Contact Point [Specific Instance](#) lodged against it in the Netherlands by a Dutch NGO, Netherlands/Milieudefensie.

More interesting still is the move to vest enterprises with governmental authority in the context of states with *weak governance or in conflict zones*. Especially in the area of the human rights obligations of enterprises, the international community has been moving in the direction of imposing a responsibility to respect—and comply—with law on enterprises operating in territories where the apparatus of state is unable or unwilling. This notion of *complementarity* pervades not just the responsibilities of enterprises in weak governance and conflict zones, but as we will see has been expanded to disregard sovereignty in the context of political criminality within the ambit of the Rome statute and its governance architecture. In this context, the issue of applicability—that is, of what states or regions may be said to be weak or conflict zones—is left to the enterprise and to those other outsiders who would compel enterprise compliance. More interesting still is the issue of the law to be applied in these zones. Clearly national law, but also international norms. And national law may be applied in conformity with international standards, the way that national law is increasingly understood in its international framework in disputes under investment arbitration regimes.

Taken together, it is difficult to overlook the potential of governmentalization through private lenders in a global ordering grounded on economics: financial institutions and enterprises

can become the apex legislatures where states and international organizations that cannot legislate directly devolve legislative authority and operate through these institutions to manage regulatory territory that extends beyond the geographical boundaries or effective control of states.

*The Systemization of Governance Rituals.* The last point is perhaps the most important in the reconstruction of the state within global or transnational legal or governance orders. The rise of governance systems beyond the state has the potential for most profoundly affecting both the theory and operation of the state within global economic and societal production chains. Where the production chain becomes a more efficient site for regulatory management than the geographical boundaries of a nation-state, where the techniques of economics and management serve the objective of management better than the traditional structures of law and administrative regulation, systems that serve these new territories inevitably arise. I have mentioned one already—the self-constituting multinational enterprise operating through its production chains. Let me suggest others.

First, of course, are the emerging systems of rules that may exist across states. Some are ancient and embedded in part in domestic legal orders—principal among them perhaps is *lex mercatoria*, about which much has been written. But others exist as well. The recent efforts to develop a *global system of criminal law*—at least of those political crimes now treated as inherently criminal when undertaken by or through or against states has also generated much controversy. But it is important to recognize in it the embrace of the principle that there are instances where states fail, and that in this context, the international community may act. That principle, nicely wrapped within a traditional sounding notion of *complementarity*, actually produces some quite radical possibilities, especially where it devolves on others to determine the willingness or ability of a state to exercise its sovereign authority against particular and specified acts.

Second, private dispute settlement mechanisms have risen to prominence in both the economic and religious spheres. The globalization of economic activity, and the trade agreements that have been produced in its wake, have created an interlocking set of arbitration jurisdictions that increasingly tend to apply their own jurisprudence, even when it is formally based on or constrained within specified national legal orders. The ICSID system is well known. But private arbitration has increasingly siphoned the work of dispute resolution—and the construction of a common law of behaviors among certain classes of litigants—away from national courts. National context matters less where global systems operate within functionally differentiated communities who agree to resolve their disputes on the basis of unified standards. This trend affects not just economic activity but *religious activities* as well and in areas once assumed to be the principal province of the state. One can see in the rise of Sharia Tribunals, Rabbinical Courts and Christian Panels the reawakening of transnational religious institutionalism and government as religion seeks to discipline its own communities according to its [own systems of rules and processes](#). These touch on matters of food safety, on core issues of family law and on the validity of religious conversion. In that sense, their operation internationalizes and privatizes important constitutional elements of national legal orders. A similar trend can be seen for the *communities created around sport*. A *lex sportiva* has generated its own transnational dispute resolution architecture. Indeed, one can only wonder at the extent of the autonomous jurisdiction of the [FIFA Dispute Resolution](#)

[Chamber](#), for example. [Some](#) even have sought to characterize it as its own autonomous transnational legal order. All of these, of course remain connected to the state in some way or another. Contracts might sometimes have to be enforced in national courts, dispute resolution that tends to affront core constitutional values of the jurisdiction in which they are to be applied can be voided, national law in its traditional sense may provide the foundation on which governance is built. Yet these systems are autonomous enough, when it suits them, to avoid states whose practices are inconvenient. More importantly, they tend to be effective in excluding those who fail to conform to their norms. That power of exclusion can have a powerful effect on individuals and enterprises—and states—that find in these systems a necessary benefit.

Perhaps the most interesting recent example of the working of the systematization of governance beyond the state occurred in the wake of the collapse of the Rana Plaza factory building in Bangladesh. The Rana Plaza factory building sat at the crossroads of transnational garment sector production chains. The factories in the building were at once subject to the legal and governance constraints of national law, and to the self-reflexive codes of apex multinationals for whose brands clothing was being produced in the multiple factories within the building. The operations of those enterprises were further constrained by the bilateral and multilateral arrangements between Bangladesh and the home states of most of the apex multinationals for whom the factory workers labored indirectly. On the collapse of the factory building, the criminal law of Bangladesh proved to be the most autonomous expression of Bangladeshi sovereignty. The apex enterprises sought to reform and better monitor their own codes. They banded together to form two multi-enterprise organizations, the Accord and the Alliance, the purpose of which was to reform building and safety standards and enhance the training of inspectors. They also provided loans or advances to downstream factory owners to make changes necessary to bring their spaces up to the new codes. These enterprises provided a remedial mechanism for those suffering injuries from the collapse through the so-called Arrangement, funded through voluntary contributions and administered privately. The home states of many of the apex enterprises also negotiated compulsory changes to the domestic legal orders of Bangladesh with respect to labor issues, grounded in the international standards of the ILO.

### III. From Practice to Insight, to Theory?

How might these trends and practices inform theory? One is faced certainly with a much more crowded field in governance. States continue to assert substantial governance authority. But then so do enterprises, non-state institutions, religions, and international organizations. As well, one can discern multiple sources of the production of governance. Beyond the state and its legal and regulatory regimes, international organizations, enterprises, religious organizations, non-governmental organizations, including international sports organs, also generate a substantial number of rules that are binding in their own way. Rulemaking has been internationalized and privatized within specialized fields of activity. Remedial mechanisms have also been privatized and internationalized. Each in their own way—religious courts, OECD NCPs, ICSID Tribunals, FIFA Dispute Resolution Chambers, WTO panels and the International Criminal Court—evidence the ability of governance communities to exist beyond the state.

That leaves us only to consider the possibilities of an overarching theory within which one can hope to make sense of these trends, events, practices, behaviors and expressions of normative principle. It is in that context that one can begin to ask the right questions about the nature of transnational legal orders: the first touches on the character of the transnational among these practices; the second on the relevance of law; and the third to the question of the ordering framework that might emerge from the aggregation of these practices and rituals.

*What is the character of the transnational among these practices?* This is an easy aspect of the changes that have transformed the state system. All of these trends and practices draw from or are centered within institutions and communities that are beyond the express control of any one state. They can exist wholly within a state but may derive their normative structures elsewhere. A good but telling example—the apex multinational enterprise with a responsibility to apply the Covenant for Economic, Social and Cultural Rights within the United States even though as a legal matter the United States has not embedded the Covenant within its domestic legal (or constitutional) order. A telling piece of evidence is the trend among states seeking to solidify their borders a bit to undertake a more stringent control of the activities of international NGOs within their territories (most controversially in China), and of the activities of SWFs and SOEs through [programs of national review](#) of investment by [host states](#).

*What does law have to do with it?* The last example draws into sharp focus a great consequence of points of contention within the conventional debates about globalization, the role, effect and character of law. Where law was once the central element in organizing the structures of behaviors and the organization of institutions, it is not clear that law retains that central elemental role any longer. Better put, law remains important, and central within the ambit of its traditional application. But that ambit has shrunk. Also shrunk is the utility and majesty of law—as traditionally understood. This trend frames the *contradiction* within which most discussions of law and globalization takes place. *Contradiction produces conundrum* for those who find in the conceptual universe of law the necessary structures of legitimacy and constraint necessary to support a vision of just social ordering. It is in this conundrum that one might best understand the enormous energy spent on saving the institution of law, not from its decline (for it has not declined *as such* or on its own terms), but from its marginalization as the sole *lingua franca* of governance and as the supreme set of normative principles on which societal organization ought to be based. Two of the more prominent strategies deployed for the protection of law are both logical and misplaced in the larger context of fundamental changes in the orientation of structures of societal organization. *The first* seeks to expand the common understanding of law to incorporate all manner of coercive rules and methodologies. These are rightly contested as seeking to distort the conception of law beyond all recognition. It ultimately reduces the concept of law to irrelevance. *The second* advances the opposite strategy—to preserve the core traditional view of law as inextricably tied to the state and its *Rechtsstaat*. These strategies manifest themselves in everything from the bilateralism at the heart of the Chinese One Belt One Road initiative and the possible tilt in American trade policy from multilateralism to bilateralism, to the great effort by an alliance of developing states and a large group of civil society actors to “legalize” the societal responsibilities of economic actors within a comprehensive treaty for business and human rights.

*What ordering frameworks do these practices, alone or in the aggregate suggest?* There is no easy answer here. And indeed, it is at this point where theory provides a most tempting passage into ideology or wishful thinking. What appears fairly clear is that the chimera of global law is alien to the practices and governance networks that are evolving. Fracture rather than consolidation appears to be the operative trend in all of the furious activity evolving beyond the state.

Still, it is also possible to see the rise of *transnational governance orders* in the aggregation of these practices. At the heart of such a conceptual framework would be the turn from the state to the production chain and from the polity to the functionally differentiated community of actors, as the territory from out of which governance may be ordered. What the trends and practices noted above point to is the emerging importance of intangible territories as a substitute and supplement to the physical territory that has served to mark the borders of states. To speak about transnational legal or governance orders, then, is to acknowledge the construction and viability of non-territorially based spaces within governance may be asserted and societal forces ordered.

It is not clear that if what is merging are transnational orders, that they are legal orders. From the classical and conventional perspective, such a claim would be impossible—law retains its fundamental tie to the state and its apparatus. It is a product of legitimating rule of law norms and processes inherent in the operation of the government of an independent democratic polity. From the perspective of international legal progressives and legal pluralists, and from that of emerging transnational legal order theorists the opposite is true. That is possible not because of the transfer of the legitimating structures of the state elsewhere but because eventually and in some governance can be folded back into law, and into and through the state.

On the other hand, polycentric rather than legal ordering may be what is at the heart of much of what is emerging—layered governance systems that sometimes supplements, sometimes opposes, sometimes fills in for, and sometimes bumps up against one or more of the law systems tied to the states within which actors within these systems operate. A polycentric theory recognizes ordering that is regulatory though not legal, that can exist independent of the structures and legitimating devices of the state. The resulting ordering of private governance might be understood as positing an extra-legal universe in which legality rather than law is the touchstone. But it is also one in which all order has lost a center. In this view the single "God" of the state system has been replaced by a pantheon with no clear central direction.

Still the traditionalists may be right. One can look at the trends and practices emerging around the state and still see in them the state. But the state substantially transformed and the state system reinvented. When one considers the trends and practices highlighted above one notes that its effect on the integrity of states can be substantial. States fracture and exist for increasingly limited public purposes within layered networks of production. Yet this is not true of all states. Even as Bangladesh disappears within TLO and production chain governance, neither China, the E.U. and its Member States, nor the United States appear affected in the same way. Indeed, they appear to use state fracture to augment their own influence in and ability to leverage their own power through these emerging TLOs. It certainly explains the relationships between Bangladesh and the U.S. and E.U. And it provides a basis for situating the ILO within the power dynamics of a U.S.-E.U. drive to manage the internal domestic legal order of Bangladesh to their satisfaction

by using the veil of internationalization (and the mechanics of ILO principles) to leverage their authority in Bangladesh and in the process to substitute this TLO for the traditional relationship between citizens and their government. Thus, what at first blush appears to be movement toward the transnationalization of law and governance might instead signal the reinvigoration of a hierarchically arranged system of state power in which full sovereignty is retained by the most developed states who project their power through the instrumentalities of internationalist legalizations. The state is not dead, rather it has returned to empire.



#### IV. Summing Up.

Where do I leave us? I suggested that emerging practices might point to [fracture](#), [permeability](#), [porosity](#) and [polycentricity](#) without a single ordering principle, whether understood as centered on states or on transnational legal orders or on global governance. The impulses of organic and instrumental practice that are reshaping the world do not yet support a singular vision of its organization. In this context all theory must, to some extent, represent both ideology and insight.

Recalling Nietzsche's famous passage with which I started my analysis, it is now fair to ask more pointedly: How do we know our new gods; what are the rituals of the new worship; and who are the new priests through which a new orthodoxy will be developed and protected? Those are the unanswered questions swirling around a generation of scholarship—and politics—loosely tied to notions of “the global” or “the transnational.” It is to the service of these new gods that even the old gods now bend their efforts. It is to that great work that all of the institutions of order have been directed. It is in this context that *legal theory may help us grasp the evolution of legal practice*; and more important perhaps, *theory may help us grasp the extent of the evolution of governance in which the very language of traditional discourse may fail us*.



The current difficulty does not reside in the core issue of the death of the old gods, but of the sausage making that represents the search for new orders out of the old. We raise the state again—not as it was once conceived—and so conceived worshiped through the offerings of law and theory. Instead we have humanized our ancient gods within a community of actors which together might be said to engage in the construction of new gods, as yet insufficiently identified. What that leaves us, for the moment, are orders without a center, and actors seeking to build a center around which emerging legal, governance and other orders can be bound. Yet it is in that order without a center that we might perhaps have a glimpse of the order or ordering that is to come, the structures through which it will be revealed, and the vocabulary that will lend it form and legitimacy.

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3 [1] Remarks at the National Defense Executive Reserve Conference, 11/14/57; in Eisenhower Archives [http://www.eisenhower.archives.gov/all\\_about\\_ike/quotes.html](http://www.eisenhower.archives.gov/all_about_ike/quotes.html)