

# HAPPY SPELLS? CONSTRUCTING AND DECONSTRUCTING A PRIVATE-LAW PERSPECTIVE ON SUBSIDIARITY

PEER ZUMBANSEN\*

## I

### INTRODUCTION

The increasingly frequent invocation of the idea and principle of subsidiarity as initially laid out in the famous 1931 papal encyclical,<sup>1</sup> in public international law, and in various other legal fields is part of a larger enterprise that reflects the correlation between established domestic and international regulatory orders, on the one hand, and the shifts, brought about in a context of globalization, Europeanization, and privatization, on the other hand. The invocation of subsidiarity occurs at a moment when the stakes of political ordering and democratic organization on a global scale are particularly high. Given the fragmenting of public and private global governance regimes across a spectrum of highly specialized governance areas, questions of representation and participation, accountability, and legitimacy have become ever more pressing. Against this background, subsidiarity may have emerged as the unavoidable candidate for becoming the new “S”-word<sup>2</sup> definitive of our engagements with challenges of an aspirational global order. It is against this background that we can appreciate the current interest in transnational law

---

Copyright © 2016 by Peer Zumbansen.

This article is also available at <http://lcp.law.duke.edu/>.

\* *Licence en droit* (Paris X Ouest); Law State Exam (Frankfurt); LL.M. (Harvard); Bar Exam, PhD and *Habilitation* (Frankfurt). Director, Transnational Law Institute, The Dickson Poon School of Law, King’s College London. This article was first presented at the “Subsidiarity and Global Governance” Conference, convened by Markus Jachtenfuchs and Nico Krisch, Hertie School of Governance, Berlin, June 19–20, 2014. I am grateful to the conveners for the invitation and for very constructive feedback on an earlier draft. I am further indebted to Stephen Minas, Research Fellow, Transnational Law Institute, Dickson Poon School of Law, King’s College London, for invaluable commentary and research assistance and Professor Maria Rosaria Ferrarese for her critical feedback. The paper has further benefitted from discussions at the *Transnational Law Reading Laboratory* at King’s in London. (Unless otherwise noted, all website resources last visited March 18, 2016.)

1. See Pope Pius XI, *Quadragesimo Anno* n. 79 (May 15, 1931) (“It is a fundamental principle of social philosophy, fixed and unchangeable, that one should not withdraw from individuals and commit to the community what they can accomplish by their own enterprise and industry. So, too, it is an injustice and at the same time a grave evil and a disturbance to right order to transfer to the larger and higher collectivity functions which can be performed and provided for by lesser and subordinate bodies. Inasmuch as every social activity should, by its very nature, prove a help to members of the body social, it should never destroy or absorb them.”).

2. See generally Louis Henkin, *That ‘S’ Word: Sovereignty, and Globalization, and Human Rights, et cetera*, 68 *FORDHAM L. REV.* 1 (1999) (arguing that sovereignty becomes subsidiary when this foundational principle of international law clashes with the promotion and protection of human rights).

governance and regulation, and in both institutional and normative<sup>3</sup> questions concerning the law's ability to perform its regulatory functions in jurisdictionally unbounded spaces.<sup>4</sup>

This article illustrates the relevance of international lawyers' increased interest in subsidiarity against this background of legal-theoretical and political-normative engagement with the *transnationalization* of law.<sup>5</sup> Contextualizing current subsidiarity debates among international lawyers within a wider set of investigations that scholars have been undertaking with regard to the viability of the state-law nexus under conditions of globalization<sup>6</sup> promises to make the study of subsidiarity more receptive to the shifting boundaries between different jurisdictions and regulatory areas. By reflecting on the architectures of variably conceived global legal orders, we regularly find deep-running concerns as to whether it is possible to rely on lessons from domestic law in our aspirations for law "beyond," rather than "without," the state.<sup>7</sup> Although a number of recent efforts by public international lawyers in the United States<sup>8</sup> and in Europe<sup>9</sup> display considerable confidence regarding particular institutional and normative heritages, weighty evidence points to the blind spots of such projects regarding alternative, critical accounts of state building and governance in other regions.<sup>10</sup> Such accounts strongly suggest the need for an expanded perspective on correlations between Western narratives of state development and histories of imperialism, colonization, decolonization,

3. See generally T. Alexander Aleinikoff, *Transnational Spaces: Norms and Legitimacy*, 33 YALE J. INT'L L. 479 (2008) (exploring the relationship between transnational lawmaking and the legitimacy of transnational norms); Neil Walker, *Taking Constitutionalism Beyond the State*, 56 POL. STUD. 519 (2008) (investigating the development of constitutionalism outside the confines of a state).

4. E.g., Graf-Peter Calliess et al., *Transformations of Commercial Law: New Forms of Legal Certainty for Globalised Exchange Processes?*, in TRANSFORMING THE GOLDEN AGE NATION STATE 83 (Achim Hurrelman et al. eds., 2007); Graf-Peter Calliess & Moritz Renner, *Between Law and Social Norms: The Evolution of Global Governance*, 22 RATIO JURIS 260 (2009).

5. See generally Ralf Michaels, *Globalization and Law: Law Beyond the State*, in LAW AND SOCIAL THEORY 287 (Reza Banakar & Max Travers eds., 2013) (providing an overview of the transformation of the state in the era of globalization and the incidental development of transnational law); Gregory Shaffer, *Transnational Legal Ordering and State Change*, in TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE 1 (Gregory Shaffer ed., 2013); Peer Zumbansen, *Law and Legal Pluralism: Hybridity in Transnational Governance*, in REGULATORY HYBRIDIZATION IN THE TRANSNATIONAL SPHERE 49 (Paulius Jurcys, Poul F. Kjaer & Ren Yatsunami eds., 2013).

6. See MARIA ROSARIA FERRARES, PRIMA LEZIONE DI DIRITTO GLOBALE (2012) for an important analysis.

7. See, e.g., Ralf Michaels, *The Mirage of Non-State Governance*, 2010 UTAH L. REV. 31, 35.

8. See, e.g., Sabino Cassese, *New Paths for Administrative Law: A Manifesto*, 10 INT'L J. CONST. L. 603 (2012); Benedict Kingsbury et al., *Global Governance as Administration—National and Transnational Approaches to Global Administrative Law*, 68 LAW & CONTEMP. PROBS., nos. 3 & 4, 2005, at 1.

9. See, e.g., Armin von Bogdandy, Philipp Dann & Matthias Goldmann, *Developing the Publicness of Public International Law*, 9 GERMAN L.J. 1375 (2008) (laying the foundation for the "International Public Authority" project at the Max Planck Institute in Heidelberg).

10. See, e.g., ANOTHER KNOWLEDGE IS POSSIBLE: BEYOND NORTHERN EPISTEMOLOGIES (Boaventura De Sousa Santos ed., 2007); B.S. Chimni, *Co-option and Resistance: Two Faces of Global Administrative Law*, 37 N.Y.U. J. INT'L L. & POL. 799 (2005).

and more recent governance programs associated with the so-called Washington Consensus.<sup>11</sup> Invoking a concept of subsidiarity can be done only in this context.

Such reversal cannot be explained or justified on formal grounds alone. Proposing to revert existing hierarchies and competences of authority from the bottom to the top or demanding an alternative site of exercising supreme control engages the very foundation (indeed, the very *legitimacy*) of the regulatory apparatus. The invocation of subsidiarity cannot escape its entanglement in a deeper struggle regarding that which grounds, upholds, justifies, and legitimates the existing control architecture in the first place. Invoking subsidiarity touches on the integrity of that architecture, both normatively and institutionally.

This article momentarily shifts attention away from normative hierarchy and subsidiarity in *public* international law and *multilevel governance* in order to contrast it with an analysis of subsidiarity thinking in what at first glance would suggest a perspective from the “other side” of public international law—namely, from *private* law. But the law of subsidiarity, this bottom-up law whose regular instantiation is supposed to be private law, can only be traced back to only a very particular understanding of “private” law, namely the law associated with the self-regulation of the “market” or the “private” sphere. Such a turn to “private law” is motivated, above all, by the politics that appear to govern much of the debate over private-versus-public ordering, especially in the context of post-Welfare State deregulation and privatization discourses. As this article shows, the proliferation of transnational private regulatory regimes on the global scale must be understood as amplifying many of the advanced domestic governance structures’ institutional transformations. This suggests that even if we were ill advised to directly apply domestic law categories to often inchoate and multilayered transnational regulatory regimes, we still ought to investigate applying critical conceptual tools, experiences with rights formation, and learned insights into the legal pluralism of existing legal orders for a better understanding of “the transnational.” The case here, or rather, legal field in point, is labor law—an area of law that has forever been at the frontlines of conflict between a libertarian private law ideology (“you get what you contract for”)<sup>12</sup> and a public and social law architecture committed to redistribution.

---

11. See generally ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005) (arguing that the colonial confrontation was central to the formation of international law, that it has always been animated by the project of governing non-European peoples, and therefore that the economic exploitation and cultural subordination that resulted were constitutively significant for the discipline); SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* (2011) (arguing that while the Global South has been inspired to use international law as a field to contest over inequality, this promise has been subsumed within a universal claim for a particular way of life by the idea of “development,” and international law has legitimized an ever-increasing sphere of intervention in the Third World).

12. See, e.g., *Lochner v. New York*, 198 U.S. 45, 58–59 (1905) (invalidating a New York statute forbidding bakers to work more than sixty hours per week or ten hours per day on the ground that it

Labor law's woes started early on and have become dramatically amplified and accentuated in the current globalization context.<sup>13</sup> Labor law poignantly illustrates the dark side of entrusting conflict resolution and redistributive mechanisms to private ordering.

This correlation between the alleged pressure that globalization exercises upon the state and its legal order and the discovery that (domestic) law was never free, unified, and coherent, but rather has always been pluralist and unstable—is central to the here-proposed concept of transnational law. It thus is necessary to investigate the tendency to resort to private-law solutions in the context of state law failure (part II) before exploring the parallels and eventual continuities between domestic and transnational legal fragmentation and legal pluralism (part III) and the hidden politics of the “private legal realm” (part IV). A case study in part V illustrates the challenges of looking for legal answers in very much uncharted territory—namely, emerging elements of a transnational labor law regime—looking closer at the operation and implications of a “bottom-up” approach akin to ideas of subsidiarity in a particularly precarious regulatory area with high normative stakes. Part VI draws some conclusions and suggests directions for future research into the doctrine and politics of transnational regulatory regimes.

## II

### SUBSIDIARITY: THE PRIVATE LAW BIAS

In light of the dramatic changes that mark the transformation, through the subsequent forms of the interventionist and the welfare state, of the twentieth-century Rule of Law, both administrative and constitutional lawyers have become interested in exploring the relationship between domestic and transnational governance structures.<sup>14</sup> Yet this relationship that should be described as a “transnational replay”<sup>15</sup> occurs in numerous manners and

---

interfered with freedom of contract and thus the Fourteenth Amendment's right to liberty).

13. See generally Harry W. Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 BERKELEY J. EMP. & LAB. L. 271 (2001); Manfred Weiss, *The Future of Comparative Labor Law as an Academic Discipline and as a Practical Tool*, 25 COM. LAB. L. & POL'Y J. 169 (2003) (discussing the several challenges faced by comparative studies of labor law in the context of globalization such as the need for interdisciplinary cooperation and the increasing dependency on “soft” legal structure in the regulation of labor relations).

14. See Alfred C. Aman Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 IND. J. GLOBAL LEGAL STUD. 379 (2001) (discussing the way in which administrative law may be reconceptualized to address the challenges, such as “democracy deficit,” caused by the delegation of public function to private actors as a result of globalization); Michel Rosenfeld, *Rethinking Constitutional Ordering in an Era of Legal and Ideological Pluralism*, 6 INT'L J. CONST. L. 415 (2008) (proposing a pluralist constitutional ordering to allow for the coordination of the supranational, the national, and the infranational in ways that are neither hierarchical nor unidirectional).

15. Peer C. Zumbansen, *Law and Society and the Politics of Relevance: Facts and Fields Boundaries in 'Transnational Legal Theory in Context'*, 11 NO FOUNDATIONS: AN INTERDISCIPLINARY JOURNAL OF LAW AND JUSTICE 1, 12 (2014), [http://www.helsinki.fi/nofo/NoFo11\\_2014.pdf](http://www.helsinki.fi/nofo/NoFo11_2014.pdf).

prompts critical engagement. Domestic state transformation offers valuable insights for a politically sensitive study of transnationalized regulatory regimes and global good governance dynamics. This is particularly true for a critique of the categories with which different spheres of political authority and legitimacy are distinguished along public-versus-private or state-versus-market lines. It is between those poles that a critique of emerging transnational regulatory regimes must offer insights into the connections as well as the *continuities* between struggles over power and democratic agency within and beyond a nation-state's confines.

For scholars of areas related to market governance, private law has tended to be their first-choice legal approach to address emerging hybrid regulatory regimes.<sup>16</sup> The dominant interest in *lex mercatoria* as the quintessential instantiation of transnational law seems to be quite representative.<sup>17</sup> The domestic preference for private law occurs against the background of a long, contested history of demarcating spheres of public and private, state and market as short-forms of normative universes. Private law has long been represented as the sphere where horizontal, contractual engagements occur between autonomous parties, free from governmental intervention. Preference for private over public law is apparent in the context of an established system of political references and routinized arguments.<sup>18</sup>

Prioritizing public over private law rests on the assumption that a clear distinction exists between the two bodies of law. But although the demarcation of spheres of law is a staple of the Western nineteenth- and twentieth-century legal trajectory, it is also one of the most contested distinctions in legal-political thought. Calling one body of law “public” and another one “private” connotes universes of meaning, order, and value—the scope and impact of which must be critically unpacked in order to understand the respective discursive universes in which such references occur.

That kind of scrutiny is hard work and is not frequently undertaken. What is therefore at stake in this impoverished space of making efficient choices between private-versus-public ordering is no longer the political nature of the legal order and its legitimacy. Instead, isolation of private-law solutions from the legal order within such solutions are sought limits perspective on ever-

---

16. See, e.g., Graf-Peter Calliess, *Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law*, 23 ZEITSCHRIFT FÜR RECHTSSOZIOLOGIE 185 (2002); Christian Joerges, *The Science of Private Law and the Nation-State*, in THE EUROPEANIZATION OF LAW: THE LEGAL EFFECTS OF EUROPEAN INTEGRATION 47 (Francis Snyder ed., 2000).

17. See the seminal volume of THE PRACTICE OF TRANSNATIONAL LAW (Klaus Peter Berger ed., 2001) (recording a conference in Münster in May, 2000, where the result of a scientific survey designed by a Research Team from the Center for Transnational Law of Münster University to clarify the process of transnationalization of commercial law in international contract negotiations, contract drafting, and international commercial arbitration).

18. See, e.g., Gillian K. Hadfield, *The Public and the Private in the Provision of Law for Global Transactions*, in CONTRACTUAL CERTAINTY IN INTERNATIONAL TRADE: EMPIRICAL STUDIES AND THEORETICAL DEBATES ON INSTITUTIONAL SUPPORT FOR GLOBAL ECONOMIC EXCHANGES 239, 239–40 (Volkmar Gessner et al. eds., 2009).

present, larger issues. Rather than a deeper reflection about correlations between “public” and “private” ordering regimes, the turn to private law is presented as the mere result of an allegedly simple choice between rationalities of different pragmatic value: government takes too long, becomes too big, and tends to overreach;<sup>19</sup> private contracting is more cost- and time-efficient, discrete, and flexible. The current mainstream appears unimpressed at best, even if at the heart of the quintessential *Lochner* decision stood the labor law and legislative attempts to equalize or mitigate drastic employer–employee bargaining asymmetry. Calls for market-based rather than state-based governance solutions tend to obscure the difference in stakes between different fields of private law. These stakes, in turn, attract little attention in a climate where the market is offered as the only option in face of the state’s fading regulatory prerogative of global business affairs.<sup>20</sup> This retreat of the state has become even more troublesome with the fast expansion of global markets. In globally integrated market exchanges, with law facilitating their consolidation and yet failing to generate viable, border-crossing regulation and enforcement regimes, everything becomes precarious. The emerging transnational ideological battle, compared to earlier standoffs in a functioning, constitutionally grounded system of balancing rights, seems to be exceptionally more problematic in a context without clearly identifiable constitutional texts, without a judiciary, and without the institutional representational safety net to rely on for a periodically reversible set of political preferences. This article’s discussion of private law does not point to engagement with contract, corporate, or labor law. Instead, in the context of international law’s interest in subsidiarity, it focuses on private law in order to illustrate the problems that arise from applying known legal categories to emerging transnational regulatory frameworks, using the case study of labor law to powerfully express the downsides of exposing some of the most vulnerable interests to the dynamics of market-based self-regulation.

Where should the lawyer turn for reference points, foundations, and orientation? Even if a return to available toolkits seems to be the only possible strategy in light of the large-scale absence of effective public-law structures in transnational settings, the degree to which complex and fast-evolving transnational regulatory regimes can be adequately mapped along the delineations of public or private law remains unclear. Whether one is concerned with standard-setting in different areas such as forestry<sup>21</sup> or

---

19. See, e.g., *Republican Platform: Reforming the Government to Serve the People*, REPUBLICAN NAT’L COMM., <https://www.gop.com/platform/reforming-government> (last visited Sept. 27, 2015) (detailing the U.S. Republican Party platform).

20. See, e.g., Veronique De Rugy, *The Best Regulator? That’s Easy. It’s the Market*, THE DAILY BEAST (Oct. 16, 2014, 5:45 AM), <http://www.thedailybeast.com/articles/2014/10/16/the-best-regulator-that-s-easy-it-s-the-market.html>.

21. E.g., Erroll Meidinger, *The Administrative Law of Global Private–Public Regulation: The Case of Forestry*, 17 EUR. J. INT’L L. 47 (2006).

accounting,<sup>22</sup> or with standards pertaining to labor and environmental conditions within global supply chains,<sup>23</sup> the central challenge is determining how to understand and conceptualize such regimes against the background of a critical engagement with the public–private distinction, as it has been proposed in the context of domestic state transformation.<sup>24</sup> While the proliferation of transnational regulatory regimes responds to and is driven by far-reaching transformations in states and markets, a critical scrutiny of the foundations of these developments’ legitimacy is seriously lagging behind.

Conceptual and terminological proposals abound: notions such as “private authority,”<sup>25</sup> “transnational private regulatory governance,”<sup>26</sup> and “transnational law” itself<sup>27</sup> evince a fast-evolving laboratory of empirical, doctrinal, and conceptual analyses. But rather than attempting to “bring the state back in,” like a global lion tamer, research on diverse industries points to the need to develop responsive, evolutionary, and adaptive regulatory strategies, taking into account the multilayered nature of processes and practices under investigation.<sup>28</sup> References to “private” as opposed to “public” forms of regulation should not be read as indicating a clear choice between neatly separable regulatory responses. Instead, the turn to private transnational governance suggests a *complementing* and, in some cases, a far-reaching *decentering* of a formerly state-based regulatory response regime, resulting in the combination of hard and soft, formal and informal regulatory elements. But consequently, the current transnationalization of regulatory regimes in a global, functionally differentiated society is only partially receptive to the same normative critique that the waning welfare states in Western democracies prompted in the 1980s.<sup>29</sup>

---

22. E.g., Dieter Kerwer, *Rules That Many Use: Standards and Global Regulation*, 18 GOVERNANCE 611 (2005); Walter Mattli & Tim Büthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, 68 LAW & CONTEMP. PROBS., nos. 3 & 4, 2005, at 225.

23. E.g., RICHARD M. LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY* (2013).

24. E.g., Günter Frankenberg, *Shifting Boundaries: The Private, the Public, and the Welfare State*, in *THE MIXED ECONOMY OF SOCIAL WELFARE* 72 (Michael B. Katz & Christoph Sachße eds., 1996); Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 FORDHAM URB. L.J. 1611 (2001) (discussing the engagement of private third parties in the delivery of public goods by government as new tools used to cope with public problems).

25. See generally PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (A. Claire Cutler, Virginia Haufler & Tony Porter eds., 1999) (exploring private firms’ attempt to establish rules and standards in global commerce, in the absence of governmental action, through case studies in both contemporary and historical perspective).

26. See generally Symposium, *Transnational Private Regulatory Governance: Regimes, Dialogue, Constitutionalization*, 13 GERMAN L.J. 1269 (2012).

27. See generally PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956). For a critical appraisal see Christian Tietje, Alan Brouder & Karsten Nowrot eds., *Philip C. Jessup’s Transnational Law Revisited—On the Occasion of the 50th Anniversary of Its Publication*, BEITRÄGE ZUM TRANSNATIONALEN WIRTSCHAFTRECHT [ESSAYS IN TRANSNAT’L L.], no. 50, Feb. 2006, <http://www.wirtschaftsrecht.uni-halle.de/sites/default/files/altbestand/Heft50.pdf>.

28. See generally Symposium, *Equator Principles*, 5 TRANSNAT’L LEGAL THEORY 331 (2014).

29. See, e.g., Jürgen Habermas, *The New Obscurity: The Crisis of the Welfare State and the Exhaustion of Utopian Energies*, in *THE NEW CONSERVATISM: CULTURAL CRITICISM AND THE*

Instead, today's critique is in need of a comprehensive grounding of its premises and starting points in a postnational, postdemocratic context. Without the regulatory state and redistributive politics as bargaining tokens, one must develop a more contextual critique within transnational regulatory regimes such as labor and human rights law, where the traditional, nation-state reference points of state versus market or public versus private are of only limited value.<sup>30</sup>

Subsidiarity has recently been receiving considerable attention within public international law. The foregoing could be seen as pointing to the domestic as well as transnational private law undercurrents. One can observe at the same time that international lawyers take the cues of seminal political economy work and start looking for "small-scale," "bottom-up," and decentralization solutions.<sup>31</sup> These possible long-term reorientations invite a closer look, especially as to how this new interest in subsidiarity relates to the just-mentioned positions, which were long ago developed in the context of debates around the limits of state action<sup>32</sup> and the appropriate level of public authority.<sup>33</sup> This article unearths the political dimensions of this recent interest in subsidiarity among international lawyers before turning to transnational law as the site of engagement with both institutional and normative consequences of the alluded-to transformation of state-based governance structures and the proliferation of private and hybrid regulatory regimes.

### III

#### WHY SUBSIDIARITY? DREAMING OF BOTTOM-UP SOVEREIGNTY IN FRAGMENTED LEGAL ORDERS

International law's interest in subsidiarity appears to develop at a time when the status of the discipline is increasingly uncertain. Against the backdrop of one of its worst identity crises during the Kosovo conflict—a crisis that deepened dramatically after 9/11 and the War in Iraq—international law has become one of the most hotly debated legal fields.

---

HISTORIANS' DEBATE 48 (Jürgen Habermas ed., Shierry Weber Nichol森 trans., 1989). This essay by Habermas is one of the most often, and by now canonically, used references for this point.

30. See H. W. Arthurs, *Reinventing Labor Law for the Global Economy: The Benjamin Aaron Lecture*, 22 BERKELEY J. EMP. & LAB. L. 271, 284 (2001); Kevin Kolben, *Transnational Labor Regulation and the Limits of Governance*, 12 THEORETICAL INQUIRIES IN LAW 403, 404 (2011).

31. See, e.g., Andreas Follesdal, *Subsidiarity*, 6 J. POL. PHIL. 190 (1998); Friedrich Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) (arguing against the establishment of a Central Pricing Board by highlighting the dynamic and organic nature of market price fluctuation that consolidates and communicates a multitude of market information effectively); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (proposing a model where citizens choose municipalities in accordance with their preference for the provision of public goods and local taxation, which in turn sorts population into optimum communities).

32. See generally FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* (1944) (warning of the danger of tyranny that inevitably results from government control of economic decisionmaking through central planning).

33. See generally Tiebout, *supra* note 31.

The field's short history<sup>34</sup> has nevertheless been a very lively one, albeit with the threat of apology triumphing over utopia<sup>35</sup> never convincingly disarmed. The very instability of international law is amplified by its origins in both ideological and methodological contestation. This background illustrates the degree to which international law's interest in subsidiarity builds on the longer-standing investigations into its structure and architecture, focusing (especially in recent years) on questions of unity, coherence, and fragmentation. The current interest in subsidiarity echoes international lawyers' debates regarding the notion of fragmentation. Those debates became prominent about a decade ago, as the proliferation of transnational regulatory regimes and an increasingly functionally differentiated transnational judiciary prompted international lawyers to search for grounding assumptions about the role of states, international organizations, and their interaction.<sup>36</sup> Of great significance has been the engagement among international lawyers with the phenomenon of fragmentation,<sup>37</sup> relating to both diversification and pluralization "of *substantive norms*, [that is], the complex interactions caused by the existence of a staggering variety of substantive sources of international law, made up of tens of thousands of international treaties in addition to customary rules,"<sup>38</sup> on the one hand, and the "fragmentation of international *authority* . . ."<sup>39</sup> concerned "not with the interrelationship between rules, as such, but rather with the distribution of power (in the legal sense of the word) among the plethora of international and national institutions and organisations who produce, interpret and apply international law,"<sup>40</sup> on the other. Additionally, a critical introspection of

---

34. See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2002) (recounting the emergence of a liberal sensibility in international law in the late nineteenth century to its subsequent decline after the Second World War).

35. See generally MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989) (demonstrating how international law becomes dangerous to the contrasting criticisms of being either an irrelevant moralist Utopia or a manipulable facade for state interests).

36. See generally STEVEN WHEATLEY, *THE DEMOCRATIC LEGITIMACY OF INTERNATIONAL LAW* (2010).

37. E.g., Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10 400–23 (2006) (documenting the fragmentation of sources and institutions in public international law); see generally Martti Koskenniemi & Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002) (arguing that the proliferation of international tribunals and their use to further new interests does not warrant excessive worries over fragmentation of international law, and should be viewed instead as an institutional expression of political pluralism internationally).

38. Tomer Brode, *Fragmentation(s) of International Law: On Normative Integration as Authority Allocation*, in *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY* 99, 101–102 (Tomer Brode & Yuval Shany eds., 2008).

39. *Id.* at 104.

40. *Id.* at 102; see generally PHILIPPA WEBB, *INTERNATIONAL JUDICIAL INTEGRATION AND FRAGMENTATION* (2013) (addressing whether the growing number of international judicial bodies render decisions that are largely consistent with one another, which factors influence this (in)consistency, and what this tells us about the development of international law by international courts and tribunals).

sovereignty, both from within<sup>41</sup> and outside<sup>42</sup> the Western–liberal edifice of international law drives a lively debate over the proprieties and foundations of the field. Without probing the international law’s internal debate over the merits and perhaps future of a comprehensive concept of subsidiarity much further, this context of a transnationalization of regulatory regimes will not only continue to play a great role in ongoing attempts at understanding the emerging international legal landscape, it will lead to ever sharper accentuation of the ideological–political stakes in the normative discussion about the role and value of international law.

Turning from international law to transnational law provides a more sensitive discursive framework for the institutional and normative implications of a turn to subsidiarity and bottom-up governance. Here, this article reengages with the theme of fragmentation by placing particular emphasis on its nature. Analysis of fragmentation through the lens of transnational law, here understood as a method rather than a distinct legal field, shows that descriptions of allegedly “real” constellations such as the “unity of (domestic or international) law”<sup>43</sup> are in fact normative assessments, more prescriptive than descriptive. Critical deconstruction can show the stakes involved in making arguments for or against fragmentation, and for or against an allegedly interventionist state.

Studying fragmentation through the lens of transnational law facilitates unpacking the normative implications of arguments regarding merits or risks of bottom-up governance, subsidiarity, and diffused public authority. In contrast to international law, transnational law is even less certain about the constituents, boundaries, and foundations of itself as a field. Its regulatory purpose, doctrinal basis, judicial forum, and normative hierarchy are even less clearly defined than the correlatives in international law. Transnational law, with its roots in international law, conflict of laws, comparative law, and sociological jurisprudence, seems to have an even more precarious stand than international law in dealing with fragmentation and globalization. But this allows transnational lawyers perhaps to exercise certain discretion in conceptualizing and connecting different research agendas and in developing an innovative ethnographic investigative strategy. A normative–institutional focus

---

41. See, e.g., Henkin, *supra* note 2 (arguing that the sovereignty of states in international law is essentially a mistake).

42. See, e.g., Lillian Aponte Miranda, *The Role of International Law in Intrastate Natural Resource Allocation: Sovereignty, Human Rights, and Peoples-Based Development*, 45 VAND. J. TRANSNAT’L L. 785 (2012) (arguing that while international law may have been originally concerned with the allocation of land and natural resources in only an interstate context, it plays a distributive role today in an intrastate context); Rebecca Tsosie, *Climate Change and Indigenous Peoples: Comparative Models of Sovereignty*, 26 TUL. ENVTL. L.J. 239 (2013) (highlighting the need to merge the international and domestic frameworks of sovereignty to meet the challenges of climate change for indigenous peoples).

43. The theme of “unity of the legal order” has been the focus of a number of studies by German authors. See, e.g., MANFRED BALDUS, *DIE EINHEIT DER RECHTSORDNUNG* (1995); DAGMAR FELIX, *EINHEIT DER RECHTSORDNUNG. ZUR VERFASSUNGSRECHTLICHEN RELEVANZ EINER ARGUMENTATIONSFIGUR* (1998).

on the “actors, norms, and processes”<sup>44</sup> in transnational governance must be brought together with both socio-legal and political analysis<sup>45</sup> of the law–non-law distinction in “the distinction between law and fact,”<sup>46</sup> with the testing case for transnational law being its ability to develop a framework of Actors-Norms-Processes (A-N-P) into a concept combining both public and private law perspectives on a legal sociological basis.

At the center of an approach such as A-N-P is an understanding of law that does not take a particular historical, institutional, or normative framework for granted when delineating the boundaries and substance of an area of law. Rather, the approach of “transnational legal pluralism”<sup>47</sup> proposes to preempt the identification of regulatory structures, rights creation, and legitimacy guarantees from an objective or even universal standpoint regarding an underlying but asserted and immunized theory of law. The aim is to use A-N-P to invite different and competing, perhaps incompatible, concepts of norm-creation, political representation, and participation to render visible differences in understanding law’s role in various societal settings. A-N-P is at the basis of this article’s political critique of the use of normative hierarchy or multilevel governance arguments with regard to subsidiarity both from a public (international) and private law perspective.

The debate over transnational law as a field or method cannot escape engagement with legitimacy. It inevitably becomes an investigation into the political dimensions of the legal pluralist order. This becomes obvious in areas of transnational regulatory conflicts that illustrate the porosity of the protective fabric that law is asked to cast over the interests of the most vulnerable,<sup>48</sup> such as labor law, investment arbitration,<sup>49</sup> food safety,<sup>50</sup> or environmental law.<sup>51</sup> At

---

44. See Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism*, 21 *TRANSNAT’L L. & CONTEMP. PROBS.* 305, 308 (2012).

45. See, e.g., Roger Cotterrell, *What is Transnational Law?*, 37 *LAW & SOC. INQUIRY* 500 (2012) (considering what approaches may be most productive, and what key issues need to be addressed, to make sense of broad trends in law’s extension beyond the boundaries of nation-states); Prabha Kotiswaran, *Do Feminists Need an Economic Sociology of Law?*, 40 *J. L. & SOC’Y* 115 (2013) (offering an economic sociology of law pursued in legal ethnographic terms as a way of revitalizing contemporary feminist legal thought on the market and the economy, illustrating its use in the context of international anti-trafficking law and transnational surrogacy).

46. See, e.g., BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION* 470 (2002); Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 *AM. J. COMP. L.* 145, 149 (1997).

47. See generally Peer Zumbansen, *Transnational Legal Pluralism*, 1 *TRANSNAT’L LEGAL THEORY* 141 (2010).

48. See Susan Marks, *Law and the Production of Superfluity*, 2 *TRANSNAT’L LEGAL THEORY* 1, 4 (2011).

49. See GUS VAN HARTEN, *INVESTMENT TREATY ARBITRATION AND PUBLIC LAW* (2006); Muthucumaraswamy Sornarajah, *Power and Justice: Third World Resistance in International Law*, 10 *SINGAPORE Y.B. OF INT’L L.* 19 (2006).

50. See Alexia Herwig, *Transnational Governance Regimes for Foods Derived from Biotechnology and Their Legitimacy*, in *TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM* 199 (Gunther Teubner, Christian Joerges & Inger-Johanne Sand eds., 2004).

51. See Usha Natarajan, *TWAIL and the Environment: The State of Nature, the Nature of the State*,

the heart of these areas are conflicts concerning agency, exclusion and inclusion, and power, even if debated and negotiated in apparently “technical” terms.<sup>52</sup> Such conflicts concern the political architecture of the system itself. They direct our attention to the construction of allocations of authority. It is from that perspective that this article returns to the status of private law.

#### IV

#### THE POLITICS OF THE PRIVATE

Although this article focuses on the political construction of the overall system, private law offers an interesting perspective. Behind the calls for marketization and private law-based regulatory approaches there is no aspiration for what public lawyers would frame as a coherent, all-encompassing legal system of authority. Instead, the preference for private law seems to be based on the idea that the market (rather than the state) can improve individual welfare, for example, by promoting regulatory competition<sup>53</sup> or decentralization.<sup>54</sup> The displacement of a public law perspective by a private law perspective, however, results in the invocations of a more coherent system of ordered hierarchy with a particularly carved-out place for subsidiarity to be pursued in pure self-interest. The private law bias, in turn, tends to disregard the “bigger picture,” which would allow us to acknowledge the distributive effects of the overall system on vulnerable parties. In Hayek’s construction of regulatory competition, which has become formative for market governance law under new institutional economics, the legal system is a backup plan, an emergency construct to be called upon only in a situation of market failure.<sup>55</sup> The irony that markets are not “natural” creatures but are constituted by law and governed by property rights and by indirect and direct redistributive politics<sup>56</sup> mostly seems lost on authors espousing Hayek’s view. Instead, one is presented with a juxtaposition of law as a nonfoundational realm of “formal

---

*and the Arab Spring*, 14 OR. REV. INT’L L. 177 (2012); *see also* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH (Shawkat Alam et al. eds., 2015) (surveying both the historical origins of the North–South divide in European colonialism as well as its contemporary manifestations on a range of issues such as food justice, energy justice, indigenous rights, trade, and emphasizing the Global South’s priorities and perspectives in the face of environmental problems).

52. *See* Richard Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 898 (1999) (“Both individual rights and the formal rules of jurisdiction are ‘technologies of the self’; they are discourses and concrete acts that define political selfhood and provide the model for biological individuals to ‘perform themselves’ as (autonomous, rational, profit-maximizing, god fearing, desiring, willful, raced, sexed) selves.”).

53. *See generally* Hayek, *supra* note 31; Roberta Romano, *Law as Product: Some Pieces of the Incorporation Puzzle*, 1 J. L. ECON. & ORG. 225 (1985).

54. *See generally* Tiebout, *supra* note 31.

55. *See* Hayek’s famous depiction of the role of the state in a system of rule of law, HAYEK, *supra* note 32, at 112–13 (“Within the known rules of the game the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts.”).

56. DUNCAN KENNEDY, *THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT* 6–8 (2006).

norms” and “social norms” that allegedly govern all relations in society—unless hampered by the interventionist state politics via legislation or judicial act.<sup>57</sup>

For international and private lawyers alike, invocations of subsidiarity regularly imply coexistence of different normative systems, even if they are only concerned with reversal of a formal normative, institutional hierarchy. And although a public lawyer may emphasize how the overall system might attain integrity and stability, the private lawyer appears much less interested in overall effect. References to subsidiarity and private government can often prove to have a destabilizing and disintegrating effect, seen from a public law perspective. From the perspective of libertarian-oriented private law, the disintegration and weakening of central government is not seen as a threat, but rather as the natural side effect of lower-level empowerment and protection of individual rights.<sup>58</sup> This is exactly the paradox in a public-and-private-law reading of dynamics such as regulatory competition, illustrated, for example, by concerns about competing or conflicting investment arbitration awards.<sup>59</sup> A parallel reading of subsidiarity invocations in both international and private law says much about how subsidiarity is supposed to subject the entire control architecture to critique, but from diametrically opposed viewpoints. The demarcation of boundaries<sup>60</sup> and levels of regulatory competence<sup>61</sup> is fundamentally an investigation into the normative foundation of the order. This investigation will proceed differently depending on whether we start from a public or a private law perspective. Whereas, from a public law perspective, it is all about coherence, integrity, and effectiveness, private lawyers can problematically foster the opposite,<sup>62</sup> as long as one accepts the law–social norms distinction put forward so persuasively by New Institutional Economics,

---

57. See, e.g., David Charny, *Illusions of a Spontaneous Order: ‘Norms’ in Contractual Relationships*, 144 U. PA. L. REV. 1841 (1996) (discussing the supplementary role of non-legal norms in commercial transactions); Peer Zumbansen, *Law after the Welfare State: Formalism, Functionalism and the Ironic Turn of Reflexive Law*, 56 AM. J. COMP. L. 769 (2008) (analyzing the contemporary emergence of neoformalist and neofunctionalist approaches to lawmaking at a time when the state is seeking to reassert, reformulate, and reconceptualize its regulatory competence, both domestically and transnationally through a comparison of the American and German experiences with the rise of social interventionist state).

58. See generally FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY, VOLUME 1: RULES AND ORDER* (1973).

59. See, e.g., VAN HARTEN, *supra* note 49, at 1–11; Broude, *supra* note 38, at 105–06.

60. See Lawrence M. Friedman, *Borders: On the Emerging Sociology of Transnational Law*, 32 STAN. L. REV. 65, 65 (1996) (“[Social sciences] face obstacles whenever and wherever it tries to cross borders and compare institutions in different societies.”); Ford, *supra* note 52.

61. See generally Joseph H.H. Weiler, *The Geology of International Law—Governance, Democracy and Legitimacy*, 64 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [ZaöRV] 547 (2004); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT’L L. 907 (2004).

62. See, e.g., Markus Jachtenfuchs, *The Governance Approach to European Integration*, 39 J. COMMON MARKET STUD. 245 (2001); Christian Joerges, *Economic Law, the Nation-State and the Maastricht Treaty*, in *EUROPE AFTER MAASTRICHT: AN EVER CLOSER UNION?* (Renaud Dehousse ed., 1994).

law and economics, as well as the so-called social norms scholars.<sup>63</sup> Remarkably, the turn to social norms occurs in the most straightforward manner and seemingly without any awareness of long-standing legal–sociological and legal–anthropological insights into the facts and politics of the interplay between formal and informal rules.<sup>64</sup>

The central contention here is that references to bottom-up governance or subsidiarity constitute a replay of law and non-law distinctions central to the disputes between welfarist (or altruistic) and individualist (or egoistic)<sup>65</sup> positions regarding the regulation of market behavior. The argument is not new. Legal realists and their attentive disciples sought to uncover the reifying impact of allocating particular instrumental purpose to one field of law in distinction from the other.<sup>66</sup> Rendering agency and choice invisible in this allocation, the demarcations between public and private and between state and market work so that the latter becomes represented as natural. What happens, however, is that the representation of the market—not impinged by the state’s overreaching intervention and redistributive politics—will now be seen as real instead of as a rhetorical outcome based on a particular premise, or as the prescriptive and predictable outcome of a dominating mindset.

This objectification is more easily discernable from a private, rather than public international, law perspective. Whereas for international lawyers, who constantly compare “the international” with “the domestic,” subsidiarity turns a logically hierarchized legal order on its head,<sup>67</sup> private lawyers, who display a more relaxed attitude towards such distinctions, welcome both domestic and international spheres as yet-to-be-explored regions of autonomous interaction.<sup>68</sup> Private lawyers have always been able to imagine private law without (too much of) the state. Early and mid-twentieth-century acclamations of *laissez-faire*

---

63. See, e.g., Gillian Hadfield, *The Public and the Private in the Provision of Law for Global Services*, in CONTRACTUAL CERTAINTY IN INTERNATIONAL TRADE: EMPIRICAL STUDIES AND THEORETICAL DEBATES ON INSTITUTIONAL SUPPORT FOR GLOBAL ECONOMIC EXCHANGES 239 (Volkmar Gessner ed., 2009).

64. For a critique of this wholesale embrace of market solutions, see, for example, Kotiswaran, *supra* note 45; see also Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Field as an Appropriate Subject of Study*, 7 LAW & SOC’Y REV. 719 (1973); Stewart Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC’Y REV. 507 (1977).

65. See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) (arguing that the form and substance of contract law are related, and that the “opposed rhetorical modes” of both levels “reflect a deeper level of contradiction” in the liberal world vision, in particular, the contradictory substantive commitment to individualism and altruism).

66. E.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. REV. 8 (1927); Kennedy, *supra* note 65.

67. See generally ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* (2009).

68. For an enthusiastic embrace of an autonomous, transnational private law, see Klaus Peter Berger, *The New Law Merchant and the Global Market Place: A 21st Century View of Transnational Commercial Law*, in THE PRACTICE OF TRANSNATIONAL LAW 1 (Klaus Peter Berger ed., 2001). See skeptical comments by Peer Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, 8 EUR. L.J. 400 (2002), as well as in Peer Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, 76 LAW & CONTEMP. PROBS., no. 2, 2013, at 117, 123.

liberalism, limiting governments' interventionist prerogatives<sup>69</sup> in core areas like contract or corporate law, were premised on outright rejection of law to prioritize a pre-political order of self-governing society over redistributive politics.<sup>70</sup> The long-standing analysis of law's interpenetration with socioeconomic and political order<sup>71</sup> had no lasting impact on an ideology, which separated a nonpolitical market sphere from an overzealous and ultimately incompetent<sup>72</sup> state. During the transformation and deconstruction of the Western welfare state during the 1980s and 1990s, private lawyers were caught up in debates over subsidiarity that eloquently revived ideological stances of the formalist–functionalist divides of the 1920s and the state-versus-market disputes of the 1970s.<sup>73</sup> Invocations of subsidiarity and calls for a “private law society”<sup>74</sup> as governing principles for emerging market orders under threats of globalization must be seen as charged with a particular vision of how societies should be ordered—and governed. Invocations of subsidiarity, self-government, and bottom-up empowerment have been celebrating a transnational comeback in the context of “good governance” programs.<sup>75</sup> Given the ideological stakes of the current interest in subsidiarity as a governing principle, there is a growing need for a political critique of how this development affects vulnerable positions.

---

69. E.g., Paul Kens, *Lochner v. New York: Tradition or Change in Constitutional Law?*, 1 N.Y.U. J.L. & LIBERTY 404 (2003). For a sharp analysis of *Lochner*, see Kennedy, *supra* note 56, at 8–16.

70. See generally ADOLF A. BERLE, *THE 20TH CENTURY CAPITALIST REVOLUTION* (1954) (offering particularly valuable insights in Chapter V “*Corporate Capitalism and the City of God*”); John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

71. E.g., MAX WEBER, *ON LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1967) (exploring features of Western law that were favorable to the development of the capitalistic economy and in what ways this economy has reacted upon methods of legal thoughts, and also whether logical rationality, peculiar to certain parts of the Western world, is connected with that rational method of economic thought characteristic of Western capitalism); FRANZ WIEACKER, *PRIVATRECHTSGESCHICHTE DER NEUZEIT UNTER BESONDERER BERÜCKSICHTIGUNG DER DEUTSCHEN ENTWICKLUNG* (1967) (tracing the development of private law rules from a formal, rule-based body of law to an increasingly material, standards-based one).

72. See generally ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000) (putting forward a comprehensive critique of the judiciary's incompetence in adequately regulating complex business disputes); POSNER, *supra* note 67.

73. For the debate in the 1920s, see for example Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923). An excellent overview and analysis of the arguments against the welfare state since the 1970s is provided by Paul Pierson, *The New Politics of the Welfare State*, 48 WORLD POL. 143 (1996).

74. See generally FRANZ BYDLINSKI, *DAS PRIVATRECHT IM RECHTSSYSTEM EINER “PRIVATRECHTSGESELLSCHAFT”* (1994). The origins therefore lie in the legal–political concept of Ordoliberalism. See, e.g., Franz Böhm, Wilhelm Eucken & Hans Großmann-Doerth, *The Ordo Manifesto of 1936*, in *GERMANY'S SOCIAL MARKET ECONOMY: ORIGINS AND EVOLUTION* 15 (Alan Peacock & Hans Willgerodt eds., 1989).

75. For a critique, see Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance*, in *LAW IN TRANSITION: RIGHTS, DEVELOPMENT AND TRANSITIONAL JUSTICE* 141 (Peer Zumbansen & Ruth Buchanan eds., 2014); Kerry Rittich, *Functionalism and Formalism: Their Latest Incarnations in Contemporary Development and Governance Debates*, 55 U. TORONTO L.J. 853 (2005).

## V

## TRANSNATIONAL LABOR LAW FOR GLOBAL SUPPLY CHAINS?

Using the example of the Rana Plaza building collapse in Dhaka, Bangladesh in 2013 and the ensuing creation of soft-law provisions pertaining to the fire- and building-safety conditions (the “Accord” and the “Worker Safety Alliance”),<sup>76</sup> scholars, union activists, human rights advocacy experts, and labor and corporate lawyers were engaged in developing (or preventing) binding legal responses in a situation where the facts were still mostly evolving and there was not yet a court decision. Whereas the above discussion illustrated the different premises in a discussion of subsidiarity among public and private lawyers, the following provides an example of how a turn to subsidiarity unfolds in a setting with high stakes for vulnerable parties.

The 2013 collapse of Rana Plaza, the eight-story building that housed numerous sweat shops producing garments for international retailers such as Benetton and Primark, killed over 1,100 people.<sup>77</sup> This was quickly noted to be not an isolated incident but instead one in a long series of workplace disasters that have claimed the lives of garment factory workers.<sup>78</sup> Maybe the proximity between this event and the “shirt on [y]our back”<sup>79</sup> helped drive a public awareness campaign during which numerous labor and human rights activist groups, including some of the before very marginalized Bangladeshi unions, found themselves in a position of influence. This coalition building, however, was complicated by numerous parallel and concurring negotiations between the Bangladeshi government, foreign and Bangladeshi industry representatives, the International Labor Organization, and Western governments, raising the stakes for all parties to reach a compromise in a timely fashion.

The Accord on Fire and Building Safety in Bangladesh,<sup>80</sup> with its relatively ambitious monitoring mechanism, was agreed to with wide buy-in from the International Labor Organization (ILO), international and Bangladeshi industry, Bangladeshi unions and Western partners (mostly in the European

---

76. See generally *Accord on Fire and Building Safety in Bangladesh*, BANGLADESHACCORD.ORG (May 13, 2013), [http://bangladeshaccord.org/wp-content/uploads/2013/10/the\\_accord.pdf](http://bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf); ALLIANCE FOR BANGLADESH WORKER SAFETY, <http://www.bangladeshworkersafety.org> (last visited Sept. 29, 2015). For an analysis, background, and summary of the Bangladesh Accord, see Tom Hayes, Robbie Gilbert & Nick Thomas, *The Accord on Fire and Building Safety in Bangladesh: An Analysis*, BRUSSELS EUROPEAN EMPLOYEES RELATIONS GROUP & MORGAN LEWIS (2013), <http://www.european-law-school.eu/media/ReaderZumbansenfinal.pdf>.

77. Joseph Allchin & Amy Kazmin, *Bangladesh Mourns as Factory Toll Reaches 228*, FIN. TIMES (Apr. 25, 2013), <http://www.ft.com/intl/cms/s/0/27e66642-ad71-11e2-a2c7-00144feabdc0.html#axzz3RSWemSYT>.

78. Joseph Allchin & Amy Kazmin, *Scores Dead in Bangladeshi Garment Factory Collapse*, FIN. TIMES (Apr. 24, 2013), <http://www.ft.com/intl/cms/s/0/bf534db4-acbe-11e2-b27f-00144feabdc0.html?siteedition=intl#axzz3RSWemSYT>.

79. See Lindsay Poulton et al., *The Shirt On Your Back: The Human Cost of the Bangladeshi Garment Industry*, THE GUARDIAN, <http://www.theguardian.com/world/ng-interactive/2014/apr/bangladesh-shirt-on-your-back>.

80. *Accord on Fire and Building Safety in Bangladesh*, BANGLADESHACCORD.ORG (May 13, 2013), [http://bangladeshaccord.org/wp-content/uploads/2013/10/the\\_accord.pdf](http://bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf).

Union and partly the United States). This mechanism was not the first attempt to develop an effective labor law for a four-million-workers industry that constitutes seventy-five percent of Bangladesh's gross domestic product. The Accord complements, rather than substitutes, existing (although not effectively enforced) regulatory regimes at the national level in Bangladesh. For example, under the Sustainability Compact for Bangladesh, Bangladesh committed to amend its labor law and work with the ILO to develop additional legislative proposals.<sup>81</sup> But that Accord is built exclusively around a soft-law approach, and it thus raises significant doubts regarding its potential to constitute a viable building block of a much-needed, transnational legal regime addressing global supply chains. It also raises serious concerns about the Accord's ability to have an impact on the prevailing political economy, in which, in Bangladesh's case, the immense garment industry of pivotal national importance is deeply embedded.<sup>82</sup>

Meanwhile, the ILO played an important role by presiding over the Accord, a now well-known and widely publicized voluntary compensation program. The ILO serves as the "neutral chair" of the Rana Plaza Coordination Committee, which both developed and now oversees the Rana Plaza Arrangement, which constitutes the process to support victims and their families. Significant sectors of the Bangladeshi industry and global brands subscribe to the Arrangement and are represented on the Committee.<sup>83</sup> But in December 2014, the Committee reduced its overall compensation estimate by a quarter, to \$30 million.<sup>84</sup>

Of particular relevance in this constellation is the role played by unions, both locally and transnationally. A number of garment-industry unions prepared, drafted, and signed the Accord on Fire and Building Safety in Bangladesh.<sup>85</sup> However, this is against a background of widely reported ongoing intimidation of unions in Bangladesh.<sup>86</sup> For example, after leaders of the

---

81. Joint Statement, Government of Bangladesh & The European Union, *Staying Engaged: A Sustainability Compact for Continuous Improvements in Labour Rights and Factory Safety in the Ready-Made Garment and Knitwear Industry in Bangladesh* (July 8, 2013), [http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc\\_151601.pdf](http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151601.pdf).

82. See, e.g., *U.S. Trade Representative Michael Froman Comments on President's Decision to Suspend GSP Benefits for Bangladesh*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2013/june/michael-froman-gsp-bangladesh> (last visited Sept. 30, 2015); *AFT Supports Withdrawal of Bangladesh Trade Privileges*, AM. FED'N OF TEACHERS, <http://www.aft.org/news/aft-supports-withdrawal-bangladesh-trade-privileges> (last visited Sept. 30, 2015).

83. See RANA PLAZA ARRANGEMENT, <http://www.ranaplaza-arrangement.org/> (last visited Sept. 30, 2015). The Arrangement has been signed by leading buyers such as Primark, the Bangladesh Ministry of Labour, Bangladesh Employers' Federation as well as major labor unions such as Bangladesh Garment Manufacturers and Exporters Association. See *Full Text*, RANA PLAZA ARRANGEMENT, <http://www.ranaplaza-arrangement.org/mou/full-text> (last visited Nov. 1, 2015).

84. Monira Munnir, *Compensation Estimate Cut by \$10m*, THE FIN. EXPRESS (Dec. 22, 2014), <http://www.thefinancialexpress-bd.com/2014/12/22/72120>.

85. See *Official Signatories*, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, <http://bangladeshaccord.org/signatories/> (last visited Sept. 30, 2015).

86. See, e.g., Ruma Paul, *Bangladesh Garment Factories Intimidate Workers Over Unions: Group*, REUTERS (Feb. 6, 2014), <http://www.reuters.com/article/2014/02/06/us-bangladesh-labour-rights->

National Garment Workers Federation wrote to U.S. contacts about their concerns, Mohammed Atiqul Islam, President of the Bangladesh Garment Manufacturing and Exporters Association, stated that “those who are making allegations abroad without informing anyone must face sedition charges.”<sup>87</sup> Considering the immense scope of the country’s garment industry,<sup>88</sup> the Bangladeshi government’s role in actively supporting workers’ collective rights is noteworthy. After the tragedy at Rana Plaza, the ILO and others pointed to the missed opportunity of preventing workers from returning to the reportedly unsafe building, if there had been a stronger role for unions.<sup>89</sup> Although Bangladeshi workers have the right to form unions “[o]n paper,” in practice “attempts to unionise the country’s garment workers have been ruthlessly suppressed.”<sup>90</sup> The poignancy of this finding is further enhanced by the fact that “at least 10 per cent of Bangladesh’s parliament members are direct owners of the country’s garment factories.”<sup>91</sup>

Considering the worldwide integration of the garment industry’s supply chain,<sup>92</sup> the role of foreign governments could be a crucial factor. U.S. Trade Representative Michael Froman recently stated,

We urge the [Bangladeshi–PZ] government to complete remaining inspections as soon as possible to prevent recurrence of workplace tragedies such as those that occurred in 2012 and 2013. There is more work to do . . . . We also urge the [Bangladesh] government to accelerate its efforts to ensure workers’ rights and to take measures to address continuing reports of harassment of and violence against labor activists who are attempting to exercise their rights.<sup>93</sup>

---

idUSBREA150YN20140206.

87. Joseph Allchin, *One Year on From Rana Plaza, Little Has Changed in Bangladesh’s Factories*, FT.COM BEYONDBRICS BLOG (July 17, 2014), <http://blogs.ft.com/beyond-brics/2014/07/17/one-year-on-from-rana-plaza-little-has-changed-in-bangladeshs-factories/>. Mohammed Atiqul Islam also sits on the board of the Alliance for Bangladesh Worker Safety, which was established by North American apparel companies with the goal of improving workplace safety. See *About the Alliance for Bangladesh Worker Safety*, BANGLADESH WORKER SAFETY, <http://www.bangladeshworkersafety.org/about/about-the-alliance/> (last visited Sept. 30, 2015).

88. See generally Mohammad Yunus & Tatsufumi Yamagata, *The Garment Industry in Bangladesh*, in DYNAMICS OF THE GARMENT INDUSTRY IN LOW-INCOME COUNTRIES: EXPERIENCE OF ASIA AND AFRICA (INTERIM REPORT) 4 (Takahiro Fukunishi ed., 2012), [http://www.ide.go.jp/English/Publish/Download/Report/2011/pdf/410\\_ch6.pdf](http://www.ide.go.jp/English/Publish/Download/Report/2011/pdf/410_ch6.pdf).

89. See *Rana Plaza: A look back, and forward. On the anniversary of the Rana Plaza Tragedy...It did not have to be like this*, GLOBAL LABOUR RIGHTS, <http://www.globallabourrights.org/alerts/rana-plaza-bangladesh-anniversary-a-look-back-and-forward>.

90. Amy Kazmin, *Bangladesh Factory Collapse a Catalyst for Workers’ Rights*, FIN. TIMES (May 3, 2013), <http://www.ft.com/intl/cms/s/0/8c72524e-b3e1-11e2-ace9-00144feabdc0.html#axzz412YkWw7B>.

91. Amy Kazmin et al., *Bangladesh Factory Disasters Highlight Regulatory Failures*, FIN. TIMES (Apr. 25, 2013), <http://www.ft.com/intl/cms/s/0/9a551ce8-adab-11e2-82b8-00144feabdc0.html#slide0>.

92. See generally Gary Gereffi & Stacey Frederick, *The Global Apparel Value Chain, Trade and the Crisis: Challenges and Opportunities for Developing Countries* (The World Bank, Policy Research Working Paper no. 5281, 2010), <https://openknowledge.worldbank.org/bitstream/handle/10986/3769/WPS5281.pdf?sequence=1>.

93. *Do More to Regain GSP Facility, US Tells Bangladesh*, BANGLADESH BUSINESS NEWS (Jan. 17, 2015), <http://businessnews-bd.com/bangladesh-to-do-more-in-labour-rights-issues-to-regain-gsp-facility-us/>.

The United States is using trade leverage to put the onus on the Bangladeshi government to improve workplace safety and to protect the right of workers to organize. The European Union, together with the ILO, the United States, and Bangladesh, launched the Sustainability Compact for Bangladesh to improve conditions for workers in the garment industry.<sup>94</sup> One year later, the European Commission was still calling on Bangladesh “to complete the labor law reform, training, and recruitment of inspectors and to create the conditions for meaningful freedom of association.”<sup>95</sup>

Much as the speedy passing of the Accord and the signing of the Alliance owed to enormous public pressure on multinationals connected to the garment-producing facilities in Bangladesh, growing public concern with multinationals’ behavior in foreign countries has long focused on a wide range of actual and potential rights violations vis-à-vis workers, indigenous communities, established traditional practices, and forms of knowledge including understandings of land use and entitlements or the environment. Although a global public may today learn of an egregious rights violation committed by a multinational company, subsidiary, or contracting partners, a closer look at such events often reveals a much more complex picture. The legal “case” or “event” is but an indicator of complicated socioeconomic, cultural, and historical constellations of interests and stakes, the understanding of which will frequently require intensive, sometimes years-long, on-the-ground, ethnographic research.<sup>96</sup> A lawyer who is called upon to work on such a case experiences a significant gap and tension between “legal” interest representation and engagement with the underlying substantive problem. Lawyers, called upon as problem solvers, find themselves couched and constrained in the dynamics of their clients’ interest representation within a legal, justiciable framework. To solve, or even to address the problem adequately, the lawyer has to go far beyond the legal litigation itself. A contextual reading of the facts of Rana Plaza focuses on this gap between the justiciable case and the bigger underlying problem. It reveals the societal dimension of a case, what human rights lawyers call the “root causes” of a rights violation.<sup>97</sup>

This root cause does not exhaust itself in a conflict between two opposing rights. Rather, it points to the inherent limits of an approach that aims at capturing a social problem through the lens of rights. Lawyers find themselves

---

94. *EU Trade Commissioner De Gucht Launches Global Sustainability Compact in Response to Bangladesh Tragedy*, EUROPEAN COMM’N (July 8, 2013), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=935>.

95. Press Release, European Comm’n, *Staying Engaged: Bangladesh Sustainability Compact—One Year On* (July 8, 2014), [http://europa.eu/rapid/press-release\\_IP-14-802\\_en.htm](http://europa.eu/rapid/press-release_IP-14-802_en.htm); see also Henkin, *supra* note 2.

96. George E. Marcus, *The Contemporary Desire for Ethnography and Its Implication for Anthropology*, in *TRANSFORMING ETHNOGRAPHIC KNOWLEDGE* 73 (Rebecca Hardin & Kamari Maxine Clarke eds., 2012).

97. See, e.g., Susan Marks, *Human Rights and Root Causes*, 74 *MOD. L. REV.* 57 (2011); see also Human Rights Council, *The Role of Prevention in the Promotion and Protection of Human Rights*, U.N. Doc. A/HRC/30/20, at 5 (July 16, 2015).

confronted with the problem of having to translate social facts into the language of law, which appears to be the only legitimate and effective way to make or build a particular case.<sup>98</sup> In the concrete case of Rana Plaza, such a contextual approach can reveal the actual place of this incident in both local and transnational spaces of the globalized, ready-made garment industry. It can help one appreciate the regulatory environment for an industry that places second globally (after China).<sup>99</sup> Precisely because of the hybrid, transnational nature of the regulatory regime for this part of the global supply chain, most existing categories fall short of capturing the different dynamics between local and other actors. What significance, for example, should the compensation fund for eventual future disasters in the industry have, which G7 leaders announced on June 8th during their Schloss Elmau meeting?<sup>100</sup> What impact will the recently filed murder charges before a Bangladeshi court for the wrongful death of 1,137 Rana Plaza workers have for safer regulation of the supply chain?<sup>101</sup> It is only by going beyond these attention-capturing developments that one can further unfold<sup>102</sup> the complexity of globe-spanning production and distribution regimes such as that of the garment supply chain.

## VI

### EMPOWERMENT DREAMS AND THE ELUSIVE PROMISE OF CORPORATE SELF-REGULATION

The above is a sketch of (what should be a more detailed account of) how a socio-legal and political critique of subsidiarity invocations in international and transnational law has very different normative stakes for different constituencies. From a private law perspective, it becomes more evident how invocations of subsidiarity, empowerment, and self-government are likely to result in increasing the precarious state of already vulnerable stakeholders, and in continuing to immunize powerful private actors from public accountability. Given the dramatic global governance gap,<sup>103</sup> the rise of so-called transnational private regulatory governance remains of particular political concern. The

---

98. See generally Peer Zumbansen, *What Lies Before, Behind and Beneath a Case? Five Minutes of Transnational Lawyering and the Consequences for Legal Education*, in *STATELESS LAW: EVOLVING BOUNDARIES OF A DISCIPLINE* 215 (Shauna Van Praagh & Helge Dedek eds., 2014).

99. See, e.g., Tandiwe Gross, *Rana Plaza: Private Governance and Corporate Power in Global Supply Chains*, *GLOBAL LABOUR COLUMN* (July 4, 2013), <http://column.global-labour-university.org/2013/07/rana-plaza-private-governance-and.html>.

100. See generally Patrick Wintour, *G7 Leaders Agree on New Insurance Fund After Rana Plaza Disaster*, *THE GUARDIAN* (June 8, 2015), <http://www.theguardian.com/world/2015/jun/08/g7-insurance-fund-rana-plaza-disaster>.

101. See generally Julfikar Ali Manik & Nida Najar, *Bangladesh Police Charge 41 With Murder Over Rana Plaza Collapse*, *N.Y. TIMES* (June 1, 2015), [http://www.nytimes.com/2015/06/02/world/asia/bangladesh-rana-plaza-murder-charges.html?\\_r=0](http://www.nytimes.com/2015/06/02/world/asia/bangladesh-rana-plaza-murder-charges.html?_r=0).

102. See, e.g., Gereffi & Frederick, *supra* note 92.

103. See generally Robert Keohane, *Global Governance and Democratic Accountability*, MILIBAND LECTURE, LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE, Spring 2002, <http://www.lse.ac.uk/publicEvents/pdf/20020701t1531t001.pdf> (addressing a number of questions critical to closing the accountability gaps in world politics).

chances of developing a coherent political, even constitutional, critique of private governance as being possible within the nation-state are considerably dim. The brief analysis of the regulatory aftermath of the Rana Plaza tragedy illustrates the concrete challenges facing the attempts of conceptualizing and implementing a labor law regime that adequately addresses locally embedded yet globally structured supply chains. What a private law analysis reveals fundamentally challenges current assertions within public international law regarding the possible merits of relying on subsidiarity to close global governance gaps. A private law analysis illustrates some of the risks in endorsing bottom-up governance ideas as an available remedy to address shortcomings on the international scale. Above all, a private law perspective on Rana Plaza offers a more differentiated analysis of how the regime operates in action. One reason for private law's explanatory potential lies in the fact that private law modulates and translates existing as well as evolving business patterns, processes, and institutions into legal form.<sup>104</sup> Another reason is that regulatory logic tends to follow specific organizational and management rationalities that govern complex business regimes. Global supply chains and the garment industry are cases in point. The widespread legal insulation mechanisms between the actual producers in the Global South and the buyers in the North are the legal mirror image of business structures that are based on a system of indirect sourcing, referred to as “subcontracting without transparency or oversight.”<sup>105</sup> The echo of famous (indeed, infamous) landmark rulings regarding the “legal person”<sup>106</sup> can be heard loud and clear, underscoring law's (and lawyers') ability to adapt its concepts and instruments to social formations and practices considered meritorious. The far-progressed erosion of public authority even on the local level makes the downstreaming of public responsibility to lower governance levels a direct liability. Private interests will readily assume the role of self-regulation as long as it can be ensured that they remain untarnished from effective public-law enforcement mechanisms. That is one of the central insights from Rana Plaza—it prompts further reflection on

---

104. See, e.g., Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L.J. 1051 (1966); Francis Snyder, *Economic Globalisation and the Law in the 21st Century*, in THE BLACKWELL COMPANION TO LAW AND SOCIETY 624 (Austin Sarat ed., 2004); Francis Snyder, *Global Economic Networks and Global Legal Pluralism* 4 (European Univ. Inst., Working Paper Law No. 99/6, 1999), [http://cadmus.iue.it/dspace/bitstream/1814/151/1/law99\\_6.pdf](http://cadmus.iue.it/dspace/bitstream/1814/151/1/law99_6.pdf).

105. *Rana Plaza: Factory Safety and Workers' Rights in the Apparel Supply Chain Two Years Later*, N.Y.U. STERN CTR. FOR BUS. & HUMAN RIGHTS, <http://bhr.stern.nyu.edu/bangladesh/> (last visited Sept. 30, 2015).

106. See *Santa Clara Cty. v. Southern Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (implying that equal protection provided by the Fourteenth Amendment applied to corporations); *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 594 (1819) (holding that the College's corporate charter qualified as a contract between private parties free from legislature's interference, and that the government's commissioning of the charter did not transform the school into a civil institution); *Salomon v. A. Salomon & Co. Ltd.*, [1896] UKHL 1 (finding that creditors of an insolvent company could not sue the company's shareholders to pay up outstanding debts, which in turn uphold the doctrine of corporate personality as set out in the Companies Act of 1862).

the consequences of giving up perhaps too quickly on the role of the state in governing global production networks.

Something seems to still be missing. This article's legal realist deconstruction of subsidiarity as a form of neoliberalism's bottom-up governance dreams in disguise, applied to a terrible disaster that occurred in a far-away place, rendered familiar by labeling it a labor and human rights tragedy in the context of a global supply chain, seems too neat to be true. And yet, what is wrong with the analysis? It offers a number of seemingly pertinent insights into the rhetoric of justifying market-driven, hybrid regulatory regimes in the absence of effective state or global government and rule enforcement. Furthermore, it makes a seemingly convincing argument for thinking about law beyond jurisdictional confines against the background of functionally differentiated spaces of institutional and normative development. Finally, the here-presented preliminary findings further support attempts to differentiate the idea and the principle of subsidiarity in international law. As Jachtenfuchs and Krisch illustrate in their introduction,<sup>107</sup> there is great potential to study the subsidiarity principle in concrete governance settings. When doing so, differentiating between bounded and unbounded, weak and strong forms of subsidiarity enables paying closer attention to concrete circumstances in which governance mechanisms can be seen not only to work upward or downward, but in which concrete manner these dynamics are being accompanied or complemented by institutions and processes of control or monitoring. Those differentiations go some distance in clarifying the actual operation of subsidiarity in various global governance contexts. They also echo the here-cited findings that seemed to espouse a private law perspective in recommending a closer scrutiny of power dynamics at play in what are frequently highly asymmetric and politically volatile arrangements.<sup>108</sup> There seems to be little room for an all-or-nothing endorsement of the subsidiarity principle as a call-to-arms for bottom-up forms of governance and empowerment. But though the rhetoric of bottom-up or market-driven governance seems as strong as ever,<sup>109</sup> there is an even greater need for a differentiated engagement with the actual forms of shifting governance regimes. The private law perspective can complement an international lawyer's grasp of the problem by highlighting not only the parallels and echoes between organizational and management business practices and legal structures and

---

107. Jachtenfuchs & Krisch, *Subsidiarity in Global Governance*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 1.

108. Such considerations were already determinative in David Trubek's famous study. See David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407 (1994).

109. See, e.g., COLIN CROUCH, *THE STRANGE NON-DEATH OF NEO-LIBERALISM* (2011) (arguing that neoliberalism will shrug off the challenges posed by the financial crisis, because although neoliberalism seems to be about free markets, in practice it is concerned with the giant corporations' dominance over public life, and suggesting that although the existence of giant corporations weaken both democratic process and free market, the solution of corporate social accountability does not lie in suppressing them but rather in dragging them fully into political controversy).

instruments. It can also illustrate the transnational “replay” that occurs rhetorically and in terms of institutional strategy between the domestic and transnational spheres.<sup>110</sup> Using transnational law as a method to investigate the stakes in attributing certain legal categories and characteristics to particular spheres, levels, or domains of law prompts us to accept the fluidity of the domestic–transnational law distinction. As suggested elsewhere,<sup>111</sup> transnational law should be seen less as a distinct legal field than as a form of law critically engaging with demarcations between allegedly distinct fields of law. Law’s allocation to public or private, national or international conceptual buckets still holds some explanatory function with a view to historically evolved and locally instantiated patterns of legal ordering. But the risk of such containment and allocation lies in missing the unique role that law plays in both structuring and deconstructing norm-creation processes in areas that do not neatly fit into the public–private, national–international mold. The tentatively emerging regulatory regime of global apparel supply chains serves as one complex illustration of this phenomenon.

## VII

### CONCLUSION

This article has, ironically, both questioned and reaffirmed distinctions between public and private law, even as it attempts to introduce a transnational law perspective in order to critically engage and overcome these distinctions as separating realities. The engagement with subsidiarity, then, seems to have functioned as a red herring, prompting debate about practical merits as well as normative implications of top-down versus bottom-up, public versus private, and national and domestic versus international and global. This harkens to the fallacy of the familiar. Actors tend to carry out conflicts in well-established patterns, relying on well-rehearsed rhetorical turns and defending the same positions. Much of that has to do with the close circle of discussants one chooses to engage and with limited understanding of alternative viewpoints. The juxtaposition between a public international lawyer’s view on subsidiarity and the corresponding view of a private lawyer helps elucidate the recurring argumentative patterns that unfold almost indistinguishably in the domestic and the global sphere. But leaving this familiar zone, one is quickly confronted with how parochial and exclusive one’s take on the issue most likely has been. From a Global South perspective, for example, the evocation of subsidiarity is likely to raise an entirely different set of references, leading to a different identification of the relevant stakes and to an alternative vision of what matters.

---

110. See *supra*, text accompanying note 27; see also Zumbansen, *supra* note 68, at 117 (suggesting a revisiting of the field of *lex mercatoria*, the body of norms associated with a transnational “law merchant,” which assumed a prominent place in studies of private ordering).

111. See generally Peer Zumbansen, *Law and Legal Pluralism: Hybridity in Transnational Governance*, in REGULATORY HYBRIDIZATION IN THE TRANSNATIONAL SPHERE 49 (Poul Kjaer, Paulius Jurcys & Ren Yatsunami eds., 2013); Peer Zumbansen, *Transnational Law, Evolving*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 898 (Jan Smits ed., 2012).

Assuming, cognizant of the risk of overgeneralization, such a perspective, it soon becomes clear how even a slight shift of one's own vantage point is likely to produce a dramatically different range of measures, engagements, and consequences.<sup>112</sup> An outsider's merely cursory view from such an alternative position suggests that there is a great need to second-guess, to "provincialize"<sup>113</sup> one's taken-for-granted perspective and reference frameworks. That seems to be the next true frontier for thinking about subsidiarity.

---

112. E.g., Amitav Acharya, *Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule-Making in the Third World*, 55 INT'L STUD. Q. 95 (2011) (proposing a new conceptual tool to study norm dynamics in world politics, which is concerned with the process whereby local actors create rules with a view to preserve their autonomy from dominance, neglect, violation, or abuse by more powerful central actors, through a case study of normative action against the Cold War alliances by a group of Third World leaders). In many ways *Norm Subsidiarity* echoes and underscores Boaventura and Rodríguez-Garavito's important findings. Compare *id.*, with Boaventura De Sousa Santos, *Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledge*, EUROZINE (June 29, 2007), <http://www.eurozine.com/articles/2007-06-29-santos-en.html> (arguing that modern Western thinking continues to operate along abyssal lines that divide the human from the sub-human, and that the Western side of this line is ruled by a dichotomy of regulation and emancipation while the other side is ruled by appropriation and violence, and that achieving a global social justice requires a new kind of post-abyssal thinking), and César Rodríguez-Garavito, *Toward a Sociology of the Global Rule of Law Field: Neoliberalism, Neoconstitutionalism, and the Contest Over Judicial Reform in Latin America*, in *LAWYERS AND THE RULE OF LAW IN AN ERA OF GLOBALIZATION* 156 (Yves Dezalay & Bryant Garth eds., 2011) (analyzing the confrontation between economists and constitutional lawyers over judicial activism in Colombia).

113. See generally DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE* (2d ed. 2007).