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Indiana Journal of Global Legal Studies, Volume 28, Issue 1, 2021, pp. 101-152 (Article)

Published by Indiana University Press

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ABSTRACT

This article purports to show how the postmodern tenets of particularity, reflexivity, decentralization, and pluralism map on to current legal forms and structures of market regulation. This is the case in the regulatory paradigm of shaping markets "from within," the

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I am thankful to Hanoch Dagan, Klaas H Eller, Andreas Fischer-Lescano, Andrew Lang, Bettina Lange, Linda Mulcahy, Robert S Wai, and the anonymous reviewers for their most helpful comments and feedback on earlier drafts. I would also like to thank my colleagues at the IGLP Global Scholar Academy and at Edmond J Safra Center for Ethics at Tel Aviv University for the very fruitful discussions on the topics raised by this article. Finally, I would like to thank the editors for their great work.

Indiana Journal of Global Legal Studies Vol. 28 #1 (Winter 2021)

aspiration of which is to embed public and social values in the operations of private corporate actors, while expanding private corporate actors' regulatory authority and scope of self-governance. As the state attempts to harness the regulatory potential of the social sphere to impose sanctions for corporate misconduct, the role of the law becomes to facilitate the permeability of private institutional structures to the pressures of the market and civil society—in short, law relies on and seeks to facilitate societal self-regulation. This mutation of the function of law reifies the asymmetries of social power in legal arrangements, while it eventually weakens the role of democratic politics as the principle of social ordering. At the same time, such new forms of market regulation do not challenge the structural inequalities encased in the original institutional setup of public and private legal infrastructure and thus fail to reconstitute market dynamics. The article questions the potential of the postmodern focus on particularity and pluralism to provide normative orientation for socially transformative projects against the backdrop of diffused private power, eventually attempting to trace new directions of critique at the intersection of law and political economy.

INTRODUCTION: POSTMODERNITY AND LAW

The architectural style that emerged in post-World War I continental Europe, and which was prominent until the 1970s, the *International Style,* was characterized by "an emphasis on volume over mass, the use of lightweight, mass-produced, industrial materials, rejection of all ornament and color, repetitive modular forms, and the use of flat surfaces, typically alternating with areas of glass."[1] Like the International Style and its aspiration to harmonise architectural form with social reform, the synchronous law of the Welfare State employed a similar legal architecture: it expanded regulation and the use of the legal form,[2] emphasised uniformity, and reinforced the role of central authority and control,[3] while it concretised a form of functionalism that

1. *Art & Architecture Thesaurus Online Full Record Display*, GETTY RES., http://www.getty.edu/vow/AATFullDisplay?find=international+style&logic=AND&note=&english=N&prev_page=1&subjectid=300021472 (last visited Aug. 18, 2020).

2. *See* John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567, 567 (1975).

3. *See* François Ewald, *A Concept of Social Law*, *in* DILEMMAS OF LAW IN THE WELFARE STATE 40, 41 (Gunther Teubner ed., 1986) ("[T]he whole has an existence of its own, independently of the parties—it is no longer the State, but Society—and the parties can never undertake obligations directly, without passing through the mediation of the whole."); *see also* Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, *in* THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 19, 37–62 (David M. Trubek & Alvaro Santos eds., 2006) (describing "socially oriented legal

conceived of the law purposively, as part of a process of social engineering.[4] Both the International Style and the substantive, purposive law of the Welfare State shared a modernist philosophical foundation in narratives of progress connected with human creativity and the capacity for scientific knowledge, self-reflection, and experimentation. It was, in fact, in the domain of architecture and, in particular, as a critical response to the International Style that the notion of *postmodernism* was popularised.[5] A nascent postmodern movement challenged the technocratic functionalism of the mainstream architectural paradigm, calling upon contextualism, participatory architecture, and critical regionalism.[6]

This brings to the foreground some important aspects of postmodernism, which also structure postmodern legal thinking: incredulity toward meta-narratives, acknowledgement of difference, and pluralism. This article will show how the postmodern tenets of *particularity* and *pluralism* map onto current legal forms and structures of market regulation. This is the case in the regulatory paradigm of shaping markets "from within," the aspiration of which is to embed public and social values in the operations of private corporate actors, while at the same time expanding the regulatory authority and scope of self-governance of such private actors. Yet, before discussing in detail the connection of these philosophical themes with contemporary modes of regulation of corporate conduct, I will delve deeper into the intellectual substratum of postmodernism in legal thinking.

Postmodernism has roots in art, architecture, and the counterculture movement; yet, it is post-structuralist philosophy that provided the most influential theoretical edifice for the multiple intellectual currents that have flourished under the general categorisation of postmodernism. According to Judith Butler, post-structuralism is the rejection of "the claims of totality and universality and the presumption of binary structural oppositions that implicitly operate to quell the insistent ambiguity and openness of linguistic and cultural signification."[7] Instead, structures of meaning are contingent,

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thought between 1900 and 1968" as the second of three globalizations of law and legal thought).

4. *See* Martin Loughlin, *The Functionalist Style in Public Law*, 55 U. TORONTO L.J. 361, 361 (2005) (Can.).

5. Peter Dews, *Postmodernism: Pathologies of Modernity from Nietzsche to the Post-Structuralists*, *in* THE CAMBRIDGE HISTORY OF TWENTIETH-CENTURY POLITICAL THOUGHT 343, 343 (Terence Ball & Richard Bellamy eds., 2003).

6. *See* CHARLES JENCKS, THE LANGUAGE OF POST-MODERN ARCHITECTURE 50 (6th rev. ed. 1991).

7. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 40 (1st ed. 1990); *see generally* JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A

unstable, fluid, and prone to change and reinterpretation. This is partly derived from the notion that if meaning in language results from the signifying practice, rather than from the terms or things themselves, then there is no certainty that one particular account corresponds to an objective state of affairs or a "truth."[8] This highlights "difference," acknowledging the fact that there are multiple ways of ordering the world and none has conceptual priority or is, in any way, "the right one."[9] Not only is there no truth to be discovered but there can also be no objective knowledge, as the subject is produced by structures of meaning outside itself and hence ceases to be the origin of its views.[10] The implications of these perspectives are profound for the modernist concepts of truth, knowledge, and objectivity.

One development of post-structuralist thinking that has had a lasting influence on jurists is *deconstruction*. Deconstruction, an attempt to unveil the hierarchy in binary oppositions that characterize Western culture, points out the arbitrariness, antinomies, and inconsistencies that define modes of thinking or institutional structures. In legal theory, deconstruction has been employed to reveal the inconsistency of legal arguments and how they disguise ideological thinking, privileging certain concepts and suppressing others.[11]

REPORT ON KNOWLEDGE (1979) (challenging grand narratives associated with teleological notions of human history).

8. CATHERINE BELSEY, POSTSTRUCTURALISM: A VERY SHORT INTRODUCTION 70 (2002).

9. Such an approach constitutes a return to Friedrich Nietzsche's attack on the fixation of Western thought upon a transcendent, timeless truth: "Perspectival seeing is the only kind of seeing there is, perspectival 'knowing' the only kind of 'knowing.'" FRIEDRICH WILHELM NIETZSCHE, ON THE GENEALOGY OF MORALS: A POLEMIC 98 (Douglas Smith trans., 1996) (emphasis omitted). Another precursor of post-structuralism is Martin Heidegger, whose critique of the knowing subject suggested the possibility of an engagement with the world not mediated through the subject-object duality. *See* MARTIN HEIDEGGER, BEING AND TIME, *in* 9 MASTER WORKS IN THE WESTERN TRADITION (Nicholas Capaldi & Stuart D. Warner eds., Richard M. McDonough trans., Peter Lang 2006) (1927).

10. In that direction, see MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (1990) for a discussion on genealogies of "knowledge" and its connection to power, and Michel Foucault, *The Subject and Power*, 8 CRITICAL INQUIRY 777 (1982). Also see DAVID S. CAUDILL, LACAN AND THE SUBJECT OF LAW: TOWARD A PSYCHOANALYTIC CRITICAL LEGAL THEORY (1997), for Jacques Lacan's insights on the role of the big Other—language and the law—in the construction of subjects.

11. Jack M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 743–44 (1987); *see also* Jack M. Balkin, *Deconstruction's Legal Career*, 27 CARDOZO L. REV. 719, 727–28 (2005) (illustrating the example of contract law, where critical legal scholars challenged the hegemonic narrative of individuals as rational, autonomous actors making choices and accepting full responsibility for bad choices with a counter-narrative of cooperation and interdependence, where individuals are not trying to take advantage of each other even where possible). The question is how this counter-narrative could change our understanding of contract law.

Deconstructionists locate marginalised counterprinciples and show not only how these principles have an unacknowledged impact on the doctrine but how conceptual oppositions between hegemonic and counterprinciples are at a permanent state of uncertainty, where one contains traces of the other, and the tension between them cannot be terminally settled. For example, according to Jack Balkin, the concepts of "public" and "private" exist in a relationship of Derridean *différance*, forming not a dichotomy, but a "nested opposition": they are mutually dependent and mutually differentiated.[12] One cannot exist without the other, and both contain traces of each other as definitional elements. As I will show in the following sections, it is precisely this highlighting of the hitherto marginalised counterprinciples of *particularity* and *pluralism* that has had the counterintuitive effect of reinforcing market-modelled approaches in the regulation of corporate conduct.

Yet, it would be reductionist to confine postmodern legal thinking by reference solely to post-structuralism. Systems theory and legal autopoiesis, albeit sharing some of the latter's premises and diagnoses of modernity, have offered a distinct path for postmodern legal theory. Systems theory conceptualises society as divided in self-referential, autopoietic systems, that are continuously self-produced in a state of operational closure and cognitive openness.[13] In other words, social systems, including law, translate the complexity of their environment into their own code of communication (e.g., the binary code legal/illegal for the legal system), while at the same time remaining able to learn

12. Balkin, *supra* note 11, at 727–30. Such an approach has also led deconstruction to become the instrument for a "critique of the critique," whereby critical scholars question the basis and consistency of critique itself. For example, see James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985) for a description of how both the subjectivist-phenomenological and the structuralist strands of critical legal thought contain within them elements of each other, essentially both relying on and contradicting each other. This alludes to Derrida's notion of "dangerous supplement," where the complementarity of two concepts or prepositions is always "in danger" of being reversed or deconstructed, never permanently settled. JACQUES DERRIDA, OF GRAMMATOLOGY (1997). The question of foundations was the concern of Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990), who approached deconstruction as a rhetorical strategy without normative grounding that destabilizes established forms of meaning and structure but creates no basis for alternative institutional designs and a more "just" society. On how this "critique of the critique" translates into skepticism about the institutionalization of critical legal theory and its constitution as an academic discipline and a source of "knowledge," see POLITICS, POSTMODERNITY, AND CRITICAL LEGAL STUDIES: THE LEGALITY OF THE CONTINGENT (Costas Douzinas, Peter Goodrich & Yifat Hachamovitch eds., 1994).

13. For an introduction to systems theory, see NIKLAS LUHMANN, INTRODUCTION TO SYSTEMS THEORY (Dirk Baecker ed., Peter Gilgen trans., 2013). For legal autopoiesis, see, indicatively, NIKLAS LUHMANN, LAW AS A SOCIAL SYSTEM (2004); GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (1993).

and adapt to the changing environment. Evolution takes place not beyond but *within* the system—it is not imposed from outside; it is a product of its inner workings.[14] According to Karl-Heinz Ladeur, this process of self-constitution betrays a type of "Eigenvalue"—a lack of a fundamental rationality or goal.[15] Systems do not share a common reality and are unable to directly communicate with each other—communication only takes place through indirect irritations, structural couplings, and adaptations. Rationality becomes relational, immersed in inter-subjective communicative processes.

Postmodern legal theory rejects classical elements of the liberal social order—the representation of a knowable, objective world and the direct, subjective, phenomenological intake and understanding of the norms.[16] It challenges the notion of a knowing subject, the attachment to normative foundations, or even the idea of legal unity based on a knowable reality and the positivist perspective of top-down hierarchy of norms starting with an imagined *Grundnorm*.[17] According to Costas Douzinas, the legal system itself "abandons the unrealistic claim that it forms a consistent system of norms. Postmodern law is constituted through a myriad of rules and regulations, statutes, decrees, administrative legislation and adjudication, formal judgments, and informal interventions and disciplines."[18] Postmodern legal theory, though by no means constituting a uniform field, is aware of the "arbitrariness, inconsistencies, antinomies, paradoxes, and even violence"[19] that lie at the basis of legal and economic constructs.

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14. Gunther Teubner, *Introduction to Autopoietic Law*, *in* AUTOPOIETIC LAW: A NEW APPROACH TO LAW AND SOCIETY 1, 7–8 (Gunther Teubner ed., 1987).

15. Karl-Heinz Ladeur, *The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law* 10–11 (Eur. Univ. Inst. Working Paper No. 99/3, 1999). Rationality becomes relational, immersed in inter-subjective communicative processes. On how law has no direct cognitive access to the reality upon which it purports to act, see Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 L. & SOC'Y REV. 727, 749 (1989).

16. For example, for liberal legal thinking the phenomenological representation of the constituting subject in law is the theory of property rights, see Thomas C. Heller, *Legal Discourse in the Positive State: A Post-Structuralist Account*, *in* DILEMMAS OF LAW IN THE WELFARE STATE 173, 179 (Gunther Teubner ed., 1986).

17. Costas Douzinas, *Postmodern Jurisprudence*, *in* THE NEW OXFORD COMPANION TO LAW (Peter Cane & Joanne Conaghan eds., 2009), https://www-oxfordreference-com.proxyiub.uits.iu.edu/view/10.1093/acref/9780199290543.001.0001/acref-9780199290543-e-1696?rskey=0d4d0e&result=1.

18. *Id.*

19. Gunther Teubner, *The Economics of the Gift – Positivity of Justice: The Mutual Paranoia of Jacques Derrida and Niklas Luhmann*, 18 THEORY, CULTURE & SOC'Y 29, 30 (2001).

This article does not aspire to discuss the full spectrum of legal discourses that, to some extent, draw from postmodernism, such as critical legal studies, feminist legal theory, or critical race theory. Instead, the goal is to discern certain fundamental characteristics of postmodern legal thought[20] and to juxtapose them with contemporary institutional practice in the regulation of corporate conduct. Postmodernism is reflected in institutional thinking through a mistrust of "objective" knowledge, technocracy, top-down regulation, uniformity, and singularity of reason—qualities traditionally associated with the state and public administration and essential elements of the centralised Welfare State model. While this postmodern skepticism has often had a critical edge, it also appears symbiotic with contemporary institutional arrangements that are not oriented toward substantive justice or socio-political transformation.

Indeed, the purpose of this article is to question the extent to which the postmodern tenets of particularity, reflexivity, decentralization, and pluralism have been fulfilling their transformative and emancipatory orientation. My argument is that, in contrast to their often progressive or critical directions, such structural elements of postmodern legal theory have, in fact, materialised in contemporary regulatory arrangements in a way that has been conducive to making the market the principle of social ordering. New forms of market regulation attempting to shape the economy "reflexively" and "from within" have entailed an extension of regulatory authority and self-governance of private corporate actors, while attempting to thicken the normative web of market dynamics and to steer private corporate activity towards goals of social and environmental sustainability. This article will highlight the structural shortcomings of such transformative projects, as well as their propensity to reify asymmetries of social power into legal arrangements and to weaken the role of democratic politics as the principle of social ordering.

Importantly, this article is not meant to discuss the reasons behind the material genesis of regulatory arrangements of *new governance* and *reflexive regulation* and whether there is a causal connection to postmodern legal thinking—that would be a story about particular institutions, actors, and their immersion in their historical economic and political context. Instead, this article purports to break down the intellectual environment that englobes this type of decentralization and delegation of regulatory authority to private actors, highlighting the

20. But see GARY MINDA, POSTMODERN LEGAL MOVEMENTS: LAW AND JURISPRUDENCE AT CENTURY'S END 190 (1995), for the critique that such a taxonomy corresponds to a modernist perspective through which postmodern jurisprudence is observed and evaluated.

"dangerous liaison"[21] and unwanted synergies between the principles of particularity and pluralism and the valorisation of market-modeled relations and solutions to social problems.

The postmodern tendency to emphasize complexity and undercut the modernist aspirations to "objective" and "holistic" knowledge coincided with the increasingly powerful neoliberal urge to view the economy as "unknowable."[22] This "unknowability" of the economy necessarily implies that planning interventions are bound to fail, while command-and-control regulation is presented as equally impossible.[23] The postmodern response, seemingly accepting the premise of unknowability, prompted decentralization, reflexivity, and pluralism. While this approach provided the conceptual tools to critically respond to the expansion of the vertical power of the state, the postmodern approach now appears less equipped to provide normative orientation in a setting of diffused private power, where the regulation that prioritizes market-based solutions is itself imbued with similar philosophical axioms of decentralization. When referring to the turn to *the market*, it is also important to clarify that *the market* should not be understood in an essentialist way, supposedly inherently destined to further private economic power. Rather, it should be understood rather as a product of legal ordering, which, nevertheless, in its current instantiation, does

21. For the term, see Hester Eisenstein, *A Dangerous Liaison? Feminism and Corporate Globalization*, 69 SCI. & SOC'Y 487, 488 (2005). Nancy Fraser also employs the term while searching for possible unwanted synergies between second wave feminism and the "new spirit of capitalism" brought about by neoliberalism. Nancy Fraser, *Feminism, Capitalism, and the Cunning of History*, 56 NEW LEFT REV. 97, 97-98 (2009).

22. *See* WALTER LIPPMANN, AN INQUIRY INTO THE PRINCIPLES OF THE GOOD SOCIETY 331 (1937); Friedrich A. Hayek, *Economics and Knowledge*, 4 ECONOMICA 33, 34 (1937). On the overlap between the Hayekian theory of knowledge and systems theory, see QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 224 (2018); Matthias Goldmann, *Public and Private Authority in a Global Setting: The Example of Sovereign Debt Restructuring*, 25 IND. J. GLOB. LEGAL STUD. 331, 335 (2018).

23. Gunther Teubner, *A Constitutional Moment? The Logics of 'Hitting the Bottom'*, *in* THE FINANCIAL CRSIS IN CONSTITUTIONAL PERSPECTIVE: THE DARK SIDE OF FUNCTIONAL DIFFERENTIATION (Poul Kjaer et al. eds., 2011) (citing WOLFGANG STREECK, RE-FORMING CAPITALISM: INSTITUTIONAL CHANGE IN THE GERMAN POLITICAL ECONOMY 236 (2009)). Beyond the technical arguments, such as the impossibility of a truly comprehensive and centralised knowledge, the lack of enforcement capacity, and the immense capacities of avoidance transnational corporate actors possess, the opposition to external regulation also has deeper philosophical roots. Teubner advances the position that "the political constitution cannot fulfil the role of defining the fundamental principles of other sub-systems without causing a problematic de-differentiation—as occurred in practice in the totalitarian regimes of the twentieth century. . . . No social sub-system, not even politics, can represent the whole society." Teubner, *supra* note 23, at 36-37.

facilitate private capital accumulation to the detriment of nonmarket values.[24]

The postmodern orientation toward *particularity* and *pluralism*, as opposed to *universality* and *legal centralism*, is reflected first in legal structures favouring governance over regulation. Second, it is reflected in a transformed understanding of the notion of "bindingness" that is conveyed, for example, by new corporate sustainability laws. In these structures, as I will show, the state attempts to harness the power of the market and civil society to impose sanctions for corporate conduct that diverges from the substantive policy objectives, substituting regulation with competition. The role of the law is now to facilitate the permeability of private institutional structures to the pressures of the market and civil society—in short, law increasingly relies on and seeks to facilitate societal self-regulation. Shifting to the horizontal relations of the market as the instrument for social ordering entails an institutionalization of social expectations and market dynamics, which transform *bindingness* from a vertical, top-down structuring of normative expectations into a horizontal, spontaneous mode of communication. Yet, the social expectations and market dynamics that replace legal sanctions in underpinning bindingness are not created in a vacuum but reflect pre-existing social inequalities. Thus, new, reflexive modes of market regulation facilitate the expression of private power and the exclusion of those who do not have the means to shape normative outcomes through their market activity.

A genuine reconstitution of market dynamics—if even possible in conditions of hierarchical social relations of production—would need to challenge the structural inequalities encased by the original institutional setup upon which the reforms that rely on societal self-regulation are meant to act. That requires a broad normative vision that also addresses public law institutions and core aspects of the legal infrastructure of markets. For instance, while relying on and attempting to encourage corporate self-regulation and social responsibility cannot by itself reconstitute market dynamics, transforming the corporate form of limited liability and shareholder primacy[25] could possibly make subsequent Corporate Social Responsibility (CSR) reforms meaningful. Such a normative vision

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24. *See* David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 L. & CONTEMP. PROBS. 1, 1 (2014); Hanoch Dagan et. al., *The Law of the Market*, 83 L. & CONTEMP. PROBS. i, i (2020). *See generally* Andrew Lang, *Market Anti-Naturalisms*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT (Justin Desautels-Stein & Christopher L. Tomlins eds., 2017) (discussing the constitutive role of law for the economy).

25. *See generally* Paddy Ireland, *Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility*, 34 CAMBRIDGE J. ECON. 837 (2010).

would nevertheless imply a return to the idea of centralized social transformation by means of the "Law," conceived as the expression of state institutions and democratic politics.

In Part I, I analyse how postmodern legal thinking has favoured particularity and pluralism as opposed to universality and legal centralism. I pose the argument that these formerly marginalised counterprinciples have become "mainstream" in institutional practice, enhancing the regulatory authority of transnational corporations and eventually leading to the marginalisation of democratic politics as the principle of social ordering. In Part II, I try to support and ground this argument by focusing on contemporary, comparative approaches to the regulation of corporate conduct and on the increasing replacement of legal sanctions with social and market sanctions. Concretely, I first examine how new forms of market regulation prioritise governance over regulation and delegate regulatory authority to private corporate actors. I proceed to do this through a discussion of the comparative rise of corporate governance as a perceived solution to broader issues of social welfare and through the implementation of new governance approaches in financial regulation. Second, I explore the transformation of the notion of bindingness by focusing, first, on consumer dispute resolution through internal corporate processes and, second, on the regulation of transnational corporate conduct through new corporate sustainability laws. Such laws include, primarily, non-financial reporting requirements, CSR spending requirements, and human rights due diligence obligations. In Part III, I summarize my findings and discuss three alternative directions of critique that could inform and inspire critical theories of law and political economy. These include a turn to the legal form as the limit to the exercise of private power, an eclectic and self-conscious return to structural elements of the legal centralism and functionalism that underpinned the Welfare State, and a further radicalisation of the current postmodern legal paradigm.

I. REVERSING CONCEPTUAL OPPOSITIONS

From the deconstructive perspective of conceptual oppositions, there are two overarching oppositions in the modern legal paradigm that have been the target of postmodern concepts of law: the opposition between universality and particularity and the opposition between legal centralism and pluralism of normative orders. In both pairs of "conceptual oppositions,"[26] postmodern legal thinking performs a reversal, scrutinizing the hegemonic principle and highlighting the

26. *Deconstruction's Legal Career*, *supra* note 11, at 723.

value of the marginalised counterprinciple, with the aim of changing legal doctrine and practice. These reversals correspond, on one hand, with a broader social critique toward a "society of generality"[27] that suffocated individualism and concealed concrete injustices under the veil of abstract equality. On the other hand, however, the concepts the reversals provided became part of a juridical framework that has privileged the market as the principle of social ordering, accentuating, in turn, the importance of private power in shaping normative expectations.

A. Universality / Particularity

The first conceptual opposition is that between universality and particularity. Universality in law, the hegemonic principle in this opposition, is understood here as entailing a rule-based system emphasizing uniform and universal application, abstract equality before the law, formal and transparent procedures, and predictability of outcomes as opposed to arbitrariness—integral elements of the Rule of Law.[28] Universality is primarily associated with formalism: the understanding of law as a doctrinal science, an autonomous system disconnected from broader political, ideological, and moral arguments and underpinned by the notion that "justice consists in the impartial application of rules deriving their legitimacy from the prior consent of those subject to them."[29] Yet, the functionalist turn of the law in the era of the Welfare State, characterised by the attempt to steer an increasingly complex society and the credo that "regulation is in fact possible,"[30] was not devoid of universality. While law was understood as a means to achieve particular social ends, thus possibly deviating from the supposed neutrality of formalism, it embraced the idea that there is,

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27. For an extensive discussion of the concept of "society of generality," see PIERRE ROSANVALLON, DEMOCRATIC LEGITIMACY: IMPARTIALITY, REFLEXIVITY, PROXIMITY 61 (Arthur Goldhammer trans., 2011). *See generally* LUC BOLTANSKI & EVE CHIAPELLO, THE NEW SPIRIT OF CAPITALISM (Gregory Elliott trans., 2007) (discussing the artistic critique). Contrary to the traditional discourse of the workers and the communist left, focusing on exploitation, monopolies, and oligarchy, the artistic critique that spurred in the late 1960s aimed at the regimes of oppression, dehumanization under technocracy, authoritarianism, paternalism, and hierarchical power.

28. For a summary of the substantive perspectives of the Rule of Law, see *contra* PAUL CRAIG, FORMAL AND SUBSTANTIVE CONCEPTIONS OF THE RULE OF LAW: AN ANALYTICAL FRAMEWORK (Richard Bellamy ed., 2005).

29. Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 351 (1973).

30. Peer Zumbansen, *Law after the Welfare State: Formalism, Functionalism, and the Ironic Turn of Reflexive Law*, 56 AM. J. COMP. L. 769, 783 (2008).

or can be, societal consensus about the goals pursued.[31] The belief in expertise and in the objectivity of science replaced the letter of the law as the source of the law's rationality: it was henceforth possible to fathom an optimal legal solution to social issues based on statistics, economics, and social sciences.[32]

Particularity, on the other hand, constitutes the marginalised counterprinciple: it emphasises difference as opposed to abstract equality, discourse as opposed to a supposed neutrality, standards and principles instead of rules, and flexibility against the illusion of total predictability. In postmodern law, the principle of particularity becomes increasingly mainstream through concepts such as *reflexivity* and *polycontexturality*, while universality, in either its formalistic or functional disguise, recedes into the background.

The universality of formalism has been the epicentre of numerous debates in legal and social theory. Scholars have celebrated formalism as integral to individual freedom, the functioning of the markets, and the development of capitalism. Most characteristically, F.A. Hayek saw in the formalism of the Rule of Law the legal embodiment of freedom.[33] As such, he lamented the introduction of standards in the law of the Welfare State and its divergence from the principle of universality. These standards, including references such as "fair" and "reasonable," were the legal translation of economic planning. According to Hayek, these "vague formulae" led to increased arbitrariness, uncertainty, and disrespect for the law and the judicature, which became instruments of public policy.[34] The substantive law of planning, concretizing a certain ideal of distributive justice entailed, for Hayek, a deliberate discrimination by the government between the needs of different people.[35] At the same time, formalism, as the "belief in the possibility of a method of legal justification that contrasts with open-ended disputes

31. *Id.* at 784–85.

32. *See* Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 1001 (1997 [1897]) ("For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."); *see generally* Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607 (2007) (Can.).

33. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 85 (2001).

34. *See id.* at 81–82.

35. This line of thinking has been criticized by positivists arguing that the concept of the Rule of Law is primarily procedural and has no reference to the relation between the government and the governed but is only concerned with the conformity of the application of the law to the law as it has been created—the rule of law has nothing to say about the content of the substantive rules. *See* Hans Kelsen, *Foundations of Democracy*, 66 ETHICS 1, 75-86 (1955).

about the basic terms of social life"[36] has been a recurrent object of critique, from legal realists to critical legal scholars.

Assuming the indeterminacy of legal rules and the multiplicity of doctrinal sources,[37] defining which possible meaning one eventually supports or which source is chosen as the applicable rule requires a background in the prescriptive theory of the relevant area of social practice.[38] This process exposes formal rules as part of a broader normative (essentially, ideological) perspective on social practice, rather than as neutral, conflict-resolution mechanisms. Furthermore, critical legal scholars have pointed out the under and over inclusion inherent in formalism, as formal rules are bound to occasionally both sanction the non-guilty, and let guilty behaviour go unsanctioned; this is the price for avoiding arbitrariness.[39] A certain element of uncertainty included in standards could incentivise compliance, as opposed to rules, which could enable individuals to purposely take advantage of under-inclusion.[40] Such an approach foreshadows the appeal of new governance regulatory approaches, as I will explain in the next section.

The universality of functionalism was increasingly challenged during the late 1970s, as the substantive law of the Welfare State appeared to stagnate. According to Jürgen Habermas, modern state interventionism faced a dual crisis: a rationality and a legitimation crisis.[41] The rationality crisis involved the increased complexity of societal operations and the unavoidable inadequacy of interventionist policies in regulating them. The legitimation crisis was the direct product of the interventionism of the State, which, by substituting the market as the main agent of allocation of resources, assumed a huge burden of political responsibility that had to be translated into mass loyalty. Seeing as the capacities for the development of such legitimizing ideologies are limited, the top-down regulation of the Welfare State was bound to face a legitimation deficit.[42]

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36. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 564 (1983).

37. *See* Kennedy, *supra* note 29, at 378. For a comprehensive discussion of the indeterminacy debate, arguing against the critical approach, see generally Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989). For an overview of the realist critique of multiplicity of sources, see generally Dagan, *supra* note 32.

38. *See* Unger, *supra* note 36, at 568.

39. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1695 (1976).

40. *Id.* at 1696.

41. JÜRGEN HABERMAS, LEGITIMATION CRISIS 61-74 (Thomas McCarthy trans., 1975).

42. *Id.*at 47. Habermas' debate with Luhmann in the 1970s was structural for many of the insights presented in *Legitimation Crisis*. Indicatively, see generally JÜRGEN HABERMAS & NIKLAS LUHMANN, THEORIE DER GESELLSCHAFT ODER SOZIALTECHNOLOGIE:

In response to this perceived crisis, "reflexive law" was conceived as the next step of an evolutionary development of the legal order.[43] Gunther Teubner suggested that reflexive law is the evolutionary stage where law "becomes a system for the coordination of action within and between semi-autonomous social subsystems."[44] Teubner saw reflexive law as a learning instrument, equipped for a functionally differentiated society of multiple rationalities. Its purpose was to enhance the self-reflecting and self-limiting capacities of social systems, without degenerating into deregulation. While economic activities had to be subjected to a regulatory framework, reflexive law aimed to enhance these capacities through a process of deliberation and discursive contestation that avoided dictating desirable outcomes.[45] Hence, reflexive law attempted to concretize the shift to procedural forms of legitimacy by encouraging the establishment of discursive structures within organisations. This was meant to resolve the legitimacy crisis by realising the potential of social subsystems, such as labour unions, to self-governance, while avoiding the paternalism of the Welfare State.[46]

In addition, reflexive law was an answer to the rationality crisis. In a functionally differentiated society, where there is no agency that can steer society but only a multiplicity of systems that have no hierarchical order, the law that emanates from the supposed "centre of society" lacks the conceptual tools for coordinating the social subsystems. The

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WAS LEISTET DIE SYSTEMFORSCHUNG? (1972) (Ger.) (discussing systems research in the context of socialization and politicization).

43. *See generally* Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L. & SOC'Y REV. 239 (1983) ("[I]dentify[ing] areas of private law in which reflexive solutions are arguably emerging, and . . . spell[ing] out the consequences which a concern for reflexivity has for a renewed sociological jurisprudence.").

44. *Id.* at 242; *see generally* PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978) (arguing that an important precursor to reflexive law was the concept of "responsive law," which similarly aimed at a more socially responsive, contextualized, and learning mode of legal intervention).

45. William E. Scheuerman, *Reflexive Law and the Challenges of Globalization*, 9 J. POL. PHIL. 81, 84 (2001).

46. *See* Teubner, *supra* note 43, at 273 ("Reflexion within social subsystems is possible only insofar as processes of democratization create discursive structures within these subsystems."). According to Habermas, post-metaphysical thinking requires legitimation to arise through a discursive rationality of the implicated parts, rather than through universal legitimation structures. This leads to procedural legitimation, whereby the formal justificatory procedures and structures, through which the decision-making process is concluded, acquire legitimating force themselves. *See generally* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., 1996). The institutionalization of procedural legitimacy includes the notion of "organizational democracy," meaning the installation of participatory mechanisms within the various social subsystems. In this sense, reflexive law concretizes the shift to procedural forms of legitimacy.

existence of reflexive structures within social subsystems is necessary so that these subsystems restrict themselves from maximizing their rationality to a degree that would create insurmountable problems to other functional systems.[47] Legal regulation had to be decentralised to better respond to the changing societal needs.[48] "Reflexive" was then the law that discouraged legal centralism and top-down regulation and instead emphasized decentralization, learning, and the interaction of conflicting societal rationalities.

Recognizing that no centralised, sovereign knowledge is privileged led Teubner to suggest that the dipole between public and private law needs to cede its place to a multiplicity of social perspectives and a pluralism of partial rationalities *within* each system.[49] The normative dimension of this recognition of polycontexturality is that social systems, including the economy, should not be allowed to express exclusively public or exclusively private rationalities.[50] This normative agenda asserts that the drive for profit-maximization cannot solely constitute the economy, but that the economy should incorporate public rationalities and concerns (e.g., respect for human rights) already within its boundaries. The aspiration to constitutionalize polycontexturality warns against an adversarial regulatory approach to social systems,[51] inviting instead the types of regulations that create self-reflecting structures that are sensitive to "learning pressures" by the environment.[52] As I will show below, this vision also underpins the privileging of governance over regulation.

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47. Considering that social systems are operatively closed, they can intensify their own rationality without regard to other social systems, as long as they are tolerated by their environment. *See* Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1006 (2004).

48. Legal regulation had to be understood as a process that "could not be initiated from a central, elevated place of sovereignty in terms of power and knowledge. Instead, law would have to be understood as inherently caught up in the conflict-ridden processes of a functionally differentiated society." Zumbansen, *supra* note 30, at 793.

49. *See* GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION 34-41 (2012).

50. *See generally* Gunther Teubner, *Constitutionalising Polycontexturality*, 20 SOC. & LEGAL STUD. 209 (2011) (analyzing the question of constitutionalisation in a transnational context).

51. *See* GUNTHER TEUBNER, DILEMMAS OF LAW IN THE WELFARE STATE 310-12 (Gunther Teubner ed. 2011) (arguing that direct, top-down regulation faces a "regulatory trilemma" of under-effectiveness, over-effectiveness, or regulatory capture).

52. On "learning pressures," see Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOB. LEGAL STUD. 617, 635 (2011).

The emphasis on the multiplicity of social rationalities and on the notion that social change can be achieved in a decentralized fashion through the internal workings of social systems constitutes a challenge to the universalist aspirations of law. Reflexivity, as the core element of particularity, invites a certain "publicization" of private actors, tailored regulation, flexibility, constant learning, and re-evaluation, as opposed to fixed and rigid rules. It also promotes standards and principles that private actors themselves are meant to flesh out, as opposed to top-down black-letter statutory regulation that could lead to "prescriptive box-ticking." In a sense, this was a response to the supposed engulfment of the social world by the Welfare State,[53] but it was also an attack on the social engineering that envisioned law as an emancipatory power and a force of social transformation.[54]

As I will show in the next section, the repercussions of this intellectual shift to particularity are not in line with the normative agenda in favour of substantive justice that informed most of the critiques against formal and functional universality. Notwithstanding the longstanding critique against law's universalism by subsets of critical, socio-legal, and realist jurisprudence, it is now through the principle of particularity that the market becomes the principle of social ordering and corporations extend their functional sovereignty over their field of activity. Governance instead of regulation, flexibility as opposed to strict, rigid rules, and the increasing prevalence of social norms in the regulation of economic activity are empowering corporate actors, construing societal questions within the framework of market operations without fundamentally challenging existing forms of market power.

B. Legal Centralism / Pluralism

The second conceptual opposition is that between legal centralism and pluralism of normative orders. Legal centralism, for the purposes of this text, is understood as the notion that law emanates from one single point of origin: the sovereign state. On the contrary, the counterprinciple of pluralism stresses the multiplicity of normative sources that the monist paradigm of legal centralism excludes, including customary laws, religious laws, commercial practices, and in general,

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53. *See*, JÜRGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION 340-44 (1984) (discussing concern of colonization of the lifeworld by the instrumental rationality of bureaucracy).

54. *See,* Erhard Blankenburg, *The Poverty of Evolutionism: A Critique of Teubner's Case for "Reflexive Law"*, 18 L. & SOC'Y REV. 273, 279 (1984).

various instances of normativity that, albeit constituting forms of social ordering, cannot be placed under the juridical hierarchy of the state.[55]

Legal centralism is intrinsically connected to state-centrism and Westphalian sovereignty, as well as a logical deduction of legal positivism. When faced with the dilemmas resulting from the global fragmentation of normative orders, scholars adhering to positivism and legal centralism require that a "minimal link" is established between any normative phenomenon and the state.[56] Scholars challenged this account by emphasising the importance of non-legal ordering and marginalised structures of normativity in shaping social behaviour.[57] According to this paradigm, normative orders that are not attached to the state can still be law. This strong version of legal pluralism that holds, for example, that "all social control is more or less 'legal'"[58] both lessens the stature of state law and raises the respect for the newly crowned versions of law. For Brian Tamanaha, this is a significant political impetus in the attack against the ideology of legal centralism.[59] According to Teubner, the passage from function to code is key in distinguishing the legal from the non-legal.[60] To understand when "we stop speaking of law and find ourselves simply describing social life,"[61] one needs to leave behind the idea that law has a particular function (e.g., social control or conflict resolution) and focus on law as a communicative process that follows the binary code of legal/illegal.[62]

Legal pluralism exists whenever phenomena of different exigencies are observed under the binary code of legal/illegal and thus produce

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55. *See* Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375, 397 (2008) (Austl.).

56. GUNTHER TEUBNER, GLOBAL LAW WITHOUT A STATE 6-7 (Gunther Teubner ed., 1997).

57. *See generally* John Griffiths, *What is Legal Pluralism?*, 18 J. LEGAL PLURALISM & UNOFFICIAL L. 1 (1986) (discussing legal pluralism in the face of "legal centralism."); Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869 (1988) (discussing normative legal ordering and its interdependence with human agency); Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J.L. & SOC'Y 279 (1987) (arguing that plurality of normative orders each attempts to control social action in its legal territory). On the different normative positions regarding legal pluralism, for instance whether it needs to be contained in state law or whether it is a normative proposition in itself, see Sanne Taekema, *Value Pluralism and Legal Pluralism: Using Radbruch's Value-Based Approach to Law to Understand Global Legal Pluralism*, *in* THE OXFORD HANDBOOK OF GLOBAL LEGAL PLURALISM (Paul Schiff Berman ed. 2020).

58. *See* Griffiths, *supra* note 57, at 39.

59. Brian Z. Tamanaha, *The Folly of the 'Social Scientific' Concept of Legal Pluralism*, 20 J. L. & SOC'Y 192, 205 (1993).

60. Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism, in* LAW AND POWER CRITICAL AND SOCIO-LEGAL ESSAYS 127-28 (Kaarlo Tuori et al. eds., 1997).

61. Merry, *supra* note 57, at 878.

62. *See* TEUBNER, *supra* note 60, at 127-28.

normative expectations. This is a major shift in the perspective through which the delineation between legal and social norms is observed; henceforth, it is not up to the arbitrary cognitive interests of the observer to delineate the boundaries of law. It is up to law itself, as a self-organising social practice, to produce its boundaries under the pressures of its social environment.[63] This not only makes society the centre of gravity for legal development, but it also cements a linguistic turn in socio-legal theory: according to Teubner, "rule, sanction and social control, the core concepts of classical sociology of law, recede into the background. Speech acts, *énoncé*, coding, grammar, transformation of differences, and paradoxes are the new core concepts utilised in the contemporary controversies on law and society."[64] Similarly, Tamanaha presents his own, non-essentialist view of the law, according to which "law" must be understood in conventional terms: "Law is whatever people identify and treat through their social practices as 'law.'" [65]

The pluralist approach draws attention to situations of interlegality, that is, the intersection and overlap of different legal orders.[66] Of particular importance for the purposes of this article is the global fragmentation of normative orders. Significantly, contemporary reality indicates a world where regulatory authorities are detached from a specific territory and increasingly organised around the principle of functionality.[67] The work of standard-setting organisations, such as the International Standardization Organization or the International Swaps and Derivatives Association, helped cement transnational private governance, which led to the establishment of fields such as "global administrative law"[68] and the global turn in legal theory more broadly.[69] Yet, in my understanding of pluralism as the counterprinciple to the hegemonic principle of legal centralism, the opposition is not directed solely against the state but also against the notion that social ordering is the privilege of "Law," as in "law" emanating from any authority with

63. *Id.* at 129.

64. TEUBNER, *supra* note 56, at 9.

65. Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J.L. & SOC'Y 296, 313 (2000).

66. De Sousa Santos, *supra* note 57, at 298.

67. Catherine Brölmann, *Deterritorialization in International Law: Moving away from the Divide Between National and International Law*, *in* NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL & INTERNATIONAL LAW 109 (Janne Nijman & André Nollkaemper eds., 2007).

68. Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 15 (2005).

69. Mikhail Xifaras, *The Global Turn in Legal Theory*, 29 CANADIAN J.L. & JURIS., 215. 222-23 (2016) (Can.); *see also* Ralf Michaels, *Global Legal Pluralism*, 5 ANN. REV. L. & SOC. SCI. 1 (2009).

some minimum link to the state. Legal pluralism is not only about de-territorialisation, but more profoundly, about seeing "law" as a communicative process that can emerge spontaneously in different social fields. State law is only one, albeit of course powerful, modality of social ordering. In this de-territorialised and autopoietic paradigm, a global order is emerging in which ratings provided by credit rating agencies, CSR Codes, *lex mercatoria*, and other forms of social expectations and established market practices acquire a certain bindingness and a potential of enforceability without the need for centralized authority, sanctions, or enforcement mechanisms.

Similar to my position regarding the universality/particularity reversal, I suggest that the preponderance of pluralism over legal centralism in postmodern legal theory has been less emancipatory than its definition would originally imply. Sally Engle Merry insightfully points out in her early account of legal pluralism that it was not a coincidence that the scholars who developed the field of legal pluralism had been working in post-colonial societies, where legal pluralism was an unambiguous fact of life.[70] Indeed, pluralism was meant to render the invisible visible, acknowledging the rich and complex processes of social determination both on the local level and on the global level. Pluralism's recognition of "the Other" is exemplary of postmodernism's virtues. Besides, the globalised era leaves few doubts about the descriptive value of pluralism as an instrument in the better socio-legal understanding of the world. But what about its normative stance towards the emerging global law?

There is often a conflation of diagnosis and prescription in what Santos calls "celebratory postmodernism."[71] An inherent anti-statism of legal pluralists[72] runs the risk of leading to an embracement of emerging legal orders, regardless of the fact that legal pluralism, in times of globalisation, can be a highly hierarchical phenomenon.[73] By understanding law as communication, such a reading of pluralism relies on informal societal rationalities and pressures as the mechanism for the restriction of actors whose influence and resources allow them to make more meaningful determinations of the binary legal/illegal. It

70. Merry, *supra* note 57, at 874.

71. Teubner, *supra* note 60, at 119, suggests that "[p]ostmodern jurists love legal pluralism" and "do not care about the law of the centralised state . . . [and] its universalist aspirations," an assertion that Santos refuses to endorse for his own work. According to Santos's "oppositional postmodernism," "there is nothing inherently good, progressive, or emancipatory about 'legal pluralism.'" BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALIZATION, AND EMANCIPATION 89 (2d ed. 2002).

72. According to Tamanaha, *supra* note 65, at 305, "[m]any legal pluralists are anti-state law by inclination."

73. SANTOS, *supra* note 71, at 94.

seems that autopoietic or conventionalist legal pluralism has not sufficiently addressed the social power behind the communicative processes or the conventions that determine whether a phenomenon is "law." Yet, the inequality in these communicative processes is a structural element of new hierarchies developed in the framework of global law. While pluralism constitutes an emancipation from the confines of state power and a demystification of the law, dispelling the narrative of sovereignty, it also opens a door to a less restrained private power. This is because the pluralist "law," as a binding force that compels social ordering, has no people or community in the name of which it is enacted and which participates in its elaboration. Thus, it is the anonymous communications that take place in the market that provide its normative foundations. And as the market is not characterised by the abstract equality of the citizenry but, instead, by vastly different resources and potential for influence, it is inevitable that certain actors are empowered in determining what form this "law" should take. This is not to say that this determination will be monolithic, unpenetrated by the multiplicities of actors, pressures, and rationalities; yet, the shift from legal centralism to social expectations and social norms deprives the least potent market actors from the capacity to co-determine normative outcomes——something which is not necessarily the case if the principle of social ordering remains the "law" as decided by democratic politics.

II. PARTICULARITY, PLURALISM, AND THE EXPANSION OF MARKET RATIONALITIES

The expansion of market rationalities to which particularity (and especially its component of reflexivity) and pluralism are conducive is most discernible in two processes. First, it is discernable in regulators' preference for governance over regulation. This is particularly the case in the elevation of corporate governance as a solution to broader social ills and in the regulatory theory of new governance. Second, the expansion of market rationalities is discernable in the transformation of the notion of bindingness. This is exemplified by instances such as consumer dispute resolution through internal corporate processes and by the regulation of transnational corporate activity by means of "soft" obligations of transparency, which subject corporate actors to the sanctions of the market. Overall, this article identifies a regulatory pattern of delegating regulatory authority to private corporate actors, while attempting to reassert public authority through a quest for "embeddedness"—an incorporation of social values within private actors themselves. However, the desired reconstitution of market dynamics in

favor of social and environmental sustainability cannot be fully purposeful in a setting where the original institutional setup, including both public and private law institutions (e.g., constitutional protections of broad property rights, tax law regimes, corporate law and shareholder ownership, privity of contract, etc.), remains unchanged.

A. Governance over Regulation

1. Corporate Governance

In the late 1970s, while scholars were advancing the concept of reflexive law and Jean-François Lyotard was publishing the emblematic opening to an era of postmodernism, *La Condition Postmoderne*, a new idea in the regulation of corporate activity was gaining momentum: that the internal governance of the corporation plays a fundamental role in social welfare.[74] Viewed as a compromise between conservative political forces attached to powerful managerial elites and reformist, centre-left forces aiming to empower shareholders' rights, the rise of corporate governance in the United States coincided with a period of mistrust towards centralised government action.[75] Corporate power, according to this perspective, needs not to be limited from the outside, but from the internal workings of the corporation itself. Corporations needed to adopt institutional features that were typical characteristics of governments, relying on shareholder democracy and independent boards of directors to ensure accountability to shareholders and to society more broadly.[76] In other words, the "governance solution" to regulating corporate conduct and ensuring accountability involves regulation that does not address the *content* of corporate action; it merely shapes the balance of

74. *See generally* RALPH NADER ET AL., TAMING THE GIANT CORPORATION (1976) (discussing how the government and citizens can battle corporate irresponsibility). For a history of corporate governance, see generally Brian R. Cheffins, *The History of Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE 46 (Douglas Michael Wright et al. eds., 2013); Mariana Pargendler, *The Corporate Governance Obsession*, 42 J. CORP. L. 359 (2016) (exploring the focus on corporate governance as solution to social and economic problems).

75. According to John W. Cioffi, *Corporate Governance Reform, Regulatory Politics, and the Foundations of Finance Capitalism in the United States and Germany*, 7 GER. L.J. 533, 558 (2006), "[i]n both the United States and Germany, governance reform fit surprisingly well with the center-left's ideological and programmatic attempts to reconcile state intervention in the economy with market economics."

76. *See generally* Cary Coglianese, *Legitimacy and Corporate Governance*, 32 DEL. J. CORP. L. 159 (2007) (suggesting corporate governance is starting to mirror public government structures); Elizabeth Pollman, *Quasi Governments and Inchoate Law*, 42 SEATTLE U.L. REV. 617 (2019) (discussing how understanding corporations as quasi-governments could subject them to constitutional constraints).

power and the decision-making processes within the corporation. Alternatively, the law could externally impose control, through measures such as corporate disclosures, fiduciary duties of managers and directors, stricter liability rules, criminal liability, prohibition on insider loans, anti-corruption legislation, antitrust laws, capital requirements for banks, and, of course, extra corporate regulation covering the area of activity of the corporation.[77]

Of course, approaches may vary as to how to empower shareholders, or even stakeholders. In that sense, John Cioffi is right to point out that the important conflicts about allocation of power between managers, shareholders, and employees are eventually "resolved by state actors in widely varying ways that reflect the configuration of interests and allocation of power within the broader political economy."[78] Yet, it is worthwhile to ponder the institutional and intellectual shifts that led to the internal workings of the corporation becoming the arena of political struggle. While the government's withdrawal from intervention in the market sector of the economy manifested in increased deregulation (but also reregulation)[79] and privatization in the intellectual sphere, the support for the substantive and purposive regulatory approach of the Welfare State was similarly in retreat, creating space for approaches that recognized the need for reflexive governance. Social complexity and the "rationality crisis" of the Welfare State led to the "prioritization" of *proximity* in the exercise of control and in the solution of social problems.[80] This meant that private actors assumed increasing governmental discretion, while regulators attempted to facilitate the

77. The regulatory approach to the agency problem was put forward by ADOLF A. BERLE, JR., & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

78. JOHN W. CIOFFI, PUBLIC LAW AND PRIVATE POWER: CORPORATE GOVERNANCE REFORM IN THE AGE OF FINANCE CAPITALISM 38 (2010).

79. *See generally* ANDREW GLYN, CAPITALISM UNLEASHED: FINANCE GLOBALIZATION AND WELFARE (2006) (challenging the success of capitalist systems worldwide); David Levi-Faur, *The Global Diffusion of Regulatory Capitalism*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 12 (2005) (discussing reregulation and the diffusion of regulatory capitalism). The functioning of the markets has been consistently supported by regulation. For example, in financial regulation, a simple contrast between deregulation and regulation may not be so revealing, as it obscures the fact that the "deregulatory" period of the 1970-80s "consisted not merely in undoing the regulatory measures of the preceding era, but rather also in its own particular conception of the appropriate occasions and tools for regulation." Roni Mann, *Paradigms of Financial Regulation: The Transformation of Capital Requirements* (Apr. 23, 2013) (working paper) (on file with the WZB Rule of Law Center).

80. The prioritization of proximity has an affinity to Hayek's knowledge theory and the notion that knowledge is always incomplete and locally distributed, thus making economic planning impossible. *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519 (1945).

flow of information and coordination between such actors, instead of the regulators themselves coordinating the provision of services through centralised planning. Governing through corporate governance is an exercise in this prioritization of proximity.

Progressively, corporate governance reform took the form of legal rules aimed to affect the corporation's internal structure, as the means to achieve broader policy goals related to shareholder protection, securing of market conditions, corporate accountability, and even social welfare in general.[81] In the United States, the Sarbanes-Oxley Act (SOX) of 2002, passed in the aftermath of the financial scandals of Enron and WorldCom, constitutes the first federal law to directly intervene in the internal structure of the corporation. SOX's requirements included audit committees comprised of independent directors, executive certification of financial statements, and enhanced internal monitoring, including anonymous whistleblowing procedures, as a way to incentivise and strengthen internal compliance efforts. SOX did, of course, also include regulatory provisions, including financial disclosure requirements and criminal sanctions. Its emphasis on private gatekeepers like auditors and whistleblowers, however, betrays its intent of controlling corporate power and ensuring accountability through the steering of the internal affairs of the corporation. The Dodd-Frank Act of 2010, a response to the financial crisis of 2008, made some incremental changes to the "governance solution," focusing again on board independence and shareholder power.[82] The legal rules addressing governance issues reflect the recurrent idea to replace outside constraints with internal checks, albeit mandatory and a displacement of a previous state of self-regulation for internal corporate matters. In the attempt to enhance internal self-limiting capacities through structures that encourage introspection and self-reflection, such internal checks are a concretization of reflexive law.

In the U.K., the Cadbury Committee's Code of Corporate Governance did not establish a set of rigid rules, but instead a code of "best practices," introducing the "comply or explain" approach. This approach means that corporations do not necessarily have to comply with the best practices as indicated by the Code, but they have to

81. *But see* Paddy Ireland, *Shareholder Primacy and the Distribution of Wealth*, 68 MOD. L. REV. 49, 49 (2005), according to whom "shareholder primacy is in reality the primacy of a small privileged elite," despite the fact that "share ownership has become more widely spread."

82. Pargendler, *supra* note 74, at 387. See generally Urska Velikonja, *The Political Economy of Board Independence*, 92 N.C. L. REV. 855 (2014), for the argument that the push for increased board independence deflects pressure for more meaningful regulatory reform.

explain any deviations from them.[83] In addition, the Code lacks statutory status, but companies that aspire to fulfil the listing requirements of the Stock Exchange should follow it. The words of the Cadbury Report were: "We believe that our approach, based on compliance with a voluntary code coupled with disclosure, will prove more effective than a statutory code."[84] The Code came as a response to a number of scandals in the late 1980s and early 1990s that shook confidence in markets and in corporate governance, constituting a preemptive alternative to external regulation.[85] Its soft approach to regulation, exemplified in the "comply or explain" modality, is meant to allow flexibility and discretion. At the same time, it aims to harness the dynamics of the market, instead of the threat of sanctions, to make itself "binding." The model of soft regulation the Code embraces, wherein actors, mindful of market sanctions, self-regulate, increasingly characterises regulation in the field of corporate governance internationally.[86] Indeed, since the 2000s, European corporate governance policy has followed a model of new governance constituted of a mix of legal and social norms and based on the comply-or-explain principle.[87]

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83. ADRIAN CADBURY, COMM. ON THE FIN. ASPECTS OF CORP. GOVERNANCE, REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE § 1.3, at 11 (1992).

84. *Id.* § 1.10, at 12.

85. According to the Cadbury Committee, "if companies do not back our recommendations, it is probable that legislation and external regulation will be sought to deal with some of the underlying problems which the report identifies." *Id.*

86. Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation* 11, 74 (Eur. Corp. Governance Inst., Working Paper No. 170, 2011). *See* Ruth V. Aguilera et al., *Regulation and Comparative Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE GOVERNANCE 23, 23, 26, 36 (Mike Wright et al. eds., 2013), on the different reasons motivating a choice between hard and soft regulation, also mentioning that the European Union (EU) Directive 2006/46/EC significantly encouraged the spread of corporate codes "by requiring that listed companies refer in their corporate governance statement to a code and that they report on their application of that code on a 'comply-or-explain' basis." This is not to say that there is full convergence on corporate governance approaches. *See* Peter A. Hall & David Soskice, *An Introduction to Varieties of Capitalism*, *in* VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE 1, 56 (Peter A. Hall & David Soskice eds., 2001).

87. Peer Zumbansen, *'New Governance' in European Corporate Law Regulation as Transnational Legal Pluralism*, 15 EUR. L.J. 246, 248 (2009) (U.K.).

2. New Governance

According to Orly Lobel, "new governance" finds its theoretical underpinning in the concepts of legal autopoiesis and reflexive law.[88] Neo-evolutionary in spirit, new governance represents the final step in the linear progress from a system that merely facilitates private ordering (formal law), to a regulatory model (substantive law), to finally a governance approach (reflexive law).[89] The theoretical model of new governance aspires to enhance the "internal self-regulatory capacities" of private actors by keeping coercion at the periphery.[90] Transparency and information disclosure are central to this approach to regulation.[91] It is, in fact, the social dynamics themselves that should act as a catalyst for regulation; in theory, shaming, social expectation, and encouraged introspection have a greater potential to ensure that private actors comply with regulations than does classic coercion.[92] Based on the premise that societies have reached such a state of complexity that makes the command-and-control type of regulation impossible, new governance posits maintaining flexibility, decentring regulation from the state, and affords a significant degree of discretion to the regulatory target.[93] Governance scholars point to the goal of reaching "a synergetic effect" or a "win-win" situation.[94]

New governance has been employed in financial regulation through regulatory delegation to market participants—for example, in the case of *principles-based regulation*.[95] Principles-based regulation means formulating broad, general, and purposive rules to guide market

88. Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 361-66 (2004).

89. *Id.* at 362.

90. *Id.* at 365. *See generally* Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, *in* THE POLITICS OF REGULATION: INSTITUTIONS AND REGULATORY REFORMS FOR THE AGE OF GOVERNANCE 145 (Jacint Jordana & David Levi-Faur eds., 2004) (advocating for a range of alternative theories to state oriented regulation).

91. Zumbansen, *supra* note 87, at 258. On how mandatory disclosures may help improve compliance with labour law and create a socially responsible workplace, see generally Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351 (2011).

92. Marc Schneiberg & Tim Bartley, *Organizations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the Nineteenth to Twenty-First Century*, 4 ANN. REV. L. & SOC. SCI. 31, 47 (2008)

93. Julia Black, *Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in the 'Post-Regulatory' World*, 54 CURRENT LEGAL PROBS. 103, 115, 123 (2001). *See* Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation*, *in* THE OXFORD HANDBOOK ON REGULATION 146, 146 (Robert Baldwin et al. eds., 2010).

94. Lobel, *supra* note 88, at 460.

95. JOHN ARMOUR ET AL., PRINCIPLES OF FINANCIAL REGULATION 533, 549 (2016).

participants towards regulatory objectives (e.g., "a firm must conduct its business with integrity" according to the first principle of the *Financial Conduct Authority Handbook*).[96]

The UK Financial Services Authority adopted principles-based regulation in securities regulation in 2003. Before becoming a focal point of critique following the financial crisis of 2008, the EU Commission heralded it as the way forward for regulation of financial markets, and the US Treasury formalized it in the *Blueprint for a Modernized Financial Regulatory Structure*.[97] Regulatory agencies regarded principles-based regulation as a prime example of regulatory flexibility, durability, and effectiveness, enabling competitiveness and innovation while, importantly, facilitating cross-border harmonization.[98]

Attempting to bridge the gap between top-down regulation and deregulation, principles-based regulation is fundamentally built on trust, which in turn invites regulatory conversations on the meaning and application of rules. As Julia Black points out, these regulatory conversations create parallel interpretative communities (e.g., regulated firms, consultancy firms, regulators) and further uncertainty about which conduct constitutes compliance and which does not.[99] But this

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96. Financial Conduct Authority, FINANCIAL CONDUCT AUTHORITY HANDBOOK § 2.1.1 (2020), https://www.handbook.fca.org.uk/handbook/PRIN/2/?view=chapter; Julia Black, *Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis*, 75 MOD. L. REV. 1037, 1042, 1045 (2012). Julia Black highlights that principles-based regulation can be formal, substantive, full, or polycentric. Julia Black, *Forms and Paradoxes of Principles Based Regulation* 25-26 (LSE Law, Soc'y and Econ. Working Papers, Paper No. 13, 2008) [hereinafter Black, *Forms and Paradoxes*].

97. Black, *Forms and Paradoxes*, *supra* note 96, at 2; Black, *Paradoxes and Failures*, *supra* note 96, at 1037, 1040-41; Charlie McCreevy, European Comm'r for Internal Mkt. & Servs., Eur. Comm'n, Speech by Commissioner Charlie McCreevy at the European Parliament ECON Committee 2 (Sept. 11, 2007) (available at http://europa.eu/rapid/press ReleasesAction.do?reference=SPEECH/07/520&format=HTML&aged=1&language=EN&guiLanguage=en) ("We believe that a 'light touch,' principle-based regulation is the best approach for the financial sector."). In the U.S., the Commodity Futures Trading Commission, contrary to the rules-based approach of SEC, has followed a principles-based approach. Cristie L. Ford, *New Governance, Compliance, and Principles-Based Securities Regulation*, 45 AM. BUS. L.J. 1, 1-2 (2008); Black, *Paradoxes and Failures*, *supra* note 96, at 1043, 1045 (noting, however, that "there is no evidence that regulation through detailed rules[, such as, for example, the approach of SEC in the US,] has fared better").

98. FIN. SERVS. AUTH., PRINCIPLES-BASED REGULATION: FOCUSING ON THE OUTCOMES THAT MATTER 2 (2007).

99. Black, *Forms and Paradoxes*, *supra* note 96, at 25-27 names this the "communicative paradox." Black, *Forms and Paradoxes*, *supra* note 96, at 28 also notes "the effect of consultants in producing isomorphism – the development of similar systems and structures in a range of organizations." *See also* MICHAEL POWER, ORGANIZED UNCERTAINTY: DESIGNING A WORLD OF RISK MANAGEMENT (2007). On how intermediaries can take on a "jurisgenerative" role in the development of legal rules through their interpretation of legal rules, see generally Philip Paiement, *Jurisgenerative Role of*

interpretative space, despite the regulators' supposed power in the last instance to decide what constitutes compliance, leaves substantial space for regulated firms to decide the process by which they might achieve the outcomes sought. Furthermore, this interpretative space opens a way for the more provocative conclusion that a regime of standards, rather than of rules, does not necessarily have a "chilling" effect on private activity—as Kennedy has argued—at least in the field of regulation.[100]

On the contrary, an uncertainty that favours a certain "shapeability" of outcomes, to the extent that it increases the improbability of sanctions, might motivate private activity and expand, rather than limit, economic rationalities. Principles can be bent, and institutional practice might eventually benefit corporate interests. An example of this might be the homogenizing role of consultancy firms, which tend to advance institutional isomorphism by consolidating uniform compliance practices.[101] In addition, considering the malleability and broad space for interpretation of principles-based regulation, uneven power relations between regulated firms and regulators could also lead to principles-based regulation being more advantageous for private actors. In short, the broader the scope of interpretation, the more room there seems to be for power relations to play out, which possibly means that the corporate interpretation of "compliance" will become decisive.

Another example of new governance is *meta-regulation*, where corporations develop their own systems of compliance and the government monitors their self-monitoring, acknowledging their expertise and proximity to their field of social activity.[102] The second and third Basel Accords employed meta-regulation in the banking sector, allowing supervised banks to use their own internal risk models for setting their capital requirements.[103] The "internal ratings-based" approach to risk weighing was meant to acknowledge the banks' variety of assets and to avoid aggregating risks that may be uncorrelated. But this approach eventually resulted, perhaps unsurprisingly, in reducing

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Auditors in Transnational Labor Governance, 13 REG. & GOVERNANCE 280 (2019). On a more theoretical level, see Robert Cover's thesis on interpretative communities, the equal status of their understanding of the norms, and the role of the judiciary in eventually creating a hierarchy by suppressing certain conceptions over others. *See generally* Robert Cover, *The Supreme Court, 1982: Term Foreword; Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

100. Kennedy, *supra* note 39, at 1698.

101. Black, *Forms and Paradoxes*, *supra* note 96, at 28.

102. CHRISTINE PARKER, THE OPEN CORPORATION: EFFECTIVE SELF-REGULATION AND DEMOCRACY (2002).

103. Black, *Paradoxes and Failures*, *supra* note 96, at 1046.

the capital charge below what the rules would require—the *standardized approach*.[104] Large banks embraced the internal ratings-based approach, although it has also been argued that their influence shaped the content of the second Accord, eventually enabling the derailment of risk modelling systems that contributed to the financial crisis of 2007-08.[105] Following the crisis, Basel III—while originally attempting to install higher capital and liquidity requirements to reduce the risk of default—eventually continued to allow large banks to calculate credit risk using internal models. Basel III also employed a loose definition of liquidity assets, allowing banks to have a wide margin of appreciation of what would constitute the required "High Quality Liquidity Assets."[106]

The last example of new governance comes from the regulation of Credit Rating Agencies (CRAs). The EU replaced the system of *monitored self-regulation* (that applied before the crisis) with a regulatory framework that still allows CRAs themselves to determine the standards that they employ for their ratings, thereby imposing on CRAs only procedural requirements, such as disclosure requirements regarding rating methodologies.[107] Once again, significant institutional reliance is placed on the potential of transparency and market

104. ARMOUR ET AL., *supra* note 95, at 299-304.

105. *See* Ranjit Lall, *From Failure to Failure: The Politics of International Banking Regulation*, 19 REV. INT'L POL. ECON. 609, 613 (2012). The renewed Basel III continued to allow large banks to calculate credit risk using internal models; however, the argument of regulatory capture needs to be scrutinized. Bart Stellinga & Daniel Mügge, *The Regulator's Conundrum. How Market Reflexivity Limits Fundamental Financial Reform*, 24 REV. INT'L POL. ECON. 393, 399 (2017) argue that the capture narrative implies that regulators are in fact in a position to replace private valuation practices with ones that would be in the public interest. Only, the interconnection of markets is such that identifying with rules are indeed in the public interest is exceedingly complicated or even impossible.

106. Stellinga & Mügge, *supra* note 105, at 408 who nevertheless highlight the difficulties in providing a narrow definition for HQLAs. According to the IMF, "A too-stringent set of rules may force banks to take similar actions to reach compliance, resulting in high correlation across certain types of assets and concentrations in some of them," INTERNATIONAL MONETARY FUND, GLOBAL FINANCIAL STABILITY REPORT 81 (2011).

107. Commission Regulation 513/2011 2011 O.J. (L. 145/30) art 23. *See also*, Commission Regulation 462/2013 2013 O.J. (L. 146/1). The previous system of "monitored self-regulation" provided for monitoring of CRA compliance with the International Organization of Securities Commissions (IOSCO) Code of Conduct by the Committee of European Securities Regulators. Yet, according to Stellinga and Mügge, supra note 105, at 403, "the bar was so low that the Big Three were thought to comply with these requirements already." *See also* Bartholomew Paudyn, *Credit Rating Agencies and the Sovereign Debt Crisis: Performing the Politics of Creditworthiness Through Risk and Uncertainty*, 20 REV. INT'L POL. ECON. 788 (2013) (on the impossibility to determine ex ante whether CRA methodologies are correct).

reflexivity, as market actors are supposed to scrutinise CRA practices, thereby forcing them to avoid arbitrary results.[108] In any event, CRAs operate in a framework that allows them to remain both a source of private ordering and as the private gatekeepers of financial stability.

3. "Self-Change" and De-Politicization

The attempt to resolve social ills through a recourse to corporate governance and new governance techniques has expanded market rationalities and the role of private actors in shaping how the regulated field functions, including the normative expectations and outcomes therein. As the idea of harnessing the power of the market to impose sanctions for corporate misconduct replaces policing corporate behaviour, competition substitutes regulation with potentially harmful outcomes for social welfare.[109] In its effort to infuse private actors with public values such as transparency and accountability, new governance's contentious application of polycontexturality has been used as a source of legitimacy for more diffused privatizations.[110] With little evidence that the publicization narrative corresponds to a transformation of private actors, new governance may be "merely the privatization of the public without the publicization of the private."[111] Similarly, the recourse to corporate governance for ensuring corporate accountability betrays an understanding of reflexivity that is entangled with self-change as a response to irritations provided by the environment, the market, and civil society.[112] In that direction, Teubner sees self-change mechanisms, such as ethics commissions and whistleblowing schemes, as integral in guaranteeing the possibility of dissent within the economic system. Yet, these mechanisms are also presented as substituting the instruments of dissent from the Welfare

108. According to Stellinga and Mügge, the non-interference of public authorities with rating methodologies can be attributed to substantive problems, such as the lack of specific knowledge by the regulators and possible, inadvertent boosting of systemic risks, rather than on "regulatory capture." S*ee* Stellinga & Mügge, *supra* note 105, at 405.

109. *See* John C. Coffee, Jr., *What Went Wrong? An Initial Inquiry Into the Causes of the 2008 Financial Crisis*, 9 J. CORP. L. STUD. 1, 1 (2009) (suggesting that excessive reliance on private gatekeepers, such as credit rating agencies, and a shift to new governance techniques that permitted US investment banks to increase leverage were largely responsible for the financial crisis of 2008).

110. For the origins of the publicization concept, see Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1291-95 (2003).

111. Fenner L. Stewart, *The Corporation, New Governance, and the Power of the Publicization Narrative*, 21 IND. J. GLOB. LEGAL STUD. 513, 516 (2014).

112. *See* Alfons Bora, *Semantics of Ruling: Reflective Theories of Regulation, Governance, and Law, in* SOCIETY, REGULATION & GOVERNANCE 32 (Regine Paul et al. eds., 2017).

State era: collective bargaining, co-determination, and the right to strike.[113] The contemporary alternative of this dipole paves the way to depoliticization. Market mechanisms and individualised ethical action are meant to substitute the social power of labour in outlining the limits of expansion for corporate rationalities. Social complexity functions as a supposed justification for the impotence of the state to outline broader arrangements of shared living that would, by definition, function as a containment of private power. In this era of governance, self-limitation, and self-change, private power is increasingly restricted by private power. This restriction becomes even clearer through the transformation of bindingness.

B. The Transformation of "Bindingness"

1. Societal Self-Regulation Replacing Law

Law understood as communication necessarily endows private actors with a certain juris-generative power.[114] These instances of jurisgeneration are as diverse as the competing interests of different actors: they could constitute both an attempt of marginalised or oppressed groups to self-govern and a form of private ordering of powerful corporate actors (such as CRAs) securing their own interests to the expense of social welfare. This highlights the double-edged nature of the communicative, non-essentialist view of legal pluralism. The intersection of state law and such jurisgenerative, private ordering can take different forms.

First, it can take the form of *recognition*, which occurs when state law enables private ordering. The rise of transnational private governance, although criticised for lack of legitimacy and de-politicisation,[115] has generally been mediated through national and international—that is, state-centred—law; for example, when national regulatory schemes mandate compliance with ISO standards.[116] Yet this

113. TEUBNER, *supra* note 49, at 89.

114. The term "jurisgenesis" is taken from Cover, *supra* note 99, in the work of whom, however, the term has the richer and deeper significance of communities creating legal meaning by means of the cultural medium. Here, I refer primarily to the different modalities of law-making capacity of non-state, private actors.

115. For a recent article, see A. Claire Cutler, *The Judicialization of Private Transnational Power and Authority*, 25 IND. J. GLOB. LEGAL STUD. 61, 62 (2018); see also, MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW (2011), arguing that the judicialization of the global political economy is displacing politics.

116. *See* David Vogel, *The Private Regulation of Global Corporate Conduct: Achievements and Limitations*, 49 BUS. & SOC'Y 68, 81-83 (2010). See also the

type of intersection essentially retains the conceptual priority of state law.

Second, it can take the form of *abstention*, which occurs when state law recedes into the background and lets society self-regulate. This is the case when market actors themselves develop codes of communication and normative expectations that are essentially binding without the need for law or adjudication.[117] One example I would like to briefly touch upon is the sharp increase in consumer dispute resolution through corporations' internal processes.[118]

While accessing formal dispute resolution mechanisms can be a time-consuming and tiresome process, corporate customer service is easily accessible and efficient in providing speedy resolutions, not only for direct consumer complaints, but also when mediating between consumers and independent third-party sellers in "network trials."[119] These internal corporate processes are neither public nor transparent, and yet they purport to fulfil certain characteristics of procedural legitimacy, such as ensuring that people have a voice and are treated with respect.[120]

The resolution of such disputes is based on parameters that not only are related to the dispute *per se*, but are related more broadly to the consumer's behavioural patterns and to his or her buying power.[121]

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classification of private ordering by Steven L. Schwarcz, *Private Ordering*, 97 NW. U.L. REV. 319, 324 (2002).

117. See the illuminating examples of the cotton and the diamond industry, where reputation sanctions enable the establishment of private orders in a way that makes the legal system largely irrelevant to their operations, Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115 (1992); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724 (2001). Along these lines, in the Law and Economics literature, social norms could be a cost-reducing and more efficient tool than contract adjudication, ERIC A. POSNER, LAW AND SOCIAL NORMS 148 (2002).

118. *See* Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REG. 547, 548-49 (2016). Another interesting example comes from Facebook's process of internal review and an "appeal" system for its own its monitoring and decisions regarding content that violates its Community Standards. *See* Facebook, *Protecting People from Bullying and Harassment* (2018), https://newsroom.fb.com/news/2018/10/protecting-people-from-bullying/.

119. Van Loo, *supra* note 118, at 551.

120. *Id.* at 560.

121. *See generally* Julie Weed, *At Uber, Airbnb and Other Companies, Customer Ratings Go Both Ways,* INT'L NY TIMES, Dec. 3, 2014 (discussing how behavioural patterns become a factor in internal corporate calculations); Natasha Singer, *Secret E-Scores Chart Consumers' Buying Power,* NY TIMES, Aug. 18, 2012 (discussing how e-scores related to buying value can impact consumer service and dispute resolution).

Importantly, automated systems can carry out the resolution.[122] As far as third-party sellers are concerned, failure to comply with the intermediary's guidelines could result in suspension from the online community. Suspension constitutes an important incentive for compliance for third-party sellers whose revenues come, in substantial part, from platforms like Amazon or eBay.

The lack of clear, uniform rules determining the outcome, as well as the lack of transparency regarding the procedure or the individuals participating in the dispute resolution process, makes internal corporate dispute resolution an opaque and highly informal process. In this case, the preponderance of particularity over universality marginalises generally applicable rules to the benefit of individual standards, leading to increased risk of arbitrariness and similar cases not being treated alike. But, while the dispute resolution process is infused with individualised market-based criteria, independent market processes also develop as a safeguard against arbitrariness.

The role of monitoring is passed onto reputation websites and ratings, which have the power to induce compliance due to their impact on consumer preferences.[123] As ratings and reputational sanctions become an informal accountability mechanism, social ordering takes place not via law but through communication and spontaneous market processes. This is a nascent, market-embedded understanding of bindingness, whereby network power, and not public authority, restricts corporate power.[124]

Yet with perceptions of fairness persisting in dispute resolution schemes, the informal corporate process shapes outcomes of "justice." As such, this form of private ordering challenges legal centralism. It not only endows corporations with juris-generative power in dispute resolution. Rather, it also means that justice is distanced from the discursive notion of co-decided norms that result from a process of inclusive deliberation and participation,[125] to connote an individualised

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122. "A simple version of this is the case of JPMorgan Chase, which implemented an algorithm that would automatically refund any online fee refund request under $50 without any human involvement." Van Loo, *supra* note 118, at 566.

123. *Id.* at 571.

124. *See* DAVID SINGH GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION 114 (2008).

125. *See generally* HABERMAS, *supra* note 46 (discussing modern law's tension between facts and norms). See also the work of Owen Fiss, for whom "adjudication is the social process by which judges give meaning to our values." Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979). *See also* AMY J. COHEN, ADR AND SOME THOUGHTS ON "THE SOCIAL" IN CONTEMPORARY LEGAL THOUGHT (Justin Desautels-Stein & Christopher L. Tomlins eds., 2017) (discussing Alternative Dispute Resolution as a collaborative alternative to adjudication).

resolution based on socially contingent notions of fairness, interpreted by corporate actors with reference to market-related criteria and disconnected from legal rights.

This type of growing informality differs greatly from the original vision of the leftist proponents of informal dispute resolution who "described legal rights, and the courts that enforce them, as hierarchical, abstract, individuated, and hence non-transformative."[126] Once again, the critical and socially transformative vision against universality and legal centralism is in complete disjunction with the current institutional practices that defy universality and legal centralism.

2. Societal Self-Regulation Within Law: The Reflexive Approach

The third, and most important for this section, form of intersection of state-centred law and private ordering is the form of *emulation*. Emulation occurs when state law relies on market processes, social expectations, and reputational sanctions to achieve broader policy objectives. In this case, state-centred law emulates social norms and the "naming and shaming" attitude of private regulation by attempting to harness the regulatory potential of the social sphere.[127] In this *reflexive* paradigm—a proceduralist and decentralizing alternative to formalism or functionalism—the role of the law becomes to facilitate the permeability of private institutional structures to pressures from the market and civil society, eventually triggering forces of self-regulation to develop within these structures.

A comparative examination of recent legislation on transnational corporate accountability reveals the legislative urge to limit corporations' extraterritorial activity regarding human rights protection and environmental sustainability. The most widespread regulatory technique employed is that of transparency regulation in the form of mandatory non-financial reporting. The EU has adopted the 2014/95/EU Directive on Non-Financial Reporting, whereby corporations must disclose certain environmental and societal matters, and has recently proposed a regulation that would require large investors to make

126. COHEN, *supra* note 125, at 3.

127. Bettina Lange & Fiona Haines, *Regulatory Transformations: An Introduction*, *in* REGULATORY TRANSFORMATIONS: RETHINKING ECONOMY-SOCIETY INTERACTIONS 1, 6 (Bettina Lange et al. eds., 2015). *See generally* Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998) (discussing the role of social norms in Law and Economics and the influence of the 'New Chicago School' in suggesting governmental intervention in the shaping of norms).

mandatory disclosures of environmental and social risks.[128] Initially, these are obligations of transparency only, primarily enforced through the "comply or explain" principle. Member states may opt for different enforcement approaches, however. For example, the German CSR Directive Implementation Act mandates that corporations make non-financial disclosures regarding their business models, environmental issues, employee matters, social concerns, respect for human rights, and preventing and combatting corruption, with non-compliance possibly leading to heavy fines.[129]

Another important example of non-financial reporting legislation is the UK Modern Slavery Act of 2015 (the Act).[130] According to Section 54 of the Act, companies that supply goods or services in the UK and have a turnover of £36 million must prepare an annual statement setting out the steps they have taken to ensure that slavery and human trafficking are not taking place in any part of their supply chain. The Act is ambitious in its extraterritorial scope, as it applies to companies that are not necessarily registered in the UK and which span over global networks of supply chains. But even though reporting is meant to support the substantive policy goal of eradicating forced labour, the obligation to report is not accompanied by an obligation to concretely oversee supply chains or a duty of care and legal liability in case of human rights violations. In fact, companies may even report that they have taken no steps to eradicate forced labour from their supply chains.

The US has also employed transparency requirements to direct corporate conduct toward social goals. The Dodd-Frank Act of 2010 included Section 1502, which mandates that corporations make specialised disclosures regarding their manufacturer's use of conflict materials emanating from the Congo region of Africa—a measure designed to address the humanitarian crisis in the region. These

128. Proposal for a regulation on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341. Council Directive 2016/2341 2016 O.J. (L 354/37). These initiatives follow existing designs of national legislations on non-financial reporting, such as the Financial Statements Act of 2012 of Denmark, where the failure to implement CSR policy must be reported without further sanctions.

129. ANDELSGESETZBUCH [HGB] [COMMERCIAL CODE], § 289, 334. "[V]iolations against the provisions on CSR reporting can result in fines of up to 10 Mio Euros, 5 percent of the total turnover in the year preceding the administrative decision, or at least twice the economic benefit derived from the offence." The obligations refer to corporations "that a) have a balance sum of more than 20 Mio Euros or revenues of more than 40 Mio Euros in the 12 months preceding the reporting date, b) are capital markets orientated and c) have more than 500 employees." Carsten Momsen & Mathis Schwarze, *The Changing Face of Corporate Liability – New Hard Law and the Increasing Influence of Soft Law*, 29 CRIM. L. F. 567, 575 (2018).

130. *See also Modern Slavery Act 2018* (Austl.) (discussing a similar structure as the UK Modern Slavery Act was followed by Australia).

reporting requirements have been understood in the relevant literature as a form of "therapeutic disclosure," designed to influence corporate behaviour through "social shaming."[131] There is no ban or penalty for the use of these minerals apart from the reporting requirement connected to supply chain due diligence.[132] Similarly, the California Transparency in Supply Chains Act of 2010 (CTSCA) requires that retail sellers and manufacturers disclose to what extent, if any, they take steps to eradicate slavery and human trafficking from their supply chains. Like the UK's Modern Slavery Act, the CTSCA does not require that companies implement measures to ensure that their supply chains are free from human trafficking and forced labour. Instead, "the law only requires that covered businesses make the required disclosures—even if they do little or nothing at all to safeguard their supply chains."[133]

A comparative analysis of different non-financial reporting requirements reveals differences in their enforcement that are not negligible. Some of these transparency laws have outright opt-out clauses, allowing companies to "disclose to what extent, *if any*" (California Transparency in Supply Chains Act 2010, Section 3) or that statements "*may* include" the desired information (UK Modern Slavery Act 2015, Section 54).[134] In the case of such an opt-out clause, even the possibility of injunction is not substantially consequential, as companies may simply report that they have taken no steps against forced labour in their supply chains. When it comes to the Dodd-Frank Act of 2010, if a company denies that it has used conflict minerals, the SEC, which would normally rely on independent certified audits to enforce compliance, does not have the capacity to validate the company's report. Yet, shareholders injured in the sale or purchase of a security by false or misleading statements by corporate insiders can incite compliance

131. STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE SCANDALS AND THE FINANCIAL CRISIS 34 (2012); *see also* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1211 (1999) (asserting that Congress intended disclosure in securities laws to affect corporate conduct).

132. *See generally* Nat'l Ass'n of Mfrs. v. S.E.C., 800 F.3d 518, 533 (D.C. Cir. 2015) (ruling that part of the statute is unconstitutional because it violated the First Amendment).

133. KAMALA D. HARRIS, CAL. DEP'T JUST., THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT: A RESOURCE GUIDE i (2015), https://oag.ca.gov/sites/all/files/agweb/pdfs/sb657/resource-guide.pdf.

134. *See generally Modern Slavery Act 2018* (Austl.) (discusses a similar structure as the UK Modern Slavery Act was followed by Australia) (an independent review of the act by members of Parliament has recommended making the law harder by eliminating the possibility that companies report nothing or introducing sanctions for non-compliance) (Austl.).

through a private right of action.[135] The German CSR Implementation Act is more invasive, prescribing significant fines in the case of non-disclosure. But, in all these cases, enforcement always concerns the first-order obligation of non-financial transparency rather than the second-order obligation of sustainable corporate activity and incorporation of labour and environmental standards across supply chains. It is eventually up to the learning pressures exerted by the markets and civil society to trigger the envisaged corporate self-regulation and embedment of social values within corporate norms. The ultimate purpose is to infuse corporations with a minimum of social goals regarding their conduct in developing countries, and this type of legislation uses corporate transparency as a means to achieve this purpose. The regulatory design aspires to induce reputational sanctions rather than to impose concrete legal sanctions for corporate misconduct and human rights violations across supply chains.

The same impetus characterizes Corporate Social Responsibility spending requirements, which have been introduced in developing countries as a way to induce corporations, even if registered abroad, to spend part of their profits on community development. For example, India's Companies Act of 2013 requires large companies to spend at least 2% of their profits on development goals. This obligation is not followed by sanctions, other than the obligation to justify non-compliance, relying once more on civil society and market pressures to achieve compliance.[136] In Mauritius, the legislature passed a similar—and this time sanctionable—CSR obligation, whereby corporations should contribute 2% of their chargeable income to a CSR fund dedicated to CSR activities.[137] Free from direct spending requirements, the South African Mineral and Petroleum Resources Development Act sets as one of its objectives that "holders of mining and production rights contribute towards the socio-economic development of areas in

135. Karen E. Woody, *Confli* Woody, *Conflict Minerals Legislation: The SEC's New Role as Diplomatic and Humanitarian Watchdog*, 81 FORDHAM L. REV. 1315, 1338 (2012).

136. *See generally* Priyanka Chhaparia & Munmun Jha, *Corporate Social Responsibility in India: The Legal Evolution of CSR Policy*, 13 AMITY GLOB. BUS. REV. 79, 83 (2018) (stating that India's minister for Corporate Affairs urged the companies not to perceive the new law as a burden or coercion but to treat it as an opportunity to create a better work environment).

137. *But see* Daniel Kinderman, *Time for a Reality Check: Is Business Willing to Support a Smart Mix of Complementary Regulation in Private Governance?*, 35 POL'Y & SOC'Y 29, 37 (2017) (stating that the CSR clause was introduced as part of a package-deal that involved cutting the corporate tax rate from 25% to 15%).

which they operate."[138] Even softer forms of legislated CSR, where there is no mechanism of implementation, exist in China and Indonesia.[139]

A slightly but not thoroughly different example is that of human rights due diligence legislation, which possibly gives rise to legal liability, as opposed to relying only on reputational sanctions. The French Duty of Vigilence Law of 2017 establishes legal obligations of human rights due diligence for certain categories of transnational corporations, without, however, employing sanctions in case of non-compliance.[140] Companies must identify risks resulting from activity in their supply chains and take the necessary steps to prevent human rights violations or threats to health, safety, or the environment. The French law is different because it establishes a duty of care, with possible civil liability for negligence in cases of corporate activity that lead to the sort of foreseeable harm that the "vigilance plan" does not adequately address. In theory, this is an incentive for compliance even in the absence of sanctions.[141] Yet the reflexive paradigm remains discernible in that corporations are invited to set the standards of conduct themselves, the non-implementation of which could possibly lead to breach of legal obligations and liability. Adherence to a self-developed vigilance plan may restrict the possibility of parent company liability for human rights violations.[142] The EU Regulation of 2017 on conflict minerals also imposes human rights due diligence on importers, requiring them to put in place systems and processes to identify, manage, and report risks in supply chains and the sourcing of raw materials.[143]

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138. Mineral and Petroleum Resources Development Act of 2002 § 2(i) (S. Afr.).

139. Min Yan, *Corporate Social Responsibility versus Shareholder Value Maximization: Through the Lens of Hard and Soft Law*, 40 NW. J. INT'L L. & BUS. 47, 72–73 (2019).

140. The sanctions for non-compliance were censored by the Conseil Constitutionnel on the grounds that some of the terms employed (e.g. violations of human rights) were not specific enough to comply with the principle of criminal legality and legality of offences. *See* Loi 2017-750 du 23 mars 2017, loi relative au devoir de vigilance des societies meres et des enterprises donneuses d'odre [Law 2017-750 of March 23, 2017 on the Law of the duty of oversight of parent companies and commissioning enterprises], CONSEIL CONSTITUTIONNEL [D.C.].

141. *But see* Cécile Barbière, *France's 'Rana Plaza' law delivers few results*, EURACTIV (Feb. 25, 2019), https://www.euractiv.com/section/development-policy/news/french-law-on-multinationals-responsibility-for-workers-abroad-achieves-few-results/ (yet, in fact, according to multiple NGOs, the law has had few results, with the French government being reluctant to enforce compliance).

142. *But see* Doug Cassel, *Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence*, 1 BUS. & HUM. RIGHTS J. 179, 196–97 (2016).

143. The EU Regulation of 2017 "lay[s] down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas." 2017 O.J. (L 130/1) 821.

On the international level, the UN Guiding Principles (UNGP) on Business and Human Rights of 2011 have pioneered the reflexive paradigm and the idea of "soft" responsibilities. The second pillar of the UNGP, "Respect," specifies that corporations have a responsibility to respect human rights while conducting their business. This includes the responsibility to conduct human rights due diligence which, however, does not constitute a legal obligation.[144] Effective operationalisations of the corporate responsibility to respect human rights eventually depend on voluntary corporate uptake of norms protective of human rights.[145]

The "voluntariness" of this uptake, however, is *per se* a topic of inquiry and a crucial point of challenge for the accounts that emphasize the potential for pluralism and reflexivity. A systems theory perspective on the intertwining of international non-binding instruments—such as the Guiding Principles or the earlier Global Compact—and private corporate codes of conduct draws attention to the possibility of making something out of this conjunction. That "something" could be nothing less than a transnational, functional equivalent to the classical constitutional state.[146]

In theory, the abstract norms entailed by non-binding instruments could serve as starting points for the generation of intracorporate norms, which then produce the actual standards for internal and external review and monitoring. This indicates a *reversal of the qualities of law*, whereby the private ordering of corporations adopts characteristics of hard law, while state or international norms maintain a soft character.[147] Corporate codes then become part of a regulatory ecosystem and an integral part of international private regulation and

144. *See also* John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights*, ¶ 54, U.N. Doc. A/HRC/8/5 (April 7, 2008) (there is an obligation of respect that subjects companies to the "courts of public opinion" and those comprise of "employees, communities, consumers, civil society, as well as investors").

145. Nicola Jägers, *Will Transnational Private Regulation Close the Governance Gap?*, *in* HUMAN RIGHTS OBLIGATIONS OF BUSINESS 295, 296 (Surya Deva & David Bilchitz eds., 2013). *See generally* John Gerard Ruggie, *Global Governance and New Governance Theory: Lessons from Business and Human Rights*, 20 GLOB. GOV'T 5 (2014) (discussing the development of the Guiding Principles on Business and Human Rights).

146. *See generally* Olaf Dilling, et al., *Introduction: Private Accountability in a Globalising* World, *in* RESPONSIBLE BUSINESS: SELF-GOVERNANCE AND LAW IN TRANSNATIONAL ECONOMIC TRANSACTIONS 1 (Olaf Dilling et al. eds., 2008) (discussing emerging norms leading to creation of hard law); Gunther Teubner, *Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOB. LEGAL STUD. 617 (2011) (discussing interaction between private and public corporate codes leading to constitutionalization).

147. Teubner, *supra* note 146, at 630.

"global legal pluralism."[148] They institutionalize a form of corporate self-governance that permeates supply chains at different levels by applying to contractors and, potentially, sub-contractors.[149] Corporate self-governance results in autonomous "legal bubbles," which are meant to homogenize regimes of production and economic coordination. Transnational economic actors may export legal frameworks that define the law on the ground for reasons other than the protection of the communities affected by corporate activity (e.g., for reasons that relate to legal predictability, cost reductions related to uniformity, and isolation of economic activities from the contingent exercise of national public authority).[150] Yet in this exercise of transnational norm creation, Teubner sees the potential for corporate codes to develop into a type of "civil constitution,"[151] addressing the limited reach of domestic law for cases of extraterritorial human rights violations or the possible gaps and weak protection of national regulations in host countries.[152]

There are two ways in which such forms of private ordering can indeed adopt characteristics of hard law. The first is the development of new linkages between state law and private ordering, for example by understanding corporate codes as binding parts of contractual arrangements.[153] This reconfiguration of private law instruments governing global value chains[154] could then lead to the legal liability of

148. *See generally* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007) (using the term global legal pluralism).

149. *See also* U.N. Conference on Trade and Development, *Corporate Social Responsibility in Global Value Chains*, 2–4, UNCTAD/DIAE/ED/2012/3 (Sep. 2012) (showing how most codes apply to the first tier of the supply chain but the use of CSR codes by TNCs further down the supply chain has steadily increased).

150. Tomaso Ferrando, *Private Legal Transplant: Multinational Enterprises as Proxies of Legal Homogenisation*, 5 TRANSNAT'L LEGAL THEORY 20, 24 (2014).

151. GUNTHER TEUBNER, THE CORPORATE CODES OF MULTINATIONALS: COMPANY CONSTITUTIONS BEYOND CORPORATE GOVERNANCE AND CO-DETERMINATION 204 (Rainer Nickel ed. 2009).

152. *See generally* John Gerard Ruggie, *Multinationals as Global Institution: Power, Authority and Relative Autonomy*, 56 REG. & GOVERNANCE 947 (2017) (giving examples of human rights violations brought in federal court in different countries).

153. Jaakko Salminem, *The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?*, 66 AM. J. COMP. L. 411, 432-38 (2018); *see generally* Peer Zumbansen, *What is Economic Law*, 1 J.L. & POL. ECON. (forthcoming) (discussing the concept of economic law as a methodology).

154. *See generally* Bruce Kogut, *Designing Global Strategies: Comparative and Competitive Value Added Chains,* 26 SLOAN MGMT. REV. 15, 15 (1985) (explaining that a value-added chain can be defined as "the process by which technology is combined with material and labour inputs, and then processed inputs are assembled, marketed, and distributed. A single firm may consist of only one link in this process, or it may be extensively vertically integrated"); Gary Gereffi et al., *The Governance of Global Value Chains,* 12 REV. INT'L POL. ECON. 78, 79 (2005) (discussing the "shifting governance

lead firms within regimes of supply chain governance.[155] Even when there is no direct contractual relationship between the parent company and the supplier's workforce (or other stakeholders, e.g., community members injured by environmental damage caused by corporate activity), the victims of a violation could make a claim as third-party beneficiaries.[156] Issuing codes of conduct or making public statements recognizing the responsibility of the lead firm towards other stakeholders could result in holding the lead firm responsible.[157] Another possible linkage with state law is through tort law and the duty of care lead firms might assume for the actions of their subsidiaries or even their suppliers.[158]

The second way to "constitutionalize" instances of private ordering is to focus on the ensemble of legal and nonlegal learning pressures that

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structures in sectors producing for global markets, structures we refer to as 'global value chains'").

155. *See generally* ANNA BECKERS, ENFORCING CORPORATE SOCIAL RESPONSIBILITY CODES: ON GLOBAL SELF-REGULATION AND NATIONAL PRIVATE LAW (2015); Larry Cata Backer, *A Lex Mercatoria for Corporate Social Responsibility Codes Without the State: A Critique of Legalization within the State under the Premises of Globalization*, 24 IND. J. GLOB. LEGAL STUD. 115, 121 (2017) (see this for a critique of the transformation of the State to a "nexus of connections within the structures of governance" and a "private economic actor operating within global private markets"); Zumbansen, *supra* note 153.

156. Zumbansen, *supra* note 153, applies this doctrine to the case *Jabir v. KIK*, where the supplier (Ali Enterprises) committed to the parent company's (KIK Textilien GmbH) codes of conduct, which included a detailed set of fire and safety regulations. The fire that killed or injured almost 300 workers in AE's sewing factory could have given rise to KIK's liability on the grounds that the company violated its obligations to monitor and enforce the safety regulations set out in the supply agreement. *See generally* LG Dortmund, Jan. 10, 2019, 7O 95/15, https://openjur.de/u/2155292.html (despite having accepted jurisdiction, the court in Dortmund rejected the lawsuit on the basis that the statute of limitations had expired).

157. Zumbansen, *supra* note 153. For an example of how the public expression of commitment to meet the UNGP Responsibility to Respect may cement the duty of care and liability for negligence, see generally Choc. v. Hudbay Minerals, Inc., (2013), 116 O.R. 3d 674 (Can. Ont. O.N.S.C.).

158. For an argumentation based on tort law and the duty of care, see the case Lungowe and Ors. v Vedanta Resources Plc and Konkola Copper Mines PLC [2019] UKSC 20, (appeal taken from EWCA Civ 1528) (where the UK Supreme Court held that a UK parent company could arguably owe a duty of care to the people affected by its subsidiaries' operations, on the grounds of the "high level of control and direction" that the parent company exercised over the subsidiary. Even though this case concerns individuals affected by the operations of a subsidiary who are not employees of the subsidiary, it eventually follows Chandler v. Cape Plc [2012] EWCA Civ 525 (on appeal from the High Court of Justice), where the parent company was found to have assumed a duty of care towards the employees of its subsidiary, who had been exposed to asbestos. This was a result of the parent company's "state of knowledge" about the factory in which these employees worked and "its superior knowledge about the nature and management of asbestos risks" in relation to the operations of the subsidiary [78]).

can lead to the genuine internalization of private ordering. The attempt to interpret corporate codes of conduct as "civil constitutions" and binding parts of contractual arrangements having effects to third parties is anyway predicated upon the issuing of such codes in the first place. The crucial actor to then set in motion the learning pressures and "communicative events,"[159] such as reputational sanctions, that force companies to adopt and genuinely observe such codes is *civil society*. Civil society movements, public campaigns, media pressure, politicized consumerism, shareholder activism, as well as processes of institutionalized non-governmental monitoring, social auditing, standardization, and certification, are part of the armoury of the new enforcement mechanisms for corporate human rights obligations.[160] Transnational judicial scrutiny in case of human rights violations and supply chain liability further contributes to the development of this "material constitution."[161]

In the reflexive paradigm, civil society becomes a critical actor because it is the source of the multiplicity of "irritations" and "learning pressures" that have the capacity to trigger the desired self-limitation.[162] It is "the Social," rather than "the Political," that steers the path between external interventions on the one hand, and self-regulation on the other hand.[163] This narrow path, the project to democratize the transnational economy from *within*, rather than by means of state intervention, transposes the postmodern tenets of reflexivity, pluralism, and decentralization into concrete modes of

159. TEUBNER, *supra* note 56.

160. Ioannis Kampourakis, *CSR and Social Rights: Juxtaposing Societal Constitutionalism and Rights-Based Approaches Imposing Human Rights Obligations on Corporations*, 9 GOETTINGEN J. INT'L. L. 537, 561 (2019). On reflexive institution-building and the impact of standard setting and certification, Klaas Hendrik Eller, *Private Governance of Global Value Chains from Within: Lessons from and for Transnational Law*, 8 TRANSNAT'L LEGAL THEORY 296 (2017). On social auditing and the possibility to establish a duty of care, see Carolijn Terwindt and Tara Van Ho, *Assessing the Duty of Care for Social Auditors*, 27 EUR. REV. PRIV. L. 379 (2019).

161. TEUBNER, *supra* note 56.

162. According to Andreas Fischer-Lescano, "the principles of democracy and of public control need to be anchored and, if necessary, legally enforced within the polycentric patterns of order themselves." Andreas Fischer-Lescano, *Struggles for a Global Internet Constitution: Protecting Global Communication Structures Against Surveillance Measures*, 5 GLOBAL CONSTITUTIONALISM 145, 167 (2016). *See also* Christopher Thornhill, *A Sociology of Constituent Power: The Political Code of Transnational Societal Constitutions*, 20 IND. J. GLOB. LEGAL STUD. 551 (2013).

163. Gunther Teubner, *A Constitutional Moment? The Logics of 'Hitting the* Bottom', *in* THE FINANCIAL CRISIS IN CONSTITUTIONAL PERSPECTIVE: THE DARK SIDE OF FUNCTIONAL DIFFERENTIATION 1, 13 (Poul F. Kjaer et al. eds., 2011). For a broader perspective on the mechanisms of enforcement of self-limitation and their role in constituting functional equivalents to the constitutional state, *see* TEUBNER, *supra* note 56.

economic governance. Fundamentally, it is a path that rests on the assumption that concrete limitations on the destructive expansion of social systems can only be the result of system-specific logic. This would mean that only the private actors that govern supply chains through contractual arrangements could effectively orchestrate the elimination of forced labour in supply chains. External observers, including the state, cannot build the necessary knowledge to inhibit such expansion.[164]

3. Critiquing the Reflexive Approach: Social Power Against Democratic Control

At first sight, the reflexive legislation of corporate sustainability laws adds an extra, hitherto inexistent burden on multinational corporations. Regulatory initiatives, like non-financial reporting, facilitate scrutiny and encourage companies to adopt corporate codes, which, in turn, can lead to legal liability for lead firms for misconduct that takes place along supply chains. Contrary to the entrenchment of hard legal protections for transnational corporations in fields such as international investment law, the introduction of disclosure obligations, human rights due diligence, or even spending requirements in the field of business and human rights could be seen as nascent attempts to strengthen corporations' social responsibilities. Nevertheless, the efficiency of such corporate sustainability laws has been called into question by the relevant literature, with current levels of compliance realigning mixed results.[165] Beyond concerns of efficiency, however, a deeper layer of critique regarding the reflexive approach relates to how it results in the institutionalization of uneven social and market power within legal structures.

In the effort of the reflexive approach to strike a balance between the competing logics of corporate profit-maximization and social

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164. Teubner, *supra* note 146, at 14 (citing WOLFGANG STREECK, RE-FORMING CAPITALISM: INSTITUTIONAL CHANGE IN THE GERMAN POLITICAL ECONOMY (2009)). Beyond the more technical arguments, such as the impossibility of a truly comprehensive, centralised knowledge, the lack of enforcement capacity, and the immense capacities of avoidance transnational corporate actors possess, the opposition to external regulation has also deeper philosophical roots. It transcribes the position that "the political constitution cannot fulfil the role of defining the fundamental principles of other sub-systems without causing a problematic de-differentiation—as occurred in practice in the totalitarian regimes of the twentieth century . . . No social sub-system, not even politics, can represent the whole society." Teubner, supra note 146, at 36-37.

165. For an overview of the efficiency of the UK Modern Slavery Act, see Virginia Mantouvalou, *The UK Modern Slavery Act 2015 Three Years On*, 81 MOD. L. REV. 1017, 1041-43 (2018).

purpose, bindingness ceases to be a uniform and predictable restraint on action. It becomes a contingent variable, dependent on the spatiotemporal market dynamics and the varying magnitude of civil society's pressures. What is binding for one corporation, because of its size, brand name, and exposure, is not necessarily binding for a corporation in a different industry, of a different size, etc. For example, a company that is highly exposed to consumer pressure and "communicative events" might be more inclined to undertake substantial non-financial reporting and adopt corporate codes that extend responsibility to stakeholders than a company whose activity is distanced from consumer society.

In addition, arrangements that depend on civil society to be meaningful accentuate the influence of the relatively more powerful private actors in establishing what is binding. For example, following non-essentialist legal pluralism, the decision of potential investors as to whether to invest in a company or not becomes the kind of communication that shifts the boundaries of "law," making a certain course of action "mandatory"—in this case, for example, it is the kind of communication that will determine the extent to which companies may pursue bona fide disclosures and be genuinely committed to social responsibility.[166] This conceals a structural change from the paradigm of legal centralism: the normativity of an imperative, an obligation set by national law becomes dependent on the reaction of civil society and the response of the market. In such a configuration, the asymmetries of power between the involved parties result in more powerful actors having a disproportionate power in determining what is binding and what the "rules of the game" are.[167]

That is not to say that bottom-up social pressures and grassroots civil society movements do not have a role to play in this determination. These informal pressures, however, rely on a social sphere that has already been shaped and determined by patterns of social hierarchy and distributional inequality. As such, societal "learning pressures" may still exclude those that lack the capacity to influence market outcomes. Contrary to the formal equality of democratic politics, the reliance on

166. Indeed, according to Rachel N. Birkey et al., *Mandated Social Disclosure: An Analysis of the Response to the California Transparency in Supply Chains Act of 2010*, 152 J. BUS. ETHICS 827, 837 (2018), where investors interpreted increased disclosure as potentially costly in terms of firm value, managers were more reluctant to pursue disclosures further.

167. For an optimistic view, along Polanyian lines, about the potential of shareholder stewardship to foster strong sustainability, see Dionysia Katelouzou, *Stewardship: A Case of (Re)Embedding the Institutional Investors and the Corporation?*, *in* THE CAMBRIDGE HANDBOOK OF CORPORATE LAW, CORPORATE GOVERNANCE AND SUSTAINABILITY 581 (Beate Sjåfjell & Christopher M. Bruner eds., 2019).

"the Social" reifies the asymmetries of social and market power into concrete legal arrangements. Those that lack the means, the resources, and the influence to participate in the building up of such social pressures, such by means of politicized consumerism or ethical investing, are left without the possibility to meaningfully exercise their public autonomy.

The same is true if one focuses on the global dimension of rendering the market the principle of social ordering. Even if the impact of corporate activity is located in developing countries, reputational sanctions are much more likely to come from the influential consumer and capital markets of the Global North. This renders individual consumer action and investment choices within western societies responsible for private-led "welfare" reforms in the Global South.[168] This embeds inequality in the global arena and curtails the authority of international institutions and politics to the advantage of anonymous, transnational market processes.

It also raises again the problem of public autonomy and voice. Even if the outcome of anonymous processes designed to enhance corporate social responsibility and social welfare, such as fair trade certification, would indeed lead to better protection of social rights in the developing world, the issue of lack of public voice persists.[169] This is because, in most cases,[170] the improvement of social welfare that can be attributed to corporate codes, processes of monitoring, and certification designed to "constitutionalize" corporate self-regulation is not directly linked to the participation of precisely those individuals who are supposed to benefit from the improvement of social welfare. In the reflexive paradigm, the absence of a transnational demos and of institutionalized politics from the transnational sphere has to be covered by law and its interfaces with other social sub-systems.[171] This may result in patching up governance gaps, but it remains an outcome-oriented model that fails to provide the input legitimacy of democratic politics. The tension here lies in the fact that the beneficiaries of the "self-limiting" corporate codes

168. Ioannis Kampourakis, *The Role of the State in Disrupting the Distribution of Power Within GVCs*, LPE PROJECT, https://lpeproject.org/blog/the-role-of-the-state-in-disrupting-the-distribution-of-power-within-gvcs/.

169. B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L CMTY. L. REV. 3, 13 (2006).

170. Laura D. Knöpfel, *An Anthropological Reimagining of Contract in Global Value Chains*, 16 EUR. REV. PRIV. L. 118, 127, 135-36 (2020) (suggests that at corporate frontiers local communities lack effective participation mechanisms but consent can be manifested. Local communities might also gain a new kind of political power through the power to grant the corporation the social licence to operate).

171. Klaas H. Eller, *Transnational Contract Law*, *in* OXFORD HANDBOOK OF TRANSNATIONAL LAW (Zumbansen ed., forthcoming Apr. 9, 2021).

(e.g., stakeholders in developing countries) have not participated in their co-authorship. If the individuals subject to power cannot see themselves as the authors of their own laws—in other words, if they do not make sufficient use of their public autonomy—then the benevolent exercise of private power is merely an instance of paternalism. While the democratic principle could in theory be recontextualized within regimes of transnational governance,[172] this would require going beyond an emphasis on guaranteeing the possibility for dissent to also secure an opportunity for co-authorship. Fostering such inclusive participation has yet to permeate institutional practice.[173]

The paradigm of *universality* and *legal centralism* does not guarantee progressive outcomes while socio-economic influence, lobbyism, and regulatory capture reduce the significance of the abstract equality and minimum of participation upon which democratic politics is based. It is also a paradigm that has excluded and marginalized those who did not fit the ideal types of conduct envisioned by law as a product of public power. Yet, it retains an "outside" to the market which, in the postmodern reflexive paradigm, appears to be receding.[174] Instead, the market is now called upon to develop a thicker normative web and to become the venue for the expression of social concerns, displacing the need for external corrective institutions.[175] Private actors address social problems which, even if created by market expansion in the first place, now become internal in the market itself.[176]

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172. *See generally* Gunther Teubner, *Quod Omnes Tangit: Transnational Constitutions Without Democracy?*, 45 J.L. & SOC. 5 (2018) (exploring how the democratic principle can be recontextualized in transnational regimes). In addition, the politicization and democratization of social systems other than that of politics should not mimic the political system. Instead, "every world of meaning must find its own way of democratization." Gunther Teubner, *Societal-Constitutionalism and the Politics of the Common*, 21 FINNISH Y.B. INT'L L. 2, 13 (2010).

173. A separate question would be whether the shift from citizens to stakeholders, which makes a principle of "affected interests" the prerequisite for participation in the process of norm-production, even allows a meaningful recontextualization of the democratic principle. *See* David Grewal, *Three Theses on the Current Crisis of International Liberalism*, 25 IND. J. GLOB. LEGAL STUD. 595, 620 (2018).

174. *See* JOHN RAWLS, A THEORY OF JUSTICE 277 (1971) (discussing the need of institutional arrangements separate than the market for purposes of distributive justice).

175. In this direction, see Ronen Shamir, *Corporate Social Responsibility: Towards a New Market-Embedded Morality?*, 9 THEORETICAL INQUIRIES IN L. 371 (2008).

176. *See* Lilian Moncrieff, *Karl Polanyi and the Problem of Corporate Social Responsibility*, 42 J.L. & SOC'Y 434 (2015) (discussing the possibility for embeddedness of economic relations in social relations). *See also* MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (2012); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1995) (discussing the expansion of market thinking and the moral limits of markets). *See generally* Frank Pasquale, *From Territorial to Functional Sovereignty*, LPE PROJECT (Dec. 6, 2017), https://lpeblog.org/2017/12/06/from-territorial-to-functional-

Still, the prioritization of market-modelled relations and the withering of democratic control does not fully capture the possible critique to the reflexive paradigm. Indeed, if it is assumed that the market is itself a product of legal ordering and not necessarily destined to perpetuate structures of inequality and domination, the question remains: why have the new forms of market regulation, discussed above under the rubric of reflexivity, been unable to prevent the persistence—if not intensification—of existing market dynamics associated with the prioritization of profit-maximization and accumulation of private power? The reason should be sought less in the efficiency of particular reforms and more in the structural inequalities encased by the original institutional setup upon which these reforms are meant to act. As core aspects of the legal infrastructure of markets (e.g., corporate law and shareholder ownership), as well as public law institutions (e.g., broad constitutional protections of private property, tax law regimes), do not shift in accordance with new reflexive interventions, such as corporate sustainability laws, they demarcate limits to what reformist projects like CSR can possibly achieve. It is also worth pondering whether transformative socio-economic projects that rely solely on the horizontal relations of the market could ever become fully purposeful. In other words, it is questionable whether, given the persistence of hierarchical social relations of production and asymmetries of social power, the "original institutional setup" could ever create the basis for markets to produce equitable and sustainable economic practices beyond the fundamental driving force of profit-making.

As the shortcomings of reflexivity and pluralism to deliver on aspirations of socio-ecological transformation become apparent, critically inclined legal theories must raise new challenges to the postmodern architecture of transnational economic governance and provide normative points of orientation. I will now attempt to trace such new directions.

III. CONCLUSIONS AND SPECULATIONS: THREE DIRECTIONS OF CRITIQUE

Postmodern perspectives have a critical edge most evident both in the attempt to revolutionize the way law is conceived and in their commitment to plurality, difference, and recognition of the Other. Reflexivity, pluralism, and the emphasis on standards, as opposed to rules, have rightly been promoted by progressive and critical scholars in

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sovereignty-the-case-of-amazon (on the notion of corporate functional sovereignty); JOSHUA BARKAN, CORPORATE SOVEREIGNTY: LAW AND GOVERNMENT UNDER CAPITALISM (2013) (discussing the notion of corporate functional sovereignty).

their relevant socio-historic context. And although the variety of postmodern legal approaches makes it difficult to speak of one unified "postmodern concept of law," I tried to show that characteristics such as a strong scepticism toward the state and a favouring of difference and decentralization are integral to this line of theoretical endeavours.

Through the vehicle of the reversals of universality and legal centralism, I attempted to demonstrate how particularity and pluralism have been construed within the current legal forms and structures of market regulation, eventually reinforcing the role that social power and market dynamics play for social ordering and, as a result, the place powerful corporate actors hold in the globalized economy. I argued that the prioritization of governance over regulation and the transformed notion of bindingness cannot fundamentally reconstitute market dynamics by encouraging normatively thicker market relationships, because such reforms are only superimposed on a legal and economic framework that generates and perpetuates structural inequalities. As such, new, reflexive forms of market regulation are conducive to the expansion of private power—including jurisgenerative power—to de-politicization and side-lining of the democratic principle, and to a quasi-institutionalisation of social and market power. To return to the architectural analogy I posited at the beginning of this article, the critique against architectural postmodernism—that it transformed the "form follows function" of modernism into "form follows brand"—is relevant for postmodern law as well.[177]

Constitutive theories of law's economic role have long concluded that a liberal market society cannot emerge as a spontaneous natural order but only as a result of a particular juridical framework.[178] Arguably, the discussed new forms of market regulation aspire to a social order where the juridical framework is itself primarily a product of spontaneous, horizontal relationships, as opposed to a product of vertical public power. Hayek was aware of the importance of law "before legislation:" that is, the value of social norms enforced through unorganised social pressure that could, "unlike commands, create an order even among people who do not pursue a common purpose."[179] Could it be that relying on the market to impose sanctions for corporate misconduct (e.g., through the creation of mechanisms of "dissent" within corporate governance, the comply-or-explain approach, non-financial disclosures, internal corporate dispute resolution) constitutes a shift toward the direction of the Hayekian "spontaneous orders"—only this time with reference to the making of a juridical framework? Is there a

177. JENCKS, *supra* note 6, at 49.

178. Lang, *supra* note 24; Hanoch et al., *supra* note 24; SLOBODIAN. *supra* note 22.

179. 1 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY 99 (1982).

replacement of legal rules with pragmatic, informal, socially contingent, and market-embedded problem-solving in transnational law?[180] The sample of cases that I have examined in this article do not, perhaps, allow for such a broad conclusion. At the same time, it remains undoubtedly true that centralised, uniform state law and regulation are still the fundaments of markets.[181] However, the transnationalisation of corporate activity creates a governance gap, which allows for shifts in how markets are shaped and directed. State law's reliance on corporate governance rules, social expectations, and market sanctions constitutes a move towards a self-regulating social order. One could speculate, even more ambitiously, that the vision of this self-regulating transnational order is that of a mutated "spirit of capitalism,"[182] where social issues can only be expressed as being embedded within economic relations and market structures.

If my article is meant to relativize and blunt the critical edge of crucial aspects of postmodern legal thinking, what could be a direction for critically inclined legal theories? I suggest there are at least three possible directions of critique. First, a neo-formalist return to the paradigm of universality and legal centralism—yet, only after having absorbed earlier critiques against legal formalism. Second, a conscious and selective return to the logic of legal centralism by means of an instrumentalist, functionalist perspective of the law as a means to achieve social goals. Third, a further radicalisation of postmodern legal thinking for the sphere of law and political economy.[183]

A return to universality and legal centralism could take the form of an attachment to the "culture of formalism," as suggested by Martti Koskenniemi.[184] Acknowledging the powerful critique to rules exerted by legal realism and critical legal studies, Koskenniemi proposes nevertheless that formalism still has something to say about power, accountability, and equality. Koskenniemi does not associate formalism with substantive outcomes; it is, in fact, the critique of formalism itself that has shown the disjunction between the letter of the law and the predictability of outcomes. Rather, it is a matter of political contestation to give the content and the meaning of the rules the one or the other

180. On neoliberal legality and transnationalism, see generally Grewal, *supra* note 173, at 615.

181. Simon Francis Deakin et al., *Legal Institutionalism: Capitalism and the Constitutive Role of Law*, 45 J. COMP. ECON. 188, 189 (2017).

182. BOLTANSKI & CHIAPELLO, *supra* note 27.

183. For further elaboration on this categorization, see Ioannis Kampourakis, *Bound by the Economic Constitution: Notes for 'Law and Political Economy in Europe'*, 1 J.L. & POL. ECON. 301 (2021).

184. MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960 494 (2001).

direction. The modest ambition of a "culture of formalism" would then be to set limits to the exercise of power and to undergird a social practice of accountability, openness, and equality, that is not reducible to the political positions of the parties involved.[185] In this process of political contestation, such neo-formalism seeks a residue of universalism, a common space to which contesting sides can resort when claiming a right. "The emancipatory core, and the universalism of the culture of formalism, lies precisely in its resistance to subsumption under particularist causes."[186] The legal form safeguards a universal space, which guarantees that politics do not degenerate to a clash of incommensurate value-systems. For Koskenniemi, the force of positive law is the force to draw sharp lines in a fluid world of opportunity, which necessarily entails that "neither the revolutionary avant-garde nor the manager of a transnational company likes them."[187] Formalism's value, as outlined here, is predicated on the limits it imposes on private power and on leeway the legal form secures for reinterpretations of the law and critiques that the legal system has distorted the principles that supposedly inform its own foundations.[188]

In a different vein, the second approach toward the return to universality and legal centralism comes from a functionalist perspective of using state law to achieve outcomes of substantive justice and distribution. Contrary to the postmodern impetus to stress the complexity, fragmentation, and unknowability of the economy, socialist and welfarist planning were grounded on the belief in the capacity of human reason to address complex situations holistically.[189] Such legal instrumentalism then understands the law as non-autonomous, an

185. *Id.* at 500.

186. *Id.* at 503-04.

187. Martti Koskenniemi, *Law's (Negative) Aesthetic: Will it Save Us?*, 41 PHIL. & SOC. CRITICISM 1039, 1042 (2015).

188. Taking this point further, Hauke Brunkhost suggests that law has a hidden negativity, in that it enables calling power to account. "Calling to account" describes the idea that law, due to its radical openness to interpretation, could mean something different than its current hegemonic instantiations: the predominance of one understanding of the law over another is eventually a matter of social struggle. *See* HAUKE BRUNKHORST, CRITICAL THEORY OF LEGAL REVOLUTIONS: EVOLUTIONARY PERSPECTIVES 29 (2014).

189. *See* HAROLD LASKI, SOCIALISM AS INTERNATIONALISM 14-15 (1949); THOMAS E. UEBEL & ROBERT S. COHEN, OTTO NEURATH ECONOMIC WRITINGS SELECTIONS 1904-1945, 373-74 (Thomas E. Eubel & Robert S. Cohen eds., Robert S. Cohen, et al. trans., 2005) (for example, the proposals for a New International Economic Order of 1974 have been widely understood as an attempt to concretize the vision of global economic planning); SLOBODIAN, *supra* note 22, at 235; E. U. PETERSMANN, THE NEW INTERNATIONAL ECONOMIC ORDER: PRINCIPLES OF POLITICS AND INTERNATIONAL LAW 466 (Ronald J St. MacDonald & Douglas M Johnston eds., 1978).

empty vessel to be filled with substantive content that can either advance or hinder different normative agendas. Instrumentalism rests on the assumption that state law is constitutive of economic structures—the market is a product of legal ordering.[190] Law's permissions, prohibitions, and entitlements backed up by public power determine the bargaining power of different actors.[191] Embracing the inevitably political nature of law, instrumentalist positions seek the reorientation of legal categories toward societal goals.[192] Eventually, this reorientation requires the dovetailing of functionalism with a social philosophy about the state, sovereignty, society, and human nature.[193] In general, however, and contrary to Koskenniemi's culture of formalism, the instrumentalist approach endorses a politicised view of the law as an instrument to be used to achieve sweeping socio-economic changes. It defends the role of the state in regulation as well as the possible employment of law for ambitious projects of social engineering.[194] Potentially, this could entail a return to command-and-control type of regulation, prescriptive regulation rather than governance solutions, and legal (as opposed to market) sanctions. While the governance gaps associated with transnationality, as well as the structural power of private financial interests, pose a challenge to a critical perspective that emphasizes the role of the state, instrumentalism serves as a reminder that all power is ultimately linked to public power. This is because private power is itself a product of legal entitlements and of the ensuing coercive power that is supported by public enforcement.[195] Even if indirectly, through its permissions, it is state law that enables the emergence and prevalence of private

190. *See* Lang, *supra* note 24; Grewal & Purdy, *supra* note 24, at 8-9; Samuel Moyn, *Thomas Piketty and the Future of Legal Scholarship*, 128 HARV. L. REV. 49, 53-55 (2014); ELLEN MEIKSINS WOOD, DEMOCRACY AGAINST CAPITALISM 183-85 (1995); Deakin et al., *supra* note 80; KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 216-19 (2019).

191. *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470 (1923).

192. *See* Unger, *supra* note 39, at 101-09.

193. See Loughlin's assertion that functionalism can only be rejuvenated once its engages again with the idealist philosophy that anchored its original political objectives, *supra* note 4, at 403. On the need to reconnect critical jurisprudence with a moral commitment to values such as solidarity with working and poor people, anti-individualism, and a utopian sensibility, see ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION 75, 77 (2011).

194. Robert W. Gordon, *Willis's American Counterparts: The Legal Realists' Defence of Administration*, 55 U. TORONTO L. J. 405, 424-25 (2005) (Can.).

195. Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1819 (2020).

ordering. State law and international cooperation could then also reverse this process.

A third possible direction of critique is that of a further radicalisation of the current postmodern concepts of law in relation to the political economy. A key notion in that direction could be "polycontexturality." Taken a step further, the "publicization narrative" and Teubner's idea of infusing the economy with public rationalities could yield a project of decentralised social change, where the markets themselves become the instrument of social transformation. This requires reading societal constitutionalism and polycontexturality as not necessarily having a linear normative impetus.[196] Democratising the economy from within would require an institutional imagination that goes beyond minor reforms of ecologisation of corporate governance, addressing the heart of the corporate form and its function in the globalised economy.[197] From a more theoretical perspective, instead of trying to update and apply the democratic idea under conditions of globalisation, a "critical systems theory"[198] that draws from Teubner's work and the ideas of reflexivity and polycontexturality attempts to reveal the political in law as the contradictory moment of law. Highlighting this contradiction, justice cannot be comprehended as an administrative formula, and needs to escape the imperialism of legal rationalities—instead, justice must be allowed to incorporate the non-institutionalised experiences of injustice. Justice must take place both within the system and in relation to other systems in a deconstructive approach of "self-subversive justice."[199] This brings critical systems theory close to de Santos's "oppositional postmodernism" and focus on social struggles. De Santos outlines a vision of a "subaltern cosmopolitan legality," which attempts to balance modern and

196. According to Gunther Teubner, "Nicht konkrete Regelungsvorschläge, sondern alternative Konstruktion von Rechtswirklichkeit," GUNTHER TEUBNER, RECHT ALS AUTOPOIETISCHES SYSTEM 152 (1989). *See also* Gunther Teubner, *Self-Subversive Justice: Contingency or Transcendence Formula of Law?* 72 MOD. L. REV. 1, 9 (2009) (in which the meaning of "justice" cannot be uniform but rather dependent on the social, human, and environmental "ecologies" of the law).

197. An example in that direction could possibly be a reversal of shareholder primacy by means of different reforms, such as the "inclusive ownership fund" (IOF), an employee ownership scheme in the UK that would transfer to the employees part of the ownership of a company, distribute dividend payments, and direct further dividends to a national fund for public services and welfare. *See* Rajeev Syal, *Employees to be handed stake in firms under Labour plan,* GUARDIAN (Sept. 24, 2018), https://www.theguardian.com/politics/2018/sep/23/labour-private-sector-employee-ownership-plan-john-mcdonnell.

198. Poul F. Kjaer, *Systems in Context: On the Outcome of the Habermas/Luhmann-Debate*, ANCILLA IURIS 66, 77 (2006).

199. Andreas Fischer-Lescano, *Critical Systems Theory*, 38 PHIL. & SOC. CRITICISM 3, 11 (2012).

postmodern concepts of law. In this subaltern cosmopolitan legality, state law and rights should be integrated into broader social struggles, while legal pluralism needs to be evaluated as to whether it contributes to reducing social exclusion or whether it rigidifies unequal exchanges.[200] This approach exhibits an instrumentalism toward state law that resembles the functional approach in favour of a return to universality and legal centralism; this time, however, the focal point is not the state and the appropriation of governmental and administrative power to effect social change, but decentralised social movements and bottom-up social struggles.

It is beyond the purposes of this article to take a stand in favour of one direction of critique or the other. Importantly, even though partial critiques based on theoretical arguments could be posed against the normative directions briefly examined here, the political context and the modalities of implementation envisioned are crucial to the evaluation of each direction of critique.[201] For example, the call to return to a Welfare State-like functionalism could constitute either an unreflective attempt to repeat past experiences in new circumstances, unwary of the identity-based exclusions of the Welfare State model and the established critiques against expertise, *or* a cutting-edge universalist approach with the potential to curb structural inequalities. Both the return to legal centralism and the project of radicalising postmodern legal thinking with reference to the political economy could constitute spearheads for political contestation of legal and institutional structures related to the dominance of market rationalities, corporate power, and socio-economic inequality. It is the sphere of politics that will forge the concrete shape and the potential of each direction of critique in different contexts.

200. DE SOUSA SANTOS, *supra* note 72, at 465-72.

201. The internalization of existing critiques within structures of market regulation requires a flexible, contextual, and mobile critical practice. *See* Deval Desai & Andrew Lang, *Introduction: Global Un-Governance*, 11 TRANSNAT'L LEGAL THEORY 219 (2020).