DEFINING THE SPACE OF TRANSNATIONAL LAW:
LEGAL THEORY, GLOBAL GOVERNANCE & LEGAL PLURALISM

Peer Zumbansen

I. Introduction

Legal inquiries into the future of law in an era of globalisation are regularly confronted with accounts of law’s alleged weakness to extend itself effectively beyond national, jurisdictional boundaries. At the same time, lawyers are not the only scholars by far who reflect on the regulatory challenges of today, which are often summarised under the heading of “global governance”. An investigation into the nature and scope of legal regulation in this context is unavoidably exposed to questions of origin and function, on the one hand, and to questions of relations, compatibility and interdisciplinarity, on the other. In this often polemic and heated discourse of disciplines and narratives, an effort to re-construct a discipline’s approach and methodology offers insights into both the trajectories and the characteristics of a particular discipline’s “take” on the problems which are at stake in a fast evolving highly asymmetric global arena.

With these considerations in mind, the following chapter takes the concerns among international lawyers about “legal fragmentation” seriously if only to contrast and to compare them with the evolution of legal orders at state level. Such mirroring offers a respite in what has otherwise too quickly been offered as a swansong about the fading light and impact of law under the duress of globalisation. Drawing out the analogies between legal sociological insights from the late Nineteenth and early Twentieth century into pluralistic legal orders and the lament about the law’s loss of “unity” in the global context, we can take a better look at the ambivalent nature of law itself. What emerges through this lens is that our analytical

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focus ought not to be upon *how law performs* in the context of globalisation, but how we are, in fact, theorising the *relation between law and society*. In other words, the advent of globalisation prompts an investigation into the theory or theories of society which informs or inform our – and competing – understandings of law.

A powerful illustration of this nexus is provided by the current debate on “global constitutionalism” and the alleged or complementary “constitutionalisation” of international law. Running through the majority of analyses offered in this context is the contention that the absence of a “world government” radicalises the governance dilemma facing modern societies, and, in turn, invites reflections upon the way in which the improvement of participatory elements can strengthen the democratic foundations of global governance institutions on the one hand, while the gradual acceptance of core human-rights values may eventually foster the emergence of a global set of values, on the other. Such contentions, however, occur in surprising isolation from both legal theory and governance discourses, which have long been pursued within the framework of the nation state. The separate tracks of inquiry in this case, one focusing on the future of law and law’s fragmentation in an era of globalisation, and the other concerned with the transformation of law in the context of radically-transformed statehood, prevent us from taking a closer look at the ways in which law has been changing over time. Certainly, scholars in law, political science or sociology have long been interested in the connections between the evolution of state institutions and the development of a global political economy. But, such inquiries which focus on the

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