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## Theorizing Transnational Legal Ordering of Private and Business Law

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# Theorizing Transnational Legal Ordering of Private and Business Law

Gregory Shaffer\*

This symposium theorizes and assesses transnational legal ordering of private law and business regulation in relation to the state. Such law and regulation seek to produce order in an issue area that relevant actors construe as a problem. The issues that the symposium covers include labor rights, corporate social responsibility, the regulation of financial derivatives, and the allocation of authority among courts to hear transnational disputes. The applicable norms adopt various forms and they vary in their formally binding nature. They are transnational insofar as they transcend and permeate state boundaries. The symposium evaluates developments in these areas, and the challenges and limits various initiatives face. It concludes with articles by leading theorists of private law from a transnational perspective.

The participants engage with the theoretical lens of *Transnational Legal Orders* (or TLOs) as elaborated in a book by Terence Halliday and Gregory Shaffer.<sup>1</sup> That book's conclusion noted areas for future research and set forth a series of hypotheses that arose inductively from the book's empirical studies in different substantive areas. The conclusion, in particular, noted the need to address private law and private ordering in relation to the TLO framework. This symposium helps fill that gap. It addresses each of the substantive issues noted above, and includes theoretical articles regarding the public/private distinction and the role of the state in relation to TLO theory.

Private law and business regulation increasingly are shaped transnationally in different ways. As countries liberalize markets and private actors engage in transnational exchange, private law and regulatory institutions adapt. This symposium assesses and evaluates the extent that changes in private law and business regulation transcend the state and give rise to transnational legal orders. By a transnational legal order, Halliday and Shaffer refer to law and regulation that seek to produce *order* in an issue area that relevant actors construe as a "problem"; that are *legal* insofar as they adopt legal form to address the problem, including through directly or indirectly engaging national legal bodies; and that are *transnational* insofar as they transcend and permeate state boundaries. The symposium participants

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1. TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015)

respectively evaluate privately made norms addressing labor protection (Larry Catá Backer) and corporate social responsibility (Cynthia Williams), the regulation of financial derivatives (Hannah Buxbaum), conflict-of-laws regimes (Christopher Whytock), legal pluralism and TLOs (Peer Zumbansen), and the state as a TLO (Ralf Michaels).

The symposium begins with **Larry Catá Backer's** article "*Are Supply Chains Transnational Legal Orders? What We Can Learn from the Rana Plaza Factory Collapse.*" In this article, Backer examines in detail the array of state and non-state actors engaged in reforming the governance of global supply chains operating in Bangladesh and elsewhere. The actors include the United States (U.S.) and European Union (EU), U.S. and European multinational companies, labor unions, civil society organizations, the International Labor Organization (ILO), the Organization for Economic Cooperation and Development (OECD), and Bangladesh itself. A group of North American apparel companies and retailers, known as the Alliance for Bangladesh Worker Safety (the "Alliance"), agreed to a series of initiatives and commitments to enhance worker safety and protection in Bangladesh. In parallel, a group of largely European apparel companies and retailers, grouped as the Accord on Fire and Building Safety in Bangladesh (the "Accord"), developed their own initiative that arguably was more stringent in its requirements. Modeled after the ILO's tripartite form of governance, the Accord includes government, labor, and business representatives in a Steering Committee that is presided by a representative of the ILO. A third group of enterprises created the "Arrangement," a voluntary mechanism for providing remedies to victims and their families, autonomous of the state and its courts. In parallel, the U.S. and EU used their leverage to press Bangladesh to reform its labor laws and institutions, and the ILO and OECD engaged in new norm making regarding global supply chain governance.

From his review of the fallout of the Rana Plaza factory collapse, Backer applies TLO theory and two alternative theoretical frames: polycentric ordering and neo-colonial state-based ordering. He analyzes their differences and complementarities. Under each frame, he notes the shift in law and governance away from the ideal notion of autonomous territorial states toward transnational legal ordering and governance arrangements. He shows how the Rana Plaza Factory collapse uncovers the dynamic, complex interweaving of national law, international standards, and private governance that, together, could be viewed as a transnational legal order. Yet, he also stresses how such legal ordering is polycentrically fractured, calling into question the extent of transnational settlement over the applicable labor norms. He thus suggests that it may be premature to speak of any settled order in the absence of principles to manage the interactions among the different Rana Plaza initiatives. He concludes that facts on the ground are shifting dynamically, which, in turn, must inform theory.

**Cynthia Williams's** article, "*The Global Reporting Initiative, Transnational Corporate Accountability, and Global Regulatory Counter-Currents,*" examines the development of corporate responsibility as a form of governance that takes a "new

governance,” soft-law approach by focusing on disclosure and transparency. The Global Reporting Initiative (GRI) is a particularly significant initiative adopting this approach, and its environmental, social, and governance (ESG) reporting has become a global benchmark. As Williams notes, “82% of the Global 250 companies use GRI as the basis for their corporate responsibility reporting. And as of 2015, 93% of the global 250 companies publish a stand-alone social report.”<sup>2</sup> GRI reports must include general and specific disclosures relevant to the industry, and set out specific facts about the effects of a company’s operations on the environment, society, and the economy.

The challenge with these voluntary reports, nonetheless, is that they often are not comparable and so give little practical information for purposes of comparing company performance. Such reporting also does not guarantee any real sustainability impact, and some studies find that the GRI has not achieved much on the ground. In contrast, a number of studies of particular *mandatory* non-financial disclosure regimes have found operational effects, such as regarding water quality, toxic release, mine safety, and restaurant quality. Williams contends that, consistent with findings in the area of financial disclosure, “to have operational effects, disclosure must be mandatory (so that disclosers cannot be selective in what they disclose), specific, and targeted to clearly identified users.”<sup>3</sup> She finds potential hope in developments regarding mandatory reporting. For example, “many European countries or their stock exchanges, and the European Union itself, require some environmental or social disclosure, to varying degrees of specificity.”<sup>4</sup>

Unlike the area of corporate social responsibility, which involves soft law (whether because it is voluntary or because it involves only disclosure), Williams points out that other areas of binding hard law have developed that work counter to sustainability goals. Williams notes, in particular, the proliferation of investor-state arbitration procedures, which grant rights to corporations to challenge national and local regulatory decisions before arbitral panels whose rulings are binding. She thus presses scholars of corporate social responsibility initiatives to address them in the broader context of other forms of transnational legal ordering with which they compete, conflict, and interact.

Regarding the TLO theoretical framework, Williams notes its important stress on studying the ordering of local practice, as opposed to studying only international or transnational formal texts that can be symbolic. As she writes, “how do particular transnational frameworks ‘touch down’ in legal processes, contracts, or proceedings, which by definition will involve local specification and an attention to hard law and legal power, and what are the conflicts and contestations that the transnational

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2. Cynthia Williams, *The Global Reporting Initiative, Transnational Corporate Accountability, and Global Regulatory Counter-Currents*, 1 U.C. IRVINE J. INT’L TRANSNAT’L AND COMP L. 67, 74 (2016).

3. *Id.*, at 82.

4. *Id.*, at 72.

regime engenders in the process.”<sup>5</sup> What researchers must do, she asserts, pointing to the TLO framework, is ask “Which norms, really, have settled where, in which legal processes, and why?”<sup>6</sup>

**Hannah Buxbaum’s** article, “*Transnational Legal Ordering and Regulatory Conflict: Lessons from the Regulation of Cross-Border Derivatives*,” addresses the regulation of over-the-counter (OTC) financial derivatives. Despite the impulse provided by the global financial crisis and considerable efforts, little convergence or settlement of legal norms have occurred across states. States have reached consensus on certain general principles, but significant regulatory divergence persists regarding their implementation. Parts of a TLO have been shaped by a private ordering regime, that of the International Swaps and Derivatives Association (ISDA), a transnational private trade association, which has created a Master Agreement and schedules that provide standardized documentation for OTC derivatives transactions. These standardized contracts have become the global market norm. But convergence and settlement of public regulatory norms has been limited.

The political economy of regulatory competition, Buxbaum explains, has limited convergence in derivatives regulation. Although national governments want to regulate derivative markets in order to counter systemic financial risks, they also wish to attract capital. “Lawmakers therefore face continuing tension between the need to strengthen regulation in the cross-border sphere and the desire to maintain the competitiveness of their markets.”<sup>7</sup> There have also been challenges of issue alignment (in the U.S., different agencies address the issues differently), diagnostic difference (regarding the nature of the problem), and a return of unilateralism (including in rulemaking by the U.S. Commodity Futures Trading Commission, which catalyzed European protests regarding the regulations’ extraterritorial scope).

Although common legal norms have not settled in this area, she contends that a form of a TLO based on conflict of laws has developed. Domestic regulators work within a framework of transnational norms regarding the allocation of regulatory jurisdiction. They evaluate each other’s regulations to determine whether they recognize them as equivalent to their own, and thus sufficient. And they engage in intensive regulatory cooperation and information sharing with each other for purposes of their own domestic securities law enforcement. Under this approach, she notes, ultimately “it is domestic law, in the form of an equivalence or comparability determination, that dictates whether compliance with a foreign regime will be accepted as sufficient.”<sup>8</sup> Such a system, she stresses, tolerates regulatory diversity and uses “conflicts methodology to manage that divergence.”<sup>9</sup>

5. *Id.*, at 81.

6. *Id.*, at 88-89.

7. Hannah Buxbaum, *Transnational Legal Ordering and Regulatory Conflict: Lessons from the Regulation of Cross-Border Derivatives*, 1 U.C. IRVINE J. INT’L TRANSNAT’L AND COMP L. 91, 95 (2016).

8. *Id.*, at 114.

9. *Id.*, at 116.

**Christopher Whytock's** article, "*Conflict of Laws, Global Governance, and Transnational Legal Order*," starts by recalling that conflict-of-laws rules govern three basic questions: jurisdiction, choice of law, and recognition and enforcement of judgments. Globally, there is no single harmonized conflict-of-laws TLO. Rather, conflict-of-laws rules are largely national and they allocate governance authority among different national jurisdictions. They produce order, but they do so in a decentralized manner with little settlement of global conflict-of-laws norms across national jurisdictions. Thus, he writes, "conflict of laws contributes to transnational legal order, yet conflict of laws is itself transnationally disordered."<sup>10</sup>

Whytock notes, however, that conflict-of-laws rules have certain common principles, one of which is comity and another of which is the international law grounds for exercising jurisdiction. He writes:

The principle of comity "suggests at a minimum an opposition to a categorically parochial approach, whereby a court would always assert jurisdiction, always apply its own nation's law, and never recognize or enforce a judgment of another nation's court, and a recognition that deference to another nation's authority is at least sometimes appropriate—by applying that nation's law, respecting the jurisdiction of its courts, or recognizing or enforcing the judgments of its courts. In addition, public international law principles of jurisdiction—although contested—contribute to the allocation of governance authority by placing limits on the jurisdiction of states to prescribe, enforce and adjudicate."<sup>11</sup>

There are nonetheless a series of developments in this area that give rise to TLOs regionally and in certain substantive fields. In at least two regions (Europe and Latin America) and two specialized areas of law (family law and commercial law), conflict of laws is increasingly harmonized by international treaty, coordinated under the auspices of the Hague Conference on Private International Law,<sup>12</sup> such that common norms can settle across national borders, leading to conflict-of-laws TLOs. The European regional TLO, through the European Union, is particularly institutionalized, adopted by a European regional body and enforced by a European regional court in coordination with national ones. As regards choice of law, these rules specify what substantive law (such as what tort or contract law) applies to a particular transnational situation. In terms of subject area TLOs developed through the Hague Conference, the family conflict-of-laws TLO is more advanced than the commercial one. Over ninety nations have ratified international child abduction and adoption conventions, and there is significant national jurisprudence applying them.

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10. Christopher A. Whytock, *Conflict of Laws, Global Governance, and Transnational Legal Order*, 1 U.C. IRVINE J. INT'L TRANSNAT'L AND COMP L. 117, 119 (2016).

11. *Id.*, at 123 (footnote omitted).

12. The Hague Conference is "an international organization with seventy-eight members that seeks the progressive unification of conflict-of-laws rules and private international law rules more generally through the production of international conventions and other legal instruments." *Id.*, at 131.

In substantive areas where norms are only partially settled, conflict-of-laws rules interact with national substantive law, such as in bankruptcy law (studied by Halliday)<sup>13</sup> and securities law (studied by Buxbaum).<sup>14</sup> They help determine “*which* set of norms should govern *which* transnational bankruptcy or secured transactions problems (choice of law), *which* courts (or other dispute resolution systems) should adjudicate those problems (jurisdiction), and *when* courts in one nation should recognize and enforce another nation’s resolution of those problems (recognition and enforcement of judgments).”<sup>15</sup> The result is a decentralized form of transnational legal ordering.

Ralf Michaels’s article, “*State Law as a Transnational Legal Order*,” turns to the theoretical plane by arguing that state law itself is transnationalized, and so state law and TLOs are not distinct categories. He contends that TLO theory, as a result, goes much further than providing a theory of a transnational body of law. It rather points toward a theory of legal ordering *tout court*. Michaels writes:

Transnational suggests, in its term already, less an overcoming than a transcending of the state. Transnational law (TL) is not above the state (like supranational law), nor between states (like international law), nor, necessarily, outside of states (like non-state law, though a connection between non-state law and transnational law is often made). . . . [T]ransnational law, somehow, cuts through the distinction between national and international, and thus between what is within and what is without the state. It promises, in this sense to be law not *without* but *beyond* the state.<sup>16</sup>

Michaels notes the ongoing critical role of the state in TLO theory. Its role includes norm construction (providing legal norms adapted transnationally), enforcement (enforcing transnational legal norms), recognition (recognizing transnational hard and soft law norms as state law), and legitimation (through incorporating the norms in state law and practice).

From this vantage, he questions whether state law and TLOs are qualitatively different, to which I respond below. In contending that states can be TLOs, Michaels maintains (reflecting a conflict-of-laws orientation) that states often produce norms that are applied transnationally and thus no transnational institution is needed. In his words, “instead of defining transnational rules as those created by transnational institutions, we should define transnational institutions as those

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13. See Terence C. Halliday, *Architects of the State: International organizations and the Reconstruction of States in East Asia*, in TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE 1, 89, (Gregory Shaffer ed., 2013); Block-Lieb and Terence C. Halliday, *Settling and Concordance: Two Cases in Global Commercial Law*, in TRANSNATIONAL LEGAL ORDERS 3, 75, (Terence C. Halliday & Gregory Shaffer eds., 2015).

14. Buxbaum, *supra* note 7.

15. Whytock, *supra* note 10, at 139.

16. Ralf Michaels, *State Law as a Transnational Legal Order*, 1 U.C. IRVINE J. INT’L TRANSNAT’L AND COMP L. 141, 141 (2016).

producing transnational rules. If this is so, then the state certainly qualifies.”<sup>17</sup> Going further, he contends, “there is very little left to [purely] national legal orders.”<sup>18</sup>

Peer Zumbansen’s article “*Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back*” concludes the symposium by pointing to the importance of theorizing “transnational law” “as a methodological lens through which to scrutinize the emerging and evolving actors, norms and processes both within and beyond the confines of the nation-state, a region or a municipality, a group or any other form of collective.”<sup>19</sup> While conventional international law scholarship focuses on states and public law, and much transnational law scholarship focuses on private actors and private law, Zumbansen agrees with the authors of *Transnational Legal Orders* that both state and non-state actors and processes, and the norms they promote, must be studied to understand the transnational. Going back to the legal realists, he shows the ongoing need to call into question the public-private divide when it comes to law and governance and their impact. He thus welcomes TLO theorists’ invitation to revisit the private law focus of some transnational law theory.<sup>20</sup>

Zumbansen also stresses how much of conventional theorizing uses concepts from the West as universals that are not fit to situations outside of it. He points to the critical role of post-colonial and Third World Approaches to International Law (TWAIL) for undermining universal pretensions and in advancing the need for a more pluralist form of theorizing that accounts for the lived experiences of people outside the West. What we must do in studying the transnational, Zumbansen stresses, is return to core legal realist insights regarding the importance of context. Scholars should work not in a false heaven of concepts (especially those drawing only from Western conventions, such as of the rule of law), but rather from the messy world of facts. In doing so, scholars must attend to those voices that are not being heard and reflected. We must, going back to the legal realists, constantly ask “the hard questions as to *who* does *what how* and *in whose interests*.”<sup>21</sup> To address these questions, we must turn to a focus on actors, norms and processes in particular contexts.

What Zumbansen means by “Where the Wild Things Are” is that the methodological construct of transnational law thrusts us into a new terrain where traditional distinctions as state and non-state, public and private, are less useful because so much governance has become hybridized. The sheer complexity of the situation makes normative assessment and critique much more difficult, and at the same time urgent. We badly need frameworks and empirical studies to ground our understanding of the transnational, but at the same time, Zumbansen insists, this is

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17. *Id.*, at 154.

18. *Id.*, at 155.

19. Peer Zumbansen, *Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back*, 1 U.C. IRVINE J. INT’L. TRANSNAT’L AND COMPL. 161, 166 (2016).

20. See also Gregory Shaffer, *Theorizing Transnational Legal Ordering*, *Annual Review of Social Science*, (forthcoming 2016).

21. Zumbansen, *supra* note 19, at 192.



not sufficient since we must act in the world and thus also need to develop normative parameters, grounded in a pluralist approach, with which to engage with the new world of transnational law.

#### THE SYMPOSIUM'S CONTRIBUTIONS TO TLO THEORY.

The scholars in this symposium seriously engage with TLO theory in light of the social problems that societies confront today and the role that private and business law play transnationally in providing order. They help advance TLO theorizing, and theorizing generally, in critical ways.

Backer and Williams highlight the key roles of private actors, such as non-governmental organizations, in creating norms that engage private practices around the globe, such as in the areas of labor and corporate law. Both authors critically show the importance of studying local practice and social dynamics to assess the existence and operation of TLOs, rather than analyzing only legal texts agreed at the transnational level. They also call attention to the need to study how different transnational norms interact, as opposed to studying them in isolation. Williams shows how new governance models can give rise to broader TLO structures, such as regarding disclosure norms, but she raises the hypotheses that disclosure regimes will more likely be effective if they are mandatory (and not voluntary) and if they permit for comparisons that facilitate informed stakeholder responses.

Buxbaum and Whytock show the ongoing importance of conflict-of-laws rules as an alternative to the creation of common substantive norms for transnational legal ordering. The conflicts approach, in particular, facilitates transnational ordering where effective and legitimate transnational institutions are lacking. Buxbaum shows the efforts and challenges of creating substantive law TLOs to address securities, such as financial derivatives. Because of ongoing regulatory competition among states, coupled with divergent state regulatory preferences, the legal ordering of derivatives remains predominantly national, other than a privately developed regime that provides for standardized derivative contracts that has become the global norm. As a result, conflict-of-laws rules are needed to provide a decentralized form of public legal ordering through the allocation of governance functions among national jurisdictions, albeit within a framework of high-level, transnational regulatory principles and common transnational contracts. Whytock likewise shows how private international law remains a critically important, decentralized alternative for transnational legal ordering. Yet, Whytock also shows how areas within private international law itself have become governed through treaties that can give rise to conflict-of-laws TLOs. He shows how these conflict-of-laws TLOs take both a regional and a substantive law form. He and Buxbaum likewise show how transnational conflict-of-laws principles, such as the principles of comity and mutual recognition, can develop informally.

Michaels and Zumbansen conclude by offering important theoretical insights regarding the relation of the TLO framework to legal pluralism and the role of the state. Both authors rightly stress that the state and state institutions remain critical

to TLO theory, unlike in other transnational law theory. As Michaels notes, “One could say that these TLOs ‘borrow’ the state’s institutions, and the state, in turn, lends out its courts.”<sup>22</sup> Under TLO theory, state law indeed becomes TLO law in subject areas when transnational legal norms are adopted and practiced in a settled, concordant way so that a new normal arises regarding the social understanding of the legal norms that apply.<sup>23</sup>

Like Buxbaum and Whytock, Michaels stresses how national norms can apply and produce order transnationally. Indeed, he is right that TLO theory must be open to the study of TLOs that arise without a transnational institution. Halliday, Shaffer and their collaborators have so far largely studied TLOs that involve transnational institutions and networks in particular subject areas in which a common conception of a problem is defined, and norms recursively interact up, down, and across transnational, national, and local levels of social organization. However, there is no requirement that a centralized transnational institution exist in order for a TLO to develop. Rather, when norms become concordant and settle transnationally, then one can speak of a TLO, whether or not a transnational institution is part of that process.

Halliday and Shaffer, in their book *Transnational Legal Orders*, nonetheless differ from Michaels regarding the scope of his claims that states are TLOs today, as when he writes, “TLOs are not an anomaly but the norm; all laws are, presumably, TLOs.”<sup>24</sup> Michaels writes from the perspective of legal theory, inflected by systems theory, at a more abstract level, whereas Halliday and Shaffer write from that of socio-legal theory at a more empirical level. The two approaches at times view the relation of state law and transnational law from different vantages. In much legal theory, grounded in legal formalism and legal positivism, state law is enclosed within a state constitutional order that provides secondary norms that define the law to be recognized and applied by national courts. Much of transnational law theory, building from Niklas Luhmann’s society-based conception of law, calls into question that state-centric, legal formalist picture from a theoretical perspective, noting that state law in reality is transnational law, as Michaels contends.

TLO theory, however, is a particular empirically-focused socio-legal theory that examines the normative settlement of legal norms that transcend national territorial boundaries. Critical to TLO theory is that state law and TLO law may or may not be the same, depending on how legal norms settle in actual legal practice. Where legal norms settle with radically different meanings in different national contexts, no TLO (as Halliday and Shaffer define it) exists. TLO and state law norms, however, are at times the same, since states serve to generate, enforce, and

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22. Michaels, *supra* note 16, at 160.

23. TRANSNATIONAL LEGAL ORDERS, *supra* note 1, at 43-44.

24. Michaels, *supra* note 16, at 160. Michaels’s approach parallels that of Patrick Glenn in his book. See PATRICK GLENN, *THE COSMOPOLITAN STATE* vii (2013) (“states are cosmopolitan in their origins, structures, populations, sources, and thought”).

legitimate transnational legal norms, and these norms can settle concordantly. Yet, as Buxbaum and others show, the creation of TLOs is often unsuccessful in practice, and TLOs when formed can also unravel.<sup>25</sup> Scholars using this framework find many efforts to create TLOs, but many initiatives fail or only partially succeed. The TLO theoretical approach does not predict that TLOs inevitably form; rather, it provides a framework through which to address the success, failure, transformation, settlement, and unsettlement of legal norms across states. As Whytock and Buxbaum show in this symposium, when TLOs do not develop, conflict-of-laws rules—with no coordination through a transnational institution—retain importance as a form of transnational legal ordering. To apply TLO socio-legal theory, one must assess empirically whether there is a TLO in which the state and state law comprise a part, including for purposes of recognition, enforcement, and legitimation of the legal norms, or whether the legal norms have not settled concordantly across states and so no TLO (as Halliday and Shaffer define it) has been formed.

For TLO theory, states are both factors and objects, as Michaels points out. States are factors in giving rise to TLOs in that state legal norms are often the origin of transnational ones, and transnational norms typically depend on states directly and indirectly, whether for their recognition, enforcement or legitimation. States are also objects in TLO theory in that the state and state law are transformed and transnationalized in the process. TLO theory is thus indeed an incipient theory of legal orders more broadly, and Michaels's analysis helps to highlight and show the way. As he writes, "transnational law is no longer [viewed as] a body of law and does indeed become a theory of law—though one informed no longer by state law as the model but instead of TLOs as the model."<sup>26</sup> Legal theory should engage with the phenomenon of TLOs for the reasons Michaels highlights, and empirical socio-legal theory should address the reach and limits of TLOs within national and local legal practice.

Finally, as Zumbansen stresses, the study of TLOs should engage with theories of legal pluralism in light of the different social contexts in which law operates. In a legal pluralist vein, Zumbansen points to the ongoing importance of normative evaluation of TLOs since TLOs often impose Western concepts which are ill-suited to local contexts. There is thus a need for both empirical study of how TLOs operate, and ongoing normative engagement and critique of TLOs in light of the different contextualized challenges that societies face today.

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25. See Terence C. Halliday and Gregory Shaffer, *Researching Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS*, *supra* note 1, at 507-11.

26. Michaels, *supra* note 16, at 160.