

The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity

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Abstract

Global law can be understood as the systematization of anarchy, as the management of a loosely intertwined universe of autonomous governance frameworks operating dynamically across borders and grounded in functional differentiation among governance communities. More conventionally, global law can be defined as the law of non-state governance systems. Global law posits a stable universe of objects of regulation around which governance systems multiply, the inverse of the traditional approach to law grounded on the presumption of a dynamic population bound to static and stable systems. The essay considers the structure of global law in this context, understood as an amalgamation of four fundamental characteristics that together define a new order in form that is, in some respects, the antithesis of the orderliness and unity of the law-state system it will displace (though not erase). These four fundamental characteristics—fracture, fluidity, permeability, and polycentricity—comprise the fundamental structure of global law. These also serve as the structural foundations of its constitutional element, its substantive element, and its process element. The essay considers each in turn in the construction of global law.

Keywords

global law; fracture; permeability; polycentricity; fluidity; sovereignty; international law; governance; anarchy; public law; law beyond the state

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1. Introduction: Not Global Law, but Governance Systems Beyond the State

Global law is coming.¹ In some respects it has already made an appearance in efforts to govern the behavior of states.² But it steals into the global village in darkness,³ a village once populated by a relatively homogenous collection of states gathered together behind thick walls of protective ideology.⁴ Its form and purpose are shrouded,⁵ and the hands that wield it are only partly visible.⁶ Global law, to the extent it is not the law of states, is threatening to the political order that reached its high point in the second half of the 20th century.⁷ For traditionalists, the question of its form revolves around the parameters of a dominant ideology that posits primacy of place to the state,⁸ to law,⁹ and to order.¹⁰ For others, global law can be seen in the shadow of the law¹¹ and the state¹²—in social norms, for

¹ Phillip Allott, *Eunomia: New Order for the World* (Oxford University Press, 1990); Martin Shapiro, 'The Globalization of Law,' (1993) 1 *Indiana Journal of Global Legal Studies* 37.

² Ruti G Teitel, 'Humanity's Law: Rule of Law for the New Global Politics,' (2001-2002) 35 *Cornell International Law Journal* 355.

³ 'The current world order is ending, but there is no clear replacement for it.' Keith Suter, *Global Order and Global Disorder: Globalization and the Nation-State* (Praeger Publishers 2003) 1.

⁴ John Griffiths, 'What is Legal Pluralism?' (1986) 24 *Journal of Legal Pluralism And Unofficial Law* 1, 3; Larry Catá Backer, 'Governance Without Government: An Overview, in Günther Handl, Joachim Zekoll, Peer Zumbansen (eds), *beyond territoriality: transnational Legal Authority in an Age of Globalization* (Brill Academic Publishers, forthcoming 2012).

⁵ grolf-peter calliess and peer zumbansen, *rough consensus and Running Code: A Theory of Transnational Private Law* (Hart 2010).

⁶ See Larry Catá Backer, 'Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator,' (2007) 39(4) *University of Connecticut Law Review* 1739.

⁷ Ralf Michaels, 'The Re-State-ment of Non-State Law: The State, Choice of Law, and the Challenge From Global Legal Pluralism,' (2005) 51 *Wayne Law Review* 1209, 1227-37.

⁸ Mireille Delmas-Marty, *Global Law: A Triple Challenge* (Martinus Nijhoff 2003).

⁹ Pierrick LeGoff, 'Global Law: A Legal Phenomenon Emerging From the Process of Globalization' (2007) 14 *Indiana Journal of Global Legal Studies* 119.

¹⁰ Giuliana Ziccardi Capaldo, *The Pillars of Global Law* (Ashgate 2008); Anne Marie Slaughter, *A New World Order* (Princeton University Press 2005).

¹¹ Günther Teubner, *Global Bukowina: Legal Pluralism in the World Society, in Global Law Without a State* (Ashgate 1997).

¹² William Twining, 'Normative and Legal Pluralism: A Global Perspective' (2010) 20 *Duke Journal of Comparative and International Law* 473; Simon Chesterman, 'Globalization Rules: Accountability, Power, and the Prospects for Global Administrative Law' (2008) 14 *Global Governance* 39.

example.¹³ It is left to those with a taste for such things to begin to suggest both its form and its structure as a singular construct producing a unified world order,¹⁴ or as something else, as something plural but still law, still strongly attached to the state and the ordering structures it represents.¹⁵ But the examination of global law in its own right tends to be occluded by the ideology of the state system that itself has contributed to the difficulty of engaging in these changes that effectively threaten the fundamental ordering presumptions inherent in the law-state ideological framework.¹⁶

I have been asked to explore the concept of ‘global law’, to provide insights into what global law means to me, and in so doing, to help the reader see global law through my eyes. I start with the Mexican poet, Octavio Paz’s insight from an engagement with the socio-cultural and political upheavals of the 1960s.

[M]odern time—linear time, the homologue of the ideas of progress and history, ever propelled into the future, the time of the sign *non-body*, of the fierce will to dominate nature and tame instincts, the time of sublimation, aggression and self-mutilation—is coming to an end. I believe that we are entering another time, a time that has not yet revealed its form and about which we can say nothing except that it will be neither linear time nor cyclical time. Neither history nor myth. The time that is coming, if we really are living a change at times, a general revolt and not a linear revolution, will be neither a future nor a past, but a present.¹⁷

Octavio Paz could have been speaking to the emergence of global law. Global law does not represent an extension of past patterns of governance, nor can it be understood as a barnyard full of tame animals with utility to

¹³ John G Ruggie, ‘International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic System’ (1982) 36(2) *International Organization* 379–415.

¹⁴ Richard Falk and Andrew L Strauss, *A Global Parliament: Essays and Articles* (Committee for a Democratic UN, 2011); Benedict Kingsbury, Nico Krisch and Richard B Stewart, ‘The Emergence of Global Administrative Law’ (2004–2005) 68 *Law & Contemporary Problems* 15; Sabino Cassese, ‘Is There a Global Administrative Law?’ in Armin von Bogdandy and others, *The Exercise of Public Authority by International Institutions: Advancing International Institutional Law* (Springer 2010) 761–776.

¹⁵ Eg Neil Walker, ‘Constitutionalism and Pluralism in Global Context’, in Matej Avbelj and Jan Komárek (eds) *Constitutional Pluralism in the European Union and Beyond* (Hart 2012).

¹⁶ Larry Catá Backer, ‘On the Tension between Public and Private Governance in the Emerging Transnational Legal Order: State Ideology and Corporation in Polycentric Asymmetric Global Orders’ (2012) Working Paper 4/2012, 16 <<http://ssrn.com/abstract=2038103>> accessed 25 June 2012.

¹⁷ Octavio Paz, *Conjunctions and Disjunctions* (First published 1969 as *Conjunciones y Disyunciones*, Helen R Lane, trans, Arcade Publishing 1982) 138.

the state and deployed for the consumption of the state system.¹⁸ Nor can it be understood as the project of lawyers in the construction of juridico-bureaucratic enterprises that provide a rule of law based systematization of institutionalized politics.¹⁹ Global law does not exist *per se*; the focus is on action—formalism is alien to the foundation of global law (though central to the ideology of the law-state). Regulatory power is not inherent in the law construct or the entities from which it emanates, but is instead something like the offal of governance activity—one grasps global law when it speaks through its actions, objects and constituent parts.

Global law, then, can be better understood, to the extent it is capable at this early stage of being understood, as the *systematization of anarchy*.²⁰ I speak here not of chaos²¹ but of the converse of *archê*,²² and away from notions of command grounded in the central reality of the state as the primary authoritative and legitimate expression of order.²³

Global law is a way of pointing to an emerging universe of systems that share characteristics and whose interactions lend them to organization. Globalization, as such, embodies the inverse of *archê*, in its sense as

¹⁸ For a critique of that view that also embraces a broader reading of law, Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (2nd ed, Reed Elsevier 2002) 21–99.

¹⁹ For an excellent description of this vision, eg Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007).

²⁰ With a nod to Edward Sandford Martin, ‘Systematized Anarchy,’ *Harpers* (February 1933).

²¹ Here also is rejection of the utility of traditional anarchism that speaks to anarchy as order without power. Rather I am suggesting order and power without a controlling superstructure in the state system. Eg Pierre-Joseph Proudhon, *Confessions d'un révolutionnaire pour servir à l'histoire de la révolution de février* (first published 1850, Adamant Media 2002) <<http://gallica.bnf.fr/ark:/12148/bpt6k5518220d/f8.image.r=proudhon.langFR>> accessed 29 July 2012; Mikhail Bakunin, *Stateless Socialism: Anarchism*, in *The Political Philosophy of Bakunin* (GP Maximoff ed, The Free Press 1953) ‘We hasten to add here that we vigorously reject any attempt at social organization which would not admit the fullest liberty of individuals and organizations, or which would require the setting up of any regimenting power whatever.’ In that respect state minimalists also fail to understand the revolutionary challenges of global law to what had been the contained universe of the state and its problems. Eg Robert D Kaplan, *The Coming Anarchy: Shattering the Dreams of the Post Cold War* 3–58 (Random House 2001).

²² This suggests the idea of international relations theory of *archê* as hierarchy and ordering under a common government. Philip G Cerney, ‘Globalization, Governance and Complexity, in Globalization and Governance’ in Aseem Prakash and Jeffrey A Hart (eds), *Globalization and Governance* (Taylor & Francis, Routledge 1999) But it also touches on older anarchist notions. Sam Dolgoff (ed), *The Anarchist Collectives: Workers' Self-Management in the Spanish Revolution 1936–1939* (Black Rose Books 1990).

²³ For an example of the traditional approach, eg Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974).

sovereignty, domination and first causes, that structure the hierarchically and self-contained system of states and their international organizations, the ends of which, its *telos*, is the structure and maintenance of the law-state system itself.²⁴ Global law posits a system uncomfortable with first causes and without singular objective, a system grounded in an *archê* and dispersion of purpose; “Nothing has any meaning”,²⁵ the essence of the market.²⁶

More conventionally, global law can be defined as the law of non-state governance systems. The definition suggests both commonalities and differences between “global law” as a distinct legal field and conventional legal fields derived from the legal orders of nation-states. Unlike domestic legal orders, global law covers a wide number of distinct governance communities existing simultaneously and organized beyond the rule imposing power of states. Moreover, these governance communities are not necessarily organized in the same way as states—with a population and a defined geographic territory and an institutional framework exercising plenary authority. Rather, global law communities may be understood as functionally differentiated societies organized for mutual benefit for specific objectives. They can include groups, institutions, and networks.

The structure of global law can be understood as an amalgamation of four fundamental characteristics that together define a new order in form that is, in some respects, the antithesis of the orderliness and unity of the law-state system it will displace (though not erase). These four fundamental characteristics—fracture,²⁷ fluidity,²⁸ permeability,²⁹ and

²⁴ Jan M Broekman and Larry Catá Backer, *Lawyers Making Meaning: The Semiotics of Law in Legal Education II* (Springer forthcoming 2012).

²⁵ Friedrich Nietzsche, *The Will to Power* (Walter Kaufmann and RJ Hollingdale trans., Walter Kaufmann, ed., first published in German in 1901, Vintage Books 1968) Book 3, ¶ 660 (“This melancholic sentence means “All meaning lies in intention, and if intention is altogether lacking, then meaning is altogether lacking, too.” *ibid.*).

²⁶ Milton Friedman, *Capitalism and Freedom* (University of Chicago Press 1962).

²⁷ Andreas Fischer-Lescano and Günther Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law,’ (2003) 25 *Michigan Journal of International Law* 999.

²⁸ Larry Catá Backer, ‘Inter-Systemic Harmonization and Its Challenges for the Legal-State,’ in Sam Muller, Stavros Zouridis, Morly Frishman and Laura Kistemaker (eds), *The Law of the Future and the Future of the Law* (Torkel Opsahl Academic EPublisher 2011); Günther Teubner, ‘A Constitutional Moment? The Logistics of ‘Hitting the Bottom’, in Poul F Kjaer and Günther Teubner (eds), *After the Catastrophe: Economy, Law and Politics in Times of Crisis* (forthcoming 2011).

²⁹ Hans Lindahl, ‘A-Legality: Postnationalism and the Question of Legal Boundaries,’ in Ronald Tinnevelt and Helder de Schutter, (eds) *Global Democracy And Exclusion* (Wiley Blackwell 2010) 117.

polycentricity³⁰—reveal both the end time of the modernity at the heart of the law-state system and posit a new form of governance organization that is neither a unified history nor myth (determinism or instrumentalism) but a collective present. These characteristics speak to a dynamic system in which order is dependent on the ability of actors to form and deploy a large number of governance structures simultaneously, where the state continues to assert a substantial power, but in which it can no longer claim pride of place.

To find global law, one must look outside the state. To understand its character one must focus on commodification within markets for governance. To frame global law, one must abandon the study of a system for the study of governance systematization, of the process and substantive boundaries of markets for governance, something with a legal, political, economic, social and cultural dimension. To apply global law one must learn the language of governance beyond territory,³¹ and beyond the state.

2. Fracture

Global law is fundamentally the law of fracture, of self-constitution,³² of a leveling of governance power hierarchies among states, non-state actors, religion, and other collectives³³ that come together for the purpose of organizing a group whose functions and structures are a reflection of the group's will.³⁴ The essence of global law follows from the reality of deterritorialization of governance power that is at the foundation of globalization.³⁵

³⁰ Günther Teubner, 'The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy,' (1997) 31(4) *Law & Society Review* 763; William Twining, *Globalisation And Legal Theory* (Cambridge University Press 2000).

³¹ Jan Arte Scholte, *Globalization: A Critical Introduction* (MacMillan 2000); Naoki Yoshihara, *Fluidity of Place: Globalization and the Transformation of Urban Space* (Trans-Pacific Press 2010).

³² Günther Teubner, *Constitutional Fragments: Societal Constitutions and Globalization* (Oxford University Press 2012).

³³ Adelle Blakett, 'Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct,' (2000-2001) 8 *Indiana Journal of Global Legal Studies* 401.

³⁴ Hans Lindahl, 'Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood,' in Martin Loughlin & Neil Walker (eds), *The Paradox of Constitutionalism* (Oxford University Press 2007) 9-24.

³⁵ Eg John G Ruggie, 'Territoriality and Beyond: Problematising Modernity in International Relations,' (1993) 47 *International Organization* 139; Stuart Elden, 'Missing the Point: Globalization, deterritorialization and the Space of the World,' (2005) 30(1)

With it, the emergence of governance spaces beyond the reach of the state – which until recently could with substantial confidence assert itself as the holder (and collectively as members of the community of states) of a (at least theoretical) monopoly of governance effectuated through the institution of government as the embodiment of the highest form of political, social and economic authority operated through law.

Global law posits the de-centralization of non-governmental organizations from states.³⁶ No longer are they mere secondary derivative collectives that owe their existence solely to the states that recognize them, these entities now acquire a self-constituting autonomy, and the governance power that flows therefrom. These entities can mimic the state in organization form; principal among them is the emerging class of self-governing multinational corporations that in many ways has begun to exercise governance authority within its own supply or value chains³⁷ that resemble the legislative authority of states.³⁸ But they can also assume other forms—they can manifest themselves as product or process certification organizations,³⁹ as standard setting organs, as assessment entities, or as a *volk*-like group evolving customs and shared practices (e.g. cyber-communities).⁴⁰

Transactions of the Institute of British Geographers 8; Scholte (n 31) 89–109. Deterritorialization is used here broadly, to refer both to the diminishing of the power of political borders to enclose, that is a weakening of ties between political organization and place, as well as its re-territorialization within other or different spaces. Cf. Gilles Deleuze and Félix Guattari, *Anti-Œdipus: Capitalism and Schizophrenia* (Robert Hurley, Mark Seem and Helen R Lane trans (First published 1972 as *Capitalisme et schizophrénie: L'anti-Œdipe*, Penguin Classics 2009); Saskia Sassen, *Cities in a World Economy* (Sage 1993).

³⁶ Robert D Cooter, 'Structural Adjudication and the New Law Merchant: A Model of Decentralized Law' (1994) 14 *International Review of Law and Economics* 215.

³⁷ Li-Wen Lin, 'Corporate Social Accountability Standards In The Global Supply Chain: Resistance, Reconsideration, And Resolution In China,' (2007) 15 *Cardozo Journal of International & Competition Law* 321; Larry Catá Backer, 'Multinational Corporations as Objects and Sources of Transnational Regulation,' 14 *ILSA Journal of International & Comparative Law* 499.

³⁸ Jennifer A Zerk, *Multinationals And Corporate Social Responsibility: Limitations And Opportunities In International Law* (Cambridge University Press 2006).

³⁹ Errol E Meidinger, 'Multi-Interest Self-Governance through Global Product Certification Programs' in Olaf Dilling, Martin Herberg, and Gerd Winter (eds), *Responsible Business? Self-Governance in Transnational Economic Transactions* (Hart 2008).

⁴⁰ Günther Teubner, 'Societal Constitutionalism: Alternatives to State Centered Constitutional Theory,' in Christian Joerges, Inger-Johanne Sand, and Günther Teubner (eds), *Transnational Governance and Constitutionalism: International Studies in the Theory of Private Law* (Hart 2004).

Fracture is not the end of order but merely its re-ordering. Where once only the state could claim a definitive role in the development of webs of rules and commands for the management of behavior, now other entities, social entities, have claimed that power to constitute themselves as well.⁴¹ Global law also posits the emergence of private governance from out of the shadow of the state, and of law. ‘This suggests a fundamental reorientation of governance, a movement away from the law-state binary to one grounded in the law-norm binary (within which the state is not necessarily present).’⁴² Law, no longer a monopoly of the state,⁴³ becomes a *relational* concept; what falls beyond the jurisdiction or structural norms of a governance collective may fall within another, and both may understand what falls outside the norms and structures of their respective legal orders differently.⁴⁴ This applies not just between states (and their domestic legal orders) but between states and other governance collectives.

Law fractures its form; it gives way to the disciplinary technologies of an administrative bureaucracy available to governance organs of all kinds,⁴⁵ but to contract as well, which is transformed from bilateral arrangements between parties for a specific objective to an instrument of managing behavior.⁴⁶ The focus is on function rather than form, on norms.⁴⁷ What serves to compel behavior serves as law; the rest is mere field boundary

⁴¹ David Sciulli, *Theory of Societal Constitutionalism: Foundations of a Non-Marxist Critical Theory* (Cambridge University Press 1992).

⁴² Larry Catá Backer, ‘Inter-Systemic Harmonization and Its Challenges for the Legal-State,’ in Sam Muller and others (eds), *The Law of the Future and the Future of the Law* (Torkel Opsahl Academic EPublisher 2011).

⁴³ Kenneth W Abbott and others, ‘The Concept of Legalization,’ in Robert O Keohane (ed) *Power and Governance in a Partially Globalized World* (Routledge 2002) 132–48.

⁴⁴ See Hans Lindahl, ‘Presentation: We and Cyberlaw: Constitutionalism and the Inclusion/Exclusion Difference’ (International Conference, Transnational Societal Constitutionalism, Torino, 17 May 2012) <<http://www.youtube.com/watch?v=IHv8-RecXEw>> accessed 29 July 2012.

⁴⁵ See, eg Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, Allen Lane 1979); Michel Foucault, *Security, Territory, Population, Lectures at the Collège de France 1977-1978* (Graham Burchell trans, Picador Palgrave Macmillan 2007) 87–110; 115–120. Cf., eg Bart Simon, ‘The Return of Panopticism: Supervision, Subjection and the New Surveillance’ (2005) 3(1) *Surveillance and Society* 1; David Lyon, *The Electronic Eye: The Rise of Surveillance Society* (University of Minnesota Press 1994) 57–80.

⁴⁶ Peer Zumbansen, ‘The Law of Society: Governance Through Contract,’ (2007) 14 *Indiana Journal of Global Legal Studies* 191; Marc Amstutz, Adreas Abegg & Vaios Karavas, ‘Civil Society Constitutionalism: The Power of Contract Law’ (2007) 14 *Indiana Journal of Global Legal Studies* 235, 236.

⁴⁷ Robert C Ellickson, ‘Law and Economics Discovers Social Norms,’ (1998) 27 *Journal of Legal Studies* 537.

protection by those seeking to retain the privilege of peculiar forms of behavior management. To the extent that these arguments rest on the classic distinction between the legitimating power of democratically enacted commands and the democratic deficit of other forms of rule making, the essence of the old *Rechtsstaat* ideal suffused with the normative power of Post-War *Sozialstaat* notions, is undercut by the move toward disciplinary techniques in the operations of nation-states.⁴⁸

Fracture also re-orders the mechanics of societal cohesion and legitimacy. Just as fractures in territorial integrity that flows from the logic of globalization created spaces for non-state governance organizations to emerge, so the fractures in democratic accountability created spaces within which alternative methods of accountability could arise and be legitimated. Global law in this sense is about the law of system legitimacy in a heterodox world of governance organizations.⁴⁹ It posits consent, not as a historical fact from which successors may not withdraw and which is managed through the formal mechanics of voting, to a more dynamic and functional action-consent,⁵⁰ in which the mechanics of and linkages between democracy, legitimacy and law/governance will have to be re-thought within contextually distinct governance spaces.⁵¹

States understand fracture in a very distinct way. As between public organs, the notion of fracture is understood as a species of federation, or of extraterritoriality.⁵² The principle object is the routinization of channels for

⁴⁸ The arguments about the democratic deficit in the European Union capture the spirit of this notion. Andreas Follesdal, and Simon Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik,' (2006) 44(3) *Journal of Common Market Studies* 533. But it is an insight with wider application. All systems in which there are substantial separations between the centers of the origination of rules and the parties that are meant to hold rule makers to account face the same issue of legitimacy, of democratic deficit. Larry Catá Backer, 'Democracy Part XXVI: Democratic Accountability—From Voter to Managed Mob,' (*Law at the End of the Day*, June 2 2012) <<http://lcbackerblog.blogspot.com/2012/06/democracy-part-xxvi-democratic.html>> accessed 25 June 2012.

⁴⁹ Ian Clark, 'Legitimacy in a Global Order,' (2003) 29 *Review of International Studies* 75.

⁵⁰ Peer Zumbansen, 'Law After the Welfare State: Formalism, Functionalism, and the Ironical Turn of Reflexive Law' [2008] *American Journal of Comparative Law* 769; cf. Jonathon W Moses, 'Exit, Vote and Sovereignty: Migration, States and Globalization' (2005) 12(1) *Review of International Political Economy* 53.

⁵¹ Amanda Coe, Gilles Paquet and Jeffrey Roy, 'E-Governance and Smart Communities: A Social Learning Challenge' (2001) 19(1) *Social Science Computer Review* 80. Cf. Thomas S Franck, 'Democracy, Legitimacy, and the Rule of Law: Linkages' in Norman Dorsen & Prosser Gifford (eds), *Democracy and the Rule of Law*, (CQ Press 2001).

⁵² Eg Daniel Augenstein, 'Study of the Legal Framework on Human Rights and the Environment applicable to European Enterprises operating outside the European Union' Study for the European Commission ENTR/09/045 (2010).

the division of authority, hierarchically arranged among a number of public bodies organized as government,⁵³ either as a form of devolution of state power or as a means of managing power through privatization.⁵⁴ Devolution posits the possibility of non-state governance only when it is borrowed, but also suggests an essential role for the state in the organization and enforcement of non-state governance systems.⁵⁵ Management fracture takes this notion one step further, positing the state at the center of a system in which sets the rules and objectives that it has privatized but still controls.⁵⁶ The object was to transform government from an entity that performed tasks to one that managed others in the performance of tasks—leveraged governance.⁵⁷

The state has been overtaken by global law in the sense of a set of presumptions that exist beyond the state but that posit that the state is one but not the only organ for the institutionalization of power within a global system in which territory is no longer demarked by physical borders alone, but in which territory has become a three dimensional construct. Groups can come together to constitute themselves along functionally differentiated lines which are demarcated by function rather than by physicality. The scope of the authority of such groups may be small indeed, but to the extent that they proceed from the group autonomously, they suggest a space for governance separate from that of other groups, including the state.

Governance, then, is dependent not on meeting the requirements for legitimacy as a state under international law,⁵⁸ but rather of a self-constituting character marked by boundaries functionally differentiated

⁵³ Larry Catá Backer, 'Forging Federal Systems Within a Matrix of Contained Conflict: The Example of the European Union,' (1998) 12 *Emory International Law Review* 1331.

⁵⁴ Kenneth W Abbott & Duncan Snidal, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 *Vanderbilt Journal of Transnational Law* 501.

⁵⁵ See Rod AW Rhodes, 'The Hollowing Out of the State' (1994) 65 *Political Quarterly* 138.

⁵⁶ B Guy Peters, 'Managing the Hollow State' in Kjell A Eliassen and Jan Kooiman (eds), *Managing Public Organizations: Lessons from Contemporary European Experience*, (SAGE Publications 1993).

⁵⁷ Allen Schick, OECD 50th Anniversary—Leveraged Governance: Avoiding Fracture and Getting Results 20–28 (OECD 2011); Peter G. Drucker, *The Age of Discontinuity: Guidelines to Our Changing Society* (Harper & Row 1992).

⁵⁸ Eg Malcolm N Shaw, *International Law*, (6th edn, Cambridge University Press 2008) 198–99; Ian Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 70.

from those of other groups.⁵⁹ Beyond a defined ‘territory’, the self-constituted group must manifest itself through government—an institutionalization of its cohesion with the power to manifest the normative objectives of the group. The government of governance groups can be as democratic as the Internet or as hierarchical as the multi-national corporation. That government must be able to manifest the group will, to make rules derived from and subject to the foundational rules (the constitution) of the group. The group must be able to discipline its members, enforce its rules and determine membership. The foundational premise rests on acceptance of the existence - independent of the control or authority of any one state or of the community of states - of a system of non-national, supra-national or multi-national principles and rules applicable, in accordance with its own terms and logic, to public and private actors, natural and juridical persons.

Global law then can be understood as those norms that structure and organize fracture in a world order populated by an aggregate of a large variety of governance organs with territorial boundaries that vary with the variation in the character of the governance organization. Its constitution is ‘form-recognizing’—the elements of this form-recognition include self-constitution, institutional autonomy, regulatory authority, and dispute resolution mechanisms. Its normative element is grounded in the customary expectations of the members of the organization:⁶⁰ citizens and residents in states; investors and customers in corporations; party members in state-party systems; believers in good standing in religious organization and so on.

These norms are all around us—from those derived from the *grund-norms* of religions and ideological systems, to the *jus cogens* notions of

⁵⁹ Ulrich Pruess, ‘Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?’, in Petra Dobner and Martin Laughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press 2010) 23–46.

⁶⁰ Custom and law understood here in its Aristotelian sense as both grounded in the internalized beliefs of those governed (Book II, cp. VIII) and requiring substantial effort to change functionally (Book IV, ch. V) even though easily changed in form. Aristotle, *A Treatise on Government* William Ellis trans, (JM Dent 1912). Cf. See The Paquete Habana, 175 US 677 (1900). The tension between the communal nature of rules and the instrumental application of rules remains a feature of governance now extended from the state to other governance organs. Eg John Ruggie, ‘UN Special Representative of the Secretary General, Protect, Respect and Remedy: A Framework for Business and Human Rights: Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (2008) Delivered to the Human Rights Council, UN Doc A/HRC/8/5.

international law.⁶¹ But fracture suggests that while there are many places from which to draw these process, structural and substantive norms, there is no system for arranging them in any definitive hierarchy other than those that follow the logic of the customs of the organizers of groups. Global law, then, posits not just fracture, but struggle among and within governance organs with respect to the arrangement and content of *grundnorms*.⁶²

3. Fluidity

The great object of the state system was the preservation of states. The United Nations system was meant to serve as a culmination of this drive to preserve the state, its territorial integrity and the primacy of the state (and law) as the paramount systems for asserting governance power in a context in which there were no governance gaps between states.⁶³ The system was meant to produce stability and equilibrium, where, freed of substantial worry about their preservation, states could turn their attention to the management of their populations within a global governance framework that would be self binding on each state as a reflection of consensus of the community of nations memorialized through international conventional and customary law.⁶⁴

The great object of global law is to permit fluidity - it is based on the assumption that governance organizations are impermanent and that there is no need to organize a meta-system around the premise that once established, self-constituted organizations ought to be preserved. It provides structure within which dynamic governance interaction is possible - as well as a space beyond the organization of governance - within which multiple governance units operate.⁶⁵ Global law, then, speaks to

⁶¹ Kamrul Hossain, 'The Concept of Jus Cogens and the Obligation Under the U.N. Charter,' (2005) 3 Santa Clara Journal of International Law 72; Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law* (2001) <www.iccnw.org/documents/WritingColombiaEng.pdf> accessed 29 July 2012.

⁶² Ironically this state of affairs reproduces the anarchy of the *grundnorm* in international public law. See eg Stefan AG Talmon, 'Jus Cogens After Germany v Italy: Substantive and Procedural Rules Distinguished,' [2012] *Leiden Journal of International Law* 25 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2085271> accessed 29 July 2012.

⁶³ Larry Catá Backer, 'The Fuhrer Principle of International Law: Individual Responsibility and Collective Punishment,' (2003) 21(3) *Pennsylvania State International Law Review* 509.

⁶⁴ Harold Hongju Koh, 'Review Essay: Why Do Nations Obey International Law?' (1997) 106 *Yale Law Journal* 2599.

⁶⁵ Cf. Joseph A Camilleri and George Myconos, 'WTO: The Competitive Dynamic of Globalization at Work' (2004) 12(1) *Law in Context* 21.

temporality of border, objectives, organization, and structure as an organizational principle, and to uncertainty. A self-constituted organization exists as long as its members wish it or can preserve it within the context of its ability to satisfy the needs of its constituent bodies and its outside stakeholders. 'Consumer choice, civic activism and public engagement are also indicative of this altering environment, albeit in a manner that may well lack cohesion due to both the differing behaviour of new governance processes and the resistance fostered by traditional ones.'⁶⁶ Here, the principles of the market but not the law of the jungle are applicable;⁶⁷ not chaos, but anarchy in the sense of a willingness to allow self-constitution to come and go.

Global law provides structure to the fluidity of a governance order made up of a large variety of actors who have little but the basic structures of their organization and operation in common. Global law can be understood as the set of customary (generally accepted) rules within which organizations may come and go, grow and shrink, project power and defend territory (understood in its three dimensional functional differentiating sense). Anarchy, the possibility of emergence and disappearance, is thus systematized through a focus on constituting elements and away from the intrinsic permanence of the institutions themselves. The logic of mass movements (sometimes as mass democracy)⁶⁸ on which politics is now founded, and from which law proceeds, thus comes to its limiting principle. Law proceeds from the masses, but the masses are not constrained by the institutions they may create from time to time (states, corporations, religions, and the like). Global law turns its gaze to the masses; it serves as the fundamental charter of mass action and societal constitutionalism in which the masses remain constant and its institutional manifestations become fluid.

Yet fluidity also can be understood in another sense, one that is also central to the idea of global law as a distinct field of study: global law is the aggregate of a set of self-reflexive and closed rules that structures and contains movements of people, goods, information, services and capital, as a

⁶⁶ Jeffrey Roy, 'E-Government, Good Government and Knowledge Management' (2005) 6(1) *Journal of Electronic Commerce Research* 44, 47.

⁶⁷ This vision was meant to scare people back into the arms of a stable system of stable states. Thomas Hobbes, *Leviathan* (first published 1651, Penguin 1985) (though it need not be limited to the social construction of states, and where so limited, it appears that sometimes the cure was worse than the disease; eg Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (Vintage Books 1997) 27–130.

⁶⁸ Edward Hallett Carr, *Nationalism and After* (MacMillan 1945). Internationalism, like nationalism, must become social, *ibid* 63.

space of.⁶⁹ But this 'space of' is dynamic - as John Urry suggests, it is fluid, capturing trends toward heterogeneity in governance.⁷⁰ Fluidity suggests that self-constituting organizations - states, international public and private organizations, corporations, and religious communities - are moving targets. What is fluid in global law can 'represent the de-territorialized movement of people, information, objects, money, images, and risks across regions in undirected and non-linear fashion and at variable speeds'.⁷¹ This touches also on the idea of permeability, discussed below, but here focuses on its consequence: the constitutional character of organizational borders (space) within which it flows (the substantive character of movements) develop in accordance with their own logic.

Fluidity, then, suggests the dynamic nature of communities constituting substructures, which when aggregated, provide a glimpse of the normative framework of global law. 'Indeed, from this perspective it is the legal system itself, and not external political, administrative, or corporate economic actors, that determines what the law is.'⁷² Institutions are not tombs within which the customs and practices of a governance community are mummified, buried and worshipped from afar. Fluidity also suggests the customary nature of global law, in the sense that the patterns of flows tend to produce habit and expectation that in turn is understood and utilized as norms; instrumentalism is here more difficult.⁷³ The logic of globalization suggests that customs and practices have emerged from their tomb, whether that tomb is understood as the conventional static oriented state or a similar governance organ (in religion, economics or otherwise), and now embrace and are embraced by the flows of people, goods, capital, services, and information to form and reform a community. Resistance challenges the relevance of the community and ultimately may doom it. Communities group

⁶⁹ Manuel Castells, 'An Introduction to the Information Age, in Frank Webster and others (eds), *The Information Society Reader* (Routledge 2004); Saskia Sassen, *The Global City: New York, London, Tokyo* (Princeton University Press 2001); Manuel Castells, *The Informational City: Information Technology, Economic Restructuring, and the Urban-Regional Process* (Wiley Blackwell, 1989).

⁷⁰ John Urry, 'Mobile sociology' (2000) 51(1) *British Journal of Sociology* 185.

⁷¹ John Hannigan, 'Culture, Globalisation, and Social Cohesion: Towards a De-Territorialized, Global Fluids Model' (2002) 27(2) *Canadian Journal of Communications* 277, 278.

⁷² Jean L Cohen, 'Whose Sovereignty? Empire Versus International Law' (2004) 18(3) *Ethics & International Affairs* 1, 9.

⁷³ Poul F Kjeaar, 'The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law and the Political in the Transnational' [2010] *Wisconsin Law Review* 489, 523.

and regroup within and between old communities and create their own.⁷⁴ Even states now disappear when suffocated by the contradictions of their inertia; corporations disappear with greater facility, religions with less grace. Global law can be understood as a legitimization of these movements and a presumption that the loss of a governance actor does not doom the aggregate system of governance—from the old something else will spring and over again.

4. Permeability

This world of heterogeneous systems of limited jurisdictions that exist without expectation of permanence and in accordance with the desires of their constituents and that can simultaneously affect actors that cross into their jurisdiction cannot exist in isolation. These systems communicate with each other - across and within borders to adjust internal structures in response to other systems' operations; discursive space permits the coupling of these systems as they learn to live among each other.⁷⁵ But structural coupling is not necessarily bounded by borders, and system closure does not suggest impermeability except, like Japan during the Shogunate, through designated trade portals. These systems also project themselves *into and through* each other. Global law can also then be understood as a set of rules of permeability,⁷⁶ one that posits the operational closure of systems,⁷⁷ but also the porous nature of boundaries that distinguish between system and non-system space but that do not impede the flows into and out of systems. Global law posits the permeability of all governance systems, though, of course to varying degrees.

Permeability does not suggest mere passive penetration, but instead suggests communication and reaction grounded in the fracture and fluidity of governance units operating, as will be discussed in the next section, within

⁷⁴ Matthew A Zook, 'Underground globalization: mapping the space of flows of the Internet adult industry' (2003) 35 *Environment and Planning A* 1261 (on the governance structures of the Internet adult industry).

⁷⁵ Günther Teubner, 'Global Bukowina: Legal Pluralism in the World-Society,' in Günther Teubner (ed) *Global Law Without a State* (Dartmouth Publishing Group 1997) 3–15.

⁷⁶ Louis Henkin, *International Law: Politics and Values* (Martinus Nijhoff 1995) ('while impermeability is still a general characteristic of statehood, it is no longer absolute. That ceased to be wholly true half a century ago and is increasingly less true').

⁷⁷ Niklas Luhmann, 'Operational Closure and Structural Coupling: The Differentiation of the Legal System' (1992) 13 *Cardozo Law Review* 1419.

a polycentric construct that makes communication, and intervention, a natural part of governance unit operation.⁷⁸ Permeability follows from the porosity of governance systems that overlap in a global order the territories of which are not measured simply by physical geography. Governance porosity follows the permeability of physical borders that have made it difficult for a single actor, traditionally a state, to exercise control of flows of ideas, capital, goods, culture, information, and people. Actions by any one actor has significant effect on other actors connected with the flows affected by governance actions (e.g., corporate policy over wages in their supply chain can affect the labor policy and law enforcement of host states, and both can be affected by investor tastes).⁷⁹ Systems that can simultaneously affect an actor tend also to speak to each other; their actions tend to affect the manner and extent to which other simultaneously applicable systems can manifest themselves. This structural (and structuring) communication produces a symbiosis of systems that sometimes manifests itself as a new form of private international law;⁸⁰ governance not only serves as a signifier of a space that exists outside of the state-government master construct, but also in intimate connection with it.⁸¹

Gunther Teubner speaks of systemic irritants, both internal and external to a societally constituted organization,⁸² ‘to indicate that legal transfers do not automatically displace pre-existing legal meanings and practices,

⁷⁸ Sol Picciotto, ‘Constitutionalizing Multi-Level Governance?’ (2008) 6(3&4) *International Journal of Constitutional Law* 457. But in the state system, that communication has tended to be vertically arranged, a state of things made more complex in discerning hierarchy outside the state system. Eg Nigel White, ‘Hierarchy in Organizations: Regional Bodies and the United Nations,’ in Nicholas Tsagourias (ed) *Transnational Constitutionalism: International and European Models* (Cambridge University Press 2007) 135.

⁷⁹ James N Rosenau, ‘Global Governance as Disaggregated Complexity,’ in Alice D Ba and Matthew J Hoffman (eds) *Contending Perspectives on Global Governance* (Routledge 2005) 131–153.

⁸⁰ Graft-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart 2010) 109.

⁸¹ Larry Catá Backer, ‘Governance Without Government: An Overview,’ in Günther Handl, Joachim Zekoll, Peer Zumbansen, (eds), *Beyond Territoriality: Transnational Legal Authority In An Age Of Globalization* (Brill Academic Publishers, forthcoming 2012) (citing, James N Rosenau, ‘Governance, Order, and Change in World Politics’ in Ernst Otto Czempiel ed, *Governance without Government: Order and Change in World Politics* (Cambridge University Press 1992); Edgar Grande & LW Pauly (eds), *Complex Sovereignty: Reconstructing Political Authority in the Twenty-first Century* (University of Toronto Press 2005) and Anne Wagner & Jan Broekman eds, *Prospects of Legal Semiotics* (Springer 2010).

⁸² Günther Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences’ (1998) 61(1) *The Modern Law Review* 11–32.

but instead trigger a new set of unpredictable choices and outcomes.⁸³ The implications extend well beyond the internal operations of national law.⁸⁴ Dan Wielsch speaks to permeability in the governance of knowledge sharing.⁸⁵ Just as territory has become porous, the integrity of governance systems is no longer measured by their imperviousness to influence by or projections from other systems. A corporation with worldwide operations will likely harmonize practices across national borders in ways that may affect local legal cultures that may affect legal interpretation of indigenous law; ‘convergence of form suggests a functional convergence of governance - the private corporation with public obligations, and the regulatory state that participates in markets. Public and private corporate bodies, once divided by an insurmountable conceptual barrier, now become mirrors of one another.’⁸⁶ But these are mirrors grounded in double reflexivity.⁸⁷ Porousness is also inherent in the three dimensional nature of borders. Multiple governance regimes may apply simultaneously on a single actor - that will likely have a penetrative effect on that actor, and by that actor’s actions affect, in turn the governance systems simultaneously internalized. The logic of global law facilitates the constant interplay - the constant irritation - of systems operating simultaneously on a common set of actors. Global law can be understood both as the normative framework that legitimates permeability as well as the condition of permeability itself.

5. Polycentricity

If law is no longer the only authentic and legitimate means of effectuating governance systems, and if states are no longer necessarily the principal

⁸³ John Gillespie, ‘Towards a Discursive Analysis of Legal Transfers Into Developing East Asia,’ (2008) 40 *International Law and Politics* 657, 665.

⁸⁴ Michael W Dowdle, ‘Completing Teubner: Foreign Irritants in China’s Clinical Legal Education System and the ‘Convergence’ of Imaginations’, in Penelope (Pip) Nicholson and Sarah Biddulph (eds), *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Martinus Nijhoff 2008) 169; Günther Teubner, ‘A Constitutional Moment? The Logistics of ‘Hit the Bottom’ in Poul F Kjaer and Günther Teubner (eds), *After the Catastrophe: Economy, Law and Politics in Times of Crisis* (forthcoming 2012).

⁸⁵ Dan Wielsch, ‘Private Governance of Knowledge: Societally Crafted Intellectual Properties Regimes’ [forthcoming 2013] 20 *Indiana Journal of Global Legal Studies*.

⁸⁶ Larry Catá Backer, ‘Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order’ (2011) 18 *Indiana Journal of Global Legal Studies* 751, 759.

⁸⁷ Günther Teubner, ‘Self-Constitutionalising TNCs? On the Linkage of “Private” and “Public” Codes of Conduct,’ (2011) 18 *Indiana Journal of Global Legal Studies* 617, 624–28.

and superior organization for the management of behavior, it may also follow that governance can exist in multiple locations simultaneously. In a world in which states govern through law and administrative apparatus, using law, regulation and non-state groups govern through contract, standards and internally generated rules, and both invoke disciplinary techniques, it is possible to posit the autonomy of these systems and their existence simultaneously in the same governance space.⁸⁸ Governance systems, no longer arranged in vertically ordered power stacks, now collide with increasing frequency and with greater consequence.⁸⁹

People, organizations, and states are now simultaneously governed by multiple systems of rules, rule systems that are produced by states and organizations and that may not be consistent, deriving their authority and character from autonomous sources. Polycentricity is the foundation of global law.⁹⁰ States are subject to the logic of their constitutions, but are simultaneously bounded by the rule systems imposed by the community of nations. States that reject the move from state centered to transnational constitutionalism⁹¹ act at their peril - lessons learned recently from the constitutional crisis in Honduras,⁹² and the discrediting of the long standing governments in Syria and Libya.⁹³

Non-state actors provide a better view of the polycentric character of global law.⁹⁴ Corporations may be subject to the laws of the states in which

⁸⁸ Ralf Michaels, 'True Lex Mercatoria: Law beyond the State' (2007) 14 *Indiana Journal of Global Legal Studies* 447.

⁸⁹ On collisions, see eg Larry Catá Backer, 'Collisions of Societal Constitutions: Hierarchical Power Arrangements and Horizontal Effects in the Management of Human Rights Regimes' [forthcoming 2013] 20 *Indiana Journal of Global Legal Studies*.

⁹⁰ Fischer-Lescano (n 27); Michael D McGinnis, 'Legal Pluralism, Polycentricity, and Faith-Based Organizations in Global Governance,' in Mark Sproule-Jones, Barbara Allen, and Filippo Sabetti eds, *The Struggle to Constitute and Sustain Productive Orders* (Lexington Books 2008) 45-64. And as neo-medievalism, eg Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (Columbia University Press 1977).

⁹¹ Wen Chen Chang and Jiun-rong Yeh, 'The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions' (2008) 27 *Pennsylvania State International Law Journal* 89.

⁹² Larry Catá Backer 'Democracy Part XX: Democracy With or Without Elections in Honduras,' (*Law at the End of the Day*, Dec. 4, 2009, <<http://lcbackerblog.blogspot.com/2009/12/democracy-part-xx-democracy-without.html>> accessed 25 June 2012).

⁹³ Larry Catá Backer, 'On Intervention in Libya: The Emerging Nature of Supra-National Legal Framework/Norms for Disciplining States and Their Leaders by Others,' (*Law at the End of the Day*, July 13, 2011, <<http://lcbackerblog.blogspot.com/2011/07/on-intervention-in-libya-emerging.html>> accessed 25 June 2012).

⁹⁴ Alice De Jonge, *Transnational Corporations and International Law: Accountability in the Global Business Environment* (Edward Elgar 2011).

they operate and are chartered, they may be subject to the laws of the states in which their subsidiaries are chartered and operate, they may be subject to international law in conflict zones, and to international soft law standards administered through states,⁹⁵ the U.N. system,⁹⁶ and private entities,⁹⁷ to the rules of listing entities,⁹⁸ and to its own internal governance systems.⁹⁹ The systems to which the entity may owe an obligation may not be compatible and they may not form parts of the same system, (emphasizing the fracture aspect in global law), but they may have an effect on the operations of the entity nonetheless, even if one system does not recognize the legitimacy of the rules of the others.

Polycentricity in its emerging form was at the center of recent efforts to develop an international framework for the management of businesses and human rights. These efforts focus on the simultaneous obligations of states and corporations, separate, simultaneous and separately founded.¹⁰⁰ It is well evidenced in the operations of the system of soft law regulation administered through the Organization for Economic

⁹⁵ OECD Guidelines for Multinational Enterprises (2011).

⁹⁶ John Ruggie, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (2011) A/HRC/17/31.

⁹⁷ Fair Labor Association Launches Independent Investigation of Foxconn <www.fairlabor.org/blog/entry/fair-labor-association-launches-independent-investigation-foxconn> accessed 28 July 2012.

⁹⁸ See Sustainable Stock Exchange Initiative, 2012 Sustainable Stock Exchanges Report: A Report on Progress <www.responsiblebusiness.com/Sustainable_Stock_Exchanges_2012_Online.pdf> accessed 28 July 2012.

⁹⁹ See Nike Inc Corporate Sustainability Report 2012 <www.nikebiz.com/crreport/> accessed 20 July 2012; Walmart 2012 Global Responsibility Report <www.walmartstores.com/sites/responsibility-report/2012/pdf/WMT_2012_GRR.pdf> accessed 28 July 2012.

¹⁰⁰ John Ruggie, Opening Remarks (Consultation on operationalizing the framework for business and human rights presented by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Palais des Nations, Geneva, Switzerland, 5-6 October 2009), at 5 <www.business-humanrights.org/Documents/Ruggie-speech-to-Geneva-consultation-Oct-2009.pdf> accessed 25 July 2012. What is described, effectively, is polycentric norm making among multiple systems of functionally differentiated governance communities that are required to interact with each other in complex and dynamic ways. Incompatible systems, law and norm – must effectively find a way to communicate and to harmonize values and relevance for their constituting communities, whether these are citizens, consumer, employees, or investors. Larry Catá Backer, 'On Challenges to Operationalizing a Transnational Framework for Business and Human Rights-the View From Geneva,' (*Law at the End of the Day*, Oct. 13, 2009) <<http://lbackerblog.blogspot.com/2009/10/on-challenges-to-operationalizing.html>> accessed 28 July 2012.

Cooperation and Development (OECD) under the Guidelines for Multinational Enterprises.¹⁰¹ It suggests the structures of what some have called 'open source anarchy'.¹⁰²

A joint venture co-owned by a subsidiary of Vedanta was challenged in its efforts to develop aluminum mining on indigenous land in the Orissa Province in India. The Indian Supreme Court determined that the joint venture had complied with all national law. A non-governmental organization unrelated to any of the parties in India brought a complaint in the U.K. alleging violation of the OECD Guidelines for Multinational Enterprises on the part of the parent corporation. Vedanta challenged the standing of Survival International to bring the complaint and the compatibility of the proceedings in light of the actions of the Indian Supreme Court approving the project. The U.K. National Contact point determined that the law of standing applicable in the U.K. was not applicable in the U.K. by an instrumentality of the government of the U.K. when acting under the governance system of the Guidelines.¹⁰³ The U.K. National Contact Point then determined that the action by the Supreme Court of India was irrelevant to the obligations of the parent corporation under international law and the Guidelines themselves.¹⁰⁴ Though the complaints under the OECD Guidelines were dismissed as 'soft law' and unenforceable as 'law' in the U.K. or India, the action eventually produced an Indian Parliamentary Commission investigation and further action on the claims of the indigenous people.

The polycentricity at the heart of global law reframes the traditional approach to law that posits a dynamic population and a static and stable system into its inverse. The 'psychology of the masses'¹⁰⁵ has been

¹⁰¹ OECD Guidelines for Multinational Enterprises (2011) <www.oecd.org/dataoecd/43/29/48004323.pdf> accessed 27 July 2012.

¹⁰² David P Fidler, 'Architecture amidst Anarchy: Global Health's Quest for Governance' (2007) 1(1) Global Health Governance 1.

¹⁰³ Initial Assessment by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International against Vedanta Resources plc, 27 March 2009 <www.business-humanrights.org/Links/Repository/266990/jump> accessed 27 July 2012.

¹⁰⁴ Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Complaint from Survival International against Vedanta Resources plc, 25 September 2009 <www.business-humanrights.org/Links/Repository/266990/jump> accessed 28 July 2012.

¹⁰⁵ This is a term usefully derived from Robert Musil's work worth quoting here and then recasting in globalized terms: 'So far as it applies to the masses, it makes very good sense to me. The masses are moved only by impulses, and of course that means by the impulses that most individuals have in common, that's only logical. That's to say, of course, it's illogical.'

recast - where once law was understood as an instrument for their management, now it has assumed more the character of a commodity that must sell itself for mass consumption; and the masses are free to buy several products at once. The state has been decentered, but the masses are now even more central - and less passive in the sense of an empowerment to choose among distinct governance frameworks.¹⁰⁶ It is in this sense of global law's fracture, fluidity, permeability and polycentricity, and of the choices made possible, that one can understand both the dynamics of the Iranian constitutional crisis of 2010 and the contests between soft law and legal frameworks for consumer and investor loyalty.

6. Conclusion

I have sought to offer something of a counter-vision to more conventional ideas of the structure and character of global law. Global law is best understood as the management of anarchy, of the systematization of a loosely intertwined universe of autonomous governance frameworks operating dynamically across borders grounded in functional differentiation among governance communities. Global law can be understood as focused on the study of the system of principles and rules applied in lieu of or in addition to the domestically germane law of a state, or of the community of states, to the relationships among persons and institutions—public and private, natural and legal, grounded in fundamental principles of fracture, fluidity, permeability and polycentricity.

Fracture, fluidity, permeability and polycentricity are the basic characteristics of global law, the systematization of which marks its field boundaries. These also serve as the structural foundations of its constitutional element (a basic set of presumptive and supreme organizing principles

The masses are illogical, they make use of logical ideas only as trappings. What they're really guided by is simply and solely *suggestion*.' Robert Musil, *The Man Without Qualities* III:420 (first published 1933 as *Der Mann ohne Eigenschaften*, Eithene Wilkins & Ernst Kaiser trans, Secker & Warburg 1960).

¹⁰⁶ Where the state held something closer to a monopoly of power within a territory, legal instrumentalism was possible and management was straightforward. 'If you give me the newspapers, the wireless, the cinema industry, and perhaps a few other means of influencing public opinion, I undertake inside a few years (...) to turn everyone into cannibals.' Musil, *The Man Without Qualities*, *ibid*, III:420. For global law, management in the context of fracture, fluidity, permeability and polycentricity now turns the methods of legal instrumentalism into the battlefields for allegiance and legitimacy.

and rules),¹⁰⁷ its substantive element (implementing the constituted system),¹⁰⁸ and its process element (rules for the development of substantive rules and dispute resolution).¹⁰⁹

From that systematization one can derive a method of theorizing the emerging framework of the unity of disunity in governance, in which law and governance systems multiply within a discernable internal logic, while the objects of regulation remain constant. While traditional law starts with the state and traces its relationship with the governed; global law starts with the governed and traces their relationship with and effects on governance organs.

Global law thus embraces the nature of governance as commodity. The rest follows. I have posited in place of *archê* and *telos*, an ordering framework in the fundamental character of which embraces an-archê and nihilism, the former in its anti-hierarchical sense, and the latter in its sense of lack of objective.

Nihilism as a psychological state has yet a *third* and *last* form. Given these two insights, that becoming has no goal and that underneath all becoming there is a no grand unity in which the individual could immerse himself completely as in an element of supreme value, an escape remains: to pass sentence on this whole world of becoming as a deception and to invent a world beyond it, a *true* world.¹¹⁰

Global law has no order to it; it has no object, it has no law about it. Global law amalgamates orders, objectives and governance. It is less a model derived from the ideology of the law-state and hierarchies of law than a *system of systems*, teeming with sub-systems, each autonomous, fluid, and permeable, existing side by side and stacked in a constantly changing governance universe, the parameters of which are discernable only in the wake

¹⁰⁷ Usually described as its societally constitutive element, and bound up in the jurisdictional rules of fracture. See eg in addition to source cited above, Gavin W Anderson, *Constitutional Rights After Globalization* (Hart 2005) 99–140.

¹⁰⁸ Eg William E Scheueman, 'Reflexive Law and the Challenges of Globalization' (2001) 9 *Journal of Political Philosophy* 81; Claire Cutler, 'The Privatization of Global Governance and the Modern Law Merchant' in Adrienne H Zritier (ed), *Common Goods: Reinventing European and International Governance* (Rowman & Littlefield Publishers Inc 2002) 127–158.

¹⁰⁹ Eg Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets* (Hart 2005) (substance and process of standardization).

¹¹⁰ Friedrich Nietzsche, *The Will to Power* (Walter Kaufmann and RJ Hollingdale trans, eds Vintage Books 1968) Book I ¶ 12. Better put, perhaps, a world that is true because it is embraced as such and remains true for the time that people consent to belief in its truth. During that time, but only during that time, its truth is eternal.

of the actions taken by them.¹¹¹ Yet the future is not inevitably written in favor of a global order; nor is the state and its ideology, of great utility to powerful actors and an important element in security likely to disappear. There is a choice, and thus the caveat to the global law project: 'If contemporary rebellion (...) is not dissipated in a succession of raucous cries and does not degenerate into closed, authoritarian systems.'¹¹² The failure of global law could lead not back to the democratic, but instead to the authoritarian state¹¹³ or anarchy with an authoritarian streak.¹¹⁴

¹¹¹ Jan-Hendrik Passoth and Nicholas Rowland, 'Actor-Network State: Integrating Actor-Network Theory and State Theory,' (2010) *International Sociology* 818 ('ANT accounts treat markets, bodies and states as socio-technical assemblages that come into being as concrete actors are enrolled: price-calculation devices, traders trained in economic theory and Reuters terminals in the case of markets; (...) land, borders, measurement and counting procedures and ideological treatises in the case of states.' *ibid* 828).

¹¹² Octavio Paz, *Conjunctions and Disjunctions* (Helen R Lane, trans, AP 1982) 139.

¹¹³ Eg Azar Gat, 'The Return of Authoritarian Great Powers' (2007) 86 *Foreign Affairs* 59.

¹¹⁴ Eg Robert Altmeyer, *The Authoritarian Specter* (Harvard University Press 1996).