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THE LAWS THAT RULE US

The Legal Infrastructure of Global Capitalism

> *La loi ne naît pas de la nature . . . la loi naît des batailles réelles, des victoires, des massacres, des conquêtes qui ont leur date et leur héros d'horreur: la loi naît des villes incendiées, des terres ravagées; elle naît avec les fameux innocents qui agonisent dans le jour qui se lève.*
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> —Michel Foucault, 'Il faut défendre la société'[1]

In his critical analysis of the 'standard of civilization', Perry Anderson described modern international law as an instrument of Western hegemony, and especially, since 1945, of American hegemony over the rest of the world.[2] The fine formula of 'sovereign equality' in Article 2(1) of the UN Charter hides an utterly hierarchical world, Anderson argued. He noted the way classical jurists such as Hugo Grotius and Emer de Vattel had used the notion of 'civilization' to draw a 'normative dividing line between Europe and the rest of the world' to justify Europe's imperial expansion and Great Power primacy. Although the vocabulary of 'civilization' has, since the 19th century, given way to 'modernization' and 'development', the official system of international law still distributes prerogatives and vulnerabilities across the world in a profoundly unequal manner.

Anderson followed Carl Schmitt in regarding the international law that came into being after 1918 as 'fundamentally discriminatory', shaped and manipulated by the liberal powers who dominated the system. The 'impartial rule of law' purportedly upheld by the League of Nations was

'invariably indeterminate', answering to the requirements of the victors of the War, as in the open-ended reparations imposed on Germany at Versailles. Although the Second World War destroyed the primacy of Europe, this basic 'principle of hierarchy' has continued in the postwar era of American hegemony. Notwithstanding its institutional flourishing since 1945—the United Nations Charter, the International Court of Justice, an expanding legal profession and academic discipline—'on any realistic assessment', Anderson argued, 'international law is neither truthfully international nor genuinely law'. Its content is dictated by the world's most powerful states and there is no 'sovereign authority capable of enforcing it on penalty of infraction'—in the absence of which, it 'ceases to be law and becomes no more than opinion'.

Yet despite its toothless and prejudicial character, international law, Anderson noted, is a major 'ideological force in the world', its rules set and bent or broken according to Euro-American whim. Whenever international law has been invoked to feebly contest the actions of Western powers, the absence of a credible system of sanctions has invariably forced it to yield. Anderson cited the cases of Suez in 1956, Vietnam in the 1960s and 70s and the many proxy wars carried out by the US and its Cold War rivals in the developing world. Instances of the US's 'systematic violation' of international law include the NATO bombing of Belgrade in 1999 and the US-led attack on Iraq in 2003. Even when supposedly critical of such action, international law has been reduced to 'a nominal aspiration' that 'does not even pretend to have any force of execution behind it in the real world'.

Although I agree with much of this assessment, here I want to engage with a certain myopia in Anderson's account, one common to left critiques. Anderson focuses on a specifically European concept of *public* international law—law as it appears in the activities of the UN Security Council, the International Court of Justice and the International Criminal Court, as well as in the arguments that parties to military conflict routinely deploy against each other. It is a criminal law-oriented

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[1] 'The law is not born of nature . . . the law is born of real battles, victories, massacres and conquests which can be dated and which have their horrific heroes; the law was born in burning towns and ravaged fields. It was born together with the famous innocents who died at break of day.': Michel Foucault, *'Society Must Be Defended': Lectures at the Collège de France, 1975–76*, trans. David Macey, New York 2003 [1997], p. 50.

[2] Perry Anderson, 'The Standard of Civilization', NLR 143, Sept–Oct 2023.

concept that thinks in terms of crime and punishment and is built upon an analogy with domestic law forged by interwar legal formalists, which casts states as 'legal subjects' in a global political society akin to a national one. In this conception, treaty-making and international institutions appear as functional equivalents of domestic legislation and administration, while international courts and tribunals fulfil the roles of adjudication that a country's courts accomplish at home.

This conception of international law colonized the imaginations of successive generations of jurists and liberal political thinkers through to the 1970s and 80s, but it was never very cogent, and international law in this sense—public, 'diplomats' law'—has since been widely criticized within the legal academy. An expanding group of Third World lawyers have systematically condemned international law's servility to empires past and present. Various feminist, postmodern and Marxist currents have taken it to task for its implication in an unjust global order.[3] But the left is not alone in attacking international law in Anderson's sense. Today, the far right, especially the MAGA movement and the US government, are launching an assault on international rules and institutions. The second Trump administration views these as unacceptable limitations on US political and economic ambitions. The basic principles of the legal-diplomatic system—territorial sovereignty, non-intervention and non-use of force—have been flouted without so much as an effort at justification. The critiques are not, of course, symmetrical. While the left attacks international law for failing to live up to its ideals of justice, peace and equality, the reactionary assault evinces scant regard for such objectives, or presumes their unfeasibility. Instead, the right pushes its nationalist and white supremacist agenda in the hopes of restoring or consolidating US 'greatness' within a world of hegemonic centres and their subservient client states, using a rhetoric of absolute

[3] From a plethora of works, some of them now classics, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge 2005; B. S. Chimni, *International Law and World Order*, 2nd ed., Cambridge 2017; Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, Manchester 2000; Rose Parfitt, *The Process of International Legal Reproduction: Inequality, Historiography, Resistance*, Cambridge 2019; China Miéville, *Between Equal Rights: A Marxist Theory of International Law*, Leiden 2005; Ntina Tzouvala, *Capitalism as Civilization: A History of International Law*, Cambridge 2020; as well as the collections Susan Marks, ed., *International Law on the Left: Re-Examining Marxist Legacies*, Cambridge 2008; and Prabhakar Singh and Benoît Mayer, eds, *Critical International Law: Postrealism, Postcolonialism and Transnationalism*, Oxford 2014.

antagonism towards racial enemies to stabilize and discipline the resulting status quo.

While I sympathize with much of the left critique in the form presented by Anderson, in what follows I will argue that it is directed at too narrow a target: the weak part of the law governing international relations—the laws of the UN Charter and the rest of multilateral treaty-making diplomacy. It overlooks what I call the *legal infrastructure of global capitalism*. This consists of the laws—public and private, domestic and international—that regulate practically all aspects of social life by distributing rights and duties, powers and vulnerabilities to groups across the world. The legal form of the sovereign nation-state and the concepts of contract and private property, as well as their many permutations, have spread across the world during centuries of European imperial dominance. They are neither weak nor manipulable at will. On the contrary, they form a ubiquitous and immensely powerful aspect of the way we are all ruled.

This legal infrastructure remains invulnerable to the standard critique of international law. It consists of many different kinds of law—international and domestic, private and public, formal and informal—that collaborate to reproduce the banal reality of an unjust world outside the spectacle of war and sovereign conflict. Consolidated in the context of state-building, commercial expansion and the ideologies of civilization, modernization and development, they do not form a logical system, nor are they the expression of a single plan. Yet since the 1980s, these laws have operated as largely taken-for-granted aspects of 'global governance', enabling powerful actors to make claims about legal rights, powers and privileges to which others have been expected to yield. Globalization has been an intensely legalistic affair. From the organization of government to the most technical rules of consumer protection, from claims of jurisdiction made by states against each other to the rights of identity, contract and property invoked by individuals and corporations, our social lives are framed and pervaded by law. Far from being an infinitely flexible façade, law governs the way we imagine our social relations, and thus defines the character of those relations. Nothing of importance can be accomplished without making claims about legal right, power and privilege.

The essay that follows is divided into four sections. I begin with some general remarks on the framing power of the law, on the way the

international world comes to us already hierarchically organized by legal terms such as 'sovereignty', 'property', 'contract' and 'right'. Whether a state, a corporation or an individual, all are expected to operate in the world according to such notions. Indeed, 'states', 'corporations' and 'individuals' are creatures of law, as holders of rights or duties. In the second section, I explore the ways public international law—the focus of Anderson's essay—is supplemented and at times overridden by an extensive network of unequally distributed private rights, powers and privileges. The third section examines the ways in which the old boundary between international and domestic law has eroded as the 'domestic' has increasingly come to appear a local instantiation of an international standard or a transplant from some reservoir of presumedly universal laws. Finally, I offer a few words on the organization of human relations under conditions of complex globalization into something resembling an 'empire of law'.

I. FRAMING

Law is not just a set of rules waiting to be complied with or violated. It is a language that translates raw factuality into a binary code—legal/illegal—using jargon such as 'right', 'responsibility', 'competence', 'privilege'. It turns, for example, the empirical fact of people queuing up to enter a heavily guarded area as the social fact of 'asylum-seekers' trying to cross an 'international boundary' into another 'state' in search of 'rights'. It tells us that a gathering of well-dressed men and women in a tall building is a 'conference' of the 'representatives' of 'members' of the 'European Union', convened to 'decide', say, on 'sanctions' against 'Russia'. To learn law—to become a competent law-speaker—is to learn how to translate social conflict into claims of legal status, and of rights and duties, and to single out the jurisdiction with the authority to implement them. Law operates in contexts of *contestation* about rights and duties and the distribution of powers and resources—claims about what is lawful and what is not, or, in other words, about what is legally *true*: true according to the legal/illegal distinction and how it ought to be applied in the world.

In this process of making, denying and affirming legal claims in an international context, only a small role is played by the laws of war and peace and institutions such as the UN Security Council, the targets of Anderson's critique. Law—that is, legal claim-making—is involved

long before a diplomat or a politician begins to contemplate whether to comply. It is already in play anywhere something is identified as being in a government's 'interests', anywhere somebody is empowered to make that determination, anywhere some assets are, or are not, counted among that government's possessions. Law is in the rights, powers and privileges claimed by *other* governments, institutions and private actors that affect the first government's calculation of the costs and benefits of their decisions. It is in a government's financial position and in the markets that determine its tax base. Law influences the bargaining position of stakeholders by determining whether their relationship ought to be understood as public or private, domestic or international, economic or political. It distributes status and determines who has a right and who must yield. And it appoints the authority that decides between contesting claims. The decisions of war that Anderson highlights take place against a dense background of legal concepts and definitions from which those involved derive their status as claimants and choose their claims and counterclaims.

Law intrudes everywhere. It does not merely limit and constrain; more importantly, it *empowers* and *enables*. Situations to which law might at first glance seem not to pertain at all are in fact full of all kinds of legally constituted freedoms and powers that those with resources can employ against others who, in turn, may, or may not, oppose such intrusion by reference to their right to be free from it. 'Property' and 'sovereignty' are typical space-filling legal words of this type: 'I am entitled to do this because I am the sovereign', or 'because I am the property-holder!' As analytical jurisprudence demonstrated long ago, such claims always come with their (negative) counterparts in legal words such as 'liability', 'disability', 'duty' or 'no-right'.[4] Law's ubiquity is precisely about this confrontation between the freedom-rights of some and the duty of others to submit to them. This is why, incidentally, there is no such thing as 'deregulation', properly speaking. Every removal of a regulatory duty entails the establishment of a rule that empowers someone to do whatever had been previously prohibited.

All interactions with the 'international' world, from digital networks to the postal system to global trade, involve a vast array of legal rules

[4] The terms come from Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *The Yale Law Journal*, vol. 23, no. 1, November 1913.

and institutions. The management of any number of issues, from environmental protection and market access to fighting a war, has been completely coded in law. Each involves claims about treaty provisions, institutional hierarchies, contractual arrangements and status, as well as diffuse vocabularies about nationality, responsibility, human rights, sustainability and, increasingly, the 'rule of law' itself. As David Kennedy has observed:

> The international world is the product of intense and ongoing projects of regulation and institutional management. The basic elements of global economic and political life—capital, labour, credit, money and liquidity, as well as power and right—are creatures of law. Law not only regulates these things, it creates them.[5]

Legal experts play a central role in all of this: whereas sickness and health exist in the absence of doctors, legality and illegality are creations of legal discourse, of which lawyers are native speakers. To know the law is to know it as lawyers know it; to speak its language as they speak it. To grasp the power and the biases of law, it is therefore useful to attend to the proliferating institutional roles of lawyers, for example in the global spread of the business practices of US law firms, or the expansion of private commercial arbitration. Lawyers likewise hold key positions in regional integration bodies and humanitarian institutions, and at global organizations like the World Bank. They also play a pivotal part in the consolidation of the leading principles of EU law and in the coding of institutional facts, such as those which render capital assets exchangeable in financial markets.[6]

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[5] David Kennedy, *A World of Struggle*: *How Power, Law and Expertise Shape Global Political Economy*, Princeton 2016, p. 11.

[6] Studies of the institutional role of lawyers include Mikael Rask Madsen, *La genèse de l'Europe des droits de l'Homme: Enjeux juridiques et stratégies d'État (France, Grand-Bretagne et pays scandinaves, 1945–1970)*, Strasbourg 2010; Dimitri Van Den Meerssche, *The World Bank's Lawyers: The Life of International Law as Institutional Practice*, Oxford 2022; Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, Chicago 1996, and *The Internationalization of Palace Wars*: *Lawyers, Economists and the Contest to Transform Latin American States*, Chicago 2002; Antoine Vauchez, *Brokering Europe, Euro-Layers and the Making of a Transnational Policy*, Cambridge 2015; Päivi Leino-Sandberg, *The Politics of Legal Expertise in EU Policy-Making*, Cambridge 2021; Katharina Pistor, *The Code of Capital: How Law Creates Wealth and Inequality*, Princeton 2019.

Law's power lies in its connotation of objective neutrality.[7] When something is addressed in legal terms, the history of struggle and violence to which Foucault referred—the origins of the law in 'real battles, victories, massacres and conquests'—is set aside and forgotten. Law's truth is what it is, and everyone must obey.[8] Although law primarily organizes the world in the process of making claims and submitting to them, sometimes claims are contested and an authoritative determination is required and made. The distance between a legal claim and its consolidation as 'true' in some institutional context is the 'politics of law'. Studies of the roles played by lawyers in various institutional contexts demonstrate how bias emerges, as a claim hardens into a truth, becoming an institutional practice and the basis for distributing powers and resources. As a result, some claims begin to win systematically, others to lose.

A world of law

The West has played a predominant role not just in dictating the rules of war and peace, as Anderson observes, but in the transformation of international law into a technique of 'global governance' that not only organizes global economic transactions but permeates domestic policymaking areas such as energy, the environment, labour and public finances. The combined effect of the complex system of legal rules concerning free trade, investment and the administration of sovereign debt has, since the 1970s, been the establishment of the 'developmental state' in the global South.[9] A network of human rights instruments has reorganized the relations between governments and citizens, while international institutions push reforms of public administration in accordance with ideas about 'good governance', 'transparency', 'accountability' and 'the rule of law'. No area of legislative policy is untouched by the seventeen goals of the UN's Agenda 2030 for Sustainable Development.

The creation and recreation of the world through law occurs through a process of constant contestation. Rules are invoked and challenged,

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[7] Hence why, Anderson notes, the idea that international law might be 'no more than opinion' is 'deeply shocking to the liberal outlook of the overwhelming majority of today's international jurists and lawyers': 'Standard of Civilization', p. 17.

[8] David Kennedy and Martti Koskenniemi, *Of Law and the World: Critical Conversations on Power, History and Political Economy*, Cambridge MA 2023.

[9] See Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War', *Harvard Journal of International Law*, vol. 38, no. 2, 1997, and 'Food Security, Free Trade and the Battle for the State', *Journal of International Law and International Relations*, vol. 11, no. 2, 2015.

principles are cited against other principles and the jurisdiction of authorities is affirmed and denied. Modern law is not a coherent whole to which a general view can be meaningfully taken but comes to the observer as piecemeal claims, embedded in more or less integrated 'legal regimes': clusters of rules and standards that often embody conflicting values and serve different purposes. Social conflict is translated into a conflict of legal regimes—trade law clashes with environmental law, human rights law with security laws—while each regime is itself internally split between an orthodox understanding of its priorities and heterodox challenges to it.[10]

In this indeterminate context, however, patterns emerge, as some institutions begin to lead, others to follow, setting priorities and distributing resources in a stable manner. The rise of human rights in the 1970s and 1980s, for example, led to a wholesale re-evaluation of deeply rooted constitutional traditions and attitudes towards state power. Later a new pattern developed, as 'securitization' emerged as a backlash to that earlier process, privileging other values and actors. The debates about rights and security are utterly legal in character—often focusing on the competences of this or that authority, or the correct interpretation of the rules. Sometimes powerful actors instrumentalize specific rules. But at others it is the rules that establish authority and determine the consequences of authoritative decisions. 'Princes rule, but interest rules princes', as the old adage has it.[11] Often it is law that tells us what our interests are—who the owner or the sovereign is and what 'ownership' or 'sovereignty' means in certain relationships. Law's precedents weigh and its patterns constrain. Only some things can be put forward as 'valid law', but what can and what cannot can only be determined in view of the legal-institutional context. The emergence of an institutional 'truth' may not end the struggle, however—the one who submits may simply lack the time or resources to contest it, for the moment.

Law and lawyers are central to a world that lacks a common ideology, history or teleology.[12] This is true of the global world, which law thus pervades: laying out its hierarchies, determining its forms of agency,

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[10] Martti Koskenniemi, 'Hegemonic Regimes', in Margaret Young, ed., *Regime Interaction in International Law: Facing Fragmentation*, Cambridge 2011.

[11] Henri de Rohan, *A Treatise of the Interest of the Princes and States of Christendome*, Paris 1640 [1638].

[12] This is a key point in Marcel Gauchet, *La nœud démocratique: Aux origines de la crise néolibérale*, Paris 2024.

allocating resources, picking winners and losers. Its dominance is manifested in the recent judicialization of international politics, visible in the increasing number of courts, tribunals, supervisory bodies and expert committees set up by governance treaties. European governments read the judgements of the European Court of Justice and the European Court of Human Rights with an intensity equal to that with which US politicians quarrel over their constitution and the case law of the Supreme Court. Arrest warrants against Russian or Israeli leaders make front-page news. The proceedings of the International Court of Justice on whether the assault on Gaza constitutes genocide, or on state duties with respect to climate change, are followed closely around the world. These rulings may lack the power of enforcement, as Anderson notes. Yet the significance of such cases lies not in their direct legal consequences but in what they represent: the rise of a view that the most important political conflicts are legal in character and must be dealt with by law and legal institutions. Without legal terms such as 'aggression', 'genocide' or indeed 'sovereignty', it would be impossible to publicly register the importance of an appalling situation, and to place it in a framework of shared meanings. A powerful actor may well disregard an international law, but it must surrender to the fact that moments felt to be of the greatest historical significance are articulated in legal terms.

2. PUBLIC LAW IN PRIVATE SERVICE

Political debate in the West has traditionally been concerned with the public organization of a polity in its domestic and international relations. Its focus has been on the nature and limits of *sovereignty*. By contrast, legal thought has, since Roman times, centred predominantly on relations of private *property*—after all, the Justinian code was one of civil law. For centuries, these two aspects of rulership—power over people and things—were united in seigneurial government, and even after their conceptual separation in the 16th and 17th centuries, sovereignty and property, public and private power, remained intimately connected. In recent times, with the advance of globalization, the point of much public regulation has been precisely to bolster private rights.

European colonialism thrived on the intermixture of public power and private money. Investment in distant trading posts and commercial networks was beyond the resources of the metropole's treasury, and

rulers were happy to grant monopoly charters to enterprising merchants and provide diplomatic and military assistance in exchange for a reasonably secure return. Dutch colonial power was indebted to the sophisticated legal form of the joint stock company, with shares traded on the Antwerp bourse—a model imitated by Richelieu when he set up French colonial government. At least seventy-five large companies, chartered by the king but financed privately—often using the royal family's funds—administered the French colonial realm from Nouvelle France to Pondicherry. None was as successful as the British East India Company, however. It took until 1808 for Britain to finally decide that the Company's possessions belonged to the crown. The British 'company-state'—not unlike present-day transnational corporations or public-private partnerships—is a good illustration of the hybrid character of European colonial rule, which was always a locally specific combination of formal empire and capitalism.[13]

The understanding of 'the law of nations' as *public* law, concerned exclusively with state-to-state relations, was the product of the early 19th century. The period's leading textbook, by Georg Friedrich von Martens, described the 'positive law of nations' arising from the Napoleonic defeat strictly in terms of European treaty-making.[14] Despite efforts by legal professionals to address the 'social question' in the mid-19th century—the novel problems of urban poverty and social dislocation brought about by industrialization—by the end of the century public international law was firmly concentrated on formal diplomacy in Europe and the 'civilization' of the colonies.[15] In the 20th century, a growing multilateral treaty system and the emergence of international institutions such as the League of Nations and the UN supported the conception of international law as 'diplomats' law'. Foreign ministries began appointing international law experts, and thick textbooks from North Atlantic universities framed diplomacy as a legal system with formal doctrines about statehood, territory, treaty law, use of force and jurisdiction analogous to ideas about

[13] I defend this thesis in *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870*, Cambridge 2021. On the 'company-state', see Philip Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of British Rule in India*, Oxford 2011.

[14] Georg Friedrich von Martens, *Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage*, 3rd edn, Paris 1864 [1789].

[15] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge 2002.

property, contract and the legal process in domestic legal systems. The UN Charter was presented as a constitution of humankind. The end of the Cold War prompted liberals everywhere to seek to consolidate the 'rules-based international order' in a burst of internationalist activity spanning the establishment of the World Trade Organization in 1995 and the International Criminal Court in 1998 to securing regional integration agreements and multilateral treaties on climate change and human rights, biological diversity and 'the war on terror'.

Throughout the last century and a half of intense diplomatic and academic efforts to bind sovereign states by legal rules in a manner analogous to the way domestic legal systems bind their citizens, this project has been met with scepticism and criticism. The rules have been ignored and breached; the discipline of International Relations, emerging from the First World War, was founded on the critique of the idea that a harmony of interests underlay these efforts.[16] In the shadow of these developments, meanwhile, a powerful network of legal relationships evolved which strengthened and expanded the rights of private property across the world. When, in 1850, the British Foreign Secretary stated that a British subject, like the Romans of old, 'in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England will protect him from injustice and wrong', he was framing the relations of property and sovereignty as a kind of romance. One of its first offspring was the system of arbitration for damages sustained by foreign businesses and for recovering debts from newly established states in Latin America and elsewhere. As intervention by gunboat was expensive and sometimes counterproductive, lawyers in London and Washington began to advocate treaty-making to oblige the host country to pay compensation for things like profit losses incurred during domestic disturbances.[17] None of this was automatic, of course. It took more than thirty armed US interventions to make a reality of the binding force of contracts with US businesses in Central America.[18] But state-organized arbitration became the preferred legal technique to secure the profits

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[16] See especially E. H. Carr, *The Twenty-Years' Crisis 1919–1939: An Introduction to the Study of International Relations*, 2nd edn, London 1946 [1939].
[17] On the US turn to imposing arbitration on Latin American states as the preferred strategy of property protection, see Alan Tzvika Nissel, *Merchants of Legalism: A History of State Responsibility 1870–1960,* Cambridge 2024.
[18] Peter Smith, *Talons of the Eagle: Latin America, the United States and the World,* 4th edn, Oxford 2013 [1997], pp. 51–6.

of US and European companies, from the Soviet nationalizations in the 1920s through the decolonization period and into the Arab Spring.[19]

The system of protecting foreign investments in operation today derives from the high tide of imperialism. A major concern among Western powers in the 1960s was the fate of companies engaged in extractive business in the decolonizing world. While some succession agreements did protect 'acquired rights', the outcome of many nationalization disputes remained inconclusive. Therefore, at the initiative of the OECD, an International Centre for the Settlement of Investment Disputes was set up within the World Bank in 1966 to consolidate the treatment of claims made by foreign companies against their host states. The result was the emergence of what is today the most important part of international law: the law of foreign investment. There are now over 3,000 bilateral and multilateral treaties around the world in which countries have agreed to lift their disputes with foreign companies from the jurisdiction of their domestic legal systems, to be settled instead by international tribunals, set up by the parties themselves and often operating in secret. The applicable law is a vague standard of 'fair and equitable treatment' under which the host state commits to maintain the legislative and administrative conditions pertaining when the investment was made. If the state violates the company's 'legitimate expectations', then it will be liable to pay full compensation, including for lost profits over years, sometimes even decades. More than 1,400 cases have been initiated by companies under these treaties.[20] The awards are exacted by an uncommonly strong system of enforcement. Under the 1958 New York Convention, the investor—or someone who has purchased the investor's rights, such as a vulture fund—is entitled to implement the award practically anywhere in the world against the property of the defendant state, including its buildings, aircraft and vessels.

In recent years, the levels of compensation have soared.[21] In more than a quarter of company-won cases, payouts have exceeded $100 million,

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[19] See Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution*, Cambridge 2022; and Andrea Leiter, *Making the World Safe for Investment: The Protection of Foreign Property 1922–1959*, Cambridge 2023.

[20] Statistics from 'Investment Dispute Settlement Navigator', UNCTAD Investment Policy Hub; available online.

[21] 'Compensation and Damages in Investor-State Dispute Settlement Proceedings', *UNCTAD IIA Issues Note*, no. 1, September 2024.

surpassing $1 billion in one in twenty cases. Ecuador was forced to pay $1.8 billion to Occidental Petroleum in 2012—a sum equivalent to 135 per cent of the country's health budget. South Sudan was recently ordered to hand over $1 billion in compensation, about 15 per cent of the country's GDP.[22] Two mining companies, one Australian, the other Canadian, were awarded nearly $6 billion against Pakistan in 2019—equivalent to Pakistan's IMF loan for that year—on the basis of lost profits for a project that had never even been lawfully approved by the government.[23] Today, the US company Próspera claims $11 billion from Honduras on account of the repeal by the Honduran Congress of a law on a 'Special Economic Zone' deemed illegal by the country's Supreme Court. The sum is equivalent to two-thirds of the country's annual budget.[24]

According to a recent investigation by the *Guardian*, more than $120 billion of public money has been awarded to firms through investor-state dispute settlement courts, including at least $84 billion to fossil fuel companies.[25] The latter are even using the 1991 Energy Charter Treaty to sue states if they take action to decarbonize.[26] The true figures are likely to be far higher as companies often do not disclose the size of payouts. Specialized firms now offer financial assistance to corporations willing to sue their host states, in exchange for a share of the eventual award—a dynamic that highlights the systemic challenge to the regulatory powers of the state.[27]

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[22] 'Compensation and Damages', p. 3.
[23] Jeffrey Sachs, 'How World Bank Arbitrators Mugged Pakistan', *Project Syndicate*, 26 November 2019. The case was settled after partial payment and reorganization of the project.
[24] Próspera and others v. Republic of Honduras, ICSID Case No. ARB/23/2. For commentary see Guillaume Long and Alexander Main, 'How a Start-Up Utopia Became a Nightmare for Honduras', *Foreign Policy*, 24 January 2024; and Ladan Mehranvar, 'Sidelining the Lived Realities of Those Most Affected by Investment Projects and Disputes', Columbia Center on Sustainable Investment Blog, 3 February 2025.
[25] Phoebe Weston and Patrick Greenfield, 'Revealed: How Wall Street Is Making Millions Betting Against Green Laws', *Guardian*, 5 March 2025.
[26] UN Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change, UN Doc A/77/226, 26 July 2022, para 15. The Energy Charter Treaty was a 1991 instrument to boost cooperation between the West and transitional economies. Although the Treaty Secretariat made efforts to universalize the treaty, many countries have been critical of it and in 2024 the EU declared that it would withdraw from it.
[27] See Brook Guven and Lise Johnson, 'The Policy Implications of Third-Party Funding in Investor-State Dispute Settlement', Columbia Center on Sustainable Investment Working Paper, May 2019.

The point is not merely the inordinate scale, incoherence or dubiousness of the awards, nor the inability of states to raise claims against corporations; it is the global restructuring of relations between public and private powers that they represent. Investment law integrates foreign companies into domestic legislative processes. When a company threatens a government with claims, its negotiating position vastly exceeds that of most citizen groups. Although it is hard to quantify, the mere threat of a claim may suffice to 'freeze' planned legislation.[28] Moreover, by directing claims at strategically important sectors, corporations may produce precedents and interpretations affecting domestic laws across the world.[29] Claims against Canada, for example, have been registered in fields such as 'energy, water and sewage, broadcasting, banking and social security', as well as 'public health and environment protection' and 'natural resources such as oil and gas, gold, forests and fisheries'; the list illustrates the extent of the practice.[30] Despite a recent backlash, the case law keeps growing and ongoing reform talks within the UN have so far failed to question the system's basic inequality.

Investment law is only the most visible aspect of the legal rearrangement of global relations underway between states and private actors. The weight of national tax laws has long been shifting from collecting and distributing resources among domestic constituencies to attracting the assets of foreign investors by expecting minimal contribution to public funds. General reforms have proven impossible and the field has been saturated with short-term solutions of immense complexity unintelligible to all but a handful of experts.[31] As is well known, this type

[28] The costs of participating in an arbitration are on average $8 million, sometimes much higher. See Kyla Tienhaara, 'Regulatory Chill and the Threat of Arbitration: A View from Political Science', in Chester Brown and Kate Miles, eds, *Evolution in Investment Treaty Law and Arbitration*, Cambridge 2011.

[29] See, for example, Julian Arato, 'Corporations as Lawmakers', *Harvard Journal of International Law*, vol. 56, no. 2, 2015.

[30] Gus Van Harten, *Sovereign Choices and Sovereign Constraints: Judicial Restraint in Environmental Treaty Arbitration*, Oxford 2013, p. 10.

[31] Tsilly Dagan, *International Tax Policy: Between Competition and Cooperation*, Cambridge 2017; Sol Picciotto, 'Technocracy in the Era of Twitter: Between Intergovernmentalism and Supranational Technocratic Politics in Global Tax Governance', *Regulation and Governance*, vol. 16, no. 3, July 2022. A 'Global Tax Deal' of a minimum 15 per cent tax on companies had been proceeding under the auspices of the OECD. The process is now frozen as President Trump has promised to retaliate against countries applying it to US firms: Daniel Bunn and Sean Bray, 'The Latest on the Global Tax Agreement', Tax Foundation Blog, 27 February 2025.

of marketization extends to the spheres of labour, environmental and consumer laws. By redescribing such legislation as 'non-tariff barriers', the World Trade Organization has set definite limits on states' legislative capacities. As a famous 1997 World Bank Report had it, the way to growth was through privatization; the state would be a 'facilitator'.[32]

Zones of privilege

In the course of the 20th century, an expansive system of commercial and investment law has emerged, aiming 'to command the compulsive power of the state without engaging with its judicial and legislative functions and oversight'.[33] Although parties to international contracts are free to choose the law under which their relations are determined, in practice, recourse is usually to the laws of England or New York State. As most states have agreed in advance to enforce the awards given in private contract arbitrations, the result has been a de facto uniform law of contracts, enabling companies to restructure their internal activities and locate their operations wherever will allow them to minimize their tax burden.[34] An especially noteworthy legal technique is states' voluntary retreat from applying their domestic customs, labour or social welfare laws in free ports, free trade areas, industrial parks or Special Economic Zones. Long advocated by the World Bank and the UN Commission of Trade and Development (UNCTAD) as a means for developing countries to attract investment and export earnings, there are now close to 6,000 such zones in almost 150 states. Apart from offering low or non-existent tax rates, cheap labour and subsidies, governments also cover planning, oversight and other infrastructure costs to create profitable conditions for companies.[35] Some of these 'non-places', such as

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[32] *World Development Report 1997: The State in a Changing World*, Oxford 1997, p. 1.
[33] Christopher Casey, *Nationals Abroad: Globalization, Individual Rights and the Making of Modern International Law*, Cambridge 2020, p. 186. Casey continues: 'By the 1970s, the end of Bretton Woods, the ratification of the New York and Washington Conventions, and the spread of bilateral investment treaties had liberated international commerce from the state while simultaneously putting the executive organs of the state at the command of the private commercial courts of the world', p. 188.
[34] The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('The New York Convention') today has 172 state parties.
[35] For one recent report, see UNCTAD, *Attracting Pharmaceutical Manufacturing to Africa's Special Economic Zones*, Geneva 2025; for analysis, see Patrick Neveling, 'Special Economic Zones: The Global Frontlines of Neoliberalism's Value Regime', in Don Kalb, ed., *Insidious Capital: Frontlines of Value at the End of a Global Cycle*, New York 2024.

the Dubai International Financial Centre (DIFC), have even set up their own legal systems to compete with older commercial tribunals in places like London, Paris or Stockholm, tailored to allow companies to avoid scrutiny under domestic laws. The four divisions of 'DIFC courts'—civil and commercial, technology and construction, arbitration, and 'small claims'—began operation in 2007 and now advertise over one thousand cases with $7.7 billion in claims and counterclaims, plus an additional 'court of the blockchain' set up in 2018, as well as a 'court of space' established in 2021 to offer 'direct capacity and capability to commercial space-related disputes'.[36]

Law is at the heart of these zones of privilege—indeed the most technical eccentricities of the law. The DIFC courts pride themselves on the competence of their judges and personnel in civil and common law, promising the highest level of judicial service for their clients. So far, benefits to the territorial states have been slim. Most zones have remained in the sweatshop phase, with companies departing as soon as the interim concessions period has ended. But the trend is clear, and even if the promised benefits fail to land in the pockets of the inhabitants of the countries, there is little sign of resistance to the gradual creation by law of an autonomous, parallel world of private privilege designed for the activities of the ultra-rich.

Equally intricate legal manoeuvres have led to global value chains that bypass states as regulators, leaving markets as the most important distributors of global wealth. Producers and distributors, designers, marketers and hundreds of intermediaries are brought together in such chains either by contract between separate entities or by corporation law between units of a single large firm, in view of tax or other benefits.[37] By enacting voluntary standards of 'corporate social responsibility', leading firms in a chain (such as Toyota, Adidas or Microsoft), as well

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[36] DIFC Statistics 2024. See further, Atossa Abrahamian, *The Hidden Globe: How Wealth Hacks the World*, New York 2024, pp. 81–111 and 133–57.

[37] See generally, Kevin Sobel-Read, 'Global Value Chains: A Framework for Analysis', *Transnational Legal Theory*, vol. 5, no. 3, 2014. On the 'regulatory arbitrage' practised by large firms such as Apple or Starbucks to secure the most beneficial protection of their intellectual property laws, see Darren Rosenblum, 'How Firms and Nations Compete through Intellectual Property Laws', in Horatia Muir Watt *et al.*, eds, *Global Private International Law*, Cheltenham 2019. As Anna Beckers points out, the regulation of value chains is conceived differently depending on whether it is viewed from the perspective of company, consumer or trade law: Anna Beckers, 'Global Value Chains in EU Law', *Yearbook of European Law*, vol. 42, 2023.

as international institutions such as the OECD, have been able to foreclose more intense and formally binding regulation by states.[38] Private actors—such as leading law firms—also stand behind the standardization of rules on commercial transactions across many jurisdictions. For example, 90 per cent of the contracts on derivative products across the world, a market worth at least $25 trillion but likely many times more, are concluded according to the terms prepared by a single law firm.[39] Emerging from the commercial centres of Europe and the US, it is little surprise that all this private and domestic regulatory activity ends up allocating resources and welfare along the colonial pattern.[40]

Law governs the distribution of global wealth by protecting and enforcing private property rights in a number of different ways. Take the world of finance. Out of a total of $100 trillion of global public debt in 2024, some 64 per cent came from private sources such as investors and banks, up from 42 per cent in 2000.[41] Because the rules of sovereign immunity no longer apply to states' commercial and financial activities, debtor states often find themselves at the mercy of their foreign creditors. The process of debt settlement is, despite intense reform efforts, still managed by informal and non-binding arrangements, conducted by the Paris Club of creditor countries and London Club of principal commercial banks and other lenders. The austerity and restructuring conditions they impose on low-income countries sometimes lead to political collapse, as in the decade-long Greek debt crisis or in Sri Lanka in the early 2020s, when the national debt exceeded 100 per cent of GDP. Moreover, private creditors sometimes become holdouts, as with Argentina's debts in 2001–16, when a single hedge fund, NML Capital, refused to go along with a settlement agreed with all the other creditors. As a result, 'a defaulted bond contract, 55 pages long and 20 years old, led a nation of 41 million people to default on $29 billion in new debt'.[42]

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[38] See, for example, Lise Smit *et al.*, 'Human Rights Due Diligence in Global Supply Chains: Evidence of Corporate Practices to Inform a Legal Standard', *International Journal of Human Rights*, vol. 25, no. 6, 2021.

[39] Benoît Frydman, *Petit manuel pratique de droit global*, Brussels, 2014, pp. 43–4.

[40] See Dan Danielsen, 'Local Rules and a Global Economy: An Economic Policy Perspective', *Transnational Legal Theory*, vol. 1, no. 1, 2010.

[41] Layna Mosley and Peter Rosendorff, 'The Unfolding Sovereign Debt Crisis', *Current History*, vol. 122, no. 840, January 2023, p. 11.

[42] For *NML versus the Republic of Argentina* in the context of private debt contracting, see Giselle Datz, 'Ties that Bind and Blur: Financialization and the Evolution of Sovereign Debt as Private Contract', *Review of Evolutionary Political Economy*, vol. 2, no. 3, December 2021, p. 578.

Diplomatic attempts under the G20 and the OECD to improve this state of affairs have so far had little effect.

Rules emerge mostly as the result of private legislation elsewhere in the financial world, too. The standard-setting work of the Basel Committee on Banking Supervision involves representatives of domestic central banks and other public authorities (though no politicians). By contrast, contracting over futures and derivatives has been regulated for the past forty years by the entirely private International Swaps and Derivatives Association, which has supplemented its Master Agreement with rules for private arbitration over disputes about derivatives transactions. Although the exact details are unavailable—arbitrations are usually secret—the financial sector now ranks second globally, after transport and commodities, in the use of private arbitrations to settle transaction claims.[43] Public legislators long ago left lawmaking in this area to the specialists who are also its beneficiaries.

When critics describe international law as a weak, hypocritical façade that is continually instrumentalized or violated by the great powers, they overlook the ways in which law, in its innumerable, often microscopic permutations, enables and liberates powerful private actors, at the expense of others, and distributes resources in a manner that reproduces the unjust structure of global relations. The legal techniques that combine sovereignty with property, formal imperialism with the market, fly under the critical radar. Such techniques are the product of a particular, ongoing history of Western dominance, and they are not for anyone simply to choose to employ or reject. Together with other global rules and institutions, they are the object of endless, complex reform projects which effectively block system-wide change. Along with the rest of the network of legally articulated hierarchies between human groups they, to borrow from Marx, weigh like a nightmare on the brains of the living.

3. FROM INTERNATIONAL TO TRANSNATIONAL

When Martens published his 'modern law of nations' at the turn of the 19th century, he conceived his subject in state-to-state terms, without presuming the presence of a separate 'international' realm. The law

[43] London Court of International Arbitration, 'Annual Casework Report 2023'.

of nations was simply the external public law (‘*äußere Staatsrecht*’) of European states. This view would be adopted by Hegel in his *Outlines of Philosophy of Right* (1821) and in many continental legal systems in due course. When I was at law school in Finland in the 1970s, my textbook was tellingly titled ‘Finland’s International Law’, presenting the field as the laws that bound Finland in its relations with other states. The idea that there is a separate international world, not merely *inter-national* relations, emerged occasionally in the 20th century, usually in cosmopolitan critiques of state sovereignty, without much impact. More recently, the field has seen the rising popularity of ‘comparative international law’, the study of how different domestic laws deal with a country’s relations with the rest of the world. For most US lawyers today, as for early 19th-century Germans, the most tangible aspect of anything ‘international’ is US foreign relations law, that is, those aspects of US law that deal with the country’s relations with other states.

The international and domestic legal worlds are so deeply enmeshed that in order to examine the international power of law, it is necessary to register the convergence of domestic legal systems in what could be called, paraphrasing Duncan Kennedy, the empire of contemporary legal consciousness.[44] This is the specific combination of ideas about private and public law, the rights of ownership and identity, contract, money, criminal punishment, taxation and the role of judges and constitutions in social life that forms the shared common sense about the character of modern law. Today’s imperialism largely takes the form of reproducing abstract ideas about law and government connected with a specific set of legal-technical rules under which the same actors and interests typically prevail.

The spread of certain dominant ways of thinking about law and legal institutions across domestic legal systems is not a new phenomenon. The so-called ‘reception’ of Roman law across European jurisdictions helped consolidate absolute rule and organize commercial relations in late-medieval and early modern Europe. Equally famous is the impact of

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[44] Duncan Kennedy, ‘Three Globalizations of Law and Legal Thought: 1850–2000’, in David Trubek and Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal*, Cambridge 2006. Kennedy’s influential argument is discussed from a wide variety of angles in Justin Desautels-Stein and Christopher Tomlins, eds, *Searching for Contemporary Legal Thought*, Cambridge 2017.

the intellectual hegemony of the German historical school of law, from the mid-19th century onwards, on the emergence of nation-states in Europe and beyond. Colonial administrations and leading universities made sure that these ideas would become widely influential.[45] Jurists like Hozumi Nobushige or Abd al-Razzaq al-Sanhuri drew on their familiarity with German and French law when modernizing the Japanese and Egyptian legal systems, while many anticolonial leaders received their legal education in Oxford, Paris or Brussels.[46] British, French and Belgian rule of their African colonies was an intensely legal affair, requiring the management of complex layers of metropolitan and local customary laws.[47] Later, the settlement of state succession issues and the organization of colonial economies inaugurated a culture of legal advocacy in postcolonial Africa that dominated debates about structural adjustment in the 1990s and 2000s. It is no wonder that a recent study noted 'a huge, sometimes staggering expansion of private legal markets fostered by the expansion of legal education and rights-oriented non-profit sectors'.[48] Law was central to empire, and it remains crucial to the global South's negotiations of its relations with the world economy.

Duncan Kennedy sketched the trajectory of three globalizations of legal thought since the mid-19th century—the expansion of (German) historical formalism and voluntarism ('classical legal thought'), the (French) 'social' conception of the early 20th century, both now integrated into today's ruling (Anglo-American) pragmatic melange.[49] Each phase involved a certain way of responding to questions about what is central and what peripheral in law and legal practice. How is the conflict between private rights and public policy preference resolved? What is the role of courts and judges? What type of constitutional thinking ought to be practised? Each 'moment' of legal thought would not necessarily offer identical rules or solutions, but each was marked by certain sensibilities, prima facie assumptions, best practices and background beliefs

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[45] For a recent discussion, see Tamar Herzog, *A Short History of European Law: The Last Two and a Half Millennia*, Cambridge MA 2018.

[46] See the essays by Hitoshi Aoki and Amr Shalakany in Annalise Riles, ed., *Rethinking the Masters of Comparative Law*, London 2001.

[47] For Britain, see Bonny Ibhawoh, *Imperial Justice: Africans in Empire's Courts*, Oxford 2013.

[48] Sara Dezalay, *Lawyering Imperial Encounters: Negotiating Africa's Relationship with the World Economy*, Cambridge 2023, p. 26.

[49] Kennedy, 'Three Globalizations'.

about the law, easily discernible among legal professionals.[50] While the 'classical' heritage stressed private (contractual) will and formal constitutionalism, the 'social' emphasized broader functional objectives and principles of administrative propriety. In the latter part of the 20th century, the reigning professional style combined these different approaches with a focus on courts and 'balancing' between conflicting rights and principles.

The global diffusion of forms of legal consciousness and accompanying standards of professional practice and academic excellence began with colonialism and the internationalization of cultures of governance in the 20th century. The globalization of the European state-form spread particular ideas about civilization, development and good government, each coded in the legal vocabularies of property and sovereignty and their many permutations. The homogenization of domestic legal education and practice was set in motion by the assumption, accepted everywhere by the 1980s, that in order to bring about 'growth' states had to integrate themselves into the pre-existing world of diplomatic and economic exchange. Opening up the economy necessitated organizing society around key ideas about government and the market, the stability of property and the enforcement of contracts, the position of individuals within the family and the workplace, as well as the limitation of state power under a constitution.[51]

Developments in legal education are a good place to survey this homogenization. As Bryant Garth and Gregory Shaffer have written: 'The influence of US law spread, facilitating and regulating market transactions, as exemplified by contract law and contract practices used for commercial transactions, corporate governance standards, approaches to environmental law, trade law and human rights law.'[52] Competition

[50] As Kennedy writes, each mode of thought provided 'a conceptual vocabulary, organizational schemes, modes of reasoning and characteristic arguments': Kennedy, 'Three Globalizations', p. 22. I used the notion of 'sensibility' to address the larger set of assumptions about the political and legal world that was shared by the men involved in the professionalization of international law from the late 19th century onwards: Koskenniemi, *The Gentle Civilizer of Nations*.

[51] For a good description of the legal theories and preferred types of rule during the 'Washington Consensus' and its modified aftermath, see Kennedy, 'The "Rule of Law": Political Choices and Development Common Sense', in Trubek and Santos, *The New Law and Economic Development*.

[52] See the editors' opening essay in Bryant Garth and Gregory Shaffer, eds, *The Globalization of Legal Education: A Critical Perspective*, Oxford 2022, p. 14.

and marketization began to suffuse standards of legal competence, channelled through legal training everywhere. The integration of EU law into law curriculums fostered similar background assumptions and sensibilities among law students across Europe. The emergence of 'leading' law schools modelled on the Anglo-American image—indeed the very switch to the term 'law schools' from law 'faculties'—cast law as a craft akin to business, rather than an intellectual discipline. The spread of English-language textbooks and electronic materials, international master's programmes, the expectation of study abroad, increasing numbers of academic visitors and the conference circuit all tended to support the homogenization of assumptions about the nature of law and legal practice.

Likewise, the global spread of the corporate model of the US law firm and, to a lesser extent, activism in human rights and public interest lawyering, have consolidated ideal types of the professional lawyer, together with a new hierarchy among forms of legal professionalization. Work at international law firms with multinational corporations as clients, focusing on private arbitration, as well as human rights advocacy within NGOs, have overtaken older forms of legal practice and downgraded the previously high status of domestic public and constitutional law. The growth of US-type lawyering in Latin America has been carefully mapped, highlighting the way the traditionally close relationship between legal and political elites on the continent has raised the standing of leading partners at large international law firms in the region's politics. Their involvement in the management of the Latin American debt crisis and consequent privatizations and austerity programmes has been paralleled and countered by the emergence of human rights lawyers following the US civil rights model, both vested in an activist engagement with the transformation from military rule to neoliberal policies.[53]

As a result of this process, domestic legal systems have become increasingly homogenous, engaging with individual rights, investment protection, the rule of law and constitutionalism according to global standards, with variants leaning either in the US or EU direction. For three

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[53] See Dezalay and Garth, *The Internationalization of Palace Wars*, pp. 47–58, 163–171. The authors trace the ascent of business lawyers working for corporate law firms in Mexico and elsewhere in Latin America in the late 1980s as foreign investors needed experts with an international education and competence to deal with issues of debt, privatization, NAFTA negotiations, election reform and corruption: pp. 198–219.

decades, international institutions, professional bodies and think-tanks have propagated models of the 'rule of law' as indispensable elements of modern governance.[54] Development projects in the global South have offered an important opportunity for international agencies and donor countries to push for the formalization of property rights, anticorruption policies and the separation of legal institutions from old rulership structures in order to offer stable conditions for investment and exchange, and enshrine the objectives of 'growth' and 'sustainability' in domestic governance.[55] Again, this does not mean that laws have become *identical* everywhere. The idea that there is a 'one size fits all' system of laws remains the favourite *bête noir* of legal comparativists, who are keen to stress the sophistication of their craft.[56] Instead, what has become virtually universal is a set of priorities and background assumptions about how to organize human relations to secure 'growth'.

Global norms

The blurring of the line between international and domestic laws was described fifteen years ago by a leading commentator, Peer Zumbansen, as the 'increasingly transterritorial nature of regulatory governance'. He was referring to the growing plurality of normative regimes both 'hard' and 'soft', private and public, that have emerged outside of the state to align domestic government with international policies. The academic debate about the nature of such regulation as 'law' overlooks its compelling force on state governments, which often appear as little more than local managers of global processes, with regulation law determining their objectives, allowing room for only local adjustment. Well-known examples of such 'regulation law' include the EU directive and the framework treaty, the latter accompanied by optional annexes or schedules as well as some provision for reporting and surveillance. As Zumbansen noted:

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[54] For details, see 'rule of law' entries on the European Commission and UN websites.

[55] For a review, see Trubek and Santos, *The New Law and Development*. On the creation of the 'developmental state' by law, see also Sundhya Pahuja, *Decolonization and International Law*, Cambridge 2011, pp. 195–213.

[56] Ralf Michaels, '"One Size Can Fit All": Some Heretical Thoughts on the Mass Production of Legal Transplants', in Günter Frankenberg, ed., *Order from Transfer: Comparative Constitutional Design and Legal Culture*, Cheltenham 2013.

> Today, many regulatory areas can only be understood as instantiations of global norm creation. Supply chains that tie regional and global markets together, commercial arbitration, food safety and food quality standardization regimes, internet governance, but also environmental protection, crime and terrorism are key examples of fast expanding spaces of individual, organizational and regulatory activity that evolve with little regard for jurisdictional boundaries but, instead, appear to develop according to functional imperatives. Similarly, fields such as corporate, insolvency and even labour law that had long been understood as embedded in historically evolved political and regulatory economies, today display a distinctly de-nationalized character.[57]

It is hard not to see neo-colonial implications when such 'regulation' emerges from powerful actors like the US or the EU with its notorious 'Brussels effect' that de facto obliges firms across the world to adjust themselves to the requirements of significant markets.[58] No less influential are the technical standards and certification systems generated daily by international expert institutions in areas such as forestry management, fisheries, mining and apparel safety.[59]

The World Bank and the OECD are well-known producers of such regulations. Standards of best practice issued by the former deal with aspects of 'good governance' such as public procurement, public management, anticorruption, disaster management and relief. Detailed, goal-oriented indicators were included in the World Bank's 'ease of doing business' rankings of individual countries. Discontinued in 2021 after data irregularities were found, this was replaced by an even more detailed country-by-country assessment—the Worldwide Governance Indicators, listing items such as 'voice and accountability', 'political stability', 'government effectiveness' and 'regulatory quality'. Among OECD-produced indicators are those dealing with responsible business

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[57] See Peer Zumbansen, 'Transnational Legal Pluralism', *Transnational Legal Theory*, vol. 1, no. 2, 2010, pp. 141, 152.

[58] Anu Bradford, *The Brussels Effect: How the European Union Rules the World*, Oxford 2020. On the value chain: Jaakko Salminen, Mikko Rajavuori and Klaas Eller, 'Global Value Chains as Regulatory Proxy: Transnationalizing the Internal Market though EU Law', in Anna Beckers *et al.*, eds, *The Foundations of European Transnational Private Law*, Oxford 2024.

[59] Errol Meidinger, 'Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems', in Christian Brütsch and Dirk Lehmkuhl, eds, *Law and Legalization in Transnational Relations*, London 2007, p. 121.

conduct, public policymaking and governance, avoidance of tax-base erosion, anti-bribery and green growth. The organization's infrastructure indicator includes graphs that enable easy comparison of each country's long-term strategic visions for infrastructure development and their fiscal sustainability.[60] The OECD has also released a set of best-practice guidelines for domestic regulatory policy.[61] These are just some examples of standards prepared within various international committees, working groups and meetings attended by experts and government officials. Their non-binding form is offset by the latter's integration in the social world of global governance.

Private institutions are equally active in producing indicators and standards. The World Justice Project, an initiative of the American Bar Association, publishes a Rule of Law Index that ranks 142 countries according to criteria such as 'constraints on government powers', 'absence of corruption', 'open government', 'regulatory enforcement' and 'fundamental rights'. Established at the height of liberal hubris in 2008, it has also produced a side-project, EUROVOICES, which deals with democratic governance, safety, justice, transparency and the business climate, among other things. The project ranks EU countries on civil participation, equality before the law, freedom of opinion and expression, and free, fair and secure elections. The scorecard on transparency and corruption produces data on 'absence of bribery', 'right to property', 'transparency and access to information', 'regulatory enforcement' and 'simple, predictable and timely administrative proceedings'.

Since the 1990s, a project has been under way to transplant elements of Western constitutionalism to former Communist countries that emerged from the Cold War and aspired to EU membership or access to resources from international financial institutions. European and US experts in constitutional law have been travelling the world, explaining Western constitutional principles to foreign audiences, 'claiming that there is a significant congruence between social problems and their constitutional solutions, and arguing that the areas of agreement and overlap clearly outweigh significant contextual and functional varieties'.

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[60] Ana Ruiz Rivadeneira, Tenzin Dekyi and Lorena Cruz, 'OECD Infrastructure Governance Indicators', *OECD Working Papers on Public Governance*, no. 59, June 2023.

[61] OECD, *The Governance of Regulators*, Paris 2014.

As the legal scholar Günter Frankenberg puts it, they have ‘pursued an overwhelmingly Western, unitary project by confirming their view in a cross-culturally coherent body of constitutional law’.[62]

The culture of rights

As domestic societies integrated into the globalized economic and cultural world, the remnants of religion and tradition that still provided social cohesion came under enormous stress. In order to implement privatization and marketization, and to provide a substitute for traditional moralities, the space of the social was everywhere filled by law, especially law articulated as individual rights.[63] Originally directed against authoritarian governments, the language of rights spread in the 1970s from Europe and the United States to much of the rest of the world, seeking to empower individuals and excluded groups: *It is my life, who are you to tell me how I should live!* The politics of identity was legally consecrated in the rapid proliferation of rights-instruments that claimed ‘trumping’ power over countervailing policies and social values.[64] As individuals and groups increasingly translated their preferences into the vocabulary of ‘rights’, more and more social conflicts were interpreted as rights-conflicts, leading to an intricate proliferation of clashing rights-claims. Freedom of speech and religion became key parts of far-right agitation and security officials learned to dress their concerns in terms of the ‘right to security’.[65] After natural rights, how was one supposed to tell the difference between real and ‘fake’ rights claims? When is a speech act an ‘exercise of the freedom of speech’ and when an incident of ‘hate speech’? There is no automatic, non-political way to make that distinction. It is all a question of perspective and a matter of contestation and struggle. Historically, the most powerful rights claim has doubtless been property—yet the enforcement of that claim has involved the denial of subsistence rights of large human groups.[66] It is no coincidence that

[62] Frankenberg, *Order from Transfer*, p. 3.

[63] As argued in Gauchet, *Le noeud démocratique*.

[64] Ronald Dworkin, *Taking Rights Seriously*, Cambridge MA 1977.

[65] See further Frédéric Mégret, ‘Human Rights Populism’, *Humanity: An International Journal of Human Rights, Humanitarianism and Development*, vol. 13, no. 2, 2022.

[66] Martti Koskenniemi, ‘Rights and the Bourgeois Revolution: The Rise of Political Economy’, in Dan Edelstein and Jennifer Pitts, eds, *The Cambridge History of Rights, Volume IV: The Eighteenth Century*, Cambridge 2024.

neoliberal economic policies arose with an emphasis on property rights and the rigorous enforcement of contracts.[67]

The expansion of the international culture of rights has given a voice to previously excluded groups and interests. It has also legalized politics and instrumentalized courts, tribunals and other expert bodies on behalf of those struggling for the formal recognition of their identities or preferences. Yet two features in the global spread of 'rights' have undermined their critical force. First, rights-advocacy has channelled social conflict into bureaucratic avenues such as courts where the outcomes are limited to legally available remedies that exclude large-scale transformation of the social conditions responsible for most serious rights-violations. Second, since rights are indeterminate—their meaning and applicability are largely dependent on the social 'balancing' carried out by legal institutions—they become another administrative vocabulary for addressing social conflict, losing their original 'trumping' force and becoming subordinate to the priorities and biases of those very bodies whose discretion they were meant to constrain.[68]

The emergence of new forms of 'transnational law'—laws that are neither international nor domestic but express interests shared by groups in different geographical locations—has led to the 'blurring of boundaries between law and society'.[69] Formal laws, treaties and binding decisions by international bodies count for a small amount of the materials referenced by transnational lawyers as they articulate what is legally 'true' in a given situation. Legal knowledge and its vocabularies mix the global and the local, the normative and the technical-factual, in a novel legal sensibility which, whatever else it does—solves disputes, provides policy advice, designs institutions—reproduces on a daily basis the world's institutions and hierarchies, and the regressive distributive consequences.

4. INTERNATIONAL LAW AS GLOBAL GOVERNANCE

Anderson's critique is directed against the state-centric world of international law visible in the work of international institutions like the UN,

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[67] Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism*, London and New York 2019.

[68] See David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, Princeton 2004.

[69] Zumbansen, 'Transnational Legal Pluralism', p. 155.

multilateral treaties, public diplomacy and the laws of war and peace. As we have seen, this emerged as a product of 19th-century German thinking about 'sovereignty', and had begun to be criticized during the interwar period by an increasingly cosmopolitan legal profession.[70] Nothing came of the critique of state-centrism at the time, however. Later, Cold War diplomacy and decolonization were likewise conducted under formal state-centrism; in the absence of shared political objectives, law was simply expected to protect sovereignty and maintain non-intervention.

The first serious postwar challenges to the formalism of statehood arose in the mid-60s when Wolfgang Friedmann, a leading legal theorist and international lawyer at Columbia University wrote that 'the national state and its symbol, national sovereignty, are becoming increasingly inadequate to meet the needs of our time'. A different kind of society was emerging: 'beside the level of interstate relations of a diplomatic character there develops a new and constantly expanding area of cooperative international relations'. Friedmann even imagined the European Communities as 'a possible precursor of a future integration of mankind' and claimed, somewhat optimistically, that the 'necessity to protect the individual as such internationally, even against his own state, has become an accepted postulate of international lawyers, and the recurrent subject of international debate'.[71] Friedmann represented a sociological welfarism that aligned with many institutional projects under way, such as the establishment of the UNCTAD in 1964 and the rise of 'law and development' generally, the conclusion of the two human rights covenants in 1966 and the process that led to the 1972 Stockholm Conference on the Human Environment. The most significant regulatory effort of this period, the New International Economic Order, sought to decolonize relations between sovereigns and redress the injustices of economic relations embedded in international law.[72]

The 1990s brought the end of the Cold War, expansion of the European Union, and intensification of international cooperation on trade,

[70] One critique came from French doctrines wedded to the liberal ideology of 'social solidarity' for which individuals, not states, were the ultimate subjects of international law. As the Paris Professor Georges Scelle argued, states were simply the administrative organs of an international society of which every individual was a member. See further, Koskenniemi, *Gentle Civilizer of Nations*, pp. 327–42.

[71] Wolfgang Friedmann, *The Changing Structure of International Law*, New York 1964, pp. 19, 376.

[72] For a thorough analysis, see Umut Özsu, *Completing Humanity: The International Law of Decolonization 1960–1982*, Cambridge 2024.

development, the environment, technology, resource management, even democracy. In this decade, the UN set up its 'social agenda' through a series of global conferences: Rio 1992 for the environment, Vienna 1993 for human rights, Cairo 1994 for population and development, Copenhagen 1995 for social development, Beijing 1995 for women and Istanbul 1996 for human settlements.[73] Regulatory ambitions were no longer pursued in the 1970s mode, however. Sovereignty-driven development became suspect. As the World Bank put it, the time of 'technocrats' with 'fanciful schemes' was over. The state was to be restricted to basic functions, the provision of security especially, and to engage in intensive 'partnerships with firms and citizens' with the goal of 'market liberalization and privatization'.[74] With the creation of the WTO, trade law shifted its focus from tariffs to limiting subsidies through domestic industrial, labour and environmental policies—core functions of statehood.[75] Human rights bodies began to undertake close surveys of governmental practices—calls for 'legitimacy' and 'accountability' were everywhere—and the International Criminal Court was set up to prosecute political leaders. People within and outside such institutions learned to address each other and wage their campaigns in legal terms, claiming rights and accusing their adversaries of crimes against humanity. Political scientists began to write on the increasing 'legalization' of international affairs.[76]

The turn to global governance did not mean worldwide 'planning' by bureaucrats within centralized institutions. Instead, like European nation-states a century before, the global world was understood to be undergoing a process of *functional differentiation*.[77] Spheres of economic

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[73] For a good summary, see J. A. Lindgren Alves, 'The UN Social Agenda against "Postmodern" Unreason', in Kalliopi Koufa, ed., *Might and Right in International Relations*, Athens 1999.

[74] *World Development Report 1997*, pp. 1–2, 6, 62.

[75] Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order,* Oxford 2011; Anne Orford, 'Theorizing Free Trade', in Anne Orford and Florian Hoffmann, eds, *Oxford Handbook of the Theory of International Law*, Oxford 2016.

[76] For the burgeoning literature, see Judith Goldstein *et al.*, eds, *Legalization in World Politics*, Cambridge MA 2000; and Nikolas Rajkovic, Tanja Aalberts and Thomas Gammeltoft-Hansen, eds, *The Powers of Legality: Practices of International Law and Their Politics*, Cambridge 2016.

[77] The UN took note of this. See 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission', finalized by Martti Koskenniemi, *UN Doc. A/CN.4/L.682*, 13 April 2006.

and social activity arose as autonomous fields of expert knowledge, a process of 'fragmentation' registered by the international law profession in the emergence of specialist technical disciplines (trade law, human rights law, environmental law, intellectual property law and so on). Each technical field was established to deal with a discrete problem, imagined as 'global'. Each had its own objectives, which began to clash: trade law collided with environmental law, security with human rights, investment law with the rights of indigenous peoples. Such conflicts first became a major concern for the legal profession in the early 2000s.[78] International politics appeared transformed: a matter no longer of conflict between ambitious states but between legally articulated 'regimes' challenging each other in search of what could be called epistemic hegemony. Politics became a struggle for jurisdiction. Is a crisis in Central Africa a human rights issue or an economic development problem? The answer depends on whom you ask, the High Commissioner of Human Rights or the World Bank. Is post-conflict governance in Kosovo a matter of security, of adequate housing and employment or of educating girls? Peace-keeping professionals, social development experts and human rights activists will each provide a different answer, with equal conviction. Legal truth is not one but many. And they are in struggle.[79]

The rise of expert rule

Yet it soon became evident that specialist lawyers were capable of coordinating their actions. Meeting regularly at global conferences, sharing a similar educational and cultural background, they could understand each other and make the required adjustments. Solutions to complex global problems became open-ended and negotiable. Black-letter rules gave way to recommendations and schedules tailored to the capacities of the participants. Such deformalization is, as Max Weber observed long ago, a feature of modern governance. In complex societies, rigid rules create injustice, appearing either over-inclusive—covering cases that it is unjust to cover—or under-inclusive: failing to capture new but relevant cases. Global governance was no more about finding homogenous solutions than about respecting the formal boundaries of sovereignty. Treaties on climate change, international investment or laws of war adopted ambiguous language—'common but differentiated responsibilities', 'fair and equitable treatment', 'proportionality'—to reflect the

[78] See, for example, Margaret Young, ed., *Regime Interaction in International Law: Facing Fragmentation*, Cambridge 2012.
[79] As extensively analysed in Kennedy, *A World of Struggle*.

social world they sought to regulate. This was law as economics: balancing the interests of those empowered to sit at the table.

The result was expert rule. Instead of providing formal rules—'utopian' in view of the world's complexity—law aligned itself with the priorities of systems of technical expertise deemed competent to solve problems those systems had themselves identified as such. States may still play a role in appointing the experts. But their policies have no distance from the expert regimes that have succeeded in making their particular problems the 'general problem'. Political struggle is reduced to a contest of functional priorities: environment or trade? More investment or more human rights? Everybody agrees on 'development', but is the relevant indicator GDP or HDI? In global governance, hegemony is epistemic: the transformation of a special concern into the general concern, articulated as binding law.

Hence also the predictable backlash against it. The anti-globalists soon noticed that 'global governance' involved distributing resources among technical experts and their favoured projects. The trade expert wants more trade, the environmental scientist more protection; the security expert pushes for more surveillance, the human rights expert for less. Each has a project based on their idea of best practice. Each believes resources ought to be directed to their field, that their project ought to become the *global project*. Notwithstanding the certainty with which each side makes its claims, what is actually taking place is a battle for resources and prestige—one in which the anti-globalists realize they have no say. They do not speak the language. Instead, they have a single conviction: whatever the expertise, we will always lose in the end; whatever the policy, it is bound to treat us as an ignorant underclass.

Michael Hardt and Antonio Negri suggested reimagining imperial rule, not as a single centre radiating its power across the world at large, but as a system with no such centre, with power embedded in the hierarchical networks of 'international society'—in the forms of knowledge carried within specialized types of expertise.[80] This is a useful way to understand law's role in the reproduction of the conditions of the international world today, and a worthwhile object of critique. Once we move our gaze from the spectacle of UN action or inaction, diplomatic conferences and

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[80] Michael Hardt and Antonio Negri, *Empire*, Cambridge MA 2000.

decisions of war, and focus on the often-hidden, low-level rules, practices and standards that are the daily business of legal professionals across the world, a new image emerges. Not a manipulable set of grandiose, indeterminate statements but a dense structure of hierarchical relations, submission to which is not optional for any single actor. This structure establishes the very conditions for participation in the social world of global rule.

EPILOGUE: TRUMP

From the vantage of 2025, it appears that the world of international law that emerged in the 1990s and their melancholy aftermath in the first decades of the 21st century may have vanished. The WTO is paralysed. Negotiations on the reform of the investment law system are stalled. The production of multilateral treaties under the UN has all but ceased. The implementation of the schedules set forth in the 2015 Paris Agreement under the UN Climate Change treaty is anything but assured. As part of its authoritarian turn, the US is attacking or ignoring international institutions, throwing overboard not only hallowed rules on free trade and refugee protection but apparently also those underwriting sovereignty and territorial integrity (except, of course, when its own is concerned). Can it still be said that international law, in the opaque, sometimes microscopic forms presented in this essay, has any power?

Yes, it has. Everything that swept Trump to the presidency was initiated, coordinated and brought to fruition by law. This includes the US constitution, of course, but more importantly, the whole legal infrastructure of global capitalism I have been sketching—the laws of property and contract and their institutional derivations that account for the wealth of some and the poverty of many, in the US and abroad. It was these rules—about corporate taxation, the conduct of financial markets, the conditions of international trade and investment—that underwrote donations to the Republican PACs, that underpin the wealth of the billionaires who joined Trump at his inauguration, that chose winners and losers in the presidential campaign, but also, not unrelatedly, that dictate the conditions of the US economy. These rules also lay out the powers of the US president, which is why the legality of most of his controversial Executive Orders is being challenged, and often vindicated, in dozens of lawsuits across the US.

Everything the Trump regime has done is embedded in an intense legal debate in the US and abroad. Every understanding of his administration's actions, critical or supportive, is couched in terms of legal rights, immunities, powers and privileges—a reflection of how thoroughly legalized politics has become, at the domestic as much as the international level, even among apparent adversaries of the 'rule of law'. Viewing Trump's actions as a rejection of the rule of law arises from a liberal understanding of the notion. Faith in that understanding, or some of its many variants, may be justified—and it may be shared by a sizeable part of the legal elite—but this does not mean that liberalism's adversaries do not also have a view of the proper content and functions of law.

Authoritarians also have their rule of law.[81] There may be good reasons to detest it, but it would be an analytical and political mistake to disqualify it as *law*. No one is entitled to rest content on their progressive laurels by simply referring to the 'rule of law' without attention to the *kinds* of law and legal institution such invocations end up buttressing. Focusing one's political energies on legal or institutional reform alone is of course insufficient. It is certainly useful to recognize the progressive potential of the recent advisory opinion by the ICJ in *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory*. But such recognition must be combined with a critical, strategic understanding that an official legal pronouncement of this kind enters a contested legal-political field, and that much more will be needed to enable the realization of that progressive potential in actual human relationships. In comprehending the power of international law, close attention must be paid to its pervasive effects on social hierarchies and the distribution of powers and resources among human groups the world over. Who, as a result, has to yield to whose legal truth?

[81] See Helena Alviar Garcia and Günter Frankenberg, eds, *Authoritarian Constitutionalism: Comparative Analysis and Critique,* Cheltenham 2019; and Frankenberg, *Authoritarianism: Constitutional Perspectives,* Cheltenham 2020.