Towards an Integrative Theory of Transnational Labor Regulation

Regulating for Decent Work Conference, ILO
July 2009

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**Work-In-Progress Not for Citation without Author’s Permission**

Introduction

Labor regulation and its attendant administrative and enforcement institutions in many developing countries are poor to the point of being almost non-existent. In response, multinational corporations (MNCs), civil society, and indeed even the ILO and many governments have turned to the creation of non-state, private regimes of labor regulation that operate, by and large, separately from state labor regulatory regimes.

Transnational labor regulation (TLR) is the field of law that concerns the regulation of work in the transnational sphere, across jurisdictions. TLR has been described as a “spider’s web”\(^1\) and a “mosaic”\(^2\) by at least two prominent scholars of the field. As such it consists of a wide range of regulatory instruments operating at multiple planes, using soft and hard, state and non-state mechanisms to achieve its aims.\(^3\) But its expansiveness is also its weakness. While on one hand it recognizes the multiplicity of legal sources of norms and enforcement, TLR lacks a strong, coherent vision of how its constituent parts should optimally engage with each other, and how state, or “public” regulatory regimes ought to optimally interact.

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\(^1\) Bob Hepple, LAW LABOURS AND GLOBAL TRADE 3 (2005)
\(^3\) Id.
Instead, the theoretical field has arguably been dominated by prominent “governance” theories of domestic and transnational regulation that are, I would suggest, ill-suited to the exigencies of labor regulation and industrial relations, particularly in developing countries. In particular, these theories, which have been largely forged in the context of developed country regulatory systems in non-labor fields, have very weak conceptualizations of the role of the state in labor law, and almost no conception of state building. In short, they provide a post-statist account of international law, relations, and politics, and do not ask how or if private regulatory institutions can and should be oriented towards building the capacity of developing states’ labor administrative capacities, or reprioritizing labor relations as a matter of public governance.

This article argues that while the advent of private regulatory regimes might be a desirable development as a mechanism to “fill the gaps” in weak regulatory regimes,4 private labor regimes should not be conceptualized as ends in themselves, or as idealized regulatory solutions to public regulatory failure. Instead, this article argues for an integrative approach to transnational labor regulation that goes beyond “complementarity” or “gap filling,” towards a regulatory strategy in which policy makers strategically develop and utilize non-state, hybrid, and traditional regulatory structures in ways that serve to target and improve deficiencies in domestic regulatory capacity. While traditional complementarity approaches seek to create regulatory structures that act as gap fillers, an integrative approach seeks to create discursive mechanisms and institutions that effectively communicate with each other with the explicit goal of increasing state regulatory capacity.5

This approach has implications for policy making in countries with strong international labor interests, such as the EU and the US, as well as in the International Labor Organization, where greater attention is being paid to non-state systems of labor governance such as in the Better Work Program. An integrative theory of TLR provides a conceptual framework for how policy makers should think about the role of law and legal institutions,

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4 ROSEANN CASEY, MEANINGFUL CHANGE: RAISING THE BAR IN SUPPLY CHAIN WORKPLACE STANDARDS, AT 33 (arguing for a gap-filling function of private regulation)

5 This differs from the concept of integration or transformation proffered by Trubek & Trubek, whereby transformation, hybridity, and integration or synonymous terms, indicating a condition whereby “new governance and traditional law are not only complementary; they are also integrated into a single system in which the functioning of each element is necessary for the successful operation of the other.” David Trubek & Louise Trubek, NEW GOVERNANCE AND LEGAL REGULATION: COMPLEMENTARITY, RIVALRY, AND TRANSFORMATION, 13 COLUM. J. EUR. L. 539, 543 (2006); see also CHARLES F. SABEL AND WILLIAM SIMON, EPILOGUE: ACCOUNTABILITY WITHOUT SOVEREIGNTY, IN LAW AND NEW GOVERNANCE IN THE EU AND THE US 395(2004)
including administrative institutions, in the design of its international labor development policy. Such policies are implemented in the programming of development agencies such as USAID and various European agencies, through international trade policy and regulation, and through the United States Department of Labor. It also has implications for non-state organizations that seek to improve labor governance in developing countries.

In Part One of this draft, I explain the emergence of non-state systems of labor regulation as a response to failed regulatory regimes in developing countries that participate in international supply chains. The reasons for, and nature of, this regulatory failure are complicated and not merely questions of resource constraints. Rather, the failures are politically and socially embedded in the specific contexts of different states. This failure represents, in part, a failure of the ability and willingness of these states to forcefully protect workers rights and develop systems of industrial relations that seek to realize important goals of labor regulation, such as industrial democracy and redistribution. However, the private regulatory response has taken place largely autonomously from public systems of governance, creating in effect an autonomous system of governance that, while relying on domestic labor law requirements, operates largely independently from domestic systems of governance.6

The rise of these largely autonomous, non-state systems of labor governance, as I describe in Part Two, has taken place contemporaneously with the rise of “governance” in political and legal thought. Governance theory, however, is potentially ill matched to the context of labor regulation in developing countries. In particular, I look at three governance theories of regulatory and legal theory that have been applied in various forms to the problem of TLR. In Part Three I start to sketch an alternative conceptual approach to TLR, looking first at the somewhat limited scholarship that has thus far been conducted on the relationship between private and public regulatory regimes; offering a set of questions for further research; and then setting the ground for an approach a state-centered conception of private regulatory regimes.

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6 This point will be developed further in later drafts.
I. The Emergence of Transnational Private Labor Regulation

In this section I discuss the rise of transnational private labor regulation (TPLR) as a response to a domestic and international regulatory deficit, that is both market based, and whose particular forms are shaped by political conflict over the appropriate institutional response to the governance deficits. The particular forms that it has taken, however, do not adequately address national governance deficits. What has emerged is a particular form of privatized transnational labor regulation, the form of which is subject to a range of various pressures and forces that can mold its shape.

A. Global Governance Deficits

As developing countries have entered the global market, and as MNCs have increasingly relied on intentional supply chains, there has emerged a regulatory gap between regulatory supply and regulatory demand. The sociologist Gary Gereffi has termed this a “governance deficit.”7 The governance deficit exists, according to Gereffi, in three domains. First, there is a home-country governance deficit, in that the home-countries of MNCs do not have adequate regulatory tools to address the new forms of international production and supply chains. That is, while MNCs might be incorporated and headquartered in a particular jurisdiction, a great deal, if not most, of their economic activities occur abroad in areas that are beyond the regulatory reach of the home-country.8 The second deficit is the limited scope and regulatory capacity of international, intergovernmental institutions.9 The limited

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7 GARY GEREFFI & FREDERICK MAYER, Globalization and the Demand for Governance, in THE NEW OFFSHORING OF JOBS AND GLOBAL DEVELOPMENT 39, 48-9 (ILO, 2005). Gereffi & Mayer’s notion of governance is broader than, but inclusive of what he calls “regulation.” For Gereffi, there are three modes of governance: facilitative, regulatory, and distributive. Public labor law, as well as private modes of labor governance, are what he terms the regulatory mode of governance, which is designed to mitigate the negative externalities of the market. Collective bargaining, however, is categorized as a form of private distributive governance, which is designed to “mitigate[] the unequal impacts of markets and enabling societies to adjust to economic change.” Id. at 42.


9 Gereffi & Mayer, at _
regulatory reach and powers of the International Labor Organization (ILO) is an illustrative example of this problem. The ILO is a tripartite organization whose “enforcement” mechanisms are by and large function through its so-called “supervisory mechanisms,” which primarily act as reporting institutions on member state action.\(^{10}\)

The third deficit, and the one that is the primary focus of this Article, is the highly limited capacity of developing countries to regulate areas of the domestic market that have expanded along with their economies. There are few areas in which this deficit is as acutely felt as in the realm of labor and employment law. We will term this the domestic labor governance deficit. While Gereffi nominally gives all three deficits equal billing, it is worth emphasizing that it is this third deficit that is most noteworthy, for it has always been in domestic jurisdictions that labor regulation has played a primary function. 

Extraterritorial application of labor laws (deficit 1) and the use of intergovernmental organizations (deficit 2) have never had and, for a variety of reasons, are unlikely to ever play, an equal role to domestic governance.

**B. TPLR**

As a result of these domestic labor governance deficits, a peculiar form of non-state governance has emerged that can be called transnational private labor regulation (TPLR). Building on governance conceptions of regulatory authority, I define TPLR to be constituted by a broad range of practices, generally outside of the strict purview of the state, that serve to regulate working conditions and the employer-employee relationship.\(^{11}\) It is private because it operates by and large outside of the traditional institutions and instruments of

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\(^{10}\) A notable exception to this is Article 33 of the ILO constitution, which allows for the ILO Governing Body to request its members to take action that “it may deem wise and expedient to secure compliance therewith.” This has only been used once in the case of Burma, in which the ILO requested its members to impose economic sanctions for violations of core labor rights. ILO Constitution, Art. 33; see generally Robert Howse, Brian Langille, with Burda, The World Trade Organization and Labor Rights: Man Bites Dog, in SOCIAL ISSUES, GLOBALISATION AND INTERNATIONAL INSTITUTIONS LABOUR RIGHTS AND THE EU, ILO, OECD AND WTO 157 (Eds. Virginia A. Leary & Daniel Warner, 2006). The limits of the ILO have been widely written about. It is worth emphasizing, however, that the ILO is almost uniquely focused on the conduct of states, and as such lacks the capacity or mandate to focus on or sanction private economic actors, such as MNCs. While a number of scholars and activists have sought to supplement the ILO’s norm generation and soft law strategies by granting a larger role to the World Trade Organization (“WTO”) and other trade regimes to address labor issues, the WTO route has been notably closed. See e.g. Kevin Kolben, *The New Politics of Linkage: India’s Opposition to the Workers’ Rights Clause*, Ind. J. Global L. Studies (2006).

government. The emphasis in this definition is on “practice,” for TPLR intentionally de-centers state institutions of coercion and control, and traditional forms of legality. Instead, it emphasizes more diffuse forms of social control, power, and action. TPLR entails a number of different practices by a range of non-state actors. It includes not only “self-regulation” by corporate actors who have created their own inspection and monitoring regimes, but also a wide range of other practices and institutions by different actors within civil society that effectively function to regulate the workplace. These disparate systems resemble traditional public law in the sense that they generally include a) a set of rules as reflected in a code of conduct, and b) a mode of enforcement of those rules, usually through a system of monitoring and clearly stated consequences in the event of a violation of those rules.

TPLR constitutes one small component of a much larger sphere of non-state law which, while a much discussed subject of study at least since Ehrlich’s seminal book, Fundamental Principles of the Sociology of Law, has received increasing attention over the years. However, there are several ways in which transnational private regulation differs from other fields of non-state legal practice and theory. First, TPLR generally addresses a very specific set of global economic processes - international supply chains and the manufacture of products made for international export markets. It is thus firmly located in the context of the globalization and its manufacturing processes. Second, while a great deal of non-state law takes place outside of the existence of a state, the functioning of TPLR almost invariably exists in the context whereby a state and a regulatory system exist, albeit a dysfunctional one. TPLR addresses the conduct of suppliers and MNCs in international supply chains that by and large directly come under the jurisdiction of a state and its labor

12 Id. at 227-8.
13 While collective bargaining is certainly a practice of private ordering, and arguably the most important practice, collective bargaining and freedom of association rights exist against a backdrop of enforcement if those rights are violated. While that backdrop might be traditional public state law, it can also be private forms of enforcement and sanctioning where that backdrop does not exist. It is transnational because the forms of control, power, and action are embedded in transnational institutions. Because state channels of recourse are unavailable, multinationals and international networks of activists become sources of pressure and power that can effectively impact employer behavior.
14 For a review see Marc Hertogh, What is Non-State Law? Mapping the Other Side of the Legal Hemisphere, in INTERNATIONAL GOVERNANCE AND LAW (2008).
15 Hertogh describes globalization as the third phase of non-state legal theory. Hertogh, at 18-19.
16 Hertogh, at 24 (conceptualizing and describing fields of non-state legal norms and enforcement mechanisms to sometimes occur within the context of the state, and sometimes without. Notably, he does not include labor law or collective bargaining in his conceptual map)
C. Markets and Institutions

The rise of TPLR has been a supply-side response by MNCs, civil society, as well as governments to the governance deficits described by Gereffi. On one hand, TPLR is a market response by MNCs to pressure from consumers and other stakeholders that have interests in production and labor processes that conform to their social preferences.\textsuperscript{17} When these processes do not conform, these stakeholders, through the mobilization of transnational networks and in some cases boycotts, have the capacity to inflict economic and reputational costs on the corporation.\textsuperscript{18} In response to these risks, some MNCs create institutions and internal regulatory regimes along their supply chains to address these concerns.\textsuperscript{19}

The market account, however, fails to fully capture the political and institutional context out of which private regulation, and specific variants of private regulation, emerges. More institutional accounts of the emergence of private regulatory regimes have helped explain the creation of private regulatory regimes as the result of political conflicts between various actors, including NGOs, states, and companies, about the regulation of global capitalism.\textsuperscript{20} According to this account, “political action occurring in neo-liberal institutional arrangements in association with globalization shaped the action of states, social movement groups, and NGOS in such a way as to help shift their efforts and resources a path towards private forms of regulation, as opposed to governmental or intergovernmental regulatory systems.”\textsuperscript{21} Thus private regulation, and the particular forms that it has taken, is not a purely natural or necessary market response to the regulatory deficit, but rather a particular

\textsuperscript{17} Bartley, __
\textsuperscript{18} See, Slaughter __, Seidman __.
\textsuperscript{19} Others have pointed out that MNCs also have an interest in regulating suppliers’ workplace practices in order to ensure stable industrial relations in suppliers’ factories and ensure a stable supply of goods and services. See Mamic, at 26.
\textsuperscript{21} Bartley, Certifying Forests and Factories, at 447.
response that was taken because, in part, other forms of coordinated governance, such as stronger forms of intergovernmental labor regulation were closed off, such as through international trade, for example.\(^{22}\) The emergence of private regulatory institutions must be understood to be the result of political conflict over different solutions to the gap in governance by non-market actors, in addition to the market response by firms explained above.\(^{23}\)

Second, the emergence of private regulatory regimes is due not only to firms, NGOs, or other civil society actors, but also governments.\(^{24}\) States have been important actors, in a number of cases, in the process of developing private regulatory regimes, yet ironically these private regulatory regimes have been only marginally focused on building the capacity of states to institute effective domestic regulatory regimes. An institutional approach might account for this as the result of a political conflict and path dependent limitations of possibilities because of ideological and institutional constraints.

The important point about the richer institutional account is to remind us that TPLR is politically and socially embedded, and that it is a response to policy choices by different actors with different agendas. This Article suggests that the particular forms that these private regulatory regimes have taken have for a variety of institutional reasons, have focused almost uniquely on creating non-state regulatory regimes, and ones that have largely not addressed the problem out of which they have sprung – the domestic enforcement gap.

## D. The Domestic Enforcement Gap

Because the primary question of this paper addresses domestic labor governance gap, I leave aside the question of what is the nature of the other two deficits highlighted by Gereffi. The domestic labor governance deficit in most developing countries is not primarily one of de jure law.\(^{25}\) Indeed, many countries have ratified the core ILO labor conventions

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\(^{22}\) Bartley, at 451.
\(^{23}\) While I take Bartley’s account to be largely correct, I believe that he underplays the degree to which the logic of private regulatory regimes is consistent with the individualistic and government skepticism of NGOs.
\(^{24}\) Bartely, Certifying Forests,
\(^{25}\) While this is not only true for developing countries, the problem is particularly acute there.
and have incorporated the basic principles into their laws. But many of these same countries have extremely weak enforcement and poor compliance by the regulated, with almost negligible, understaffed, and corrupt labor inspectorates; as well as highly dysfunctional labor courts effectively making in many cases the law as written effectively a dead letter. This has resulted in a gap between the rules and enforcement. Indeed, there is no clear correlation between respect of labor standards and their incorporation into national law. This problem is particularly acute in developing countries, which have far lower rates of labor inspections than do developing countries.

The first problem with enforcement concerns a lack of resources. Labor inspectorates, a linchpin of labor enforcement in many countries, clearly suffer from a lack of resources, resulting in inadequate numbers of inspectors. In addition to low numbers, government employees in developing countries are notoriously underpaid, and the labor ministry is no exception, if not a particular locus of the problem. Low pay leads, at least in part, to high levels of corruption throughout government, including at the low levels of the bureaucracy, where poorly paid labor inspectors sit. In Cambodia, for example, inspectors draw a salary of $25/month – less than that of a garment worker.

But the causes of poor domestic labor law enforcement, like other regulatory contexts in developing countries, are also highly contingent on the particular institutional and political context of a given state, as well as the cultural/social context therein. Thus the causes of poor regulatory enforcement in developing countries must be understood to exist within a larger set of economic, institutional, and political factors that are both


29 OECD, at 304


31 The situation is similar in other areas of administration in developing countries. See e.g., Michael J. Trebilcock & Ronald J. Daniels, RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS 205 (2008) (noting that it is almost impossible to isolate a specific set of factors and weigh their relative importance in the determination of what determines the efficiency and efficacy of tax administration). See also, DARA O’ROURKE, COMMUNITY DRIVEN REGULATION (2004)

32 Trebilcock & Daniels, (-) at 332.
endogenous and exogenous to a particular state. Poor enforcement cannot be simply attributed solely to weak inspectorates, which constitute just one, albeit a very important aspect of enforcement, but also to the other institutions that constitute enforcement regimes, such as the judiciary and other rule making institutions. Despite the context specific variability of root causes, we can generalize some broad phenomena that characterize the labor administrative challenges faced by developing countries.

One such challenge is the close economic and social ties between government and employers that can lead to under-enforcement of the labor law. In Mexico and Guatemala, for example, low state capacity is exacerbated by corrupt practices that are rooted in the corporatist ties between the state, capital, and at least in Mexico trade unions that are closely aligned with the government. In Cambodia, the garment manufacturing association maintains very close ties with the entrenched ruling government, and factory owners are sometimes members of government or of the army.35

Governments also make strategic decisions on how to expend resources on given regulatory priorities. States, for example, often make strategic decisions to invest more heavily in ministries of commerce, which are charged with increasing FDI and economic activity, than it might a labor ministry, which might be conceived to increase costs of foreign investment, thus creating an unattractive investment environment. As O'Rourke puts it, “[b]ecause the state is interested ultimately in the promotion of industry, the accumulation of capital, and taxing these activities, state power and even survival is tied to the promotion and protection of industrial production.”36 The result is labor ministries and inspectorates that are intensely underfunded and do not have the scope to inspect the factories. In Bangladesh, for example, there are only 200 inspectors countrywide, and only 27 inspectors working in the RMG sector for approximately 5,000 factories. There are 15 teams that conduct random inspections.

Penalties for violation of the law are also seldom imposed, and insufficient to incentivize compliance. In Bangladesh, in 2007, there were only 87 recorded violations of

33 OECD, at 303.
34 Rodriguez Garavito, at 213. Garavito writes that “In Mexico, such practices range form corrupt business unionism to the bridging of labor judges and inspectors. In Guatemala, they include the violent repression of unions and an informal revolving door system whereby former labor inspectors are appointed as heads of human resources in apparel factories producing for export.” Id.
35 See John Hall; Kevin Kolben
36 O'Rourke, Community Driven Regulation, at 10.
37 Kevin Kolben & Borany Penh, Bangladesh Labor Assessment (USAID report) at 18.
the law—a low number given external reports on labor conditions in the country. While the official penalty could be up to three months in jail and 25 thousand taka (a relatively low monetary sum), in fact no jail time has been given, and penalties have been relatively low.  

Another problem concerns not the formal rules and enforcement institutions, but rather a culture of non-compliance. This problem can be particularly acute in the area of labor regulation, where hierarchy and power relationships are rife, and the economic consequences of regulatory decisions are perceived to be very tangible. Factory owners can expect that the laws will not be enforced, but factory owners also potentially have engrained attitudes that are hostile to the regulation of their workplaces. A key issue then is to develop the legitimacy of the labor ministries and of labor law, and to inculcate a culture of compliance among the regulated.

In sum, the reasons for the lack of enforcement then, cannot be merely reduced to a lack of resources, but rather must be understood to be due to a number of political and cultural factors that are context and country specific.

II. Governance, Law, and the State

The emergent regulatory landscape then has witnessed a rise of TPLR as a response to labor regulatory deficits in developing countries, which can be attributed to resource constraints, and a range of political and social. This has occurred contemporaneously with the ascendance of “governance” as a conceptual framework. This section examines the rise of governance, particularly in political science and law, and its conceptualization of the state and regulation.

38 Kolben & Penh, at 18.
39 See Trebilcock & Daniels, at 203; Diane Frey, An Institutional Approach to Compliance: The Case of Forced Labour in Central American and the Dominican Republic (describing the gaps in formal rules on forced labor and actual practice in Central America).
40 Frey, _
41 Rodriguez-Garavito, at _; It should also be noted, however, that the challenges of labor law enforcement are not specific to developing countries. While there are higher rates of labor inspection in developed and transnational countries, levels of enforcement vary, and are often insufficient. Indeed, the United States has been often criticized for its levels of enforcement of freedom of association.
Private regulatory regimes must be understood within the theoretical context against which they have been forged, in which the strength and fundamental centrality of the nation-state and its ability to effectively regulate society and the market has begun to be questioned and reexamined. Regulatory authority and mechanisms have been increasingly decentralized, and “command and control” regulation has given way to new decentralized forms of coordination and regulation. The term often used to describe this legal and political order is “governance”. The decline of the state and the rise of governance as the conceptual framework through which economic and social regulation occurs has become a central matter of discussion in academic literatures including political science, law, and sociology.

While governance has a number of definitions, at its core it describes a process in which regulatory authority and legitimacy have become de-centered from the state and from government. Instead, they are now conceptualized as dispersed, diffused, and dislocated among multiple actors, private and public, domestic and international. Separations between public and private become much less clear, and “public and private ordering both overlap and become exchangeable.” Governance definitions and conceptualizations are intentionally expansive. Two prominent international relations scholars have defined it as being all processes and institutions, both formal and informal, that guide and restrain the collective activities of a group…Governance need not necessarily be conducted exclusively by governments and the international organizations to which they delegate authority. Private firms, associations of firms, nongovernmental organizations (NGOs), and associations of NGOs all engage in it, often in

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42 See e.g., Saskia Sassen, Debating Governance: Authority, Steering and Democracy (ed. Jon Pierre 2000);  
association with governmental bodies, to create governance, sometimes without governmental authority (emphasis added).\(^{47}\)

Indeed, the notion of governance existing without government means, “the state is no longer the sole, or in some instances even the principal, source of authority, in either the domestic arena or in the international system.”\(^{48}\) Indeed, in more radical versions, what becomes important for authority and legitimacy is less the “state” itself, but rather, according to James Roseneau, the “inter-subjective meanings” of the regulated. Thus, if the majority of those subjected to those forms of control accede to the forms of control, or Roseneau suggests, the most powerful affected actors within a particular system of rule, then the system of control effectively functions.\(^{49}\) In governance theory, responsibilities and boundaries become less distinct, and the nation state as traditionally constituted is no longer understood to be the primary or central agent in addressing social and economic issues.\(^{50}\)

The essence of governance, then, is its focus on governing mechanisms that do not rest on recourse to the authority and sanctions of government.\(^{51}\) Instead, responsibilities for regulation of the market, which had been traditionally considered to be the exclusive regulatory domain of the state, have also now become, according to some scholars, the legitimate regulatory domain of private actors.\(^{52}\)

A parallel move towards governance has occurred in legal scholarship, particularly in the area of regulatory theory.\(^{53}\) These legal literatures have begun to re-conceptualize the role of the state and of government, and re-conceptualize how law is generated, and what are


\(^{48}\) According to two prominent scholars who advocate such a perspective, “our conception of private authority is intended to allow for the possibility that private sector markets, market actors, NGOs, transnational actors, and other institutions can exercise forms of legitimate authority…. “Rodney B. Hall & Thomas J. Biersteker, The Emergence of Private Authority in the International System, in The Emergence of Private Authority in Global Governance 1, 5 (2002).

\(^{49}\) James Roseneau, Governance, Order and Change in World Politics, in Governance without Government, at 6. See also Harry Arthurs, Private ordering, at 477, (“For workers and consumers, managers, and government officials to be persuaded to accept voluntary codes as the equivalent of legal protections, all must acquiesce in roughly similar values and assumptions”).

\(^{50}\) Gerry Stoker, Governance as Theory, at 21

\(^{51}\) Id. at 17.

\(^{52}\) Other discussions of governance and its relation to the state focus on the increasingly fragmented and dispersed responsibilities among a range of international specialty organizations, such as, for example, the World Trade Organization. See e.g. Sol Picciotto

\(^{53}\) For a broad overview and survey of the literature, see Orly Lobel, The Renew Deal: The Fall Of Regulation And The Rise Of Governance in Contemporary Legal Thought, 89 MINN. L. REV. 342 (2004).
legitimate sources of law and regulatory authority. At the international level, scholars have extensively examined the processes by which networks of trans-governmental actors, both formal and informal, create international networks to resolve global regulatory issues. Legal pluralism scholars have argued that norm generation takes place through a number of overlapping normative orders, while scholars of “private ordering” have examined the ways in which groups of private commercial actors self-regulate and settle disputes outside of the state and state law. Administrative law scholars have developed a new literature on global administrative law, arguing that there exists a new administrative space outside of the boundaries of the traditional nation state, in which not just public, but public/private or just purely private actors carry out regulatory functions formally undertaken by public bodies.

Much of the literature describes a transformation of the regulatory state and limits of the capacity of the state, and even law itself, to effectively regulate certain spheres of economic and social activity. One of the leading advocates of such a development, Orly Lobel, has claimed that the move to governance represents a much broader shift in regulatory theory, reflecting a move from centralized command and control regulation into a more “dynamic, reflexive, and flexible regime,” where “the exercise of normative authority is pluralized.”

Others have used “governance” to emphasize and promote a notion of fluidity between the public and private. Nan Hunter, for example, uses governance as a conceptual tool because “it permits us to move easily back and forth across public-private boundaries.” Building on Foucault’s power-focused concept of “governmentality” she highlights the “power exchanges that cross the borders between government, the market, civil

55 See Anne-Marie Slaughter, NEW WORLD ORDER (2004); Anne Marie-Slaughter, Global Government Networks MICH. J. INT’L L. For Slaughter, transgovernmental networks address what she calls a “governance trilemma” which is that we a) need global rules without b) centralized power, but c) with government actors who can be held to account through a variety of political mechanisms. Slaughter, WORLD ORDER, at 10
56 See Paul Schiff Berman, Global Legal Pluralism, 80 S. CAL. L. REV. 1155, 1557-8 (2007); see also Sally Merry, Levit.
59 Lobel, Renew Deal, at 365
60 Lobel, Renew Deal, at 373.
society, and private life. Rather than a model of social control that emanates from actions of the state, governance theory begins with an understanding that the channeling of actions, resources, and policies is far more complex than a top-down model implies. “Governance” denotes a conceptualization of power that is circular rather than subject-verb object unidirectional, networked rather than hierarchical, and multi-dimensional beyond the state, encompassing non-juridical zones such as market forces or culture. Governing, in this sense, is comprehensive and multidimensional; it is to structure the possible field of action of others.”61

B. Three Regulatory Theories as Applied to TLR

In this section I look at three schools of legal thought that have been highly influential in legal theory, and that at the same time have been applied to transnational labor regulatory issues. This is by no means an exhaustive list, but I focus on these because of the prominence of these schools of scholarship and of their lead theorists, and because they have been drawn upon in various transnational labor regulatory scholarship. Indeed, while none of them was forged specifically in the context of, or for the application to, transnational labor regulation, all three of them have been applied to it in various degrees, both explicitly and less directly.62

A common theme among these branches of thought is that they fundamentally challenge the efficacy of command and control regulatory regimes, and are skeptical of their ability to provide optimal regulatory outcomes or to effectively impact the behavior of the regulated parties. In its stead, decentralization, deliberation, and communication are emphasized. Law, rights, and the state are critiqued, either implicitly or explicitly. Indeed, democracy is re-thought, substituting state-centered notions of accountability and legitimacy with more global administrative conceptions of accountability and legitimacy, in which “principle agent accountability gives way to peer review.”63

61 Nan Hunter, Risk Governance and Deliberative Democracy in Health Care, 97 GEORG. L. J. 1, 6 (2008).
62 Jill Murray, The Sound of One Hand Clapping, AUST. J. LAB. L. (critiquing the application of governance regulatory theories to labor law and labor relations)
1. Systems Theory

The first body of literature is grounded in the law and society movement. Legal theorists, particularly legal sociologists such as Gunther Teubner, have questioned the capacity of law to be effective in the regulation of what they perceive to be socially autonomous social spheres. The ineffectiveness of law to functionally regulate these spheres is, according to Teubner, fundamentally one of communication. Each subsystem is autonomous and self-referential, and because of that, law, which constitutes its own self-referential and autonomous system, is not sufficiently “structurally coupled” with those other systems. What emerges is a so-called regulatory trilemma, in which regulatory interventions are either “irrelevant or produce disintegrating effects on the social area of life or else disintegrating effects on regulatory law itself.” In this conception, law is insufficient to resolve conflicts within those systems, but also has the potential to “destroy valued patterns of social life” within them. For, according to Teubner, these systems while cognitively open, are normatively closed, meaning that while they are capable of responding to external stimuli of different facts and circumstances, they are only able to conceptualize and process outside norms within their own language and terms. For Teubner, the state has no monopoly on law, and instead there exist a pluralized set of legal orders within society that function mostly independently of the state. Society, therefore, is understood to be a self-regulating system of communication, within which law is just one of those systems.

In response, Teubner and others have developed and promoted the notion of “reflexive law,” which conceptualizes law primarily as a mechanism of regulating the self-regulating processes of other social spheres. This notion is particularly resonant for some in collective bargaining and in labor law, which is premised on regulating the self-regulating processes of the bargaining parties. For Teubner and other proponents, reflexive law’s

64 Gunther Teubner, Substantive and Reflexive Elements in Modern Law, 17 L. & Soc’y Rev. 239 (1983); GUNTER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (1993); _
67 Teubner, JURIDIFICATION, at 21.
68 Teubner, Substantive and Reflexive Elements in Modern Law, at 274; _
69 Teubner, LAW AS AN AUTOPOEITIC SYSTEM, at 111.
70 See Rogowski, _
71 Teubner, Substantive and Reflexive Elements in Modern Law and Society, at 276.
“principles promote the internal self-regulatory capacities of other social fields (or subsystems) with which it interacts. Unlike the regulatory model, it is not self-destructive but self-sustaining.”

For some scholars, such as Larry Catá Backer, private law systems, such as TPLR, constitute complete systems of law. In his conception, the primary actors in this system are:

(i) multinational corporations as legislator and enforcer of norms, (ii) civil society organization (principally human rights NGOs) as system monitors and intermediaries, (iii) the media (as the vehicle through which monitoring efforts are legitimated and communicated to consumers, investors, the financial community and government), (iv) consumers, investors and the financial markets as the target audience for all this activity (acting as a proxy for a democratic publicity in a political community); and (v) national and international political communities providing baseline standards from which multinationals and civil society elements derive their more focused rules of conduct.

For Catá Backer, Private law systems “mimic the forms of public law in remarkable ways,” and in doing so relegates the state to “a role as a marginal player – passive and reactive at best, a tool of powerful local forces at worst.” But while Catá Backer makes the argument that private regulatory regimes, constitutes an autonomous field, albeit one in communication with public law, and obviously expresses some concern about the possible power of corporations, he does not make any strong normative argument about the broader implications for the rise of private regulation. He also notes that the private system of law is in communication with the private system, but his notion of communication only runs in one direction – the transfer of public norms into private systems. There is no discussion of a reverse flow, or any normative discussion of what the implications of this are.

72 Lobel, at 365.
74 Id. 1751.
75 Catá Backer, at 1762.
76 See infra, at _
Some international labor scholars have found a basis in Teubner’s theories of reflexivity and Luhmann’s theories of autopoeisis, to argue for transnational labor regulatory approaches that seek to force MNCs to reveal information that will be useful to actors in civil society, thus releasing a set of “self-regulatory” processes through the supply chain. David Doorey, for example, has argued for national laws that force MNCs to release the names of their supplier factories, in order to enable civil society to mobilize and exert non-state regulatory pressure on the MNCs and their supplier factories.77

Yet reflexive law theories are obviously intrinsically skeptical of the law in its traditional form, and of the state in its ability to exercise control and exercise sufficient authority. And while Doorey does not explicitly reject state building as a goal, or seek to completely give up on developing states as a source of regulatory authority, his emphasis on regulation in home states to facilitate processes of TPLR clearly de-emphasizes domestic public governance as a priority.

2. Responsive Regulation

A second branch of thought, that is centered around the writings of regulatory law scholar John Braithwaite, has attempted to re-conceptualize the role of traditional law and of regulation, arguing along with Ian Ayres in a seminal book, for an approach to regulation that they call “Responsive Regulation.”78 In this theory, policy makers set policy goals but let the regulated craft solutions to achieving them. Regulators are to be “responsive” to the degree to which actors are effectively regulating themselves. Thus, at a base level, there should be deliberations by the regulated about policy matters. If they fail to engage in debate and engage in repair and reform, they are subject to increasing scrutiny and punishment by the state.

For Braithwaite, Responsive Regulation also reflects a particular democratic form. Rather than a hierarchical conception of democracy “restorative and responsive regulatory


78 JOHN BRAITHWAITE AND IAN AYRES, RESPONSIVE REGULATION (1992)
theory has evolved into a deliberative, circular theory of democratic accountability, as opposed to a hierarchical theory where the ultimate guardians of the guardians are part of the state.”

Rather, Braithwaite’s notion of democratic accountability is more grounded in deliberative democratic notions. Communication and discursive acts are the key drivers, and where accountability fails, the circles can widen out to bring in other actors who can provide accountability.

An important idea underlying the theory is that the more “dialogic” engagement with the regulation that exists, the more that actors will come to accept the legitimacy of “coercion.” This is particularly important in the context of developing countries, and in labor regulation, where the legitimacy of the state and of law is for more tenuous.

Braithwaite, however, recognizes that Responsive Regulation and its reliance on the “stick” is potentially ill-suited to the contexts of developing countries, which have poorly functioning regulatory states, and often poorly developed civil societies, and that are thus unable to actualize the punishment threat that underlies the first level dialogic processes. How to address this? Braithwaite makes, in fact, a rather radical argument. He writes that,

I have become persuaded that we live in an era of networked governance. An implication of this is that developing countries might jump over their regulatory state era and move straight to the regulatory society era of networked governance. Developing states might therefore cope with their capacity problem for making responsive regulation work by escalating less in terms of state intervention and more in terms of escalating state networking with non-state regulators.

Braithwaite’s idea, and perhaps ideal, is that where there is a regulatory matter that the state cannot adequately address, actors will network with governments and private actors with similar goals to achieve the policy objective. Using an example from labor law and labor relations, he suggests that “When fundamental labor rights are being crushed, the local trade union can escalate up to networked support from a state ministry of labor, the International Confederation of Free Trade Unions, the labor attaché at the US Embassy, the Campaign

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79 John Braithwaite, Responsive Regulation and Developing Countries, 34 WORLD DEVELOPMENT 884, 885 (2006).
80 Id.
81 Braithwaite, at 887.
for Labor Rights, the Clean Clothes Campaign, or Oxfam International”.82 Likewise, Braithwaite suggests, if an employer is subject to unreasonable demands from a trade union, it can network with other pro-business entities to counter those unreasonable demands.83

A second solution that Braithwaite proposes in addition to using NGOs and networks as state substitutes, is to rely on *qui tam* actions, whereby “whistleblowers” would be incentivized to bring legal actions against violators by receiving a portion of the court imposed penalty. So, for example, according to Braithwaite if a trade union sued a company for non-payment of wages, it would collect 30% of the payment. Unions or other groups could network with lawyers around the world to also bring suits in foreign jurisdictions, “thereby obviating the need to rely on courts in the poor country.”84

There are at least several serious problems with this theory, however, as applied to developing countries. First, both theories largely aim to do an “end-run” around public regulatory institutions and do little to actively develop them. This is truly a radical proposal to claim that developing countries can simply skip the development of the regulatory state. Indeed, there is no normative value given to the presence of a strong regulatory state – its absence is assumed, and the solution is to find an alternative that can substitute for it.

Second, Descriptively, however, there is no assurance that NGOs and civil society, particularly labor organizations, are sufficiently developed and ubiquitous to adequately substitute for the state. Reliance on private parties as regulators and enforcers, particularly in labor context, is contingent upon there being an adequate number of interested parties. As some scholars have shown, however, the level of international interest in labor rights issues is highly contingent on the kind of issue that it is.85 Freedom of association, for example, certainly receives far less attention than does child labor.

Third, as Braithwaite concedes, the *qui tam* theory depends on judicial systems in developing countries being functional and operative – a strong assumption to say the least. He briefly alludes to the fact that if the courts are dysfunctional, then creating some system of transparency could empower private actors, but this is not fleshed out, and only reinforces the problem articulated in the first point.

Fourth, as Braithwaite concedes, the responsiveness framework works best in states

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82 Braithwaite, at 893
83 Braithwaite, at 893.
84 Braithwaite, at 896.
85 *Gay Seidman, Beyond the Boycott* (2007)
that have strong markets, strong civil society, and strong states. But he argues that even where that does not exists, democracy is best achieved in the context of building up circles of deliberation, whether it be through organizations that we join, companies that engage in CSR to address consumer social demands, or when workers engage in deliberation with their employers. But this vision of democracy and democracy building, while partially correct, once again takes a strong non-statist, deliberative approach to democracy whereby the essence of democracy lies in circles of deliberation not just at the national, but also at the international level. To completely de-center the state from democracy, however, elides the fact that democracy, particularly industrial democracy, has been and will likely remain a largely domestic, bounded matter. Labor rights are best enforced in the context of democratically responsive states that have a dynamic regulatory apparatus that can ensure that workers’ rights to freedom of association and collective bargaining is guaranteed, and that basic workplace conditions are under surveillance.

Fifth, Braithwaite uses the specific example of unions mobilizing to represent the interests of its members. Unions are assumed to be representative instructions that represent workers interests. But in many developing countries, unions are either unrepresentative of their members, weak, and/or represent an extremely small segment of the workforce. He implicitly assumes a far greater degree of representation than actually exists.

Finally, Braithwaite’s theory lacks a sufficient conception of power. Braithwaite’s theory suggests that there are enough organizations in global civil society that have shared interests with each other, and with other governments and private actors, that they can network sufficiently to address power differentials in the local political environments of developing countries. But particularly in developing countries, this is not the case. There are no labor organizations that can come close to matching the power of organized business interests, for example. Moreover, it is a strong assumption that trade unions have a large degree of shared interests with human rights and development organizations. Often their goals and interest are quite divergent. The level of interconnectedness between industrialists and the state is so high, on the other hand, that it can be almost indistinguishable. Accordingly, Braithwaite’s adaption of responsive regulation to the context of developing countries, particularly to the labor context, is wanting.

86 Braithwaite, at 886.
3. New Governance: Ratcheting and Rolling

A third branch of legal thought in the governance school is what is often termed “New Governance.” New Governance is a loose term referring to a broad body of research that has been said to mark a move “away from the familiar mode of command and control, fixed rule regulation towards, multi-level, collaborative, multi-tier, adaptive, problem solving.” Others have defined it to entail “new processes emerging which range from informal consultation to highly formalized systems that seek to affect behavior but differ on many ways from traditional command and control regulation. These processes…may encourage experimentation; employ stakeholder participation to devise solutions; rely on broad framework agreements, flexible norms and revisable standards; and use benchmarks, indicators and peer review to ensure accountability.”

The strains of New Governance scholarship are diverse, but one variety has been particularly influential, and has spawned at least one prominent proposal on how to address transnational labor issues. The primary thinker behind it is Charles Sabel, who argues that contemporary, post-new deal regulatory institutions are ill suited to achieve optimal regulatory outcomes. This is because they are unresponsive to the needs of the regulated and unable to engage in creative solutions to key regulatory problems. Instead, he argues for forms of democratic experimentation through structures such as “directly deliberative polyarchy” or “rolling rules regulation” in which multiple, decentralized groups of interested parties deliberate over desired regulatory outcomes. Information and solutions drawn from direct experience and are pooled and shared. Best practices are determined, and new regulatory solutions are arrived at through deliberation. This, according to its proponents, sets the foundation for new forms of democracy, decentralized from the traditional agent model of democratic representation.

Sabel’s theories are also notable in part because of the particular interest that Sabel

88 Bradley Karkainnean, New governance in legal thought and in the world: some splitting a antidote to overzealous lumping, MINN L. REV at 473.
89 Louise Trubek & David Trubek, New Governance & Legal Regulation : Complentarity, Rivalry, and Transformation,
COLUM. J. EUR. L. 539, 541 (2007)
90 See Karkainnean, _
has taken in labor issues, particularly internationally and in international supply chains. His most notable scholarship on the issue, co-authored with Archon Fung and Dara O’Rourke, is entitled Ratcheting Labor Standards. Sabel et al argue in this article, and its various iterations, for a system of labor regulation in countries with failed regulatory regimes. The authors propose a ratcheting approach, arguing for an elaborate system of private monitoring of firms, information sharing, and ranking. Monitors would be hired by individual companies to monitor facilities and rank those facilities based on performance. A central monitoring body (perhaps, they concede, an entity like the ILO) would then monitor those monitoring agencies and rank them. This would, in turn, be coordinated by a central monitoring authority, which would lead to an upward movement in standards. Finally, the authors suggest that the primary role for public law would be to require participation in the system and to sanction firms that do not participate.

RLS has been subject to a number of critiques by labor scholars for being out of sync and an inappropriate application of generalized regulatory theory to the specialized field of labor law. In particular, RLS puts forward a system of labor regulation that critics fear will relegate workers and unions as passive monitors; and that while purportedly creating a de-centralized system of rule generation, will put rule-making authority into the hands of Western MNCs and consumers.

Indeed, these critiques of RLS in which are prescient of subsequent writing by Sabel, who has argued for the need for a new labor regime that is responsive to the new era of post contractual labor relations. Contractualism, he asserts, both in the forms of pluralist collective bargaining and through more administrative legal regimes (such as France) has defined what he argues is an outmoded mode of labor governance, and as such has been largely replaced in practice by new forms of cooperative workplace arrangements.

The old contractualist regime of “fixed rule” command and control regulation and collective bargaining, Sabel argues, were embedded in the turn of the century, industrial revolution period of production where the model was of “sweating”, whereby extraction of

91 For salient critiques, see e.g., Adelle Blackett, Codes of Corporate Conduct and the Labour Regulatory State in Developing Countries, in HARD CHOICES, SOFT LAW (MICHAEL J. TREBILCOCK & KIRTON, EDs, 2004), at 121; Jill Murray, The Sound of One Hand Clapping, AUST. J. LAB. L. at 63.

maximal productivity at lowest labor cost was intrinsic to the model. The new model of production, however, is not grounded in such a model, but rather one of flexibility, speed, and adaptation. The Contractualism model, he suggests, also describes transnational private regulatory regimes that rely on fixed rules via codes of conduct, and monitoring thereof to ensure compliance. These regimes, he declares, have largely failed to achieve what they set out to do, which is to improve labor conditions in any sustainable way. He largely attributes this to the fixed rule nature of codes and the impossibility of adequately adapting workplace rules to the realities of global production patterns and practices.

In its stead, Sabel advocates for a new labor law regime that is complementary to the new forms of co-operation and co-development that requires continuous adjustment rather than periodic adjustment and renegotiation of rules.\(^94\) He thus proposes a collaborative two-tiered system of information pooling and sharing. At the first level, groups of workers would collaborate and deliberate over how to solve workplace labor problems such as why there is necessity for intense overtime, and how pay systems can reflect fair distribution of the gains from productivity innovation. These first tier solutions would be pooled and shared across plants and industries by a second level institution in order to create benchmarks for minimal standards and improvement rates. That second level institution would then pool information generated locally and 1) compare different local solutions to given labor problems in order to establish benchmarks based on best practices; and 2) engage in diagnostic reviews of the local level institutions that are doing root-cause analysis of problems. This would also inform the establishment of benchmarks, although it is unclear if these are simply used for deliberation and arguments by work groups but also to evaluate the success of the first level problem solving techniques.\(^95\)

One the one hand, Sabel’s proposals are with the observations of Locke et al who have shown that compliance model private monitoring regimes have been ineffective in themselves in improving workplace problems. However, Sabel’s proposed new labor law regime has a number of problems both in the context of the broader objectives of labor regulation, and that are specific to the context of developing countries. First, the replacement of collective bargaining and traditional structures of worker representation through unions through workplace teams is highly controversial. One serious critique of

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\(^94\) Sabel, at 270.

\(^95\) Sabel, at 271.
workplace team systems is that, barring highly specified safeguards, they risk becoming vehicles for employer domination in the context of workplaces with highly asymmetric power relationships. This is perhaps even more acute in developing countries, and especially in low skill industries, where power asymmetries between employers (often male and foreign) and employees (often young, female, and poorly educated) are even more pronounced.

Second, Sabel’s proposed labor regime is not only post contractual, but also indeed arguably post-statist – at least post-administrative statist. Murray and Blackett have both suggested that RLS radically rethink the role of the state in labor governance. Indeed, Sabel and his co-authors’ approach to labor regulation, articulated both through RLS and through Sabel’s rolling rule labor regulatory theory, seemingly relegates the state to be at most an information compiler, and perhaps not even that, suggesting at one point that an NGO such as the Fair Labor Association could serve the role of second-tier information pooler.

Third, Sabel’s theory assumes that many problems in the workplace can be solved using managerialist, productivity oriented techniques. But to assume that the key economic and sociological dynamics underlying labor law have evolved in the new era of “lean production” is exaggerated at best, and pernicious at worst. Relationships between employer and employees remain conflict ridden and are imbued with power asymmetries that can perhaps only be remedied through the intervention of centralized legal regime that is democratically responsive and not just market responsive. As Mark Barenberg has argued, there needs to be carefully articulated rules and direction given to any regime of workplace team collaboration to ensure that those inequalities are properly remedied, and that one of the primary objectives of industrial regulation – industrial democracy – is realized.

Finally, Rolling Rule Labor Regulation and RLS, in their desire to be rid of centralized fixed rules, provide for almost no conception or place for rights. In its stead,

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96 Mark Barenberg, Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production, 94 COLUM. L. REV 753, 904 (1994) (“The very features of team-based organization that promise to enhance efficiency and self-governance also generate new potential for management illegitimately to coerce workers, distort their communication, and manipulate their subjective experience.”)

97 Sabel, at 271-2.

98 Barenberg, at 896. Barenberg argues that in the context of U.S. labor law, that the “government’s primary role should be to facilitate the decentralized, private ordering of the workplace – particular, to safeguard workers’ free communication and choice over modes of workplace governance. The second is that the legal regime should concurrently encourage, through instrumental incentives and normative symbols, the emergence of democratic, labor empowering, forms of workplace governance – both to serve the ideals of undominated self-governance and to enhance consultative trust and collaboration in productive efficiency.” Barenberg, at 947.
deliberation and collaboration, benchmarking and transparency are understood to provide the primary vehicles through which workers’ interests are realized and protected. They are post-conflict and post-rights, post-state, and technocratic. Workplace regulation and industrial relations are understood to be a matter of “getting it right” through deliberation, benchmarking, and mutual learning. Surely, some of the challenges facing workers in developing countries, particularly those in low-skill industries, are a matter of getting it right. But surely many, if not most, are a function of the deeply entrenched relationships of power, articulated through class, gender, ethnicity, and other cleavages in society that require some kind of rights discourse, and concrete rights protections with the backing of an effective state apparatus and rule of law to ensure their respect and enforcement.

C. Critique

Contemporary Regulatory and political science theory has described and argued for a transfer of authority away from the state to non-state actors, normative plurality, and decentralization from command and control regulatory methodologies towards more disaggregated and experimentalist methodologies. An important meta-critique that emerges from these theories, however, is that most of its scholarship investigates and discusses regulatory phenomenon that take place in developed countries. There is perhaps good reason for this. Governance theories or regulation have particular intellectual and policy resonance in the context of highly juridified and active legal systems in developed regulatory jurisdictions, such as the United States or the EU.

But in developing countries, the role of the administrative state is quite different, and requires a different analysis. There, the primary issue is not one of over-juridification or of unresponsive regulation, but rather one of failure of the rule of law, and of under-developed regulatory regimes that have far too little effect, thus creating a defective labor regulatory environment that fails to achieve its objectives. These systems face serious challenges in both

99 In the U.S., a range of scholarship has looked at regulatory initiatives in such areas as health care, child welfare, environmental protection, and worker health and safety to name but a few.

100 At least one scholar has recognized the difficulty of adopting these theories to the developing country context, and has attempted to modify his own approach to the developing country context by using transnational networks. See John Braithwaite, Responsive Regulation and Developing Economies, 34 WORLD DEV’T 884 (2006).
generating rules and norms and, even more important in the realm of labor regulation, in enforcing those rules and norms. As we have examined earlier, labor ministries are often the most neglected ministries, and face serious staffing and resource shortages, creating an environment in which corruption and non-action are rampant. Employers thus operate in an environment often without any background context of a state with the power to punish or enforce its domestic labor law, even if that law is fully compliant with international standards.

Some scholars have suggested, however, that the governance regulatory models and theories could be potentially well suited to developing countries where there is regulatory failure or limited state resources, or “circumstances in which the gap between the aspired norm and the existing reality is so large that hard regulatory provisions are meaningless.”

Soft law mechanisms, therefore, provide flexible mechanisms of implementing social regulation that are more adaptive to local circumstances.

A second important critique of these theories, as others have pointed out in particular examples, is that they are not adequately addressed to the particular goals and normative values of labor law, including weak conceptions of rights. Instead of furthering, for example, industrial democracy, redistribution, or freedom of association, they are instead agnostic about labor law’s broader goals, prioritizing instead broader deliberative processes and technocratic solutions to labor regulation.

Rather than completely bypassing, or skipping over the development of the regulatory state, as some governance theories might suggest, Transnational Labor Regulation requires an approach to regulation that is grounded in the normative goals of labor and that prioritizes the development of state labor governance capacity – the subject to which we turn next.

101 Lobel, at 390.
102 A growing body of literature has attempted to address the regulatory deficits present in developing countries, and in particular to analyze the effectiveness of “self-regulation” in developing contexts. See e.g., Dana Brown and Ngaire Woods, Making Self Regulation More Effective in Developing Countries (2007)
III. Strengthening Public Regulatory Capacity via Private Regulatory Regimes – Towards an Integrative Approach

Up until now, we have seen that the evolution of transnational private regulatory regimes in developing countries has been a response to failed domestic regulatory capacity in those states. Market pressures on MNCs, and mobilized civil society have, created forces within society to develop varieties of private regulatory regimes that seek to substitute or supplement what the state is unable to provide – adequate enforcement of domestic and international labor law. This development has coincided with the rise of several prominent schools of legal and regulatory theory that seek to move away from command and control regulation and from state-centric solutions to regulatory problems. These theories have been forged, however, in the context of developed countries, and often usually in regulatory areas that are materially different than labor regulation. While they might be helpful in addressing problems in that particular regulatory context, they are potentially less helpful in the context of transnational labor regulation, where a fundamental problem is the near non-existence of a regulatory state, or one where there exists high levels of regulatory and administrative dysfunction. Nevertheless, various scholars have drawn on these theories to construct solutions to transnational labor regulatory problems. Not surprisingly, these solutions have been designed to work around poor regulatory capacity rather than build it. Building on the premise that an effective public regulatory regime is an important element of an optimal industrial relations and labor regulatory design, in this section I ask how private regulatory regimes ought to be conceptualized such that they can further the state building goals of TPLR.

A. The Relationship Between Public and Private labor regulatory Regimes

To begin, we need to first understand the ways in which public and private regulatory regimes interact in practice. Research on the relationship between private and public labor regulatory regimes is a nascent field, and as such there remains much to be
examined. In this section I begin to sketch out some existing dynamics from existing research, and theorize some other dynamics that are in need of further study. I also pose a set of questions that will form the basis of future empirical study by myself, and potentially by others.

**Norm Flows**

First, there some obvious one way flow relationships from public regimes to private regulatory regimes. Both in the labor and environmental arenas, codes are often based on applicable domestic state law,103 and private codes of conduct often reference both domestic and international labor law as the regulatory floor upon which suppliers must operate.104 Is it possible, however, that there might be substantive norms generated in private regulatory regimes that could be absorbed into state legislation?

**Catalysts**

Second, while private and public regimes might operate fairly independently, states are sometimes the impetus behind the creation of private regulatory regimes, thus creating a public catalyst for private regulation.105 One often cited example of this phenomenon is the promotion of the Fair Labor Association by the U.S. government in 1996. In other examples, Jordan, Cambodia, and Vietnam have promoted the creation of non-state monitoring regimes to supplement their weak domestic labor regimes.

But can private regulation be a catalyst for improved public regulation? There have been examples of MNCs, for example, lobbying for public regulatory strengthening in the countries of their suppliers. One such example of this phenomenon occurred, according to the garment manufacturer, Levi-Strauss, when representatives of the company actively worked with the Mauritian government, advocating for reforms in the labor law and with US

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104 Ivanka Mamic, *Implementing Codes of Conduct: How Businesses Manage Social Performance in Global Supply Chains* 48-9 (2004); Susan Hayter, _

105 See e.g. Meidinger, _; Tim Bartley, _ The United States government, for example was the impetus behind the creation of the Fair Labor Association.
government officials to help press for labor law reform. Levi-Strauss also claims that it engaged in a similar process in Guatemala in 2001 in order to ensure that Guatemala would receive beneficiary status under the U.S. Caribbean Basin Trade Promotion Act. Levi Strauss claims that it actively engaged with the Guatemalan labor ministry, and encouraged its suppliers to lobby the government for improved labor laws, which it subsequently did.106

Implicit Complementarity

Other emerging research, however, has begun to examine more closely the interactions that occur between private and public regulation in a developing countries, finding that rather than displacing public systems of labor governance, private systems of regulation in fact can complement and even potentially reinforce public systems. Mathew Amengual has found, in a case study of a MNC sourcing from the Dominican Republic, that rather than displacing state regulation, state and private regulation worked in a complementary manner, benefiting from their comparative advantages.107 This happened in several ways. First, there was an increase in demand for state inspection services by workers and employers who were required by private regulators to provide certain documents, such as signed contracts, or certain state certificates.108 Second, Amengual found that private and public regulatory institutions worked in complementary ways on issues within their comparative advantage, with the state focusing on freedom of association and individual conflicts, and private regulators focusing on health and safety and overtime issues.109 Third, Amengual found some, albeit limited, evidence of the creation of a “culture of compliance” in the garment sector due to the presence of private regulatory regimes. Accordingly, factory owners became more “amenable to following state law as well as private codes.”110

This suggests not just complementarity, but in fact a more proactive strengthening

107 Matthew Amengual, Complementary Labor Regulation, The Uncoordinated Combination of State And Private Regulators in the Dominican Republic (paper presented at Annual Meeting of the Society for the Advancement of Socio-Economics, San Jose, Costa Rica, July 2008)
108 Amengual, at 23.
109 Amengual also found that the high levels of private regulation in the free trade zones freed up public inspectors from spending time there. Id. at 25.
110 Id. at 27. This evidence was purely anecdotal however, and gleaned from a single interview. Thus it should be taken as a point of departure for further research.
function of private regulation. Amengual argues that the task of scholars, then, is to conceptualize how private regulatory regimes can “be designed so that the rise of private regulation will more likely result in the strengthening of social protection than in the undermining of what little regulation currently exists”. One way to think about what Amengual is suggesting is to achieve a form of “explicit complementarity,” or what I would call a more integrative approach to transnational private labor regulation. In such an approach, actors self-consciously seek to design and implement non-state regimes that examine where weaknesses in state administration lie, and to create regimes that actively seek to retain a space for, and where possible boost the ability of the state to effectuate an effective public labor regulatory regime. The next two bodies of research adopt more explicit approaches.

_Labor Citizenship and the State in Transnational Networks_

The sociologist Gay Seidman, in an examination of the effectiveness of transnational labor activist networks concludes that some of the most successful transnational labor strategies have been focused on improving democratic labor governance in countries where labor abuses are taking place. Using COVERCO, the well known monitoring organization in Guatemala, as a case study, Seidman claims that COVERCO’s focus on monitoring was understood not as “an alternative to oversight by state institutions but rather as a key part of trying to strengthen and democratize them.” She claims that this focus allowed COVERCO to shift the focus of attention away from MNCs, and to local specific Seidman, accordingly, normatively argues for an approach to transnational labor activism that aims to “expand citizenship.” Labor citizenship, in her conception, is historically local and national. Thus, activists should “focus their efforts on shoring up weak states, reinforcing national institutions rather than trying to replace with even weaker NGOs.” She writes, “instead of focusing on employers alone, [Transnational Advocates] should focus on strengthening institutions of citizenship, and increase power of workers voice, and channels of articulation

111 Amengual, at 32.
113 Seidman, at 139.
through collective bargaining."

The question, however, is how to effectively achieve these goals, not only in the context of transnational labor activism, which is the subject of Seidman’s analysis, but of private regulatory regimes more generally. While Seidman describes, for example, an emphasis on training of inspectors by COVERCO, and an ideological commitment to advocating for improved democratic governance, she does not extensively describe how activists, or for that matter other actors in private regulatory regimes, might functionally improve state regulatory performance.

Democratic Monitoring

Labor law scholar Mark Barenberg has provided one example, from the perspective of both scholar and participant, of how such a model might operate in the context of private monitoring organizations. Barenberg draws a distinction between what he calls “managerialist” models of monitoring, and “democratic” models. In managerialist models, which Barenberg considers most private regulatory regimes to be, the governance system is top-down and not designed not to foster worker participation. In Democratic models, worker voice and participation is prioritized, and there is an explicit goal of opening up space for government action. Barenberg argues that one particular organization, the Workers Rights Consortium (WRC), exemplifies the latter. Using several examples of investigations by the WRC as examples, he writes that the WRC seeks to develop an intensive model of private monitoring, but it opposes the displacement of legitimate sovereign authorities and workers’ organizations by private organizations. It therefore seeks to cooperate with and build the capacity of local labour ministries and tribunals, just as it and other private monitors attempt to build the capacity of local NGOs." Unlike managerialist monitors, the WRC assesses workplace grievances in contexts where local workforces are "in motion" - that is where workers are in fact attempting to address factory non-compliance through their own associational activities. The WRC attempts to engage in robust enforcement of labour rights and thereby open political space' for legitimate public involved.

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114 Seidman at 143.
authorities, workers organizations, and other collective actors to engage in long-term, self sustained monitoring.\textsuperscript{115}

\section*{B. Towards an Integrative Approach}

As we have just seen, scholars have begun to conceptualize how, if properly guided and conceptualized, private regulatory regimes might help strengthen, or in some cases complement, public regulatory capacity in developing countries.\textsuperscript{116} My goal is to ask if it is possible to build on the regulatory insights of governance theory, its applications to transnational labor regulation, and to augment and build on them with the insights of some of the research just described in order to craft regulatory solutions and approaches that a) are more relevant to developing countries, and b) that at the same time further the traditional goals of labor law. What is needed therefore is an approach to the new private developments in global labor governance that, rather than leapfrogging over dysfunctional states as some governance theory seeks to do, aims instead to develop state capacity.

I call such an approach an “integrative regulatory approach” to transnational labor governance. While Governance literature approaches regulatory questions in the context of ineffective command and control regulatory approaches and questions the effectiveness of law to regulate various social spheres, an integrative approach as applied to developing countries has a different overall objective – to build the regulatory capacity of states. An integrative approach has several elements. First, private and public regulatory regimes must be seen to operate not independently, but cooperatively. The goal is to achieve systems of effective labor governance, but ones that actively seeks to achieve the traditional objectives of labor law, including industrial democracy and protecting workers rights. Second, an integrative regulatory approach, while acknowledging that new forms of labor regulation have emerged that effectively regulate the workplace, that while private regulation might be

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\item Mark Barenberg, Toward a Democratic Model of Labor Monitoring, in \textit{REGULATING LABOUR IN THE WAKE OF GLOBALISATION: NEW CHALLENGES, NEW INSTITUTIONS} 37, 41 (CYNTHIA ESTLUND AND BRIAN BERCUSSON EDS., 2008).
\item Dara O’Rourke, World Development, at 912 (arguing that an evaluation criteria should be ; Kolben, at 233-4.
\end{enumerate}
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more effective in particular regulatory contexts than public regulation, that these forms are not necessarily equally legitimate or accountable.

Third, Integrative Labor Regulatory Theory seeks to create systems of communication and interaction between public and regulatory regimes with the explicit goal of developing public regulatory regimes where those regimes are excessively weak. On one hand, there are some clear mechanisms of communication between public to private regulatory regimes. Substantive norms clearly flow from public law into private codes. Often, as noted, private codes reflect state generated law in the substantive elements of the code. If, for example, there is a strengthening of the law by the state that is more exigent than the private regime or code, then this will be generally reflected in the private system through reference to domestic law, through an amendment to a relevant code of conduct, or through a modified expectation of the relevant stakeholders. There is, therefore, what I would term a form of “communication” between these two regulatory systems, primarily in the form of national and international law informing the codes and normative constitution of the private regulatory system.

But while this form of communication between public and private labor regulatory systems is fairly well established, what about in the other direction? Is there, can there, and should there be a reciprocal or equivalent “communication” from private to public regulatory systems? What effects do private regulatory systems have on public regimes? Is there a way to coordinate private regulatory processes to be directed towards the goal of strengthened public regulatory capacity? How can private regulatory regimes be designed and regulated to achieve these normative objectives?

The idea of communication and interaction between private and public actors in administrative theory has been examined in other regulatory contexts, but is an under-examined area of research in TLR. Jody Freeman, for example in her seminal studies of U.S. administrative law, has argued that U.S. administrative law should be understood as a collaborative “process of negotiation” between private and public actors, in which private authority acts “symbiotically with public authority,” creating a relationship of interdependence in the design and enforcement of an administrative legal regime. Importantly, she argues, “the relationship between public and private actors in administrative

117 See supra 103 and accompanying text.
law cannot properly be understood in zero sum terms, as if augmenting one necessarily depletes the other.”

An integrative approach to TLR attempts to at once retain the fluidity and negotiation between the private and public and to acknowledge the important role of private actors and non-state labor regulation regimes, but at the same time it attempts to shift the momentum. While the current conceptualization of governance suggests a de-centering and a movement away from the state, I seek to recapture the importance of the state in industrial relations in developing countries. It therefore looks specifically at how private regulatory regimes might serve to not just *statically complement*, but *dynamically strengthen* public regulatory capacity.

*Some Descriptive Questions*

To develop this concept, I also propose some descriptive questions about the interaction between private and public regimes. Building on Amengual’s research, might there be for example more implicit ways in which private regimes create an environment that allows for, or even encourages, greater state regulation. This might occur, for example, through the creation of what Amengual and Seidman and others term a “culture of compliance.” Does, for example, the presence of a private regulatory regime with effective or semi-effective remedies create a culture of acceptance of regulation among factory owners who, often, are deeply engrained in a culture of property rights and non-regulation that makes them resistant to state regulation?

On the other hand, does private regulation potentially undermine the legitimacy of state regulation by occupying the regulatory field? Does the presence of private regulation create expectations among workers for an effective regulatory mechanism? Do regulatory regimes that effectively enforce freedom of association, and thus increase union presence, create effective pressures on the state for improved labor law enforcement and improved standards? Is there competition generated between state and private regulatory regimes through, perhaps, the fear of being made redundant, that creates incentives for government regulators to improve their enforcement?

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To examine some of these questions and to develop concrete mechanisms of how non-state labor governance systems can help improve public governance, I will be looking at the Better Work program (BW) as a case study. BW is a joint initiative of the ILO and IFC, and is an outgrowth of a unique experiment in Cambodia that developed out of a trade agreement between the U.S. and Cambodia. The U.S./Cambodia Bilateral Textile Trade Agreement contained a provision that ensured quota incentives for Cambodia if its garments industry was found to be in substantial compliance with Cambodian law and international labor standards. The determination would be made through the creation of a program to assess conditions in Cambodia’s garment factories. It was agreed that the ILO would develop and run the monitoring program. The program was based on tripartite governance between governments, employers, and unions (although this system was weak and was dominated by the ILO and U.S. government). The Cambodia program, however, was fundamentally premised on the use of tools that are more characteristic of private regulatory regimes than public regulatory systems i.e. factory inspections by ILO monitors, public information dissemination, and remediation. This program has transitioned into its own organization called as Better Factories Cambodia, and is becoming an independent entity without ILO involvement.

BW uses a similar methodology to Better Factories Cambodia, and is establishing pilot programs in Jordan, Vietnam, and Lesotho. The basic mechanism will be the voluntary participation of factories in each country, which has been one source of criticism of the model. Participating factories agree to be subject to a monitoring regime in which BW monitors, using a code derived from domestic and international labor law, will inspect factories and using an information management system called Supply Chain Tracking of Assessments and Remediation (STAR) will create a general database that will be accessible to buyers and the public.

Conclusion

This draft paper has sought to begin to develop an integrative theory of transnational labor regulation. My goal is to at once accept and even embrace the development of non-state forms of labor governance as necessary but limited responses to the gap in domestic
labor governance. But it is also possible to understand these non-state systems as serving a
more dynamic role in which they serve to build state regulatory capacity. My goal here is not
to prescribe or envision what a might be an ideal, universal system of labor regulation either
at the domestic or transnational level. Instead, I have argued that at the conceptual level,
governance accounts are not necessarily sufficient are applicable in the developing world
context, particularly in the realm of labor law; and at the practical level private and public
regulatory regimes operate largely as separate uncoordinated systems that do not function to
boost state capacity.