without ever pausing a second in order to try to justify his “supranational” preference or explain, without merely alluding to the “métode communautaire,” or succumbing to the circular attractiveness of the sui generis mantras (at 9)—disproved so masterfully by Schütze—what a properly functioning Union would be, according to him. Multiple allusions to the “projets et espoirs des Pères de l’Europe” (at 8, 27) seem to represent little more than a refusal to look for a proper legal-theoretical, if not moral foundation of the European integration project—a fault of many other books, unfortunately—as brilliantly exposed by Williams in his last work.

The book Soldatos wrote, constructed around vague but omnipresent presumptions of the author which are not explained anywhere, is written as if the field were an intellectual desert, feeling no need to engage with peers and, consequently, merely presenting well known facts hanging in the air with little proper theoretical explanations or scholarly analysis, embracing an approach antithetical to the idea of academic dialogue.

In a way, the book is a perfect illustration of one of the main deficiencies of the European integration project as such: a comprehensive idea of justice to back it up and to inform its development is simply nowhere to be found.

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1 For another review, see Frederik von Harbou, 3 Kritische Justiz 357 (2011).

5 ROBERT SCHÜTZE, FROM DUAL TO COOPERATIVE FEDERALISM (2009).


I.

The book under review is volume 11 in the series Internationale Studien zur Privatrechtstheorie [International Studies in Private Law Theory] which may be the most exclusive, and the most underestimated, book series on the globalization of law. Established in 2000, the series has published no more than one book per year, on average—all of them so far in German, although the editorial committee is set up by international stars of the field. As a consequence, we find gem after gem, starting with the very first three books—Peer Zum-Bansen’s brilliant study on the transformation of the welfare state under conditions of globalization, Dan Wielch’s functional analysis of liberal democratic economic law as a guarantor of liberty, and Marc Amstutz’s theory.

of evolutionary economic law (by far the best analysis of legal evolution that I know of).6

Some may think private law theory to be uninteresting to scholars of international law and global constitutionalism. They would benefit from a closer look. The alleged breakdown of the public–private distinction has not only opened the eyes of public lawyers for the role of individuals and of private agreements; it has also spurred a revolution in private law thinking which has moved beyond the insight that private law is also informed by public values. More recently, private law theory has begun to focus on private regimes beyond the state and the question whether such regimes need to establish their own constitutions,7 whether they can borrow constitutions from the state,8 or whether they are a phenomenon of a new neoliberal global constitution that aims at keeping economy and politics strictly separate.9

Moritz Renner’s book, grown out of his doctoral thesis, demonstrates this link between private law theory and global constitutionalism nicely—and adds yet another dimension that is frequently undervalued in discussions of constitutionalism and public international law: that of private international law.10 This is nothing less than a fabulous book. It bridges, almost effortlessly, legal theory, legal doctrine, and legal empirics. Its use of literature is extensive and always to the point, and the analysis of hundreds of arbitral awards most impressive. As a consequence, we find an argument that is both grounded deeply in the extensive literature on its topic and highly original. The book is well written and structured, and its author masters his theme and the literature in it with stupendous maturity and confidence. Renner’s book should become a standard reference, and it is to be hoped that an English translation will be available soon.11

II.

The book’s topic—mandatory transnational law—is a theme of both private international law and legal theory. Mandatory rules are of course a common feature of domestic law—they are those rules that parties cannot deviate from by contractual agreement. Beyond the state, the treatment of such rules become tricky. It is by now universally accepted that parties can choose the law that applies to their contract—and thereby opt out of the law that would apply without such a choice, according to private international law. Importantly, such choice enables them, at least in principle, to opt out of even the mandatory rules of a deselected law. This ability to opt out of mandatory rules through party autonomy is not without limits. Some rules remain applicable regardless of the parties’ choice—we speak of so-called internationally mandatory rules which remain applicable under private international law. But private international law itself emerges from

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7 Günther Teubner, Constitutional Fragments—Societal Constitutionalism and Globalization (2012).
domestic law, so the parties sometimes can avoid even these constraints if they opt out of the judicial system of state courts altogether and submit their litigation to private arbitration. A core doctrinal question, then, is whether arbitral tribunals are required to apply such mandatory rules and thus limit the parties’ freedom of contract, even though the arbitrators’ mandate itself rests on party designation.12

If that debate in private international law and the law of arbitration is generally insufficiently jurisprudential,13 a related debate in legal theory pays too little attention to doctrine, in particular to private international law. The legal theory debate concerns the question of whether international arbitration is turning into its own autonomous legal regime.14 If this is the case,15 the question arises whether this autonomous regime must establish its own constitutional (and thus mandatory?) norms, in order to achieve both stability and legitimacy.16

Renner’s starting point is that these two debates take insufficient notice of each other (at 21–22). Not only is the private international law discussion insufficiently theoretical, while the theoretical discussion is insufficiently doctrinal; the solutions offered by both are quite different. In private international law, the main question concerns the applicability of domestic mandatory rules; the development of a true transnational ordre public is only rarely discussed. In legal theory, by contrast, national rules are almost altogether ignored; the whole focus is on constitutionalization of transnational law. In private international law, the solution lies in the development of private international law rules that designate the applicable law. In legal theory, the solution lies in the establishment of an internal hierarchy of rules, with a constitution as overarching law.

III.

Renner’s first achievement is to bring these two debates together. The first part of the book already combines doctrine and theory, by demonstrating how the distinction between mandatory and non-mandatory rules reflects, within private law, the distinction between state and society, or between politics and economy. He then discusses the treatment of mandatory rules in private international law, in particular as “internationally mandatory rules” as defined in Article 9(1) Rome II Regulation17 and as ordre public (while ignoring, unfortunately, other restrictions of party autonomy), and how their enforcement can be undermined through forum shopping and through regulatory competition. Finally, he outlines how the tension between private autonomy and mandatory law plays out in international arbitration.

International arbitration is then addressed more specifically in the second part of the

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12 Most recently, see Mandatory Rules in International Arbitration (George A. Bermann & Loukas Mistelis eds., 2011).
13 For an exception, see Emmanuel Garello, Legal Theory of International Arbitration 114–134 (2010).
15 I have doubts and believe instead that international commercial arbitration is an amalgam of non-state and state laws and institutions. See Ralf Michaels, The True Lex Mercatoria: Law Beyond the State, 14 Ind. J. Global Legal Stud. 447 (2007); also see Ralf Michaels, Rollen und Rollenverständnisse im transnationalen Privatrecht, 45 Berichte der Deutschen Gesellschaft für Völkerrecht 175 (2012); English version: Roles and Role Perceptions in International Commercial Arbitration (forthcoming); Jürgen Basedow, The State’s Private Law and the Economy—Commercial Law as an Analagam of Public and Private Rule-Making, in Beyond the State—Rethinking Private Law 281 (Nils Jansen & Ralf Michaels eds., 2008), also in 56 Am. J. Comp. L. 703 (2008). This is very much in accordance with Renner’s findings.
17 “Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”
book. Renner discusses the treatment of internationally mandatory rules in three different types of arbitration: the private regime of commercial arbitration, the public–private regime of investment arbitration, and finally domain name arbitration by the Internet Corporation of Assigned Names and Numbers (ICANN) (arguably a less important area than the other two). He summarizes the academic debate, but the greatest value of this part lies in the comprehensive empirical analysis of case law in each of these areas. In the end, Renner finds that all three areas, despite their differences have a tendency towards developing transnational mandatory rules, supplemented to some extent by rules of domestic origin.

Part III, finally, turns these findings into a theory, a doctrine, and a method. The theory draws on studies in legal pluralism, systems theory, and transnational law, as they have been developed in particular by Gunther Teubner and his students. But Renner remains critical of these studies (including those of his own supervisor Calliess; see, e.g., at 218) and develops his own account of transnational law that aims at transcending the distinctions between national and international, between unitary and fragmented, and between private and public. Within this transnational law, he sketches nothing less than an actual economic constitution, consisting of both domestic and international law rules. The doctrine consists first of a general part, which focuses especially on the applicability of mandatory rules found in either uniform law and national law, and on hierarchical relations between the different rules. This is followed by a special part in which these hierarchical relations are analyzed for the three areas analyzed in Part II: transnational commercial law, investment law, and domain name law. Renner, following Klaus Schurig, insists here that applicability of legal rules is always the result of a rule of private international law (at 251–252), but he supplements this approach with a detailed analysis of hierarchy structures within transnational law (at 270–273). At last, Renner suggests implications for legal method, in particular for the role of precedent and for proceduralization.

The book closes with a detailed summary.

IV.

The argument of the book is stringent, comprehensive, and convincing. It provides us with an extremely helpful paradigm for the interrelation of political and economic system in transnational law that helps transcend the state paradigm. That is a huge step forward in the debate. If anything, it shows us that we will need to move even further. In what follows, I want to suggest in what way we might want to do that.

Renner suggests that the concept of transnational law transcends the dichotomies between public and private, between domestic and global, between state and society (at 217–228). But I do not think that he himself truly transcends the dichotomies. What happens instead is that these dichotomies are transferred beyond the state (see, e.g., at 18–19, 295–296). A public–private distinction, a distinction between private and societal concerns, is still visible. Also, the solutions within transnational law—private international law rules for conflicts between regimes, hierarchy rules for conflicts within regimes—still derive from domestic law; they maintain, largely, the global–domestic dichotomy. This
transfer from the state to the transnational sphere is a very important, indeed crucial, step, and we are fortunate that Renner’s book takes it. But the next step may have to be to overcome the dichotomy itself.21

One particular concern is whether either the dichotomy between party autonomy on the one hand and mandatory rules on the other, or that between the economic and the political system, is actually the proper framework for today’s law. Renner suggests that the history of this dichotomy, and therefore his topic, starts in the nineteenth century: prior to this, freedom of contract did not exist, and thus the dichotomy between party autonomy and mandatory rules would not have made sense (at 25). This seems correct, as a historical analysis.22 But it makes one wonder why such a recent, and historically contingent, dichotomy should actually be appropriate for a study of transnational law. This is doubtful especially because the development of this dichotomy was itself closely linked to the rising role of the nation state in private law. If the main challenge for transnational law is to overcome the central role of the state, then a state paradigm may not be the best starting point. Instead, it might help to recall that, prior to the nineteenth century, private law was already transnational—interspersed only by local statutes, made by city states and other local entities.23 These rules can, with all caution, be paralleled to mandatory rules of national origin.24 But these local statutes were

21 For a similar plea in a slightly different context, see Ralf Michaels, The Mirage of Non-State Governance, 2010 Utah L. Rev. 31, 43–45.
24 I develop this thought in Michaels, supra note 8, at 150–151 and passim.

not the only constraints on party autonomy. In addition, the ius commune itself contained quasi-mandatory rules, designed either for a proper functioning of contracts or for the guarantee of fairness.25 Despite all the differences between the world of ius commune and ours—and Renner himself does emphasize the aspects of evolution and of differentiation of society over time—might this not provide a useful alternative model for us at least to consider?

That the dichotomy between politics and economy, or public and private, may be too simple is not a mere historical point. Renner himself, at the beginning of his book, sketches a typology of mandatory rules in domestic law which goes beyond state and economy: besides mandatory rules as expressions of political preferences, other mandatory rules have other functions identified earlier: enabling functioning of contracts, or the guarantee of fairness (at 29–32). This diversity of mandatory rules is lost in legal theory. I think, when the contrast between freedom of contract and its limits is conceptualized, following the public–private distinction, only as that between politics (state) and economy (market). Gunther Teubner, in particular, has pointed out that the public–private dichotomy, just like the dichotomy between state and society or between politics and economy, is too simple and should be replaced by what he calls polycontexturality.26 This might also be the next challenge for transnational law.

A similar need exists as concerns doctrinal discussions. As a matter of substantive law, private law does not cover merely economic law in a narrow sense—family law, to take one example, is feeling the challenges of glob-
alization at least to the same extent. 27 And as far as private international law is concerned, limits on party autonomy do not emerge only from the explicitly “public” areas of internationally mandatory rules and from ordre public, which Renner discusses. Most constraints on party autonomy concern particular types of contracts (like employment or consumer contracts)28 or situations (e.g. purely domestic contracts). 29 These constraints have generated less doctrinal and theoretical interest than internationally mandatory rules. 30 But the diversity of private international law restraints on private international law is, in many ways, the response to the diversity of domestic mandatory rules in substantive law, and thus also to the diversity of discourses and policies beyond politics and economics that shape society and law.

In the end, we may realize that the strict dichotomy between contractual freedom and mandatory rules of constraint was a historical contingency that became untenable. Freedom—of contract or otherwise—is not conceivable without a framework, whether we call this constraint or otherwise. For some time, globalization discourse suggested otherwise: freedom of contract was celebrated as a quasi-natural law, and mandatory rules as an exception in need of justification. This is either an illusion or an ideology, and Renner’s book demonstrates this very nicely.

V.

These ruminations should not take away from the huge achievement that is Renner’s book. Quite to the contrary: they demonstrate how much the book can push our discussions forward. In the same way in which it responds, convincingly, to a debate that has, hitherto, been muddled and unclear, it clears the way to new debates. This book is not, it is to be hoped, the last word on its topic (including by its author, who promises to become a major voice in the scholarship on globalization of the law). But it is an important step forward in our ability to understand, and to respond to, the globalization of law.

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28 It is surprising that private international law rules for consumer contracts are missing, given that Renner’s supervisor treated them in his own book: GRAF-PETER CALLIES, GRENZÜBERSCHEITENDE VERBRAUCHERTRÄGE: RECHTSSICHERHEIT UND GERECHTIGKEIT 90–109, 153–175 (2006). The need for such rules may seem small in international commercial arbitration (but see, e.g., Catherine A. Rogers, The Arrival of the “Have-Nots” in International Arbitration, 8 Nev. L.J. 341 (2007–2008); but both for a full empirical picture and for an adequate theory and doctrine they seem indispensable.


30 For my own approach, see Ralf Michaels, Die Struktur der kollisionsrechtlichen Durchsetzung einfach zwingender Normen, in LIBER AMICORUM KLAUS SCHURIG 191 (Ralf Michaels & Dennis Solomon eds., 2012).