

The Global Land Rush from the Viewpoint of Transnational Law:  
Authorities, Subjection and Legitimacy

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Abstract

This thesis investigates a global land rush from a viewpoint of transnational law. The global land rush is a rapid expansion of transnational land deals in a recent decade, triggered by complex reasons including global food crisis, climate change and an expansion of foreign direct investment. Most typically, countries worried about food security with volatility of food prices went on to acquire foreign land on a large scale, especially in developing countries in Africa, Latin America, and Southeast Asia. Such acquisitions cause social problems when people who were traditionally settled in those acquired lands lost their lands without fair compensation. A variety of actors are involved in the acquisitions, and it is a structural problem unable to be controlled by one country's domestic policy. The causes of the land rush are volatile food prices, caused by a combination of climate change, food price speculation, and the direct link between fuel and food prices created by the growth of the biofuel industry. The global land rush has been recognized as an urgent global issue by international society as it causes social, environmental and political problems, such as an exclusion of local communities from their land without prior consultations or sufficient compensations. This thesis analyzes legal and normative frameworks constituting the facilitating background of the global land rush, and thereby contributes to the interdisciplinary debate on how to remedy problems caused by the global land rush.

Theoretically, this thesis is an investigation of the recent theoretical debate on how to study law in an era of globalization. With the advancement of globalization, laws and societies are both experiencing a significant transformation. For example, an emergence of non-state laws such as *lex mercatoria* has questioned the assumption that only nation-states have law-making authority and indicated that there are emerging different forms and operations of laws other than state law. On the other hand, as the Rana Plaza tragedy in 2013 in Dhaka, Bangladesh illustrates, cases and problems arising in society have become deeply embedded in a globalizing economic, legal, and political environment, and elusive from the traditional legal scholars' eye, which tends to focus on state laws

and clearly demarcated different legal fields. With both laws and societies transforming in an era of globalization in these ways, methods legal scholars have been relying upon are facing uncertainty about whether they can stay relevant and meaningful without catching up with the dynamics of globalization. Meanwhile, the advancement of globalization has gradually been recognized as a paradigm shift in all the branches of humanities and social sciences, and recently given rise to the new field of “global studies,” but law is largely absent from the picture. There, law is not considered as a crucial element to consider in unpacking the process and mechanism of globalization.

The purpose of this thesis is to reconsider the methodology of legal studies in an era of globalization and provides a better understanding of how law actually affects the process of globalization, either by facilitating or constituting it. This thesis considers that since legal scholars have largely not been able to adapt their analytical framework to the dynamics of globalization and its huge impact on laws and societies, a crucial role that laws play in the process of globalization is not well understood. The simple argument of this thesis is that the serious reconsideration of legal methodology is urgently needed bearing in mind the rapid pace of globalization, and with a fruitful overhaul of the methodology legal scholars can better contribute to tackling urgent global issues the world is facing.

For that purpose, this thesis engages with the emerging debate on transnational law, a distinct debate on methodology of law in an era of globalization. Elaborating upon the emerging debate of transnational law this thesis elucidates its own approach and theoretical framework. In short, this thesis considers an approach focusing on a specific social phenomena and explicitly engaging with urgent global issues is a fruitful “third approach” within transnational legal scholarship, and then builds a theoretical framework suitable for such an approach. As a concrete case study, this thesis treats the issue of the global land rush, a typical case embodying the impact and dynamics of globalization. As such, the purpose of this investigation is two-fold. First, this thesis tries to formulate a theoretical framework to further and clarify the understanding of roles of law in a globalizing world and second, using the framework, this thesis seeks for the better understanding of how law impacts the phenomenon of the global land rush, and based upon such an understanding it further presents normative arguments on how to remedy the problems of the global land rush.

The structure of this thesis is as follows. First, chapter 1 introduces the thesis, presents the research question, and discusses background of the theoretical framework and the case study briefly. The abstract of this introductory chapter has been discussed above. Then, the following

substantive arguments are divided into three Parts. In Part I (chapter 2), this thesis presents the theoretical framework for the analysis. Part II (chapters 3-6) applies this framework to the case of the global land rush. Lastly, Part III (chapter 7) provides an implication of this thesis to the debate of law and globalization. The overview and main arguments are as follows.

Chapter 2 engages with the debate of law and globalization and extensively discusses the methodological debate of transnational law. First, this chapter introduces the methodological standpoint of this thesis, which defines the general purpose of transnational legal scholarship to understand the relationship between law and globalization. This general purpose suggests that the existing approach of law, namely a separation of legal fields and a focus on case and state laws, are insufficient for the purpose. Rather, it reveals that transnational law needs a renewed method to analyze the transnational legal landscape to better grasp the relationship between law and globalization. Second, this chapter considers the existing approaches to analyzing globalization and law. It defined two directions, namely analysis of newly emerging laws and norms, and envisions of the global legal order. While these two approaches are an important component of the legal study of globalization, this thesis suggests that an approach focusing on certain phenomena embodying impacts of globalization, namely global issues, is a promising third way of looking at transnational law. In addition, it discusses that since such an approach pertains to addressing urgent global issues, it needs to bear in mind the new geography of power in an era of globalization. Thus, this objective cannot be satisfied with empirical analysis and needs to provide normative arguments. Third, following these debates, this chapter provided the theoretical framework of this thesis. Drawing on theories of Peter Zumbansen and Nancy Fraser, the theoretical framework of this thesis first analyzes actors, norms, and processes behind certain transnational phenomena, and then draws normative arguments based on the theory of “injustices of misframing” by Fraser. Utilizing the theoretical framework developed here, in the next chapter, this thesis initiates the analysis of the case of the global land rush.

Chapter 3 initiates a substantive analysis of the case of the global land rush. First, it discusses the nature of the problem of the global land rush through three representative case studies, identifying that the global land rush is an issue which involves varying consequential problems, either socially, environmentally or politically. Second, this chapter discusses the limitations of traditional legal approaches based on methodological nationalism in analyzing the global land rush, and how transnational legal scholarships can contribute to the debate. Third, this chapter reviews interdisciplinary debates on the problems of the global land rush, classifying them into political economy analysis, global governance analysis, field study, and globalization study. Building upon

the review of the debates in other disciplines, this chapter presents the overarching research question for the case study, namely: who the structurally disadvantaged people in the case of the global land rush are, why, and in what sense. Fourth, this chapter discusses the first element of the analysis of actors, norms and processes, namely the prevailing norms over relevant actors in the context of the global land rush. It discusses state laws and regulations; International law of foreign investments and human rights; and transnational public contract as three main norms influencing the global land rush, and considers how different actors are affected by these norms.

Chapter 4, in turn, discusses actors and processes relevant to the global land rush. The purpose of this chapter is to analyze the interrelationship between actors' normative claims and governance processes of the global land rush and thereby to consider if these governance processes are inclusive enough. On the one hand, the more states are relying on contract in realizing their policy processes, the more it becomes less accessible from certain actors. The prevailing style of the contractual process is confidential negotiations, and local communities who are affected by such contracts are in most cases not included within the contracting process. On the other hand, the emerging different governance processes, including international organizations and transnational social movements, are embracing the norm of multistakeholder consultation. Generally speaking, it is a positive outcome because various actors including local communities have better access in policy arena. However, the efficacy of such governance processes is a separated issue. To consider the efficacy, it is necessary to look further at the outcomes of governance processes. While they appear to be inclusive, it does not suffice if they are not effective enough in changing the situations of those who were raising normative claims.

Chapter 5 explores the interrelationship between processes and norms, and thereby to consider if these governance processes are efficient enough. The outcome is again mixed. On the one hand, those emerging governance processes are capable of providing detailed rules. Although they are non-binding, one cannot disregard the potential influence that such non-binding measures have. However, on the other hand, we observe the sobering continuing trends of the global land rush, which unfortunately show the limited impacts of those blooming policy measures. While it is too early to disregard altogether the existing efforts to govern the global land rush, this thesis emphasizes that serious attention is needed to unpack the causes of insufficient outcomes. Also, this chapter reveals that although those concerted attentions, legal norms pertaining investment arbitration and transnational public contracts largely remain untouched. Therefore, existing efforts of governance processes are at least not effective enough to treat the issue of the global land rush, given that norms pertaining to investment arbitration and transnational public contracts constitute crucial

drivers of the global land rush.

Following the analysis of the governance structure in chapters 3 to 5, chapter 6 presents normative arguments of this thesis. Chapter 6 discusses practical implications of the analysis to the issue of the global land rush. It first discusses what are the issues and perspectives revealed through the current theoretical framework in contrast with traditional legal approaches. Then, this chapter further discusses what sorts of injustices of misframing can be observed from the analysis. It discusses that transnational public contracts are remaining as a blind spot to different legal interventions. This understanding is possible only after looking at both normative claims by actors and different governance processes relevant to the global land rush. Transnational public contracts appear as a normative process that local communities who are seriously affected by such contracts have no way to access. With this understanding in mind, this chapter discusses some promising spaces for interventions to current situation. This is where the current approach is bridged to existing legal fields, such as investment arbitration and property law. On the other hand, some of the topics here are rather emerging ones not easily connected to existing legal fields, such as free, prior and informed consent and community development agreement. The last section of this chapter discusses some remaining issues and future prospects of the enduring problems of the global land rush.

Chapter 6 concludes Part II of this thesis. The task of Part II has been to apply the theoretical framework developed in chapter 2 to the case of the global land rush. As an approach to tackling urgent global issues, this thesis has first analyzed the governance structure of the global land rush by focusing on actors, norms and processes (chapters 3-5) and then bridged such empirical analysis to spaces for normative interventions (chapter 6). This thesis is not the kind of work that provides a final resolution to the issue of the global land rush. Far from it, this thesis only provides a preliminary analysis of the issue of the global land rush and opens a way for serious attentions by legal scholars to this issue. This thesis also has a limitation with regard to its scope: it concentrates on the analysis of the marginalized people, and it means that this thesis focuses on only one social problem arising from the global land rush. Regardless of these limitations, this thesis proposes one way to effectively analyze urgent global issues from a legal viewpoint, and thereby opens a way for legal scholars to commit to urgent global issues.

Lastly, chapter 7 considers theoretical implications of the current analysis. It has first discussed contributions of the current approach both to traditional legal scholars and to transnational legal scholars. The discussions clarify that the best benefit of the current approach is an issue-finding one: the current approach illuminates those social problems that are not treated in legal studies or such issues dropped in-between different legal fields. This chapter also discusses that the

collaboration between the current approach and other approaches in traditional and transnational legal scholars is not just ideal, but necessary, to complete the aim of the current thesis, namely, to understand the relationship between law and globalization and to tackle urgent global issues. Then, this chapter presents the place and meaning of the current approach in its relationship to neighboring disciplines. It discusses international relations and global studies to illuminate strengths, challenges, stakes and possibilities of the current approach. In the end, the current approach is situated as both a part of transnational legal scholarships and a part of global studies. Situated like this, the current approach is well oriented to enhance the understanding of globalization by social scientists, and to situate law as a problem-solving tool for urgent global issues.

In an era of globalization, both laws and societies are facing significant transformations. One most general and overarching message of this thesis is very simple: when laws and societies are significantly transforming in an era of globalization, legal scholars need to work hard in re-considering their methodology and analytical framework so that they can better catch up with this fast pace of change. It is important to keep disciplinary conversations within separated disciplines and legal fields to achieve particular mandates of those fields; however, at the same time, it is equally important to keep checking if such mandates stay relevant within the society. This thesis suggests that, since the pace of transformation in society is so drastic, there should be a good reason to have one branch in law that is specifically paying attention to global issues themselves, as a space to reconsider existing legal fields. This approach to transnational phenomena constitutes a fruitful branch of law that holds a problem-finding role, and eventually, it enables legal disciplines to catch up a fast pace of globalization.