

Army, the ultimately victorious army, G.H.] makes it possible for the idea of a counter-genocide against the Hutu population to be spread' (at 142). He continues to probe, discovers positive signs of reconciliation in the interpersonal sphere, but repeatedly encounters aspects that reveal Gacaca to be a pure instrument of power politics. 'Gacaca was never really what it pretended to be and what the sensitization programmes attempted to suggest: a grassroots mechanism used by ordinary people for ordinary people. Instead, it was imposed by the government and operated under the permanent control of local authorities. What kept Gacaca running was often not the conviction that it was responding to the actual needs of communities, but rather that it was an obligation imposed by the government' (at 160). On more than one occasion the reader is tempted to point out to the author that injustice does not become injustice through its repeated comparison with justice. On reflection, however, the reader remembers that institutionalized injustice, in particular, does not leave any stone unturned in presenting itself as justice. And then he realizes that it is good to have as many arguments as possible at hand to enable injustice to be called injustice, even if it is presented by those in power in Rwanda as a successful measure of transitional justice.

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Annelise Riles. ***Collateral Knowledge: Legal Reasoning in the Global Financial Markets***. Chicago and London: University of Chicago Press, 2011. Pp. xii + 295. \$27.50. ISBN: 9780226719337.

*Collateral Knowledge: Legal Reasoning in the Global Financial Markets* does for collateral, in legal thought and practice, something like what Marcel Duchamp's *Fountain* did with and for the urinal in artistic thought and practice.<sup>1</sup> The book takes what Annelise Riles calls a 'little sideline item' (at 1) of mundane use in global financial markets – an item of undeniable practical importance, but typically considered unworthy of serious attention – and encourages us to see it anew. As in the case of *Fountain*, what we may experience afresh is not just the object and the use of it, but also the order of knowledge or, in Riles' terms, 'knowledge practice' (at 10) in which it has been repositioned.

Beginning with collateral – secondary assurance or value provided by one or both counterparties to a transaction to offer a means of satisfying a debt in the event of the provider's default upon a primary undertaking – Riles tells a (perhaps surprisingly) compelling story of global financial markets as 'a constellation of both theoretical and doctrinal maneuvers and material documents' (at 38). Practices of collateralization, in their very marginality, standardization, or taken-for-grantedness, comprise 'a legal technology that is paradigmatic of global private law solutions' (at 41). Prised open under Riles' deft touch, collateral becomes the stuff of 'dreams' (at 37–38 and 138–144) and responsibilities (at 119 and 244); a 'quiet nexus of tremendous political and economic *legitimacy*' (at 4, emphasis in original).

The work that *Collateral Knowledge* performs in this regard is that of legal ethnography, resulting from 'seventeen months of fieldwork conducted in Tokyo between summer 1997 and fall 2001' and 'frequent research visits in the years that followed', focused on large financial institutions and those who work with and for them (at ix). It is closely engaged with ongoing scholarship in the field of science and technology studies – work led by anthropologists such as Bruno

<sup>1</sup> A. Schwartz, *Marcel Duchamp* (1975), at 111; A. d'Harnoncourt and K. McShine (eds), *Marcel Duchamp* (1973), at 16 and 282.

Latour (e.g., at 72). It contributes, too, to current debates in American legal theory, venturing important critiques of Legal Realism while at the same time drawing innovatively upon that tradition (see, e.g., at 45–46 and 212–214). In this review, however, I would like to focus less on these dimensions of *Collateral Knowledge* than upon the contributions that it makes to contemporary scholarship in public international law: two contributions, in particular. First, I would like to consider the book's restaging of the public–private distinction. Secondly, I would like to focus on the shift from norms to knowledge practices for which *Collateral Knowledge* argues and the possibilities with which that shift is identified in the book.

At least since the early 1990s, public international law scholars, led by Hilary Charlesworth and Christine Chinkin, have acknowledged that '[d]istinctions between spheres of public and private define the scope of international law' (although that insight is, at least in part, of much older provenance).<sup>2</sup> So what does *Collateral Knowledge* contribute to international lawyers' appreciation of these dynamics? One thing it *does not* do is try to offer a comprehensive map. Corresponding to its questioning of architectural design as a regulatory preoccupation (at 225–228), *Collateral Knowledge* does not sketch a system; it does not delineate boundaries. This is important because so much debate in public international law concerning public/private distinctions – and the worries and aspirations often hinged upon those distinctions – has tended to get stuck on the question of where to draw the line. Whether one turns to talk about humanitarian intervention or talk about IMF conditionality, it often seems in public international law scholarship as if everything depended upon someone, somewhere drawing a line the crossing of which would enable us to distinguish a helping hand from a Machiavellian claw.

What *Collateral Knowledge* does do is turn the question of distinguishing public from private, and understanding and problematizing their relationship, from a *what* question to a *how* question. Public versus private gets restaged in *Collateral Knowledge* as a matter of doing: specifically, the doing of technocracy as distinct from the doing of technique. As a result, the two modes come to seem much more interchangeable and intimate with one another than is often the case otherwise. The regulatory state becomes, in this account, the 'alter ego of global private governance' (at 113). Important distinctions persist – primarily distinctions of scale, distance from so-called market realities, and anticipated duration. The 'private constitutions' which collateral is understood to install are still set apart, in Riles' account, from large-scale 'regulatory framework[s]' (at 166 and 177; 106). The terms public law and private law are still meaningful in the book's narrative. Collateral is described, for instance, as an 'artifact of multiple kinds of publicly created law', albeit not as a straightforward 'pass through to state power' (at 43 and 45).

Nonetheless the public/private distinctions so drawn are characterized more as matters of affect, perspective, training, emphasis, and inclination than monumental political or institutional divides. 'It is a subtle thing:' Riles writes, 'for technocrats ... , the focus was more squarely on the ends, not the means. Tools mattered, but only so much. What mattered more were market realities' (at 105–106, emphasis in original). 'The masters of private legal technique', on the other hand, 'show much less concern about its groundedness in reality. As a skill, legal technique assumes a more epistemologically subtle approach' (at 106).

In this way, the distinction between public and private, and the properties identified with each, are recast, in *Collateral Knowledge*, on a continuum of 'projects' (at 46) or 'approaches to expert legal knowledge' (at 113). This is crucial to the prospects for collaboration which the book works to foster. For if adopting the outlook of a public regulator or technocrat, as compared to adopting the outlook of a private market participant or technician, is simply a matter of switching

<sup>2</sup> H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000), at 31. For an earlier incarnation of public/private critique dating from 1843, to which Charlesworth and Chinkin seem somewhat indebted, see Marx, 'On the Jewish Question' in R.C. Tucker (ed.), *The Marx-Engels Reader* (2nd edn, 1978), at 26–52.

between alter egos – realizing, that is, affective and interpretative possibilities already latent within oneself – then the broad-ranging, multi-party collaboration towards transformative possibilities for which the book calls ought not to be so difficult to pursue.

This takes me, then, to the second aspect of *Collateral Knowledge* on which I wanted to focus in this review – its call to action through knowledge practice: a call sounded as much for international lawyers as for others working in, on, and around global financial markets. Before I turn to that, however, let me raise one concern about unintended consequences that could flow from this particular restaging of the public/private distinction. Let us just say, for purposes of argument, that public/private distinctions in the global arena sometimes ‘up the ante’ in useful ways. That is, sometimes framing issues and constituencies *as if* they occupied different spheres can sharpen oppositions, clarify hard choices to be made, and focus attention on the distinct and limited mandates which particular institutions enjoy. Thinking of humanitarian intervention as the tripping of some invisible wire between public and private, as public international lawyers often do, seems questionable. Nonetheless, it remains a powerful way to argue against the deployment of lethal force in particular instances.<sup>3</sup> By way of further illustration, public/private framing might also serve those who, in the context of the Irish and Euro-zone financial crises, have questioned the wisdom of the European Central Bank’s insistence that Ireland repay in full all bank senior bondholders, including unguaranteed bondholders, without any ‘haircut’.<sup>4</sup>

So, whatever one thinks on those particular issues, there may be risk associated with characterizing the differences of mandate and authority that we often label in public/private terms primarily in terms of *affect* and *perspective*. The risk in question is that this might have the effect of rallying more people to what David Kennedy has referred to as the ‘squishy centre’.<sup>5</sup> It might have the unintended effect of reinforcing the idea that centrism is the necessary or ideal course to pursue through the sort of thorny political debates to which I alluded. One can accept the extremely important point made in *Collateral Knowledge* that legal technicalities are more political – that they embody more ‘political imaginativeness’ – than is typically acknowledged and still worry about the possible flattening effect of casting that politics on a continuum of technical projects (at 223 and 177).

One answer to this worry may be to remove – as I think *Collateral Knowledge* urges us to do – any shadow of the diminutive surrounding the word ‘technical’. The technical is not *just* technical nor is it necessarily centrist or flat; this the book shows us very clearly. The technical is not the ‘flat table’ of Sato’s account on which market participants arrange plates and saucers (at 135) (Sato being the pseudonym of one of the interviewees who features in the book, a ‘back office [employee] of a prestigious financial institution’ (at 37)). The technical is broken up, it turns out, across time and space and embedded within hierarchies and assumptions for which Riles urges academics to take some responsibility (at 165–166 and 118–119). Nonetheless,

<sup>3</sup> See, e.g., Tesón, ‘Humanitarian Intervention: Loose Ends’, 10 *J Military Ethics* (2011) 192 (canvassing, *inter alia*, the argument that ‘[f]oreigners who use force to alter [political] processes are disrespecting the citizens of the target state’). Cf. A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003), at 143–157 (exploring ‘whether the emancipatory promise of self-determination can offer a counter to the efficient management practices underpinning international administration’, while expressing ‘uneas[iness] about this promise in its ‘reinforc[ing] [of] a vision of international order as essentially consisting of an “aggregate of independent, private spaces”’ (quoting Kane Race)).

<sup>4</sup> See, e.g., Mullineux, ‘Banking for the Public Good’ (14 June 2012), available at: SSRN: <http://ssrn.com/abstract=2084149> or <http://dx.doi.org/10.2139/ssrn.2084149>; Ryan, ‘The Euro Crisis and Crisis Management: Big Lessons from a Small Island’, 8 *Int’l Economics and Economic Policy* (2011) 31.

<sup>5</sup> Kennedy, ‘Governance and the Return of Political Economy’, Keynote Address, International Law and the Periphery Conference, 19 Feb. 2012, Cairo, Egypt, available at: [www.law.harvard.edu/faculty/dkenne-ny/speeches/](http://www.law.harvard.edu/faculty/dkenne-ny/speeches/), forthcoming in 26 *Leiden J Int’l L* (2013).

I wonder if shedding the 'just' or the sense of flatness often attending the technical can counteract the centripetal force that tends to surround the 'squishy centre' in contemporary global affairs? Do we instead need something like a traditional public/private distinction for that, at least sometimes, given the way we have ordered our world? Then again, a relatively rigid public/private distinction and an ever more encompassing 'squishy centre' are surely not the only alternatives available for thinking contemporary global controversies, are they?

Let me do some inelegant technical work by leaving those questions hanging and turning now to the question of what *Collateral Knowledge* invites us – all of us readers who 'govern the market by being involved in it every day' (at 224) – to do. What precisely is the call to action issued by the book that international lawyers might heed?

Among the actions that *Collateral Knowledge* seeks to elicit from its readers is a shift of attention. Instead of focusing on the *norms* supposedly enshrined in global private governance, *Collateral Knowledge* directs our attention towards routinized knowledge practices (at 33). In place of reasoning round 'ought' statements, prescriptions, and plans of one sort or another, *Collateral Knowledge* would have us focus attention on 'material artifacts' (at 175) – documents, for instance – and the ways in which people work with and on them. Moreover, the relationship between these two elements (objects and people) which *Collateral Knowledge* brings to the forefront of our vision is not primarily an instrumental one. People do not necessarily bend objects to their will; rather, objects often shape people's sense of their own will and the possibilities for its exercise (at 72).

It is possible to see this attention-shift from norm to practice-in-collaboration-with-objects as immanent to the field to which it relates – the field of global finance. This move tracks, to some degree, the bureaucratic practice of 'unwinding' which Riles attributes to the influence of neoliberal economic and political theories. Through 'unwinding', regulation in the mode of planning for the whole from a distance tends to be disfavoured. It gives ground to regulation understood to cleave much closer to market practice and focused on the creation of new kinds of economic subjects and economic relations (at 146–148). The attempt in *Collateral Knowledge* to reshape the mundane experiences and self-understanding of 'lawyers and legal professionals of all kinds – from secretarial and paralegal staff to back-office managers to legal academics and judges and everyone in between' (at 244) may be read as an exercise of unwinding in its own right. Do not worry so much about designing architecture, *Collateral Knowledge* tells us; change your experience of hammering, tiling, or lugging soil. In that regard, *Collateral Knowledge* leads by example. Like Marcel Duchamp, Riles works with found objects (for want of a better term; clearly the objects in question are made rather than found).

Yet, for all the book's insistence upon occupying the material terrain of knowledge practice, norms are not wholly cast aside. The stated aim of *Collateral Knowledge* is to 'democratize the practice of global financial regulation' (at 223). It 'shares the ambition of many current proposals to make financial regulation more stable, effective, and democratic' (at 232). Group norms reappear here in the mode of a commitment to democracy. This is a commitment the bones of which are not fleshed out, except to the extent that repeated references to the 'private constitutions' constituted by collateral and other technical assemblages offer some hint as to content (e.g., at 166 and 177). The democratic benchmark deployed here is that of constitutional democracy, it seems. Beyond that, it is hard to say how 'strong' (in Benjamin Barber's terms) a commitment to democracy is contemplated.<sup>6</sup>

In puzzling over this, it struck me that the norms reintroduced at these points in *Collateral Knowledge* are not the same as those which were set aside at the start of the book as a basis for

<sup>6</sup> B. Barber, *Strong Democracy: Participatory Politics for a New Age* (1984). See also Susan Marks' discussion of 'low intensity democracy': S. Marks, *The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology* (2000), at 50–75.

explaining or evaluating the global markets. Read through the ‘motif[s]’ and ‘lens[es]’ of the book (at 10), the apparent hollowness – the ‘virtualness’, perhaps (at 187) – of the normative commitment to democracy affirmed in *Collateral Knowledge* may be telling. *Collateral Knowledge* may invite us to enact democracy with a hollow core, the content of which remains unspecified in advance, tracking the form of Japan’s netting legislation, to which the book devotes considerable attention.<sup>7</sup> ‘This [hollow-cored] form of regulation has important applications’, Riles writes, ‘in the context of transnational governance problems in which multiple jurisdictions, and constituencies with nothing but a very thin understanding of one another, must be engaged’ (at 241). Perhaps in leaving the book’s commitment to democracy hollow, *Collateral Knowledge* signals something similar in relation to democracy on a transnational scale. Perhaps one should expressly *not* seek to advance anything thicker by way of a commitment to democracy if one is to leave room for collaboration across multiple jurisdictions and constituencies; perhaps this is a ‘refus[al] to achieve’ as significant as the netting law’s (at 203).

We may find echoes here of the empty place of Claude Lefort’s account of modern democracy, whereby the identity of the ‘people’, and the identity of those able to speak in the name of the people and to afford legitimacy to the democratic order, remains perpetually in question.<sup>8</sup> The hollowness of the democratic benchmark evoked in *Collateral Knowledge* may signal a demand that democratic participation ‘constant[ly] and active[ly] produc[e]’ such empty places, as Ernesto Laclau has argued.<sup>9</sup>

Yet there is peril here too, as *Collateral Knowledge* readily points out. Hollow laws like Japan’s netting law, *Collateral Knowledge* cautions, do ‘not alter social or economic practices’ nor ‘disturb existing rights and obligations as they are understood by the parties’; such a law ‘simply enshrines pre-existing authority and practice’ (at 203). Likewise, the action that *Collateral Knowledge* invites its readers to join ‘requires no new laws, no new policies, not even a change in ... lawyers’ existing roles’ (at 244–245). How ‘transformative’ can we expect the ‘transformative potential’ embedded in legal technique to be if it tends to take such untroubling, undemanding forms (at 246)?

‘The form of law,’ *Collateral Knowledge* argues, ‘enrolls and engages different actors in different ways’. Form engenders ‘consequences and possibilities’ (at 216). Yet the book sounds a call for political action additional to the recognition of those consequences and realization of those possibilities. For all the agency that *Collateral Knowledge* would attribute to legal technique (at 72), it does not envisage legal technique supplanting political agency enacted in other ways and at other sites. Legal technique may ‘serve as the basis for collaboration’ (at 246). But the collaboration so hoped for still gets projected outwards by the book, to some degree. It still remains, in the words of the book, ‘the challenge of this moment, to forego the impulse to simply recreate out of the rubble yet another version of the same old regulatory state, or its nemesis, free market opportunism’ (at 246). What *Collateral Knowledge* achieves in that regard, through its

<sup>7</sup> *Collateral Knowledge* contains a detailed discussion of Japan’s netting law, promulgated in 1998: a law confirming the enforceability of arrangements by which participants in derivatives markets who are party to multiple transactions with the same counterparties set off against one another the assets and liabilities to which those various transactions gave rise, effectively cancelling out much of their obligation to collateralize debt and requiring that they collateralize only that portion that cannot be so ‘netted out’ (at 99–105, 188–216). For a translation and commentary see Steele, ‘Japan’s Bankruptcy Safe Harbour Provisions and Repurchase Agreements: A Commentary and Annotated Translation of the “Act Concerning Close-out Netting of Specified Financial Transactions Undertaken by Financial Institutions Etc.”’, 15 *J Japanese L* (2010) 175.

<sup>8</sup> C. Lefort, *Democracy and Political Theory* (trans. D. Macey, 1988).

<sup>9</sup> Laclau, ‘Democracy and the Question of Power’, in J. Hillier and E. Rooksby, *Habitus: A Sense of Place* (2nd edn, 2005) 53, at 64.

close attention to ongoing knowledge practices, is a considerable shortening of the time horizon in question. Accepting this challenge is not, primarily, a matter of planning for the future or deferring to some constituency located elsewhere, in the book's account. It is a matter of recognizing demonstrable possibilities here and now, in the mundane present of international legal work. Such a project enlists the power of thought, but it also enlists the power of lived practices, including practices of the most banal and unheroic kind. Like Duchamp's *Fountain*, Annelise Riles' *Collateral Knowledge* suggests that all kinds of routine legal ablutions might become opportunities for reflection and creative action; further, it shows us, page by page, how such reflective, creative action may be performed. For that this truly original book should be read widely by international lawyers, and indeed anyone with an interest or a stake in global financial markets.

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