

Globalization as a Factor in General Jurisprudence^{*}

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1 Introduction

What reason, if any, do legal theorists have to treat globalization as a matter of theoretical concern? This paper will examine the claim, made with increasing force and frequency in recent years, that there are indeed compelling reasons for legal theory to engage critically with the phenomena of globalization, but that the discipline has thus far responded poorly to its associated challenges. Legal theorists, arguably more so than their colleagues in the humanities and social sciences, have in the words of one commentator offered a ‘paucity of theoretical underpinning for the development of law as an academic discipline into the broader territory that current global trends now present.’¹

Although this charge is certainly not without basis, it applies more strongly to some parts of legal theory than to others. It is not entirely true, for instance, in the case of much socio-legal scholarship, a discipline that has been characteristically quick on the uptake when it comes to novel empirical developments such as those engendered by globalization. It is also hard to maintain that many doctrinal sub-disciplines have ignored globalization. Whether we are discussing constitutional, private or criminal law, it is rare for scholarship to completely neglect the impact of globalization. This not only means that significant attention is paid to various formal legal sources of non-national provenance (such as treaty regimes, human rights instruments and international organization regulatory systems), but that such work frequently engages with the role of various forms of soft law, non-binding codes, best practices and guidelines as well as highlighting the increased role of private actors in areas of governance more generally.

The charge arguably *is* justified if applied to the more specific project of contemporary *jurisprudence*, in the tradition of H.L.A. Hart, Joseph Raz, and Jules Cole-

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1 Andrew Halpin & Volker Röben, ‘Introduction,’ in *Theorising the Global Legal Order*, ed. A. Halpin & V. Röben (Oxford: Hart, 2009), 1. Compare William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009), 5: ‘If one adopts a global perspective and a long time scale, at the risk of oversimplification, one can discern some general tendencies and biases in Western academic legal culture that are in the process of coming under sustained challenge in the context of “globalization.”’

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man, rather than legal theory more broadly understood.² The accusations in this direction are relatively clear-cut. Although globalization is many things, it is perhaps most clearly a theoretical and practical challenge to various forms of *state-centric* thinking. Jurisprudence is at present, and has historically been, overwhelmingly state-centric. The term 'law' is synonymous with 'state-law,' and any form of inter- or transnational phenomena is derivative of state-law or state-authority. For example, rulemaking by international organizations ultimately depends on a chain of validity extending back to an authorising state, whereas various forms of nominally private, non-state soft law ultimately depend on or are authorized by the power of the state and its capacity for coercive enforcement. Various novel forms of transnational law may be interesting, but they fail to truly challenge the conceptual foundations of modern jurisprudence, as they are ultimately forms of non-state law, subordinate to and dependent on the state for their continued existence, force and validity.

The modest aim of this paper is to suggest how recent scholarship in the area of law and globalization might prove relevant specifically to *jurisprudence*, rather than legal theory in a more general sense. Precisely because of the state-centric character of jurisprudence, and the rather esoteric and conceptual discourse of its main debates, it is not only difficult to establish what tangible impact globalization might have on the basic theoretical tenets of jurisprudence: it is hard to see how it might be deemed to be relevant at all, given the dismissive stance typically taken to non-state legal phenomena. In what follows, I will offer a rough outline of the globalization debate as it stands, and attempt to provide a roadmap showing how such concerns may be linked to the traditional concerns of contemporary jurisprudence.

2 Problems of Contemporary Jurisprudence

It would fall beyond the scope of this paper to engage extensively with the considerable range of writing in the field of jurisprudence over the last six decades. Fortunately, such a degree of comprehensiveness is not necessary for present purposes. The aim of this section is to offer a broad general outline of the themes and concerns that have characterized the debate within modern jurisprudence in the latter half of the twentieth century. I will emphasize those aspects that will enable us to better understand the contemporary globalization debate and how it might be linked to the concerns of jurisprudence scholars. The discussion will

2 Throughout this paper, the terms 'jurisprudence' and 'general jurisprudence' will be used to refer to the modern tradition of analytical, descriptive jurisprudence, to contrast it both with empirical socio-legal theory and normative jurisprudence. This paper will not directly consider the works of normative jurisprudence, primarily because it is in the area of analytical, descriptive jurisprudence that much recent engagement with globalization has taken place. This is not to say that a normative perspective would not be welcome with regards to the problems discussed in this essay. Indeed, it will be suggested by way of conclusion that such a perspective may be preferable to the traditional, descriptively oriented approach of analytical jurisprudence.

proceed along two dimensions, dealing respectively with methodological and substantive aspects.

2.1 Methodological Issues

Jurisprudence in the analytical tradition of Hart, Raz, and Finnis,³ and more recently Jules Coleman and Scott Shapiro,⁴ aims at offering a *general* and *descriptive* theory of law.⁵ Taken together, these objectives are often grouped under the heading of ‘general jurisprudence.’ Each of these features of jurisprudence brings with it a distinct set of interrelated commitments.

To begin with the obvious issue of the relation between descriptiveness and law: what exactly is general jurisprudence descriptive of? The answer is unequivocal: law is coterminous with *state-law*. Few within the jurisprudence have found grounds to question this basic point of departure. Indeed, it is striking how infrequently the question is even raised. Because descriptive theories are only rarely constructed for the purposes of uncovering what a particular object *is*, the question of whether or not a particular phenomenon merits inclusion within its descriptive scope is sometimes treated as a moot point. An enumeration of law’s defining characteristics and structural features is of course part and parcel of any theory, but these cannot be fruitfully read as responses to what a particular object *is*, of which most informed observers will have at least a relatively clear preliminary conception, and a theory mainly serves purposes of clarification rather than identification. Because people have a ‘quite general ability to recognize and cite examples of laws’ and much is ‘generally known about the standard case of a legal system.’⁶ deviant cases cannot be the source of puzzlement about the question of ‘what is law?’ because ‘it is perfectly clear to everyone that it is their deviation in these respects from the standard case which makes their classification appear questionable. There is no mystery about this.’⁷

The crucial point is that equating an inquiry into law with an inquiry into the law of the *state* is rarely even perceived as a methodological problem. It is, in many ways, an intuitive, almost pre-theoretical axiom. For instance, Hart simply asserts that ‘[t]he starting-point for this clarificatory task [of legal theory] is the widespread common knowledge of the salient features of a *modern municipal legal sys-*

3 H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1994); John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1982); Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979).

4 Scott Shapiro, *Legality* (Cambridge, MA: Belknap Press, 2011); Jules L. Coleman, *The Practice of Principle: in Defence of a Pragmatist Approach to Legal Theory*, Clarendon Law Lectures (Oxford: Oxford University Press, 2001).

5 See generally Stephen R. Perry, ‘Hart’s Methodological Positivism,’ in *Hart’s Postscript*, ed. J. Coleman (Oxford: Oxford University Press, 2001).

6 Hart, *The Concept of Law*, 4.

7 Ibid. See also Joseph Raz, ‘Two Views of the Nature of the Theory of Law: A Partial Comparison,’ in idem, *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009), 57: ‘Explanations are of puzzling or troubling aspects of concepts, and they are therefore almost always “incomplete” ... The relativity of good explanations to the interests and the capacities of their public makes them ephemeral and explains why philosophy has a never-ending task.’

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tem.⁸ Whatever other variation there may be between theories of law, this point of departure is fixed and usually not scrutinized and as Brian Bix notes, the question ‘On what basis do we keep such [alternative, non-state] social systems in – or out of – our definition of “law”?’⁹ has been relatively neglected by traditional jurisprudence. The fact that a theory of law is synonymous with a theory of ‘state-law’ has simply been taken as axiomatic and having no need of justification.

Thus, a theory of law is for all intents and purposes a theory of *state-law*. What can such a theory be expected to deliver? Jurisprudence has historically set great store by their ambition to offer a *descriptive* account of the law. Yet general jurisprudence uses the term ‘descriptive’ in a highly idiosyncratic sense that bears little resemblance to how the term is typically understood in the social and behavioural sciences.¹⁰ Hart’s controversial assertion that his theory was an exercise in ‘descriptive’ sociology can too easily lead one to conclude that the aims of his own position – and that of analytical jurisprudence more generally – is to describe the social practice ‘law’ in a similar fashion to the social sciences. Yet this conflation would be misleading.

Hart’s most explicit statement about his methodological commitments is to be found in the postscript to *The Concept of Law*, where Hart writes ‘[m]y account is descriptive in that it is morally neutral and has no justificatory aims.’¹¹ Thus, Hart makes it quite clear that ‘descriptive’ is used in a negative sense, as ‘not-prescriptive’ rather than something like ‘empirical.’ In more positive terms, what general jurisprudence offers is perhaps best called a ‘conceptual reconstruction’ of a social institution, something akin to an ideal-typical focal case or ideal-type of how we *conceive* of the law.¹²

As a consequence of this unique concept of descriptiveness, the kind of meta-theoretical criteria we use to judge the descriptive merit of the empirical social sciences (where predictive power, coherence and empirical range are considered determinative) differ from those used to evaluate the relative success or failure of general jurisprudence. For instance, empirical data do not seem to play a large role in falsifying or questioning the character of its conclusions, as much of jurisprudence is quite dismissive of the value of empirical research in addressing its own particular concerns. Raz, for example, claims that

8 Hart, *The Concept of Law*, 239-40 (emphasis in original).

9 Brian Bix, *Jurisprudence: Theory and Context* (London: Sweet & Maxwell, 1999), 10.

10 On the peculiar character of ‘descriptive’ jurisprudence, see Perry, ‘Hart’s Methodological Positivism’; Edward L. Rubin, ‘Scholars, Judges and Phenomenology: Comments on Tamanaha’s Realistic Socio-Legal Theory,’ *Rutgers Law Journal* 32 (2000); Brian Bix, ‘Conceptual Jurisprudence and Socio-Legal Studies,’ *Rutgers Law Journal* 32 (2001).

11 Hart, *The Concept of Law*, 240.

12 Indeed, this is the thrust of the well-known first chapter of Finnis’ *Natural Law and Natural Rights*. John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1982), chap. 1.

'[t]he general theory of law is universal for it consists of claims about the nature of all law, and of all legal systems, and about the nature of adjudication, legislation, and legal reasoning, wherever they may be, and whatever they might be'¹³

and further claims that

'the truth of the theses of the general theory of law is not contingent on existing political, social, economic, or cultural conditions, institutions, or practices. ... [Which] do not determine the nature of law, they only affect its instantiation.'¹⁴

Andrei Marmor, in a similar vein, has labelled the various critiques of the kind noted as 'agenda-displacement theory': empirically oriented questions are 'fine as long as it is not really jurisprudence – understood as the philosophical question about the nature of law – that one attempts to reduce to a natural science.'¹⁵ Thus, general jurisprudence is only descriptive in a very loose sense of the term. It eschews clearly defined data sets, rigorous empirical inquiry and seems generally untethered to any *specific* empirical referent.

How, then, is general jurisprudence supposed to be anchored in social reality, if its empirical support is tenuous at best? This lack of 'empirical fit' is compounded by the problem of generality. A general jurisprudence not only narrows its scope to *state-law* but is also not tied to any *particular* system of state-law. The generality to which general jurisprudence strives is inextricably linked to its idiosyncratic conception of what constitutes a 'descriptive' theory, i.e. a *conceptual* account of the *nature* of law. As noted by Raz above, general jurisprudence aims to capture the nature of legal systems 'wherever they may be, and whatever they might be.'¹⁶ General jurisprudence does not offer an empirically informed description of particular state legal systems, and its description is not in any sense a representative sample of a defined set of empirical data. Indeed, many legal philosophers argue that a general theory should cover all *possible* legal systems, in addition to actually existing legal systems. Upon closer inspection, many legal philosophers would claim that what we are describing is in fact our collective *intuitions* of a particular social phenomenon called 'law' rather than the systems in themselves (in philosophical terms, there may not be a difference – although socio-legal scholars would vehemently contest this). As Raz notes: 'It follows that in working out a theory of law we are explicating *our own self-understanding* of the nature of society and politics.'¹⁷ The 'nature' of law refers to the essential feature of the concept of law, the essential features that any social institution must possess for it to qualify as 'law.'

13 Joseph Raz, 'On the Nature of Law,' in idem, *Between Authority and Interpretation*, 91.

14 Ibid., 91-92.

15 Andrei Marmor, *Philosophy of Law* (Princeton, NJ: Princeton University Press, 2011), 33.

16 Raz, 'On the Nature of Law,' 91.

17 Ibid., 97 (emphasis added).

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Having thus outlined the main meta-theoretical parameters of modern jurisprudence, we now turn to the substance of its conclusions.

2.2 *Substantive Issues: Institutionalality and Normativity*

Having discussed some of the peculiar methodological features of modern jurisprudence, what can we say about its substance? Within the parameters just outlined, modern jurisprudence has been almost exclusively concerned with two dimensions of the law: its *institutionality* and its *normativity*. These two themes are mirrored in the twin pillars of Hart's well-known concept of law as a union of primary rules of obligation and secondary rules of change, adjudication and recognition. In fact, one of the many reasons why Hart's concept of law has been so influential is arguably because it incorporates two basic intuitions about law in the modern world.

The first is the idea that law is a matter of norms proscribing, prohibiting, and enjoining certain kinds of conduct, in other words, that law possesses *normativity*. Law is, as Lon Fuller put it, in the business of 'subjecting human conduct to the governance of rules.' The second intuition is that the law is in important ways inseparable from the vast assembly of lawyers, judges, legislators, police officers and other officials that make, enforce and adjudicate the law. Modern law is remarkable to a large degree due to the existence of a vast organizational apparatus explicitly concerned with the smooth operation of a system of conduct regulating, primary norms. In other words, the law possesses *institutionality*.

A successful theory of law will offer a coherent account of how both of these features are best conceptualized. With regards to normativity it will explain, for instance, how the law can provide reasons for action and why rational agents have grounds to comply with the law's directives, of which Raz's 'service conception' of authority, and Finnis' account of 'practical reasonableness' are the most well-known examples. It might also explain, as Hart famously did against Austin, why coercion is a problematic factor in accounting for the *normativity* of law (being obligated is not the same as being obliged). With regards to institutional-ity, it might expound on how the conduct of a particular class of agents (legal officials) can constitute a rule of recognition which serves as the structural foundation for the institutional dimension of law.

One curious by-product of this distinction, which in itself is a testament to the influence of Hart's theory, is how completely Hart's basic framework dominates the agenda of much jurisprudence scholarship. In fact, it has opened up something of a schism within jurisprudence, persisting to this day, whereby *either* we focus on how legal norms are related to actual behaviour (the normativity dimension) *or* we focus on the internal discourse of a particular group (i.e. legal officials) and how, from an embodied first-person perspective, certain norms are recognized as valid and others as invalid in a wider systemic context (the institutional-ity dimension). In theory there is no reason why both perspectives cannot be usefully combined, but in practice many theorists confine their attention to one of

these issues. In the case of jurisprudence, this has typically been the latter institutional dimension.¹⁸

If globalization is deemed relevant, this is because it will impair the ability of legal theory to explain, illuminate or otherwise provide a coherent general account of law across both of these two dimensions. The central argument of this paper is that much of contemporary writing linking globalization to legal theory can be mapped onto these two themes, with specific critiques applying within each sphere. Before turning to these critiques, however, we must devote a few words to the way in which the concept of globalization has been interpreted by legal theorists.

3 Globalization as a Legal Concept: Revolutionary or Evolutionary?

Globalization is arguably the most pervasive essentially contested concept of recent times. Along with other central political categories such as liberty, democracy and justice, the phrase bears all the hallmarks of an essentially contested concept. More specific and developed accounts of globalization, accounts which move beyond the level of the broad and general, turn out to cover an incredibly rich and diverse spectrum of propositions and claims.¹⁹

Although the volume of writing on globalization is immeasurably vast, for present purposes we can broadly divide concepts of globalization into two varieties. First, there are comprehensive accounts of globalization that interpret various specific elements – global markets, the diffusion of cultures and information, the rise of global terrorism, global threats of environmental degradation, and so on – as indicators of a more fundamental, *underlying* process of social transformation. The key for such authors is to emphasize that globalization, at least for the purposes of conceptual inquiry, is an autonomous transformative force underlying *all* spheres of human activity whilst not being reducible to any particular dimension of the social world. As McGrew and Held note, many current approaches

‘share in common a recognition that it has systemic or emergent properties which make it causally significant, rather than simply epiphenomenal: in effect it has intrinsic causal powers which are not simply reducible to particu-

- 18 This is evident in the fact that many of the central debates in modern analytical jurisprudence continue to revolve around the basic character of the rule of recognition, e.g., by addressing such issues as the manner in which the behaviour of officials constitutes this rule, the extent to which the rule affords legal officials discretion in the identification of valid legal norms and, of course, whether such a rule must necessarily appeal to moral criteria. These are all questions that revolve primarily around the character of law’s institutionality, and only to a lesser extent to its normativity vis-à-vis non-officials.
- 19 There is hardly a discipline within the humanities that has not seen the emergence of a coterie of globalization & ... scholars. For a key overview of the various dimensions, see David Held & Anthony G. McGrew, eds., *Globalization Theory: Approaches and Controversies* (Cambridge: Polity, 2007).

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lar economic, political or social forces whether capitalism, neoliberalism or militarism.²⁰

By contrast, legal theorists fall firmly into a second category of scholars that read globalization through the lens of a particular discipline or theoretical orientation. The point here is not to determine whether globalization is or is not reducible to a particular kind of force, as McGrew and Held suggest. Rather, many of those who are concerned with the *impact* of globalization tend to remain agnostic on the ontological nature of globalization, treating the concept as a proxy for a more limited range of phenomena relevant to their own theoretical or empirical concerns, prompting them to speak of ‘adjective’ (economic, cultural, political) globalization.

The importance of this distinction is to dispel a common belief that globalization is transformational to such an extent that previous modes of understanding, explaining and interpreting the world are inadequate as a consequence of the revolutionary character of globalization. In short, it is important to note that legal theorists decidedly do *not* believe that globalization changes absolutely everything (generally speaking such positions are quite rare: certain quarters of economics and sociology probably come closest to such a position). The claims made on behalf of globalization scholars in the sphere of legal theory are typically quite modest. Almost without exception, the primary phenomenon that most lawyers appear to have in mind is some variant of *legal pluralism* and framing the issue of globalization in terms of legal pluralism is by far the most common approach to analysing the impact of globalization on legal theory.²¹ As Ralf Michaels notes:

‘Many of the challenges that globalization poses to traditional legal thought closely resemble those formulated earlier by legal pluralists. The irreducible plurality of legal orders in the world, the coexistence of domestic state law with other legal orders, the absence of a hierarchically superior position tran-

- 20 David Held & Anthony G. McGrew, ‘Introduction: Globalization at Risk?’, in Held & McGrew, eds., *Globalization Theory*, 6.
- 21 See, e.g. William Twining, ‘Normative and Legal Pluralism: A Global Perspective,’ *Duke Journal of Comparative & International Law* 20 (2010): 474. ‘[L]egal pluralism has in the last ten years or so become a central topic in the study of law generally, including jurisprudence, comparative law, and public international law. This is largely, but not entirely, in response to so-called “globalization.”’ Other representative examples include: Brian Z. Tamanaha, *A General Jurisprudence of Law and Society*, Oxford Socio-legal Studies (Oxford: Oxford University Press, 2001); Gunther Teubner, ‘Global Bukowina: Legal Pluralism in the World Society,’ in *Global Law Without a State*, ed. G. Teubner (Dartmouth: Brookfield, 1997), 3-28; Paul Schiff Berman, ‘Global Legal Pluralism,’ *Southern California Law Review* 80 (6) (2007): 1155-1238; Ralf Michaels, ‘Global Legal Pluralism,’ *Annual Review of Law and Social Science* 5 (2009): 243-62; Oren Perez, ‘Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of Transnational Law,’ *Indiana Journal of Global Legal Studies* 10 (2) (2003): 25-64; Mireille Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World*, French Studies in International Law, Vol. 1 (Portland, OR: Hart, 2009); Peer Zumbansen, ‘Transnational Legal Pluralism,’ *Transnational Legal Theory* 1 (2) (2010): 141-89.

scending the differences – all of these topics of legal pluralism reappear on the global sphere.’²²

Legal pluralism ‘is generally defined as a situation in which two or more legal systems coexist in the same social field.’²³ The impetus for this research originated mainly in the study of the interplay between local, indigenous law and transplanted, forcibly imposed, colonial law.²⁴ It was in such contexts that the contrast between the law in the books – the official, formally promulgated legislation of the colonial power – was most strikingly at odds with the law in action – the normative systems that governed daily life which often bore little resemblance to the former.²⁵ Legal pluralism has also been close to the hearts of legal historians who have long emphasized the plurality of laws – from canon law, to urban law, feudal law, manorial law, to the *lex mercatoria* and much more.²⁶

The critical edge of the legal pluralist critique is directed at the perceived state-centrism of much orthodox legal thought. Many jurisprudence scholars in particular mistakenly subscribe, in John Griffiths’ seminal formulation, to a belief in ‘legal centralism,’ understood as the ideology that

‘law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions. To the extent that other, lesser normative orderings, such as the church, the family, the voluntary association and the economic organization exist, they ought to be and in fact are hierarchically subordinate to the law and institutions of the state.’²⁷

To the extent that social life is norm governed, it is empirically highly implausible to assume that state legal norms will be the sole, or even the principal, determinant in accounting for observed patterns of norm governed conduct. Legal pluralism aims to take seriously the complex and multifarious structure of the empirical picture, acknowledging that agents act on the basis of multiple overlapping identities each with their own distinctive and context-sensitive normative commitments. Sometimes actions are determined by state legal norms, sometimes by religious or cultural norms, customary norms, and sometimes simply by deeply embedded and unarticulated shared understandings of appropriate conduct. The point being that such questions are to be settled by inquiry rather than stipulation. The claims of state legal norms to be the primary source of social order in

22 Michaels, ‘Global Legal Pluralism,’ 244.

23 Sally Engle Merry, ‘Legal Pluralism,’ *Law & Society Review* 22 (5) (1988): 870.

24 For an early overview, see John Griffiths, ‘What Is Legal Pluralism?’, *Journal of Legal Pluralism and Unofficial Law* 24 (1986): 1-55.

25 See e.g. Brian Z. Tamanaha, *Understanding Law in Micronesia: an Interpretive Approach to Transplanted Law* (Leiden: Brill, 1993).

26 See e.g. Harold J. Berman, *Law and Revolution: the Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983).

27 Griffiths, ‘What Is Legal Pluralism?’, 3.

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society must, on this view, be vindicated by the empirical data. In other words, the legal pluralist critique rests ultimately on the apparent truism (for all but legal philosophers) that the etiology of social life is complex.

So far all of this is familiar territory. How, then, has the concept of legal pluralism been adapted to the exigencies of globalization? In the next two sections, we will discuss two versions of the resulting concept – ‘global legal pluralism’ – that roughly correspond to the aforementioned distinction between normativity and institutionality.

The first is to see globalization as a catalyst or a compounding factor for the kind of *normative pluralism* just described. Normative pluralism is, empirically speaking, the standard case for the analysis of social life. Yet in an interconnected world of rapid communication, global markets, hypermobility of people, capital, goods and ideas, norms diffuse more easily, clashes between worldviews become more likely, and the opportunities and technological tools for social interaction are greatly enhanced, at the expense of central states to control the normative environment of its subjects.²⁸ According to this view, the challenge to jurisprudence is structurally similar to earlier variants of legal pluralism. Specifically, it challenges both the *normativity* claims of jurisprudence as well as the appropriateness of its methodology for understanding legal phenomena in a global context. We will consider this line of argument in section 4.

The second way in which globalization and legal pluralism have been linked is more specifically concerned with *legal* phenomena, rather than simply the proliferation of *normative* pluralism. The term ‘legal’ here is used to broadly signify those forms of normative order that possess a degree of institutionalization and a considerable systemic quality, to distinguish them from broader sources of normative order such as the family or the workplace which are often marked by a stronger degree of informality and are rarely codified. Many of these institutionalized systems are nominally private, being only loosely related to state-law, yet in practice frequently straddle the line between the public and the private sphere. This is true, for instance, for standard setting bodies such as the ISO, private certification organizations that nevertheless wield large degrees of influence in specific sectors (such as the financial ratings agencies²⁹ or various forms of eco-³⁰ or kosher food labelling³¹) or which control critical material infrastructures or

28 On this aspect of globalization, see especially Manuel Castells, *The Rise of the Network Society* (Malden, MA: Blackwell Publishers, 2000); Manuel Castells, *Communication Power* (Oxford University Press, 2009).

29 See e.g. John Flood, ‘Rating, Dating, and the Informal Regulation and the Formal Ordering of Financial Transactions: Securitizations and Credit Rating Agencies,’ in *Privatising Development: Transnational Law, Infrastructure and Human Rights*, ed. M. Likosky (Leiden: Martinus Nijhoff, 2005).

30 For an example in the context of global fisheries regulation through the Marine Stewardship Council, see Thomas Hale, ‘Marine Stewardship Council,’ in *Handbook of Transnational Governance: Institutions and Innovations*, ed. T. Hale & D. Held (Oxford: Polity, 2011), 308-14.

31 See e.g. Shayna Sigman, ‘Kosher Without Law: The Role of Nonlegal Sanctions in Overcoming Fraud Within the Kosher Food Industry,’ *Florida State University Law Review* 31 (2004): 509-601.

resources (banks, large, transnational oil companies, or corporations responsible for the internet's physical infrastructure). This concept of global legal pluralism poses significant challenges for the concept of *institutionality* within jurisprudence. In section 5, we will consider recent scholarship that takes aim at this dimension of jurisprudence in light of global legal pluralism.

4 The Normativity of Law and Global Legal Pluralism

Traditional legal pluralism directed its criticism mainly at two aspects of jurisprudence. First, with regards to *method*, it dismissed its idiosyncratic understanding of descriptiveness as a misnomer: from the perspective of empirically informed social inquiry, the kind of speculative and conceptual inquiry typical of jurisprudence is descriptive in name only. Second, with regards to *substance*, legal pluralism argues that any plausible empirical account of norm-governed social life cannot be limited to an investigation of state legal norms alone. The two points are sides of the same coin. The non-empirical, conceptual bent of jurisprudence that takes the primacy of state-law for granted is part cause, part consequence of its inability to properly accommodate the insights of empirical research.

One current strand of global legal pluralism can be read as an extension of this line of thought, noting that globalization can create the kind of social dynamic that reinforces tendencies towards normative pluralism that have long been present in society. Globalization, on this view, is a *catalyst* for legal pluralism.

4.1 Globalization as a Catalyst for Legal Pluralism

There are a variety of ways in which globalization can reinforce tendencies towards legal pluralism. Globalization may, for instance, play a role in reinvigorating and strengthening local, grass roots and informal embedded norms vis-à-vis the homogenizing tendencies of global political and economic pressures towards convergence.³² Such processes are neither unidirectional nor one-dimensional. In some cases, authors have focussed on the role of relatively small and cohesive communities and how they are utilising modern communication technologies to organize themselves across borders. The embedded, bottom-up and communal norms that characterize daily life for most people can in such cases be strengthened rather than threatened by globalization. Small communities that would otherwise find themselves singled out as minorities and their communal norms under threat can forge transnational solidarities and social media to consolidate their positions by joining forces with like-minded groups across the world and by mustering support for their causes in popular media. Globalization, particularly in terms of modern social media and communication technology, is credited with facilitating novel forms of social organization that allows for the creation of transnational solidarities, a theme often touted with regards to the 'Arab Spring' revolts in 2010 and 2011 and the global 'Occupy!' movements in the

32 For a recent example, see Sally Engle Merry et al., 'Law From Below: Women's Human Rights and Social Movements in New York City,' *Law & Society Review* 44 (1) (2010): 101-28.

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wake of the on-going global financial crisis. In other words, the spatial assumptions underpinning much social theory (including law) are being actively challenged by the ‘deterritorializing’ tendencies of globalization:

[D]eterritorialization refers to the reach of this connectivity into the localities in which everyday life is conducted and experienced. This is at once a perplexing and disruptive, and an exhilarating and empowering phenomenon, involving the simultaneous penetration of local world by distant forces, and the dislodging of everyday meanings from their “anchors” in the local environment.³³

Yet similar dynamics have been noted, most notably by Anne-Marie Slaughter, with respect to professional and so-called epistemic communities that organize themselves into transnational networks for the purposes of exchanging information and ‘best practices’ as well as forging a common *esprit de corps* that extends beyond narrow national boundaries within a certain profession or area of technical expertise.³⁴ In this context, particular attention has been paid to the phenomenon of ‘judicial borrowing’ whereby Supreme Court judges seek to cite opinions by their foreign peers in matters of domestic adjudication in conscious efforts to locate their own jurisprudence in relation to that of other jurisdictions.³⁵ Thus, according to this view, globalization is a catalyst for normative pluralism more generally through a variety of causal mechanisms: enabling cross-distance communication, allowing for transnational solidarities as well as provoking resistance against external pressures for normative conformity or political adaption.

Another way to put the point is to observe that globalization ruptures the close association between space and norm. Actors in the contemporary world have access to social interactions and communities that extend far beyond their geographical locale, and the rapidly emerging picture is a situation wherein the status of a normative system as ‘hard’ or ‘soft,’ ‘national’ or ‘international,’ ‘formal’ or ‘informal’ is becoming increasingly irrelevant to its adoption or practical effect: actors will resort to whatever norms appear expedient or legitimate, relative to their own concerns and perspective.³⁶ ‘Indeed, in a global world, legal pluralism is

33 John Tomlinson, ‘Globalization and Cultural Analysis,’ in *Globalization Theory: Approaches and Controversies*, eds. A. McGrew & D. Held (Cambridge: Polity, 2007), 152-53.

34 Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004).

35 For recent efforts in this area, see ‘Special Issue on Highest Courts and Transnational Interaction,’ *Utrecht Law Review*, 8 (2) (2012).

36 Compare, for instance, Dalhuisen on the driving rationale behind the adoption of the new *lex mercatoria*. Jan Dalhuisen, ‘Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its *Lex Mercatoria*,’ *Berkeley Journal of International Law* 24 (1) (2006): 133: ‘The search is therefore on for a forward-moving set of internationalized, uniform principles and rules that may be largely articulated by participants themselves and draws widely from their practical needs, established ways of dealing, best practices, trade organization rules, and from the innate rationality of their international dealings.’

increasing, as is the capacity for and the actual growth of various forms of global law, defined primarily as the law of private actors.³⁷

4.2 *Global legal pluralism as a critique of normativity*

In short, one view of global legal pluralism is the ‘catalyst’ view: the degree, or at least the relevance, of legal pluralism increases in some proportional measure to the extent that traditional social structures are affected by globalization. The main point to note about this argumentative strategy is that globalization is somewhat unremarkable in all of this, in the sense that all the traditional arguments against jurisprudence apply with the same force in the context of globalization.

Any general theory of law that excludes non-state normative phenomena from its analysis is likely to suffer from an inability to adequately explain actually observed social behaviour. A number of excerpts from recent writing on legal theory and globalization should demonstrate how many authors latch onto precisely this point. Jurisprudence, says Twining, has bypassed the fact that

‘from a global perspective, a reasonably inclusive picture of law in the world would encompass various forms of non-state law, especially different kinds of religious and customary law that fall outside “the Westphalian duo” [of national state-law and public international law].’³⁸

A state-law centric theory is needlessly parochial and

‘for the purpose of viewing law from a global perspective as part of a cosmopolitan discipline, a conception of law that is confined to state law (and maybe a few close analogies) leaves out far too much. There are many phenomena, which can be subsumed under the umbrella of non-state law, that are appropriate subject-matters of our discipline that would be excluded or distorted by so narrow a focus, such as various forms and traditions of religious or customary law.’³⁹

Menski notes that ‘there is an emerging consensus that one cannot view law as solely emanating from the state,’⁴⁰ while Glenn contends that the ‘search for transnational law is hampered by the idea that the source of all law is the nation-state.’⁴¹

37 Alfred C. Aman Jr., *The Democracy Deficit: Taming Globalization Through Law Reform* (New York: New York University Press, 2004), 2.

38 Twining, *General Jurisprudence*, 7.

39 *Ibid.*, 66.

40 Werner Menski, *Comparative Law in a Global Context: the Legal Systems of Asia and Africa*, 2nd ed. (Cambridge: Cambridge University Press, 2006), 27.

41 H. Patrick Glenn, ‘Transnational Common Laws,’ *Fordham International Law Journal* 29 (2006): 457.

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Many early critics of jurisprudential thought, such as Ehrlich, Malinowski and Pound, basically conceived of the law as those normative standards of conduct that were manifested in the actual behaviour of concrete social groups.⁴² Often, (according to many: most of the time) those normative standards are not those of the state. However, general jurisprudence assumes – uncritically and with little or no empirical justification – that the primary rules of obligation of the *state* are typically successful at maintaining social order, even if in actuality social order is most commonly maintained by a variety of other mechanisms of social control, ranging from local customs and religious norms, to various forms of social control exerted through churches, labour unions, schools, universities and so forth. The view emphasized by these critics is

‘that law consists of and can be found in the regularized conduct or actual patterns of behaviour in a community, association, or society. This view of law led them to reject the notion that law is connected to the state.’⁴³

The state-centrism of general jurisprudence is exemplified by the assumption that the primary rules of obligation manifested in the actual conduct of agents are congruous with those rules promulgated by the state: an assumption that is by no means necessarily the case, and must *follow* rather than *precede* empirical inquiry. From the legal pluralist perspective,

‘[t]here is no need to uphold, *as a matter of definition*, a particular perspective on the “nature” of law. On the contrary, the nature of law, as of any other social phenomenon, is something to be learned in the course of inquiry. It is an outcome, not a starting point.’⁴⁴

A truly descriptive theory, critics argue, ‘treats legal experience as variable and contextual. That canon is violated when law is characterized unidimensionally or is said to possess invariant attributes.’⁴⁵ The primary behavioural norms of the state may or may not be a factor in the observed conduct of social groups, but this is not something that can be assumed.

The critique of methodology is thus internally connected to a critique of normativity: a theory confined to state-law cannot account for observed normative conduct, and this is in part because of an impoverished understanding of what ‘descriptive’ entails. Even *if* one accepts that we can equate ‘law’ with ‘state-law,’

42 See e.g. Eugen Ehrlich & Nathan Isaacs, ‘The Sociology of Law,’ *Harvard Law Review* 36 (2) (1922): 130-45; Roscoe Pound, ‘Law in Books and Law in Action,’ *American Law Review* 44 (1) (1910): 12-36; Bronislaw Malinowski, *Crime and Custom in Savage Society*, Littlefield, Adams Quality Paperback (Totowa, NJ: Littlefield, Adams, 1972).

43 Brian Z. Tamanaha, *Realistic Socio-legal Theory: Pragmatism and a Social Theory of Law* (Oxford: Oxford University Press, 1999), 93.

44 Philippe Nonet, Philip Selznick, & Robert A. Kagan, *Law & Society in Transition: Toward Responsive Law* (New Brunswick, NJ: Transaction Publishers, 2001), 10 (emphasis in original).

45 *Ibid.*, 9 (emphasis in original).

the *kind* of theory on offer within jurisprudence will do little to shed light on how state-law operates in practice. William Twining makes the point as follows:

‘... what is needed is a much broader conception of what is involved [in conceptual analysis] than those of Hart or Raz or even Stone. The central concern is with the development of adequate ways of expressing law and talking about law across legal orders, jurisdictions, levels, traditions, and cultures – ranging from comparison of two or more contexts to genuinely global generalizations. What travels well/badly, when, why, and how?’⁴⁶

Concepts can aid the process of description, but they are not *themselves* descriptive. Concepts mediate between the observer and the observed, but cannot stand in for actual knowledge about how law actually operates, which can only be acquired through sustained empirical inquiry.

One can thus question whether globalization on this view is at all ‘revolutionary.’ In many ways, state-law had already been pronounced ‘dead’ by many socio-legal scholars long before it became fashionable to advance similar claims regarding the Westphalian nation-state itself in the wider context of the social sciences. We might thus reasonably expect the burgeoning literature on globalization and state-decline to be a welcome complement to longstanding efforts to assail the dominance of state-law in legal theory. One of the ironies about the current state of the legal theory and globalization debate is that the latter is treated as further confirmation that the legal pluralist critique had been right all along. State-law is not, and never has been, the all-powerful and omnipotent Leviathan ruling over society. Rather, the normative infrastructure of society has always been far more complex and diverse, with social processes being governed by norms drawn from a wide range of different sources, whether they be the norms of culture, morality, civility, family, the workplace, the industry sector, etc.

The fact that globalization is being invoked more broadly to assail the primacy of the nation-state in other areas is taken as a vindication of an insight that had held sway in the more narrow confines of empirically oriented socio-legal theory for several decades. But the other side to the legal pluralist approach is that globalization functions less as an independent object of inquiry, but rather as a kind of catalyst: increasing flows of global migration simply create *more* sources of trans-cultural norms, the growing amount of interactions around the globe simply makes us *more* aware of the bewildering plurality of normative systems, and the darker, more repressive side of global integrations compels many groups to

46 Twining, *General Jurisprudence*, 39.

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assert their own cultural and religious identity in the face of encroaching hegemonic tendencies.⁴⁷

‘Global legal pluralism’ is thus an evolutionary progression from earlier incarnations, emphasizing many of the same themes and phenomena. Globalization acts both as a catalyst – amplifying longstanding tendencies towards normative pluralism within society – as well as a source of novel normative phenomena, such as those dealing with the regulation of transnational phenomena.

For all of these reasons, a global world is simply a world of more rather than less legal pluralism, but a world of legal pluralism nevertheless, much as it has always been. As an independent variable in an account of social behaviour, an NGO’s voluntary, non-binding ‘code of conduct’ to which multinational corporations may or may not subscribe is qualitatively much the same as a domestic legislative provision proscribing a certain course of conduct, if both secure a degree of compliance. Globalization tells us that it might be wise to look beyond our usual scope of potential explanations. Notably, it suggests that regional and global forces can be expected to be relevant where this was previously not feasible. Explanations of this kind are often attributed to the role of the social media, e.g. when the spread of the ‘Arab Spring’ protests is attributed partly to the ability of events in one country to affect those in another through the rapid dissemination of information.

We can conclude this section with the observation that there is a strong case that globalization is indeed a problem for jurisprudence *to the extent* that it shares the explanatory aims of socio-legal theory. The debate sketched in this chapter barely transcends the level of methodology and meta-theory, and further does little to address the merits of either general jurisprudence or its socio-legal alternatives. Hence, this critique is referred to as the ‘external’ critique, because it takes place mainly outside of the level of substantive conclusions.

5 The Institutionality of Law and Global Legal Pluralism

5.1 An Alternative Conception of Global Legal Pluralism

The methodology-normativity critique discussed in the previous section raised a number of issues about the value of conceptual, analytical jurisprudence traditionally conceived. It questions the commensurability of, on the one hand, the ambition to be ‘descriptive’ with, on the other, the *a priori* rejection of any social phenomenon other than state-law as an object of inquiry. At odds were different conceptions of what a descriptive theory of law should ultimately deliver: should

47 Rubya Mehdi et al., ‘Introduction,’ in *Law and Religion in Multicultural Societies*, eds. R. Mehdi et al. (Copenhagen: DJØF Pub., 2008), 16-17: ‘Modern modes of instant communication over huge distances mean that immigrants often remain effective members of their communities of origin. This reduces any tendency that there might have been for them to modify or abandon their religion’s tenets and practices when they find themselves in an environment which is less receptive or accommodating.’

it make empirically rich generalizations from a circumscribed set of social institutions? or should we instead seek something more transcendent and conceptual such as a 'concept' of law's 'nature,' or a description of the central or focal case of law? Globalization does not fundamentally change this critique: it has simply become the latest battleground in a longstanding war. It does, however, give the debate renewed vigour. Anybody wanting to learn more about contemporary social processes will have to deal with 'glocalization',⁴⁸ that is, the likelihood that social dynamics at the local level are increasingly intertwined with a wider range of actors and systems than ever before, many of which will be transnational in character. The principal consequence is mainly methodological. Those hoping to learn more about the social world we inhabit and the laws which animate its social life, are well advised to consider the role of global markets, social movements, transnational solidarity groups and many more social forces typically associated with globalization, in addition to the more localized factors that have typically been the focus of social inquiry.

Whereas much of this critique ultimately rejects the project of jurisprudence *tout court*, there is a growing body of scholarship that accepts the basic orientation of jurisprudence whilst trying to address the concern that global legal pluralism challenges some of the discipline's basic assumptions. As noted, the first variety of global legal pluralism just described is structurally similar to earlier versions of legal pluralism. It is viewed as a process concerned with normative phenomena more broadly defined, thus including the informal, non-codified and often-unarticulated norms governing specific communities and defined locales. By contrast, the more salient and consequential development is, in the eyes of many, a special kind of global legal pluralism marked by the emergence and subsequent proliferation of a particular kind of normative formation that tends to exhibit a stronger degree of formality, institutionalization and rationalization. This manifestation of global legal pluralism is characterized by the following features:

1. The community of norm-makers and norm-subjects frequently extends across the territorial boundaries of the state. The dominant dimension of jurisdictional scope tends to be functional rather than geographical. The nature of modern social interaction is such that almost every sphere of human action – from the economic, to the political and to the cultural – can be conducted with only a minimal regard for the timing and spacing of activities.⁴⁹
2. The relevant norms of the system are frequently formulated, interpreted, applied and adjudicated by non-state actors in addition to more traditional state actors (e.g. the phenomenon of 'soft law') or, when international organi-

48 The term is commonly attributed to Roland Robertson. See Roland Robertson, 'Glocalization: Time-space and Homogeneity-heterogeneity,' in *Global Modernities*, eds. M. Featherstone, S.M. Lash, & R. Robertson (London: Sage, 1995).

49 See in particular Castells, *The Rise of the Network Society*; Saskia Sassen, *Territory, Authority, Rights: from Medieval to Global Assemblages* (Princeton, NJ: Princeton University Press, 2006).

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zations are formally constituted by state consent, the decisions of many supranational and regional bodies are both *de facto* and *de iure* binding on its members despite the fact that their authority ultimately depends on state consent.

3. The legal systems exhibit a significant degree of institutionalization, in the minimal sense that they are part of conscious and explicit efforts on the part of a group of actors to regulate their own and others' affairs and in the more comprehensive sense that the system exhibits high degrees of formalization (e.g. utilizing explicit codes, guidelines, best practices or model contracts), rationalization (e.g. the adoption of procedures for promulgation, change or adoption) and institutionalization (e.g. the formation of committees, boards, tribunals and the issuing of briefs, the use of consultations, judicial-like decisions, etc.).⁵⁰
4. Many of these systems govern spheres of action that have significant and widespread consequences for the governance of those areas of social life that have, for most of the post-World War II period, been deemed to fall firmly within the purview of the nation-state.

These attributes are offered merely as a rough approximation, but its main contours will nevertheless be familiar to most: the laws and decisions of international organizations such as the World Trade Organization and the European Union, the new *lex mercatoria*, standards and voluntary guidelines drafted by industry associations, NGO's, multi-national corporations, and so forth.⁵¹ Many of these systems do not simply function as a repository of norms, they do so in a self-conscious and reflexive manner with a full complement of councils, tribunals, codes, procedures etc.

Yet most relevant to legal theory is perhaps the fourth element: the fact that many of these global regimes encroach upon domains of social life that had, until recently, been deemed to be the exclusive purview of the state. Whether it is the widespread (semi-)privatization of former public services (of public utilities from telecommunications to public transportation) or the governance of such crucial technologies as the Internet (largely facilitated by the Internet Corporation for Assigned Names and Numbers, or 'ICANN' – a private organization incorporated in California, United States) or the co-operation of national central banks (through the Basel Committee on Banking Supervision). In a development that has been going on for well over two centuries, society is increasingly dividing itself into distinct spheres of social action, each with its own logic of action and normative system. Due to the tremendously increased capacity for coordination,

50 Of particular relevance here is the work of Niklas Luhman & Gunther Teubner. See Niklas Luhmann et al., *Law as a Social System*, Oxford Socio-legal Studies (Oxford: Oxford University Press, 2004); Teubner, 'Global Bukowina'; Gunther Teubner & Andreas Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law,' *Michigan Journal of International Law* 25 (2004): 999-1046.

51 For a comprehensive overview, see Zumbansen, 'Transnational Legal Pluralism.'

transportation and communication across borders, such systems draw together participants from across geographical, political and cultural boundaries. Thus, any given system – say, the global pharmaceutical industry, or a regional network of coffee producers – will depend for its proper functioning on a dense constellation of state laws, informal and tacit guidelines, formalized best practices and codes of conduct, possibly drafted by industry associations and labour unions, standard contracts, etc. As Teubner and Fischer-Lescano note,

‘[t]hrough their own operative closure, global functional systems create a sphere for themselves in which they are free to intensify their own rationality without regard to other social systems or, indeed, regard for their natural or human environment.’⁵²

This variant of global legal pluralism thus limits its focus to those phenomena which are transnational and non-state, yet highly formalized and institutionalized, are often operating in fields that have a quasi-public dimension and have, at the very least, a tangible impact on areas of public concern. As such, this conception of global legal pluralism raises a different set of concerns for jurisprudence, to which we now turn.

5.2 Institutionalism and Global Legal Pluralism

As noted above, Hart’s introduction of secondary rules as a key analytical concept within legal theory has been a defining feature of contemporary jurisprudence ever since. Curiously, this focus has led to a subsequent weakening of the focus on law associated with primary norms, as noted above. Postema remarks that:

‘Hart narrowed the conventional foundations of law to the practice of law-applying officials in the limited enterprise of recognizing legal norms as valid in the system, although he added, in what might strike some as an afterthought, that general conformity of the behaviour of the populace to the officially-recognized law is also necessary for its existence.’⁵³

When jurisprudence studies the law, what is being discussed, in substance, is the practice of legal *officials*. Contemporary debates in jurisprudence have subsequently focused almost exclusively on the activities of this group, and the principal product of their behaviour: the rule of recognition. Whether it can include references to moral norms or legal principles, whether it is actually a rule or simply a social fact, simple or complex, and much more.

This introduces an obvious point of connection with one major aspect of global legal pluralism. As mentioned above, the phenomenon is remarkable in large part due to the proliferation of institutionalized normative systems that are not coex-

52 Teubner & Fischer-Lescano, ‘Regime-Collisions,’ 1006.

53 Gerald Postema, ‘Conformity, Custom, and Congruence: Rethinking the Efficacy of Law,’ in *The Legacy of H.L.A. Hart*, eds. M. Kramer et al. (Oxford: Oxford University Press, 2008), 45-46.

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tensive with the law of the state. For many scholars that are broadly sympathetic to the aims of jurisprudence, this raises vexed questions about how these new systems relate to the traditional conceptualization of law's institutional features.

What can we say about institutionality and law in modern jurisprudence? It is useful to keep in mind that institutionalized normative systems are not peculiar to the modern state. The public law of the late imperial Roman period had well-developed and codified systems of secondary norms, including rules for the establishment of offices for the creation of new laws, prescribing procedures for the appointment of office-holders and providing mechanisms for the adjudication of disputes according to legal norms.⁵⁴ Similarly, many historical corporate bodies, such as medieval guilds, churches and the first trading corporations (e.g. the various India Trading Companies), similarly had the kind of institutional structure which is marked by the presence of secondary rules.

In spite of this, Hart put the institutionalization of law – the establishment of secondary rules to mediate the application of primary rules of behaviour – at the heart of jurisprudence. Although Hart did not go to great lengths to differentiate state legal systems from other institutionalized normative systems in this regard, one of his main assertions is the point that the municipal legal systems of the nation-states are nevertheless unique on account of their own, specific mode of institutionalization. On the basis of Hart's discussion in *The Concept of Law*, the tenor of his argument suggests that there are two important differences. The first contains the distinct identity of the class of agents whose behaviour is constitutive of the rule of recognition, i.e. *public* officials. Hart does not go into a great deal of detail concerning the identity of these officials (a fact which several critics have latched on to⁵⁵), taking it as self-evident that the central case of such an official can include judges, lawyers, administrators and other typical state agents. Yet the distinction between a public official and a private citizen is strongly presupposed by Hart's theory, and indeed much of modern jurisprudence.⁵⁶

The second distinctive feature is that Hart implies at various points in *The Concept of Law* that legal systems play a facilitating role in the creation of other institutional systems. They are, in a sense, conceptually (and perhaps empirically, although that is more tenuous) prior to other institutionalized systems in society. For example, Hart notes how the establishment of the 'power conferring' rules that exist within legal systems allow norm-subjects to craft their own arrangements – interpersonal or institutional – for the pursuit of their own ends.⁵⁷ Hart

54 If bureaucracy is used as a rough proxy for the amount of 'legal officials' and the extent to which secondary rules are a feature of a system of rule, the size of the late Roman imperial bureaucracy is remarkable. See Christopher Kelly, *Ruling the Later Roman Empire* (Cambridge, MA: Belknap Press of Harvard University Press, 2004), 111: 'By the beginning of the sixth century, at a fairly conservative estimate, there were perhaps 30,000 to 35,000 bureaucrats on the imperial payroll.'

55 Notably by Tamanaha, *A General Jurisprudence of Law and Society*, 139.

56 See *ibid.* See also Keith Charles Culver & Michael Giudice, *Legality's Borders: an Essay in General Jurisprudence* (Oxford: Oxford University Press, 2010), chap. 1.2.

57 Hart, *The Concept of Law*, 27-28.

seems to be expressing the traditional liberal view of the state as an ‘association of associations,’ a facilitative framework upon which more limited-purpose groups in society can build. The priority of the state legal system is also suggested in Hart’s discussion of the ‘minimum content of natural law’ that all legal systems are taken to pursue, in which he argues that securing a baseline level of order and security is the unique task of the legal system, which, at the same time, realizes the requisite preconditions for other kinds of institutional activity. Both features suggest that the state legal system is not simply one institutionalized system among others. Rather, it is *the* principal institutionalized normative system that enables and facilitates the operation of alternative, more limited institutional systems.

Although the discursive shift in legal theory away from the nineteenth century focus on norms and coercive enforcement and toward the normative structures that undergird a legal system *qua* system is primarily due to Hart (and, to a lesser extent, Kelsen), it is Joseph Raz who has most explicitly formulated the distinctive nature of the institutionalization of state legal systems and further elaborated on its main features. Raz argues that ‘[l]egal systems differ from other institutionalized systems primarily by their relation to other institutionalized systems in force in the same society.’⁵⁸ This relation is characterized by three features. First, legal systems are comprehensive in the sense that ‘they claim authority to regulate any type of behaviour.’⁵⁹ Second, legal systems are supreme, in that

‘every legal system claims authority to regulate the setting up and application of other institutionalized systems by its subject-community. In other words it claims authority to prohibit, permit, or impose conditions on the institution and operation of all the normative organizations to which members of its subject-community belong.’⁶⁰

Finally, legal systems are open systems ‘to the extent that they contain norms the purpose of which is to give binding force within the system to norms which do not belong to it.’⁶¹

It is precisely this model of law’s institutional nature that has come under threat due to globalization. One of the main features of global legal pluralism noted above is the fact that many of the novel transnational regulatory regimes possess a great deal of formal and practical independence from nation-states. In the words of Saskia Sassen, under conditions of globalization

‘we are seeing a proliferation of normative orders where once state normativity ruled and the dominant logic was toward producing a unitary normative framing. One synthesizing image we might use to capture these dynamics is

58 Raz, *The Authority of Law*, 116.

59 Ibid.

60 Ibid., 118.

61 Ibid., 119.

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that of a movement from centripetal nation-state articulation to a centrifugal multiplication of specialized assemblages. This multiplication in turn can lead to a sort of simplification of normative structures insofar as these assemblages are partial and often highly specialized formations centered in particular utilities and purposes.⁶²

For many, the autonomy of functional systems cannot be reconciled with the hierarchical view outlined above. This point is not entirely attributable to globalization, as legal theorists such as Teubner and Luhmann have long advanced (and, indeed, Teubner continues to do so in the context of global legal pluralism). Yet state-law's decline as the *de facto* and *de iure* overarching normative system is gaining traction in a wider sphere. What such authors object to, is not so much the assumption that state-law is relevant (it clearly is) but that it is *supreme* or that it effectively controls or anchors other social spheres.

Raz has emphasized that the structural features are in some sense conceptually necessary in that they do not always match up with the facts. State legal systems claim supremacy, even when they do not in fact attain it. The key point made in the context of globalization is not simply that supremacy, hierarchy and comprehensiveness are *descriptively* inadequate. The point is rather that such claims do not even characterize the *conceptual* nature of legal systems, the 'claims' they characteristically make. It is to this point that we now turn.

5.3 *Towards a Differentiated View of Legality*

One of the advantages of global legal pluralism, from a scholarly perspective, is the fact that the problem of normative conflict is not simply a theoretical, but a thoroughly practical problem faced by courts and policy makers with a great degree of frequency. As such, many recent accounts have a strong adjudicative slant to them. Consider, for instance, the work of Paul Schiff Berman, arguing for a 'jurisprudence of hybridity' and noting that

'such a jurisprudence may actually be preferable to either a hierarchical jurisprudence whereby the hegemonic state imposes a universal norm, or a separatist jurisprudence whereby non-state communities attempt to maintain complete autonomy.'⁶³

Delmas-Marty writes that

'[t]his is where the difficulty lies: the interactions already occurring between multiple and heterogeneous legal systems do not offer the same image of legal certainty as that which results from the principle of hierarchy in the standard representation of legal systems. And yet, these are indeed legal, and

62 Saskia Sassen, 'Neither Global nor National: Novel Assemblages of Territory, Authority and Rights,' *Ethics & Global Politics* 1 (1-2) (2008): 61.

63 Paul Schiff Berman, 'Towards a Jurisprudence of Hybridity,' *Utah Law Review* 1 (1) (2010): 12.

therefore normative, interactions: they define an “ought to be” (normativity), rather than simply an “is” (normality), though of course one influences the other.’⁶⁴

Legal scholars have long been interested in the question of recognizing private law making, customary law and the like. Similarly, conflict of laws doctrine is a rich repository of doctrinal thinking concerning the co-existence of different forms of (national) laws. Such doctrines are still premised on the broad view of state supremacy and a clear hierarchy of legal sources. In more recent times, debate has focused strongly on cultural rights, in particular whether courts ought to acknowledge the right of minority cultures to enforce norms that run counter to state-law (e.g. the cultural defence in criminal law, exceptions for religious slaughter laws etc.). Whereas such debates have been more common in political theory than in legal philosophy, globalization has given such issues a strong salience in the legal sphere as ‘regime collisions’ occur more frequently.⁶⁵

Particularly in relation to supranational organizations and courts, such as the EU, ECtHR and ICC, legal scholarship is now replete with discussions of subsidiarity principles, margins of appreciation, complementarity, open methods of co-ordination etc.: all of them principles designed to deal with a world of multiple normative sources lacking a clear hierarchical relation. Undoubtedly the fact that many of the problems of pluralism arise in the institutional context of state courts has fuelled such efforts. As much is suggested by Patrick Glenn:

‘The judicial function requires that a judge should not treat a national legal system as a simple fact, applicable on national territory with no further justification, but as a normative claim for application engaged in a dialogical relation with other normative claims for application. The judge, as judge, cannot be a positivist legal philosopher who simply accepts the existence and necessary application of national legal systems, in the face of alternative, reasoned, legal claims. We know this from the practice of judges who accept legal unities other than state law.’⁶⁶

Two recent works have attempted to outline the implications of these developments for the Hartian-Razian model of institutionalization.⁶⁷ Culver and Giudice, in their *Legality’s Borders*, build their argument around the concept of ‘legality,’ which takes direct aim at the Hartian-Razian model. Whereas Hart’s view of law as a system of primary norms institutionalized through secondary rules has tradi-

64 Delmas-Marty, *Ordering Pluralism*, 15.

65 See in particular Gunther Teubner & Peter Korth, ‘Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society,’ *SSRN* 2009, <http://ssrn.com/abstract=1416041>.

66 H. Patrick Glenn, ‘Accommodating Unity,’ in *Highest Courts and Globalisation*, eds. S. Muller & S. Richards (The Hague: Hague Academic Press, 2010), 95.

67 Detlef von Daniels, *The Concept of Law from a Transnational Perspective* (Farnham: Ashgate, 2010); Culver & Giudice, *Legality’s Borders*.

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tionally been taken to be the paradigm instance of legality, the authors argue that any plausible understanding of contemporary ‘prima facie’ legal phenomena will encompass, inter alia ‘intra-state legality, trans-state legality, supra-state legality and super-state legality’ and they go on to claim that as a consequence

[s]tate-based theories of Hart and Raz ... with their commitment to the ideas of “official”, “hierarchy”, and “system” – very likely distort the nature of emerging forms of prima facie legality, forcing as they do all experience of legality through understanding of the law-state. [In light of this] several features of state-based analytical legal theory suffer from growing descriptive irrelevance. Among these are the explanatory commitments to officials, hierarchies, and comprehensive, supreme, and open systems at legality’s foundation.⁶⁸

The authors’ own alternative account intended to avoid the distortions of state-based legality is composed of two main elements. The first is to disassociate the concept of ‘legality’ from the concept of the ‘state’ by articulating a generic conception of legality based on the work of Raz and MacCormick. The essence of this concept lies in the ability of a particular institutionalized normative order to generate ‘content-independent peremptory reasons for action’, understood in Hartian terms as

‘those norms requiring conduct that are capable of being identified and serving as reasons for action independently of consideration of their underlying purposes or justificatory reasons. ... In our view, where they exist, legality exists.’⁶⁹

The authors go on to state that

‘once we are meta-theoretically committed to avoidance of the distorting effects of presumption of the systemic law-state as the basic experience of legality, and aim instead to elaborate a concept of law useful to inquirers facing legality in institutional homes within and without the law-state, we become sensitive to the need to provide a deeper account of the way officials and non-officials use legal norms in systemic and other kinds of legal order.’⁷⁰

The observation that there are multiple forms of legality within society is not itself new. Indeed, it is a point made by many jurisprudence scholars, including Raz. Yet as discussed above, the traditional view of such non-state orders is that they ‘are all established in order to achieve certain limited goals and each claims authority over behaviour relevant to that goal only.’⁷¹ While it is indeed the case

68 Culver & Giudice, *Legality’s Borders*, 175.

69 *Ibid.*, 114-15.

70 *Ibid.*, 115.

71 Raz, *The Authority of Law*, 117.

that the regimes emphasized by global legal pluralism are highly specific (indeed, their technical and functional character is often their most conspicuous feature), to view such regimes as simply private associations pursuing private ends would be to misjudge their fundamental character. The strong distinction between state-law as an overarching, public association contrasted with the more limited, private and factional groups that it supports and to which it is superior misses the fact that although many regimes are hyper-specific and technical, they are deeply implicated in questions of public governance. And as a consequence,

‘non-state international and transnational legality often comes to shape future practices of states, which as a result may have to relinquish their self-identity claims of comprehensiveness, supremacy, and openness.’⁷²

The shift is due to the changing nature between ‘public’ and ‘private’ legal spheres associated with the rise of the modern regulatory state. As Peer Zumbansen argues:

‘[A]n allegedly clear-cut distinction between public and private governance schemes, built on the image of a sovereign, knowledgeable state presiding over a fragmented market society, would fail to grasp the intricate forms of intertwined public-private governance mechanisms, of knowledge sharing and experimental politics that characterise contemporary lawmaking.’⁷³

And elsewhere Aman notes that

‘[o]ne of the hallmarks of regulation in the global era has been the shift from state-centered, command-control approaches to market forms of regulation. This trend goes well beyond the use of market incentives in rules issued by administrative agencies. It also includes partial and sometimes wholesale delegation of certain public functions and responsibilities to the private sector.’⁷⁴

As a consequence, the state’s relation to many of those nominally private regimes is one of interdependence rather than domination. According to the authors, this necessitates a shift to an *interactional* model of legal institutionality:

‘Legal systems which no longer claim to be comprehensive, supreme, and open are far removed from the dominant analytical understanding of legal systems as state legal systems ... Once legality is seen to depend upon non-hierarchical practices of institutions interacting with each other across old

72 Culver & Giudice, *Legality’s Borders*, 78.

73 Peer Zumbansen, ‘Neither “Public” nor “Private”, “National” nor “International”: Transnational Corporate Governance from a Legal Pluralist Perspective,’ *Journal of Law and Society* 38 (1) (2011): 66-67.

74 Alfred C. Aman Jr., ‘The Limits of Globalization and the Future of Administrative Law: From Government to Governance,’ *Indiana Journal of Global Legal Studies* 8 (2001): 379.

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state boundaries, talk of separate legal systems seems only more and more distracting.⁷⁵

Because legality is present to varying degrees in many institutional loci, it is crucial to pay attention to the *interaction* between various orders of legality, as it

‘is useful to choose, as legality-tracking characteristics of legal institutions interacting over time, the fact that those institutions are typically part of a composition of interdependent institutions related by *mutual reference* occurring at some level of *intensity*.’⁷⁶

Ultimately, the authors conclude:

‘[O]nce it is recognized that legality within states is constituted not by the activities of the state, or supreme state sources of law, but rather is constituted by institutional interdependence and interaction which may or may not be organized hierarchically, and may or may not rest at the borders with the activities of determinately identifiable state officials, it becomes clear to see that inter-institutional activity can occur at many levels and across many different geographical regions.’⁷⁷

Apart from the argument that state-law is simply one manifestation of legality, and that global legal pluralism provides many examples of normative order that are institutionalized in similar ways to state-law, operating and structured along similar lines, the more significant point is that the *interaction* between normative systems ought to be a crucial element in a general theory of law. What had previously been considered essential elements – supremacy, openness, a rigid distinction between officials and non-officials – now appear to be non-essential, either because such features cannot reasonably be said to represent a typical case of state-law, or because such features are in fact widely shared between state-law and other forms of law. Instead, the authors recommend focusing on inter-institutional dynamics and treating ‘law’ as the totality of inter-institutional relationships of normative orders.

It is at this point that the work of Culver and Giudice shows a strong affinity with the theses developed in *The Concept of Law from a Transnational Perspective*, by Detlef von Daniels. Like Culver and Giudice, Von Daniels suggests various amendments to Hartian legal theory in light of the various transnational phenomena already noted.⁷⁸ In the first place, Von Daniels contests that the concept of secondary rules themselves go a long way in explaining the distinctive feature of

75 Culver & Giudice, *Legality's Borders*, 74.

76 *Ibid.*, 124 (emphasis in original).

77 *Ibid.*, 172.

78 Von Daniels' book aims to bring the analytical jurisprudence of H.L.A. Hart to bear on the work of Habermas and of continental thought more generally. As these sections do not directly bear upon the present discussion they will be disregarded here.

law's institutionality ('the distinction between primary and secondary rules is, in itself, inadequate to explain the specifics of a legal system, as it is merely one way to describe the formation of institutions'⁷⁹). Instead, we need to supplement Hart's identification of the main categories of secondary rules – change, adjudication and change – by a further type: *linkage rules* that acknowledge the reality that all normative orders are 'woven into a net of legal systems.'⁸⁰ He goes on to suggest that

'every legal system, that is, every institution administrating legal rules with final authority, is for conceptual reasons interwoven with other legal systems or regimes, some being "higher," some "lower," and others on an "equal footing." Hence, the concept of linkage rules is an indispensable component of any descriptive theory that is more than a mere interpretation of one particular practice and has overcome Kelsen's epistemological limits [of considering all legal statements as internal to a practice].'⁸¹

Like Guidice and Culver, Von Daniels rejects the preoccupation with hierarchy and supremacy: the search for a single, over-arching master normativity is not only descriptively futile, but conceptually self-defeating. Von Daniels notes:

"The key is to see that the descriptive point of view does not need an ultimate super-criterion in addition to those already mentioned. It is thus neither "centrality" nor the "monopoly of legitimate force" nor anything else along those lines that could serve as the "super"-criterion, but instead it is the way that legal systems are linked to each other that determines what counts *as a matter of fact as a legal system*."⁸²

This view is remarkably close to Culver and Guidice, who similarly maintain a version of the claim that any general theory of law is at the same time a theory of the interrelationships *between* various kinds of normative order.

In conclusion, the internal critique sets out to retain certain basic tenets of analytical jurisprudence. It accepts Hart's basic point that institutionality is a central feature of state-legal systems. What it questions is the extent to which strong assumptions about hierarchy, comprehensiveness and openness can be sustained. It is worth noting that the arguments just discussed are not simply an argument against comprehensiveness and supremacy, but against *any* sort of determinate and fixed principle for negotiating a plurality of normative claims. Similar to currently fashionable 'network' theories, such moves aim to internalize complexity, adaptability and the growing capacity for self-organization apparently inherent in contemporary social conditions. Nevertheless, such voices remain relatively obscure within jurisprudence, and it remains to be seen to what extent such rec-

79 Von Daniels, *The Concept of Law from a Transnational Perspective*, 160.

80 *Ibid.*, 163.

81 *Ibid.*, 161.

82 *Ibid.*, 155-56 (emphasis in original).

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ommendations will manage to meet with more widespread assent in the field of jurisprudence.

6 Conclusion

The goal of this article was to offer a brief survey of how globalization is being developed within jurisprudence. Jurisprudence is narrower than legal theory when it is understood simply as a general reflection on particular aspects of the legal discipline. The study of transnational law and global governance, the diverse forms of contemporary international law, soft law and transnational regulatory regimes has been proceeding apace, in a wide variety of legal sub-disciplines. Globalization as a factor of theoretical interest is flourishing in many quarters of legal scholarship. Yet jurisprudence, in the more narrowly defined sense, has been quite slow to address many of these concerns. Moreover, as discussed above, the manner in which it is discussed is not dissimilar from more traditional debates in this area.

This paper has argued that there are two broad ways of approaching the issue of globalization, which is itself mainly understood through the lens of global legal pluralism. The first is to use it as a catalyst for longstanding claims attacking jurisprudence for its state-centric focus, its unwillingness to engage with empirical data and its excessively conceptual orientation. However, as noted, in this respect globalization does little to raise new theoretical questions of the discipline. Structurally, the challenges it presents have been long established, and the extent to which one is persuaded to take them seriously will depend on how inclined one is to accept the socio-legal critique more generally.

The more theoretically fruitful critique, it was suggested, lies in recent attempts to address these concerns while staying broadly in the framework of the Hartian and Razian tradition by aiming to tease out the institutional characteristics of law in the context of global legal pluralism. Their theories are emblematic of modern social and political theory more generally. The concept of 'inter-institutional interactions' and 'linkage rules' are similar in tone to fashionable 'network' theories and 'social constructivism' in the wider social sciences that consciously emphasize dynamism, adaptability and ephemerality of legal and political arrangements at any given point in time.⁸³ The central dynamic of interest is the mechanisms whereby states negotiate the co-existence of a multiplicity of normative sources. This can be a matter of negotiating state law and international law, European Union law and the law of its Member States, but it might also refer to 'functional' clashes as those emphasized by Teubner, e.g. when the global trade regime conflicts with the global environmental regime.⁸⁴ Another characteristic feature of such an approach is that it eschews the static quality of hierarchical views of law. Which actors and which normative orderings hold sway in any par-

83 See e.g. Castells, *The Rise of the Network Society*; Slaughter, *A New World Order*.

84 See Teubner & Korth, 'Two Kinds of Legal Pluralism.'

ticular context is constantly changing. Their concepts aim to capture a view of law in which the main participants, actors and norms are constantly in flux and contested.

There is nevertheless a lingering concern. Both theories ultimately seem to embrace, at least in descriptive terms, the non-uniqueness of the state-law and the socio-legal insight that, in terms of explanatory adequacy, there is nothing a state legal system does that cannot, and often has not, been done by non-state legal orders (this is true even for such basic and minimal functions as order, as evidenced in a range of studies of 'failed states'⁸⁵). While they hold fast to the main tenets of analytical jurisprudence, namely that a general, conceptual account of law is valuable separately from the social-scientific approach advocated by socio-legal theory, both theorists have difficulty in pointing out the distinctive features of state-legality vis-à-vis other non-state orderings. If it is no longer supremacy, comprehensiveness and openness that defines the institutionality of state-law, is there any distinguishing feature left?

This problem is related to another central theme in globalization: the perceived shift from 'government' to 'governance.' The dominant mode of regulation during the government era (by rough consensus, lasting from the early twentieth century night-watchman state through to the post-war Keynesian welfare state) was 'command and control' regulation, understood as 'regulation by the state through the use of legal rules backed by (often criminal) sanctions.'⁸⁶

The modern state is no longer characterized by its 'law-sanctioning, hierarchical and command form' but rather by 'its reliance on (state-endorsed) self-regulatory organizations and increasing use of more sophisticated regulatory techniques based, wherever possible, on "soft" law, such as codes of practice and voluntarism, than on direct command-and-control.'⁸⁷ The modern 'regulatory' state is marked primarily by flexibility in the choice of means in regulating its subjects. Its approach is not monolithic, top-down and imperative or centralising. Instead, writes Julia Black,

'[c]omplexity, fragmentation of knowledge and of the exercise of power and control, autonomy, interactions and interdependencies, and the collapse of the public/private distinction are the central elements of the composite "decentred understanding" of regulation.'⁸⁸

85 See Dieter Neubert, 'Local and Regional Non-state Actors on the Margins of Public Policy in Africa,' in *Non-State Actors as Standard Setters*, eds. A. Peters et al. (Cambridge: Cambridge University Press, 2009), 35-60.

86 Julia Black, 'Critical Reflections on Regulation,' *Australian Journal of Legal Philosophy* 27 (2002): 3.

87 Roger King, *The Regulatory State in an Age of Governance: Soft Words and Big Sticks* (Basingstoke: Palgrave Macmillan, 2007), 7 (referring to the work of John Braithwaite).

88 Black, 'Critical Reflections on Regulation,' 8.

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Such views are remarkably similar to the account offered by legal pluralism, with the exception that the conclusion is *not* that the state is powerless or marginalized. Instead, many states have embraced the diversity of actors and the complexity of social processes and developed novel techniques to deal with the resultant complexity. In John Braithwaite's words: '[N]on-state forms of governance by firms, industry associations NGO's and global institutions expand alongside growth in state governance capability.'⁸⁹

All of which leads to a final comment. All of the authors discussed in this essay believe in the value of a *descriptive* account of law. Viewing state-law as a comprehensive and supreme legal system, unilaterally controlling and trumping any other form of normative system in society, has been shown to be problematic. But there is good reason to believe that such principles are more effective as *normative* principles than they are as *descriptive* principles. The loss of certainty, the sense that control over major social forces is lacking, is an endemic and worrying feature of globalization.

It might be more salutary, in line with the normative jurisprudence of authors like Dworkin and Finnis, to view principles as 'supremacy' and 'comprehensiveness' as expressions of the fact that the state with its laws remains the principal institutional locus of legitimacy and public concern. Particularly with the heavy emphasis on privatization, self-regulation and flexible instruments of governance, there appears to be a growing need to ensure that public values are secured as the technique of governance evolves. A view of state legal systems as top-down, unilateral instruments of the state may perhaps fit neither the practice nor the theory of law in a globalized world. Yet, as many regulation theorists have pointed out, relinquishing the model of the state as an all-knowing, all-controlling Leviathan does not mean we have to stop seeing the state as the principal site for the pursuit of the common good. The *means* may have changed, but the *ends* have remained largely the same. Yet that of course raises all the usual concerns about the very possibility of separating the descriptive and normative elements of jurisprudence. Although it falls outside of the scope of this paper, it appears that the evolving character of law in a globalized environment raises fresh concerns about the desirability of a purely descriptive jurisprudence, and whether such a project is even possible or desirable. Be that as it may, jurisprudence remains a relative newcomer to the globalization debate, and many questions remain to be addressed.

89 John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Cheltenham: Edward Elgar, 2008), 28.