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'Global/Transnational Law' Challenges to Theorizing About Law*

Introduction

Although we commonly tend to think that the legal scholarship's vocabulary, entailing phrases such as 'global' or 'transnational law', is a profoundly new phenomenon triggered by processes of radical globalization, this is not quite true. As early as 1931, Max Gutzwiller, an University of Heidelberg professor of international law and arbitration, has used the phrase "*transnationale Privatrecht*" to label the cases of arbitration taken up by the mixed arbitration tribunals created by the Versailles Treaty, which fell out of the scope of the traditional "international private law".¹ In a 1947 discussion on the institutionalization of a post-World War II system of international criminal justice, the famous German legal philosopher Gustav Radbruch characterized it as "a further step from international law to world law (*Weltrecht*)".² More prominently, in his 1956 book, Philip Jessup argued for the introduction of the term "transnational law", which would "include all law which regulates actions or events that transcend national frontiers." It would cover "both public and private international law", as well as "other rules which do not wholly fit into such standard categories."³ These authors were aware of the fact that the world was entering into a phase in which non-state actors will increasingly become subjects of legal regulation beyond the state,⁴ and, hence, they considered the traditional term 'international law' – denoting law regulating relations between states – inadequate to capture the character of this new body of rules. At the same time, they had no reservation as to whether rules guiding the solution of "transnational situations" and/or effects they were producing were of the legal nature.⁵

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¹ Pierre-Yves Saunier, *Transnational History* (Basingstoke: Palgrave Macmillan, 2013), 18-19.

² Gustav Radbruch, *Vorschule der Rechtsphilosophie* (3rd ed.), (Göttingen: Vandenhoeck & Ruprecht, 1965), 111.

³ Philip C. Jessup, *Transnational Law* (New Haven: Yale University Press, 1956), 2.

⁴ Jessup introduced the term "transnational situation", which "may involve individuals, corporations, states, organization of states, or other groups." *Ibid.*, 3.

⁵ Jessup argued that while "[a] problem may also be resolved not by the application of law", the results arrived at "may have legal effect and be in legal form." *Ibid.*, 7.

In terms of the diversity of actors involved in “transnational activities”, the nowadays globalized world aptly demonstrates Jessup’s dictum that there is “almost infinite variety of the transnational situations which may arise.”⁶ What is, however, far less clear is whether all rules regulating those activities and guiding resolution of disputes arising from them are of the legal nature. A noticeable tendency among the contemporary scholars dealing with “transnational activities” is that, while relativizing and blurring the demarcation line between law and non-law, they readily attach the label of ‘legality’ to the respective regulatory mechanisms. Global/transnational “law” discourse, in that respect, seems to be premised on two important assumptions: first, that the empirical reality of the present day globalized world requires moving beyond the traditional concept of international law, because it no longer successfully depicts the nature of “raw data” of various regulatory and adjudicative phenomena taking place at the transnational level; and second, that the analytical rigor of the long dominant positivist strand of jurisprudence, which insists on the criterial approach to law and its autonomous status, nowadays contributes more to the obfuscation than to the clarification of its subject matter. Both of these assumptions lead to the claims that significantly challenge our traditional theorizing about law. According to the first – *substantive* – challenge, global/transnational phenomena give rise to the birth of a novel, non-statist and post-modern concept of law. According to the second – *epistemological* – challenge, the nature of the inquired phenomena requires adopting new research strategies which goes beyond the traditional method of the dominant analytical jurisprudence.

I will scrutinize both of these challenges. As regards the first of them, I will show that while the strong claim that we are in the possession of some entirely novel concept of (global/transnational) law is not warranted, more modest claims regarding functional sphere of validity and genuinely new (global/transnational) sources of law merit significant weight. When it comes to the second claim, I will argue that the obsession with “law” as the “default descriptor” (Somek) for various global instruments of regulation and standardization stems largely from the erroneous assumption about the special, i.e. “exclusionary” nature of legal rules. Once the direct link between legal “normativity”, “validity”, and “bindingness” is exposed as unsubstantiated, the path is cleared for a more

⁶ *Ibid.*, 4.

nuanced investigation about the nature of different phenomena that do not pass the threshold of “legality”. This, finally, implies that calls to substitute analyticity and criterialism with some sort of legal pluralist approach, which self-consciously blurs the lines between law and non-law, should be abandoned in favor of a refined analytical approach, which relies on a different sort of socio-legal investigation, the one that treats law as a normative order that is a product of specific historical development and that is as such in interaction with other social normative orders.

Towards a New (Post-Modern) Concept of Law?

Any case for global/transnational law proceeds from suspicion in the sustainability of the dominant conceptual framework which knows only of municipal and international law. However, Jessup’s worry that we are in “the lack of an appropriate word or term” for the rules governing “transnational situations”⁷ may not be the biggest problem for legal scholarship. Some authors are ready to argue that the problem is not merely of the terminological nature, but that we are essentially dealing with a very new concept of law. Hence, Zumbansen says that “TL presents a radical challenge to all theorizing about law as it reminds us of the very fragility and unattainedness of law ... TL works itself like a drill through the few remaining blankets covers hastily thrown over an impoverished and internally decaying conceptual body.”⁸

A common starting point for this stronger case is to emphasize that one of the dominant features of the modern concept of law is its connectedness to state. As put by Avbelj, “[t]he state has long been considered a main, if not the exclusive source and operating theatre of law.”⁹ Since a host of regulatory activities at the global level “does not originate, directly or indirectly, from the organs of the state”, we are warranted not only in employing the term “transnational law” to denote those activities, but also in speaking about a novel concept of law that is a product of post-modernity.¹⁰ Simply put, this new

⁷ *Ibid.*, 1.

⁸ Peer Zumbansen, ‘Transnational Law’, in Jan Smits (ed.), *Encyclopedia of Comparative Law* (Edward Elgar Publishing: 2006), 739.

⁹ Matej Avbelj, ‘Transnational Law between Modernity and Postmodernity’ (2016) 7 *Transnational Legal Theory* 3: 9.

¹⁰ *Ibid.*, 12.

concept of law – call it transnational or global¹¹ – “questions many of our state-centric or otherwise jurisdiction-centric premises about law as a settled form and about the grounds of its authority and legitimacy.”¹²

This quite intuitive reading has, nonetheless, to be carefully inspected. When we are speaking about state, we are in fact speaking about the two general types of state institutions: those vested with the right to *create* law and those vested with the right to *apply* law.¹³ While it is certainly true that the law-creating activity in modern times is largely vested in particular state institutions (legislatures), this is by no means a necessary condition for the existence of law. Not only was law in pre-modern, medieval times largely created by the diffuse society, in the form of customary rules,¹⁴ but even in the modern state a number of different actors are empowered with the right to create legal norms – companies, associations, universities, churches, along with individuals.¹⁵ Law thus created, firstly, has to comply with the broadly conceived requirement of ‘publicness’, because even private law “is still law”, and as such it “carries an inescapable public element with it.”¹⁶ Provided that this condition is met, law thus created is, secondly, enforceable before the state courts. Independent and impartial state courts are the central law-applying institutions of the modern state. Despite the fact that this was not the case in the pre-modern times, and that

¹¹ Although authors in the field draw at times various distinctions between the two labels, I am using them interchangeably.

¹² Neil Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2015), 26.

¹³ MacCormick proceeds from the distinction between institutions in charge of “rule-formulation” and those in charge of “rule-administration”. Then, they can be further subdivided into “rule-makers, decision-makers, administrators of facilities, and enforcement agencies.” Neil MacCormick, *Institutions of Law – An Essay in Legal Theory* (Oxford: Oxford University Press, 2007), 34-35.

¹⁴ Surely, the history of medieval law in Europe is far more complex than this, but the point I want to stress is that “the central problem of the Middle Ages was the creation of the law”, insofar as the question was open who was entitled to create law. Walter Ullmann, *Law and Politics in the Middle Ages – An Introduction to the Sources of Medieval Political Ideas* (Cambridge: Cambridge University Press, 1975), 29.

¹⁵ This fact is usually not enough stressed in the writings of modern, especially Anglo-American legal philosophers. In fact, they tend to focus only on state-created rules as the proper case of legal rules. For example, in his discussion on the so-called “incorporation” doctrine, Raz at one point clearly states: “UK and USA statutes give legal effect to company regulations, to university statutes, and to many other standards without making them part of the law of the United Kingdom or the United States.” The same holds for “legally binding contracts, which are also binding according to law and change people’s rights and duties without being themselves part of the law of the land.” Joseph Raz, ‘Incorporation by Law’, in *Between Authority and Interpretation – On the Theory of Law and Practical Reason* (Oxford: Oxford University Press, 2009), 193-194. MacCormick departs from this line of reasoning, by treating “companies or corporations enjoying juristic personality by virtue of being incorporated under appropriate statute law” as “institutional agencies”, thus, on par with legislatures, courts, government departments and enforcement agencies, which are typical cases of “institutional agencies” of law. MacCormick, *Institutions of Law*, 35.

¹⁶ Claudio Michelon, ‘The Public Nature of Private Law?’, in Claudio Michelon et al. (eds.), *The Public in Law Representations of the Political in Legal Discourse* (Farnham: Ashgate, 2012), 195.

courts nowadays are no longer the sole actors designated with this role – think of various arbitral bodies, mediators, regulatory agencies with a quasi-judicial function, as well as human rights protection bodies, such as ombudspersons¹⁷ – law-applying institutions are indispensable feature of law. That is, law as a distinctive normative order cannot effectively function without the existence of specially designed institutions designated with the role to authoritatively solve disputes regarding the law-application.

Now, what are the terms of functioning of modern law-applying institutions? First, they are expected to solve conflicts on the basis of legal rules whose coming into being can be traced to some recognized formal source of law. Simply put, all (applicable) law is source-based.¹⁸ And this holds true for the application of either domestic law, or foreign law – in cases falling within the purview of private international law – or directly enforceable public international law. Second, modern law-applying institutions function under the condition of the territorial sphere of validity of the applicable law. This principle implies that all persons – be they natural or legal – within the given jurisdictional area are subject to the laws of that area.¹⁹ While both of these terms are challenged in the current global/transnational law literature, they are not potentially of equal harm for the concept of law as we know it.

¹⁷ However, decisions of these bodies are, normally, reviewable before the state courts. There are some exemptions though. For instance, in certain legal systems (e.g. Switzerland, Sweden, Belgium, France), arbitral awards may not be reviewable before the state courts if parties in advance consent to revoke this right. Furthermore, European Court of Human Rights has in a recent decision (*Tabbane v. Switzerland* [Application no. 41069/12] from 24 March 2016) found that such provisions are not contrary to Article 6(1) of the European Convention, which guarantees the right to fair trial. See in more detail in, Catherine A. Kuntz, 'Waiver to Challenge an International Arbitral Award Is Not Incompatible with ECHR: *Tabbane v Switzerland*' (2016) 5 *European International Arbitration Review* 1: 125-132.

¹⁸ This is an uncontroversial point even in the old philosophical battle between natural law theorists and legal positivists. What they primarily dispute about is whether some specific "normative facts", that is, moral sources (e.g. human reason, *de rerum natura*, etc.) should count as sources of coming into being of valid legal rules. On a natural law reading, law's existence conditions depend on normative (moral) facts, just as on a legal positivist reading, law's existence conditions depend solely on non-normative (social) facts. See in more detail in, Mark C. Murphy, 'Two Unhappy Dilemmas for Natural Law Jurisprudence' (2015) 60 *American Journal of Jurisprudence* 2: 121-141. Within the camp of legal positivists, Raz fostered the claim that not only the existence, but also the content of every law is determined by social sources (exclusive positivism). The opposite camp of inclusive positivists argue that "this view seems contrary to the usual understanding of many Western legal systems, which seem to have legal rules with embedded moral standards and judicial review of legal rules based on moral tests." Brian H. Bix, *A Dictionary of Legal Theory* (Oxford: Oxford University Press, 2004), 203-204.

¹⁹ This is a profoundly distinctive feature of modern law. Writing about the medieval European law, Harding at one point says: "As late as the middle of the ninth century it could still be said that five men together in the same room might each follow his own law. The practical consequence of this 'personality of law' was that disputes were more easily settled by customary forms of arbitration in local assemblies than by judgments which attempted to apply a general code of law." Alan Harding, *Medieval Law and the Foundations of the State* (Oxford: Oxford University Press, 2001), 12.

1) The Sources of Law Challenge

The first challenge has two versions. First of them can be ascribed to Scott. He concludes his article on three plausible conceptions of the “proto-concept” of transnational law by noticing that “there are potentially multiple senses of ‘legal pluralism’ relevant to thinking about the interaction of law in transnational contexts.” One could foster a pluralist view with respect to the sources of law, while still holding that there is a single concept of law. Alternatively, “one could be a legal pluralist about both the sources and concept of law (i.e., there is no single concept of law).” Although Scott has not dealt with this issue in more detail, he admits that “the general tenor of [his] narrative has been one of openness ... to a double legal pluralism”.²⁰

The second version of this argument is presented by Walker. He defines global law as “any practical endorsement of or commitment to the universal or global-in-general warrant of some laws or of some dimension of law”²¹ One of the specificities of global law is that its “authoritative basis ... may not be understood and articulated in terms of specific source or pedigree *at all*, whether located at the planetary or at the local level.”²² Instead, its “crucial definitional minimum” concerns “a double sense of the global *appeal* of global law”. In the first sense, “the global scale of global law is indicated by its destination rather than its source”.²³ In the second sense, global law makes a global appeal insofar as it claims or assumes “a universal or globally pervasive justification for its application”.²⁴

Walker’s proposal in favor of some *source-less* law would indeed be revolutionary departure from our common understanding of this concept if it were not for his clarification that the label “global law” is to be understood as “adjectival rather than a nominal category”.²⁵ And indeed, much of his efforts in theorizing under this label are invested in opening the eyes of traditional legal scholars and enlarging them the picture of the current

²⁰ Craig Scott, “Transnational Law” as Proto-Concept: Three Conceptions’ (2009) 10 *German Law Journal* 6: 875.

²¹ Walker, *Intimations of Global Law*, 18.

²² “For global law also refers to the emergence or to the prospect of the emergence of a trans-systemic and often explicitly inter-systematically engaged *common sense and practice* of recognition and development of jurisdictionally unrestricted common ground on particular rules, case precedents, doctrines or principles, or even with regard to background legal orientations.” *Ibid.*, 20.

²³ It “purports to cover all actors and activities relevant to its remit across the globe”. *Ibid.*, 21.

²⁴ Global law’s “global reach is grounded in the claim or assumption that there are globally defensible good reasons for its invocation”. *Ibid.*, 22.

²⁵ *Ibid.*, 23.

legal landscape.²⁶ Knowing that, it is not clear why Walker insists on the term “global law” if he is primarily interested in a novel – and I will argue warranted – epistemological perspective of approaching legal phenomena from a global perspective.²⁷ The clarificatory potential of this umbrella term eventually becomes dubious for its capaciousness and alleged ability to absorb both “convergence-promoting” and “divergence-accommodating”²⁸ aspects of global landscape.²⁹ As such, it does not prove to be adequate enough as, for example, Shaffer’s term “*global legal ordering*”, which similarly refers to “the transnational construction, flow, settlement, and unsettlement of legal norms in particular domains.”³⁰

When it comes to Scott’s “double legal pluralism” argument, it contains both a less and a more promising part. The former concerns his idea that transnational law should be treated as some distinctive concept of law. To begin with, neither of three “candidate conceptions”³¹ of that concept which he discusses seems to vindicate this claim. This is obvious in the case of a traditionalist conception, which “sees nothing about law responding to transnational phenomena that requires departure from a state-centred positivism”.³² The same conclusion is less apparent but also warranted in the case of “transnationalized legal decisionism”, which understands transnational law “as the resulting (institutionally generated) interpretations or applications of domestic and international law to transnational situations.”³³ But, there is nothing even in the most radical conception of “transnational legal pluralism”, which would support the claim that we are dealing with a

²⁶ Walker says at the opening page that “[t]he hope is that the reader will emerge with a sharper sense of the complexity of the global legal environment, and of the vital forces underwriting that complexity”. *Ibid.*, 1.

²⁷ Twining, whose jurisprudential account is conceived as one such approach (William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* [Cambridge: Cambridge University Press, 2009]), is very skeptical towards the usage of the ‘global law’ phrase. Although Walker opens his book with a praise of this author’s work, he, nonetheless, believes that there are enough explanatory grounds for employing this label.

²⁸ Walker, *Intimations of Global Law*, Ch. 3

²⁹ Kenny says: “[I]f global law must include all of these conflicting concepts, I would be tempted to conclude that it is a phenomenon that is simply so complex or so general that there is little we can meaningfully say about it and even less we can do to influence it.” David Kenny, ‘Book Review of Neil Walker, *Intimations of Global Law*’ (2015) 63 *American Journal of Comparative Law* 4: 1057. Cf. Richard Collins, ‘The Slipperiness of ‘Global Law’ (2017) 37 *Oxford Journal of Legal Studies*: 1–26 (forthcoming)

³⁰ Gregory Shaffer and Carlos Coye, ‘From International Law to Jessup’s Transnational Law, From Transnational Law to Transnational Legal Orders’ (2017) *Legal Studies Research Paper Series No. 2017-02*, at <https://ssrn.com/abstract=2895159>, 2.

³¹ He underlines that does he does “not seek to make an argument for the single best reading of the concept of ‘transnational law’”. Scott, “‘Transnational Law’ as Proto-Concept: Three Conceptions”, 863.

³² *Ibid.*, 868.

³³ *Ibid.*, 871.

different concept of law. According to this conception, transnational law “is *neither* national nor international nor public nor private”, and at the same time it is “*both* national and international, as well as public and private.”³⁴ This conception fosters the claim that transnational law should be recognized as a new and distinctive field of law,³⁵ but this fact alone does not vindicate a much stronger implication regarding the nature of this body of rules. The problem of a single concept of law is well known in legal philosophy, but it boils down to the dilemma whether such concept can be said to be universal or it is destined to be culturally parochial.³⁶ In that respect, a field of law which is developed at the level beyond particular nation states and is largely a product of globalization can serve far more successfully the case for a universal concept of law than the rival one of many culturally embedded concepts of law. To say all this by no means implies that a warranted global perspective of law would not profoundly affect our traditional conceptualization of this normative order, and I will have to say something about that in the last part of the paper.

Let us now turn to a more promising part of Scott’s “double legal pluralism argument”, the one regarding the sources of law. According to Scott, even “transnational legal pluralist” would concede that in order to achieve internal coherence, transnational law necessitates “coherent interconnections with the other fields of law from which it grows.”³⁷ According to this conception, transnational law is “the organic outgrowth of cumulative decisions that are explicitly or implicitly authorized by domestic or international law”.³⁸ This means that the vast majority of rules and decisions falling within the ambit of global/transnational law owe its legal validity to some identifiable source of municipal or international law. However, not insignificant portion of what is in the literature considered

³⁴ *Ibid.*, 873.

³⁵ This is a common claim among scholars of global/transnational law. Hence, Avbelj says that “transnational law cannot be subsumed under either international law or comparative law without changing the two beyond recognition.” Avbelj, ‘Transnational Law between Modernity and Postmodernity’, 11. Similarly, Catá Backer argues that transnational law as “the law of non-state governance systems” is “a distinct legal field”. Larry Catá Backer, ‘Principles of Transnational Law: The Foundations of an Emerging Field’, at <http://lcbackerblog.blogspot.rs/2007/03/principles-of-transnational-law.html>

³⁶ Cf. Joseph Raz, ‘Can There be a Theory of Law?’, in Martin P. Golding and William A. Edmundson (eds.), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Malden and Oxford: Blackwell Publishing, 2005), 331ff

³⁷ Scott, “‘Transnational Law’ as Proto-Concept: Three Conceptions”, 874, fn. 22

³⁸ *Ibid.*, 874.

transnational law *lato sensu*³⁹ may raise the question whether there is room for some different sources of law than the ones recognized within particular national legal systems and those listed in Article 38(1) of the International Court of Justice Statute.⁴⁰ This is particularly true of certain segments of the so-called “global administrative law”,⁴¹ which Avbelj classifies as “hybrid transnational administrative law”⁴² and “private administrative transnational law”.⁴³

a) The Case of WADA Code

For example, is the World Anti-Doping Agency’s (WADA) Code a (global/transnational) formal source of law? WADA is a private foundation with its seat in Lausanne, established pursuant to Swiss law. In an important decision of the Swiss-domiciled Court of Arbitration of Sport (the “CAS”) – widely referred to as “the sport’s supreme court” – to which WADA has a right of appeal for doping cases, it is stated that “[t]he rules of a Swiss private law entity should comply with Swiss law. If they do not do so, there is a risk that the Swiss Courts will declare them to be non-compliant.”⁴⁴ However, public order constraints to the functioning of private entities in constitutional democracies

³⁹ According to Avbelj, this is “any law whose effects extend beyond the state”. This author provides a comprehensive map of transnational law in this broader sense, which is presented in the following table:

| Transnational law | | |
|------------------------------------|----------------|-----------------------------|
| Public | Administrative | Private |
| International law | Public | New <i>lex mercatoria</i> |
| Supranational law | Hybrid | Transnational corporate law |
| Private international law | Private | |
| Transnational human rights regimes | | |

Avbelj, ‘Transnational Law between Modernity and Postmodernity’, 12.

⁴⁰ Regarding the sources of international law, Besson notices that “[a]lthough, and probably because, it is one of the most central questions in international law, the identification of the sources of international law, that is, its law-making processes, remains one of the most difficult.” Samantha Besson, ‘Theorizing the Sources of International Law’, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 163.

⁴¹ In the respective literature, this designation refers to various global regulatory regimes involving such diverse sectors as “[t]rade, finance, the environment, fishing, exploitation of marine resources, air and maritime navigation, agriculture, food, postal services, telecommunications, intellectual property, the use of space, nuclear energy, and energy sources”. Sabino Cassese, ‘Administrative Law without the State? The Challenge of Global Regulation’ (2005) 37 *International Law and Politics*: 671.

⁴² “Hybrid transnational administrative law is created in the transnational administrative space beyond the state jointly by public (statist, international, supranational) and private actors.” Avbelj, ‘Transnational Law between Modernity and Postmodernity’, 15.

⁴³ These are “standard-setting and certifying bodies in which states or other public entities are absent from decision-making”. *Ibid.*, 16.

⁴⁴ CAS 2006/A/1025 *Mariano Puerta v. International Tennis Federation* (“ITF”)

are usually construed narrowly so as to enable them to use broad associational freedom for whatever purposes.⁴⁵ Hence, a private entity, like WADA, becomes legally empowered to define its vision as nothing less than “[a] world where all athletes can compete in a doping-free sporting environment.” To be sure, such a bold statement would be meaningless if WADA was not established the way it was – under the initiative of the International Olympic Committee, with the support and participation of intergovernmental organizations, governments, public authorities, and other public and private bodies fighting doping in sport.⁴⁶ Its aspiration as a Swiss private law-based organization to exercise global regulatory authority in the field of doping control was expressly stated in the Code, but it was additionally strengthened by the *International Convention against Doping in Sport*, which was adopted unanimously by the 33rd UNESCO General Conference on October 19, 2005.⁴⁷ This was a needed step, because, despite equal governmental involvement in the funding and management of WADA, the Code is considered not legally binding for governments. Under the traditional reading, obligations of governments could be created only by an international convention.⁴⁸ On the other hand, the Code itself was not meant to bind governments in the first place. As explained in the Introduction of the Code – “All provisions of the Code are mandatory in substance and must be followed as applicable by each *Anti-*

⁴⁵ Such is the case in Switzerland as well – “Despite the law on associations being mostly not compulsory, there are a few mandatory rules, which have an impact on the autonomy of sports organizations.” Lucien William Valloni and Thilo Pachmann, *Sports Law in Switzerland* (Alphen aan den Rijn: Kluwer Law International, 2011), 45. More specifically, “a sports federation is required to act in accordance with (1) mandatory provisions of association law; (2) the “general boundaries of the legal order” (*Allgemeine Schranken der Rechtsordnung*), in particular public policy, general mandatory law, *bona mores*, and protection of personality rights and (3) general principles of law, in particular equal treatment of members, good faith, prohibition of abuse of rights, and due process in the decision-making process.” Mike Morgan, ‘The Relevance of Swiss Law in Doping Disputes’, at http://www.morgansl.com/pdfs/The_relevance_of_Swiss_law_in_doping_disputes.pdf, 3. There are additional reasons for the fact that almost 50 international sport governing bodies are seated in Switzerland. Namely, associations are neither obliged to register with the state nor to publish their accounts. They are granted tax breaks and flexible legal terms that allow them to govern their own affairs and are exempt from Swiss anti-corruption laws. However, recent corruption scandals in FIFA triggered the adoption of a legislative act pursuant to which leaders of sports organizations in Switzerland will be designated as so-called “Politically Exposed Persons” subject to corruption investigations. At http://www.swissinfo.ch/eng/sports-oversight_new-law-brands-fifa--other-sports-officials--politically-exposed-persons-/41165532

⁴⁶ <https://www.wada-ama.org/en/who-we-are>

⁴⁷ “Entered into force on 1 February 2007 – becoming the most successful convention in the history of UNESCO in terms of rhythm of ratification after adoption – the Convention is now the second most ratified of all UNESCO treaties.” <http://www.unesco.org/new/en/social-and-human-sciences/themes/anti-doping/international-convention-against-doping-in-sport/>

⁴⁸ Cf. Paul Marriott-Lloyd, ‘International Convention against Doping in Sport’ SHS/2010/PI/H/2, at <http://unesdoc.unesco.org/images/0018/001884/188405e.pdf>

*Doping Organization and Athlete or other Person.*⁴⁹ The Code was assented to by the International Olympic Committee, International Paralympic Committee and virtually all international sports federations and organizations. In virtue of this, WADA is empowered not only to regulate and control anti-doping in sports, but also to sanction individual athletes and persons found in violation of the Code.⁵⁰ According to Bogdandy, Dann and Goldmann's definition, WADA clearly exercises "authority", insofar as it effectively realizes its "legal capacity to *determine* others and to reduce their freedom, i.e. to unilaterally shape their legal or factual situation."⁵¹ Most importantly, this authority will be also exercised in cases of athletes or persons who subsequently enter certain sports competitions, thereby only tacitly agreeing to the established anti-doping rules and procedures. Therefore, this branch of transnational law is "not a contract based-law of horizontal application between consenting parties, but instead carries with it elements of verticality and authority which are not founded on consent."⁵² Moreover, due to the WADA's indirect international empowerment through an international treaty, one may go further as to claim that it possesses elements of "international public authority".⁵³

In light of all this, what shall be the response to the initial question regarding the Code as a (global/transnational) source of law? From a purely formal point of view, the Code is an internal act of a private law-based entity, but due to the international authorization

⁴⁹ World Anti-Doping Code, at <http://www.itftennis.com/media/194262/194262.pdf>, 16.

⁵⁰ See Article 10 WADA Code

⁵¹ "The determination may or may not be legally binding. It is binding if an act modifies the legal situation of a different legal subject without its consent. A modification takes place if a subsequent action which contravenes that act is illegal ... The capacity to determine another legal subject can also occur through a non-binding act which only conditions another legal subject. This is the case whenever that act builds up pressure for another legal subject to follow its impetus." Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', in Armin von Bogdandy et al. (eds.), *The Exercise of Public Authority by International Institutions – Advancing International Institutional Law* (Heidelberg: Springer, 2010), 11-12.

⁵² Avbelj, 'Transnational Law between Modernity and Postmodernity', 16. This opens up profound problems of legitimacy of these governing structures. No wonder thus that the vast literature in the subject area of "global administrative law" is focused on these problems of political justification.

⁵³ Bogdandy, Dann and Goldmann consider "as international public authority any authority exercised on the basis of a competence instituted by a common international act of public authorities, mostly states, to further a goal which they define, and are authorized to define, as a public interest." Bogdandy, Dann and Goldmann, 'Developing the Publicness of Public International Law', 13. It is not obvious that the indirect international authorization of WADA would be sufficient for these three authors to recognize its status of "international public authority".

through the *International Convention against Doping in Sport*,⁵⁴ as well as the specific membership of WADA, the personal scope of validity of the Code rules and WADA decisions are truly global. Hence, it is possible that even an athlete's freedom of movement is restricted by the respective sports federation, based on the prior decision that the Code's anti-doping rules were violated.⁵⁵ Similarly, it is possible that, based on the Code's rule on WADA's right of direct appeal to the CAS (13.1.3.), a national anti-doping case with no apparent international links, which was already decided by the national sports association's anti-doping tribunal, ends up being decided by the Swiss-based arbitration body, and subsequently reviewed by the Federal Supreme Court of Switzerland.⁵⁶ Having this in mind, it is hard to escape the conclusion that the WADA Code *is* a distinctive (global/transnational) source of law, independent of national and international legal instruments from which it directly and indirectly draws its authorization. This eventually means that the plurality of sources thesis merits some weight.

2) The Territorial Sphere Challenge

All this leads us to the second challenge of global/transnational scholars regarding the territorial sphere of validity of legal rules. The WADA case persuasively demonstrates

⁵⁴ Article 2 of the Convention, which provides definitions of the key terms, such as "athlete" or "anti-doping violation", clearly states that they "are to be understood within the context of the World Anti-Doping Code." It adds, though, that "in case of conflict the provisions of the Convention will prevail", but this is highly unlikely, having in mind that the Code's rules are more detailed operationalization of the very same, abstractly stipulated terms of the Convention. The text of the Convention is available at <http://unesdoc.unesco.org/images/0014/001425/142594m.pdf#page=2>

⁵⁵ This has happened to Serbian tennis player Viktor Troicki. International Tennis Federation found him in violation of the Code's rules, and the CAS confirmed this decision, albeit lowering the competition ban from 18 to 12 months. On the basis of this decision, ITF banned Troicki from attending the Davis Cup semifinal match played in Belgrade between Serbia and Canada. <http://www.tennisworldusa.org/news/news/all/13046/Viktor-Troicki-banned-from-attending-the-Davis-Cup-semifinals-by-the-ITF/> It would have been interesting to see how the Serbian Constitution Court would react in some putative constitutional complaint for violation of freedom of movement.

⁵⁶ This is what happened in now well-known case of 34 players of the Australian football club Essendon. They were charged by the Australian Sports Anti-Doping Authority (ASADA) for using illicit supplements, but the charges were cleared before the Australian Football League Anti-Doping Tribunal. Since ASADA had decided not to challenge this decision, WADA directly appealed to CAS, requesting a *de novo* hearing before this tribunal. In finding players guilty, the CAS rejected the AFL Tribunal's probation approach, known as "links in the chain", where any given chain of evidence is dismissed if a link within it cannot be proven, and instead employed WADA's approach, known as "strands in the cable", where individual evidence chains with missing links may still be accepted if the combination of all such chains forms a sufficiently strong case. In the final act of this saga, the Swiss Federal Supreme Court "decided not to entertain the appeal filed by the players against the CAS". See, https://en.wikipedia.org/wiki/Essendon_Football_Club_supplements_saga#cite_ref-66 For some interesting legal aspects of the case, see <http://www.theaustralian.com.au/sport/afl/doping-scandal-swiss-court-dimisses-appeal-by-the-essendon-34/news-story/b44c0f8ef61895fa0a09c9462b2a34e7>

what Walker calls the “global appeal” of global/transnational rules, which is manifested in “claiming or assuming a universal or globally pervasive justification for its application.” It is, furthermore, “expressed in the symmetry of subject and object”. This means that global normative instrument “is, or should be, applicable to all who might be covered by its material terms regardless of location or association with a particular polity, because it is justifiable to all who might be covered by those material terms, or so it is claimed or assumed.”⁵⁷ In that respect, global/transnational law posits that “law systems are no longer grounded on an identity between law (or regulatory authority) and the state (and the community of states).” For that reason, distinct transnational governance actors “may be understood as functionally differentiated communities organized for mutual benefit for specific objectives.”⁵⁸ This, eventually, testifies to the fact that in virtue of “global legal ordering” law, in general, “is increasingly becoming a functionally, rather than just a territorially bound phenomenon.”⁵⁹ That is, “functional (subject matter)” is “opposed to territorial logics.”⁶⁰

This rise of diffusive,⁶¹ “non-territorial, largely functional juris-generative entities” is for Avbelj the crucial indicator that we live in “the era of legal poly-centricity”, that is, in the world of “a plurality of sources of law.”⁶² As already demonstrated, this thesis is plausible, but not necessarily for the reasons that Avbelj has in mind. We have to return to the distinction between law-making and law-applying institutions and to the elucidation why the latter are inescapable feature of a normative order called law. In cases of doubt which of the rules created by different institutional actors is to count as a valid legal rule, the decisive answer would be given by the practice of those institutional actors assuming⁶³ the power to

⁵⁷ Walker, *Intimations of Global Law*, 22.

⁵⁸ Catá Backer, ‘Principles of Transnational Law: The Foundations of an Emerging Field’

⁵⁹ Avbelj, ‘Transnational Law between Modernity and Postmodernity’, 19.

⁶⁰ Shaffer and Coye, ‘From International Law to Jessup’s Transnational Law, From Transnational Law to Transnational Legal Orders’, 12.

⁶¹ According to Catá Backer, “[d]iffusion of regulatory authority is one key to understanding the structure of Transnational Lawmaking. Another key is functional differentiation of authority among a wide variety of political and nonpolitical communities.” Catá Backer, ‘Principles of Transnational Law: The Foundations of an Emerging Field’

⁶² *Ibid.*

⁶³ One may object my narrative by referring to Shapiro’s well known argument about the (im)possibility of law. In discussing this problem, he draws an analogy with the chicken-egg dilemma: “Imagine that norms that confer legal power are the ‘eggs,’ and those with power to create legal norms are the ‘chickens.’ The Egg and Chicken principles can be rendered as follows:

Egg: Some body has power to create legal norms only if an existing norm confers that power.

administer those rules in individual cases, including conflictual ones. Since the sources of law are commonly defined as “all the facts or events that provide the ways for the creation, modification, and annulment of valid legal norms”,⁶⁴ it is upon law-applying institutions, and in particular courts, to determine which of the “facts or events” shall count as such sources. In the modern-state setting one can hardly encounter such problem, due to the existence of a central legislating body, a hierarchical system of adjudicating bodies with a supreme court at its top, and a set of constitutional legal norms dividing those powers between the respective institutions. However, no such setting exists at the international level. And, yet, “law exists and is created or changed, and one way of expressing this phenomenon is through recognition of certain ‘sources’.”⁶⁵ Despite the fact that international law knows of no court of last resort,⁶⁶ “the existence of dispute settlement mechanisms is in itself significant.” This is so in virtue of the fact that “[a]ll law has ultimately to be put to the test of ‘How would a court decide?’ (*ubi iudex, ibi jus*), even when ... there exists no mechanism for judicial examination and settlement unless and until the parties so agree.” Eventually, “[i]n the courtroom the question has to be ‘What is the law?’ and not ‘What ought the law to be?’”⁶⁷ This aptly demonstrates why the puzzle of the sources of law, particularly at the level beyond the state, is to be solved primarily by observing the practice of law-applying institutions. One can more credibly speak of the WADA’s Code as an independent formal source of law by pointing to the fact that it is as such treated not only by the CAS, but by the Swiss Federal Supreme Court.

Chicken: A norm conferring power to create legal norms exists only if some body with power to do so created it.” Scott J. Shapiro, *Legality* (Cambridge, Mass. and London: The Belknap Press of Harvard University Press, 2011) 40. The same problem of priority can be extended to “those with power to apply legal norms”, because an empowering legal norm would be needed for them to assume that power. However, I do not intend to make point about the priority of either law or political institutions, but that among the latter, those with the capacity to decide on conflicts – including on conflict of competences – are vital for the effective functioning of a normative order called law.

⁶⁴ Besson, ‘Theorizing the Sources of International Law’, 169.

⁶⁵ Hugh Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2014), 3.

⁶⁶ Yet, international scholars often argues that International Court of Justice has to play the “central role and act as a higher court in a legal order that does not provide for formal hierarchy”. This role must be “earned as a *primus inter pares*, followed not out of legal compulsion, but through recognition of and deference to its intrinsic authority and the quality of its legal reasoning and findings.” Georges Abi-Saab, ‘Fragmentation or Unification: Some Concluding Remarks’ (1999) 31 *New York University Journal of International Law and Politics* 4: 729.

⁶⁷ Thirlway, *The Sources of International Law*, 2.

Towards a New Epistemology of Legal Theorizing?

There is, however, a more profound problem with certain rules created by functionally differentiated global regulatory actors. Related, but not identical to the question whether certain process of rule-creation can count as an independent source of law⁶⁸ is the question whether the given rule qualifies for the status of a 'legal' rule in the first place. Simply put, identifying some fact or event by a law-applying institution as a source of law is premised on the idea that that what is produced has the quality of 'law'. This is what Somek calls "the paradox of adjudication", namely, how can law-applying institutions "cash in on their promise to say what the law is if they are not concerned about what it is they call 'law'?"⁶⁹ According to a standard view, to assess 'legality' of a certain rule is to elucidate "the *normative quality* [emphasis mine] of legal norms as opposed to other social norms and hence the quality of a legal order in general as opposed to other kinds of social orders."⁷⁰

Under this traditional jurisprudential reading, legal "normativity", "validity" and "bindingness" are directly linked concepts. Kelsen, for instance, says that under the statement that a norm is valid "we assume that it has 'binding force' for those whose behavior it regulates."⁷¹ Raz similarly concludes when analyzing differences between "requests" and "orders" that the former "cannot be said to be binding", because to utter "'I am asking you to do A and this is binding' is to say that I am not making a request but giving an order." While it makes sense to speak of "a (normative) power to command", it is senseless to speak of "a (normative) power to request". In conclusion, Raz says that "an order can be binding because if valid it requires that its addressee shall act on it disregarding

⁶⁸ This problem is well documented in the theory of sources of international law. For example, there is a scholarly dispute whether decisions of international organization should be listed as a distinctive formal source of international law. Thirlway, for instance, is of the opinion that "decisions of an organ of an international organization may be effectively lawmaking to the extent that the constituent treaty of the organization (or another treaty of similar ranking) confers power to make decisions binding on the member States ... Beyond that, such decision cannot be regarded as an independent technique of lawmaking, thus a 'source' in our terminology." *Ibid.*, 22-23.

⁶⁹ Hence, "legal theory arises as a consequence of, and in response to, adjudication. The latter, however, would not have any authority if it were not for conventional rules requiring deference to what might strike one as bold expositions of law." Alexander Somek, 'The Concept of "Law" in Global Administrative Law: A Reply to Benedict Kingsbury' (2010) 20 *The European Journal of International Law* 4: 992, fn. 43.

⁷⁰ Besson, 'Theorizing the Sources of International Law', 172.

⁷¹ Hans Kelsen, *General Theory of Law and State* (Cambridge, Mass.: Harvard University Press, 1949), 30.

other considerations.” Put succinctly, “it is binding by being exclusionary”.⁷² Therefore, a valid legal rule has a special normative force of bindingness in virtue of being an “exclusionary” reason for action for its addressees.⁷³

As already indicated, the contemporary “global/transnational law” literature displays a somewhat contradictory tendency of *both* relativizing and blurring the demarcation line between law and non-law, *and* readily attaching the label of ‘legality’ to the respective regulatory mechanisms. Hence, Zumbansen speaks of “transformation and erosion of the vertical (law/non-law) ... boundaries”,⁷⁴ while Walker notices that “[s]ome of the more powerful instances of global law, indeed, are of the pre-positive or non-positive variety.”⁷⁵ I want to challenge both of these theoretical inclinations of “global/transnational law” literature.

1) Law as the “Default Descriptor”?

I will start with what Somek qualifies as the tendency to treat law as the “default descriptor” for various global regulatory instruments,⁷⁶ some of which are of manifestly dubious legal quality. This tendency is palpable in Walker’s treatment of some “pre-positive” and “non-positive” rules as nonetheless belonging to the class of “legal” rules. If we are to follow Walker, we would be forced to depart from the traditional wisdom of legal theory, according to which “positivity” i.e. “validity” is “the specific existence” of legal norms.⁷⁷ This way we would effectively erase the distinction between law and non-law. But, what goal is to be achieved with this theoretical inclination, and even more importantly, how is it to be reconciled with the tendency to treat rules of plausibly different nature as all falling within the category of ‘legal’ rules? Finally, if the demarcation line is to be blurred, why not proceeding from the contrary assumption of relegating all law into non-law rather than from the one which upgrades the quality of miscellaneous rules into the status of ‘legality’?

⁷² Joseph Raz, *Practical Reason and Norms* (2nd ed.) (Oxford: Oxford University Press, 2002), 101.

⁷³ While legal norms are first-order reasons i.e. reasons for performing or refraining from a certain act, they are also “exclusionary reasons” i.e. negative second-order reasons, that is, reasons to refrain from acting for some conflicting reasons. *Ibid.*

⁷⁴ Peer Zumbansen, ‘Transnational Legal Pluralism’ (2010) 1 *Transnational Legal Theory* 2: 187.

⁷⁵ Walker, *Intimations of Global Law*, 23.

⁷⁶ Somek, ‘The Concept of “Law” in Global Administrative Law: A Reply to Benedict Kingsbury’, 988.

⁷⁷ Kelsen, *General Theory of Law and State*, 30.

One of the apparent reasons why the “global/transnational law” literature opts for the latter strategy lies in the widely shared opinion that “law has always had an upper hand in the process of construction of social reality.”⁷⁸ Simply put, we attach special social significance to legal rules. That is, we tend to treat law as “the signaler of last resort” and this tendency is grounded in our attitude of “respect for the law as a source of signals of salience”.⁷⁹ The significance we attach to law is largely an effect of the aforementioned belief that, in comparison to other rules, legal rule has a special normative force of being ‘binding’ for all those whose behavior regulates. However, what does it mean for a rule (norm) to be ‘binding’ (*verbindlich*)?

Rules are normative in the sense that they purport to guide and regulate our behavior, that is, they provide us with reasons for action. Although there are many normative orders (law, morality, religion, customs, etiquette, fashion, etc.), normativity is one and the same across various normative orders.⁸⁰ This means that reason-giving nature of norms has the same logical form. As pointed out by Raz, “statements of the form ‘x ought to ϕ ’ are logically equivalent to statements of the form ‘There is reason for x to ϕ ’.”⁸¹ A universal mechanism of various normative orders through which they give us reasons to behave in a certain way is by installing obligations.⁸² It is, thus, in the very nature of an obligation of any kind that it provides reasons for action. Now, we normally say that a ‘binding’ rule is the one that is ‘obligatory’. Does this imply that all rules purporting to impose obligations are ‘binding’? Such conclusion would not be in line with our common way of thinking, according to which ‘binding’ rules are ‘mandatory’, in the sense that they

⁷⁸ Avbelj, ‘Transnational Law between Modernity and Postmodernity’, 21.

⁷⁹ This “general respect is then related dispositionally to one’s respectful response to a particular signal designating an option as salient in coordinating a response to a question of common concern.” Jeremy Waldron, ‘Authority for Officials’, in Lukas H. Meyer, Stanley L. Paulson and Thomas W. Pogge (eds.), *Rights, Culture and the Law – Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford: Oxford University Press, 2003), 54.

⁸⁰ As pointed out by Spaak, “there is only one sense of normativity, only one sense of ‘ought’, so that although we may with good sense speak of the normativity of law or the normativity of morality, etc., there is no specifically moral or legal or prudential *type* of normativity, but only normativity plain and simple.” Torben Spaak, ‘The Normativity of Law’, 87.

At <http://www.jura.uni-freiburg.de/institute/rphil/rphil/de/downloads/spaak-text>

⁸¹ Raz, *Practical Reason and Norms* (2nd ed.), 29.

⁸² Hence, rules of etiquette put us under an obligation to be the first to greet the older ones; moral rules put us under an obligation not to lie and cheat; religious rules put us under an obligation of worshipping; customary rules put us under an obligation of mourning for deceased loved ones, fashion rules put us under an obligation to follow latest trends when picking our clothes, etc.

are *non-optional* for norm-subjects. Among various normative orders, law is typically conceived as the one containing ‘mandatory’ i.e. ‘binding’ rules for its addressees.

How are we to understand this claim that legal rules are ‘binding’, that is, ‘non-optional’? One way to interpret this claim would be to say that the addressee cannot but to comply with the required behavior. This reading would equate ‘non-optionality’ of a rule with some sort of physical incapacity of the norm-subject to resist the course of action prescribed by the rule. But this is surely not the sense of ‘non-optionality’ we have in mind when referring to the ‘binding’ nature of legal rules. If we were to employ this meaning of ‘non-optionality’, a tax law requiring paying of taxes would have had the same ‘binding’ force for its norm-subjects as the law of gravitation has for all the objects. However, as Kelsen famously demonstrated, one should differentiate between laws of nature and human laws. According to him, the principle of ‘peripheral imputation’ “has, in the rules of law, a function analogous to that which the principle of causality has in the natural laws by which natural science describes nature.”⁸³ The crucial difference lies in the fact that in the rule of law both A and B depends on human’s will. Whereas A stands for a norm created by an act of will of a legal authority,⁸⁴ the requested behavior – B – does not come out of necessity as in the case of laws of nature, because it is upon norm-subject’s will to decide whether to follow the norm or not. As put by Kelsen: “The rule of law does not say, as the law of nature does: when A is, ‘is’ B; but when A is, B ‘ought’ to be, *even though B perhaps actually is not* (emphasis mine).”⁸⁵

Another way of interpreting ‘non-optionality’ of legal rules would be to consider them in Razian sense as “content-independent”⁸⁶ and “exclusionary” reasons for action. On this reading, irrespective of what is required by the rule, it preempts and excludes all the conflicting reasons that the norm-subject might have for the contrary behavior. But what is

⁸³ Hans Kelsen, ‘Causality and Imputation’ 60 *Ethics* 1: 1-2.

⁸⁴ “The reason for the different meaning of the connection of elements in the rule of law and in the law of nature is that the connection described in the rule of law is brought about by a legal authority (that is, by a legal norm created by an act of will), whereas the connection of cause and effect is independent from such human interference.” Hans Kelsen, *Pure Theory of Law* (Berkeley and Los Angeles: University of California Press 1967), 77.

⁸⁵ *Ibid.*

⁸⁶ “A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason. The reason is in the apparently ‘extraneous’ fact that someone in authority has said so, and within certain limits his saying so would be reason for any number of actions.” Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 35.

the implication of “preemptive” and “exclusionary” nature of legal rules for the practical agency of those who follow it? Rodriguez-Blanco argues that practical agency requires acting for reason, and to act for reason is to act *intentionally*.⁸⁷ This contradicts Raz’s claim that it suffices that the agent *conforms to* reasons for action, without necessarily *acting for* reasons. In Raz’s words, “we cannot reliably conform to reason unless much of the time we do so automatically and unthinkingly”.⁸⁸ On the other hand, he stresses that “no blind obedience to authority is ... implied” by his account.⁸⁹ Rodriguez-Blanco responds to this apparent tension within Raz’s account, by noticing that “[t]o merely follow the authority’s order *unintentionally*, though conforming to reason, is not to exercise our practical reasoning.”⁹⁰ Therefore, to follow legal rules “intentionally and not blindly” is “to ‘tap into’ the grounding reasons of legal rules.”⁹¹ This eventually raises *the paradox of intentionality*: “if we follow legal rules intentionally, then legal rules cannot be exclusionary reasons.” And *vice versa*, “[i]f we do not follow legal rules intentionally, then legal rules do not have a reason-giving character.” Consequently, “either legal rules cannot be exclusionary reasons or legal rules do not have a reason-giving character.”⁹²

In criticizing Raz, Hurd highlights a different sort of paradox arising from his account – “the paradox of practical authority”. On the one hand, there is “a canon of practical rationality” which dictates that we act on the balance of reasons that are available to us. On the other hand, Raz’s conception of authority implies that a government has practical

⁸⁷ Veronica Rodriguez-Blanco, *Law and Authority under the Guise of the Good* (Oxford and Portland: Hart Publishing, 2014), 153.

⁸⁸ Joseph Raz, *Engaging Reason – On the Theory of Value and Action* (Oxford: Oxford University Press, 1999), 94.

⁸⁹ Raz says that “acceptance of authority has to be justified, and this normally means meeting the conditions set in the justification thesis.” This implies bringing into play “the dependent reasons, for only if the authority’s compliance with them is likely to be better than that of its subjects is its claim to legitimacy justified.” Joseph Raz, ‘Authority, Morality and Law’, in *Ethics in the Public Domain – Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1996), 215.

⁹⁰ ⁹⁰ Rodriguez-Blanco, *Law and Authority under the Guise of the Good*, 159.

⁹¹ Veronica Rodriguez-Blanco, ‘Legal Authority and the Paradox of Intention in Action’, in George Pavlakos and Veronica Rodriguez-Blanco (eds.), *Reasons and Intentions in Law and Practical Agency* (Cambridge: Cambridge University Press, 2015), 122. In conceiving intentionality, we need to abandon “the standard view”, according to which intentions are “mental states”. This view cannot provide an adequate explanation of the fact that, when acting intentionally, “we know the reasons why we are doing this or that, and this knowledge enables us to achieve the end of our action in a controlled manner.” Rodriguez-Blanco, thus, argues that the primary explanation of an intentional act requires employing “the guise of the good” model, which, by using the *why*-question methodology, helps one to explicate her performed action (including the rule-following) in terms of the grounding reasons for action as good-making characteristics. For the full exposition of “the guise of the good model”, see, Rodriguez-Blanco, *Law and Authority under the Guise of the Good*, Ch. 3.

⁹² *Ibid.*, 157.

authority “if it can command us to act in ways that may not comport with the balance of reasons as we see it”. According to Hurd, this leads to a paradoxical consequence that “obedience to law of the sort required by the exercise of practical authority violates a central principle of rationality.” This is so on account that one may justifiably wonder “[h]ow could it ever be rational to act contrary to the balance of reasons as one sees it solely because one has been told to do so?”⁹³

On both of these readings, the key problem of Raz’s approach is that it initially formulates the moral puzzle of legal authority from the deliberative perspective, but then provides the solution from the theoretical, third-person perspective.⁹⁴ However, questions of how authorities are justified and how their directives enter into agents’ practical reasoning cannot be separated, “because the justification of legal authority is *primarily* from the first-person perspective or the deliberative viewpoint.”⁹⁵ Consequently, in order for legal rules to guide our behavior and provide us with reason for action they have to be *deliberatable*,⁹⁶ which essentially makes them *non-non*-optional for norm-subjects.⁹⁷ Were

⁹³ Heide M. Hurd, *Moral Combat* (Cambridge: Cambridge University Press, 1999), 69.

⁹⁴ Rodriguez-Blanco, *Law and Authority under the Guise of the Good*, 160.

⁹⁵ *Ibid.*, 9, fn. 10. This is in line with Green’s “perspectival” approach, according to which, “[a]s a social relation, authority is to be identified from the point of view of those who participate in it and for whom the relation has a special meaning.” Leslie Green, *The Authority of the State* (Oxford: Oxford University Press, 1988), 60.

⁹⁶ Perry, for his part, introduces the concept of “*reweighting* reason”, as “a subjective second-order reason”, which, while not cancelling completely the status of authority, “would never permit my own judgment to be preempted completely by that of the authority.” Stephen Perry, ‘Second Order Reasons, Uncertainty, and Legal Theory’ (1989) 62 *Southern California Law Review*: 932.

⁹⁷ Himma notices that, in Raz’s view, “exclusionary reasons do not preclude an agent from deliberating to determine what the balance of excluded reasons requires; they *simply preclude* (M. J.) the agent from acting on those reasons or on her assessment of what those reasons require.” (Kenneth Einar Himma, ‘Practical Authority’ (2017) at <https://ssrn.com/abstract=2957215>, 15.) First, as pointed out by Hurd, Raz himself is not quite clear on this point (Heide M. Hurd, *Moral Combat* [Cambridge: Cambridge University Press, 1999], 76-77). But even if Himma’s interpretation of Raz’s view is correct, it would be pointless from the first-person perspective of practical agency to argue that one reason is ‘deliberatable’ with other reasons, while at the same time always “precluding” an agent from acting on other conflicting reasons. Such a nature of one reason makes it essentially non-deliberatable for a practicing agent. This, then, pushes Raz’s stance towards Hart’s position, according to which norms of practical rationality would be violated if in the case of “peremptory” reasons an agent would deliberate on the class of conflicting reasons. Hart says: “[T]he commander characteristically intends his hearer to take the commander’s will instead of his own as a guide to action and so to take it in place of any deliberation or reasoning of his own: the expression of a commander’s will that an act be done is intended to preclude or cut off any independent deliberation by the hearer of the merits pro and con of doing the act.... This, I think, is what is meant by speaking of a command as ‘requiring’ action and calling a command a ‘peremptory’ form of address.” Herbert L.A. Hart, ‘Commands and Authoritative Reasons’, in *Essays on Bentham* (Oxford: Oxford University Press, 1982), 253. Himma considers Hart’s stance “problematic” for a number of reasons. Himma, ‘Practical Authority’, 15ff.

it any different, legal rules would have been transformed “into mere habits devoid of any normative meaning.”⁹⁸

Having said all this, the only remaining venue for the treatment of ‘non-optionality’ of legal rules is that of taking into account the law-applying institutions which are in charge of their enforcement. A legal rule is, then, considered ‘non-optional’ in the sense that its breach will trigger the enforcement of sanction against the disobeying norm-subject. On this view, ‘bindingness’ of a legal rule boils down to the fact that it is backed up by the coercive machinery of state institutions. This is a well-known position in legal philosophy, stretching from Bentham to Kelsen. However, the alleged special normative force of legal rules should not be confused with coercive guarantees. This is what Bix has in mind when noticing:

We certainly say that the law of a country ‘applies’ to its citizens (and often non-citizens resident in the country) whether those individuals ‘accept’ the law or not. By this, we mean in part that if those individuals act contrary to law’s prescriptions, they may be subjected to sanctions. However, while law’s *coercion* may be inescapable, its *normativity* is not.⁹⁹

Coercive guarantees are only “auxiliary reasons” for action of norm-subjects,¹⁰⁰ but they nonetheless help law as a complex institutionalized normative order to function with a higher level of efficiency than other normative orders. Or, as famously put by Hart, “‘sanctions’ are ... required not as the normal motive for obedience, but as a *guarantee* that those who would voluntarily obey shall not be sacrificed to those who would not.” Having this in mind, “what reason demands is *voluntary* co-operation in a *coercive* system.”¹⁰¹

As I have elsewhere tried to elaborate extensively,¹⁰² all this leads us to an unconventional conclusion that there is nothing special about the normativity of law. That

⁹⁸ Sylvie Delacroix, *Legal Norms and Normativity – An Essay in Genealogy* (Oxford and Portland: Hart Publishing, 2006), 154.

⁹⁹ Brian Bix, ‘The Nature of Legal Obligation’, in Kenneth Einar Himma, Miodrag Jovanović, and Bojan Spaić (eds.), *Unpacking Normativity: Conceptual, Normative, and Descriptive Issues* (Oxford and Portland, Oregon: Hart Publishing, forthcoming, 2018)

¹⁰⁰ Rodriguez-Blanco, *Law and Authority under the Guise of the Good*, 199.

¹⁰¹ Herbert Hart, *The Concept of Law* (With an Introduction by Leslie Green and a Postscript edited by Penelope A. Bulloch and Joseph Raz) (3rd edn) (Oxford: Clarendon Press, 2012), 198.

¹⁰² Miodrag Jovanović, ‘Theorizing “Unidentified Normative Objects” of Global Regulatory Regimes’, Kenneth Einar Himma, Miodrag Jovanović, and Bojan Spaić (eds.), *Unpacking Normativity: Conceptual, Normative, and*

is, law's normative force competes with the normative force of other normative orders that also provide us with reasons to behave in a certain way by installing obligations. This deliberation about the conflicting demands of normative orders does not occur each time an actor is confronted with law's order, because that "would considerably diminish, and maybe cancel law's efficiency".¹⁰³ However, the higher level of efficiency of law is a result of the combined effect of the interrelated typical features of law – normativity, institutional nature and (coercive) sanctioning – and should not be erroneously attributed to the exclusionary nature of legal norms as reasons for action.

Once the direct link between legal "normativity", "validity", and "bindingness" is exposed as unsubstantiated, the path is cleared for a more nuanced discussion about the nature of different "unidentified normative objects" of global regulatory regimes, "whose legal character is uncertain or challenged, but which produce or aim to produce regulation."¹⁰⁴ In that case, there is no persuasive reason to treat various regulatory mechanisms as all falling with the category of 'legal rules', since some of them have managed to acquire significant normative force in terms of safeguarding the required behavior of its norm-subjects.¹⁰⁵

2) A Legal Pluralist Approach?

From everything said so far, it seems clear that global/transnational regulatory phenomena calls for a change of perspective in our legal theorizing. But, what sort of change? According to Zumbansen,

The lawyer struggling to understand the fate of her field in a world of transition from national to global is bound to engage in a both methodological and theoretical inquiry. It is methodological in the sense that legal concepts are competing with alternative disciplinary approaches to effectively address the regulatory challenges and goals arising from 'global governance'. It is theoretical in the sense that the widely observable proliferation of norm creation and norm administration in numerous areas of what legal

Descriptive Issues (Oxford and Portland, Oregon: Hart Publishing, forthcoming, 2018), at <https://ssrn.com/abstract=2838337>

¹⁰³ Delacroix, *Legal Norms and Normativity – An Essay in Genealogy*, 154.

¹⁰⁴ Frydman, 'A Pragmatic Approach to Global Law', 3.

¹⁰⁵ See, for example, my discussion of Basel banking regulations in, Jovanović, 'Theorizing "Unidentified Normative Objects" of Global Regulatory Regimes'

scholars and political scientists have been coining ‘private transnational regulation’ prompts a revisiting of the ‘concept’ of law.¹⁰⁶

Legal scholars, thus, have to engage themselves in the business of scrutinizing and exploring “both the obvious and the not so obvious differences between law and competing regulatory approaches that are on offer in a globalising world”.¹⁰⁷ However, Zumbansen believes that neither in terms of form – its reliance on *hierarchy*, nor in terms of substance – the centrality of *justice*, can legal scholars defend law’s superiority. Therefore, he concludes that legal scholarship “must conceive of this transformation and erosion of the vertical (law/non-law) and horizontal (national/global) boundaries as a methodological inquiry into the way in which spaces of legal order are being defined.”¹⁰⁸ In that respect, global/transnational law is nothing more than “another name for transnational legal pluralism, for an (inherently interdisciplinary) inquiry into the nature of legal regulation” of transnational situations.¹⁰⁹

Twining, for his part, argues that globalization, understood in a broad sense, as “all modern tendencies to transnationalisation”, calls for a redefinition of “theoretical or more abstract part” of the discipline of law known under the name of jurisprudence.¹¹⁰ He advises legal theorists “to adopt a global perspective”, because “[t]hinking in terms of total pictures is mainly useful for setting a context for more particular studies.”¹¹¹ In that respect, “generality” of jurisprudence is perceived in terms of “the theoretical study of two or more legal traditions, cultures, or orders (including ones within the same legal tradition or family) from the micro-comparative to the universal.”¹¹² According to Twining, this conception of “general jurisprudence” differs from its predecessors, insofar as “(i) it treats generalising about legal phenomena as problematic; (ii) it deals with all levels of legal ordering, not just municipal and public international law; and (iii) it treats the phenomena of normative and legal pluralism as central to jurisprudence.”¹¹³

¹⁰⁶ Zumbansen, ‘Transnational Legal Pluralism’, 184.

¹⁰⁷ *Ibid.*, 185.

¹⁰⁸ *Ibid.*, 187.

¹⁰⁹ *Ibid.*

¹¹⁰ William Twining, *Globalisation and Legal Scholarship* (Oisterwijk: Wolf Legal Publishers, 2011), 2-3.

¹¹¹ Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, 18.

¹¹² *Ibid.*, 20-21.

¹¹³ *Ibid.*, 21, fn. 84.

Unlike Zumbansen, Twining is not willing to give up the dominant jurisprudential methodology, in fact, he argues that “there is more than ever a central role for conceptual analysis”. What he, nonetheless, proposes is to broaden “the agenda”, as to include “analytical concepts that can be used across legal traditions, and basic concepts of empirical legal studies, as well as the relatively narrow range of concepts studied by analytical jurists working with one or other narrow doctrinal conceptions of law.”¹¹⁴ In doing so, Twining suggests to take seriously the phenomenon of “normative pluralism”,¹¹⁵ understood as “the coexistence in the same time–space context of multiple systems of norms or rules or of institutionalized normative orders—concepts”.¹¹⁶ This methodological orientation implies that general jurisprudence, when adopting a global perspective, has to operate with a broader conception of law,¹¹⁷ which includes various forms of “non-state law”, such as “religious law, some forms of custom, important examples of institutionalised self-regulation, and various forms of ‘soft law’, such as *lex mercatoria* or non-binding declarations of rights”.¹¹⁸

Despite the fact that the expression “global/transnational legal pluralism” has gained currency in recent years, Twining is of the opinion that “[a]s a concept it is not very promising.” Not only that each of the constitutive elements of this phrase is contestable and ambiguous, but it does not address the fundamental question: “plurality of what exactly?”¹¹⁹ Put differently, whenever the legal pluralist’s lens is employed in the discussion about legal phenomenon, the undertaken analysis stumbles upon “the problem of the

¹¹⁴ *Ibid.*, 445.

¹¹⁵ One of the pioneers of ‘legal pluralism’, Griffiths (see his seminal work, John Griffiths, ‘What Is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism & Unofficial Law* 1: 1-55) has also recently conceded to the idea that legal pluralism is best seen as a species of normative pluralism (John Griffiths, ‘The Idea of Sociology of Law and its Relation to Law and to Sociology’, in Michael Freeman (ed.), *Law and Sociology: Current Legal Issues, Vol. 8* (Oxford: Oxford University Press, 2005), 63-64). Similarly, Tamanaha opts for labels “normative’ or “regulatory pluralism”. He distinguishes between six forms of “normative ordering” which are commonly studied in the legal pluralism literature: “(i) official legal systems; (ii) customary/cultural normative systems; (iii) religious/cultural normative systems; (iv) economic/capitalist normative systems; (v) functional normative systems; (vi) community/cultural normative systems.” Brian Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’ (2008) 30 *Sydney Law Review* 3: 397.

¹¹⁶ William Twining, ‘Normative and Legal Pluralism: A Global Perspective’ (2010) 20 *Duke Journal of Comparative and International Law* 3: 476, fn. 4

¹¹⁷ Twining uses a “working” definition of law: “From a *global perspective* it is illuminating to conceive of law as a species of *institutionalised social practice* that is *oriented to ordering relations* between subjects at one or more *levels* of relations and of ordering.” Twining, *General Jurisprudence: Understanding Law from a Global Perspective*, 117. (emphasis in the original)

¹¹⁸ *Ibid.*, 443.

¹¹⁹ Twining, ‘Normative and Legal Pluralism: A Global Perspective’, 511.

definitional stop". That is, "if one moves beyond state law how does one avoid including all kinds of social norms and institutions?"¹²⁰ As already explained, this tendency of global/transnational law scholarship to treat law as the default descriptor for all regulatory activities¹²¹ is not only unhelpful, but it is also unnecessary once the classical picture of the normativity of law is abandoned. But this important insight becomes more obvious if one endorses a particular socio-legal approach which treats law as a normative order that is a product of specific historical development and that is as such in interaction with other social normative orders. As rightly noticed by Delacroix, the "axiomatic status" of legal normativity needs to be challenged and elucidated "by putting forward an account of the context of social interaction that allows and conditions law's normativity."¹²²

In that respect, the healthy core of pluralists' doctrine is the idea of normative pluralism, understood in the aforementioned sense, which is as a social fact easily observable if one approach law from a global perspective. Normative pluralism at global level provides us with distinctive empirical grounds for studying the concept of law. As noticed by Raz, the requirement of the "minimal conditions for the possession of a concept" is partly responsive to our normal notions, and partly a stipulative regimentation of these notions.¹²³ Traditional jurisprudence has relied almost exclusively on "normal notions" confined to the state-centered empirical setting.¹²⁴ In Raz's influential theory, these "normal" empirical notions upon which the concept of law is premised include, for instance,

¹²⁰ *Ibid.*, 505.

¹²¹ Take, for example, Schiff Berman's account of "global legal pluralism". He proceeds by speaking of complex multiplicity of both traditional state and "nonstate legal (or quasi-legal)" authorities, which, *inter alia*, includes "communities of transnational bankers and accountants developing their own regulatory regimes governing trade finance or accounting standards". (Paul Schiff Berman, *Global Legal Pluralism* (Cambridge: Cambridge University Press, 2011), 7-8) In the next step, he adopts "a cosmopolitan pluralist perspective", which "does not privilege one set of norms as somehow hierarchically superior and therefore able to dictate compliance. Instead, it recognizes the role of all legal pronouncements as fundamentally rhetorical, and it views the question of legitimacy not through formalisms such as sovereignty but rather on the basis of what statements come to be accepted as true over time. Thus, legitimacy becomes a sociological question about changes of legal consciousness, and a cosmopolitan pluralist legal system seeks to keep those multiple voices in dialogue with each other to the extent possible." *Ibid.*, 325.

¹²² Sylvie Delacroix, *Legal Norms and Normativity – An Essay in Genealogy* (Oxford and Portland: Hart Publishing, 2006), 102. This is the task of the *genealogical* method. The point of this method "is to bring out the artificial character of a certain kind of institution." This method "typically aims at those institutions that seem to be able to construct their legitimacy only by 'forgetting' that they were brought into existence by a historical process." *Ibid.*, 100.

¹²³ Raz, 'Can There be a Theory of Law?', 326.

¹²⁴ As put by Raz, "for quite some time now the State has been, or was assumed to be, the most comprehensive law-based social organization in the contemporary world." Joseph Raz, 'Why the State' (2014) *Legal Studies Research Paper Series, Paper no. 2014-38: 2*. At <http://ssrn.com/abstract=2339522>

claims to obedience by putative authorities, as well as non-consensual relations of hierarchy and subordination.¹²⁵ However, almost none of these “normal notions” apply when we move at the level beyond the state.¹²⁶ Authoritativeness of international institutions, built on the consensus of states, decisively depended, and still very much depends, not primarily on their claims to obedience, but, as noticed by Raz himself, on their capacity to generate “respect and loyalty of people around the world”.¹²⁷ Furthermore, legal ordering of social relations at the international level is largely taken in the absence of clear-cut relations of social hierarchy and subordination. Such state of affairs is further complicated by a complex nature of “transnational situations”, involving both state and non-state actors. Thus, one of the important findings of socio-legal research taking a global perspective is that

much of what occurs under the auspices even of state or interstate law does not transpire at the formal level (of courts, etcetera) but in a complex informal world in which official law mutates and morphs as a function of delegated (even privatized) authority, social and economic power struggles, good faith mutual response to common needs, and interaction with unofficial normativities.¹²⁸

All this may have a potential bearing for a jurisprudential treatment of typical features associated with the concept of law, such as normativity, institutionality, or sanctioning.

Take, for example, the last mentioned feature.¹²⁹ The functioning of global/transnational regulatory regimes provides an illuminating laboratory for the

¹²⁵ Raz, *The Morality of Freedom*, 27. Joseph Raz, ‘The Problem of Authority: Revisiting the Service Conception’, in *Between Authority and Interpretation*, 162ff.

¹²⁶ Classical literature in legal pluralism, developed within the field of legal anthropology, has always challenged that these normal notions apply even at the state level, or at least it challenged the universality of these empirical phenomena. In his seminal work on legal pluralism, Griffiths attacks “the ideology of legal centralism”, according to which “law is and should be the law of the state, uniform for all persons”, administered by a single set of state institutions, exclusive of all other forms of law, such as that of church, the family, other organizations and groupings (Griffiths, ‘What Is Legal Pluralism?’, 2-3). Griffiths refutes this understanding by claiming that “[l]egal pluralism is the fact”, whereas “[l]egal centralism is a myth, an ideal, a claim, an illusion.” *Ibid.*, 4-5.

¹²⁷ Raz, ‘Why the State’, 23.

¹²⁸ Scott, ‘“Transnational Law” as Proto-Concept: Three Conceptions’, 875.

¹²⁹ It is a well-known that contemporary Anglo-American legal philosophers in legal positivist tradition disagree whether coercion shall be treated as a necessary or only contingent feature of law. Raz argues that a legal system without the recourse to coercion is “logically” conceivable, yet for the moment “humanly impossible”. Raz, *Practical Reason and Norms* (2nd ed.), 158-159. Green fosters a similar claim. He says that “it is a feature

elucidation of the nature of sanctioning, as well as of interrelated concepts of compliance, effectiveness, or social pressure. A number of functional regulatory entities in the global/transnational arena possess “a novel *ensemble regulatory structure*, with positive (network) enforcement and normative externalities.”¹³⁰ Socio-legal studies have long ago confirmed that participation in such structures “is often valuable to members of networks of community.” This, on the one hand, has profound implications for the effectiveness of such regulatory structures, and on the other hand, it helps us understand why “social sanctions of expulsion from or ostracism in those networks can be powerfully coercive”.¹³¹ It is important to bear in mind that these “ensemble regulatory structures” can only partly be explained by reference to the consent of the network members. In a number of areas, the processes of globalization have led to (quasi)institutionalized and highly autonomous regulatory regimes from which the opting-out of their norm-subjects is fairly burdensome.¹³² Hence, such highly globalized regulatory structures generate strong social pressure for conformity to their norms of self-regulation. And for Hart this may bear some relevance for discussing ‘legality’ of those regulatory regimes. In drawing his famous distinction between “being obliged to” and “being under an obligation”, Hart says that “rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great.” When this social pressure takes the form of physical sanctions, “even though these are neither closely defined nor administered by officials but are left to the community at large, we shall be inclined to classify the rules as a primitive or

of our concept of law that it is *coercive if necessary*, though not necessarily coercive.” Leslie Green, ‘The Forces of Law: Duty, Coercion and Power’ (2016) 29 *Ratio Juris* 2: 167. Himma, on the other hand, has recently argued in favor of “coercive enforcement mechanisms” as a “conceptually necessary feature” of law. Kenneth Einar Himma, ‘The Authorization of Coercive Enforcement Mechanisms as a Conceptually Necessary Feature of Law’ (2015) at <http://ssrn.com/abstract=2660468>

¹³⁰ Oren Perez, ‘Private Environmental Governance as Ensemble Regulation: A Critical Exploration of Sustainability Indexes and the New Ensemble Politics’ (2011) 12 *Theoretical Inquiries in Law* 2: 545.

¹³¹ Roger Cotterrell, ‘What is Transnational Law’ (2012) 37 *Law & Social Inquiry* 2: 520.

¹³² This inevitably opens the problem of legitimacy of such regulatory structures, as well as the question whether satisfying some substantive standards is in any way connected to the putative legality of a regulatory regime. In discussing ‘legality’ of ‘global administrative law’, Kingsbury, for instance, argues that “the quality of publicness, and the related quality of generality, are necessary to the concept of law in an era of democratic jurisprudence.” Benedict Kingsbury, ‘The Concept of “Law” in Global Administrative Law’ (2009) 20 *The European Journal of International Law* 1: 31. Somek criticizes this move by qualifying the “publicness” criterion as “*ius naturalis*” element which is inconsistent with Kingbury’s inclination to offer a Hartian conceptualization of “global administrative law”. Alexander Somek, ‘The Concept of “Law” in Global Administrative Law: A Reply to Benedict Kingsbury’ (2010) 20 *The European Journal of International Law* 4: 991.

rudimentary form of law.”¹³³ Sanctioning at the level of global/transnational regulatory communities may not be in the form of coercive measures,¹³⁴ but “[w]hat is important is that the insistence on importance or *seriousness* of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations.”¹³⁵ It is, thus, not surprising that some global regulatory regimes, whose legality is dubious to say the least, manage to display a surprisingly high level of normative force, understood as the capacity to give rise to obligations of their addressees.

A Concluding Note

Traditionally, theorizing about law has predominantly relied on the central case of municipal, that is state law. However, even some of the most prominent contemporary legal philosophers, such as Raz, acknowledge that “exclusive concentration on state law was, it now turns out, never justified, and is even less justified today.” He notices that “[i]n part, though not only, we need to rethink the relations of state-law to other legal systems, as the scope both of the authority and of the sovereignty of states has diminished and is likely to diminish still further, and the ways states integrate within the emerging international law is going to confront us with practical and theoretical problems.”¹³⁶ Scholars in philosophy of international law has already realized that there are no longer reasons for treating the relationship between state law and international law as “a one-way street”, where the latter is assessed through the prism of the former.¹³⁷ While there are maybe still good reasons to treat international law as a special case of the central concept of law, one that is “drawn from” it,¹³⁸ dominant state-centered features are nowadays under a heavy theoretical challenge. Thus, “if international law does not fit the criteria of the concept of law used at

¹³³ Hart, *The Concept of Law*, 86.

¹³⁴ For instance, some of the specific sanctions in the area of transnationally organized business networks are: “reduction in reputation among peers and business partners; loss of opportunities for productive dealing with other members of the communal network; denial of access to knowledge available to other members; blacklisting; less favorable terms and conditions of trade; less availability of cooperation from other members; and, ultimately, exclusion from the communal network.” Cotterrell, ‘What is Transnational Law’, 521.

¹³⁵ Hart, *The Concept of Law*, 87.

¹³⁶ Raz, ‘Why the State’, 22.

¹³⁷ Samantha Besson and John Tasioulas, ‘Introduction’, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), 7.

¹³⁸ Cf. Patrick Capps, *Human Dignity and the Foundations of International Law* (Oxford and Portland, OR.: Hart Publishing, 2009), 35-39.

the domestic level, it may not (only) be a problem for the legality of international law, but (also) for those criteria themselves and hence for a given legal theory.”¹³⁹

The burgeoning “global/transnational law” scholarship raises some additional challenges to our theorizing about law. This paper tried to map the most important ones and to demonstrate that despite some of them are unsustainable (e.g. “post-modern” concept of law, the idea of “source-less” law, methodological inclination towards deleting the line between law and non-law, while at the same time treating law as the “default descriptor” for various regulatory instruments), some others are highly relevant for the contemporary jurisprudence (e.g. functional vs. territorial sphere of validity, independence of certain global/transnational sources of law, approaching law from a global perspective and judicious employment of the lens of normative pluralism). Consequently, it would be safe to conclude that, despite the highlighted deficiencies, the “global/transnational law” scholarship “pushes the boundaries of the legal imagination in such a way that, at the very least, legal theory and legal education based entirely on ‘domestic’ (state) and ‘international’ (interstate) constructs of law must be open to developing in ways that might take us all out of current conceptual comfort zones.”¹⁴⁰ Put differently, not only that jurisprudence needs to redefine “normal notions” from which it proceeds in its conceptual work, but it may also need to significantly modify “stipulative regimentation of these notions” (Raz) when trying to elucidate the nature of law.

¹³⁹ Besson and Tasioulas, ‘Introduction’, 8.

¹⁴⁰ Scott, “Transnational Law” as Proto-Concept: Three Conceptions’, 876.