16

Globalisation and Law: Law Beyond the State

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1. INTRODUCTION

IF GLOBALISATION IS the main paradigm of our time, then a chapter on globalisation and law could also be entitled, simply, 'The Law of Our Time'. Few, if any, areas of law are not—at least potentially—fundamentally impacted by globalisation. In reality, of course, the impact of globalisation on legal thought has, so far, been more limited. That has various reasons. A first reason is that globalisation, although (or perhaps because) it is generally accepted as the new paradigm of society, has remained a remarkably vague concept in general discourse. The fundamental debates over globalisation of the 1990s more or less petered out, without leading to a clear consensus. A second reason is that legal thought has so far reacted to globalisation not with a true paradigm shift but instead by more and more inapt attempts to adapt the methodological nationalism that has provided its paradigm for the last two hundred years or so. The same can still be said about much of social theory, which also remains within such a state paradigm. Globalisation has not, yet, led to a true paradigm shift.

A third reason, finally, is that globalisation poses interdisciplinary challenges, and interdisciplinarity in law and globalisation is still surprisingly lacking. On the one hand, many of the conceptual and theoretical discussions of globalisation ignore or downplay the law as an important factor (beyond an occasional nod to international law). A widespread understanding of globalisation distinguishes three aspects: economics, culture, politics. Law, in words, is absent. In legal thinking, on the other hand, globalisation is often either purely absent (where discussions are purely doctrinal) or appears as a simple idea of internationalisation that somehow influences the law. Legal theory and doctrine have, until recently, often operated with oversimplified concepts of globalisation.[1]

[1] The most impressive theory of legal globalisation, and one that has influenced the thinking behind this chapter, is W Twining, *General Jurisprudence—Understanding Law from a Global Perspective* (Cambridge, Cambridge University Press 2009); summarized in part in W Twining, 'The Implications of "Globalisation" for Law as a Discipline' in A Halpin and V Roeben (eds), *Theorising the Global Legal Order* (Oxford, Hart Publishing) 39–59.

This suggests what this chapter needs to accomplish. In the second section, I try to clarify the meanings of globalisation by introducing three different types of concept: globalisation as reality, as theory, and as ideology. This discussion, just as the rest of the chapter, remains necessarily abstract in two ways. First, it remains abstract from particular areas in which globalisation and law meet—human rights, international economic law, family law, etc. Such areas are used as mere examples. The reason is that globalisation is not confined to these areas of the law; it permeates all of law and thus matters everywhere. Second, the chapter remains abstract from specific theories. Globalisation is not a single theory or even a cluster of theories. Rather, it is the emerging paradigm underlying all current theories of both state and law. Instead of presenting individual theories of globalisation, I present what all of them have in common.

In the third section, I discuss what I consider the core theme of globalisation—the transformation of the state, both empirically and theoretically. The state has long provided the tacit framework for our thinking in both social and legal theory. If, as I argue, globalisation overcomes this focus, then a discussion of the transformation it brings with it must put the state at its centre. My analysis therefore follows along the traditional three elements of the state—territory, citizenship and government—and shows how each of them is transformed.

The fourth section, finally, suggests a theory of globalisation and law, called transnational law. This may look like a legal, not a social theory, so some methodological points should be made here. Although I begin by explaining globalisation and then focus more on the law, in this chapter, social and legal theory are not strictly kept apart. This amalgamation performs one main thesis of the chapter. Globalisation, I argue, is not an external development that comes at the law from the outside. Rather, globalisation and law mutually shape each other—today's globalisation is as much a product of a law as it influences the law. A proper theory of globalization must include the law; a proper theory of the law must have a better idea of globalization. Moreover, just as globalization challenges the distinction between the state and society, so it challenges the distinction between social and legal theory. Legal theories must necessarily not just be influenced by social theory; they must become social theories.[2]

2. THREE TYPES OF GLOBALISATION

There is no universally accepted definition of globalisation, and so this chapter will not offer one. But that does not mean that no clarity can be achieved. Closer analysis of the debates suggests that three different types of concept of globalisation must be distinguished. I call these three types globalisation as reality, globalisation as theory, and globalisation as ideology. Inside each type, fruitful debates can be had. Between the types, however, such debates are less useful because the types are largely independent of each other. All three types are relevant for the law, and I will discuss implica-

[2] See R Cotterrell, *Law, Culture and Society. Legal Ideas in the Mirror of Social Theory* (Aldershot, Ashgate, 2007); R Banakar, 'Law Through Sociology's Looking Glass' in A Denis and D Kalekin-Fishman (eds), *The New Handbook in Contemporary International Sociology: Conflict, Competition and Cooperation* (London, Sage, 2009).

tions for the law in each segment. However, I suggest that the last one—globalisation as theory—is the most important for legal thought, because paradigm shifts happen neither in reality nor in ideology but in our ways of understanding the world.

Globalisation as Reality

Globalisation refers, first and foremost, to developments in the real world that are, in some way, global. Many such developments are well known. Some concern the relations between states, in particular the growing interdependence[3]—the increase in global trade and global markets (made possible in part through liberalisation of trade), global communication (due in large part to the internet), global travel and global migration, global networks (from online gamers to terrorists), global environmental destruction and climate change, increased hybridity of cultures and societies, increased influence of US values and culture on the rest of the world. All of these developments are undoubtedly real—even though their extent is sometimes overestimated (for example, most consumption is still domestic). But the question is whether all these events amount to something categorically new that we should call globalisation.

In response to these concerns, the most helpful analytics of globalisation is still one proposed by David Held et al in the late 1990s.[4] They suggest that globalisation is characterized by four elements. The first three of these concerns global transactions, and in particular their *extensity*, *intensity* and *velocity*. Extensity describes the stretching of activities across borders and distances. Intensity describes the magnitude of interconnectedness inherent in these transactions. Velocity describes how these transactions have gained in speed—if a letter from Europe to the USA used to take a week, and a fax ten minutes, an e-mail, today, arrives instantly. The fourth factor concerns what Held et al sometimes call *impact* and sometimes the *enmeshment between the global and the local*—the idea that local events can have global consequences, and that on the other hand global developments materialise locally, often with considerable variations. In this reading, there have been globalisations before our time, but ours is the first that scores high on all four of these factors. The increase of global transactions creates new challenges for legal transactions. The fourth element, the enmeshment between the global and the local, is reflected in the law in the increasingly blurred lines between domestic and international law.

This analytics makes it possible to avoid a number of errors about globalisation. First, globalisation is *not a mere transfer of issues from a local to a supranational sphere*, which could be accompanied by a move from domestic to supranational law (as is the case in the European Union, but not really on an international level). Nor does it seem sufficient to think of the local and the global as distinct spheres that may interconnect—a relation well known in law as the relation between domestic law and international law, to be discussed later. Instead, what we find is that the local and the global mutually constitute each other—Boaventura de Sousa Santos speaks, helpfully,

[3] RO Keohane and JS Nye, *Power and Interdependence*, 4th edn (Upper Saddle River, NJ, Pearson, 2011).

[4] D Held, A McGrew, D Goldblatt and J Perraton, *Global Transformations: Politics, Economics, and Culture* (Palo Alto, Stanford University Press 1999) 14–28.

of 'globalized localism' and 'localized globalism'.[5] Global commerce relies, to a large extent, on local laws and domestic enforcement mechanisms—its globalism is localised. Human rights movements, on the other hand, attempt to achieve local policy changes by forming networks—their localism is globalised.

Second, *globalisation is not merely uniformisation.* Although increased communication and competition may sometimes lead towards uniformity—of culture, of policies, and of laws—such uniformity always remains partial. In response to ideas of an 'end of history', scholars have found that there are sustainable 'varieties of capitalism' in different capitalist countries.[6] The same appears to be true in law—different countries can still have different laws, and this may even be beneficial. Even where laws look the same formally, their actual application often differs significantly. The same is true for theses of an 'Americanization'.[7] Even if it is the case that US law has been enormously influential in the world—in contract drafting, in commercial law, in constitutional law—this does not, necessarily, create uniformity: American culture and law in turn have become more diverse—the English language and Caucasian ethnicity, once clearly dominant, are giving way to an ever more hybridised culture.

Third, we can meaningfully compare our current globalisation to *earlier globalisations.* We know that many current developments—internationalisation, liberalisation, universalisation and westernisation—are not new and therefore not sufficient for a definition of globalisation as a new phenomenon.[8] International trade has, relative to domestic trade, only recently surpassed the level of importance it had before the First World War. However, this is a problem only if we think that globalisation describes only our current period and are unwilling to use the title for comparable developments in the past—in particular the nineteenth century.[9]

Globalisation as Theory

Even if the empirics were universally accepted, we would still find different interpretations of these empirics, especially as they relate to law. This leads to a second use of the term globalisation—globalisation as theory. Several theories of globalisation exist. What they have in common is a shift away from the paradigm of *methodological nationalism* that has dominated both social and legal thought over the last two hundred years. Methodological nationalism describes an approach in social theory that takes the nation-state as an assumption. Wimmer and Schiller distinguish, helpfully, three modes in which methodological nationalism occurs.[10] First, they argue, social theories

[5] B de Sousa Santos, *Toward a New Common Sense*, 2nd edn (Cambridge, Cambridge University Press, 2002) 179–80.

[6] PA Hall and D Soskice (eds), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford, Oxford University Press, 2001).

[7] For discussions concerning law, see eg RD Kelemen and EC Sibbett, 'The Globalization of American Law' (2004) 58 *International Organizations* 103.

[8] JA Scholte, *Globalization—A Critical Introduction* (New York, St Martin's Press, 2000) 44–46. For Scholte, the only truly new development is deterritorialisation (ibid, 46–50).

[9] eg J Osterhammel and NP Petersson, *Globalization: A Short History* (Princeton, Princeton University Press, 2009).

[10] A Wimmer and N Glick Schiller, 'Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences' (2002) 2 *Global Networks* 301.

of modernity have largely ignored that modernity—rationalisation, the transcendence of ethnic, religious and (to some extent) economic differences—took place not just within the nation-state; these theories also went along with a persisting ideological nationalism that must thus be viewed as a constitutive element of modernity, not its opponent. Second, social theory has naturalised the nation-state and thereby made it the framework of its analysis of society, rather than its object. Third, and finally, the analytical focus of social science and theory have been restrained by the boundaries of the nation-state. With regard to the later mode, we can speak of the state as container of social processes.[11]

Regardless of whether or not such methodological nationalism has dominated the social sciences[12] it seems clear that it has been predominant in legal debates. Here, methodological nationalism translates into what is called the *Westphalian model*—the idea that the state presents the ultimate point of reference for both domestic and international law. In this model, all domestic law is the law within one state, whereas in international law, the only actors are states and the supranational institutions that states have set up. We can see the prevalence of this model in all legal disciplines. Discussions in public law assume the existence of one government (unitary or not). Private law has been nationalised—not just formally, as codes (in civil law countries), but also in our understanding of it.[13] Even law that is not national law is understood within such methodological nationalism. Thus, international law, understood as law between states, perpetuates the idea of the state as the only relevant reference point. Even where law is moved to the supranational level—as is the case for the law of the European Union—it remains caught in the perspective of the state.[14] Moreover, even where non-state law is described as law, the concept of law used is typically borrowed from the model of state law.[15] Conflicts between legal systems are, in such a perspective, viewed as an exception; the dominant solution in private international law is to allocate international transactions to one state.

Globalisation as theory explicitly rejects such a nationalism and seeks for new ways to theorise both society and law. There is no space in this chapter to address all of these theories,[16] or even only those that are of relevance for the law. Halliday and Osinsky, who explicitly draw on Held's four factors, distinguish four such interpretations that are, at the same time, models of social theory.[17] The first model is *world polity*, the idea of global convergence. Such convergence encompasses the law, which converges either formally, through increased international and supranational law, or informally, through the diffusion of laws and best practices. The second model is what they call *world system analysis*—the idea of hegemonic states and actors that prevent

[11] U Beck, *What Is Globalization?* (Cambridge, Polity Press, 2000).

[12] For doubts, see D Chernilo, 'Social Theory's Methodological Nationalism: Myth and Reality' (2006) 9 *European Journal of Social Theory* 5.

[13] See N Jansen and R Michaels (eds), *Beyond the State? Rethinking Private Law* (Tübingen, Mohr Siebeck, 2008).

[14] JM Smits, 'The Draft-Common Frame of Reference, Methodological Nationalism and the Way Forward' (2008) 4 *European Review of Contract Law* 270.

[15] S Roberts, 'After Government? On Representing Law without the State' (2005) 68 *Modern Law Review* 1.

[16] For a useful overview of theories of globalization, see WI Robinson, 'Theories of Globalization' in G Ritzer (ed), *The Blackwell Companion to Globalization* (Malden, MA, Blackwell, 2007) 125.

[17] TC Halliday and P Osinsky, 'Globalization of Law' (2006) 32 *Annual Review of Sociology* 447.

the development of global norms. In law, we saw this for a long time as the imposition of American laws and institutions on the world, be it in commercial law, or in public international law. Their third model is *postcolonial globalism*, the insight into the power imbalances between powerful and less powerful countries. Its consequence is that law is perceived as neutral and objective in the North, which creates and enforces it, while it often looks fragmented and oppressive for actors in the South. The fourth model is *law and development*, the analysis of law reform in developing countries, influenced (and often imposed) by developed countries.

Globalisation as Ideology

A third understanding of globalisation, finally, is yet distinct from the first and the second one. Understood as an ideology, globalisation (and its flipside, antiglobalisation) are political projects, or ideal, perhaps utopian (or dystopian) views of how the world could be. Globalisation as ideology comes in a number of related variants. One variant is that of a *world community* (or a global village, or cosmopolitanism) in which everyone is connected with everyone. That world would be more homogenised and uniform, resting less on parochial views and instead on values common to humanity. Individuals would no longer be citizens of individual countries but instead citizens of the world—globalisation as cosmopolitanism. In law, we find this reflected in ideas of a world law and a world court that were popular in the beginning of the twentieth century and have more recently become popular again[18] Another variant of globalisation as ideology is *neoliberalisation*: the idea that markets should emancipate from states and their regulation and thereby lead to more freedom and more prosperity. The new *lex mercatoria* in particular is a legal ideal expressing this idea. This is linked to the idea of *individualisation*—in the same way in which the state loses its regulatory appeal, so it is argued, the individual agent is strengthened.

Globalisation as ideology is of course closely related to globalisation as reality and as theory. Ideologies formulated in light of existing empirics and theory. Moreover, both the ever-closer world community and the rise of neoliberalism are often presented as inevitable consequences from the state of the world as it is today. This is so, interestingly, both among proponents and opponents of these ideologies. But it seems fair to say that such necessitarianism is false, or at least too simplistic. This is so not only because the future can never be predicted with accuracy (this is, if anything, even more true today than it ever has been, because of the increased velocity of globalisation). Moreover, such necessitarianism ignores two things.[19] One is the array of alternative developments that are possible, both theoretically and practically—alternative globalisations, alternative constellations. The other is the degree to which globalisation is not just a force of nature but a construct of human agency—even if that agency is decentralised and plural—and thus also, to a large extent, of law.

This does not mean that we need to reject globalisation as ideology. Quite to the contrary, if it is true that we need to rethink radically the role and shape of law in

[18] See eg R Domingo, *The New Global Law* (Cambridge, Cambridge University Press, 2011).

[19] See eg RM Unger, *Free Trade Reimagined: The World Division of Labor and the Method of Economics* (Princeton, Princeton University Press, 2010).

our changing society, then we need such ideologies as a normative guidance. What we should reject, however, is the conflating of ideology and empirics.

3. LAW BEYOND THE STATE

For all three concepts of globalisation—reality, theory, ideology—the role of the state is central. This is so especially with regard to law, because the state is so central to our contemporary thinking. Thus, it seems appropriate to look in more detail at how the elements of the state have traditionally been constitutive of the law, and how their transformation under the impact of globalisation has effects on the law as well.

Much debate in the 1990s was dedicated to the question of whether or not globalisation caused the state to decline. For some time, decline seemed more plausible in view of the rise of non-state actors such as multinational enterprises and non-governmental organisations (NGOs), regulatory competition and the ensuing limitations on a state's policy discretion, the rise of neoliberalism. Soon, this literature of the decline of the state spurred a counter-debate that emphasised either that states had remained strong, or that they had even been strengthened by globalisation.[20]

That dichotomy of decline and stability was unsatisfactory for a variety of reasons. First, looking at 'the' state as an abstraction from real states has always been a problem, especially so in international law. It becomes more of a problem in discussions of the impact of globalisation. Whatever we understand globalisation to mean, its effects on countries such as the United States or China are undoubtedly different from those on Somalia or Andorra, and so on.

Second, asking what impact globalisation has on states implies that globalisation is an external factor. The question thus ignores the extent to which states (in large part through their law) are among the institutions that create and shape globalisation.[21] The same is true for many discussions of law and globalisation: law is viewed as a recipient of globalisation, although law is also one of the most important shapers of globalisation. For example, international trade does not occur prior to state regulation; rather, liberalised trade regulations and treaties (first and foremost the World Trade Organization) have made it possible. Similarly, the internet is not external to the state and never has been; it was established with strong support by the US government; its functioning today is guaranteed by a myriad of legal regulations.

Third, the dichotomy of decline/strengthening is much too crude. It makes more sense to speak of transformation of the state[22]—and then to analyse the particular characteristics of this transformation. Of course, transformation is nothing new: the states have always, since their inception, been transformed constantly. What may be new is the specifically global character of current transformations. One such aspect is the so-called 'disaggregation' of the state: the insight that states are not unitary actors but combine a multitude of institutions and actors which may deal with internation-

[20] Held et al, above n 4, 3–7 speak, parallelly, of hyperglobalisers and globalisation sceptics.

[21] S Sassen, *Teritory, Authority, Rights: From Medieval to Global Assemblages*, 2nd edn (Princeton, Princeton University Press, 2008).

[22] Held et al, above n 4, 7–9; M Shaw, *Theory of the Global State: Globality as an Unfinished Revolution* (Cambridge, Cambridge University Press, 2000); S Leibfried and M Zürn, *Transformations of the State?* (Cambridge, Cambridge University Press, 2005).

alisation and globalisation in different way.[23] Another aspect is the increased number of informal networks in which states now regulate. A third aspect is the increased regulatory competition that puts pressure on states' abilities to maintain their welfare systems.[24]

With these caveats out of the way, some general findings can nonetheless be described. Although all states undergo different transformations, generalities can be described, using the traditional elements of the state. Traditionally, we understand the state to be constituted by three elements: a territory, a population and an administrative structure.[25] The transformation of the state under conditions of globalisation can most fruitfully be described as a transformation of these three elements.

Territory

We assume that a state's laws apply only within its borders—and that, similarly, no other state's laws apply here. This is unproblematic as long as domestic transactions are at stake. But it has even been true, by and large, for questions of public and private international law. In public international law, the idea of territorial integrity and exclusive jurisdiction remains strong—even though it allows for exceptions, and even though the idea of territoriality has been enhanced to include intraterritorial effects of conduct that took place elsewhere. For example, it is now almost universally accepted that a state has jurisdiction over antitrust violations that have an effect on the state's markets, even if the conduct leading to the violation took place elsewhere. Enforcement actions by the state are traditionally confined by a state's borders. Similarly, territoriality has traditionally played a significant role in private international law (or conflict of laws) even though it does not govern absolutely. Thus, the jurisdiction of courts is mostly based on territorial connections such as the defendant's domicile, or the place of a tort, etc. Territoriality also governs questions of applicable law: the law applicable to a tort, for example, has traditionally been determined by the place where the tort occurred. Such territoriality has never been exclusive, however. Not infrequently, the applicable law is determined on the basis of non-territorial connecting factors such as the parties' nationality.

This great importance of territoriality for the law is not a coincidence. Rather, it reflects the great importance that territoriality has, traditionally, had for sovereignty. Territorial integrity and sovereignty are perhaps the most important characteristics of a state. Globalisation challenges this importance of territoriality in a number of ways. First, globalisation often makes geographical distances less relevant. Travel has become much easier, and accessible to large numbers of people. More importantly, improved means of communication—most importantly the internet—have in many cases made such travel far less necessary: the same document can now be edited at various places

[23] A Slaughter, *A New World Order* (Princeton, Princeton University Press, 2005).

[24] N Gilbert, *Transformation of the Welfare State: The Silent Surrender of Public Responsibility* (Oxford University Press, 2002).

[25] G Jellinek, *Allgemeine Staatslehre*, 3rd edn (Berlin, Häring, 1914) 394–434. These three elements, supplemented by a fourth (the capacity to enter into relations with other states) are codified in Art 1 of the Montevideo Convention on Rights and Duties of States (signed at Montevideo 26 December 1933; entered into force 26 December 1934).

at the same time. Global production chains are made possible.[26] And social interaction has undergone a qualitative change.[27] Second, for the same reason, state borders have become less important—and less effective. Previously, it may have been possible to keep unwanted information out by simply closing borders and censoring the press. Today, given the global character of the internet, and the omnipresence of blogs and twitters, this has become much harder.

This has posed challenges for the law's territorial character. The law has reacted in different ways.[28] A first reaction is a declined emphasis on territorial boundaries. Newer theories of sovereignty and of jurisdiction replace territoriality with a state's interests—a state is, more and more, entitled to regulate even extraterritorially when the regulated conduct concerns a justified interest. This has meant that large and powerful countries such as the United States now increasingly apply their laws extraterritorially, or pass laws directly with a view to changing policies elsewhere, for example on minimum wages, press freedom and the persecution of religious groups. A second reaction is enhanced international co-operation to regulate transborder transactions. Such co-operation makes sure that rights acquired in one country will be recognised in other countries; it thereby provides the necessary stability for trade. A third reaction is, ironically, a re-established emphasis on territorial boundaries. Somewhat counter-intuitively, judges have begun to justify territorial approaches to the law precisely with the increase in transborder transactions.[29] In such arguments, borders change their character. They may once have been real physical delimitations between countries; now they have become formal entities to delimit application of the law.

Two issues are important. First, territoriality may have become less central, but it has by no means become irrelevant. Access to water—one of the main challenges facing our overpopulated globe—still requires territorial connections; the internet cannot provide us with water. Distances between large cities with airports may now be bridged easily; small outposts are still hard to reach. Fights over territorial boundaries—military, but also legal—remain regular news topics. Sometimes such fights concern clearly important territories, such as the ongoing disputes over territorial authority in Israel and Palestine. Sometimes they concern seemingly irrelevant territories such as the uninhibited Senkaku Tiaoyu Islands, the source of a fierce dispute between China and Japan.

The last example demonstrates something else. The reason such islands are disputed often lies not in their immediate usefulness, but rather in the legal implications of sovereign authority, in particular a state's ability to claim sovereignty over the sea around the island. This leads to the second important issue: the role and importance of territory remain, to a large extent, a function of the law. The internet is deterritorialised not only because of its technology but also because of how it is (or is

[26] F Snyder, 'Governing Economic Globalisation' in F Snyder (ed), *Regional and Global Regulation of International Trade* (Oxford, Hart Publishing, 2001) 1.

[27] LJ Strahilevitz, 'Social Norms from Close-Knit Groups to Loose-Knit Groups' (2003) 70 *University of Chicago Law Review* 359.

[28] R Michaels, 'Territorial Jurisdiction after Territoriality' in PJ Slot and M Bulterman (eds), *Globalisaton and Jurisdiction* (Dordrecht, Kluwer Law International, 2004) 105; G Handl, J Zekoll and P Zumbansen (eds), *Beyond Territoriality: Transnational Authority in an Age of Globalization* (Leiden and Boston, Martinus Nijhoff, 2012).

[29] For two examples from North America, see *Tolofson v Jensen* [1994] 3 SCR 1022 (Canadian Supreme Court); *F Hoffmann-LaRoche Ltd v Empagran SA* (2004) 542 US 155 (US Supreme Court).

not) legally regulated. If states resist this deterritorialisation, they still have means to avoid it, as the example of China shows.[30]

Population/Citizenship

The second traditional element of the state is its population. The romantic idealisation of the modern nation-state even suggests that the population, understood as an imagined community (a people, a nation) is prior, logically and historically, to the state—first there was the German people, then there was the German state. In reality, the order is often reversed, as Benedict Anderson has shown: the nation-state, once established, defines its own people.[31] To stay with the German example, there was long the chance that Austria would become part of the newly founded German empire; once it was not, it was also clear that the German people would be defined as excluding the Austrians.

The latter shows already the extent to which citizenship is a function not (at least not primarily) of culture or ethnicity, but instead of the *law*. The designation of citizenship is, traditionally, left to each state (though international law limits the discretion of states to deprive their nationals of citizenship). However, once citizenship is thus established, it creates certain rights and obligations vis-à-vis the state. Rights include in particular civil rights (eg elections); obligations include, in particular, military service. Altogether, citizenship both assumes and creates, traditionally, a bond of allegiance, and defines the most important part of an individual's identity.

Globalisation has an impact on this allegiance and identity as well. A first impact concerns the sharp increase in *global migration*. Migration takes place amongst both sought-after specialists and poor economic refugees. As a consequence, in many countries, large parts of the population are of foreign nationality. The law is an enabler of such migration—by making immigration easy for highly coveted high achievers and enabling the exploitation of unskilled labourers. And the law draws consequences from the increasingly multinational character of its populations. First, most countries have made access to citizenship easier—at least for desirable highly qualified individuals. National identity thus turns from a matter of fate to a matter of choice, shifting also the basis for obligations of allegiance.[32] Second, multiple nationality is increasingly gaining acceptance—the old idea that one could only serve one master is giving way to a recognition of multiple national allegiances. Third, more and more constitutional rights are granted to foreigners and citizens alike. Using Marshall's triad of rights as civil, political and social rights,[33] we can see that more and more civil and social rights are extended to foreign citizens. In the European Union, even the core political right of taking part in elections is now sometimes granted to members of other EU

[30] See J Goldsmith and T Wu, *Who Controls the Internet? Illusions of a Borderless World* (Oxford, Oxford University Press, 2006).

[31] B Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London, Verso, 2006,).

[32] E Kofman, 'Citizenship, Migration and the Reassertion of National Citizenship' (2006) 9 *Citizenship Studies* 453.

[33] TH Marshall, *Citizenship and Social Class and Other Essays* (Cambridge, Cambridge University Press, 1950).

countries, at least for local elections. As a consequence, the relative importance of national citizenship declines.[34]

Another impact of globalisation concerns *non-state identities*. Together with the transformation of the state, we find a growing importance of multiple identities and allegiances, of which national identity is only one. Pierre may identify not only as a Frenchman but also as a business consultant, a vegetarian, a conservative, a Catholic, a member of a chess club, a Berber, etc. It is inexact (as is sometimes done) to suggest that such a plurality of identities is a novelty of globalisation. Historically, however, all such identities were considered to be transcended by the national identity. Or, put differently: the national identity served to enable all these identities—*e pluribus unum*. What globalisation increases is the degree to which such identities can be experienced in a transnational fashion. Business consultants now work in multinational firms. Conservatives form international alliances. Chess players meet online to play with counterparts around the world. Ethnic groups are able to communicate around the globe. By their transnational status these identities transcend the state, which remains, relatively, localised. States often recognise such non-state identities through their law with multiculturalism and legal pluralism, but these are topics that will be dealt with in the next section.

Government

The third element of the state, finally, is a government, or a functioning administration. This means, first, that the state, through its government, has the power to lay down binding rules as laws that do not require the specific consent of the governed. It means, secondly, that the state, and only the state, is entitled to enforce its laws—it has the monopoly of violence.

It is important to understand the contingency of this dual monopoly of lawmaking and of enforcement—especially because it is often misrepresented in globalisation literature. First, the *monopoly is a historical, not an analytical finding*. The monopoly is an achievement of the modern state, not a characteristic of every conceivable state. The monopoly did not exist in the Middle Ages, when multiple institutions competed. It did not exist in Germany and Austria after World War II, or in Iraq after the Iraq war, because the occupying powers retained considerable rights.

Second, and importantly, the *monopoly does not mean that state laws are the only binding rules in society*. It has always been known that lots of non-state institutions are able to make binding rules and to have them enforced through the state's courts or through arbitration. What the monopoly implies, here, is merely that such powers of non-state institutions acquire their legally binding force only from delegation or recognition by the state. The state is not the only lawmaker, but it is the only institution that is free to determine whose rules should be recognised as law.

What, then, does globalisation change in this picture? A first important development comes from the increased global *interdependence* of states mentioned earlier. We find more and more delegation of lawmaking powers to supranational institutions, be they global (eg the United Nations) or regional (eg the European Union). We find more

[34] R Falk, 'The Decline of Citizenship in an Era of Globalization' (2000) 4 *Citizenship Studies* 1.

and more co-operation between nations, either formally through treaties and executive agreements, or informally through ad hoc international consultations. Sovereignty is thus shared. A state no longer holds absolute discretion on lawmaking. However, such co-operation does not necessarily limit a state's effectiveness. Quite to the contrary, multinational co-operation often seems necessary to deal with transnational issues. Properly, one speaks not of a decline of sovereignty but of the 'new sovereignty'.[35] Much is contested here; in the United States, in particular, a large number of scholars and policymakers are trying to protect US self-determination as provided for in the Constitution against such shared sovereignty.[36] Regardless of whether such a defence is normatively attractive, what is striking from a methodological perspective is how it is based in methodological nationalism: the values of the national constitution are taken as a necessary starting point of the discussion, so the outcome—a prioritisation of national over transnational lawmaking—is almost a logical necessity.

A second important and much-discussed consequence concerns the importance of *non-state norms*. Some of these norms are religious, as in the question of whether Islamic and Jewish divorces should be recognised in England or Canada. Some such norms are based in ethnicity, such as the question of whether we should be more lenient with wifebeaters who come from cultures where beating one's wife is common. Some such norms are economic, such as the alleged privately created law governing relations between global businesses, the so-called new *lex mercatoria*. The state accounts for such rules, typically, without recognising them as law.[37] One such mode is incorporation—the transformation of non-state law into state law, as happened with much of canon law in the emergence of the civil law. Another is deference—the transformation of non-state law into facts for the purpose of adjudication, which is what happens traditionally with commercial customs, but also quite often with customary norms of non-state communities. A third one is delegation—the transformation of non-state law into subordinated law, whereby the rules of non-state communities are simultaneously recognised and subordinated to the laws of the state. Calls that non-state rules have to be recognised as law, for purposes of conflict of laws, have so far largely been rejected.

It has become fashionable to refer to the new state of the law as *global legal pluralism*.[38] This implies, frequently, the suggestion that social realities require us to extend our often exclusive focus on state law and call other things law as well: subnational, national, supranational (international) and non-state law. Such categories are helpful, but they have obvious limits. One such limit is, analytically, that the categorisation still defines every type of legal order by how it relates to the state: subnational law

[35] A Chayes and A Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA, Harvard University Press 1998).

[36] See only JL Goldsmith and EA Posner, *The Limits of International Law* (Oxford, Oxford University Press, 2006); JK and J Yoo, *Taming Globalization: International Law, the US Constitution and the New World Order* (Oxford, Oxford University Press, 2012).

[37] R Michaels, 'The Re-*State*-ment of Non-State Law. The State, Choice of Law, and the Challenge from Global Legal Pluralism' (2005) 51 *Wayne Law Review* 1209.

[38] PS Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge, Cambridge University Press, 2012); S Richards, 'Globalization as a Factor in General Jurisprudence' (2012) 41 *Netherlands Journal of Legal Philosophy* 129, but see already eg B de Sousa Santos, *Towards a New Legal Common Sense*, 2nd edn (London, Butterworths, 2002) 85–98; W Twining, *Globalisation and Legal Theory* (Cambridge, Cambridge University Press, 2000) 82–88.

stands below the state; supranational law stands above it; non-state law stands beside it. Instead of overcoming the state paradigm of law, the categorisation thus not only depends on that paradigm, it even expands it by fitting even normative orders into it that were not traditionally its part. Second, and relatedly, some of the categories are not very useful. Non-state law, for example, is a category that must group together such diverse phenomena as the new *lex mercatoria* (to be discussed later), Islamic law and corporate standards of conduct. It is hard to see what holds these laws together, and distinguishes them from state law, other than the fact that they are not state law. Third, theories of global legal pluralism often mesh empirical findings (a lot of rules worldwide are not state laws) with theoretical conceptions (we need to theorise all of these as laws) and ideological positions (we have to grant greater deference to non-state orders, though how much exactly often remains unclear). Altogether, although the phenomena described under the heading of global legal pluralism are immensely relevant, their treatment as legal pluralism seems to be of limited use.[39]

One theoretical challenge, however, emerges without doubt. Traditionally, it was possible to treat a legal system as internally coherent and ultimately founded in some highest rule. In legal theory, Hans Kelsen referred to this highest rule (which for him was a hypothetical one) as basic norm (*Grundnorm*); HLA Hart, in his sociologically inspired theory, called it a rule of recognition.[40] Today's world, with its overlapping laws and claims to regulatory authority, with its forum shopping and regulatory conflicts, cannot so easily be framed as such a system. This does not mean that the old theories, established for the state (and grounded in methodological nationalism), have become useless. It has been suggested, not without plausibility, that the relation between EU law and the law of individual Member States can be conceived of as the relation between two separate rules of recognition.[41] But it seems clear that the state's dual monopoly can no longer be maintained on either empirical or theoretical grounds. New theories of law will be needed.

4. TRANSNATIONAL LAW

It is too early to say whether a new paradigm will replace the methodological nationalism that has shaped our thinking about law over the last centuries, and if so, what this new paradigm might look like. A candidate exists, however, in what is called transnational law. Transnational law, as a theory of law beyond the state, is attractive in particular from the perspective of social theory, because it attempts to combine both doctrine and theory, and both law and social reality. In other words, it promises to fulfil the requirement named in the beginning for an understanding of law and globalisation, namely an approach that views both as deeply interrelated.

The concept of transnational law was originally outlined around the middle of the last century by Philip Jessup.[42] Jessup used the term to describe a body of law 'to include all *law which regulates actions or events that transcend national frontiers.*

[39] R Michaels, 'Global Legal Pluralism' (2009) *5 Annual Review of Law and the Social Sciences* 243.

[40] H Kelsen, *The Pure Theory of Law* trans M Knight (Berkeley, University of California Press, 1960/67); HLA Hart, *The Concept of Law*, 2nd edn (Oxford, Clarendon Press, 1994).

[41] N MacCormick, 'Beyond the Sovereign State' (1993) *56 Modern Law Review* 1.

[42] P Jessup, *Transnational Law* (New Haven, CT: Yale University Press, 1956) quote at p 2.

Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.' This was, in other words, an understanding of law defined not by its sources or its form but by its object, a functional concept. Although formulated prior to discussions about globalisation, it has thus proved useful under conditions of globalisation. This is so because the very boundaries that transnational law tries to transcend—those between public and private law, but also those between international and domestic law—are precisely those boundaries that are closely tied to the nation-state and have therefore become questionable. An additional boundary was not discussed by Jessup but has become prominent and important under globalisation too—the boundary between (formal) law and non-law.[43] This boundary is of particular importance from the perspective of social theory, because its decline requires us to redefine the relation between law and society. I will discuss these boundaries, and their transformation, in turn.

Domestic/International Law

It was described earlier how the distinction between domestic and international law was representative for the Westphalian model and thus for a methodological nationalism in legal theory and doctrine. In their classical conceptions, international and domestic law dealt with different problems and would thus rarely overlap: international law dealt with the international relations between states; domestic law dealt with relations between the state and the individual (public law) or between individuals (private law).

This dichotomy, always fragile, was broken up in the twentieth century. International law, on the one hand, came to include non-state actors, in particular NGOs and multinational corporations. Moreover, international law began to focus more on individuals—in human rights law on the one hand, in international criminal law on the other. In this way, international law came to reach into what had previously been considered internal matters of sovereign states, and began to break up the idea of absolute state sovereignty. Domestic law, on the other hand, has had to internationalise, the more it has been confronted with situations that cannot be located clearly within one state.

As defined by their objects, then, international and domestic law are no longer as distinct as they once were. Today, this is a direct consequence of globalisation and the decline of the 'state as container'. Nonetheless, international and domestic law remain formally distinct, and a theory of transnational law that ignores this formal distinction would have to be deficient.

Public/Private

A second distinction that is challenged by transnational law is the one between public and private law. Public law is the law that governs relations between the state and the individual; private law governs relations between individuals. In some way, this

[43] See P Zumbansen, 'Transnational Legal Pluralism' (2010) 1 *Transnational Legal Theory* 141.

distinction exists in all domestic legal systems, though it has different meanings in different legal systems[44] and is less relevant in some (eg English law) than in others (eg French law).[45] This public/private distinction had been challenged already in the late nineteenth and early twentieth centuries. It appeared to replicate a liberal conception of society, in which neatly distinguished public and private spheres existed, and in which the public (the state) and the private (the market, the family, society) would not interfere with each other.[46] In social theory, antiliberal critique of several variants (feminist, critical, deconstructionist, etc) proclaimed a collapse of the distinction and emphasised the public relevance of the seemingly private spheres of economic and personal relations. In legal theory, similarly, the collapse of the public/private distinction was proclaimed, as well as the public character of private law. The idea behind this argument is this: even private law depends, for its enforcement, on the state and its institutions. Insofar as private plaintiffs enforce their private rights, therefore, they borrow sovereignty from the state.

It should be clear, then, that the critique of the public/private distinction is not specific to globalisation; it is a general element of antiliberal critique. Globalisation, however, challenges the public/private distinction in particular ways. The most important of these has to do, again, with the overcoming of methodological nationalism: once the state loses it privileged position, *public law* (as the law that governs the state's relations with private parties) *loses its special position as well.* Traditional regulatory functions of the state are performed by private actors.[47] The state, on the other hand, sees itself in competition with other states and private parties in a global market for investors; it starts to resemble private actors.

This becomes clear in several constellations. The most obvious one may be the proclaimed confluence of public and private international law.[48] Another of these emerges in *international investment law*, which often pairs states and investors on opposing ends. Here, both parties have asymmetrical powers (the state has sovereignty, the investor has assets), and it is not clear, in terms of either power or law, which is superior.[49]

Another area in which the relations become unclear is party autonomy in private international law. Increasingly, the law applicable to contracts is determined by *party choice* rather than governmental interests; furthermore, commercial parties frequently delegate their disputes to arbitrators instead of state courts. As a result, several of the state's core functions—lawmaking, adjudication—are, in effect, privatised. What remains for the state is to recognise the results of such choices and to enforce choice-

[44] R Michaels and N Jansen, 'Private Law Beyond the State. Europeanization, Globalization, Privatization' (2006) 54 *American Journal of Comparative Law* 845.

[45] JWF Allison, *A Continental Distinction in the Common Law–A Historical and Comparative Perspective on English Public Law* (Oxford, Oxford University Press, 1996).

[46] For a more nuanced overview of the multiple meanings, see J Weintraub, 'The Theory and Politics of the Public/Private Distinction' in J Weintraub and K Kumar (eds), *Public and Private in Thought and Practice—Perspectives on a Grand Dichotomy* (Chicago, University of Chicago Press, 1997).

[47] T Büthe and W Mattli, *New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton, Princeton University Press, 2011).

[48] A Mills, *The Confluence of Public and Private International Law* (Cambridge, Cambridge University Press, 2009); H Muir Watt, 'Private International Law Beyond the Schism' (2011) 2 *Transnational Legal Theory* 347.

[49] See JA Maupin, 'Public and Private in International Investment Law: An Integrated Systems Approach' (2013) 54 *Virginia Journal of International Law.*

of-law clauses and arbitral awards. In some ways, therefore, such party choice turns the traditional hierarchy between state and parties on its head. This could be viewed as a consequence of a decline of the state, as described before. But it must be recalled (again) that this growing party autonomy is in effect a creation by the state and its laws.

It is important to see that the international/domestic distinction and the public/private distinction are transformed simultaneously, with perhaps surprising results. Within the state paradigm it was possible to say that all private law is public law because the state has the power (and discretion) to enforce it. This is true, however, only for domestic law. With only little exaggeration, therefore, we can say that *all international law is private law*. And, indeed, we see such developments. In the same way in which societal institutions (eg markets and families) become transnational while states remain local, so private law is becoming denationalised, while public law remains local. The proclaimed *lex mercatoria*, the alleged autonomous law of international markets, is the most prominent example. In reality, such a reconstitution of the public/private distinction as the domestic/international distinction is nothing new: private law was for most of its history understood as transnational, whereas public law was always tied to the state.[50]

Law/Society

A third distinction is highlighted especially in newer theories of transnational law—that between (formal) law and society and its norms.[51] This distinction has long been important for legal theory and practice, for various reasons: only laws are considered binding; only decisions on law have the force of precedent; questions of law are allocated to judges, whereas questions of fact can sometimes be decided by juries, etc. As a consequence, what counts as law was long based, at least in principle, on the basis of formal criteria—we speak of legal positivism. This is so although the distinction was never clear-cut: the common law, for example, is thought to emerge from custom. But what makes it law is its recognition by the state. Nor was the distinction ever all-encompassing; it was always clear that individuals are restrained not only by law but by multiple other norms.

Now, globalisation challenges this distinction. The reason is not merely, as is sometimes proclaimed, a decline in the importance of the state as regulator. If anything, official laws have become more important than they were in the past: the state regulates more and more affairs. Instead, the distinction begins to collapse because the criteria used in legal positivism to define what should count as law are becoming questionable. Legal positivism requires an unquestioned starting point—a constitution, a sovereign people—and this starting point is, in almost all variants, tied to the state. Once we overcome our methodological nationalism, we are required to justify this very starting

[50] See R Michaels, 'Of Islands and the Ocean: The Two Rationalities of European Private Law' in R Brownsword, L Niglia and HW Micklitz (eds), *Foundations of European Private Law* (Oxford, Hart Publishing, 2011) 139.

[51] See eg G Calliess and P Zumbansen, *Rough Consensus and Running Code—A Theory of Transnational Private Law* (Oxford, Hart Publishing, 2010).

point. Moreover, we become aware that the starting point itself is a creation of the law, not just its precursor.

The result is that we must understand law and society as being mutually constitutive: law is created by and in society, but law also creates society in the way in which we find it. Empirically, this may not be a novelty. But such mutual constitution now becomes also theoretically unavoidable. This is so because, after the end of methodological nationalism, the state can no longer be distinguished, analytically and theoretically, from society. It becomes a specific practice within which norms, whether we call them legal or otherwise, is negotiated.

In a sense I have come full circle. I began this chapter describing globalisation as a vague and broad concept. I end with presenting transnational law as an equally vague and broad concept. This parallel vagueness is, of course, no coincidence. At the same time, it may be viewed as unsatisfactory. Transnational law does not seem very helpful: if transnational law encompasses all legal (and non-legal!) rules, it may be thought to lose any distinguishing potential. If everything is transnational law, nothing really is. In this sense, the suggestion made in this chapter is much more cautious. Transnational law is not a theory, just as globalisation is not a theory. If anything, transnational law is an attempt to theorise what we find empirically as law beyond the state, and a theoretical conceptualisation of law after the breakdown of methodological nationalism. Transnational law describes a starting point, not an endpoint, of thinking about law. Most of the actual work of translating globalisation into law, and vice versa, still remains to be done.

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