Ratio Juris. Vol. 21 No. 1 March 2008 (1–18)

Transnational Communities and the Concept of Law

ROGER COTTERRELL*

Abstract. The proliferation of forms of transnational regulation, often unclear in their relation to the law of nation states but also, in some cases, claiming authority as "law," suggests that the concept of law should be reconsidered in the light of processes associated with globalisation. This article identifies matters to be taken into account in any such reconsideration: in particular, ideas of legal pluralism, of degrees of legalisation, and of relative legal authority. Regulatory authority should be seen as ultimately based in the diverse moral conditions of the networks of community which regulation serves.

This article's concern is with globalisation and the concept of law. It asks: What is the significance of globalisation for legal theory's attempts to analyse the nature of law? Putting matters differently: Is it necessary to conceptualise law in new ways because of changes in the conditions and forms of regulation brought about by processes associated with globalisation?

To invoke "globalisation," however, is always problematic. To refer to it is to indicate a vast and indeterminate topic. Most often the term is taken to encompass a range of (possibly interrelated) changes in the nature of (i) transnational economic (commercial, financial, etc.) relations, (ii) population movements between countries, (iii) cultural influences, commitments and bonds, and (iv) processes of global communication. More specifically, it usually refers to claims about the increasing intensity and scale of these relations, movements and processes, and to a sense of the compression of global space and time, so that the transnational effects of events, situations and actions arise more quickly, directly and powerfully than in the past.

* This article is based on the text of a paper given at a colloquium on "Globalisation and the International Community" at the University of London Institute in Paris on April 14, 2007. I am grateful especially to André-Jean Arnaud for valuable comments.

But the idea of globalisation embraces so much, and entails such huge claims about social and economic forces and the movements of history that it is hard to grapple with.

It is also widely seen as weighed down with valuations positive or negative.[1] Attempted descriptions of phenomena associated with globalisation usually carry with them arguments or assumptions about the causes of these phenomena. They are seen, for example, sometimes as the product of inevitable, almost natural forces (a global "invisible hand"), or as the result of more deliberate political, economic, cultural or other strategies (often seen as imperialistic). And judgments are made about the consequences of globalisation. There are important differences in the typical connotations of Anglo-American usage of "globalisation" and French usage of "*mondialisation*" and the valuations frequently associated with each term (Arnaud 2004, chap.1)—especially when viewed from within the cultural contexts that inform the other term. A range of other concepts also exists to try to grasp the scale and meaning of transnational developments: for example, "world system" (Wallerstein 1974), "world polity" (Meyer 1987), "world society" (Luhmann 1982), "world risk society" (Beck 1999), "post-national constellation" (Habermas 2001, chap. 4) and "cosmopolitanism" (Habermas 1999, chap. 7), each with its own intellectual orientations, each attempting to grasp aspects of the "freeing up" and "speeding up" of economic, political and cultural influences, with resulting opportunities and dangers.

However, the vast research horizons opened up by the globalisation literature are not this article's direct concern. It is not necessary to engage in debates about the nature and meaning of globalisation in order to suggest implications for legal theory of some of the regulatory phenomena associated with it—that is, for theory aiming to explain the general nature of law. We need only recognise the many new or newly prominent kinds of transnational regulation, transnational legal aspirations and transnational regulatory problems to identify conceptual problems that contemporary legal theory faces. By transnational regulation is meant here regulation that applies to (or is intended to affect directly) non-state actors (individuals, groups, corporate bodies) and is not restricted within the jurisdictional limits of a single nation state. Some of this regulation is indisputably law. But some of it raises difficult issues about what "law" should be taken to mean in transnational contexts. How should legal theory understand the field of transnational law?

[1] Cf. Salah 2002, 1, seeing "*mondialisation*" as "simultaneously, a descriptive concept, an explanatory principle and a positive and irreversible orientation of individual and collective actions."

1. Varieties of Transnational Regulation

Francis Snyder and others have written illuminatingly about what they call "global legal pluralism" (e.g., Snyder 1999; 2004; Perez 2003).[2] For Snyder, "pluralism" here indicates a transnational arena in which many different kinds of law exist. These include the familiar constitutions, legislation, treaties, and case law produced and enforced by nation states; the rules and institutions of public international law; the relatively "hard" (elaborately formulated and officially enforced) law created by transnational structures such as the European Union and the World Trade Organisation[3]; but also many kinds of "soft" (not so formulated or enforced) law or regulation varying in authoritativeness, precision and regulatory effectiveness and produced from public and private sources (e.g., Schäfer 2006; Qureshi 1999, 22–4). Snyder notes "a startling variety of new legal forms and regimes," "a variety of institutions, norms and dispute resolution processes located, and produced, at different structured sites around the world" (Snyder 2004, 624; 1999, 342). There is a "global legal playing field" (surely far from level), including "a novel regime for governing global economic networks"; but the many sites of global legal pluralism "do not make up a legal system" (Snyder 1999, 343, 372, 374). There is no uniform jurisdictional reference point, no single discursive arena in which legal reasoning takes place. Instead, regimes of different kinds (state, interstate and trans-state, public and private, official and unofficial) intersect, conflict, compete, and overlap.

As Snyder has shown, for example, in studying the international toy industry (ibid.), industries organised on a transnational basis typically produce extensive regulation governing the relationships of actors who wish to operate in the particular commercial field. Whether or not this kind of regulation, often created by or on behalf of the leading multinational corporate players in the field, is considered law, it is often undoubtedly what Eugen Ehrlich (2002) famously termed "living law"—that is, practically recognised, operative social norms governing relationships, establishing mutual understandings, claiming authority, defining obligations and entitlements, and often preventing disputes.

Many lawyers will wish to differentiate carefully between these various types of regulation, seeking to reserve the label "law" for some but not

[2] The term is useful in so far as it suggests the diversity and polycentricity of transnational regulation, not necessarily implying any single globalising process in relation to law, any emerging unified global legal regime, any homogeneity of transnational regulation, or any theoretical presuppositions about the form or scope of this regulation.

[3] The WTO's website http://www.wto.org declares: "The WTO's agreements, negotiated and signed by a large majority of the world's trading nations, and ratified in their parliaments [. . .] are the legal ground-rules for international commerce [. . .] The agreements were negotiated and signed by governments. But their purpose is to help producers of goods and services, exporters, and importers conduct their business."

others. Most will want, for example, to distinguish sharply between public and private sources of regulation, often refusing the title "law" to products of the latter, or to regulation lacking official institutionalisation. They will tend to assume a hierarchy of regulatory types and sources. They will usually treat regulation produced by the law-making agencies of the state, according to what legal positivists see as "pedigree tests" of the legal, as "most fully" law. Generally, now, lawyers recognise international law between states as law, either because nation states and national legal systems provide the authority by which international law is created or recognised, or because international law as a body of doctrine has a degree of historical stability, managed by international institutions and, broadly, understood by states as linking them in an international community. But the institutionalisation of international legal doctrine is still limited by comparison with that of the most stable and developed municipal legal systems. So, international law, in this traditional conception, tends to be seen as "not a system but a set of rules" analogous in content and function (but not form) with those of nation-state legal systems (Hart 1994, 236–7).

2. Limits of Methodological Nationalism

This way of ordering the terrain of law is, however, coming to seem out of touch with reality in important respects. It is founded on what some social scientists call "methodological nationalism" (Beck and Sznaider 2006). This is the idea that the basic focus of social (including legal) analysis is the politically organised society of the nation state, and that all meaningful concepts of social analysis presuppose this nation-state point of ultimate reference. Leading sociologists now advocate discarding "a nation-state definition of society and politics" and replacing it with a "cosmopolitan outlook" (ibid., 2). This will entail constructing an entirely new set of concepts with which to study transnational social phenomena (again including law). One reason why Ulrich Beck and Natan Sznaider talk of cosmopolitanism rather than globalisation in this context is to reject the idea that what must be taken into account now are solely external processes—a tide of globalisation enveloping and transforming local environments (ibid., 9). They argue that it is necessary to think also of innumerable local experiences and individual perceptions, of people changing their relations to and understandings of others no less than being changed by externally operating forces. What is at issue is not just a new perspective of globalisation, but a multiplicity of perspectives and standpoints.

If we translate this insight into the agenda of legal theory, it means that legal theory's task is not just to analyse, from its traditional standpoints, a range of new transnational legal phenomena. The task is rather to rethink legal theory in a situation in which it is slowly losing its basic modern

reference points, the firmly defined jurisdiction of the nation state and the politically organised national society as the terrain from which all legal phenomena can be observed and evaluated. Perhaps, indeed, there can no longer be a single legal reference point to provide the basis for juristic thought.

Indications of this changing situation are now familiar. Legal experience in national legal systems is clearly being changed by such matters as the impact of European law, the influence of international human rights norms and aspirations, extraterritorial law enforcement and legal influences, and transnational commercial norms and practices. The matter can be regarded as one of confrontation and interaction between legal or regulatory regimes, regarded as "internal" or "external" according to various criteria. But it is also a matter of shifting perspectives involving a disorientation and renegotiation of legal and social experience.

Much western legal thinking has presupposed, until recently, a juridically-unified, regulated population—whether thought of as subjects (e.g., Hobbes, Bentham, Austin), citizens with powers and duties (e.g., Hart) or members of a community inspiring or creating its law (e.g., Dworkin, and classical English common law thought). But some of the most perceptive and socially-observant forms of legal philosophy in the Anglophone world have, more recently, been developing various versions of a "jurisprudence of difference" (Cotterrell 2003, chap. 8) that recognises structured distinctions (by gender, race, ethnicity, religion, class, physical capacity, sexual orientation, etc.) among law's regulated population and its professional interpreters. These distinctions can produce different experiences and views of law. Law can thereby be given different meanings, making it a different phenomenon for different people. Assumptions about a single juristic standpoint from which law is to be observed and interpreted are undermined.

If this kind of thinking is applied to the transnational arena (something which has so far not been done very much) it makes sense to see law's regulated population and its interpreters not just in terms of a national jurisdiction, and still less in terms of some kind of homogeneous national community (which the jurisprudence of difference suggests may not exist in any meaningful sense) but in terms of transnational communities of many kinds. The many different kinds of transnational regulation which now exist, or are developing, relate to the interests, experiences, allegiances and values associated with transnational networks of community: for example, transnational business and financial networks; networks established and sustained by NGOs and social movements in environmental and human rights fields; networks of production and distribution in particular transnational industries (like that described in Snyder's toy industry study); networks facilitated by co-operation between states such as the EU, NAFTA, MERCOSUR; and professional networks such as those

involved in international commercial arbitration or transnational legal practice. Inside one network of community, ideas about law or regulation may appear in very different ways from the way they appear in a different network. And, equally, perceptions of the way different regimes of regulation relate may vary.

3. Sources of Legal Authority

Orthodox juristic thinking may be ill-equipped to deal with this regulatory variety and its diverse regulated populations. A main reason may be the need in this thinking always to try to identify stable and—as far as possible—uncontroversial structures of legal authority. If much legal philosophy has been concerned to demonstrate the systemic unity of law, a major reason has been that it has tried to meet lawyers' need for a clear specification of the location of legal authority and the criteria of legal validity (see, generally, Cotterrell 2003). It has often sought law's criteria of validity and hallmarks of authority in a demonstration of its systematic character or the hierarchical structure of legal rules or norms. For all its originality, Kelsen's (1961, 363–88) explanation of the relationship between national and international law is typical in this respect. He claims that both of these necessarily form part of the same system. Either international law is authorised by the norms of national law (and so exists as an extension of it) or national law is subsumed in the system of international law—the basic norm of international law ultimately authorising the production of national legal norms as valid law. But the price paid for such a clear solution of the authority-validity puzzle is that a diversity of valid, competing legal systems or legal regimes, co-existing in the same social environment yet not integrated, cannot be envisaged.[4]

The existence of transnational communities, combined in complex networks and requiring particular kinds of regulation, makes it necessary to think differently. Hart's claim that international law is not a system but only a set of rules is an implicit criticism of Kelsen. Even eminent international lawyers—perhaps committed, like Kelsen, to emphasising the systematic quality of this law—note a worrying lack of co-ordination in its current development and serious institutional conflicts or contradictions in its practice and interpretation (e.g., Higgins 2006). In relation to transnational law, regulating the relations of non-state actors in transnational arenas, there seems to be an even more obvious indeterminacy about questions of regulatory authority (Cutler 2003, 62–70) and little co-ordination. When different regimes of transnational regulation collide, how is their relative authority or validity to be determined? Which rules or

[4] See Kelsen 1961, 363: "It is logically not possible to assume that simultaneously valid norms belong to different, mutually independent systems."

regulations should prevail in cases of conflict? There is often no hierarchy but only a plurality of authority. Much transnational law seems free-floating, not tethered to the hierarchical authority structures of nation-state legal systems.[5] Often, its main (potential) sources of authority seem moral rather than political—rooted primarily in the regulatory demands, aspirations and understandings of its particular diverse communal constituencies.

Legal sociologists do not necessarily have juristic concerns with finding clear, uncontroversial sources of legal authority or criteria of legal validity. They are not necessarily disturbed by the idea of many such sources or criteria, competing or remaining fluid or vague. In fact, almost all theoretically sophisticated socio-legal writing on globalisation and law adopts a legal pluralist perspective. What is such a perspective? The term "legal pluralism" normally refers to "a situation in which two or more legal systems coexist in the same social field" (Merry 1988, 870), making independent jurisdictional claims. In other words, these systems have similar or overlapping jurisdictions, so that they compete in their claims to regulate the same social situations.

Lawyers encounter an apparent legal pluralism in relation, for example, to federal legal systems, colonial law, or relations between European Union law and the law of member states. Crucially, however, in these juristically recognised cases, a hierarchy of authority or juridical division of labour between the potentially competing legal regimes is postulated. So, in theory, questions about the applicability of particular laws can be resolved by appeals to established legal criteria that fix the validity, authority and jurisdiction of particular rules. The approach depends on agreement, both about what is to count as law and about the legal relationship between different systems of law. So, it presupposes ultimately a monistic rather than pluralistic conception of legal order—in other words, a seeming plurality of legal systems is to be understood in terms of a larger, overall conception of legal order that unifies this plurality and ultimately defines the structures of legal authority within it.

Jurists are often forced to recognise that this approach may not readily solve all problems in practice. In federal systems there can be ongoing uncertainties about boundaries of jurisdiction between state and federal legal authorities. Elsewhere, difficult problems of jurisdiction and conflicting authority arise, casting some doubt on the normative integrity of legal systems and the juristic security of their authority structures. Extensively discussed contemporary examples are uncertainties about the relations of EU law and state law, or of EU law and WTO law (e.g., Barber 2006, 323ff;

[5] For Cutler 2003, 241, old ideas of state-based authority are "incapable of providing contemporary understanding or locating the authority and historical effectivity of transnational merchant law." Strange 1996, 198–9 sees, more generally, the loosening of the "strings that held each of us to the nation-state" as having created "a ramshackle assembly of conflicting sources of authority [. . .] a world of multiple, diffused authority."

Weiler 2000, especially chap. 4). But those adopting the monistic presupposition necessarily assume that all such problems can eventually be conclusively solved through juristic analysis or legislative clarification.

4. Some Approaches to Legal Pluralism

Legal sociologists have often had little hesitation in recognising legal pluralism in situations where no monistic presupposition seems warranted. Snyder's "global legal pluralism," for example, denies any necessary unity of transnational law, and emphasises the great diversity of its independent, often entirely unrelated sites and regimes. The question then arises: What is to count as "law" in this scenario? There seem to be four realistically possible approaches to the conceptualisation of law in legal pluralism:

a. One is the orthodox juristic approach, which (following Kelsen's approach to international law) has been called, above, *monistic*. It claims that ultimately there must be a single criterion of law to be applied to the diversity of legal regimes and that this criterion will then determine the relationship between those regimes (and hence the structure of legal authority within and between them).

b. A second approach, which might be called *agnostic*, avoids any final determination of the criterion of law and merely recognises the interaction of various normative regimes with varying degrees of practical effectiveness and authority. The question of what counts as law might be decided merely for particular purposes in particular contexts but does not need to be addressed as a general matter.

c. A third approach, which can be termed *statist*, would recognise some regimes as law by reference to particular criteria usually modelled on those applicable to nation-state law, and would see other regimes as merely non-legal regulation.

d. A final approach would be to rethink the concept of law to free it from biases built into it by its almost universal modern association with nation-state law. Such a concept would not be one that purports to reduce the plurality of transnational regulation to a single, unified system (a surely pointless task at the present time). Nor would it treat state law as necessarily expressing the essential contemporary characteristics of law. Instead, it would adopt criteria of the legal that are sufficiently flexible to recognise many different forms of law in currently indeterminate but potentially developing relations with each other.[6]

[6] Brian Tamanaha has advocated a further approach which he calls *conventionalist*. It amounts to accepting as law "whatever people identify and treat through their social practices as 'law' (or *droit*, *Recht*, etc.)": See Tamanaha 2001, 166. But this surely combines the worst of all worlds: maintaining a definitional concern with what the concept of law should cover, yet removing from the concept so defined all analytical power. Because of this it cannot contribute to legal theory's conceptual concerns with transnational law as identified in the present article.

Let us look at each of these approaches more closely. The monistic approach merely ignores the fact that transnational law does not form a system of any kind and does not have established general criteria of authority or validity of its regulation. There is no reason why, for juristic purposes, transnational regulation cannot be portrayed in terms of a comprehensive normative system, hierarchically ordered. But this would bear scant relation to the actual practice of transnational regulatory regimes. It would be juristic wishful thinking. Globalisation's gift to law, for the moment, is a high degree of juristic chaos and indeterminate foundations of regulatory authority in many transnational fields. Transnational law is a work in progress without a basic norm or rule of recognition, a Hartian system of rules or Kelsenian hierarchy of norms, or any other juristic model of unity and authority.

The second (agnostic) approach, which avoids determination of what is to count as law, except pragmatically for the purposes of particular projects, is adopted by William Twining in his writings on globalisation and legal theory—or what he more recently has seen as a return to general jurisprudence (Twining 2000, 249; 2002). He emphasises normative pluralism, rather than legal pluralism, and so deliberately leaves questions about the concept of law to one side (Twining 2003, 201 note, 224, 249–51, 253; 2000, 224–33). For many purposes of socio-legal research this is acceptable. But it leaves juristic questions about legal authority and validity unaddressed, at least when transnational regulatory regimes come into conflict. It bypasses central issues of juristic legal theory. The question "What is transnational law?" remains unanswerable in this approach.

The third (statist) approach is, in many ways, appealing. It largely leaves intact familiar juristic approaches to the identification and conceptualisation of law and considers other normative phenomena by analogy with a basic model of law as state law. One version of this approach is André-Jean Arnaud's. Arnaud (1995; 2004) advocates a legal pluralist approach in considering the terrain of globalisation and law as well as the regulation produced within the framework of the European Union. But he writes of a plurality of "juridical" (not legal) systems, and reserves the term "law" (*droit*) for nation-state law. Juridical systems gain their identity from their relation to (state) legal systems. They consist of alternatives to or extensions of (state) law, or norms in the process of becoming or influencing law, or presenting themselves for consideration for enactment as legal norms. They are especially what Arnaud calls the "*avant dire-droit*" (law prior to its enunciation); norms waiting to be thematised as legal, often produced by campaigning organisations aiming to change law, or in various kinds of social practice that might eventually be formalised or recognised in legal relations (Arnaud 1981, 369–87; 1998; Arnaud and Fariñas-Dulce 1998, 297–304).

This approach is useful and illuminating in many ways, especially as a sophisticated updating of Ehrlich's "living law" concept (for Ehrlich, living law gets its identity mainly as a kind of shadow or parallel of state law, much like Arnaud's *avant dire-droit*). And it makes the powerful claim that the juridical is much wider in scope than state law. But what makes norms juridical except their possible destiny as future rules of state law? Ultimately, the statist approach—in this form—goes beyond the agnostic approach only by making the definite affirmation that state law is, indeed, fully law. Like agnosticism it actually backs away from a commitment to *legal* pluralism because it refuses to attribute legal qualities to norms unless they are part of the law of the state, or will become a part of it. On this juristic view, the state remains the sole source of all that is truly legal. But the interesting implication is that the transnational arena is full of what might be considered, in some way, the "nearly legal."

I should like to suggest that it is only the fourth approach (which now appears as the only *genuinely pluralist* approach to law among these four possibilities) that can be adequate to reflect the variety of transnational regulation and the reality, but also the ambiguities, of its character as law. One of legal theory's most important conceptual problems is to develop a useful pluralist approach to law. Certainly, it might be objected that this has already been achieved: Legal anthropology and legal sociology have produced numerous such approaches, and legal pluralism is a much discussed idea in these fields of research (see, e.g., among a huge literature, Von Benda-Beckmann 2002, Dalberg-Larsen 2000, Merry 1988, Belley 1986). But legal theory needs a genuinely pluralist approach for *juristic* purposes no less than for socio-legal ones.[7]

Juristic legal theory needs to knock away the support on which it has been leaning since the rise of modern legal positivism. That support is the assumption that all law is created by the state or derives authority and validity from its recognition by agencies of the state, and that its guarantee is its enforceability by the state. Clearly, a vast amount of law still relies securely on these conditions that relate it to the state, and it will continue to do so for the foreseeable future. But much regulation lacks these characteristics, wholly or in part. And it is becoming embarrassing to deny some of this regulation the name of law, or to see it as legally insignificant, or as inferior to state legal regulation. A useful pluralist concept of law would be one that can recognise the current (and probably enduring) prominence of state law but not assume that all law must conform to or be measured against the state law model, or exist in inevitable subordination to or dependence on the law of the state.

[7] Autopoiesis theory has been proposed as a basis for a genuine legal pluralism: See Teubner 1992. But its approach is to observe law (perhaps as a plurality of discourses), not to engage juristically with it. For wider criticisms of this theory see Cotterrell 2001.

5. Legal Pluralism inside the Nation State

In the space available it is not possible to do more than comment on a few aspects of how such a pluralist approach might be developed, built on elements already contributed by many writers. One essential is to recognise that the problems of conceptualising transnational regulation are not the only socio-legal developments demanding a pluralist approach in juristic legal theory.

For example, experiences of multiculturalism are relevant. Social groups having shared religious or other beliefs or cultural traditions often express distinctive regulatory aspirations reflecting the nature of their particular social relations of community. These aspirations sometimes inspire demands for an official legal pluralism within the nation state; for more diverse and flexible approaches to legal regulation reflecting the cultural mix of multicultural society (Shadid and Van Koningsveld 2005; Shah 2005; Pearl and Menski 1998, chap. 3; Rohe 2007). The effective rejection or negotiation of this demand and the continued enforcement of a unitary state law depend ultimately on the state's monopoly of coercive power but also on the strength of the moral sources of legitimacy of state law that are to be found in the whole range of networks of community that constitute the "society" of the nation state. But the more fundamental point is that, in these conditions of cultural pluralism, perspectives on law and its bases of authority tend to become increasingly diverse and relativistic, dependent on standpoint; a situation already signalled by the emergence of the jurisprudence of difference, mentioned earlier. Legal thinking requires new concepts and methods, paralleling the "cosmopolitanism outlook" that, as noted above, is now being advocated in social science.

Some writers have also emphasised a plurality of legal sources and structures of legal authority *within* state law itself. Leading positivist legal philosophers now frequently accept that it may not be possible to characterise realistically the source of ultimate authority of a legal system in the idea of a single rule of recognition, however complex its form (Raz 1979, 93–7; see also, e.g., Barber 2006, 316–8). And, from a socio-legal standpoint based on an empirical examination of legal practice, it may seem obvious that serious conflicts and unresolved differences or ambiguities sometimes arise in views of the legal position that are adopted by different state administrative or enforcement agencies, or between different courts (e.g., Dalberg-Larsen 2000, 103–14). These matters, in practice, are not necessarily resolved by formal appeals or final judgments, either because the matters are never raised for resolution or because ambiguities survive after efforts have been made to remove them. Differences in legal practice informed by different understandings of law may remain. Perhaps in the common law world, where much law is created by a plurality of courts, this idea of pluralism in state law is easier to accept than in some continental European

civil law contexts where code and legislation provide primary models of law enacted by centralised, unified authorities.

6. Law and Community

Throughout this article an attempt has been made to try to avoid large, perhaps intractable, conceptual issues surrounding globalisation by referring to diverse communities as social sites of law and regulation or even as sources of (moral) legitimacy for this regulation. I also want to suggest that an idea of communities or, more precisely, networks of community as the basis of regulatory systems, aspirations, or problems, may point towards productive ways of conceptualising law in the context of transnational regulatory regimes.

By "community" I mean the existence of relatively stable social relations, where this stability comes from mutual interpersonal trust between those involved in such relations. Law regulates innumerable kinds of social relations. For legal theory an important question is whether there are some fundamental, endlessly recurring regulatory problems associated with particular types of social relations of community. If so, one can generalise about law's problems of regulating community life, while recognising important differences in the basic types of possible bonds linking people together socially and that these differences will be reflected in basic differences in regulatory problems. So, for example, regulatory problems and possibilities may differ greatly depending on whether social relations of community are based on (i) common or convergent interests or projects, (ii) shared fundamental beliefs or ultimate values, (iii) purely emotional bonds and allegiances, or (iv) common traditions, customs, environments or historical experiences. To regulate co-operation for common projects may, in general terms, be significantly different from regulating to reflect or protect basic beliefs or value commitments held for their own sake; or from regulating merely to make possible co-existence without unacceptable friction in a shared environment. Even more different may be regulatory problems in addressing relationships largely shaped by emotional attachments or rejections.

These, at least, are hypotheses for which Max Weber's classic social theory provides some warrant. Weber (1978, 24–5) saw all social phenomena as built from innumerable combinations of just four basic (pure) types of social action. Correspondingly, one can postulate four basic types of social relations of community that largely mirror Weber's action-types and produce the distinctions just noted between possible bases of communal bonds—instrumental, belief/value-based, affective, and traditional. These basic types of social relations of community are combined in social life in innumerable ways. The combinations can be called networks of community. Legal theory obviously cannot examine all possible kinds of trans-

national, national or sub-national networks of community that can exist; it cannot become sociology. But it can explore *general* regulatory problems posed by *basic types* of community and their interaction. In this way it can examine the general characteristics of the law that community life inspires (see, generally, Cotterrell 2006).

As regards the nature of law's authority, legal theory can recognise that this authority has two aspects. It resides partly in law's legitimated power of command (*voluntas*)—often guaranteed by the police and military power of a state—and partly in the principled character (*ratio*) of legal doctrine; that is, in the moral meaningfulness of that doctrine for the communities it regulates.[8] Ultimately law's *voluntas*, too, has to found its legitimacy on some stable relationship with the networks of community that are regulated by law; a relationship of acceptance or at least acquiescence by those involved in such networks.

Thus, in this approach, a task of legal theory is to consider the specifically regulatory aspects of community life so as to consider the forms that law may take and the general problems that face law in expressing the regulatory needs of these types of community as they combine in innumerable ways in the collective life of social networks and groups.

This merely sketches a way of going about things—a direction for developing a pluralistic legal theory. Its most obvious characteristic is that it partly detaches the idea of law from the idea of the state, but it does not leave law detached from all specific social reference—for example, as social rules conceived, as in Hart's concept of law, in purely abstract form. It roots law in the practical regulatory requirements of communal life. Hence it opens the possibility for seeing transnational networks of community as producing or inspiring their own law or, at least, being in a position to give or refuse legitimacy to forms of regulation addressed to them or developed with reference to them. One might begin to develop a sense of legal authority and validity as given or refused, in some way, by networks of community that are not restricted to homogeneous nation-state populations (i.e., subjects or citizens of the state).

7. Modelling Transnational Law

How might one begin to set about conceptualising law using such an approach? It would be possible to start from Hart's model of rules. Neil MacCormick (1993), for example, has already explored its applicability beyond the nation state in relation to the European legal order. Combinations of primary and secondary rules, as Hart describes them, might be expected to be found in transnational as in national law. But a meaningful ultimate Hartian rule of recognition will be hard to find for much tran-

[8] On *voluntas* and *ratio* see Neumann 1986, 45–6, and Cotterrell 1995, 317–20.

snational regulation and it might be doubted whether the lack of one is enough to settle the question of whether law exists.

To understand law's expansion beyond the hegemony of the state, there is also a need for a realistic and nuanced concept of the state in its relation to law (Belley 1986, 28–31),[9] but, as has long been noted (Raz 1979, 98), Hart's theory does not supply one. Such a concept would need to be one that imports into both juristic and socio-legal analysis a sense of current discussion of the postulated "hollowing out of the state," the reduction or redirection of its regulatory capacities in the face of the expansion of trans-state, interstate and intrastate regulation and regulatory pressures, as well as the possible atrophying or undermining of a strong sense of national public interest.

Clearly, where states exist they have regulatory power, yet the nature and extent of this power surely varies greatly between them. In some cases, both legal and political authority of states might be seen as greater (for example, in the reach of their authority beyond nation-state boundaries) than orthodox theories of state sovereignty postulate. In other cases, this authority might seem much weaker. These matters of variation in the nature and situation of states are extensively documented in social science literature,[10] but little noted in the literature of juristic legal theory when it searches for an ultimate source of legal authority. Such a source (as in Hart's and Kelsen's theories) is often linked to a criterion of effectiveness, but the idea of the "effectiveness" of a legal order—or indeed of a legal norm insofar as this bears on questions of legal authority or validity (Kelsen 1967, 211–4)—surely cries out for re-examination in conditions of legal pluralism where the role of the state as a regulator is a matter of debate.

I think that a useful direction could be to expand Hart's approach in various ways. To focus only on rules—the Hartian "model of rules"—in a concept of law seems too limited to address the great diversity of normative forms that transnational regulation shows. It may be very useful to treat soft (imprecise, negotiated, relatively unenforced) law as law for certain purposes and to explore its conceptual relation to "hard" law. It might be best, indeed, to use a concept of law as "doctrine,"[11] that encompasses rules, standards, principles, concepts and values as part of law. There is nothing new in such a suggestion, adopted in various ways

[9] More generally, and abstractly, it can be said that what is needed is a concept of power as it exists in networks of community (such as, but not limited to, the political society of the nation state) and a focus on how power is organised and exercised politically in regulating such networks.

[10] See, e.g., Van Creveld 1999; Strange 1996; Jones 2000; Sur 1997. For detailed debates in a specifically British context see, e.g., Holliday 2000, and literature there cited.

[11] The term is not used here in the civil law sense of juristic or judicial exposition of legal ideas.

by such diverse legal scholars as John Dickinson (1929), Roscoe Pound (1954, 56–9), Karl Llewellyn (1941), and Ronald Dworkin (1977).

It might be good, also, to think not merely in terms of secondary rules but also in terms of the existence of institutionalised *practices* and *agencies* existing specifically for the purpose of creating, interpreting, applying or enforcing doctrine. Law, seen as institutionalised doctrine in this way (Cotterrell 1995, chap. 2), is not an all-or-nothing matter. The existence of law might be—as, for example, Lon Fuller (1969) and Karl Llewellyn (1940) suggested[12]—a matter of degree; regulatory arrangements and systems might be more or less institutionalised, more or less legalised.[13] Not all aspects of creation, interpretation, application, or enforcement of legal doctrine will be institutionalised to the same extent in all legal regimes; indeed, some aspects might not be institutionalised at all.

Hence, in working towards answering questions about the legal authority of different transnational regulatory phenomena it may be possible to develop a useful conception of relative legal authority linked to a notion of degrees of legality. This will not solve jurisdictional disputes or conflicts over authority and legitimacy claims but it may offer a slowly emerging template in terms of which these can be judged. Consistently with the idea of an emerging "cosmopolitan outlook," the emphasis in determining the authority, scope and meaning of regulation will fall increasingly on negotiation and mutual recognition from diverse perspectives and standpoints, rather than on hierarchical juristic determination and observation from some fixed jurisdictional point (which, in fact, for many purposes no longer exists).[14]

Nevertheless, such an approach will surely need to recognise that, for the time being, state law—with its highly institutionalised, elaborately developed legal doctrine and its long established national networks of community—is, for many purposes and from many standpoints, the most authoritative, secure and precisely delineated form of law (cf. Belley 1986, 28–31). But as the institutionalisation of various kinds of transnational regulatory doctrine continues, this superior status may be increasingly challenged. And beyond familiar juristic concerns with legal authority and validity, other questions about regulatory legitimacy remain.

The legitimacy of the law of the nation state has been slowly secured, in the most stable states, over long periods of experimentation with democracy and other forms of government. Through these experiments, ways have been found by which effective claims can be made that the moral authority of the regulated population infuses law. Transnational law

[12] Both Fuller and Llewellyn, unusually among jurists, accept a genuinely (i.e., my fourth) pluralist approach to conceptualising law.
[13] See also, as regards degrees of legalisation in international relations, Abbott et al. 2000.
[14] On the problems of juristic perspective and standpoint see also Schlag 1991.

requires a similar process of evolution. Its moral legitimacy (which also ultimately underpins any political legitimacy it can secure) lies in the transnational networks of community that, in some way, it has to represent. These remain fluid and in process of formation. It cannot be taken for granted that they will continue to develop and strengthen although at present the indications seem to be that they will.

At present, the relationship between transnational communities and the concept of law is hardly explored. Yet this is now one of the most important items to be added to legal theory's agenda of juristic problems. The aim here has been merely to identify certain themes that will surely need to be a central part of the discussion of that item.

University of London
Queen Mary and Westfield College
Department of Law
Mile End Road
London E1 4NS, UK
E-mail: r.b.m.cotterrell@qmul.ac.uk

References

Abbott, K. W., R. O. Keohane, A. Moravcsik, A.-M. Slaughter, and D. Snidal. 2000. The Concept of Legalization. *International Organization* 54: 401–19.

Arnaud, A.-J. 1981. *Critique de la raison juridique 1. Où va la sociologie du droit?*. Paris: LGDJ.

Arnaud, A.-J. 1995. Legal Pluralism and the Building of Europe. In *Legal Polycentricity: Consequences of Pluralism in Law*. Eds. H. Petersen and H. Zahle, 149–69. Aldershot: Dartmouth.

Arnaud, A.-J. 1998. From Limited Realism to Plural Law: Normative Approach versus Cultural Perspective. *Ratio Juris* 11: 246–58.

Arnaud, A.-J. 2004. *Entre modernité et mondialisation: Leçons d'histoire de la philosophie du droit et de l'État*. 2nd ed. Paris: LGDJ.

Arnaud, A.-J., and M. J. Fariñas-Dulce. 1998. *Introduction à l'analyse sociologique des systèmes juridiques*. Brussels: Bruylant.

Barber, N. W. 2006. Legal Pluralism and the European Union. *European Law Journal* 12: 306–29.

Beck, U. 1999. *World Risk Society*. Cambridge: Polity.

Beck, U., and N. Sznaider. 2006. Unpacking Cosmopolitanism for the Social Sciences: A Research Agenda. *British Journal of Sociology* 57: 1–23.

Belley, J.-G. 1986. L'État et la régulation des sociétés globales. Pour une problématique du pluralisme juridique. *Sociologie et sociétés* 18: 11–32.

Cotterrell, R. 1995. *Law's Community: Legal Theory in Sociological Perspective*. Oxford: Clarendon.

Cotterrell, R. 2001. The Representation of Law's Autonomy in Autopoiesis Theory. In *Law's New Boundaries: The Consequences of Legal Autopoiesis*. Eds. J. Přibáň and D. Nelken, 80–103. Aldershot: Ashgate.

Cotterrell, R. 2003. *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy*. 2nd ed. Oxford: Oxford University Press.

Cotterrell, R. 2006. *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*. Aldershot: Ashgate.
Cutler, A. C. 2003. *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*. Cambridge: Cambridge University Press.
Dalberg-Larsen, J. 2000. *The Unity of Law: An Illusion? On Legal Pluralism in Theory and Practice*. Glienicke: Galda & Wilch.
Dickinson, J. 1929. The Law Behind Law. *Columbia Law Review* 29: 113–46, 285–319.
Dworkin, R. 1977. *Taking Rights Seriously*. Revised ed. London: Duckworth.
Ehrlich, E. 2002. *Fundamental Principles of the Sociology of Law*. Trans. W. L. Moll. New Brunswick, NJ: Transaction.
Fuller, L. 1969. *The Morality of Law*. Revised ed. New Haven, CT: Yale University Press.
Habermas, J. 1999. *The Inclusion of the Other: Studies in Political Theory*. Eds. C. Cronin and P. De Greiff. Cambridge: Polity.
Habermas, J. 2001. *The Postnational Constellation: Political Essays*. Trans. M. Pensky. Cambridge: Polity.
Hart, H. L. A. 1994. *The Concept of Law*. 2nd ed. Oxford: Clarendon.
Higgins, R. 2006. A Babel of Judicial Voices? Ruminations from the Bench. *International and Comparative Law Quarterly* 55: 791–804.
Holliday, I. 2000. Is the British State Hollowing Out? *Political Quarterly* 71: 167–76.
Jones, R. J. B. 2000. *The World Turned Upside Down? Globalization and the Future of the State*. Manchester: Manchester University Press.
Kelsen, H. 1961. *General Theory of Law and State*. Trans. A. Wedberg. New York, NY: Russell & Russell.
Kelsen, H. 1967. *Pure Theory of Law*. Trans. M. Knight. Berkeley, CA: University of California Press.
Llewellyn, K. N. 1940. The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method. *Yale Law Journal* 49: 1355–400.
Llewellyn, K. N. 1941. My Philosophy of Law. In *My Philosophy of Law: Credos of 16 American Scholars*. Ed. A. Kocourek, 183–97. Boston, MA: Boston Law Book Co.
Luhmann, N. 1982. The World Society as a Social System. *International Journal of General Systems* 8: 131–8.
MacCormick, N. 1993. Beyond the Sovereign State. *Modern Law Review* 56: 1–18.
Merry, S. E. 1988. Legal Pluralism. *Law and Society Review* 22: 869–96.
Meyer, J. 1987. The World Polity and the Authority of the Nation-State. In *Institutional Structure: Constituting State, Society and the Individual*. Eds. G. Thomas, J. Meyer, F. Ramirez, and J. Boli, 41–70. Newbury Park, CA: Sage.
Neumann, F. L. 1986. *The Rule of Law: Political Theory and the Legal System in Modern Society*. Leamington Spa: Berg.
Pearl, D., and W. Menski. 1998. *Muslim Family Law*. 3rd ed. London: Sweet & Maxwell.
Perez, O. 2003. Normative Creativity and Global Legal Pluralism: Reflections on the Democratic Critique of National Law. *Indiana Journal of Global Legal Studies* 10: 25–64.
Pound, R. 1954. *An Introduction to the Philosophy of Law*. Revised ed. New Haven, CT: Yale University Press.
Qureshi, A. H. 1999. *International Economic Law*. London: Sweet & Maxwell.
Raz, J. 1979. *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon.
Rohe, M. 2007. *Muslim Minorities and the Law in Europe: Chances and Challenges*. New Delhi: Global Media Publications.
Salah, M. M. Md. 2002. *Les contradictions du droit mondialisé*. Paris: PUF.

Schäfer, A. 2006. Resolving Deadlock: Why International Organisations Introduce Soft Law. *European Law Journal* 12: 194–208.
Schlag, P. 1991. The Problem of the Subject. *Texas Law Review* 69: 1627–743.
Shadid, W., and P. S. Van Koningsveld. 2005. Muslim Dress in Europe: Debates on the Headscarf. *Journal of Islamic Studies* 16: 35–61.
Shah, P. 2005. *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law*. London: Glass House.
Snyder, F. G. 1999. Governing Economic Globalization: Global Legal Pluralism and European Law. *European Law Journal* 5: 334–74.
Snyder, F. G. 2004. Economic Globalisation and the Law in the Twenty-First Century. In *Blackwell Companion to Law and Society*. Ed. A. Sarat, 624–40. Malden, MA: Blackwell.
Strange, S. 1996. *The Retreat of the State: The Diffusion of Power in the World Economy*. Cambridge: Cambridge University Press.
Sur, S. 1997. The State between Fragmentation and Globalization. *European Journal of International Law* 3: 421–34.
Tamanaha, B. Z. 2001. *A General Jurisprudence of Law and Society*. Oxford: Oxford University Press.
Teubner. G. 1992. The Two Faces of Janus: Rethinking Legal Pluralism. *Cardozo Law Review* 13: 1443–62.
Twining, W. L. 2000. *Globalisation and Legal Theory*. London: Butterworths.
Twining, W. L. 2002. Reviving General Jurisprudence. In *Transnational Legal Processes: Globalisation and Power Disparities*. Ed. M. Likosky, 3–22. London: Butterworths.
Twining, W. L. 2003. A Post-Westphalian Conception of Law. *Law and Society Review* 37: 199–257.
Van Creveld, M. 1999. *The Rise and Decline of the State*. Cambridge: Cambridge University Press.
Von Benda-Beckmann, F. 2002. Who's Afraid of Legal Pluralism? *Journal of Legal Pluralism & Unofficial Law* 47: 37–82.
Wallerstein, I. 1974. *The Modern World System*. New York, NY: Academic Press.
Weber, M. 1978. *Economy and Society: An Outline of Interpretive Sociology*. Ed. G. Roth and C. Wittich. Berkeley, CA: University of California Press.
Weiler, J. H. H., ed. 2000. *The EU, The WTO and the NAFTA: Towards a Common Law of International Trade*. Oxford: Oxford University Press.

