Transnational Law as an Excuse.
How teaching law without the state makes legal education better

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“[T]ransnational law is an idea that pushes the boundaries of the legal imagination in such a way that … legal theory and legal education based entirely on ‘domestic’ (state) and ‘international’ (interstate) constructs of law must be open to developing in ways that might take us all out of current conceptual comfort zones”, Craig Scott.

“Legal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion. Nevertheless, the ideology of legal centralism has had such a powerful hold on the imagination of lawyers and social scientists that its picture of the legal world has been able successfully to masquerade as fact and has formed the foundation stone of social and legal theory”, John Griffiths.

Abstract

The purpose of this essay is to argue in favour of the idea that we should consider ‘transnational law’ as a legitimate part of legal education, including not only state but also non-state forms of normativity. The paper is structured as follows. First, I suggest that in the face of the existing conceptual controversy around the concept of ‘transnational law’ we should adopt a pragmatic perspective, focusing on the uses we can make of the concept ‘transnational law’ for legal theory and, in

¹ Professor at ESADE Law School, Barcelona. This essay would not have been possible had the CTLS not existed. Much of the inspiration for writing this paper comes from the semester I spent as a professor at the CTLS headquarters in London (fall 2009). In particular, I want to thank all those with whom I shared that period of time, who helped to create an intellectually challenging and absolutely friendly atmosphere: Scott Foster (administrative director), Carrie Menkel-Meadow and Franz Werro (academic directors), and my colleagues Christian Armbuster, Dora Neo, Christiana Fountoulakis, Victor Ramraj, Ken Roach, Francisco Satiro, and Karsten Thorn. I am also indebted to the students participating in the program, and the many speakers and visitors that we had the privilege to receive, as well as to the other CTLS professors and academic authorities that made possible the (very inspiring) CTLS conference held at the University of Torino in May 2010. I also want to express my gratitude to Ana Benetó Santa Cruz for helping with English and providing comments on the manuscript.
particular, legal education. Then I consider the term ‘transnational law’ as an instance of legal pluralism, and I briefly review some legal phenomena of contemporary relevance that are non exclusively dependent on the state. Subsequently I analyse the traditional view of state-centered positivism, emphasising the fact that it is unable to cope with legal pluralism. I compare the situation in legal studies with the broader field of social and political theory, showing how the dogma that lawyers hold so dear has been devastatingly criticised in other fields of knowledge. Finally I summarise the reasons why, in my view, the acceptance of ‘transnational law’ will improve legal education. These reasons have to do both with understanding the world and with making the world a better place.

**Keywords:** Transnational legal theory, legal education, legal pluralism, pragmatism
I. Introduction

Let me begin this contribution with a personal anecdote. A few weeks ago I was attending a commencement ceremony for a graduate program in international business law at a law school somewhere in continental Europe. These occasions are apt for speeches, and one came from the director of this particular program. Addressing himself to the students who were receiving their degrees, the director congratulated them, saying that during that academic year of hard work they had made a good job at trying to understand what is really international in the world of business, namely, the transactions and dealings between corporations that are incorporated in different nation-states. But, he advised the students, do not be fooled. Only this is international, not the law itself. Apart from very few exceptions, he went on saying, law is something local, and the law that you must know and the law that the school must teach, is the domestic law of the state where you are going to practice as a lawyer.

Certainly paradoxical words, coming from the director of a program in international business law, but hardly surprising for anyone familiar with legal academia. Indeed, this little speech nicely illustrates what I would call the dominant paradigm in legal theory and legal education: **state-centered positivism**.

The bottom line of the paradigm is that the sovereign nation-state holds the monopoly of legal creation and enforcement. To put it simply, only the rules that come from the sovereign nation-state are **law**, and they make up for the only object of study that deserves to be part of law school curricula. These rules can be produced autonomously by a single state or they may be the result of agreements and contracts among different states: in the first case we speak about domestic law, which is the predominant form of law according to the speaker at that commencement ceremony, and in the second case we speak about international or interstate law.
However, while law professors, academic authorities and legal textbooks adhere in a more or less explicit fashion to this traditional framework, the fact is that some things are going on that do not fit naturally in that picture.

Thus, for example, we hear that there are dozens of international institutions with independent authorities that reach final legal decisions, even if they do not organise themselves under a single global authority presided by a state or group of states. Similarly, lawyers are already familiar with some exotic terms denoting bodies of law that transcend national borders and that are not directly dependent on the nation-state, such as *lex mercatoria*, *lex sportiva*, and a few others.

Quite often, we hear and read about the fact that private actors are becoming more and more important in all fields of social and political interaction, and that the state is one among other players, rather than the player. For example, we learn about professionals interacting autonomously across borders, gathering together in associations and professional organisations with normative power, or acting in more informal ways. Thus, we know that domestic judges interact with their counterparts in other countries under no common authority, and that they arrive at far-reaching legal agreements, such as mini-treaties to solve cases of global bankruptcies without the governments of the countries affected being involved.

It is also widely known that private corporations are gaining normative power, both by entering into agreements with other corporations and by acting according to self-imposed codes and standards of behaviour. The concept of Corporate Social Responsibility points at the fact that private corporations, especially large multinationals, are acting in ways that we thought were reserved for the state. It is not unusual to hear corporations claiming that they work for the public interest, and if we check their websites we can read statements that speak about justice and fairness, just as if they were political or legal actors rather than simply players in the market. Some of the most recent literature in business studies even considers the role of private corporations as providers of rights. The other side of the coin is that we can observe how states struggle to impose their territorially bounded laws upon these extremely mobile corporations. On the contrary, some large
corporations are so powerful that they can play the sovereign states against each other when legislating sensitive issues, such as labour law.

It is said that these are just particular instances of a more general fact, namely, that the nation-states are not being able to cope with many among the most important problems in our globalised world, such as regulation of the global economy, problems of world security, environmental threats, the problems posed by technological shifts like the Internet, and many others. In part as a consequence, there is an intense academic controversy around the concept of sovereignty. Some claim that the idea of ‘sovereignty’, as we have conceived it for the last centuries, has faded away, and new original concepts are suggested, such as as ‘disaggregated sovereignty’ or ‘inclusive sovereignty’. By the same token, we learn that the Westphalian model of the world does not reflect reality anymore, and we read about new terms such as ‘neo-Westphalia’, ‘post-Westphalia’ and even the ‘Westphalian myth’.

Those who are involved in legal education are witnessing some developments that were unthinkable a few years ago. Thus, there is a growing connection among law schools from all around the world through academic exchange programs, and more. In Europe, the adaptation of legal education to the so-called Bologna process is actually happening in spite of a strong resistance on the part of many professors and academic authorities. The stated aim of that process is to homogenise higher education in Europe, thus allowing for students (including law students) to move freely among different countries, not only to study but also to find jobs. We can see how law schools in non English-speaking countries introduce more and more courses taught in English in their curricula, and even entire graduate programs in English where law students from all around the world come together. Western law schools are proactively advancing into the unknown trying to forge academic links with Eastern Asian institutions. Often we hear that this is a consequence of globalisation, and that it is intimately related with the abovementioned points.
In the following pages I will develop some of these concepts, and a few others. For now it is enough to underscore the fact that all of them share a common feature: they are directly or indirectly related with phenomena that transcend the borders of the nation-state. We refer generally to these phenomena using the term ‘transnational’.

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This essay is ambitious in its content and in the scope of the critique, but its aim is limited and modest. All I suggest is that we should consider ‘transnational law’ as a legitimate part of legal education, including not only state but also non-state forms of normativity. As a corollary, this means the acceptance of legal pluralism as a fact and as a methodology.

The paper will be structured as follows. First, I will suggest that in the face of this conceptual controversy or confrontation around the concept of transnational law we should adopt a pragmatic perspective, focusing on the uses we can make of the concept ‘transnational law’ for legal theory and, in particular, legal education. Then I will consider the term ‘transnational law’ as an instance of legal pluralism, and I will briefly review some legal phenomena of contemporary relevance that are non exclusively dependent on the state. Subsequently I will analyse the traditional view of state-centered positivism, emphasising the fact that it is unable to cope with legal pluralism. I will compare the situation in legal studies with the broader field of social and political theory, showing how the dogma that lawyers hold so dear has been devastatingly criticised in other fields of knowledge. Finally I will summarise the reasons why, in my view, the acceptance of ‘transnational law’ will improve legal education. These reasons have to do both with understanding the world and with making the world a better place.
II. What is Transnational Law? A Conceptual Controversy

From a linguistic point of view, the use of the term ‘transnational’ in reference to legal or law-like phenomena that exceed the domestic sphere seems adequate, since the prefix “trans-” suggests “across”, “beyond” and “through”. The term is semantically broad, as it denotes a wide range of phenomena. At the same time, it is obviously different from the more traditional term “international” law, since the prefix “inter-” suggests “among” or “between”, thus pointing at law that is the result of agreements among different states, and that can be aptly named ‘interstate’ law.

The use of the term ‘transnational law’ has been generalised since the American jurist Philip Jessup published an homonymous book in 1956. Although Jessup did not offer a definition stricto senso, he came very close to it in the following passage:

I shall use, instead of ‘international law’, the term ‘transnational law’ to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.

Clearly enough, the definition is very broad. But with such a broad definition controversy inevitably appears, especially if one considers the well-known passion of lawyers for conceptual discussion. In the opening paragraph of the book that many consider the cornerstone of contemporary legal philosophy, The Concept of Law, Herbert Hart underscored the perplexing degree of conceptual controversy that surrounds the academic study of law. It is worth while to quote his opening lines since they illuminate further points of this paper:

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2 According to The Oxford English Dictionary.
3 Again, according to The Oxford English Dictionary. Craig Scott underscores this linguistic consideration in Craig Scott, “‘Transnational Law’ as Proto-Concept: Three Conceptions”, German Law Journal 10 (2009), 866.
4 Philip C. Jessup, Transnational Law (New Haven: Yale University Press, 1956). Although he is often considered the first scholar to have used the term, in a footnote Jessup himself acknowledged previous uses of the word ‘transnational’ in a legal context (ibid., p. 2, footnote 3).
5 Ibid., p. 2.
Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strange, and even paradoxical ways as the question ‘What is law?’ Even if we confine our attention to the legal theory of the last 150 years and neglect classical and medieval speculation about the ‘nature’ of law, we shall find a situation not paralleled in any other subject systematically studied as a separate discipline. No vast literature is dedicated to answering the questions ‘What is chemistry?’ or ‘What is medicine?’, as it is to the question ‘What is law?’ A few lines on the opening page of an elementary textbook is all that the student of these sciences is asked to consider; and the answers he is given are of a very different kind from those tendered to the student of law.6

In fact, when Jessup introduces the concept of ‘transnational law’, he is consciously taking part himself in a conceptual controversy of this kind, in particular around the concept of ‘international law’. It is scarcely noted that the author opens his essay with some considerations on that controversy, including the opinions on the matter given by the French Jurist Georges Scelle and the renowned Scandinavian scholar Alf Ross. Jessup finds the term ‘international law’ “misleading since it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states)”.7

Thus, the definition offered by Jessup is an answer to his insatisfaction with the definition of ‘international law’, but it is in itself broad enough to give rise to a new conceptual controversy around the term ‘transnational law’. It is something more than interstate law, but what is it exactly?

6 HLA Hart, The Concept of Law (Oxford: Clarendon, 1961), p. 1. Of course, Hart himself contributed to the ongoing discussion with his book, although his search was not for an essentialist conceptual purity of any kind; instead, it was based on an attentive observation of the social and linguistic uses related to law and normativity.

7 Jessup, Transnational Law, p. 1. Following this quotation, and for the rest of the paper, I shall use the term ‘nation’ and ‘state’ as equivalent, thus deliberately ignoring the difference that exists among these two concepts in political theory (and in some countries even in the law). Compare with François Rigaux, ‘Le droit au singulier et au pluriel’, Revue Interdisciplinaire d’Études Juridiques 9 (1962), 20, emphasising the undesirability of assimilating ‘nation’ and ‘state’, that he attributes to the dominance of state legal positivism.
Professor Craig Scott makes a remarkable effort to answer this question in a very recent article in which he suggests three different possible conceptions of ‘transnational law’. The first conception makes reference to the law that regulates transnational phenomena of any kind, considering that it is made up of “rules, principles and/or standards and related decisions and other juridical acts ‘located’ in one of two kinds of legal systems: public international law or the state (national / domestic / municipal) law”. The second conception makes reference to a sort of "law in the result" in terms of the legal decisions that are gradually building up with respect to transnational problems, taking into account that it is the domestic law and the interstate law that “create the pool of norms that may be thought of as rules of decision in potentia and they also bestow authority upon certain actors to exercise a power of decision that leads to some kind of resolution of a transnational issue, problem or dispute”.

These two conceptions accommodate the obvious fact that there are legal phenomena going on across, or through, or beyond borders, but they do not question the central position of the state, either by reference to domestic law or interstate law. Things are different, however, according to the third conception, that Scott himself calls “transnational socio-legal pluralism”. This conception “sees transnational law … as being in some meaningful sense autonomous from either international or domestic law”. In this third conception there is an obvious connection with the literature on legal pluralism, as Scott underscores. Focusing the attention on legal or law-like experiences that are independent from the state law, legal pluralist thinking sustains that “[l]aw as both social practice and animating ideal may well be constructed and continue to exist independently of ‘official’ (in the sense of modern state) law”.

What differentiates the third conception from the previous two conceptions is the independence from official state law, and this turns the conceptual controversy into a full-fledged confrontation. Unsurprisingly, there is a marked resistance on the part of legal scholarship to accept a conception of (transnational) law that escapes

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8 Scott, “‘Transnational Law’ as a Proto-Concept”, 868-69.
9 Ibid., 871.
10 Ibid., 873.
11 Ibid., 874. Later on I will develop the concept of ‘legal pluralism’. See infra section IV.
from the basic principle of state monopoly. In fact, Scott’s third conception questions the very definition of law. Once again we find ourselves involved in the old discipline of general theory of law, and certainly honouring Hart’s quotation.

Does the discussion on ‘transnational law’ deserve such serious considerations? Not only does it, but I believe that Jessup’s seminal work was already pointing at these far-reaching consequences. Including ‘international law’ within the new category of ‘transnational law’, Jessup points out that he is not just looking for a new fancy term in order to denote some sort of marginal or very specific phenomena. On the contrary, considering ‘international law’ and “other rules which do not wholly fit into such standard categories” at exactly the same level, he is suggesting a new different way to look at what had been accepted as uncontroversial. In fact, shortly after introducing the new term ‘transnational law’, Jessup clarifies that it can be applied to “corporate bodies, whether political or non political”, and that “transnational situations … may involve individuals, corporations, organizations of states, or other groups”.

As was mentioned before, Jessup’s insatisfaction with the concept of ‘international law’ lay in the fact that it involved only the ‘states’, while the sort of phenomena that he had in mind goes beyond the framework of state law, pointing at some of the aspects that are becoming so relevant today (including the normative power of corporations). By the same token, the terminological shift of some international law scholars who are increasingly using the term ‘transnational law’ is extremely significant, and not just a matter of style.

III. What Is Transnational Law For? A Pragmatic Perspective

As was suggested in the previous section, we are confronted with an ontological discussion, that is, a controversy around the meaning of a thing or an idea, namely, transnational law. I suggest adopting a pragmatic perspective in order to address this problem. Following the school of thought of American pragmatism,

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12 Jessup, Transnational Law, p. 3.
what something *is* cannot be disentangled from the *uses* of something. For this reason, when defining and discussing an idea we must focus on the real consequences that such an idea will have for us humans living in the world.

In this point, my paper becomes philosophical in the following Jamesian way: “the whole function of philosophy ought to be to find out what definite difference it will make to you and me, at definite instants of our life, if this world-formula or that world-formula be the one which is true”.\(^{13}\) The two world-formulas that are confronted here are the traditional version of state-centered positivism *versus* the acceptance of transnational law in Scott’s third conception (admitting the existence of law independently of the state). My suggestion is that accepting the term transnational law is useful in terms of legal scholarship and legal education, or at least more useful than state-centered positivism.

Thus, this essay is not part of a crusade in favour of the triumph of transnational law, not even as a concept (although many of the proponents of state-centered positivism seem to be involved in a crusade themselves). In fact, my interest does not lie so much in what law is in itself but in a different question: *How is the law best conceived of for research and educational purposes?*\(^{14}\) This is why I take the notion of ‘transnational law’ as an excuse, rather than an essential concept. I suggest to adopt it as a sort of working title, “as a kind of fuzzy or suggestive proto-concept”,\(^{15}\) in the spirit of what pragmatist philosophers called an “instrumental truth”.\(^{16}\) Incidentally, it is worth mentioning that it was in this spirit that Jessup formulated the idea of transnational law as a provisional solution to deliberately avoid further classifications and definitions.\(^{17}\)

The adoption of a concept as a provisional non-essentialist solution to advance research and education until we come up with something better does not weaken


\(^{15}\) Scott, ‘Transnational Law’ as Proto-Concept’, 864.

\(^{16}\) According to the pragmatists, ‘one idea is truer (instrumentally) than another if and only if it helps us more than the other idea to get into satisfactory relations with other parts of our experience ’ (John P. Murphy, *Pragmatism. From Peirce to Davidson* (Boulder: Westview Press, 1990), p. 51). It is in this spirit that I sustain that the idea that law is not necessarily dependant on the state is instrumentally truer than the idea that law is necessarily dependant on the state. I believe that the first idea is helpful in getting into satisfactory relations with other parts of our experience, as for example, the way we teach law to future lawyers and citizens.

the theoretical discourse in any way. Quite the opposite, contemporary epistemology and studies on the theory of science teach us that almost everything in science is provisional (even in the natural sciences!), and that what we take as truth is dependent on all sort of conditions, including historical, political and social conditions.\(^\text{18}\)

Of course, it is important to take into account that state-centered positivism, as it is rooted in wider conceptions of sovereignty, does not escape this condition of provisionality.\(^\text{19}\) Thus, for example, when deconstructing the dominant model of sovereignty, Anne-Marie Slaughter clarifies that “the fiction of a unitary will and capacity for action has worked well enough for purposes of description and prediction of outcomes in the international systems”.\(^\text{20}\) In a similar way, Robert Falk asserts that the very concept of “nation-state” is in itself a fiction.\(^\text{21}\)

Thus, concepts and definitions, especially in the field of social sciences, are instruments that can be evaluated according to their usefulness in terms of representing reality. In his classical book on legal and judicial theory, \textit{The Nature of the Judicial Process}, Justice Benjamin Cardozo wrote the following illuminating sentence:

\begin{quote}
Analysis is useless if it destroys what is intended to explain. Law and obedience to law are facts confirmed every day to us all in our experience of life. If the result of a definition is to make them seem to be illusions, so much the worse for the definition; we must enlarge it till it is broad enough to answer to realities.\(^\text{22}\)
\end{quote}

Again, Cardozo’s point is in line with contemporary epistemology and illustrates one of the basic points in pragmatic philosophy. “A man’s vision is the great fact


\(^\text{19}\) I will develop the conditions of state-centered positivism below. See infra section V.


about him”, wrote William James.23 Popular wisdom has a straightforward formulation for this philosophical principle: we see what we want to see. But speaking in more academic terms, it is not only a matter of willing to see, but also about being appropriately equipped to see. In law, as in other fields, the equipment is basically made up of conceptual tools. My thesis can be reformulated in this way: the concept of transnational law is a good tool in order to perceive reality in its complexity. It is useful, and it can be profitably used for research purposes and for legal education.

IV. At the borders of legality. Transnational law as an instance of legal pluralism

LEGAL PLURALISM. The concept of ‘transnational law’ seems to be more in fashion today than the concept of ‘legal pluralism’. My belief is that the reason that explains this fact is prosaic to say the least: as opposed to ‘legal pluralism’, we tend to identify ‘transnational law’ with the world of international business, and thus the use of the term seems to be supported by the interests of international commerce and in line with the dominant economic dimension of globalisation. However, as Craig Scott brilliantly unveils, the two concepts are intimately related, and looking at transnational law is an invitation to look at legal phenomena through the eyes of legal pluralism.24

Legal pluralism can be simply defined as “a situation in which two or more legal systems coexist in the same social field”.25 The term also denotes an area of

24 The relation between ‘transnational law’ and ‘legal pluralism’ is explicit in Scott’s third conception, as it was defined in section II.
25 Sally Engle Merry, ‘Legal Pluralism’, Law & Society Review 22 (1988), 132. Legal pluralism as a field of research is characterised by the fact that it does not require an essentialist definition of law. Following Berman, “the whole debate about law versus non-law is largely irrelevant in a pluralism context because the key questions involve the normative commitments of a community and the interactions among normative orders that give rise to such commitments, not their formal status” (Paul Berman, ‘Global Legal Pluralism’, Southern California Law Review 80 (2007), 1177). This connects with Hart’s previous quotation on the debate around the concept of law that has been taking place for centuries. Among other things, it is this debate what justifies the contempt of legal pluralism for the search of an essential definition of law (Laura Nader, The Life of the Law. Anthropological Projects, (Berkeley: University of California Press, 2002), p. 31). The jurist that probably best represents a well-founded lack of interest in the limits of legality is the American legal philosopher and contracts scholar Lon Fuller. See Lon Fuller, The Morality of Law (New Haven: Yale University Press, 1969), and his posthumous work edited by Kenneth Winston, The Principles of Social Order. Selected Essays of Lon L. Fuller (Oxford: Hart Publishing, 2001).
research, and the set of works that can be adscribed to this area, both empirical studies and conceptual elaborations.\textsuperscript{26} As a body of knowledge, legal pluralism emerged during the early decades of the 20\textsuperscript{th} century. That version of “classical legal pluralism” was mainly focused on colonial and post-colonial societies, and normally addressed the coexistence between the metropolitan legal system that was imposed within the territory of the colony and the aboriginal forms of law. Since the 1970s a new perspective emerged, “new legal pluralism”, that shifted the focus of study from colonial societies to advanced industrial societies. The basic conceptual framework remained the same, with the state law as the dominant player coexisting with other normative orders that are typically in a marginal position.\textsuperscript{27}

Nowadays, globalisation has added one further layer (or many layers) to the complexity of legal pluralism.\textsuperscript{28} There is an emergence of renewed literature in the field of legal pluralism that constantly shifts between local and global “to demonstrate that law need not be conceptualized as having to have either a direct or a derivative relationship to the state or the interstate order”.\textsuperscript{29} In the contemporary world, state and non-state forms of law, formal and non-formal, public and private, interact in the most fluid and ambiguous ways. It is in this spirit that Paul Berman has appropriately defined the global legal system as “an interlocking web of jurisdictional assertions by state, international, and non-state normative communities”.\textsuperscript{30} One of the classic writers in legal pluralism, Sally Engle Merry, describes the new pluralistic situation in the following way:

Multiple forms of order coexist in the same social space, only some of which are formal law. ... Research on legal pluralism examines the nature of each legal system and the way it intersects with others. Global, national, and local laws are each separate legal systems, joined in some areas by

\textsuperscript{26} Besides an area of research, legal pluralism can be conceived as a theory and even as a paradigm (Jean François Perrin, \textit{Sociologie empirique du droit} (Françfort-sur-le-Main: Helbing & Lichtenham, 1997), p.38. A further discussion on this point is not necessary for the purposes of this essay.

\textsuperscript{27} Merry, ‘Legal Pluralism’, 134-35. ‘New legal pluralism’ underlines the fact that both systems (state and marginal) influence each other, thus conceptualising their relation as bidirectional (Paul Berman, ‘Global Legal Pluralism’, 1171).

\textsuperscript{28} Berman, ‘Global Legal Pluralism’.

\textsuperscript{29} Scott, ‘Transnational Law’ as a Proto-Concept, 874. For abundant references to this renewed literature, see Sally Engle Merry, ‘New Legal Realism and the Ethnography of Transnational Law’, \textit{Law & Social Inquiry}, 31 (2006), and Berman, ‘Global Legal Pluralism’.

\textsuperscript{30} Berman, ‘Global Legal Pluralism’, 1159.
regional laws, such as EU law and regional human rights law. In all societies there exist forms of normative ordering outside the state law, sometimes based in institutions such as universities or corporations as private law and sometimes governing social life in more informal ways.\(^{31}\)

Of course, not every phenomenon of legal pluralism is transnational in a strict sense. Thus, for example, “classical legal pluralism” was mainly concerned with what happened in one single society, typically a colony that then became an independent nation-state. Similarly, contemporary studies in “cultural defense” may focus on a single nation-state, analysing if and how normative claims of minority groups fit into the state legal system.\(^{32}\) It is true, however, that both examples have a transnational element at their origin: in the first case, a legal system that is brought from abroad; in the second case, usually migrant groups that take their norms with them when crossing borders. But the sphere of research can still be limited on territorial grounds to one single nation-state.

On the other hand, if we accept the notion of transnational law in Scott’s third conception, that is, transnational law as meaning something different from either state or interstate law, then we are necessarily accepting the existence of legal pluralism. It is in this sense that adopting transnational law is an invitation to legal pluralism and to include non-state forms of normativity as valid, legitimate and important objects of study in law schools. This invitation is implicit in Jessup’s original formulation of transnational law, which apart from public and private international law considers “other rules which do not wholly fit into such standard categories”.\(^{33}\)

But the very definition of legal pluralism is in open contradiction with state-centered positivism.\(^{34}\) Once the state monopoly of legal creation and implementation is broken, the field is open to the consideration of different

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31 Merry, ‘New Legal Realism’, 980.
normative orders in such a way as to question the limits of legality.\textsuperscript{35} Maybe this confrontation can be explained in terms of separate scientific communities: many researchers on legal pluralism are anthropologists who are interested in law but not interested in the law of the state and its rigid forms\textsuperscript{36}. In the same line, later on I will develop the ideological function of state-centered positivism. In any case, no matter how relevant these questions are in terms of explaining the academic controversy, they leave the capital point that I want to underline here untouched: \textit{legal pluralism cannot be accounted for from the perspective of state-centered positivism}.\textsuperscript{37}

\textbf{Erosion of Territoriality and the Power of Corporations.} One of the most spectacular failures of state-centered positivism’s explanatory power is its inability to cope with the normative power of private corporations. It is out of question that globalisation has conveyed a significant power shift from sovereign nation-states to transnational corporations and other private actors. When describing the phenomenon of globalisation, the German sociologist Ulrich Beck asserts that “global enterprises have for a long time not been challenged by any other (transnational) power”.\textsuperscript{38}

This change can be explained in terms of “erosion of territoriality”.\textsuperscript{39} While the nation-state is the territorial entity \textit{par excellence}, corporations have little respect for territorial principles. This is not surprising; on the contrary, it is part of the corporate DNA, so to speak. As Thomas Jefferson wrote two hundred years ago, “merchants have no country. The mere spot they stand on does not constitute so strong an attachment as that from which they draw their gains”.\textsuperscript{40}

\textsuperscript{37} Andreas Fisher-Lescano and Gunther Teubner, ‘Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’, \textit{Michigan Journal of International Law} 25 (2004), 1010: “full understanding of legal pluralism is only possible if one abandons the assumption that global law exclusively derives its validity from processes of State law-making and from state sanctions, whether these derive from State internal sources of law or from officially sanctioned international sources of law”.
\textsuperscript{39} Falk, \textit{Law in an Emerging Global Village}, p.25.
This lucid sentence encaptures in its simplicity the very spirit of contemporary globalisation. Thus, the obvious problem is that while the state is a territorial entity, technological evolution and other factors have made the radical de-territorialisation of economic relations possible (followed by other types of relations, including legal relations). For this reason, actions taken by the states, that typically emphasise territoriality, are necessarily at odds with globalisation.\(^\text{41}\) “While one player continues to play the game within the framework of the national state, the other is already playing within the framework of world society”.\(^\text{42}\) But world society does not even mean a world state: “it means a non-state society, a social aggregate for which territorial state guarantees of order, as well as the rules of publicly legitimated politics, lose their binding character”.\(^\text{43}\)

The consequence is that large transnational companies may have powers that are similar in kind to those of nation-states.\(^\text{44}\) Significantly, there is a growing literature in the field of business studies advancing the idea that companies should have corresponding responsibilities, even if we have always thought that they could only be attributed to the states. Thus, for example, it is claimed that in a deterritorialised world the state is not the only provider of rights, which incidentally according to liberal justifications of the modern state such as Locke social contract theory constitutes its main function.\(^\text{45}\) This is an important field where corporations are actually stepping in, offering protection of rights in a state-like role.\(^\text{46}\) Sometimes the reason behind this phenomenon is the inability of developing states to protect the rights of their citizens, but quite often it is just that the protection of rights is beyond the reach of the nation-states (any nation-state) in contexts such as global markets or environmental protection. As a consequence, it is claimed that private normative instruments, such as global codes of conduct self-imposed by

\(^{43}\) Ibid, p.102 (emphasis added).
\(^{44}\) Boaventura de Sousa Santos, Sociología Jurídica Crítica. Para un nuevo sentido común en el Derecho (Madrid: Trotta, 2008), p. 352. There is a previous English version of this book: Towards a New Common Sense. Law, science and politics in the paradigmatic transition (New York: Routledge, 1995). I will cite the Spanish edition because it is more complete than the English version.
businesses, may in fact become the most effective protection of social rights in a
global context.\footnote{Ibid., 173. It is worth mentioning that the area of corporations and human rights is flourishing, both in terms of scholarship and in terms of practice in the global field.}

Less spectacular than the example of protection of rights, but not less significant, is the well-known re-emergence of \textit{lex mercatoria} as a set of principles that make up for a sort of private order among merchants (nowadays corporations). Instead of trying to bring back this private order to the scientific discipline of state-centered positivism through “logical tricks” of a Kelsenian fashion, I suggest adopting a historical perspective in order to underscore the fact that there is nothing new about \textit{lex mercatoria}. Quite the opposite, \textit{lex mercatoria} has been considered the most ancient instance of globalisation in the legal world. Its origins date back from the 11\textsuperscript{th} century, when the modern nation-state did not even exist. At that time the needs of commercial exchange did not differ much from today: in order to regulate their own relations, merchants from different jurisdictions needed rules that should be equal for all of them, that should reinforce the element of trust that is essential in commercial dealings, and that should be functional for their interests. When it emerged, the new modern nation-state could not see \textit{lex mercatoria} with anything but suspicious eyes, since it contradicted the principle of territoriality as well as the legal monopoly of the state. As a consequence, \textit{lex mercatoria} (including its own courts) either disappeared or was adapted to national laws, including the rules of private international law.\footnote{Santos, \textit{Sociología Jurídica Crítica}, p. 349.}

Paradigms tend to fix assumptions in the academic mind so that we do not have to rethink the same foundational principles. This is necessary for paradigms to perform their function, but it becomes a nuisance when foundational principles must be challenged.\footnote{Kuhn, \textit{The Structure of Scientific Revolutions}, offers many historical examples in which strong resistance must be overcome before well-established principles can be challenged.} As lawyers, we have assumed that state-centered positivism is the natural state of affairs, while in fact it is the result of very particular historical and social circumstances.\footnote{More on these circumstances in section V.} Law existed before the nation-state, and law will exist after the nation-state. It just takes a quick look at the history of legal philosophy to unmask the ideology of legal centralism: some of the most important
classical authorities in the field, such as Plato, Cicero or Aquinas, did not live in nation-states in the modern sense of the term; on the contrary, their worlds were legally pluralistic. Unsurprisingly, a short overview of the history of commercial law leads to the same conclusion.

PUBLIC VS. PRIVATE. Are we therefore referring to law that is privately created? Yes, this is exactly what we are referring to. In the process of globalisation, many sectors of world society demand regulations that state and interstate institutions are not able to provide. Thus, they resort to their own forms of normativity, with their own sources of law and substantive law outside the sphere of state law stricto senso.

Obviously, this lies at the origin of the spectacular rise of private dispute resolution systems. Thus, for example, private commercial arbitration has become one of the most important fields in global legal practice today, but this is just part of a wider tendency to move dispute resolution away from the official state system of courts. The success of the ADR movement (Alternative Dispute Resolution) during the second half of the 20th century embodies this tendency towards an increasing privatisation of the law with the state playing a secondary role, and it has been criticised precisely for that reason. It is empirically verified that in case of conflict between parties with unequal power it is the weakest party that has a preference for the traditional courts of law, whereas the most powerful party is willing to play the game within the framework of privately created alternative systems.

It may be tempting to approach this situation as if the state was a victim. But this interpretation would obliterate the fact that the state itself is willing to delegate power to non-state institutions, public and private, that are better placed to deal with certain problems such as global financial regulation, environmental protection,

51 Following Aman, “our concepts of the private and the public have now been fundamentally changed by globalization”, ‘The Globalizing State’, 778, see especially part IV.
53 Nader, The Life of the Law.
transnational law enforcement, the control of dual-use technology, and so on. Of course, the fact that the states voluntarily delegate their power may provide for legitimacy, but it does not mean that the framework of the nation-state is the best framework to approach the new state of facts. The best example here is the European Union: although it was initially set up as a strict delegation of power from nation-states, it has grown to be a semi-autonomous field beyond their control. European law and domestic law of the Member States interact with each other in multiple non-traditional ways, and as a result the European Union is being widely regarded as the most important experiment in contemporary Western legal history.

All the previous aspects point at the same problem: the private-public divide is blurring. We hear about the political activity of the corporation, and at the same time about “depoliticization of governments”. These notions challenge traditional theories of the corporation and traditional theories of law and politics, since both are based on a strict public-private distinction: it is the government that must be political, not the corporation. One of the most remarkable expressions of this strict separation is the widely cited article by the Nobel Prize in Economics Milton Friedman, “The Social Responsibility of Business is to Increase Its Profits”. In it, Friedman claimed that private corporations should not pursue any kind of public interest and that their only legitimate goal is to make money for their shareholders. This is the role of companies, as it is the role of governments to take care of the environment or the wages of workers or protecting rights or any other political goal. Consistently, the dominant theories on corporate governance were developed following the model of the agency theory, where the managers are agents of the shareholders and their duty is to increase the value of their shares.

The incredible rise of the concept of corporate social responsibility (CSR) in the business world during the last few decades strikes directly against this traditional

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57 Falk, Law in an Emerging Global Village, p. xxiv.
picture, since CSR exemplifies the confusion between the public sphere and the private sphere better than any other concept. The concept of stakeholder, a pivotal idea in contemporary theories of management, demands corporate managers to consider the interests not only of shareowners, but also of workers, suppliers, clients, members of the community, and so on.\textsuperscript{60} Even the environment is often considered as a relevant stakeholder. In practice, this new thought about corporations (that the corporations themselves are increasingly adopting, at least at the rhetorical level) means that corporate managers should weigh and balance different interests and play social roles that traditional liberal theories place exclusively in the hands of (democratically elected) public servants.

This is exactly what Friedman, who already in the 1970s saw CSR coming, was criticising. It is not a coincidence that his main argument against CSR is based on an analogy with the tax system (the exclusive power of the state by definition). According to Friedman, a manager that invests part of the corporate profits to perform social roles would, in fact, be taxing his shareholders, but without the legitimacy that democratic elections provide.\textsuperscript{61} However, no matter how clear the reasoning, Friedman’s claim today sounds as a swan song of traditional positions in economics and law. The fact is that the public-private separation becomes increasingly vague, and in some states it may easily disappear. Whether they like it or not, nowadays companies are acting politically. Recent research in the field of business ethics is elaborating on the notion of \textit{political} CSR: when companies act (or claim to act) with social responsibility, this does not mean that they act simply as good law-abiding corporations, not even as philanthropic institutions, but as full-fledged political actors.\textsuperscript{62}

\textbf{Multiple Normative Communities.} The different ways in which the transnational corporate world is generating norms, and regulations, and standards of behaviour, is just one among many instances that challenge the state legal monopoly. In fact,
“we inhabit a world of multiple normative communities”\(^{63}\). All sorts of ethnic, religious and cultural and subcultural groups generate their own norms, many of which have a transnational character in a world of increasing personal mobility. In fact, globalisation has changed the way in which many of these groups express themselves through norms: “given increased migration and global communication, it is not surprising that people feel ties to, and act based on affiliations with, multiple communities in addition to their territorial ones”\(^{64}\).

Quite often these groups and their norms will be reduced to a position of marginalisation, especially when they conflict with the official state legal system. This is what happens, for example, when cultural arguments are brought up in courtrooms by members of minority groups, typically migrants. Usually the response that they obtain from judges, when they do not simply rule out evidence about cultural background as irrelevant, is that “individuals from other cultures should conform to a single national standard”.\(^{65}\) Obviously, disparities in political and economic power are absolutely relevant in defining how much influence a normative community will have, and how strong its norms will be when conflicting with the state system. Thus, even if state law usually retains its pivotal place, the position of customary rules that are binding in socially marginalised groups is less influential than corporate regulations which may be finally incorporated into the official legal system.

In spite of these considerations, it is important to understand that legal pluralism offers a descriptive, rather than an evaluative, framework. In other words: legal pluralism is a fact, rather than an ideal.\(^{66}\) It would be a mistake to hold a naively romanticised view of legal pluralist phenomena. In the framework of traditional political theory, the multiplicity of alternative normative orders endangers democratic legitimacy. Progressive thinkers criticise transnational corporate regulations on these grounds, but the same reasoning can be applied to other

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\(^{63}\) Berman, ‘Global Legal Pluralism’, 1157.

\(^{64}\) Ibid., 1171.


forms of normativity. It must be plainly acknowledged that “some instances of legal pluralism are repressive, violent, and/or profoundly illiberal”. 67

The actors involved in the plurality of normative communities, as well as the contents of their norms and their aims and actual power of influence, are as varied as society itself. But what they have in common is that all of them challenge state-centered positivism. In a colossal new book, Boaventura de Sousa Santos exhaustively illustrates legal pluralist phenomena taking place both at an infrastate and at a suprastate level. From *lex mercatoria* to the norms of indigenous groups, from global human rights to the rules governing the *favelas* in Rio de Janeiro, the defining feature of alternative normativities is that they challenge the principle that the nation-state holds the monopoly of legal production and enforcement. 68

V. Out of the comfort zone. The dominant paradigm on legal theory and legal education

A “MENTAL BLOCK”. Paradigms are comfort zones. At the price of rigidity they offer security to the scientific mind. For the last two centuries state-centered positivism has been the lawyers’ comfort zone.

Questioning the cornerstone of state legal monopoly means as much as moving away from the comfort zone. 69 Obviously, resistance is to be found. There is a sort of “mental block” that undermines both the capacity and the desire to imagine alternatives to a world that is structured along the lines of sovereign nation-states. 70 This may explain the resistance, but it is no justification.

The history of science is a never-ending search for solid theoretical frameworks that are constantly challenged and eventually defeated. There are reforms in

67 Berman, ‘Global Legal Pluralism’, 1164. Consider the many examples of informal law that Roberto Saviano describes in his book about the Napolitan camorra, binding both the members of the organisation and those who are not members but live within the area of its influence (Roberto Saviano, *Gomorra. Viaggio Nell’impero Economico E Nel Sogno Di Dominio Della Camorra* (Milan: Mondadori, 2006); there is an English translation, *Gomorrah* (New York: Farrar, Straus and Giroux, 2007)).

68 Santos, *Sociología Jurídica Crítica*.

69 Scott, “Transnational Law as a Proto-Concept”, 876.

science, and there are revolutions.\textsuperscript{71} This is true for natural sciences, and even more true for the human and social fields of knowledge. We should not look at this as a defect or a failure; on the contrary, as John Murphy puts it beautifully:

Since belief appeases the irritation of doubt, which is the sole motive for thinking, thought comes to a rest, at least momentarily, when belief is reached. But it does not remain at rest for long – since belief is a rule of action, its life is in its application, and each application can open the door to further doubt and, therefore, further thought to appease it.\textsuperscript{72}

These words are trying to capture the thinking of Charles Peirce, one of the leading pragmatist philosophers. Another pragmatist, Justice Oliver Wendel Holmes, wrote that “certainty generally is illusion, and repose is not the destiny of man”.\textsuperscript{73} We are not meant to live comfortably in comfort zones. At least not for long.

Probably the “mental block” around the idea of nation-state is stronger in the field of legal studies than in any other social scientific discipline, and this has obvious consequences for legal education. The fact that an initiative such as the recently created Center for Transnational Legal Studies is considered a novelty and a challenging innovation indicates how strong traditional ideas are in the field.\textsuperscript{74} For the most part, law school curricula are devoted to the domestic law of the state, and the same holds true for most legal scholarship. This is not only a question of contents strictly speaking, but also a matter of mindset. Thus, the (usually few) courses on international law tend to emphasise the ultimate authority of the state, remaining within the borders of the comfort zone.\textsuperscript{75} When receiving their law

\textsuperscript{71} Kuhn, \textit{The Structure of Scientific Revolutions}.
\textsuperscript{72} Murphy, \textit{Pragmatism}, p. 25.
\textsuperscript{74} There are few similar organisations in the field of legal studies. Another educational experiment, similar in kind to the CTLS, is The Association of Transnational Law Schools, and its program Agora (Phillip Bevans and John McKay, ‘The Association of Transnational Law School’s Agora: An Experiment in Graduate Legal Pedagogy’ \textit{German Law Journal} 10 (2009)). However, transnational academic networks of this sort are far from being novel in most fields of knowledge.
\textsuperscript{75} Following Berman: International law scholars have not often paid attention to the pluralist literature, nor have they generally conceived of their field in terms of managing hybridity. Instead, the principal emphasis has been on formal state-to-state relations, the creation of overarching universal norms, or the resolution of disputes by locating them territorially in order to choose a single governing law to apply. (‘Global Legal Pluralism’, 1159)
degrees, most students have never been exposed to concepts such as ‘transnational law’, ‘legal pluralism’, ‘informal law’, or the like.

In some parts of the world, such as continental Europe, the focus on domestic law comes together with two other characteristic features of mainstream legal education. One is the use of the dogmatic method. The bulk of class exposure consists of lectures during which the professor repeats the contents of the rules of state law and doctrinal interpretations thereof. In spite of what is often claimed at the formal level (but consistently with what is known at the informal level), learning rules by heart is an effective tactic for students who want to obtain good grades in most of their subjects. The second element is a marked isolation from other fields of knowledge. Again, this is something that may go unnoticed at the formal level, but informally university professors from other departments and schools tend to be unanimous in their perception that establishing links with the law school is particularly difficult.

STATE-CENTERED POSITIVISM AND ITS CONDITIONS. The jurist that has probably expressed the legal monopoly of the state in the most absolute fashion is the Austrian-born Hans Kelsen, who found the purity of the theory that he searched for in the conceptual identification of law and state. It is worth while to mention that there are not many other contemporary expressions of the leading dogma of legal positivism as honest and straightforward as this one. Not suprisingly, those who criticise the controlling paradigm tend to describe it more accurately than those working within the dominant framework. John Griffiths, who belongs to the first

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27 In spite of that, Berman underlines the existence of a body of post-Cold War literature in the field of international law that addresses the overlapping between state and non-state forms of normativity, although it does not take the specific literature on legal pluralism into account.

76 This is not true in North America and most English-speaking countries, where lectures are not the usual technique used by professors in class; cases and materials are more important (or at least not less important) than codes and statutory rules, and there is a tradition of clinical studies. It is significant that there is a tendency to spread clinical legal education all around the world, which may be part of a more general movement to export American-style legal education globally. However, consistently with what was said before, it appears that Continental Europe offers the strongest resistance against the adoption of clinical legal education (Richard Wilson, ‘Western Europe: Last Holdout in the Worldwide Acceptance of Clinical Legal Education’, German Law Journal 10 (2009)).


78 As it has been keenly noted, the indisputably leading principle of contemporary legal science has been for the most part implicitly presupposed (Rigaux, ‘Le droit au singulier et au pluriel’, 7).
group, defines the contents of what he calls “the ideology of legal centralism” (emphasising the normative dimension of the paradigm) in the following terms:

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

State-centered positivism and the ideology of legal centralism have ruled for a long time, and their origins can be found well before Kelsen’s seminal work on legal theory, at least at the beginning of the 19th century. Different social and political factors contributed to the emergence of the new paradigm, and it is essential to consider how “technological progress facilitated and intensified the central administration even of large territorial units, giving greater power than ever to central government and thus making each state more of a closed circuit in economic, political, and social terms”. This allowed jurists to play a key role in defining the concept of sovereignty, which has been central ever since both in law and social sciences.

In other words, social conditions enabled focusing all the attention in the state, both as a descriptive framework and as normative ideal. But there was also a willingness on the part of jurists to do so that was related to their collective purpose to be regarded as scientists; there was an ambition to convert legal studies into a real science. Against the usual consideration of the law as a fluid, changeable, unstable object, unsuitable for precise observation (not to speak about prediction), scientifically-minded jurists during the 19th century had to search for solid foundations and a particular object for their science that could be equated with the planets studied by astronomy or the atoms studied by chemistry.

81 The powerful criticism against the alleged scientific nature of law by the Prussian jurist Julius von Kirchmann, Wertlosigkeit der Jurisprudenz als Wissenschaft (Berlin: Verlag Julius Springer, 1848), is a classic. Von Kirchmann claimed
And jurists found their object: the laws of the sovereign state. This legal scientific framework, of course, required certain conditions; among them the actual existence of nation-states that held the monopoly of force (or at least that held enough force to impose their own laws) and that were based on a territorial principle.\textsuperscript{82} And these conditions were in fact given, at least in the West. Thus, lawyers learnt what was the object of their study: books of laws, either mainly made up of judicial decisions and precedents (as was the case in England) or of statutory rules compiled in codes (as was the case in France). This made it possible to draw a strict line dividing the field of law and the field of morals, thus reducing the concept of natural law to a marginal position.\textsuperscript{83} The field of legal studies finally enjoyed its own autonomy.\textsuperscript{84}

This picture has been good enough to provide a comfort zone as long as social and political circumstances have remained the same \textit{grosso modo}. However, a radical change such as the one we are witnessing at the turn of the 21\textsuperscript{st} century is endangering the paradigm. It is widely accepted that “in a globalized world … global governance – referring to rule-making and rule-implementation on a global scale – is no longer a task managed by the state alone”.\textsuperscript{85} The erosion of territoriality and the increasing interconnection among different states and other social actors at a global level are of basic importance. Both the principle that law lies solely in the acts of the state (or state-sanctioned entities) and the principle that law is an exclusive function of sovereignty have eroded over time.\textsuperscript{86} As we see forms of legalisation “flourishing in the absence of centralized coercion”, the hard core of the traditional theory is weakened.\textsuperscript{87} As was said in the previous

\begin{itemize}
  \item[82] It is only the \textit{de facto} power of the state what allows for the single, unified, and hierarchical normative system that has been traditionally considered ‘law’. It is here that the necessary connection between law and state lies. John Griffiths, ‘What Is Legal Pluralism?’, 3.
  \item[83] At the beginning of the 19\textsuperscript{th} century the strict division was drawn by English thinkers such as the philosopher Jeremy Bentham and his disciple John Austin. Thus, for example, in his work published in French \textit{Traité de la législation civile et pénaile} (Paris: Bossange, Masson et Besson, 1802), Bentham denounced that the term natural law is often used in an “anti-legal way”, insofar as it is conceived as a superior standard that positive law must respect.
  \item[84] The idea that legal thinking is an autonomous field of knowledge is fairly recent. For the most part in the history of Western tradition it is extremely difficult to distinguish between the areas of legal philosophy, moral philosophy and political philosophy. It is only after the 19\textsuperscript{th} century that jurisprudence claims to be an autonomous field, independent from morals and politics.
  \item[85] Scherer, Palazzo and Baumann, ‘Global Rules and Private Actors’, 506.
  \item[86] Paul Berman, ‘Global Legal Pluralism’, 1174-5.
  \item[87] Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter and Duncan Snidal, ‘The Concept of Legalization’ \textit{International Organization} 54 (2000), 203. Centralised coercion is precisely the defining feature of law in Kelsen’s model. However, the concept of legalization “creates common ground for political scientist and lawyers by moving away from a narrow view of law as requiring enforcement by a coercive sovereign” (ibid., 202).
\end{itemize}
section, the many legal or law-like phenomena that are emerging everywhere in the age of globalisation challenge the fundamentals of what we thought was already definite. Fisher-Lescano and Teubner express this idea in very precise words that deserve a lengthy quotation:

For centuries law had followed the political logic of nation-states and was manifest in the multitude of national legal orders, each with their own territorial jurisdiction. Even international law, which viewed itself as the contract law of nation-states, did not depart from this model. The final break with such conceptions was only signaled in the last century, with the rapidly accelerating expansion of international organizations and regulatory regimes, which, in sharp contrast to their genesis within international treaties, established themselves as autonomous legal orders.88

Thus, the conditions that account for the dominant concept of sovereign nation-state and the monopoly of law creation and enforcement are historically limited and transitory in their own nature.89 They are also culturally dependent. These conceptions of law and state are essentially Western conceptions, and more specifically “part of the ideological heritage of the bourgeois revolutions and liberal hegemony”.90 The 19th century emergence of state-centered positivism as a dominant framework took place simultaneously in the three great Western legal traditions: English, French and German. Since then, the paradigm spread more or less naturally to other Western areas, and rather unnaturally to non-Western contexts.91 Thus, the answer to the question ‘what is legality’ is both historically and culturally bounded.

An important consequence of strictly fixing the criteria of legality is the exclusion of those objects that do not fulfill the conditions that have been defined from the field

88 Fisher-Lescano and Teubner, ‘Regime Collisions’, 1008. These words account for their overwhelming conclusion: “it is ... necessary to give up the idea that a legal system in its strict sense exists only at the level of the nation-state”.
90 John Griffiths, ‘What is Legal Pluralism?’, 2-3.
91 In fact, it has been argued that in many non-Western environments the application of Western-like ideas of the law and the state has had devastating effects (Nader and Grande, ‘Current Illusions and Delusions about Conflict Management’, 588).
of legal scholarship and legal education. From a legal scientific point of view, non-state law-like phenomena (from the norms that rule Gypsy settlements to ethical codes self-imposed by transnational corporations) are either ignored or marginalised. Indeed, it is difficult to take them seriously since “the state and interstate order have for the last 150 or so years cast a commanding shadow over all other normative phenomena, constantly reminding other claimants to ‘law’ that they exist by dint of the space left for them by state and interstate law”.  

When the paradigm fulfills its function, marginalisation of non-state norms takes place quite naturally or even unconsciously, and lawyers actually believe that there is no other law but the law of the state.  

Brian Tamanaha offers a brilliant example when he compares the definitions of law offered by three different thinkers who come from quite different backgrounds: Hoebbel, Webber, and Hart. These three authors, all of them inspired by anthropological and sociological approaches, looked for the essentials of the law with an open mind, not limiting themselves to the law of the state. However, what they found indeed reflects the strength of state-centered positivism. In fact, they  

locate the criteria for law by extracting or emulating those elements which appear to be essential to state law, then substracting all trappings of the state. Similarly, the main test we apply to determine whether the proposed definition captures what we mean by law is to measure it against our intuitions about the essential characteristics of state law, sans the state.  

The resilience of traditional ideas in the field of law is partly the result of a general resistance to transdisciplinary studies that is rather common in law schools and endemic in some particular contexts such as continental Europe. In fact, some of the ideas that challenge the traditional legal framework, and that appear to be quite innovative and even radical in the legal context, are widely accepted in most fields of social knowledge, including international relations, political theory,
business studies, sociology or anthropology. The transition from nationally organised societies to a global society, and the subsequent “contradiction between national framework for action and transnational problems”,95 is transforming all areas of social studies.

More specifically, it is widely accepted that the Westphalian model of nation-state is not valid anymore given the new conditions of globalisation, in spite of the fact that most jurists still adhere to this traditional model. Robert Falks opens one of his books with a paragraph that accurately illustrates this point:

[T]here is a growing consensus that the fundamental structure of international law that has prevailed for several centuries, or roughly since 1648 at the time of the Peace of Westphalia, is no longer adequate as a framework of inquiry. And yet the realist mainstream, built around the statist paradigm of sovereign, territorial units, retains much of its hold on the political imagination of the legal profession that addresses global issues.96

As was mentioned before, the very idea of autonomous nation-states, sovereign within their territory and roughly equal in power, has always been a fiction obviously contradicted by dramatic power inequalities among states.97 However, the model successfully fulfilled its function during the modern period.98 Among other things, it provided a solid foundation for state-centered positivism, since the Westphalian model was state-centric, sovereignty-oriented and territorially bounded.99

The transition from a state-centered framework of analysis to a transnational framework “allows for the recognition of the role of non-state transnational actors

96 Falk, Law in an Emerging Global Village, p. xxi.
97 ibid., p. 35.
98 Slaughter, A New World Order, p. 12. But this assertion is controversial. According to Andreas Osiander, the "ideology of sovereignty" has impaired the development of the discipline of international relations for the last couple of centuries. Following Osiander, it is time to deconstruct the "Westphalian myth", which in itself is the result of historical misinterpretations of the facts that gave place to the peace of Westphalia in 1648 (Osiander, ‘Sovereignty, International Relations, and the Westphalian Myth’).
in the international system”. This recognition of private actors, as well as the erosion of territorial principles, has had important consequences in the different areas of social studies. Business scholars refer to the political role of transnational corporations, whereas anthropologists underscore the need for a “deterritorialized ethnography”.

In other words, all disciplines except law are abandoning their own comfort zones. We know that when lawyers look beyond the law of the state, they look into the abyss as long as they have been trained in the dominant framework of state-centered positivism. But it would be a mistake to believe that things are easier for other social scientists and thinkers. In the field of international politics, for example, there is a growing sense of insecurity regarding the consequences that the abandonment of the Westphalian model may convey. How will the political world order evolve? What are the positive and the negative outcomes of all possible scenarios? We live in a challenging age: with an unstable world economy that the nation-states struggle to regulate, constant threats of global terrorism and environmental devastation, and dramatic technological innovations, the times inspire everything but certainty. However, discomfort must be confronted: there is no justification for adhering to an old framework that is not satisfactory anymore both in practical and academic terms, as is the case with the Westphalian model.

This situation in the academic world points at a further question: how is it possible for lawyers to remain in their comfort zone while everybody else is moving out of their comfort zones? As was advanced before, part of the answer lies in the natural bias against transdisciplinarity that state-centered positivism carries with it. Focusing their attention exclusively in law books, lawyers discovered a way to develop a science that could not only be autonomous but also isolated from other fields of knowledge. The social conditions involved both in the creation and in the application of law played a secondary role, or simply disappeared.

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102 Merry, ‘New Legal Realism’, 980.
104 The school of American Realism is a meritorious (and to a great extent successful) attempt to bring social facts at the forefront of legal studies. There is an extensive primary and secondary literature on this school; a good introduction is
philosophy could also be left out of the picture. This enabled the modern lawyer to become a legal scientist without actually having to read or to observe or to analyse anything else but the books of law. And this certainly contributes to explain the fact that lawyers remain faithful to the principles and assumptions that other fields of knowledge have already abandoned or are questioning very seriously. In other words, lawyers have created a comfort zone for themselves that is more comfortable than any other.

In those areas of the world where the dominance of state-centered positivism takes the form of the dogmatic method of legal education based on statutory law, as is the case in continental Europe, the sense of scientific isolation is most intense. The study of case-law, which is the most widely used method of legal education in the common law systems, inherently allows the introduction of social conditions and other aspects that lie beyond the books. However, when the object of study is the code, it is easier to close the door on any other considerations that are not written down in the book. It is certainly tempting for the lawyer to find everything that matters in the book and, following that famous French professor, to claim that “I do not know the civil law: I teach the civil code.”

Lack of transdisciplinarity works as a vicious circle. Since state-centered legal positivism does not want to know what is taking place in other disciplines, jurists cannot inform themselves about the new discoveries in these other disciplines. In my view, this may be the reason why legal education remains so attached to a vision of the world, based on the territorially bounded sovereign nation-state, that does not hold true any more in most social and political disciplines. The resistance to accept the concept of ‘transnational law’ illustrates this point.
IDEOLOGICAL DISCOMFORT. To finish with this section, I am going to develop on the ideological implications that lie behind state-centered positivism. Differently to natural sciences, paradigms in social disciplines have a strong ideological component, and this is especially true in the case of law, since it is a normative discipline. State-centered positivism does not only offer a comfort zone in scholarly terms: it offers an ideological comfort zone, too. In my view, ideological discomfort also contributes to explain the resistance against the concept of ‘transnational law’.

The dominant picture of a world order that is made up of independent sovereign states “included the claim that such a system of distinct sovereignties upheld the well-being of humanity, that interstate law was the best vehicle by which to achieve the objectives of humanity”. The Westphalian model of autonomous sovereign states interacting with each other in conditions of rough equality is a “remote aspiration” that can be traced back to the pioneer works in international law of jurists such as Hugo Grotius or Francisco de Vitoria. The idea of nation-state does even have a “popular emotive appeal”; although connected with nineteenth century ideologies of nationalism, many examples confirm that this appeal still persists in the age of globalisation.

Many see in transnational law an aggression against that old and noble ideal, especially (but not only) when it is connected with commercial law. Thus, it is tempting to interpret transnational law as the advancement of the interests of large economic groups against those who are disempowered and can only place their hopes on the democratic political process. Obviously, the dominant forms of lex mercatoria reflect the interests of those who are the dominant players in the game, and this may contribute to enlarge social inequalities. The appeal of legal pluralism might lead us to a blind combat against the state, since it is precisely the combat against state centralism that inspires legal pluralism as a field of

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106 On the ideological element of the traditional conception, see Griffiths, ‘What Is Legal Pluralism?’ As was noted before, Griffiths speaks about the “ideology of legal centralism”. His point is that legal centralism is an ideal, whereas legal pluralism is the real fact (ibid., 4).
107 Falk, Law in an Emerging Global Village, p. 35.
108 Ibid., p. 209.
110 Santos, Sociología Jurídica Crítica, pp. 351-2.
As a consequence we could wrongly take the state as the ‘bad guy’, whereas in fact undermining internal sovereignty is a threat to democracy: the power of each individual vote decreases along with the internal sovereignty of the state. In other words, maybe the state was the ‘good guy’.

Again, this is a problem that affects law but that is obviously wider in scope. Authoritative sources in the field of social and political theory affirm that globalisation carries with it the success of neoliberal ideologies, the liquidation of the public-private divide, and even (some claim) the end of politics. Expressing a widely held view, Barber asserts that “we have managed to globalize markets in goods, labor, currencies and information, without globalizing the civil and democratic institutions that have historically comprised the free market’s indispensable context”.

Of course, these judgments are controversial in themselves. How could they not be! For example, there are those who claim that there is nothing to be afraid of, since corporations can do a very effective job at advancing human rights and protecting public interests in general. But leaving aside for a moment ideological extremes, what seems obvious is that the new state of affairs endangers very seriously the traditional conception of liberal democracy as the source of legal and political legitimacy. Anne-Marie Slaughter adequately describes the situation as a “tri-lemma”. On the one hand, it is out of the question that the territorially bounded state is struggling to cope with transnational problems. On the other hand there is no plausible project for a global state, at least not in the short term. Furthermore, it is not clear that such a global state would be desirable; quite the opposite, it “would certainly be the most tyrannical of structures, from which no one would be able to escape in the end”. Since the nation-state is constrained by territorial boundaries and the world state does not exist, non-state actors are those who are taking care of these global problems. In doing so, they are gaining

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112 Reinicke, ‘Global Public Policy’, 120.
113 Beck, What is Globalization? Beck underscores the fact that globalisation has happened and is happening without politics being involved (at least in the traditional sense of democratic parliamentary politics) (ibid., p. 4).
115 Robert Falk makes a meritorious effort at contrasting what he believes may be the (devastating) negative effects of globalisation against its positive effects (Falk, Law in an Emerging Global Village, pp. 212-8).
116 Slaughter, A New World Order, p. 10.
more and more power in a sort of delegation by the nation-state, delegation that may be more or less direct, more or less explicit. But where does this new private power obtain its legitimacy from?

Many scholarly contributions in the field of political theory, international relations, and political philosophy today offer different tentative answers to this question. I cannot analyse the discussion here, since it is beyond the scope of this piece. It will be sufficient to point out the fact that the debate is actually taking place: *liberal democracy, as it has been conceived for the last few centuries, is struggling to cope with some of the most obvious facts of global reality*, such as the new public role that multinational corporations are playing in the world.¹¹⁸

Thus, again, lawyers are not alone in their ideological discomfort. What seems to be a challenge to the dominant role of the state in law creation and enforcement, is in fact nothing else than the reflection in the legal province of a much broader debate. There is a battle going on in the fields of social and political theory that touches upon the very foundations of liberal democracy. It is, to say the least, a lack of humility on the part of the lawyer to neglect this and to swear allegiance to the old and increasingly outdated notion of sovereign nation-state.

Nevertheless, there is a further (and quite obvious) methodological conclusion to this controversy; namely, that describing that something happens does not imply that it is actually good or desirable in any sense. Ulrich Beck offers a good example when he conceptually clarifies what lies behind the debate on globalisation.¹¹⁹ On the one hand, following Beck, we should conceive *globalisation* as a set of processes that lead to a situation of facts that he calls *globality*. Both globalisation (as a set of processes) and globality (as a matter of fact) must be distinguished from *globalism*, which is precisely the ideological component of the phenomenon. Beck himself is clearly opposed to globalism, insofar as it represents (in his view) neoliberal ideology trying to liquidate the divide between economy and politics and to reduce parliamentary democracy to

¹¹⁸ Scherer, Palazzo and Baumann, ‘Global Rules and Private Actors’, 520, adopting Habermasian-like deliberative democracy as a foundation for a political conception of CSR.
the field of irrelevance. However, this does not prevent him from undertaking a thorough analysis of what globalisation means as a phenomenon.

I suggest that this is exactly the way in which lawyers should approach the concept of transnational law. In the previous section, I deliberately considered different instances of transnational non-state legal phenomena or alternative normativities at the same level, precisely to underscore the fact that the ideological implications of such phenomena can be many and varied. What all these phenomena have in common is not their ideology, but the fact that they are non state-centric. I struggle to see how we become better lawyers, and how we better educate future lawyers, neglecting their existence. Likewise, I believe that lawyers should include transnational law as part of their conceptual equipment, since this will offer a better knowledge of the world where we live in. Furthermore, I sustain that by doing so law professors will contribute to build a better world and to inspire a sense of justice in future lawyers. In the following section I will justify my opinion.

VI. Why is it worth the effort? Reasons for a new perspective

STATE-CENTERED POSITIVISM AND THE DESCRIPTION OF THE WORLD. As a conclusion to the previous sections, academic lawyers are confronted with the following dilemma: to honour state-centered positivism and neglect transnational law, or to accept transnational law (thus abandoning the familiar comfort zone). The pragmatic question is: from the point of view of legal scholarship and legal education, what are the consequences of following each option? Indeed, they are quite different.

The first option (rejecting ‘transnational law’ as a concept and honouring state-centered positivism) is an option for exclusion beforehand, and it advances the “neglect of juridical experience”. It simply reinforces the fact that traditional legal thinking, narrowly limited by its own methodology, has despised the incredible amount of knowledge that is offered by socio-legal experience. It is exactly this sort of socio-legal experience what legal pluralism tries to uncover, as it is partly
embodied in the conception of ‘transnational law’ that is being used throughout this paper. “Indolent legal thinking”, following Santos’ powerful expression, has decided to close the door on much of actual legal experience, and this is probably one of the most dramatic stories of scientific neglect in Western thinking.\textsuperscript{120}

When confronted with contemporary transnational phenomena, the usual way of proceeding using traditional legal thinking is trying to integrate all forms of normativity within the traditional framework. Thus, when a hierarchical line can be traced to the ultimate authority of the nation-state (as has always been the case, for example, with traditional fields such as contracts or private arbitration), the area of law in question is accepted as part of mainstream legal education. However, when no direct hierarchical line can be traced from a particular body of norms to the ultimate authority of the nation-state (such as is often the case, for example, with religious norms or the non-written rules of marginal communities), the area of law in question is rejected as an object of study in law schools. This kelsenian-like and very academic way of solving the problem implies the elaboration of rather abstract reasonings that, through the use of logics and the theory of sources, may lead to the conclusion that much of what we call transnational law is in fact valid law \textit{because of} the state, even if this is counterintuitive to a certain extent.\textsuperscript{121} This way of thinking is consistent with the expression “transnational situations yes, transnational law not”.\textsuperscript{122} Although this would leave some “marginal” bodies of normativity out of the picture, it might account for the bulk of transnational law that is connected with international business law, and probably with other fields of global practice such as human rights law.

However, following this path has at least two problems. The first one is that given the radical fragmentation of globalised society, including normative fragmentation, the traditional aspiration to a unitary authoritative hierarchy becomes a “vain

\textsuperscript{120} I adopt both expressions (“neglect of juridical experience” and “indolent legal thinking”) from Boaventura de Sousa Santos, \textit{Sociología Jurídica Crítica}.
\textsuperscript{121} State-centered positivism can be very counterintuitive. For example, Kelsen held that legal norms are not addressed to citizens (not even what Hart called ‘secondary rules’), but only to judges and state officials that are in charge of imposing sanctions.
\textsuperscript{122} Scott, “Transnational Law’ as a Proto-Concept’, 876. Perhaps it might be compatible with the use of the term ‘transnational’ in one of the two previous conceptions that were defined before, but certainly not with the third conception. See supra section II.
hope".\textsuperscript{123} In the familiar landscape of national law there were some essential elements that made things easier, such as conceptual-doctrinal consistency, clear hierarchy of norms and effective judicial hierarchy.\textsuperscript{124} But none of these elements stand at the global level today, and as a consequence “any aspirations to a normative unity of global law are thus doomed from the outset".\textsuperscript{125}

And there is a second problem. Even in the improbable case that lawyers were successful in effectively reducing global legal complexity to the framework of the state-dependent hierarchical pyramid, how would the result work as a better description of the world we actually live in?

My straightforward answer is that it will not work as a better description of the world, and I believe that the traditional way of looking at the problem misses what is really important about transnational normative phenomena.

For example, it is true that from a logical point of view the domestic legal systems of the Member States give validity to the European Union law, but the important fact here is that the European Union is evolving to become a semi-autonomous legal system that is actually imposed upon the states (and prevails over their domestic legal systems).

By the same token, it is true that transnational contracts that are usually subject to private arbitration must ultimately be implemented in the courts of a sovereign state, but the important fact here is that the contracting parties sign very complex agreements (that, incidentally, affect many other third parties who are not signatories to the agreement, including the states), with the specific and often expressed intention of never initiating court proceedings.

If I may use a final illustration, it is true that the business ethics codes and the formalised ethical reports that are published by private companies are not law

\textsuperscript{123} Berman, ‘Global Legal Pluralism’, 1166.
\textsuperscript{124} Fischer-Lescano and Teubner, ‘Regime Collisions’, 1002.
\textsuperscript{125} Fisher-Lescano and Teubner, ‘Regime Collisions’, 1004. In their analysis, based on systems theory, these authors sustain that in order to understand legal fragmentation is necessary to first understand the wider processes of social fragmentation that are happening in the world. Thus, for example, behind the collision of \textit{lex mercatoria} against the norms of the World Health Organisation lies the confrontation between the opposing rationalities of these subsystems. In this way, facts are confirming Niklas Luhman’s hypothesis that “global law would experience a radical fragmentation, not along territorial, but along social sectoral lines” (\textit{ibid.}, 1000).
because they do not emanate from the ultimate authority of the state, but the important fact here is that sovereign nation-states are incorporating the content of these codes and privately made reports as valid state law because they provide the best tools to regulate companies’ social behaviour.\textsuperscript{126}

In all these examples, the claims of the traditional theory (such as the statement that the European Union is valid law only because the domestic laws of the Member States say so) are true, in the same way as any tautology is true. But they do not offer a good description of the world we actually live in because they miss the really relevant aspects of the phenomena. In other words, insofar as traditional legal thinking perceives law as a single unified body of rules under the authority of the state, it becomes a “hindrance to accurate observation”.\textsuperscript{127} Furthermore, it contributes to widen the gap between law, on the one hand, and the rest of social and humane disciplines, on the other. On the contrary, accepting a pluralistic landscape of normativities, including non-state transnational forms of normativity, “offers both a more accurate descriptive account of the world we live in and a potentially useful alternative approach to the design of procedural mechanisms and institutions”.\textsuperscript{128}

STATE-CENTERED POSITIVISM AND JUSTICE. I believe that accepting transnational law as normativity that is not strictly dependent on the state is not only good in descriptive terms but also in normative or evaluative terms, insofar as it allows for the consideration of arguments revolving around the idea of justice in a more

\textsuperscript{126} The GRI framework for sustainability reports is a textbook example of privately created mechanisms that are incorporated into the state official law. The GRI (Global Reporting Initiative) is a private global multi-stakeholder network that publishes formalised guidelines for sustainability reporting to be used on a voluntary basis by corporations and other entities. The GRI system has been extremely successful, with thousands of reports voluntarily filed by companies from all around the world. As a consequence, some nation-states have decided to include the GRI framework in their official legal system, either as a compulsory reporting standard or as a recommendation. States that have taken this option include Sweden, Denmark, Norway and Holland. I am indebted to my colleague Ignasi Carreras, member of the GRI Board of Directors, for this reference.

\textsuperscript{127} Griffiths, ‘What Is Legal Pluralism’, 4. Let me explain a personal experience to illustrate how the traditional approach can actually obstruct accurate observation. As a law student in Spain, a European Union Member State, I became familiar with the dominant doctrine that sustains that European Law is valid law because of the national constitutional mechanisms that allow for the validity of international treaties. According to this view, the Spanish Constitution is at the top of the hierarchical pyramid, and the norms of the European Union are “below” as delegated norms. This reasoning seems correct from a logical point of view, in spite of being overtly counterintuitive. In terms of education the result is that in spite of the fact that most of the applicable legislation in Spain comes directly or indirectly from European law, all the EU law I studied to obtain my law degree was a one-semester long compulsory subject (in a curricula that was made up of ten semesters!), together with a couple of short optional subjects that I signed up for. The situation has not changed significantly since then. I think the anomaly speaks for itself.

\textsuperscript{128} Berman, ‘Global Legal Pluralism’, 1165. The struggle of territorially bounded positive law to offer normative solutions to global problems becomes obvious in areas such as the internet.
natural way than state-centered positivism. This aspect is especially relevant in contrast with the fact that, when not left completely out of the picture, considerations about justice are usually marginalised in mainstream legal education, when not left completely out of the picture. Here again, the traditional framework works as a sort of mental block that narrows the legitimate object of legal studies. It is relatively easy to identify the law that emanates from the sovereign nation-state. This is the object of legal education. Justice is beyond the boundaries; it pertains to the fields of philosophy, ethics, or religion, but not to the serious and strict realm of jurisprudence.\textsuperscript{129}

It is rather obvious that leaving justice outside law schools contributes to a certain degree of dehumanisation in the education of lawyers, and it encourages their insensitivity towards the ultimate values that the legal system is meant to serve. On the contrary, I sustain that teaching transnational law, which does allow for considering arguments about justice, contributes to make the world a better place. In order to justify these assertions, I will draw on the last book by the Nobel Prize in Economics Amartya Sen, \textit{The Idea of Justice}.\textsuperscript{130} In this important work, Sen takes on the criticism of mainstream theories of justice within the contractarian tradition, and more specifically in their most recent version of the American philosopher John Rawls.\textsuperscript{131} Among other things, Sen criticises Rawls' theory of the social contract as ‘institutionalist’ and ‘exclusionary’.

State-centered positivism, as a theory of law, is the jurisprudential counterpart of social-contract theory as a political philosophy. In fact, it is the social contract theory that provides ultimate legitimacy for state-centric approaches to law, and what justifies the jurist in remaining within the strictly defined limits of her field ignoring explicit considerations of justice. Similarly to social contract theories, state-centered positivism can be criticised as a model of legal theory and

\textsuperscript{129} In a recent academic congress, together with a colleague I emphasised the deficit that mainstream legal education suffers in the area of ‘justice’, and we suggested a few hints on how the gap might be bridged. See César Arjona and Josep Francesc Mèria SJ, ‘La idea de justícia en Amartya Sen y la educación jurídica en las facultades jesuitas’, \textit{Shaping the Future. Networking Jesuit Higher Education for a Globalizing World} (Mexico DF: Universidad Iberoamericana, 2010) (the paper can be read in Spanish at \url{http://www.uia.mx/shapingthefuture/documents.html}).

\textsuperscript{130} Amartya Sen, \textit{The Idea of Justice} (London: Allen Lane, 2005).

education that is both ‘institutionalist’ and ‘exclusionary’. Thus, the criticism of state-centered positivism ultimately reaches the sphere of political philosophy.

STATE-CENTERED POSITIVISM AS AN INSTITUTIONALIST FRAMEWORK. Sen criticises social contract theory in general, and Rawls’ version in particular, for being institutionalist, meaning that it equates justice with a set of just institutions, while leaving aside the realities of human live to a great extent, as well as people’s behaviour and social realizations, and even the social consequences that institutions produce. Of course, it is naive to believe that the key to justice lies in spontaneous human behaviour, but focusing exclusively on the design and implementation of institutions that are considered adequate will not be enough to tackle the real causes of injustice. There must be a balance that takes into account the mutual dependence between institutional reform, on the one hand, and real changes in social behaviour, on the other. In Sen’s own terms, “we have to seek institutions that promote justice, rather than treating the institutions as themselves manifestations of justice, which would reflect a kind of institutionally fundamentalist view” .

To illustrate this point, Sen draws on a distinction in classical Indian jurisprudence between the concepts of niti and nyaya that it is worth while to describe here. In classical Sanskrit both terms mean ‘justice’, but they emphasise different dimensions of justice. Niti refers to “organizational property and behavioural correctness”, whereas nyaya points towards a “comprehensive concept of realized justice” that considers the real consequences that happen in the world. A niti perspective concentrates on rules and institutions, but in order to understand the world we live in and the actual instances of injustice that take place we need to adopt a nyaya perspective.

State-centered positivism offers a radically institutionalist view of the legal phenomenon, since it devotes its attention exclusively to the quintessential institution, the nation-state. According to this framework, law is not about social

132 Sen, The Idea of Justice, p. 82.
133 Ibid., p. 20.
and human behaviour, but about rules and institutional arrangements that obtain their validity from the ultimate authority of the state. In those systems where the law of the state is taught through the use of the dogmatic method, we find the ultimate expression of the niti approach, so to speak.

On the contrary, a nyaya approach inevitably requires social knowledge beyond the books of law, because it is not in the books of law that we learn about social behaviour, nor about the social and human consequences that are the outcome of applying the books of law themselves. This consideration is intimately connected with the need to undertake transdisciplinary studies, and for this reason the niti approach is more obviously dominant in those systems that are less permeable to transdisciplinarity, as is the case in Continental Europe.134

Thus, by using the niti/nyaya distinction it is suggested that transdisciplinarity is a useful tool not only in descriptive terms but also in evaluative or normative terms, since it takes considerations about justice into account in a broad and non-formalistic way. As has been emphasised in the literature, in legal fields that are particularly sensitive to justice, such as human rights or legal ethics, global success relies more heavily on cultural matters than on the enacted codes or rules, which are seldom the solution to the problems.135

Thus, for example, a niti approach to human rights in the world would offer almost a heavenly picture, with dozens of very ambitious legal documents in effect at the national, regional and global level, including many statements and declarations but also legally binding laws. However, once we look through the nyaya eyeglasses we must admit that the global score in human rights is dramatically far from being perfect, since the real problems do not lie in the enactment of laws but in their implementation. What is necessary to address these problems is not better legal documents but intermediaries between law and social sciences, as well as a more

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134 In countries where there has been an intense exposure to legal realist thinking the situation is significantly different. The niti-nyaya distinction resembles the distinction between law in books and law in action that was initially formulated by Roscoe Pound, the father of American Legal Realism (Roscoe Pound, ‘Law in Books vs. Law in Action’ American Law Review 44 (1910)).

intense cooperation among disciplines that can identify and address the real causes of the problems.\textsuperscript{136}

\textbf{STATE-CENTERED POSITIVISM AS AN EXCLUSIONARY FRAMEWORK.} Sen also criticises social contract theory in general, and Rawls’ version in particular, for being exclusionary, meaning that this approach is limited by definition to one particular political community. The social contract, both in the Rawlsian version and in the classic versions, is signed by a specific set of individuals, excluding of other individuals. The contents of the contract bind those individuals that have signed it (and not others) and it is among them that just arrangements are made. This position is absolutely consistent with the spirit of the contractualist tradition, which aim (since Thomas Hobbes) is to legitimate the political power of the state.

However, as Sen points out, in an increasingly interconnected global world it is extremely narrow to examine justice within the borders of a particular nation-state without taking facts and perspectives that originate abroad into account. This is so for at least two reasons. First, because in the world we live in what takes place in one nation-state may have (and often has) a very serious impact on citizens in other nation-states. Second, because perspectives from abroad can illuminate native conceptions of justice, thus becoming a pivotal element in the fight against parochialism.\textsuperscript{137}

State-centered positivism represents parochialism at the level of jurisprudence. The dominance of this traditional model accounts for the fact that considerations about justice are to a great extent excluded, or marginalised, in legal education. Much injustice in our world is global in scale, and national law is inevitably narrow both as a perspective to observe and describe injustice and as a weapon to fight against it. Moreover, an exclusive focus on domestic law misses the relevance of perspectives coming from beyond the borders of the nation-state, thus condemning legal theory and legal education to parochialism.

\textsuperscript{136} Merry, ‘New Legal Realism’, 978. 
Sen’s approach to justice is inspired by the value of ‘open impartiality’, that (in contrast with Rawls’ concept of ‘justice as fairness’) is not limited to one single community. Open impartiality not only takes the interests of those who are nearby into account, but also of those who are far away. The search for objectivity that a rational theory of justice requires is better satisfied when many different judgments coming from many different sources survive an informed scrutiny. Instead of the Rawlsian original position, Sen suggests bringing back the analogy of the ‘impartial spectator’ as it was originally formulated by Adam Smith. In the eyes of the impartial spectator state boundaries are of little relevance, even if we cannot ignore them for legal purposes.

Of course, the fields of international and comparative law can offer some interesting perspectives in this regard. In fact, in his last important book, The Laws of Peoples, Rawls translates the ideals of international law into his system of political philosophy. Grosso modo, Rawls’ shift consists in treating the different states as independent units that relate to each other in different ways, including a hypothetical original position where representatives from different communities would take part. However, Sen concludes that this solution is partial and unsatisfactory, since ‘international’ and ‘global’ are not the same, and the real nature of justice (as well as the scope of injustice) is global rather than international. In Sen’s own words, “the demands of global justice may differ substantially from those of international justice”. Thus, the central position in Rawls’ theory remains occupied by single political communities individually considered. By the same token, state-centered positivism accepts international law as long as it is conceived as the set of rules that are the result of formal agreements among sovereign nation-states.

Always following Sen, there are very specific problems with this model. On the one hand, this conception of ‘international’ ultimately demands the institutional support of a global supra-state that is not feasible in the short term and not necessarily desirable either, as has been mentioned before. On the other hand, not everything

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138 Ibid., p. 123.
139 Ibid., pp. 44-6.
that is important for justice depends on the state: individuals, groups and non-state organisations can be both agents and victims of injustice. The interactions among these agents (often of a transnational nature) cannot be reduced to a perspective based on the centrality of the traditional sovereign nation-state. In this point, Sen’s critique in the field of political philosophy is in line with the paradigm shift that is taking place in most social and humane disciplines, in spite of the dominance of state-centered positivism in legal theory and legal education.

Thus, both by adopting an institutionalist perspective and by concentrating on individual political communities (either in isolation or interacting), state-centered positivism does not provide a good conceptual tool in order to consider matters of justice and injustice. Just as traditional social contract theories struggle with real injustice in an increasingly pluralistic global world, state-centered positivism struggles to cope with the pluralistic complexity of contemporary legal phenomena. I suggest that by accepting ‘transnational law’ as a legitimate object of study, by admitting the legal importance of non-state actors and by leaving the door wide open for legal pluralistic thinking, law schools could inspire a sense of justice in future lawyers in a way that state-centered positivism is incapable of.

142 Ibid., pp. 141-2.
VII. Conclusion

I once heard a senior administrator of a top American law school saying that he had the impression that in most law schools around the world (he had been visiting a few of them very recently) people were still riding horses. His metaphor keenly points to a fact that can be stated in a less picturesque but more precise way, by saying that to a great extent legal education is still living in the 19th century, at least in many parts of the globe.

In particular, the dominant model of legal theory and legal education, namely state-centered positivism, has the flair of the 19th century. It assumes a conception of knowledge that is based on 19th century epistemology, but that does not hold true anymore, and it works with a conception of the state that was at its peak during the 19th century, but that does not hold true anymore either. It even shows some of the ideological nationalism that was typical in the 19th century and that still pervades the legal profession and legal academia in many countries.

State-centered positivism has not promoted an active dialogue between law and other fields of knowledge. Quite the opposite, for the last centuries it has justified the relative isolation of the lawyer and her methods that has been particularly crucial in some legal cultures. The result is that law remains faithful to some traditional conceptions that other social disciplines are questioning very seriously, while trying to adapt themselves to the dramatic changes that our world is suffering.

Transnational law is among the many consequences that globalisation carries with it. The problem is that both globalisation, as a general framework, and transnational law, as a specific set of normative phenomena, jeopardise the model of state-centered positivism and the conception of the territorial sovereign nation-state that lies behind the model.

Traditional legal theory and legal education find themselves in trouble, and it is not surprising that academic lawyers react by denial. Similarly to the attitude of
children, who close their eyes when they see something that they do not like, many lawyers act as if nothing different was happening, and trust in the ability of old forms of reasoning to cope with an increasingly complex and pluralistic reality. Just as we can understand childrens’ reactions, we must understand the reaction of traditional legal thinking. It can be explained. But it cannot be justified. On the contrary, it must be overcome.

I am not claiming this is an easy thing to do, because obviously it is not. The difficulty of confronting reality is the central theme of one of the founding texts of Western philosophy, Plato’s cave allegory, in The Republic. As this parable suggests, confronting reality is tough. It requires great effort and strength to climb all the way up to the mouth of the cave, one will be inevitably blinded by the clarity of the world outside, and, finally, when returning to the cave one will not bear to live amidst darkness anymore, but will nonetheless cause great resentment on those who stay there comfortably.

But comfort zones can be zones of neglect. Especially when they are hidden deep in a cave. Looking at the world from the perspective of any other social science we see something dramatically different from the world legal theory still inhabits.

Legal theory and legal education must change in order to confront reality as it is. This does not mean abandoning everything that has been done until now to start all over again. In the same way as Einstein’s theory of relativity did not imply the abandonment of Newtonian physics, that are still profitably used, legal academic tradition should be kept for what it is worth. But state-centered positivism, insofar as it makes up for an exclusively institutionalist and exclusionary framework, should be seriously questioned, not to speak about the principle still dominant in some parts of the world that legal knowledge consists on the literal knowledge of the contents of the rules of the state.

I have claimed that state-centered positivism must be overcome both for descriptive and for normative reasons. For descriptive reasons, because it does not help us to better describe, analyse and understand our global and increasingly
pluralistic world. For normative reasons, because it critically excludes important perspectives of justice in the real world, and does not help us to educate future lawyers to be good lawyers, including from a moral point of view.

Of course, legal theory and legal education have the option to remain attached to the old conceptions. Following the words of the speaker at the commencement ceremony with which I opened this paper, lawyers could look with contempt at what is taking place in the world just to enarbolate the singularity of legal science: we are the ones who remain faithful to the old model, no matter what happens in other fields. This may be a more or less comfortable option in the short term. However, such attitude is doomed from the outset, and its only destiny would be to reduce legal studies to the field of irrelevance.

But law is too important a field of human activity to enjoy this privilege.
PSEUDO MAXIMUM LIKELIHOOD ESTIMATION OF STRUCTURAL CREDIT RISK MODELS WITH EXOGENOUS DEFAULT BARRIER.