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SOME REMARKS ON METHODOLOGY IN LEGAL STUDIES IN THE LIGHT OF THE CHALLENGES THAT GLOBALIZATION POSES TO LEGAL DOCTRINE

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Abstract

This article revolves around the recent flourish of writing devoted to problems of method in law studies relating to the challenges that globalization poses to legal doctrine. The aim of the article is to maintain that in issues about legal methodology there is little methodology and much more ideology and to show that, as a consequence of this, the perception itself of what does not work and the search for a "methodological turn" are strongly influenced by ideological and not methodological preferences. The paper is composed of two parts, both conceived as clues to corroborate such a stance. The first part discusses from a conceptual point of view what makes the study of law a relatively autonomous field, especially focusing on the idea of doctrinal constructivism advocated by Prof. von Bogdandy. The second part, taking as an example a recent study about new models of pluralist global governance, tries to argue that it is possible to reconcile doctrinal constructivism with a plural legal world.

Key words: methodology; legal doctrine; pluralism; global governance.

ALGUNS COMENTARIS SOBRE METODOLOGIA EN ESTUDIS LEGALS EN VISTA DELS DESAFIAMENTS QUE LA GLOBALITZACIÓ PLANTEJA A LA DOCTRINA LEGAL

Resum

Aquest article tracta del creixent nombre d'escrits sorgits al voltant dels problemes de mètode en estudis de dret sobre els desafiaments que la globalització planteja a la doctrina legal. El propòsit de l'article és mantenir que en assumptes sobre metodologia legal hi ha poca metodologia i molta més ideologia i, també, com a conseqüència d'això, mostrar que la percepció mateixa d'allò que no funciona i la recerca d'un 'gir metodològic' estan fortament influïdes per preferències ideològiques i no metodològiques. L'article està format per dues parts, les dues concebudes amb la finalitat de corroborar la posició esmentada. La primera part tracta, des d'un punt de vista conceptual, sobre què fa de l'estudi del dret un camp relativament autònom i se centra, especialment, en la idea del constructivisme doctrinal defensat pel prof. von Bogdandy. La segona part, tot prenent com a exemple un estudi recent sobre nous models de governança global pluralista, intenta sostenir que és possible conciliar el constructivisme doctrinal amb un món legal plural.

Paraules clau: metodologia; doctrina legal; pluralisme; governança global.

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Summary

1 A Renewed Season of Disputes On Legal Methodology

One of the main figures in legal scholarship of the second half of the 20th century has written that "sciences which deal with methodology are ill sciences" (G. Radbruch, 1969).[1] Therefore one could look with some concern at the recent flourish of writing devoted to problems of method in law studies relating to the many challenges and changes in our contemporary world.[2]

Such works point out mostly what is not working well and what to undertake to do better.[3] The aim of this article, instead, is to maintain that in issues about legal methodology there is little methodology and much more ideology and to show that, as a consequence of this, the perception itself of what does not work and the search for a "methodological turn" are strongly influenced by ideological and not methodological preferences. As will be clearer reading on, here by ideology I mean the set of ethical values which jurists imply in their practices, which reveals a certain view about what the law is and how it works.

More specifically the article seeks to articulate in the first part, sections 1-3, an argument that legal methodology is something which cannot be equated with methodology of science.[4] There are, indeed, underlying assumptions and choices that cannot be fully illuminated by explaining techniques and procedures used by legal doctrine and the main reason is that the subject to analyse, law, is to a large extent disputed.

The way in which jurists and lawyers represent and discuss their own practise is, in turn, constitutive of the domain of law. This is a simple and broadly acknowledged feature of this area of human activity, but curiously it is often forgotten at the moment of criticizing what legal doctrine does or recommending what it should do.

In the second part, sections 4-6, building on the assertions of the first part, an account of how to model multilevel or global governance is presented in order to argue that this novelty does not require giving up a doctrinal approach to the study of law.

This reflection was prompted by the initiative of the PhD law school of Florence to devote a whole cycle of seminars, featuring scholars of different disciplines and positions, to the topic of the "identity of legal sciences in multilevel legal systems". The focus of the title is on "legal sciences", suggesting that it would be necessary to seek (or recommend) an identity of the latter in connection with multilevel legal orders (provided that we are able to establish what these are). This claim might be understood in at least two senses: a) multilevel legal orders have changed (or make it convenient to change) the identity of legal sciences (hence of "legal scientists" too); b) legal sciences (and jurists) which have to do with multilevel legal orders need a different identity from the traditional legal sciences of traditional national legal systems.

In the literature on concurrence and overlapping of national, supranational and transnational legal orders, when dealing with methodological problems, the first option is by far the most common. Not only, that is to say, would traditional legal methods be unfit to investigate the new phenomena of the global order, but also, as an effect of such an order on domestic legal systems, these should be studied on different grounds which imply a kind of break with the past.

1 Quoted by R. Zimmermann, *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today,* 46 (2001).

2 Among the most recent see Rob van Gestel, Hans-W. Micklitz, Miguel Poiares Maduro, "Methodology in the New Legal World", EUI Working Papers, LAW, (2013).

3 This is made clear even from the choice of literature genre when articles are called "manifesto". See Armin von Bogdandy, "National legal scholarship in the European legal area—A manifesto" *International Journal of Constitutional Law* (I•CON) 10(3), 614–626 (2012)*; S. Cassese, New paths for administrative law: A manifesto,* I•CON 10 (3), 603-613 (2012*).*

4 It is unthinkable to provide bibliographic references as regards scientific method. Let us cite the entry for scientific method in the *Oxford Dictionary of English*, A. Stevenson, ed., OUP (2013) online edition: "method of procedure that has characterized natural science since the 17th century, consisting in systematic observation, measurement, and experiment, and the formulation, testing, and modification of hypotheses".

As regards this issue it is worth elaborating a little more what I have mentioned above about law as a disputed concept. It seems to me, in fact, that what is at stake in the foregoing debate is the concept of law itself rather than legal methodology. That is to say that the main reason for difficulties—more or less genuine—in depicting legal science (whether or not we can use this term appropriately) lies precisely in disagreements about the subject.[5] The historical time we live in, that is to say the overwhelming narrative about the loss of importance of national legal systems, makes that difficulty even more evident. In the end, however, it is neither new nor especially surprising.

The reason is that it is a feature of "law doctrine" to be part of its own subject, part of the "thing". In other words, a task of our "science" is the (explicit or implicit) definition of the subject of study and therefore, at least partially, of law too.

We can think, as an example, of the dispute, unresolved and irresolvable, about the role (that is) to be acknowledged to ethics in legal discourse. In the end the struggle between legal positivism and its opponents can be reduced to the following: according to the former, moral values (which are not embodied in legal norms recognized in the light of certain formal criteria) cannot be part of a legal system. From this it does not follow, from a legal positivistic point of view, that courts and lawyers in general do not resort or should not resort to moral values in order to solve a case. According to opponents of legal positivism moral values must (or may) be part of a legal system. They become (or may become), in other words, rules of recognition of the existing law.

Although we have just defined the existing law in two different ways, they are such that they still enjoy a common denominator in normativeness. In other words, there are anti-positivists who can concede that a guide to human conduct in its social dimension—which for some reason we call law—is needed. Without entering into too sophisticated disputes, let us assume that those who do not accept even this minimal ethical commitment toward normativeness, in my view, are not properly able to take part in a "legal speech". Naturally normativeness alone is not sufficient, as we have just seen that we can rely on moral rules conceived or not as legal rules.

One might doubt that these kinds of dispute are relevant for a lawyer steeped in her work. Suffice it to say that an issue as important as the rule of law, as regards which legal positivist and anti-positivist scholars often agree on the point that the rule of law in its pure formal dimension is an essential concept and ideal for law if it wishes to fulfil its function with a minimum of effectiveness.

We can also sustain that these theoretical discussions are irrelevant from an even more general perspective. It can be said that law is a practice which works thanks to a cluster of components forming a set of cogs and that this keeps on working "against all odds". Jurists, as components of this practice (the cogs), are part of it and that is all that matters. We can trace back this kind of consideration, albeit implicit, to several prominent legal scholars. Let us think, for instance, of the words of Vittorio Emanuele Orlando in 1925 after founding in 1885 the so called "legal method" and "school" of Italian public law. He pointed out, reflecting on the outcomes of public law scholarship, that the very merit of the group of scholars who followed his method was "not having wasted their time on methodological disputes".[6]

However, taking heed of how much wisdom lies in this admonishment, I do not believe we can be satisfied with utterly and deliberately ignoring basic conceptual issues about law. Especially when we define ourselves as "scientists" (or just scholars) being aware of what we do and why might be therapeutic in itself. As regards this point I need to develop my argument a bit more.

5 Such a statement is obviously neither new nor particularly original. See for example recently Dennis Patterson, "Methodology and Theoretical Disagreement", in *European Legal Method. Paradoxes and Revitalisation,* 227 (Ulla Neergard, Ruth Nielsen, Lynn Roseberry eds. 2011), whose starting point is that "methodology cannot be separated from one of the most fundamental questions: how do we decide what the law is?".

6 *Diritto pubblico generale: scritti varii (1881-1940) coordinati in sistema*, 24 (1940).

2 Doctrinal Constructivism versus Topic Method

It is common to match law to natural languages. The most interesting analogy is this: as we naturally learn to speak because of a need to communicate and take part in the practice, so we learn the basic features of law through practice, which, to a certain extent, affects everybody. As has recently been explained, the legal method meshes the way in which common people ("common sense") recognises the law with a technical approach, or better, it builds the technical approach on common sense.[7]

Those who want to describe this practice, as a linguist or a lexicographer do with a language, look at it from outside and for this reason they can be described as scientists. The jurist steeped in the practice cannot and does not want to assume such an external point of view. She simply continues to take part in such a collective endeavour (the practice of law). Thus, is she still a scientist? This question is nearly embarrassing considering the wide use we make of expressions like "science" of this or that branch of the law and therefore I am not going to give a comprehensive answer. I shall confine myself to pointing out my preferences as a way of joining the ongoing debate.

We can say that such a scientist must be a quite special instance of the type, because her goal is to prescribe rather than describe.[8] Our task (as legal doctrine) is the one which Norberto Bobbio used to define "prescriptive jurisprudence" and Uberto Scarpelli, in turn, "directive methodology".[9] Here the problem regards the possibility itself to sever the practitioner from the legal scholar.[10] I do not believe there is a qualitative distinction between the two but only a "quantitative" one, which concerns the addressees and style of respective discourses. The methodology is, however, the same.

Practitioners limit themselves to applicative and interpretive operations, where a remarkable normative attitude can be detected. Scholars—at least in the common tradition of continental Western Europe—add to this the construction of "dogmatic theses", that is to say clusters of propositions which we call legal theories or doctrines.

We can think of some examples regarding Italian public law as the theory of "legitimate interest", that of "administrative act", and that of "parliamentary government". These theories or dogmatic constructs have a partially cognitive content, but actually they work above all as instruments of integration/creation of law. In other words they are employed to generate implied norms or, better, norms which cannot directly refer to a basic written proposition. [11]

For instance, from the theory according to which acts of "technical appraisals" of administrative authorities do not belong to the discretionary decision type, one can infer the legitimacy of their full assessment in court on the grounds of articles 24 and 113 of the Italian Constitution. From the theory of the division of powers, the theory about the existence of "powers reserved to the public administration" follows, from which, in turn, the theory of the constitutional unlawfulness of concrete decisions shaped in the form of a statute law or the thesis of the contestability of such statutes—conceived as substantive administrative decisions—before an administrative court follow.

It is what Armin von Bogdandy calls "doctrinal constructivism" and this is part of our legal culture.[12] In the

7 Mario Jori, *Del diritto inesistente. Saggio di metagiurisprudenza descrittiva*, 138-139 (2010).

8 The point is not about the objectivity of legal propositions vis-a-vis written rules which the former describe. Indeed also when a jurist limits herself to "quoting" what a legal source says she is recommending that you should do "such-and-such".

9 Respectively Norberto Bobbio, "Scienza giuridica tra essere e dover essere", *Rivista internazionale di filosofia del diritto*, 475-486 (1968), and Uberto Scarpelli, "Il metodo giuridico", *Rivista di diritto processuale*, 533 (1971).

10 There are those, though, who mean by legal science every operation of application of law, which is based on the same methodology, that is to say, as a physicist. See Gaetano Carcaterra*, Presupposti e strumenti della scienza giuridica*, 1-10 (2012).

11 See Riccardo Guastini, "Componenti cognitive e componenti nomopoietiche nella scienza giuridica"*, Diritto Pubblico* (DP), 927 (2004).

12 *The past and promise of doctrinal constructivism: A strategy for responding to the challenges facing constitutional scholarship*

words of the German public law's leading scholar, doctrine develops and often creates fundamental concepts and structures, enlightens and legitimises existing law in the light of general principles, inspires and criticises the evolution of law and instructs new generations of lawyers.

With specific reference to public law Bogdandy points out that this "method" steeps its roots in a "positivist" stance, according to which, though, doctrine, rather than concentrating on the comment and systematization of positive law, is expected to "structure the law" using autonomous concepts: "In order to accomplish such a structuring, law is detached from social reality and tied to legal instruments that flow from the sources of law. From this foundation, the positive material is then transcended, not by way of political, historical, or philosophical reflection but through structure-giving concepts such as 'state', a 'legal person', 'state will', 'sovereignty', 'individual rights in public law', 'person', or 'substantive' and 'procedural law'."[13]

There is no point here in dwelling upon the numerous biases and consequent criticisms and reactions over this method across more than a century of development of public law scholarship in Europe. It has been labelled as dully dogmatic and as such detached from the reality of social and political life. An injection of social, political, economic and so forth views in legal doctrine has been, therefore, the answer to this dogmatic "absolutism". Such a trend has further increased with the advent of the post-World War II constitutions and their openness to moral and political values and principles. Nevertheless these approaches have hardly replaced within mainstream scholarship the basic tenets of constructivism.

"In contrast to the success of the agenda of the positivist legal method, the integration of social science approaches into legal scholarship and theoretical reflection fail to conjoin into a common disciplinary platform; here, in contrast with the doctrinal sphere, the relevant insights are often incommensurate. And so it should remain: the incorporation of 'reality' and 'theory' into legal scholarship is as heterogeneous and controversial today as it was eighty years ago".[14]

Hence, one should bear in mind that radical attacks against the "constructive" role of legal doctrine are far from new. At every historical turning point, now globalization, new surges of such stances flow.

A good example of the latter is represented by some of the responses prompted by the Manifesto of von Bogdandy about the future of European legal doctrine, one of the starting points of the aforementioned Florentine cycle of seminars.[15] The effort of von Bogdandy here is especially aimed at facing the hegemony of North American legal culture. He proposes, on the one hand, to insert in the tradition of dogmatic constructivism, which he defends, a reshaping of the boundaries between different legal disciplines—favoured by the new problems that the progressing of a *jus publicum europaeum* pose—and, on the other hand, to resort more systematically to comparison and dialogue with social sciences.

I shall discuss a response to such a view which can be taken as an epitome of the "fight" against doctrinal constructivism.

I refer to a very distinguished Italian scholar, Massimo Brutti, who has argued that doctrinal constructivism suffers from an unavoidable lack of effort to clarify the aims of law as a social practice and to explore how these aims can be effectively achieved. According to this view only a "historicist" stance or one based on the North-American realism movement would allow us to reach such aims.[16]

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in Europe, I•CON 7, 364-400 (2009*)*.

13 Ibidem, 373.

14 Ibidem, 380.

15 Quoted supra at note 3.

16 Massimo Brutti, "Per la scienza giuridica europea (riflessioni su un dibattito in corso)", *Rivista trimestrale di diritto pubblico* (RTDP), 905 (2012).

In my opinion we should simply acknowledge, though, that in all our "constructions" there is a hiatus between what we say and what we actually do: in other words we continuously seek arguments to cover up or justify the unavoidable discretion that the application of law yields. And neither the anchorage to "history" (in itself not an exact science) nor the adherence to a kind of "realism" make this or that theory magically more "scientific".

Brutti speaks of a counterposition between a "topic" method, which he defends, and an "axiomatic" one. When facing a legal problem, a decision-maker who uses the topic method grasps a point of view which looks like a good solution. This solution does not find its justification in a preexisting conceptual frame, as an axiom-like interpreter would. Instead the topic-like interpreter adopts a solution according to a choice justified resorting either to community shared values or to functional criteria in order to achieve a desirable goal.

An example of a topic method interpretation would be the theory according to which in the new Italian Administrative Procedural Code (IAPC) one could have found the so called enforcement action to have an administrative body condemned to act according to the plaintiff's demand also before its express provision in the IAPC itself with an ensuing amendment. In actual fact, for years Italian doctrine has been supporting this view on the grounds of elegant dogmatic constructions largely based on a systematic ("axiomatic") approach, but before the explicit provision of the "enforcement action" in the IAPC courts kept claiming its inadmissibility in the Italian legal system.

The general point I want to make is that it seems to me quite inappropriate to assimilate the idea of legal system to an axiom. In the argumentational processes of lawyers there is a bit of everything and also the construction of a system (which remains a cornerstone for thinking like a lawyer[17]) is not made once and forever, as if carved in granite. It is instead something which is very flexible and changeable.

As a matter of fact—continuing with the example of the enforcement action before its being established under a positive law—one had to retrieve a rule in the Italian system (such as, say, article 1 of IPAC[18] according to which the administrative judiciary is to guarantee a full and effective protection of rights according to constitutional and European legal principles) if one wanted to uphold the "topic" argument, deduced by way of comparison, according to which the enforcement action is a European principle because it is provided for by the German § 42 I 2 of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung/ VwGO). And for that reason it shoul have been applied in Italy as well.

One may note, perhaps, from an "axiomatic" perspective, that the latter argument is still not very solid. Anyway, what I am trying to say here is just that if a lawyer wants to convince somebody (for example an administrative court) of the rightness of her view, it is mandatory for her to justify such a claim on the grounds of rules which are in some way deduced from the legal system as well as resorting to any other argument she considers opportune (comparison, history, a theory of justice, economic efficiency). This remains true even if a historian could explain with hindsight that this rule was introduced in a certain legal system either because it expressed a shared value or because it was appropriate to reach the desired aim.

The rules of the game of the practice we are speaking of (the pragmatic context of interaction between law and doctrine) are not based on the technique of "thinking by problems" recommended by Brutti. Unfortunately in our linguistic conventions it is the legislator, in a broad meaning including therefore also the judiciary, for whom that motto is appropriate.

And indeed the other example of a topic method proposed by Brutti is apparently more convincing, but just because it is remarkably different from the previous one. In fact the example concerns an English judge of the House of Lords, Lord Denning, who introduced attachment in the English law just arguing that that was

17 See Frederick Schauer, *Thinking Like a Lawyer*, 4-9 (2009).

18 Mentioned by Massimo Brutti in the above quoted article (note 16).

the right thing to do. But, as he was a common law judge, Lord Denning possessed the power to change the law, as every other higher court of civil law can do.

In brief, as long as doctrine works and contributes to the construction—through the maintenance of a specific language—of concepts apt to guide legal operators, dogmatics cannot suffer from radical or even destructive criticism, just because, as is mentioned above, it is part of the "thing".

To sum up we can also say that what is typical of legal doctrine is the necessity to deal with some form of "constraints", which counteract what we may sense as facts in the real world. Doctrinal constructivism entails that we are constrained by limits that emerge from the systematic or conceptual constructions of doctrinal work. Of course, there are disagreements over what does and what should constrain the kind of things we can say and still count as participating in legal doctrinal argument. Nonetheless, these kind of methodological disputes accompany the endless effort of legal scholars to come to terms with the problem of serving the identification of the object of study from the construction of theories which stand within the domain of such an object. It seems to me that a "method" which programmatically refuses such constraints (such as the "topic method") is hardly within the domain of law.

3 Science and Jurisprudence

However, we should also avoid the risk of falling into conceptualism, which lurks beneath either the faith in the truth of syllogism or the idea of the infallibility of reasoning starting from principles.

We often attribute those flaws to a "positivistic" stance, which is, though, more hypothetical (and perhaps professed by doctrine in certain historical periods to underpin ideologically oriented conceptions) than real.

But, among the different conceptions, ideologies, stances that legal doctrine assumes—often implicitly or also without awareness—there are margins of choice. A kind of critical legal scholar who wishes, for instance, to inspire herself in the ideal of certainty of law should not hide her preferences behind dogmatic constructs, taken as analytical discourse and not as what they actually are: instances of prescriptive discourse.

In this context we might briefly wonder whether and to what extent the question of method in law resembles what scholars who assume an external point of view mean by "methodology".

In law, I insist, disputes about method are only apparently such. They are indeed disputes about the concept of law or doctrinal aims and we may add that it is inevitably so since this is derived from the special nature of "jurisprudence" vis-à-vis "science".

The same opposition between an inductive and a deductive method is largely unjustified. It is not appropriate, that is to say, to describe "legal science" as something which proceeds by way of careful observation, analysis and classification of social facts, formulation of generalisations and attempt to design hypothesis and explanation for such generalisations, in other words to discover the "laws" which govern social life.

A social scientist would define more or less in such a way her method in terms of scientific methodology. However, it is no coincidence that if we look in a social science text-book we do not find any mention of "legal science".

I think it is worth stressing that the question here is not so much the one relating to the unavoidable involvement of the observer-experimenter, which also affects natural sciences, or the necessarily provisional character of any "scientific truth", and so on.

Legal discourse in turn does aim at objectivity, at least in terms of averagely acceptable justification of its statements, but continues to be a prescriptive endeavour. For this reason I do not find those attempts which seek the fundament of "legal science" resorting to analogies with epistemology of science very stimulating.[19]

As I have already mentioned. the way I see as the most enlightening to understand the difference between science and jurisprudence is the rooting of law, as a social practice, in common sense. What common sense means by law cannot be ignored (that is to say that it poses rigid barriers to eccentric theories), being the thing itself which we speak about, a reality which exists according to a collective belief or, better, a collective willingness (to mention Searle and his institutional facts).[20] In empirical sciences, on the contrary, one must necessarily ignore common sense if one wants to propose a new theory. Let us think, as a banal example, of the Ptolemaic system of universe, which is false just because it reflects common sense.

We can probably find some conception of legal doctrine according to which a jurist steeped in her work does exactly what social scientists do: examining brute facts to discover their "laws". Sometimes this method is mentioned as an inductive one and is attributed in the Italian debate to institutional views, though I do not think this is an appropriate account of such approaches. Nor is it what coherent realists recommend, indeed they should strictly confine themselves to describing what courts or lawyers do.[21]

I think, instead, that this kind of approach characterises certain legal ideologies—which are inspired by hermeneutics—which in the end aim at seeking law with no regard to a theory of legal sources.

By "theory of legal sources" I mean the rules of recognition of existing law. I am now making explicit what was implicit in what I objected to above as the alleged superiority of a "topic" method. In my humble opinion, without a theory of legal sources, we cannot actually understand a "legal speech". That is to say that we can neither say what lawyers do nor, assuming an internal point of view, what they should do.

19 There have been countless attempts to make legal studies more scientific. In most cases these attempts start by adding something else to the word "law", according to the pattern "law and...": law and economics, law and finance, law and society, and so on. As regards this point see Mathias M. Siems, "Legal Originality", *Oxford Journal of Legal Studies* 28,156 (2008). This is interesting research which helps jurists to understand the consequences of their own work and which favours useful interdisciplinary contaminations. It shows, though, its fallacy as soon as it claims to propose itself as the "authentic legal method".

The same problem partially affects comparative law if one presents it as the legal method *par excellence* and points it out as the recipe to cure all the ills of legal culture. In other words, it seems to me, a methodological directive according to which legal research should essentially coincide with comparison of solutions in different legal systems would sound quite peculiar.

It is the existence of a class of legal academics, who need to accredit themselves as scientists before both the world of legal practice

and other academic disciplines, which boosts the tendency to seek analogies with methodologies universally acknowledged as scientific because they are descriptive.

However, the use of the word "science" to indicate the study of law is not sufficient to cover the perennial unease of jurists in identifying the firm points of their discipline. On the contrary, it fuels that uneasiness. This is the reason why, after all, I believe that to give up using the expression "legal science" or "legal sciences" would be a good starting point. On the contrary, on behalf of the scientificity of legal research, distinguished US academics come to the claim that "doctrinal legal research is dead" (Eric Posner as referred by R. v Gestel and H.W. Micklitz, "Revitalising Doctrinal Legal Research in Europe: What About Methodolgy?" in U. Neergard, R. Nielsen, L. Roseberry (note 5) 25.

On such questions it is well worth reading David Kennedy, "A Rotation in Contemporary Legal Scholarship", *German Law Journal*, 338 (2011), an excellent work which explains the evolution of US law doctrine towards the search for a "scientific paradigm" to respond to the radical challenge of realism.

20 John Searle, *Speech Acts: An Essay in the Philosophy of Language (1969). Upon such a philosophical approach Neil MacCormick and Ota Weinberger, An Institutional Theory of Law: New Approaches to Legal Positivism (1986),* have built one of the most influential institutional theories of law.

21 In Italian legal culture "institutionalism" is mainly associated with the legacy of Santi Romano *L'ordinamento giuridico* [1917], (1946), according to which law is first of all a matter of organisation, that is to say of people who set up their own political institutions. This attention to institutional facts has influenced an important part of the Italian public law doctrine which has developed an aptitude to cultivate relationships with social sciences and a less formalistic approach to the study of law, which is sometimes labelled as 'public law realism'. I am referring to scholars such as Massimo Severo Giannini and Sabino Cassese.

As has been explained by some legal theorists[22], reasoning in such a way means attributing a specific authority to some acts, enabling us to formulate norms which are independent and exclusive reasons for the action.[23]

In other words, according to such a view, law as a social practice implies a claim of authority. Even though I am inclined to think that this is a conceptual aspect of law, it can, nonetheless, also be a matter of choice of lawyers who want to assume the view of a "critical legal positivist".

The so called inductivist views, instead, fail to recognise the reason why law has such an important role as a social practice. This reason has been recently pointed out in the explanation that there is an intuitive meaning of law (law of common sense) which everybody in our western society shares (otherwise we could not use

this term in different contexts and understand each other) and whose main feature, in my view, is "counter-factuality".[24]

4 Globalisation and Legal Doctrine

The trend I am conventionally calling realism/inductivism[25] has flourished with globalisation and here we can situate the question of multilevel, in its two main declinations of multilevel governance and multilevel constitutionalism.

This fortunate term is not especially explicative and even misleading if referred to phenomena different from the European Union for which it has been coined.[26]

The expression gives the idea of a cluster of decisional levels having some kind of interaction and still responding to some sort of "order", but that we do not hazard to call federation. However, federalism itself is an indeterminate concept and we could also think that multilevel is merely a way of describing a federal legal system. The point is still about having a theory of legal sources to decide whether there are different legal systems or just one "multilevel". This is indeed the typical case of the dispute relating to the nature of the EU.

However, if we take into consideration the broader phenomenon of international organisations, transnational political processes, private transnational organisations, various instances of non-state entities which conclude transactions and create new institutions (which we can hardly consider political) with vast consequences for the life of people in many countries, the idea of a multilevel structure is not very seductive. There are no constitutionally binding rules for these actors, they weave relationships with each other going beyond national boundaries. If the multilevel metaphor suggests a constellation of sites or platforms which are relatively stable and not too different from states, these new actors and respective interrelations suggest, instead, a net of "fluid, intermeshing nodes of influence".[27]

Perhaps even more hackneyed is the word pluralism, but as it is more generic it can stand for a broader group of phenomena, among which also the one called global governance. Hence, I feel it is more promising and explicative than multilevel.

22 Joseph Raz, *The Authority of Law (1979).*

23 See also Frederick Schauer (note 17) 61-84, where the idea of authority constitutes the necessary premise for reasoning through generalisations that is the way how jurists think.

24 On law as partly rooted in common sense see Mario Jori (note 7).

25 The term realism does not mean in this context a proper theory of law, which in Italy is better known as sceptical. In fact the streams I refer to share a strong commitment to influencing legal methodology (see also supra at note 22).

26 See Giacinto della Cananea, "Is European Constitutionalism Really 'Multilevel'"? *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 70 (2),283-317 (2010).

27 Neil Walker, "Multilevel Constitutionalism: Looking Beyond the German Debate", LEQS Paper No. 08/2009, 21 (2009).

The fact is that, *vis-à-vis* globalization, feeling ill at ease at using the fundamental criterion of legal methodology—a theory of legal sources—but pushed forward by the need to subject certain phenomena to legal rules, we risk taking causes as effects and forsaking legal methodology completely.

However, we can find outside legal disciplines sound and useful insights of the relationship between law, states and globalization, like the one offered by Sassen, who explains to what extent part of phenomena associated with this term has actually developed inside the state, through a change of some historical features of the latter, which continues, though, to be the grounds on which global processes thrive.[28]

From this view comes the proposal to conceive global governance and relating institutions as transnational more than post-national phenomena, if by the latter one means the end of state experience. I shall come back to this specific issue later.

What consequences does all this produce for legal doctrine? This question is in the background of the "Manifesto" of Armin von Bogdandy about the future of European legal doctrine,. The answers of the author, as we have seen above, are both to favour a loosening of the rigid barriers between legal disciplines still characterizing the European doctrinal tradition, especially in the light of the new challenges posed by EU integration, and to exploit more systematically the beneficial effects of comparison and dialogue with social sciences.

According to other responses, globalization requires a radical change of the role of jurists, since the object would be totally different from the one that the concept of law suggested by common sense and the recognition of law made by lawyers seem to point out. Once more we are dealing with disputes about the subject. Then it is worth examining more closely what we are speaking about.

For this purpose I would like to take into consideration a recent study which, with a legal-political approach, distinguishes three fundamental modes of global governance in the light of a wide consideration of the relevant literature.[29]

5 A recent analysis of global governance

The first mode concerns the creation of comprehensive regimes integrated at the level of international relations. These are the institutions which have been founded since the end of the Second World War, the UN and its specialized agencies, the IMF, the World Bank, the GATT-WTO and others. These are regimes which can be reconciled to the principal-agent model, where nation states or their coalitions are the principals and international institutions are the agents which operate according to rules of conduct created by the principals themselves to solve problems of interdependence. Such regimes are thus largely state-centric.

The second mode began to develop in the mid-1990s because of factors of crisis in the first mode which need not be mentioned here. What characterises this new trend is the fading of the hierarchical principle and the affirmation of new forms of "networked information exchange" and collaboration between public and private entities which often, from a political perspective, constitute new patterns of authority. These new relationships and institutions, fostered by the internet and social media, gain authority simply because some players acknowledge them as rule-makers in a certain arena.

28 Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages,* 265-271 (2006): especially significant is the last paragraph of p. 271.

29 Grainne de Búrca, Robert O. Keohane, Charles Sabel, "New Modes Of Pluralist Global Governance", *New York University Journal of International Law & Politics.* 45 (2013), 723-786.

A scholar has developed the concept of "entrepreneurial authority" to indicate this acknowledgement to civil society players of a kind of authority without formal authorization or delegation by states.[30] In several cases such institutions are somewhat orchestrated by the more traditional ones, which either try to stretch their influence beyond the boundaries of intergovernmental agreements or to apply the rules of the latter involving other organizations and global actors.

The most relevant point regards the growth of a variety of governance assets, which include, as well as the above mentioned cases of "orchestration", a number of cases called "regime complexes". These represent hypotheses of aggregations of institutions (states, sub-state unities, international and civil society organisations, private parties) which govern specific issue areas (climate change, energy, intellectual property, and anti-corruption) whose spheres of action partially overlap due to the absence of hierarchical relationships.

That is the area in which the approach called global administrative law (GAL) has mainly taken root. As is well known, GAL stands for a bundle of rules and practices descended from the analogy with the principles of domestic administrative law, among them due process, proportionality, fairness, and transparency.[31] Many exponents of this movement seem to share the intent to reconcile phenomena of global governance with the typical values of the rule of law associated with democratic nation states, using procedural devices to make agencies listen to objections coming from addressees of administrative decisions and promoting the idea that decisions are to be faithful to the directives of the principal.[32]

But, as has been stressed in the literature, transplanting these rules and principles to an environment lacking in devices of accountability, hierarchy, a legislature, etc. is a problematic move both from a theoretical and practical point of view.[33]

Others, in fact, conceive GAL as something completely remote from mechanisms of accountability and legitimacy typical of national traditions. The trend of administrative agencies to create rules on their own, regardless of legislators and courts, would be the essential administrative feature of global networks.

According to this view an experimentalist and self-made rule-making tendency which has been characterizing the functioning of national public administrations for decades has somehow migrated progressively to the transnational and global. Thus GAL should be connected to the idea of a "disaggregate state"[34] which "is not a state in dissolution, but a state which transforms itself into a loosely-coupled "network" of public and private actors, who are held together by a fragmented set of regulatory tasks of "moderation".[35]

The third and more recent model of global governance, called experimentalist, is characterised by even more flexibility and openness to the participation of many and various actors, with a strong connection with groups and local interests and the capacity to swiftly modify strategies of intervention learning from errors. Three examples of this novel mode are pointed out in the above-mentioned work: the Inter-American Tropical

30 Jane Green, *Private Actors, Public Goods: Private Authority in Global Environmental Politics* (PhD dissertation, Princeton University (2010). A significant example is the Forest Stewardship Council, https://us.fsc.org/index.htm.

31 For a synthetic panorama of global administrative law with reference to the most relevant literature see Lorenzo Casini, "States and Global Administrations in Context", in *Global Administrative Law: The Casebook,* chap. I, (Sabino Cassese, Bruno Carotti, Lorenzo Casini, Eleonora Cavalieri, Euan MacDonald eds. 2012). For a deeper reflection on GAL and its features, especially from the perspective of participatory rights, see Sabino Cassese, *The Global Polity,* 159-176 (2012).

32 Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law", *European Journal of International Law* (EJIL) 20, 23 (2009), who maintains we should add the criteria of "publicness" as regards global entities to that of recognition in a Hartian sense. Publicness stands for adherence of global institutions to principles like legality, rationality, proportionality and a number of substantive human rights. For a critical view on this proposal see Ming-Sung Kuo, *Inter-public legality or post-public legitimacy? Global governance and the curious case of global administrative law as a new paradigm of law,* I•CON 10, 1050–1075 (2012).

33 Nico Krisch, "The Pluralism of Global Administrative Law", EJIL 17,247-278 (2006). See also Id, "Global governance as public authority: An introduction", I•CON 10, 976 (2012).

34 Anne-Marie Slaughter, *A New World Order,* 14 (2004).

35 Kart-Heinz Ladeur, "The Emergence of Global Administrative Law and Transnational Regulation", *Transnational Legal Theory,* 243 (2012).

Tuna Commission; the UN Convention on the Rights of Persons with Disabilities; the Montreal Protocol of Substances that Deplete the Ozone Layer.

There is no point in doubting that these examples do show that such regimes are highly informal and even more complex and innovative than second mode regimes.

For the limited purpose of this paper I will confine myself to noting, taking only the first case, that the success of the policy of the Tropical Tuna Commission, whose aim is to protect dolphins from unfettered and inappropriate methods of fishing, was determined in the end by the decision of United States to put an embargo on tuna imports which were not fished according to the techniques established by the Commission itself. So the cooperation of a number of public and private entities and the regulation of fishing implemented outside traditional legal systems surely played an important role, but the intervention of a state legal discipline was nonetheless decisive.

What can we infer from this proposal of systematization of the phenomena of global governance?

First of all that global institutions are to be carefully studied using a variety of conceptual devices, which should be carefully distinguished. Speaking of globalisation or multilevel governance as one thing only, a sort of nebula in contrast with the old state order, looks more like a move to discredit legal methodology *per se* than the result of an objective description of facts.

The same global administrative law, which with some caution can be useful in explaining the functioning of some of those institutions, is not necessarily a category which substitutes national (or European) administrative law, as if the former were the evolution of the latter, a new frontier now standing outside public law.[36]

Secondly, despite what has been commonly claimed, it is not so easy to make out in global dynamics legal relationships between individuals outside state or semi-state legal systems, that is to say normative structures which claim legitimate authority.[37] The same phenomenon of *lex mercatoria*, as a private binding self-regulation, since it is applied by non-state arbitrators, is hardly understandable without considering the role, both in acknowledging and executing decision of arbitrator committees, of national legal systems.[38]

The third consideration is that it is still disputable whether we have actually entered a post-national era or we are experiencing phenomena which should be best described as transnational legal systems.[39]

As has been noted, descriptively, it is unlikely that the majority of US Americans, not to mention Brazilians, Chinese and Indians, perceive themselves as living in a post-national order.[40] In many of the cases which have been studied recently (double taxation, tariff regulation, company bankruptcy, intellectual property, the struggle against money laundering) we can see the presence of rules established astride two or more legal systems through courts, intergovernmental networks, and private parties. We observe processes which seem to overcome the traditional national/international law divide, but which require a further effort of empirical analysis and then reflection at the level of theory of law and law doctrine according to the respective conceptual and methodological categories.

36 That is, otherwise, the fascinating view of Sabino Cassese, "'Le droit tout puissant et unique de la société'. Paradossi del diritto amministrativo", RTDP 5 (2009).

37 It is a different thing, conceptually, to affirm that global decisions have direct effects on private parties. The point is, in fact, to clarify what kind of effect we are speaking about. As regards the "direct effect" of global regulation see Sabino Cassese (note 28) 37-41.

38 *European Legal Method. Paradoxes and Revitalisation* (2006).

39 Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010), favours the first hypothesis.

40 Gregory Shaffer, "A Transnational Take on Krisch's Pluralist Postnational Law", *The European Journal of International Law* 23, 565 (2012).

However, empirical studies show how states keep a central role in those processes since the main part of legitimate authority (even from a sociological perspective) remains with national legal systems or their projection on the international level.[41] Such processes of "transnational law" determine, in turn, remarkable change on national legal orders which differ sensibly, though, whether we consider the issue at stake, the single country, the specific political and economic context.

The fourth and last point is that before the pluralism of global governance we wonder where the law is (according to that attitude which is also prescriptive because we must assume a certain concept of law) or how to subject certain phenomena to a specific legal regulation.

For instance we can try to make out in some normative structures a rule of recognition different from the ones of state and semi-state legal systems and to understand whether the fundamental criterion of "legal sources" is reconcilable with pluralistic systems and thus whether we should admit the coexistence of inconsistent rules of recognition[42] and also acknowledge—but this is by no means new—that there might be normative systems which are rooted on a conditioned force, whose sanction is just expulsion from the system.

When jurists deal with these kinds of problems (for instance the concept of transnational legal system) they see things from a higher (not necessarily better) perspective.[43] They assume the point of view of the theory of law, as English and American legal scholars often do, feeling that the distinction between theory and dogma is somewhat blurry. I believe this is useful and legitimate, maybe even recommendable especially if one wants to seek common grounds from traditions and cultures which are often so diverse in order to build, for example, a common European public law.

All this implies everything but the isolation of legal doctrine, even though it does imply a relative autonomy of legal discourse if it wants to define itself "legal" in some pregnant sense. The above mentioned study about global governance is a good example of how a jurist can have recourse to political science to obtain a determined "order" of reality and then with her own approach try to identify the proper legal features.

It is undeniable that the same can be said regarding relationships with many other sciences. When, though, one claims that we should promote, methodologically, a full integration between all social sciences since they are branches of the same tree from which legal sciences have been artificially detached, I must confess I cannot fully understand either the deep sense or the concrete prescriptive content of such a directive.

Nor do I agree with the directive according to which novelty (namely the final crisis of legality) should make doctrine look at institutional practices without the guidance and lens of legal rules and case law, but carry out research "fieldwork, with interviews and analyses of official documents and statistical data, in order to study these unregulated areas".[44] It seems to me that many researchers already do such things without feeling the urgent need to call themselves jurists.[45]

41 See articles collected in the monographic issue of *Law & Social Inquiry, Volume 37*, Issue 2, 229–264, Spring 2012, as regards Transnational Legal Process and State Change.

42 This is what Nicholas Barber, "Legal Pluralism and the European Union", *European Law Journal* 12,306 (2006), sustains.

43 See Detlef von Daniels, *The Concept of Law from a Transnational Perspective,* (2010); Roger Cotterrell, "What Is Transnational Law?", *Law & Social Inquiry* 37, 500 (2012); Gralf-Peter Callies, Peer Zumbansen*, Rough Consensus and Running Code: A Theory of Transnational Private Law* (2010).

44 Sabino Cassese (note 3), 610.

45 As regards this point what Norberto Bobbio observed, while welcoming the growing attention and openness to other disciplines, in an essay first published in 1971—now reprinted as "Diritto e scienze sociali", in *Dalla struttura alla funzione*, 44 (Norberto Bobbio ed. 2007) about the risk that "lawyers, once they have abandoned their own island, are drowned in the vast ocean of an indiscriminate science of society" is still valid.

6 This Is Water

What I have observed until now reminds me of the following story which David Foster Wallace told during a ceremony for the conferment of degrees at Kenyon College (Ohio) in 2005.

"There are these two young fish swimming along and they happen to meet an older fish swimming the other way, who nods at them and says, 'Morning boys. How's the water?'. And the two young fish swim on for a bit, and then eventually one looks over at the other and goes, 'What the hell *is* water?'."[46]

The moral of this story, in all its apparent banality, in my opinion fits very well with law and its study. The point is simply that although the most obvious, important and omnipresent realities are often the most difficult to understand and discuss, they work. We cannot be satisfied, however, like a worm in the apple, to keep eating in the conviction that as jurists we are already in the apple and thus we do not need any criterion to identify what an apple is and how it works. Especially because there is no apple here.

46 David Foster Wallace, *This Is Water* (2009).