CHAPTER 10

CONCEPTUAL THEORIES OF LAW AND THE CHALLENGES OF GLOBAL LEGAL PLURALISM

A Legal Interactionist Approach

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10.1 Challenges for Conceptual Theories of Law

One of the perennial discussions in legal philosophy is: What is law? Many theorists have tried to answer this question by identifying certain characteristics of law that are deemed essential for the concept of law. Indeed, according to Julie Dickson it is the core business of analytical jurisprudence "to isolate and explain those features which make law into what it is." Philosophy should search for the distinctively legal, namely, "those essential properties which a given set of phenomena must exhibit in order to be law."[1] Examples of characteristics that have been suggested are associations with sovereign state orders, sanctions, force, authority, primary and secondary rules, institutions, and practices of legality.[2] I will call theories that thus try to elucidate the concept of law and provide definitions conceptual theories of law. These theories may be philosophical,

* This chapter contains various excerpts from my book *The Dynamics of Law and Morality: A Pluralist Account of Legal Interactionism* (Farnham, UK: Ashgate, 2014). Reproduced with permission of Informa UK through PLSclear.

[1] Julie Dickson, *Evaluation and Legal Theory* (Oxford: Hart Publishing, 2001), 17.

[2] For an extensive discussion of possible characteristics of law, see, e.g., Mark Van Hoecke, *Law as Communication* (Oxford: Hart Publishing, 2002), 17–60.

but also sociolegal or even doctrinal (for instance, in the context of international private law).

For such conceptual theories, global legal pluralism presents a number of major challenges. For most theories it is already a challenge to deal with international law, especially in its emerging stages. When does it become law? What are the reasons to call it law—or not? Is there one international legal order, or is it a loose collection of legal orders? Most contemporary philosophers of law now recognize international law as law and have reconstructed their theoretical tradition so that they can deal with this recognition, even though it may not always fit easily in their theories. However, global legal pluralism presents an even more radical challenge to conceptual theories of law, for at least four reasons.

First, it recognizes a wide variety of types of law. It includes many types of nonstate law, such as customary law, internal rules of semi-autonomous social fields, ethics codes, and disciplinary rules of professions and enterprises. At the international level, there is not merely interstate law, such as treaties between states, but also phenomena like *lex mercatoria*, customary law, and covenants between nongovernmental organizations (NGOs), businesses, and states. Global legal pluralism recognizes normative orders as legal orders that do not know enforcement agencies, courts, secondary rules, sanctions, and other characteristics that have been traditionally identified as distinctively legal. This wide variety of phenomena not merely challenges existing theories of law but also raises the more radical question whether there are any significant characteristics at all that these normative orders have in common.

Second, it recognizes a wide variety of law-producing actors. Most traditional theories of law focus on lawmaking institutions associated with the state, such as legislatures, courts, and bureaucracies. Global legal pluralism takes a very broad view with regard to nonstate law, and thus also recognizes many more actors that can produce law outside the state legal order. For example, Paul Schiff Berman includes norms made in "tribal or ethnic enclaves, religious organizations, corporate bylaws, social customs, private regulatory bodies, and a wide variety of groups, associations and non-state institutions."[3] At the international level, we can mention examples such as communities of transnational bankers, the International Olympic Committee, NGOs, and enterprises.

Third, the phenomenon of gradually emerging legal orders, such as those of international law, is undeniable. Many legal orders are not created at a specific constitutional moment, but emerge from normative orders that gradually come to look more like law, until almost everyone will regard them as law. This confronts us with the question whether a legal order can gradually emerge and become more law during the process. This is a clear challenge with regard to international law, but a similar question is raised, for example, by self-regulation and ethics codes in the medical field that gradually evolve into disciplinary law and then are codified in state law. Is law a gradual concept or is there a clear cutoff point, using a clear criterion, at which we can say of emergent

[3] Paul Schiff Berman, "Global Legal Pluralism," *Southern California Law Review* 80, no. 6 (Sept. 2007): 1155–238, 1172.

orders that they now should be recognized as law, but not before? Global legal pluralism seems to suggest that a gradualist concept of law does more justice to reality.

Fourth, the pluralism of global legal pluralism is not a loose collection of separate and sovereign legal orders. These legal orders overlap and are intertwined in many ways. To take one example, the legal orders of the European Union, the Council of Europe (especially the European Convention of Human Rights), international law, and domestic law of member states are intertwined in a dialectical interplay. They influence each other in various ways, and although each legal order may claim supremacy over the other in certain respects, these claims can be contested, as the German *Solange* cases show.[4] Similarly, in the field of biomedicine, professional ethics, disciplinary law, state law, and international treaties and codes are part of a dialectical intertwinement rather than being relatively separate legal (or nonlegal) orders. This phenomenon of intertwinement may be problematic not only for many positivist theories but also for systems theories that presuppose a more strongly separate existence of legal orders and focus on the borders between orders. Global legal pluralism rather suggests that there are no strict borders and that many legal orders are at most relatively autonomous and partly intertwined.

I formulate these four challenges as mere challenges to conceptual theories of law. Although some of these challenges may seem fatal to specific theories, none of them needs to be perceived as knockdown arguments. Philosophers can always try to critically reconstruct their theories in such ways that the reconstructed theories may seem—at least in the eyes of the true believers—able to meet the challenges that global legal pluralism poses. We may discern three different strategies to deal with the challenges posed by global legal pluralism: monist, relativist, and pluralist.

Monist approaches stick to the search for one universal concept of law. They look for essential characteristics that define what makes a normative order to a legal order. Most theories also provide a clear definition of law, though H.L.A. Hart is a famous exception.[5] This may allow these theories to exclude as nonlegal a number of orders that a broad version of global legal pluralism identifies as law. In most positivist theories, this leads to the exclusion of some forms of customary law and of the internal rules of organizations and professions. In recent years, various attempts have been made to construct such monist theories of law, based on legal positivism or Dworkinian interpretivism, but allowing the definition of law to include some legal orders other than the domestic state law that characterized these traditions in their original form.

These attempts are valuable in their own right because they may provide important insights into the rich phenomenon we call law, as well as into related phenomena such as

[4] See, e.g., Solange I (Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel, decision of 29 May 1974, BVerfGE 37, 271 [1974] CMLR 540), and Solange II (Wünsche Handelsgesellschaft decision of 22 October 1986, BVerfGE 73, 339, 2 BvR 197/83, Europäische Grundrechte-Zeitschrift, 1987, 1, [1987] 3 CMLR 225, noted by Frowein (1988) 25 CMLRev 201.

[5] H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon, 1994), 17.

morality. However, in the end I believe these attempts all fail because they are not pluralist enough to fit the reality of global legal pluralism. A crucial criterion for accepting or rejecting theories is that they can conceptualize in a productive way the most important phenomena and topical problems we actually see in the world, and in my view most positivist theories—if not all—have been unable to do so. Nevertheless, I will not further discuss this critical thesis as it would require an elaborate discussion of the limitations of every conceptual theory of law and every refinement and every adaptation suggested in the recent literature. Instead, I want to focus not on critique but on construction, on developing an interactionist theory that is suited to the task.

Relativist approaches are on the opposite side of the spectrum. They state that law is a highly variable phenomenon and that there is no possibility to find one common definition or one common concept. Therefore, the best thing to do is to refer to the views of the participants in a certain practice. If they call a normative order law, then the legal scholar should accept that qualification. Such a relativist theory has been developed by Brian Tamanaha. According to Tamanaha, "[l]aw is whatever people identify and treat through their social practices as 'law' (or droit, recht, etc.)."[6] If ordinary people call something law, researchers must simply accept that label. This view was adopted by Paul Schiff Berman.[7] It is a sympathetic approach as it does not impose the researcher's own views on a phenomenon, but rather takes a bottom-up approach: let the ordinary people decide rather than the theorist.

Although it may seem sympathetic, we should reject conceptual relativism.[8] First, it replaces the possible ideological bias of the scholar with the ideological bias of the society, which is even worse, because it may be less explicit. A society strongly oriented toward Catholic natural law may deem a liberal abortion statute to be not law, whereas an identical statute in a liberal society whose culture is strongly influenced by legal positivism is deemed law. Second, it is impractical as it will often be inconclusive in divided countries. Whose view on law do we have to take into account: that of the Republicans or that of the Democrats? And which Republicans: those who hold Catholic natural law views or the more moderate ones? Does the minority of legal practitioners have a stronger force in determining the society's view on what law is, or do we focus on the men and women in the jury box? As there will often be no conclusive reason to prefer one group's view over the other, for practical reasons we are often stuck with a deadlock, and thus without a useful concept of law. Third, it makes comparative legal research or even international legal philosophy impossible. When researchers don't have a common notion of law

[6] Brian Z. Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001), 166.

[7] Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence for Law Beyond Borders* (Cambridge: Cambridge University Press, 2012).

[8] For a more elaborate argument, see Van der Burg, *The Dynamics of Law and Morality*, *supra* note *, at 85. See also Twining's criticisms at William Twining, "A Post-Westphalian Conception of Law," *Law & Society Review* 37, no. 1 (Mar. 2003): 199–258; William Twining, *General Jurisprudence. Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009), 97–103.

(as well as many related concepts), they will compare apples and oranges. I encountered an interesting example when teaching a jurisprudence class in London. After discussing Berman's article in class, I asked the students whether the internal disciplinary rules of the legal profession, with its elaborate procedures and heavy sanctions like disbarment, constituted law in their eyes. Much to my surprise, most students (including a barrister) did not want to call this law. In the Netherlands, there is no doubt the equivalent is called law, if only because it is called disciplinary law and has a statutory basis. Those UK students, however, influenced by their own legal culture and the traditional association of law with state law, preferred a different label for a phenomenon that looked in all respects quite similar to me. Thus, the use of the label of "law" becomes rather arbitrary and controversial.

Pluralist approaches are the third strategy to develop conceptual theories of law. This chapter will elaborate this strategy. In response to the variety of phenomena that global legal pluralism analyses, it accepts both conceptual pluralism and definitional pluralism. It regards the concept of law as plural, as there may be different, incommensurable conceptions of law that are all defensible and all provide important insights. And it accepts that there is a plurality of defensible definitions of law and that the adequacy of the definition may depend on the context and the purpose for which we need a definition. Pluralism, however, is not relativism in Tamanaha's sense: the conceptions and definitions of law do not depend on the unreflective views of the participants in a practice, but on a reflective judgement by scholars that certain conceptions and definitions are the best ones for a specific purpose in a specific context.[9] My suggestion is that for such a pluralist strategy we should try to find a starting point in the tradition of American pragmatism.

For various reasons, pragmatism provides a productive angle to deal with the challenges identified earlier. It eschews essentialism and the search for universal truths and universal or essential characteristics. It takes account of contextual differences and is especially interested in dynamic evolution and variations in phenomena. Moreover, it is skeptical of "pernicious dualisms"[10] and strict separations, such as separations between law and morality or between different legal orders. If this chapter aimed to provide a complete overview of the pragmatist tradition, it should certainly include authors like Llewellyn and Pound. However, I want to focus on two more recent authors, namely Lon L. Fuller and Philip Selznick, because they provide the most important intellectual resources for understanding global legal pluralism, even if they never explicitly discussed international law.

[9] Conceptions of law thus vary with regard to context and purpose, but are not relative to the views of the participants in the practice.

[10] Philip Selznick, *The Moral Commonwealth. Social Theory and the Promise of Community* (Berkeley: University of California Press, 1992), 21. Martin Krygier, *Philip Selznick: Ideals in the World* (Stanford: Stanford University Press, 2012), 30. Both refer to Dewey.

10.2 Lon L. Fuller

Lon Fuller is best known for his book *The Morality of Law* and his debate with the legal positivist H.L.A. Hart.[11] For our purposes, two other, less-known books are more important because they provide a broader perspective that contributes important insights to a theory of law that can deal with global legal pluralism. These are the short encyclopedic book *Anatomy of the Law*[12] and the posthumously published collection of essays *Principles of Social Order*.[13]

For Fuller, law is a purposive enterprise, a practice. In *The Morality of Law*, he focuses on the legislative enterprise. "Law is the enterprise of subjecting human conduct to the governance of rules. Unlike most modern theories of law, this view treats law as an activity and regards a legal system as the product of a sustained purposive effort."[14] A purposive enterprise can be more or less successful. This implies that law is a gradual phenomenon. Moreover, it is an enterprise that can take place in different contexts and thus may take different forms. This leads to a radically pluralist view of law: schools, organizations, even a group of friends on a camping tour may constitute legal orders. He bluntly declares that there are tens of thousands of legal orders in his country, the United States, alone.[15] Whether the enterprise of legislation is more or less successful depends on whether it meets the eight principles of the internal morality of law.[16] Legislation is embedded in an interactional practice: a reciprocal relation between legislator and citizens. In order to subject human conduct to the governance of rules, the legislator has to treat citizens as autonomous persons. If a legislator provides incoherent or incomprehensible rules, let alone retroactive rules, citizens cannot be guided by those rules.

In *Principles of Social Order*, Fuller discusses other processes of social order apart from legislation, such as contract, mediation, adjudication, and managerial direction.[17] Each of them has its own internal morality, responsive to the specific type of law and its functional demands. Each of these types of law can be more or less successful in its enterprise and thus more or less law.

[11] For more elaborate discussions of Fuller, see Kenneth I. Winston, ed., "Introduction," in *The Principles of Social Order: Selected Essays of Lon L. Fuller* (Oxford: Hart Publishing, 2001), 25–58; Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Oxford: Hart Publishing, 2012); Willem J. Witteveen and Wibren van der Burg, eds., *Rediscovering Fuller: Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999)

[12] Lon L. Fuller, *Anatomy of the Law* (New York: Praeger, 1968; Westport: Greenwood Press, 1976).

[13] Lon. L. Fuller, *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth I. Winston (Oxford: Hart Publishing, 2001).

[14] Lon L. Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1969), 106.

[15] Ibid., 125.

[16] These eight principles are that laws should be general, promulgated, nonretroactive, clear, and noncontradictory; they should not require the impossible, they should be constant through time, and there should be congruence between official action and the declared rules.

[17] See Winston, *supra* note 11, at 41; the list of processes varies in Fuller's work.

Anatomy of the Law is Fuller's most inclusive work as he tries to do justice to the valuable insights in both legal positivism and the natural law tradition. He distinguishes two main types of law, implicit law and made law.[18] These names are confusing because it suggests that as soon as someone formulates the norms of implicit law explicitly, it becomes made law; moreover, all law is man-made. Therefore, I prefer terms also used by Fuller in his work, namely, interactional law and enacted law.[19] This typology is very helpful for understanding global legal pluralism because it does justice both to positive law produced by legal authorities and to horizontal, interactional law.

Enacted law is law that comes into existence as the result of an explicit enactment by a legal authority—for example, a legislature, a court, but also an official in an organization. Interactional law is law that comes into existence through a gradual process of interaction in which a standard of conduct emerges that gives rise to legal obligations. Interactional law may be described as "a set of reciprocally adjusted expectations that functions as a basis for order between the parties."[20] Interactional law finds its implicit expression in the interaction itself, whereas enacted law is the explicit formulation by an enactment of a legislature or some other lawmaking institution. In enacted law, the formulation of the norm is supposed to precede the action not only in time but also as the source of the law. In interactional law, the formulation comes only after it has emerged in the interaction, if at all, and the interaction remains the primary source of the law, even after it has been formulated. Thus, the two names refer to two different sources of law, enactment and interaction.

In modern societies, enacted law takes the form of black-letter law, usually consisting of a set of rules. Enacted law is explicitly produced as law by institutions that claim the authority to make law and to pronounce authoritative statements regarding its contents. The most important ones are, of course, legislatures and courts but these are certainly not the only ones. Many government organizations and officials have delegated regulatory power and can produce regulations that are considered binding upon those who are subject to their powers. Moreover, in every organization of a certain scale, whether it is a governmental organization or a business, there are some officials or institutions that set internal rules for the employees and for those who are dependent on their services. Other such examples are churches, professional associations, and even soccer clubs: these organizations may also have law-producing authoritative institutions.

[18] Fuller, *Anatomy of the Law*, *supra* note 12, at 43–84.

[19] In Fuller, *The Principles of Social Order, supra* note 13, at 232, Fuller uses the terms enacted law and authoritatively declared law as synonyms for made law. Interactional law is used in Fuller, *The Morality of Law*, *supra* note 14, at 221 and 237. For a further elaboration of both types of law, see Gerald J. Postema, "Implicit Law," in *Rediscovering Fuller: Essays on Implicit Law and Institutional Design*, eds. Willem J. Witteveen and Wibren van der Burg (Amsterdam: Amsterdam University Press, 1999); Van der Burg, *The Dynamics of Law and Morality*, *supra* note *.

[20] Fuller, *The Principles of Social Order, supra* note 13, at 286. Although Fuller does not present this formula as a description of implicit law, David Luban rightly remarks that it can be used as a definition of implicit law. David Luban, "Rediscovering Fuller's Legal Ethics," in *Rediscovering Fuller: Essays on Implicit Law and Institutional Design*, eds. Willem J. Witteveen and Wibren van der Burg (Amsterdam: Amsterdam University Press, 1999), 206.

Gerald Postema explains the concept of enacted law (or, in his terminology, made rules) as follows:

> Made rules are given canonical verbal formulations by a determinate author at a reasonably precise date. The practical force of made rules depends on the authority of their makers or the offices they occupy. Thus, made rules presuppose both authors and relations of authority and subordination.[21]

Enacted law emerges out of vertical relationships. That need not be the commanding authority of an absolute dictator, but the relationship is one between the lawmaker and the subject. This vertical order is embedded in a more horizontal order, but the vertical aspect of authority is essential in enacted law. There are authoritative institutions that claim to have lawmaking and law-enforcing authority. This type of law can usually be described in the familiar frameworks of legal positivism, like a union of primary and secondary rules (H.L.A. Hart) or an institutionalized system claiming authority (Joseph Raz).[22] However, for a full understanding of enacted law, we need to go beyond legal positivism, because the reason why enacted law has obligatory force cannot be fully understood from within a legal positivist framework.[23] One of Fuller's central theses is that enacted law is embedded in a reciprocal pattern of interactions between citizens, legislators, and other officials.

For a description of interactional law (or implicit rules), we may also turn to Gerald Postema:

> [I]mplicit rules arise from conduct, not conception. Verbal formulations may more or less accurately capture the rules implicit in the conduct, but the formulations are always post hoc and strictly answerable to the conduct. No formulation is authoritative in virtue of its public articulation alone. Although implicit rules arise from the conduct of determinate agents, typically they have no precise date of birth and no determinate authors. They presuppose no relations of authority and subordination; thus, their practical force depends neither on authority nor on enactment, but on the fact that they find "direct expression in the conduct of people toward one another."[24]

It is this ongoing practice that is the basis for the obligatory force of interactional law. Interactional law is usually implicit in the interaction, but it can be made explicit by formulating the rules and putting them on paper. For example, the continuing relationship

[21] Postema, "Implicit Law," *supra* note 19, at 256.

[22] Hart, *supra* note 5; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon, 1979).

[23] See Postema, "Implicit Law," *supra* note 19, at 260.

[24] Ibid., 257, quoting in the last sentence Lon L. Fuller, "Human Interaction and the Law," in *The Principles of Social Order: Selected Essays of Lon L. Fuller*, ed. Kenneth I. Winston (Oxford: Hart Publishing, 2001), 232.

between business partners can be laid down in a contract, and this may acquire a certain legal status in its own right.[25] However, often the contract will not be followed to the letter because the underlying practice requires adaptation and both partners will understand the need for these adaptations. For the partners in the contract, the implicit interactional law is more authoritative than the written contract. As long as this orientation to the underlying practice is considered to be the basis of the obligatory force, we can speak of interactional law, even if the norms have also been formulated in contracts, treaties, codes, or even statutes.[26]

Interactional law usually arises out of interactions having a horizontal character, but it may also arise out of interactions with a more vertical dimension. Indeed, interactional expectations are also present in vertical power relationships, when, for example, a person in power gives orders to citizens and the citizens decide to accept and obey those orders or do so only in part. Even in an autocratic state, when the state uses statutory norms to regulate the actions of its citizens, the interactional element is still present and essential. The state orders specific actions, but the citizens have to acquiesce to the norms in order to give them effect. In some cases, these patterns of interaction and reciprocal expectations may intensify and acquire, in the opinions of all actors involved, obligatory force; then we may even speak of interactional law in a predominantly vertical relationship. Even vertical relationships are often characterized by a combination of enacted and interactional law.

It may appear as if these are two completely different systems of law. However, they are not. They are intertwined. There are always interactional elements presupposed by enacted law and, especially in modern complex societies, enacted elements that influence interactional law.[27] Enacted law must be interpreted in order to be applied, and for that interpretation we must rely in part on moral considerations as well as on the interactional legal norms that are accepted in society or in relevant subsections of it.[28] Moreover, there are certain implicit principles of interpretation that are not often formulated in enacted law itself, but that are fully part of the interpretive practice, as, for example, the principle that in case of conflict, a newer statute has more weight than an older statute. Such principles may be considered part of the interactional law that makes enacted law possible.

A more fundamental illustration of how enacted law presupposes interactional law is Fuller's internal morality of law.[29] If a legislator wants to enact law, he does not have full

[25] See Fuller's analysis of the interactional foundations of contract law in Fuller, *The Principles of Social Order, supra* note 13, at 244.

[26] However, when and in so far as the written texts become an independent source of obligatory force we are leaving the domain of interactional law and replacing it with enacted law or contract.

[27] See Fuller, *Anatomy of the Law*, *supra* note 12, at 57–84, where he presents various examples of how implicit elements are present in made law and vice versa. See also Roderick A. Macdonald, "Legislation and Governance," in *Rediscovering Fuller: Essays on Implicit Law and Institutional Design*, eds. Willem J. Witteveen and Wibren van der Burg (Amsterdam: Amsterdam University Press, 1999), 284–93.

[28] Fuller, *Anatomy of the Law*, *supra* note 12, at 57–60.

[29] Ibid., 60. "Every exercise of the lawmaking function is accompanied by certain tacit assumptions, or implicit expectations, about the kind of product that will emerge from the legislator's efforts and the

license to do whatever he wants. In order to make law that can act as guidance to those subject to it, he must respect the principles of legality; otherwise he will simply fail to draft a law that can guide behavior. For example, if the legislator does not publicize the laws, the citizens cannot act on them; if the laws are inconsistent or vague, they will simply not know what they are expected to do. Many legal positivists have regarded these principles as mere demands of effectiveness. If a legislator wants to be effective, he should respect them. However, this misses the fundamental point.[30] For Fuller, legislation is embedded in a framework of interactional expectations based on reciprocity. The legislator expects the citizens to follow the law, but the citizens also expect the legislator to be reasonable. A citizen is expected to act as a responsible citizen, and the legislator is expected to act as a responsible legislator. The legislator must enable citizens to guide their actions and pursue their own aims within the context of a stable legal framework. The ideal of the rule of law and the ideal of democracy as a common enterprise to govern society responsibly are central to these interactional expectancies. If the legislator violates the principles of legality, or more fundamentally, the expectations following from this normative order, he loses legitimacy and weakens the bond of reciprocity between legislator and citizens. In extreme cases, citizens will no longer take account of the laws, because following them can no longer be seen as a reasonable demand. Thus, the possibilities and constraints of enacted law are embedded in interactional law. It is this reciprocal relationship between legislator and citizens that is the basis for the internal morality of legislation. Those positivists who reduce the eight principles to demands of effectiveness can only do so because they mistakenly take the relationship between legislator and citizens as merely one of a unidirectional exercise of authority. Fuller, on the contrary, would argue that even if the superficial relationship is one of a unidirectional exercise of authority, it can only give rise to valid obligations if it is embedded in an underlying interaction based on reciprocity.

The reverse also holds true: interactional law builds on enacted law. Modern societies are so strongly permeated by enacted state law that there is no longer such a thing as a private realm completely free from the influence of enacted law. When patterns of interactions emerge and form interactional law, this is not a purely spontaneous process. The actors will have been strongly influenced, sometimes consciously, but usually unconsciously, by the norms of the state legal order when they think about the terms of cooperation. There is usually a dialectical interplay between citizens' ideas about what is reasonable and fair and the principles laid down in statutes.[31] Statutes often codify customary law, but they also modify it, and moreover, they make one uniform code. If a statutory norm has been in the books for two hundred years, which is the case in many European countries with Napoleonic codes that were introduced in the early nineteenth century, then this has also, in various direct and indirect ways, influenced the popular

form he will give to that product." Fuller uses "legislator" here in the interpretation that is common in the European civil law tradition as the personified lawmaking authority; I follow him in this respect.

[30] See Rundle, *supra* note 11, at 92.

[31] On this interplay, see Macdonald, *supra* note 27, at 288.

legal consciousness and general practice. In as far as this has happened, interactional law builds upon enacted law. Moreover, each one reinforces the other.

An example of such a mutual reinforcement of interactional law and enacted law is the contract. From the perspective of state-enacted law, contracts are binding because a statute says so. Most European civil codes contain a provision to that effect. From the perspective of interactional law, however, contracts are binding because they explicitly formulate what was already implicitly understood as a set of mutual obligations on the basis of a cooperative relationship. The fact that the norms of interactional law and enacted law converge implies that contracts contain a strong obligatory force. We should not be reductionist here and try to reduce the force of the contract to only one of the sources; both are a source in their own right. There is no need to try and base all claims to validity and bindingness on merely one source. Both interactional law and enacted law can give rise to legal obligations, and if they both point in the same direction, the obligatory force is only reinforced.

We must add even more complexity to the story. The contract itself is also a source of law in its own right.[32] Once it has been signed, it constitutes a relatively autonomous legal order, based on mutual consent. The terms of the contract are the primary sources of the obligations following from it; both the underlying interactional law and the enacted law on contracts are, from this perspective, only secondary sources. So there are three perspectives on the meaning of the contract. Each of them can claim to give an explanation for why the contract can create obligations; each of them provides part of the truth. Especially in the context of international law, this is important as treaties play a central role in that context. Building on Fuller, but extrapolating his work beyond its original formulations, I suggest that we should understand contract—or treaty—as a distinct third type of law in its own right.[33]

[32] In Fuller, *Anatomy of the Law*, *supra* note 12, at 117, Fuller distinguishes four mechanisms of law: "legislative enactment, customary law, contractual law and adjudicative law as exemplified in the common law system." Each of them contains a mixture of (in Fuller's terminology) implicit and made law, but the mixtures differ. Even so, legislative enactment and customary law can be seen as embodying the ideal type of made law and implicit law, respectively. Here Fuller's broad use of the phrase "sources of the law" may cause confusion. Each of the four mechanisms can be a source of law in the narrow sense of the phrase, meaning that it can be the basis for legal obligations. In Fuller's broader sense of the phrase, each of them is also a source for the obligatory force of the law. However, this obligatory force must, if I understand Fuller correctly, be grounded in the mixture of made and implicit elements. In this respect I differ from Fuller, as I argue that contract derives its obligatory force not only from enacted and interactional law, but also can be seen as an obligatory force creating mechanism in its own right, based on consent. The same might hold in common law countries for adjudication, which can both be seen as deriving obligatory force from enacted law and interactional law and as a source of obligatory force in its own right.

[33] With this claim, I go beyond my treatment of contract in Van der Burg, *The Dynamics of Law and Morality*, *supra* note *, as a third but less important form. I would like to defend now that interaction, enactment, and consent are all equally important sources of law that can mutually reinforce each other.

10.3 Philip Selznick

After this long discussion of Fuller, I want to turn briefly to his contemporary Philip Selznick.[34] Lon L. Fuller and Philip Selznick have many things in common. They stand out among the legal theorists of the 1960s and 1970s because they both accept a broad form of legal pluralism and explicitly pay attention to law outside the context of state legal orders. Moreover, they emphasize contextual variation and variation within law, and they have a gradual and dynamic view of law. Law is a gradual concept, and an order can be—and become—more or less law. Both also emphasize the intertwinement between different types of law and different legal orders. Whereas Fuller is a lawyer with a strong theoretical interest, Selznick is a sociologist with an interest in legal and social theory. Selznick not only shares many ideas with Fuller but also adds two important insights.

The first is his suggestion that legality should be understood as an ideal and that law is a normative system oriented toward legality.[35] The core notion of legality is "the progressive reduction of arbitrariness in positive law and its administration."[36] Legality is a complex ideal, consisting of a set of constitutive values. Ideals are more open to interpretation than principles; in different contexts different aspect of the ideals may be emphasized.[37] Moreover, ideals are also more open to evolution. Therefore, if we focus on law as a practice (or set of practices) oriented toward the ideal of legality, it may be easier to discern change and variation. Consequently, understanding law not in terms of Fuller's eight principles of legality but in terms of the more fundamental ideal of legality leads to an account that is more pluralist and dynamic. In the context of democratic legislation, these values lead to Fuller's eight principles of legality, but in other contexts, the values may be associated with a different internal morality and, thus, with different sets of principles of legality.[38] For Selznick, the distinctively legal may be found in law's orientation to this master ideal of legality.[39]

The second suggestion is the idea of incipient or emergent law. Formal law may evolve out of informal settings. In its early stages of development, we may call this emergent or incipient law. This notion is based on Selznick's study of law outside state institutions,

[34] More elaborate discussions of Selznick's work may be found in Krygier, *supra* note 10, and Sanne Taekema, *The Concept of Ideals in Legal Theory* (The Hague: Kluwer Law International, 2003).

[35] Philip Selznick, "Sociology and Natural Law," *Natural Law Forum* 6 (1961): 84–108.

[36] Philippe Nonet and Philip Selznick, *Law and Society in Transition: Toward Responsive Law* (New York: Harper & Row, 1978), 108.

[37] For this view on ideals, see Wibren van der Burg and Sanne Taekema, eds., *The Importance of Ideals: Debating Their Relevance in Law, Morality, and Politics* (Brussels: Peter Lang, 2004); Taekema, *supra* note 34.

[38] This may be at odds with Fuller's presentation of legality in Fuller, *The Morality of Law*, *supra* note 14, but is consistent with Fuller's suggestion in Fuller, *The Principles of Social Order*, *supra* note 13. Each process of social order has its own internal morality: each legal process has its own principles of legality. See also Winston, *supra* note 11, at 42.

[39] Taekema, *supra* note 34, at 113.

especially in administrative agencies and industrial relations. In *Law, Society, and Industrial Justice*,he claims that in the internal functioning of organizations, principles of legality such as fairness and due process already are present and thus a form of incipient law within these organizations can be found.[40] Moreover, he includes Hart's minimal definition of law as a union of primary and secondary rules.[41] Through the combination of this criterion of secondary rules and the orientation toward legality, he provides two criteria to identify law. He thus provides a basis for understanding the legal character of the normative orders at the organizational level.

10.4 Legal Interactionism

Based on Fuller's and Selznick's theories I have developed a theory I call legal interactionism.[42] Legal interactionism recognizes interactional law as a source for legal obligations, but also accepts that contract and enacted law may constitute relatively autonomous legal orders in their own right. Even though, ultimately, the obligatory force of enacted law and contract is embedded in an interactional pattern, it does not reduce the obligatory force of contract or enacted law to that of interactional law.

Legal interactionism implies a broad form of relative legal pluralism, accepting that there is a great plurality of relatively autonomous legal orders—orders that are partly autonomous and partly intertwined. Rather than accepting one criterion as the "distinctively legal," legal interactionism emphasizes that the concept of law is plural in character and can best be analyzed in terms of a dynamic family resemblance. Because of this pluralist character, legal interactionism can do justice to both an enormous body of state-enacted law and the emergence of interactional law in various areas of law, including international law. Moreover, it can also do justice to the undeniable fact of global legal pluralism.

Interactional law emerges from the interaction of a great many actors on the basis of their shared understandings. This is in stark contrast to positivist theories that usually focus on law as the product of specific state authorities such as legislatures and courts. In this paradigm, "law" refers to the interaction of these actors, the various practices in which legal norms emerge, the norms themselves, and the legal doctrine that emerges from these practices. Normative development is the result of an interplay between various societal stakeholders. Even if, in the end, the courts or the legislature may formulate the norms authoritatively, their role is much less important than it is commonly described in legal theory. For example, in the development of bioethics and biolaw, legal scholars and moral philosophers have played a leading role, in combination with various groups in biomedical practice and in society at large. This is typical of the interactional paradigm. Legislatures and courts certainly play a role, but it is frequently a more

[40] Philip Selznick, *Law, Society, and Industrial Justice* (New York: Russell Sage Foundation, 1969).
[41] Ibid., 5–7.
[42] Van der Burg, *The Dynamics of Law and Morality*, *supra* note *.

marginal one and also different from the traditional roles accorded to them. They participate in a social dialogue and help to structure and guide it, often leaving open the direction that development should go. In a sense, to implement their general ideals, they rely more on practice than on theoretical doctrine.

Legal interactionism, as I understand it, differs from Fuller's theory in *The Morality of Law* in one important respect.[43] In line with the later work of Fuller, I do not regard interactional law as the only source of law. Legal institutions often take on a life of their own. In some cases, law may even best be analyzed in terms of general commands enforced with sanctions. Thus, I develop a more consistently pluralist account of legal interactionism, accepting that interactional law, enacted law, and contract can all be important sources of law.

We may summarize legal interactionism in four theses. First, we must accept an irreducible plurality of sources or types of law, each with its own distinct characteristics (*pluralism with regard to sources of law*). Each of these sources may create obligatory force. The three most important sources are interactional law emerging as the result of interaction, enacted law created as the result of authoritative enactment and contract or treaty, created by consent. Second, there is not one characteristic or set of characteristics that constitutes the distinctively legal, but a dynamic family resemblance (*conceptual pluralism*). Third, law is a gradual concept; therefore, there are different dimensions according to which a normative order can be more or less law or not law (*conceptual gradualism*). Fourth, a multiplicity of definitions is legitimate, to be justified in light of context and purpose (*definitional pluralism*).

I have elaborated the first thesis in this section and will discuss the remaining three in the next two sections.

10.5 Conceptual Pluralism

How does legal interactionism address the question of the concept of law? It embraces conceptual pluralism for three reasons. The first reason is that law may be regarded as a

[43] As Jutta Brunnée and Stephen John Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010), base their interactionalist theory only on Fuller's *Morality of Law* and ignore his later work, I also differ in this respect from their view on international law. Brunnée and Toope are not the only authors to focus on the eight principles of legality developed in the context of legislation and ignoring that these principles cannot be simply transplanted to international law. An example is Thomas Schultz, "The Concept of Law in Transnational Arbitral Legal Orders and Some of Its Consequences," *Journal of International Dispute Settlement* 2, no. 1 (Feb. 2011), 59–85, who applies Fuller's principles to transnational arbitral orders without even acknowledging Fuller's work on, e.g., customary law and arbitration. For a critique, arguing that other work by Fuller is much more productive to understand transnational dispute resolution than *The Morality of Law*, see Ralf Michaels, "A Fuller Concept of Law Beyond the State? Thoughts on Lon Fuller's Contributions to the Jurisprudence of Transnational Dispute Resolution—A Reply to Thomas Schultz," *Journal of International Dispute Settlement* 2, no. 1 (Aug. 2011): 417–26.

dynamic family resemblance concept.[44] With the broad diversity of types of law that legal interactionism recognizes, it is difficult to find traits that all these different types of law have in common. That does not mean that we cannot find a number of traits that are often present. Almost all the characteristics that have been suggested as essential and defining of the "distinctively legal" are frequently present in various legal orders. They thus provide important insights in our understanding of those legal orders in which they can be found, even if they do not constitute universal or essential characteristics. This holds for characteristics such as sanctions, authority, and secondary rules that are frequently present in many legal orders. The association with the sovereign state, however, is only present in some orders, namely, state legal orders. Of course state legal orders are for practical purposes the most important ones. Even so, legal interactionism's emphasis on interactional law, contract, and enacted law in nonstate organizations makes clear that for conceptual purposes this association with the state is certainly not necessary.

The notion of family resemblance is often understood in a static way, as if there is a settled collection of characteristics that are variably present in a group of family members. However, families are dynamic phenomena. Members die, new members are adopted into the family, marry into the family, or are born to family members. Thus some traits wither away and others are introduced into the family that were not present until they were incorporated through marriage, adoption or birth. Therefore, we should understand the notion of family resemblance in a dynamic way: some types of law may become less important over time and new ones may arise. For example, the reliance on customary law in the domestic law of civil law countries largely disappeared after the major Napoleonic codifications, only to re-emerge a century later through the rise of international and global law. Some traits may be very important in a certain era: the association with the state was central to our understanding of law in the nineteenth century, but was less so before Napoleon, and is becoming less important again in the era of globalization. Other characteristics may emerge. For example, our understanding of sanctions may radically change in the emerging law of the internet world where negative reviews on Airbnb or Uber may more seriously damage commercial interests than state fines.

However, to fully understand the concept of law we have to move beyond the notion of family resemblance to a second reason to embrace conceptual pluralism. According to authors such as Radbruch, Fuller, Selznick, and Dworkin, law is oriented toward certain ideals or values such as justice and legality.[45] As the interpretation of these open values can give rise to endless controversies about the best conception of law, we should

[44] Ludwig Wittgenstein, *Philosophical Investigations*, trans. G.E.M. Anscombe, 3rd ed. (Malden: Blackwell, 2001), no. 67.

[45] See, on the thesis that law is oriented toward ideals or values, Taekema, *supra* note 34; Gustav Radbruch, *Rechtsphilosophie*, eds. Erik Wolf and Hans-Peter Schneider (Stuttgart: K.F. Koehler, 1973); Selznick, "Sociology and Natural Law," *supra* note 35; Fuller, *The Morality of Law*, *supra* note 14; Ronald Dworkin, *Justice in Robes* (Cambridge: Belknap Press, 2006).

regard law as an essentially contested concept.[46] However, according to most legal positivists, law can be understood without reference to values and only requires references to social facts. Therefore, it is contested whether law is to be regarded as an essentially contested concept. This is a second order contest; hence, we can call law *a second-order essentially contested concept*.[47]

This notion of law as a second-order essentially contested concept does not merely apply to the general concept of law but also to distinct legal orders. Can we understand state law interpreted by judges, or customary international law emerging from the interactions of states and other actors, as oriented toward the value of legality or not? Some orders may be more strongly oriented toward legality than others, and in some it may even be lacking. Perhaps state law in a totalitarian dictatorship can best be analyzed as commands enforced by sanctions, where the orientation toward legality is lacking or quite minimal. This may imply that it is less law when measured against the principles of legality, but I would not go as far as Fuller in his *Morality of Law* to say that such an order is not law at all, because that would presuppose an essentialist understanding of law. Thus, there is variation among legal orders here.

The third reason for embracing conceptual pluralism to understand law is that it is an *essentially ambiguous concept*.[48] Law can be modeled in two different ways that are at least partially incompatible. The first model, which I call "law as a product," focuses on statutes and judicial rulings, and on law systematized as a doctrinal body of rules and principles. The second model, which I call "law as a practice," focuses on the practices by which law is constructed, changed, and applied. My claim is that we need both models to fully understand law. However, both models are incommensurable, just like the two models of an electron, as a small particle and as a wave, are incommensurable. As a result of this fundamental incommensurability, it is not possible to develop a theory of law that is both coherent and complete. Consequently, we cannot avoid conceptual pluralism: there is a plurality of legitimate conceptions of law that each can illuminate certain aspects of the phenomenon called law. Sometimes, for example, when doctrinal scholars study law, a conception based on law as a product may be most helpful. If we focus on interactional law on the other hand, a model of law as a practice may generate more important insights. Even so, we can get the best understanding if we alternate between the different models and, consequently, between the different conceptions of law that may be generated by those models.

Legal interactionism thus provides three reasons for conceptual pluralism, the thesis that law can be best understood by alternating between different, competing, and partly

[46] Walter B. Gallie, "Essentially Contested Concepts," *Proceedings of the Aristotelian Society* 56, no. 9 (1956): 167–98.

[47] I have critically reconstructed Gallie's notion of essentially contested concepts and discussed the idea of second order contestedness in Wibren van der Burg, "Law as a Second-Order Essentially Contested Concept," *Jurisprudence* 8, no. 2 (Summer 2017): 230–56.

[48] For the notion of law as an essentially ambiguous concept, see Van der Burg, *The Dynamics of Law and Morality*, *supra* note *, at 95–170.

incommensurable conceptions of law.[49] Each conception helps us to understand some aspects of the complex and variable phenomenon of law but is blind to other important aspects.

The fact that we can understand law in terms of a dynamic family resemblance and as a second-order essentially contested concept is also the reason for arguing that law is a gradual concept. Law can have more or less of the characteristics that are included in the family resemblance, and it can have each of these characteristics to a greater or lesser degree. Moreover, the orientation toward ideals of legality and justice can also be stronger or weaker and the realization of these values is a gradual process. Because of the gradualism in these two aspects, it is best to regard law as a gradual concept. Therefore, legal interactionism embraces conceptual gradualism.

10.6 Definitional Pluralism

Definitional pluralism is a logical implication of conceptual pluralism. If there is not one unified concept of law, but a plurality of defensible, partly incompatible conceptions, there cannot be one general definition of law. Which conception of law and, consequently, which definition of law is the most adequate, depends on the purpose, the methods and the object of study. Constructing a definition is not about finding some essential characteristics but requires a stipulation. For the purposes of their specific study researchers may define law in a specific way.

This does not mean that everything goes. Researchers have to provide good reasons for a specific conception of law and for the associated definition. These reasons will depend on the object: obviously a definition of law that focuses on sanctions, secondary rules, and authoritative institutions may be less helpful in the context of international law than in the context of domestic law. They will also depend on the methods of research: a sociologist may need a definition that can be easily operationalized in terms of observable phenomena whereas a legal philosopher may more strongly focus on the core values that are important in understanding law. An interesting illustration of how the methods may influence the choice of definition can be found in the work of Philip Selznick. He advocates a conception of law in which law is oriented toward the ideal of legality; yet in his empirical study of law in the context of industrial relations, he uses a definition of law based on Hart's idea of a union of primary and secondary rules.[50] The choice of definition may also be determined by the purpose of a study: if a doctrinal scholar wants to describe the legal doctrine on euthanasia as interpreted by the courts,

[49] In this respect, I differ from some other Fullerians like Brunnée and Toope. Their interactionist conception of international law is, in my view, a legitimate conception, but only a partial conception.

[50] Selznick, "Sociology and Natural Law," *supra* note 35, and Selznick, *Law, Society, and Industrial Justice*, *supra* note 40, respectively.

she may choose a different definition than an anthropologist who wants to describe the legal framework as understood by the medical profession.

A definition of law is not only important for researchers but also for legal practitioners. The objective identification of what counts as law has important practical consequences. For this issue, however, an academic debate on the definition of law in general is not very relevant. It is not determined by philosophical or sociological debates but is a matter of reconstruction of the explicit and implicit criteria of a particular legal order for recognizing norms as legal. State legal orders usually have a set of norms of recognition, determining when a specific norm is to be counted as law, or more broadly as legally relevant. Some of these rules are statutory, some of them have been developed by the judiciary, some others even by citizens, legal scholars, or social groups. These norms of recognition may not be uncontroversial nor may they be a clearly distinguished set. The Dworkin-Hart debate provides an example of this. In my reading, Dworkin's primary criticism in "The Model of Rules" is not about a philosophical theory of law, but about how lawyers debate about what is to count as law.[51] That is an internal criticism, from the perspective of legal practice. To determine what is to count as law for the purposes of a particular legal order is a question that can only be determined within the internal perspective of that order.

That is not a matter of stipulation, but a matter of critical reconstruction. The result of this critical reconstruction may be controversial as Dworkin's critique on Hart demonstrates. To take another example: Brunnée and Toope have suggested that there are three requirements for the emergence and continued existence of international law.[52] These are a community of practice, a practice of legality, and a continuing practice of legality. As international law scholars, they submit that this is the best possible construction of what should count as a legal order at the international level. Obviously, however, this suggestion is not uncontroversial.[53] Though legal theory and sociology may provide important input, the discussion is primarily one taking place within the internal perspective of international law. For some specific international legal orders, the adequacy of their conception and definition may be doubted. For example, their theory only focuses on interactional law, and therefore may be less adequate to describe the gradual emergence of the legal order of the European Union. For the gradual thickening of the institutional character and the increasing emphasis on black letter, enacted law in the European Union, their definition of law may be less helpful.[54]

[51] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978).

[52] Brunnée and Toope, *supra* note 43.

[53] For similar criticisms, see Christian Reus-Smit, "Obligation through Practice," *International Theory* 3, no. 2 (2011): 339–47; Nico Krisch, review of *Legitimacy and Legality in International Law: An Interactional Account*, by Jutta Brunnée and Stephen John Toope, *American Journal of International Law* 106, no. 1 (Jan. 2012): 203–209.

[54] See Van der Burg, *The Dynamics of Law and Morality*, *supra* note *, at 138, for a more elaborate criticism.

10.7 Conclusion: How Legal Interactionism Can Deal with the Challenges of Global Legal Pluralism

In the introduction to this chapter, I identified four challenges that global legal pluralism presents for conceptual theories of law. I have argued that legal interactionism can adequately address these challenges and that, therefore, it is a good theory of law for the twenty-first century. Let me conclude by discussing how legal interactionism deals with each of the four challenges.

First, there is a wide variety of types of law. This is a central issue in legal interactionism. According to Fuller, there are two main types of law: enacted law and interactional law. I have argued that, especially in the context of international law (treaties) and global law (covenants), a third main type should be recognized, namely, contract, based on consent. These types of law are not completely separate legal orders; on the contrary they are intertwined and mutually reinforce each other. Nor can they be reduced to one main type; each of them can be law in its own right, even if its claim to legitimacy may be reinforced by the fact that it is not an isolated legal order but embedded in a network of legal orders and in underlying interactional patterns. International law thus is an intertwined collection of numerous legal orders. The legal character of one legal order reinforces the obligatory character of the other with which it is loosely or more intensely connected.

Legal interactionism implies conceptual pluralism: the concept of law is open to different conceptions. The various conceptions of law are connected in a family resemblance, and the choice for which conception is the most productive should be based on reasonable arguments. Legal interactionism also implies definitional pluralism. There may be many different useful definitions of law, but we should be able to present reasonable arguments why we prefer one specific definition, referring to the purpose, the methods, and the object of study. Conceptual pluralism should be distinguished from relativism as advocated by Tamanaha and Berman.[55] Legal interactionism and relativism have in common that they accept that there is a wide variety of types of law and that there is a legitimate plurality of conceptions and definitions of law. However, for relativism the choice for a certain conception and definition depends completely on the views of the participants in a practice. Legal interactionism argues that this position should be rejected (see my arguments in section 10.1). The choice should be made by the scholars studying law, and it is not an arbitrary or purely subjective choice; they need to provide reasonable arguments for their choice.

The second challenge is that according to global legal pluralism there are many law-producing actors. Of course, this is central to interactional law, one of the three main

[55] See Tamanaha, *supra* note 6; Berman, *supra* note 7.

types of law recognized by legal interactionism. Customary law, one of the forms that interactional law takes, is not just some form of law that we need not take seriously any more—it is crucial to our understanding of law. Interactional law can be law between states, or between a state and its citizens, but mostly it is between citizens or different organizations. Moreover, legal interactionism also has a richer understanding of enacted law, as it includes not merely enactment by state agencies but also by authorities within bureaucracies and commercial enterprises.

The third challenge was that of emergent legal orders. Here, legal interactionism provides a good theory, but its competitive edge against other theories is less obvious. After all, most positivist theories provide certain criteria regarding when a legal order exists, and as long as these criteria are not yet met, there is not yet a legal order. This answer is simpler than the answer provided by legal interactionism, which holds that law is a gradual concept and that normative orders become gradually more (or less) law during their evolution. Even so, in my view, the latter is preferable because the gradual concept of law does more justice to social reality. Even if theorists may claim there are clear criteria and thus a clear cutoff point in which a normative order becomes law, for participants in those practices, it is more like a gradual development and a cutoff point may seem quite arbitrary.

Finally, the fourth challenge, that of intertwinement. Legal interactionism does not connect law to sovereign state legal orders nor does it presuppose that legal orders are fully autonomous. On the contrary, it claims that legal orders are intertwined, that contract and enacted law may be embedded in and reinforced by interactional law, and that the reverse holds as well. Legal orders are relatively autonomous[56] and are open to other legal orders—and to morality—in a variable degree. We can no longer deny global legal pluralism nor the existence of multilevel legal orders, like in the combination of the legal orders of the European Union, the Council of Europe, and the domestic law of the member states. Legal interactionism provides a good description and explanation of the dynamic intertwinement between these legal orders. Therefore, it is the most adequate conceptual theory to study law in the twenty-first century.

[56] Taekema, *supra* note 34, at 189.