UNDERSTANDING LAW IN AN ERA OF GLOBALISATION & LEGAL PLURALISM: DOES THE WORLD NEED MORE LAW?[1]

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INTRODUCTION

Addressing the question posed – "Does the world need more law?" – is essentially a 3-step process. Step 1 involves determining what is meant by "law". This requires not only an exploration of the nature of law, but its relationship with extra-legal considerations. Step 2 involves examining the possible justifications for desiring more law. Finally, Step 3 answers the question in light of the analyses in the previous 2 steps.

In Part I of this Paper, the writer undertakes Step 1, offering her preferred conception of law, its role(s), and its nuanced relationship with extra-legal considerations. Part I concludes with a summary of how law is created, and how it relates to the concepts of morality, politics, sovereignty, legitimacy, and power. The writer then undertakes Steps 2 and 3 in Part II, providing possible explanations for the push for more law, but ultimately answering the question in the negative.

The conclusion is drawn for 2 reasons: First, the more pressing task at hand is not creating more law, but understanding the existing normative orders more deeply and cohesively, while developing mechanisms for resolving conflicts between them. As such, what is needed is not more law *per se*, but a more evolved understanding of law. Second, the desire for "more law" stems from misconceptions of the effects of globalisation and legal pluralism. Specifically, the writer contends that while globalisation and legal pluralism pose unique challenges for the nation-state, they do not render it obsolete. Rather, just as our understanding of law evolves, so too should our understanding of the role of nation-states.

I. TOWARDS AN EVOLVED UNDERSTANDING OF LAW

In this Part, the writer first examines the nature of law and its relationship with extra-legal considerations, before placing law in context in preparation for the discussion in Part II. As for the relevant context for discussion, the writer proposes focusing on the dichotomy between law within and law beyond the nation-state. Contextualising law in this manner is apposite, as "the world" relevant for our purposes is today's globalised and legally pluralistic world, in which "law" should no longer be understood as consisting solely of state law, and non-state law operates at both the national and supranational levels.

(a) The Nature of Law

A good premise on which to begin the discourse is to acknowledge that law is a normative order. By this, the writer means that law seeks to regulate standards of acceptable human conduct. This normative order serves 2 functions: to resolve conflict, and to coordinate within and amongst societies. Such normative order necessarily involves judgment. As aptly put by Neil MacCormick, *"[t]o engage with a norm… is to judge what must be done in a given context; to reflect in normative terms… is to judge, against some envisaged norm, whether what was done ought… or ought not to have been done".*[3]

MacCormick concludes that law is positive, and has an independent institutional character, i.e. the ability to determine of itself what counts as law.[4] The question arises, however, where there is plurality of judgments (each conclusive within a particular order), as to which ought to prevail. In such circumstances, MacCormick acknowledges the moral and political dimensions to the question.

(b) Law's Relationship with Extra-Legal Considerations

Given the relevance of moral and political dimensions to the question of normativity of law, it is imperative that we examine these dimensions and their unique relationships with law. At the same time, no discussion on law, morality, and politics is complete without a discussion on sovereignty, legitimacy, and power.

Law & Morality

While natural lawyers posit that law and morality are indistinct (i.e. law is concerned with "ought", as is morality), positivists contend that law and morality may overlap but are conceptually distinct (i.e. law is concerned with "is", while morality is concerned with "ought"). MacCormick describes this nuanced relationship as follows:

> *"Morality is concerned with law,… the criticism of legal decisions and… rules,… the… obligation to respect the law, and with… law's claim to be genuinely normative… Yet morality is not law, nor is law morality…*

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[3] MacCormick 1997 at 1057.

[4] MacCormick 1997 at 1057 – 1059 and 1064.

> *Law resembles morality in that it is normative; it resembles conventional morality in being a normative order commonly observed in some community or society,… backed by both strong pressures of opinion, and the regularly confirmed belief that others apply norms… regarded as common standards for the group in question…".*[5]

Joseph Raz takes it a step further by suggesting that law claims to <u>be</u> moral, and to have *"intrinsic… moral excellence"* over its subjects,[6] irrespective of the subjects' acknowledgement. The law simply "is", and need not establish its claim to moral legitimacy or normative power.

The writer pauses to note that the distinction between "ought" and "is" may cause confusion. After all, the starting premise that law is a normative order possessing the inherent quality of judgment suggests that law is concerned with "ought". To clarify matters, it would be helpful to refer to the further concepts of discursive versus truncated normativity. Commonly perceived as alternative and mutually exclusive theories of law, the writer suggests that one possible way of reconciling the two is to view them as operating along a linear process of arriving at legal norms. Within the context of the nation-state, the process can be depicted as follows:

Diagram 1 – Arriving at Legal Norms Within the Nation-State

(i) First, discourse takes place within the legal community as to what "ought" to be the norm for an identified issue. This "legal community" is different from John Gillespie's *"regulatory community"* engaged in public discourse,[7] and consists of whatever combination of formal, informal, or hybrid bodies participating in legal developments within each society. Such discourse necessarily touches upon the relative morality of the various standards proposed (i.e. discursive normativity). The legal community is also entitled to consult the regulatory community at this stage, to ensure that standards adopted are reflective of the moral standards, interests, and will of the people.

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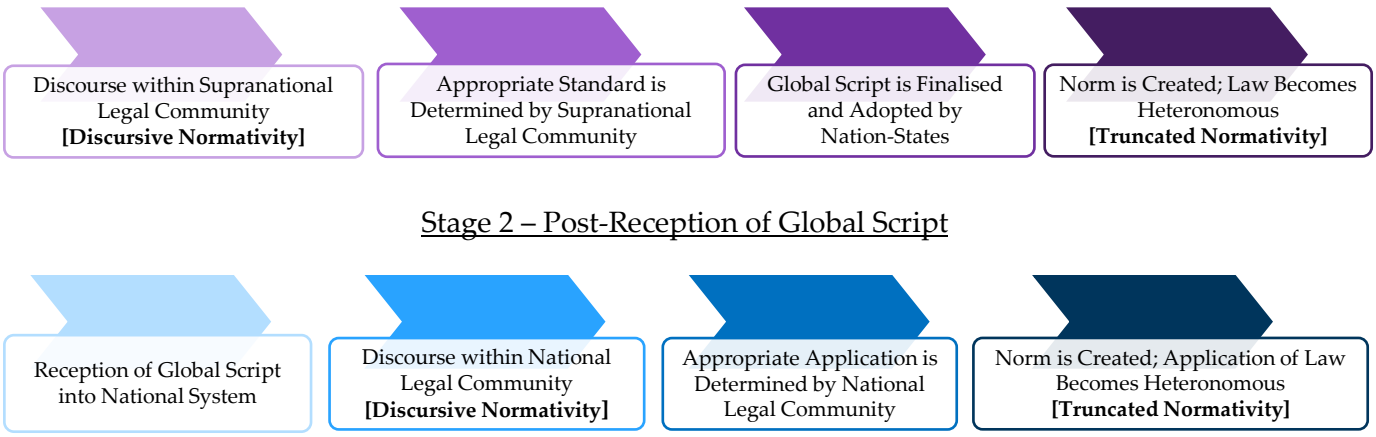
5 MacCormick 1997 at 1062 and 1065.
6 Raz 2003 at 16.
7 Gillespie 2009.

(ii) Following the discourse by that society's legal community in consultation with its regulatory community, the most appropriate standard for that issue, society, and time is determined.

(iii) Upon determining the appropriate standard, a norm is created, becomes heteronomous law, and ceases to be discursive. The law now "is", and reflects truncated normativity.[8]

This analysis equally applies to the formation of law beyond the nation-state, by introducing the additional stage of creation of what Gillespie terms a *"global script"*[9] at the supranational level, and the additional step of reception of the global script into the national legal system.

Diagram 2 – Arriving at Legal Norms Beyond the Nation-State



This time, the discursive normativity discourse on the appropriate moral standard takes place in Stage 1 within the supranational legal community (in consultation with the supranational regulatory community), while the discursive normativity discourse on the appropriate moral application of the determined standard takes place in Stage 2 within the national legal community (in consultation with the national regulatory community). Truncated normativity is reflected at the supranational level by the creation of the legal norm, and truncated normativity is reflected at the national level by the creation of its appropriate application for that society and time.

By this analysis, the writer proposes a third perspective on the relationship between law and morality that belongs to neither the natural law nor positivist camp. As established above, the

8 "Heteronomous" here being MacCormick's conception of heteronomy, as contrasted with autonomy.

9 Gillespie 2009 at 211.

creation and/or adoption of law is essentially a process that begins with a discourse on morality. Law is the standard arrived at by reasoning from a position of discursive normativity to a position of truncated normativity. This discourse has a cut-off point determined by the law itself (i.e. MacCormick's conception of the independent institutional character of law). Once created, the law claims legitimate moral authority over its subjects (i.e. Raz's conception of the law's intrinsic moral excellence).

But the law in and of itself is neither moral nor amoral, though it is arrived at by discourse often inseparable from morality. Law and morality are thus neither conceptually indistinct and inseparable (i.e. traditional natural law), nor conceptually distinct and separable (i.e. traditional positivism). Law is, instead, conceptually distinct yet derivatively inseparable from morality, as morality is its origin and its ultimate claim to normative force. Law begins and ends with morality, and exists because of the discourse it inspires. As to the true force of law, and the forces that drive its creation and enforcement, we turn to the relationship between law and politics.

Law & Politics

In light of the evolving role of nation-states, the two properties of sovereignty and legitimacy come sharply into focus. While sovereignty refers to the freedom or independence from external legal constraints or authority, legitimacy is what makes the possession or exercise of power defensible.[10] Seen from another perspective, sovereignty involves the exercise of power top-down by sovereign on society, while legitimacy involves the conferring of power bottom-up by society on sovereign.

There are 2 conceptions of sovereignty: legal and political. MacCormick explains the distinction as follows:

> *"On the legal conception, all law can be made or re-made by whoever has sovereign power…; whereas on the political conception, it is simply a question of who obeys whom, only the ultimate commander in a chain of command being a sovereign."*[11]

In other words, the former refers to *de jure* sovereignty, while the latter to *de facto* sovereignty.

[10] Raz 2017(2) at 156 – 158.
[11] MacCormick 1993 at 12.

There are likewise 2 conceptions of legitimacy: actual and apparent. Raz acknowledges this distinction when he says, *"while not all governments have legitimate authority, all of them claim to have legitimate authority"*.[12] Again, we detect that morality has a role to play in undergirding legitimacy. Sovereigns with actual moral legitimacy enjoy acknowledgment and support from their subjects, while sovereigns with only apparent moral legitimacy do not. The same is true for the moral legitimacy of law. Laws arrived at with acknowledgment and support from their subjects possess actual moral legitimacy, while laws arrived at without such acknowledgment and support possess only apparent moral legitimacy. Yet, the absence of actual moral legitimacy does not invalidate the normative force of law. Subjects who did not vote for a government must nonetheless abide by the laws it enacts upon coming to power.

Understanding this distinction aids in appreciating Raz's suggestion of the need for empirical study of the relationship between sovereign and subjects. His suggestion in no way detracts from his positivist conception of law, nor does he suggest resorting to pure social theory. Rather, Raz merely acknowledges that in the legitimacy discourse, there are forces at work other than the legality of power. For this reason, Matthew H. Kramer's and Detlef Von Daniels' criticisms of Raz's apparent shift away from positivism, and apparent conflation of sociology and law, are misconceived.[13]

Armed with a deeper understanding of sovereignty, legitimacy, and power, we are now better placed to appreciate the relationship between law and politics. Once again, MacCormick's observations are apt:

> *"Law interacts with politics in many ways, sometimes as the object over and through which political power is exercised, and sometimes as a control upon the use and abuse of power… [P]olitics is about power, law is about normative order…*
>
> *Politics concerns the exercise of power through mainly peaceful discussion, persuasion, and negotiation within forms of government… Still, however discursive politics may be, the discourse remains one of power…"*[14]

[12] Raz 2017(2) at 157.

[13] See Von Daniels 2017 and Kramer 2004.

[14] MacCormick 1997 at 1063.

(c) Placing Law in Context

Understanding the nature of law and its relationship with extra-legal considerations is not enough. To take the analysis further, we must understand its operation within and beyond the context of the nation-state.

Law & the Nation-State

Raz traces how the nation-state, being *"the most comprehensive legally based social organisation of the day"*,[15] came to be the central focus of jurisprudential theories. Consequently, state law has dominated legal theory discourse since the Peace of Westphalia. Nevertheless, Raz warns against regarding state law as the only form of law, given the dominant trend of globalisation and *"the legal changes that attend it"*.[16]

Similarly, MacCormick observes:

> *"Law is institutional normative order, and state law is simply one form of law. Conversely, the state is a form of territorial political order…, and the law-state is simply one form of state…*
> *All this helps in building an understanding of the coming world order beyond the sovereign state."*[17]

The above observations acknowledge the significance of the nation-state in our understanding of law, while simultaneously emphasising the need to conceptualise law as a normative order distinct from the nation-state. State law may have been the point of origin for modern discourse, but it is neither the destination nor the route.

Law Beyond the Nation-State

Raz highlights 3 important lines of development in modern international law:

(i) Emergence of international organisations with independent law-making powers not conditional on nation-state consent;

(ii) Changes in the quantity, speed, and mode of emergence of new international law rules; and

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15 Raz 2017(2) at 137.
16 Raz 2017(2) at 151.
17 MacCormick 1997 at 1067.

(iii) Extended range of agents with powers of action in international law.[18]

The cumulative effect of these trends is a significant change in the standing of nation-states, as *"[t]heir freedom is more limited, hemmed in by pervasive and invasive international regulations, and no longer are states free from the legal authority of bodies not under their control"*.[19] However, Raz rightly concludes that the legitimacy of nation-states and the lack of viable replacements mean that nation-states face *"change but not displacement"*.[20]

The above trends were termed by Robert A. Schapiro as the *"disaggregation of the nation-state"*,[21] with power flowing away from the nation-state in 2 directions: upwards to supranational bodies, and downwards to subnational regions and localities. Unlike Raz, however, Schapiro posits that this disaggregation spells the end for nation-states, though not the end for formal governance.[22] He thus suggests looking to subnational-states and their constitutions to play a central role in legitimation and coordination of law, to avoid fragmentation.

A few preliminary responses. First, the writer sees the force of Schapiro's argument in relation to legitimacy vis-à-vis subnational-states; that a subnational government may be perceived as better reflecting a government *"of the people"*, *"by the people"*, and *"for the people"*.[23] This does, to a certain extent, meet Raz's requirement of legitimacy insofar as the subnational community is concerned. But how would a subnational government achieve legitimacy on the national and supranational levels? Schapiro does not appear to address this.

Second, the writer disagrees with Schapiro's proposition that subnational governments would provide better coordination of international law, and address the problem of fragmentation. In fact, devolving all power to the subnational level may well compound the problem. If agreement and coordination amongst lesser, but larger, units of nation-states already pose multiple challenges, it is unclear how breaking these nation-states down to infinitely more, but smaller, units of subnational-states would resolve them.

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18 Raz 2017(2) at 151 and 154.
19 Raz 2017(2) at 155.
20 Raz 2017(2) at 156.
21 Schapiro 2008 at 811.
22 Schapiro 2008 at 835.
23 Schapiro 2008 at 821.

Nevertheless, what is helpful from this debate is that it sets the stage for our discussion on which actors are best placed to meet the challenges of globalisation and legal pluralism in Part II.

(d) Conclusions on Part I

Based on the discussion thus far, the writer draws the following conclusions on how the pieces of law, morality, politics, sovereignty, legitimacy, and power fit within the larger puzzle of the theory of law:

(i) Morality drives and permeates the discourse on law.

(ii) Politics determines the participants of that discourse.

(iii) Law is the product of that discourse.

(iv) Morality and law are conceptually distinct but derivatively inseparable, as morality is law's origin and its ultimate claim to normative force. Law claims moral legitimacy, and legitimate laws are predicated on morality.

(v) In the realm of politics, governments claim sovereignty and legitimacy vis-à-vis their subjects.

  (a) At the national level, sovereignty is easily established, and the issue is one of legitimacy. While some governments possess actual legitimacy, others possess only apparent legitimacy. Legitimacy, in turn, has moral undertones, and the moral authority of governments is dependent on acknowledgement and support from their subjects.

  (b) At the supranational level, legitimacy is easily established, and the issue is one of sovereignty. This is because legitimacy at this level is often determined by legal norms: governments either possess or lack legal standing to participate in supranational discourse. As for sovereignty, while most governments have legal sovereignty, some do not have political sovereignty. This, in turn, determines their relative bargaining power vis-à-vis other governments in supranational discourse.

(vi) In the realm of law, once created, law is implemented through legal institutions. Both law and legal institutions claim sovereignty and legitimacy vis-à-vis their subjects and, in some cases, this claim prevails due to extra-legal strengths, whether military, economic or otherwise.[24]

  (a) At the national level, the issue is one of moral legitimacy, rather than legal or political sovereignty. The moral legitimacy of state law is dependent on acknowledgement and support from subjects for their sovereigns, and the law and legal institutions they create.

[24] Raz 2017(2) at 146 and 156.

(b) At the supranational level, issues of both sovereignty and legitimacy arise, as supranational law and legal institutions are seen as interfering with nation-state sovereignty.

Nevertheless, at both levels, law, arrived at through the processes in Diagrams 1 and 2 above, retains its normative force and heteronomous nature, irrespective of politics and morality.

II. LAW IN AN ERA OF GLOBALISATION & LEGAL PLURALISM

Finally, we come to the discussion on possible reasons for the push for "more law". In this Part, the writer first examines the novel forms of legal regulation that have emerged as a consequence of globalisation and legal pluralism, before explaining why "more law" does not address the challenges posed.

(a) Novel Forms of Legal Regulation

Transmission

One of the legal phenomena that has emerged from globalisation is the transmission of law. Quite apart from the obvious example of colonisation, H. Patrick Glenn,[25] William Twining,[26] and Ko Hasegawa[27] have demonstrated that transmission of law can be more subtle and nuanced. Labelling it as a process of *"diffusion"*, Twining suggests that there are 12 ways in which our understanding of this process has evolved.[28]

Hasegawa takes the analysis further, by examining more deeply the *"translation"* of laws by the receiving society, the role of the translator / *"situated critic"*, and his impact on shaping the ultimate legal product.[29] What makes Hasegawa's works of particular significance is his use of social legal theory and empirical research to explain global legal phenomena.

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25 Glenn 2014.
26 Twining 2009(2).
27 Hasegawa 2009.
28 Twining 2009(1) at 54.
29 Hasegawa 2009.

This ties in nicely with the work of Brian Z. Tamanaha, who contends that apart from natural law and legal positivism, social legal theory has existed for centuries. Tamanaha suggests that this third branch of jurisprudence provides a contrasting yet complementary perspective, and rounds out the full range of theoretical angles on law: natural law being normative, legal positivism being analytical / conceptual, and social legal theory being empirical.[30]

Regardless of which theory or combinations of theories one subscribes to, it is clear that transmission of law is an extremely rich subject. Yet, it is only the first angle from which to approach the study of global legal phenomena.

Typologies

The second contribution of globalisation to legal theory is an expanded understanding of the typologies of law. With interaction between societies comes the realisation that "law" as understood and practiced within each society may be different; that a multitude of other "laws" govern human behaviour, are adhered to, and enjoy legitimacy amongst segments of society. The issue thus arises as to recognition beyond those segments. When should normative orders be classified as "law"?

Our discussion in Part I had focused on state law versus supranational law. Yet, "*state law is simply one form of law*".[31] Even within a nation-state, there are different normative orders operating as non-state laws, e.g. Shariah law, Jewish law, indigenous law etc. Once again, issues of sovereignty and legitimacy arise. There may be good reasons for governments to recognise or reject normative orders other than state law. Sovereignty entitles governments to make such pronouncements, while failure to recognise normative orders may cause governments to lose legitimacy amongst their adherents. Navigating these complex issues is ultimately a matter of politics which is, in turn, driven by power-relations.

A full examination of the typologies of law and the relevant criteria for recognition are beyond the scope of this Paper. Nevertheless, what is important to note is that legal pluralism requires an

[30] Tamanaha 2015.

[31] MacCormick 1997 at 1067.

acceptance that multiple normative orders coexist within "the world", only some of which are recognised at the national and supranational levels as "law".

Normativity

The corollary of recognising that there are non-state laws operating at both the national and supranational levels is the issue of normativity of laws. While theories like cosmopolitanism and value pluralism are attractive, they do not answer the challenges posed when normative orders clash.

At the national level, we see clashes between subjects, and between governments and their subjects, typically where:

(i) Different subjects adhere to different normative orders; or

(ii) Governments enforce state laws against subjects who adhere to non-state "laws".

Oftentimes, the conflict is resolved by resorting to politics: governments make policy decisions after weighing competing interests, and exercise their sovereign power to either recognise one normative order as "law" to the exclusion of the other, or recognise both normative orders but accord them different statuses in the hierarchy of laws.

At the supranational level, we see clashes between state law and supranational law, with such conflicts being resolved by state or supranational legal institutions. The resulting pronouncements are often contradictory, leading to the perception of chaos in the global legal order.[32]

What further complicate matters are the trends in modern international law identified by Raz above, along with 2 other trends that he highlights:

(i) The marked tendency in recent times to recognise emerging customary rules (not requiring nation-state consent); and

(ii) The granting of standing to individuals to instigate judicial proceedings in international law.[33]

[32] See Schapiro 2008 for a detailed analysis on conflicting decisions at the national and supranational levels.

[33] Raz 2017(2) at 154.

While the former reflects power-relations struggles which are not new, the latter elevates national-level conflicts to the supranational level. By empowering subjects to sue their governments under the auspices of supranational law, supranational law and legal institutions simultaneously diminish nation-state sovereignty and legitimacy, while enhancing their own.

A final challenge at the supranational level needs mentioning – that of clashing supranational laws. This raises issues of normativity amongst supranational laws and legal institutions. The phenomenon is termed the *"proliferation"* and *"fragmentation"* of international law,[34] and arises due to the creation of multiple legal institutions dealing with specialised supranational laws.

(b) Why "More Law" is Not the Solution

The above analysis on the challenges of globalisation and legal pluralism gives the impression that there is a pressing need for legal reform. It is thus easy to understand why there may be calls for "more law". After all, if law's dual functions are resolving conflicts and coordination, then law would be the answer to the issues posed. But where the conflicts are themselves driven by the plurality of laws, is "more law" really the solution? The writer takes the view that it is not. More law does not solve the problem of having so many laws, and is both counterintuitive and based on a misconception of the effects of globalisation and legal pluralism.

Embracing Globalisation & Legal Pluralism

It should be noted at the outset that globalisation is not a new phenomenon. Martin Wolf, in examining globalisation from an economic perspective using empirical data, concludes that:[35]

(i) Today's growing integration is not unprecedented, and the world has seen similar trends before.

(ii) Despite various economic changes, the markets for goods and services and factors of production are no more integrated than they were a century ago.

(iii) Despite technological advances, it is policy, not technology that has determined the extent and pace of international economic integration.

[34] See Treves 1999, Guillaume 2004, Andenas 2015 and Reinisch 2008.

[35] Wolf 2011 at 179 – 182.

Wolf further suggests that globalisation be viewed as a journey and a choice, not a destination or an ineluctable destiny. It is a choice made by nation-states to enhance economic well-being, and nation-states are free to choose how far along that journey to go, *"[b]ut if integration is a deliberate choice… it cannot render states impotent. Their potency lies in the choices they make"*.[36]

Raz draws similar conclusions in the legal and political context. He postulates that while the nation-state's standing in the global legal order may have suffered blows, its continued legitimacy amongst its subjects, and the absence of a viable replacement for the *"sense of identity and loyalty"*[37] associated with it, ensure its continued survival and participation in legal development.

Likewise, in relation to legal pluralism, nation-states may choose to either embrace or reject plurality. If they choose to embrace it, they must necessarily contend with issues of recognition, conflict, and normativity. They must develop policies, criteria, and/or mechanisms for resolving those issues. But the nation-state's role has not been extinguished. It has simply evolved.

The Evolving Role of Nation-States

Given the interaction between law, morality, and politics expounded in Part I, going forward, at the national level, state laws will likely evolve to reflect supranational norms that have gained legitimacy amongst its subjects. This maintains the moral legitimacy of nation-states at the national level, by ensuring that state laws are aligned with the moral standards, interests, and will of its subjects.

At the supranational level, nation-states will likely adopt policies that reflect the growing legitimacy of supranational law, seek greater participation in the development of supranational norms, and continue to assert their sovereignty. This maintains the moral legitimacy of nation-states at the supranational level, by setting and ensuring compliance with norms that are aligned with the moral standards, interests, and will of the supranational community.

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[36] Wolf 2011 at 178 and 182 – 183.

[37] Raz 2017(2) at 162. See also Raz 2017(1).

Nation-states will continue to do what they do best, namely, navigate power-relations in politics while seeking to maintain sovereignty and legitimacy at both the national and supranational levels. While the content of their policies and the range of participants in the discourse may vary, the process of formation of legal norms remains largely the same. Moreover, self-preservation of nation-states will likely motivate greater coordination with supranational law. This prospective trajectory of events renders the proposed solution of "more law" unnecessary. Instead, all that is needed is a more evolved understanding of law, and a more evolved understanding of the role of nation-states in this globalised and legally pluralistic world.

III. CONCLUSION

While the constraints of this Paper make it impossible to fully examine all the issues raised, the writer has sought to present a multi-faceted and multi-dimensional answer to the loaded question posed. In particular, it is hoped that the above discussion brings greater clarity on the nature of law, and its relationship with extra-legal considerations. It is further hoped that the discussion has shed light on the true impact of globalisation and legal pluralism, the challenges that they present, and the evolving role of nation-states in meeting those challenges.

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