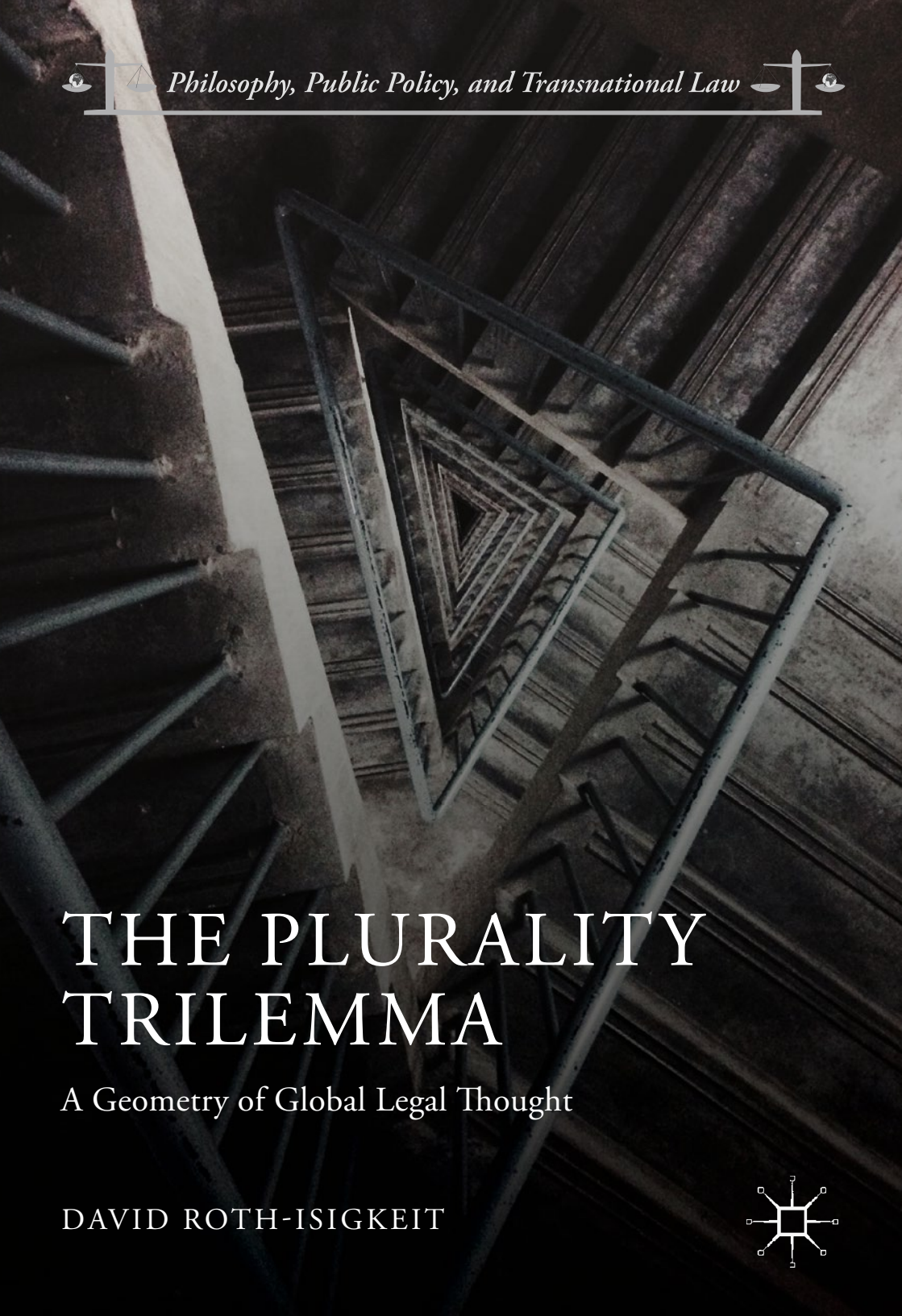

Philosophy, Public Policy, and Transnational Law

THE PLURALITY TRILEMMA

A Geometry of Global Legal Thought

DAVID ROTH-ISIGKEIT

Philosophy, Public Policy, and Transnational Law

Series Editor
John Martin Gillroy
Lehigh University
Bethlehem, PA, USA

Philosophy, Public Policy, and Transnational Law seeks, uniquely, to publish new and innovative arguments about global law and policy that transcend realist/positivist assumptions and the conventions of current legal/policy discourse. This series means to encourage the application of systematic philosophical and theoretical arguments to practical policy and legal issues that combine domestic, comparative or international law. We will pursue scholarship that integrates the superstructure of the positive law with its philosophical and public policy substructure, and which, in this way, produces a more three dimensional understanding of transnational law and its evolution, meaning, imperatives and future. We seek dissertations, solo and edited volumes, as well as innovative reports that integrate new methods, epistemologies and interdisciplinary perspectives with practical issues on the full range of policy and legal dilemmas challenging transnational relations.

David Roth-Isigkeit

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A Geometry of Global Legal Thought

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David Roth-Isigkeit
Normative Orders, Goethe University
Frankfurt, Germany

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Foreword

An observer perched on the cusp of the sixteenth century in Western Europe, surveying the writings of jurists, statesmen, diplomats, and councilors, might well have had an inkling that something important was going on. Within a 100-year period (1500–1600), the terms of argumentation concerning the nature of secular order, religious faith, and their relationship with universal legal order shifted dramatically. The medieval Christian and Roman roots of thinking about the nature of universal order remained thick and deep, but they were undoubtedly being grafted and cultured in new ways, sprouting new breeds of argumentation and conceptual innovations that sought to respond to the pervasive and violent fracturing of the medieval world's political forms, modes of knowledge, and ontologies of order. The final crisis had been a long time coming, and had many sources—economic, social, and political. But one of the central problems it bequeathed to jurists and theologians was how to account and argue for the sources of law and legal authority, both within a civil power (soon to be grasped specifically as *states*) and between civil powers. It would be perhaps another 150 years before anything like a common image of this new epoch could be taken for granted as the starting point of an argument; Hegel's owl of Minerva takes flight at dusk, after all, and until that time philosophy (or legal theory) continues to paint its gray in gray.

David Roth-Isigkeit's book attempts to grasp a similar kind of topology of argumentation in the midst of another moment of great, perhaps epoch-making, change—the contemporary period of "globalization" and "digitalization." The state is unquestionably still with us—and current populist politics powerfully evince its libidinal grip on our political imagination—but

its concreteness as the archê for law, legal authority, and legal form is slipping through our fingers. The past 25 years have spawned an explosion of writing about global law, transnational law, law beyond the state, and legal pluralism, registering the pervasive sense that a distinctive space of legal ordering is materializing before our eyes. Not exclusively national nor international (in the sense of inter-state), it is glossed as global, and seems to engender modalities of law and legal normativity that are not elementarily assimilable to either national law (public and private) or the formal structures of international law. As Roth-Isigkeit shows, at stake in these writings—which he has comprehensively digested and critically synthesized in this book—are not only efforts at describing what we are seeing, but also the attempt to shape its emergence. Global law theory is, as Roth-Isigkeit argues at length, performative: such writing endeavors to interpret *and* change the world by trying to shift the schemata of intelligibility and reference that orient thought, judgment, and action, in relation to these diverse "global legal" phenomena.

Roth-Isigkeit's critical synthesis has an important ambition: to show that the main streams of theorizing about global law (what he calls "global legal thought") seek to capture the same social-legal phenomena, but through methodological and value presuppositions that foreground different relationships, dynamics, and problematics, and thus intimate very different kinds of descriptions and prescriptions about what global law is and what it should become. Roth-Isigkeit's impressive mastery of the enormous literature of global legal thought leads him to claim that a master narrative of global legal thought cannot be achieved by a synthesis of its streams; their presuppositions and commitments are incompatible, and the reasons why one might prefer one picture of this reality over another are contingent.

His call is not for a unification of these theories, but rather for reflexivity and self-knowledge in their use and deployment. What he prefigures and exhorts, it seems to me, is the conscious *self-construction* of a professional, political, and ethical persona for our current conjuncture—the Global Legal Thinker, who is both lawyer and theorist, fumbling constantly to situate her or his own praxis and thought within a space of possible (legal, political, social, institutional) spaces which her or his activity, ineluctably, helps bring into being.

European University Institute,
Fiesole, FI, Italy

Nehal Bhuta

Series Editor's Foreword

If there is one "sure thing" about the future of the international legal order, it is that while state sovereignty will remain a central standard of legal interaction, the absolute nature of its authority is gone forever. In the absence of this certainty, it is more important than ever for scholars, lawyers, and policy analysts to think about how and through what philosophical principles and arguments a balance will be attained between a traditional kind of *Lotus* sovereignty and transnational authority beyond the state.

This thought will be both provoked and enriched by David Roth-Isigkeit's book, which I welcome with enthusiasm to our series in *Philosophy, Public Policy and Transnational Law*.

In his argument, Roth-Isigkeit approaches the subject of law transcending the nation-state in a unique and creative way. Drawing on a range of classical and modern philosophical theories, he concentrates not on the empirical dimension of "global law" (i.e., defined by the author as the first level of analysis), nor does his effort concentrate on the next level where theory addresses explicit conflicts between different legal systems. Rather, he proscribes a third alternative approach where he argues for a metatheory that traces the varied approaches to global legal thought back to their fundamental "societal epistemologies." During this reorganization of the philosophical geography of international discourse, he segregates three specific but interrelated epistemologies that, by the end of the argument, are characterized by Roth-Isigkeit as a *plurality trilemma* where their individual advantages and disadvantages must be both recognized and overcome in the realization that each identifies essential elements of what a global social-legal order ought to be.

The first of these epistemologies relies on the formal quality of the law and the value of legitimate discourse as a decisive element of social problem-solving; the second addresses the irreducible plurality of legal substructure through a post-modern understanding of systems theory; and the third deals with the inherent tension between values, principles, and moral realism. Roth-Isigkeit concludes by providing us with a "geometrical map" of the "trilemma" consisting of Habermasian, Luhmannian, and Dworkinian components. He then makes the claim that they are "mutually irreconcilable" but each necessary to the navigation of the changing transnational legal landscape.

The call here is one for abandoning the objective of finding one unified theoretical approach to answer all of the questions and respond to all of the dilemmas of our evolving international legal system. Calling this an exercise in "futility," Roth-Isigkeit encourages us to recognize the essence of this controversial finding and think about transnational law and policy unconventionally. In this way, his argument is exactly what this book series was created to promote.

Throughout his argument, two things are stressed. First and foremost, that the practical consideration of the international legal system cannot be understood without an equal attention to the collected philosophical knowledge that has both created global legal practice and been created from it. Second, this dialectic of theory⇆practice is redirected from the conventional presupposition that a single philosophical approach is enough to understand and adequately influence the evolutionary path of transnational law. The challenge presented here is one of recreating the perspective of scholars and practitioners alike in their consideration of both the surface and the essence of international law. Primarily, there is the imperative to be conscious of the interdependence of both the philosophical substructure and empirical superstructure of international law. Next, there is the call for a consciousness of the "circumstances of plurality" representing the simultaneous interdependence and irreconcilable nature of lines of philosophical thought that requires the concurrent consideration and coordination of the tenets of multiple approaches to global legal thought in our effort to decipher, advocate, and adapt to change.

This profound insight, which Roth-Isigkeit characterizes as a "practical turn" in the study of international law and policy, is, from the standpoint of this series, a true expression of the essential trialectic of Philosophy⇆Policy⇆Law that is necessary to a more complete knowledge of the inherent architecture of the transnational legal system. This is

especially true given the laws, current and ongoing, struggle with globalization and the waning of the absolute sovereignty of the state. Whatever else this approach does, it will spark a conversation that needs to be initiated.

This book is a fine addition to *Philosophy, Public Policy and Transnational Law*, and the editorial board and I welcome its creativity and the challenge it poses to both scholars and practitioners alike.

Bethlehem, PA, USA John Martin Gillroy

Preface

… In that Empire, the Art of Cartography attained such Perfection that the map of a single Province occupied the entirety of a City, and the map of the Empire, the entirety of a Province.

[…]

In the Deserts of the West, still today, there are Tattered Ruins of that Map, inhabited by Animals and Beggars; in all the Land there is no other Relic of the Disciplines of Geography.

Jorge Luis Borges[1]

The territory no longer precedes the map, nor survives it. Henceforth, it is the map that precedes the territory.

Jean Baudrillard[2]

Finally, if the suspended map were opaque, the same objection raised for the extended map would be valid: preventing the penetration of solar rays and atmospheric precipitation, it would alter the ecological equilibrium of the territory and thus become an unfaithful representation of it.

[…]

Furthermore, occupied in constant revisions of the map, the subjects could not deal with the ecological decline of the territory; the activity of map revision would lead to extinction of all the subjects – and therefore the Empire.

Umberto Eco[3]

[1] *Collected Fictions*, trans. Andrew Hurley (London: Penguin Books, 1998), 325.

[2] *Simulacra and Simulation*, trans. Sheila Faria Glaser (Ann Arbor: University of Michigan Press), 1.

[3] *How to Travel with a Salmon and Other Essays*, trans. William Weaver (New York: Harcourt Brace & Co., 1994), 99–100.

The drawing of maps is and has always been a contentious activity. This is because a map is the symbolic representation of elements of space, most frequently a territory. Its function is to render the space accessible for the reader of the map by simplifying or scaling down its actual size. This way, a reader might explore the geography of Siberia without ever having been there or simply find the closest place to eat an ice cream. The indications of maps are helpful tools, giving orientation to those yet unfamiliar with a certain fraction of space.

Since maps contribute to the formation of our beliefs on the actual composition of the space they describe, they exercise a considerable amount of power. This power reaches from examples like an online map leading the reader not to the closest but an advertising ice-cream parlor to the fact that a majority of the world population believes that the African continent is far smaller than it actually is because it has been misrepresented on two-dimensional maps of the globe. Conflicts begin and end with the drawing on maps. This might be as trivial as an unsatisfied ice-cream customer, but it may also aim at redefining political relations, such as the domestic legal requirement for maps in the Russian Federation to include Crimea as part of Russian territory.

In international law, maps play a central role in deciding territorial disputes. Yet, even though this is a book about international law, it is not concerned with the traditional meaning of maps in the discipline. Rather, it deals with maps of the social world: *theories*. On the one hand, theories are supposed to represent their territory, that is to provide adequate signs and directions. On the other hand, they exercise power because they inform and define the reader's view on the composition of the world. It is in this way, as Jean Baudrillard has diagnosed, that maps shape and ultimately *become* the territory.

The drawing of a map requires the observation of its object with a certain degree of abstraction. Mapping requires symbolic depictions and simplifications, and it is only through this reduction in information that the map might be useful for the reader. Jorge Luis Borges' short story *On Exactitude in Science* illustrates this requirement with an ironic twist. He describes a fictional country, in which the art of mapping reached such perfection that the size of the map equaled the size of the territory. Soon, the cartographers recognize that such a map becomes useless. Similarly, someone trying to grasp the complexity of legal practice by looking directly at cases and institutions might miss the wood for the trees. A map might guide the view toward patterns and regularities and, in this way, facilitate

access and understanding. Theory, in general, fulfills such a role with respect to the social world.

Mapping the social world is a particularly delicate exercise since it cannot rely on a physical territory. While sooner or later one will probably find the closest ice-cream parlor or eventually experience the true size of Africa in lengthy travels, social phenomena are fluid. Customary international law, for example, requires the shared belief that a certain course of conduct is legally required. Whether or not this belief is taken does not depend on criteria of pedigree but on a mapping of the social world. This book will highlight some of the complexities that the mapping of social phenomena involves.

This is a book about maps of law beyond the state. Economic globalization and digitalization have caused a considerable amount of turmoil in the traditional structures of the international legal system. A system based on the consent of national states is in the process of rapid adaptation to its new social preconditions. In this process of change, there is more need than ever to guide the understanding of international lawyers with the provision of maps of the newly globalized law.

In the theory of international law, many authors have responded to this *lacuna* and engaged in cartographical projects. These projects consume a large part of the disciplinary resources. As Umberto Eco interprets Borges' short story, map-making might also change the "ecological equilibrium of the territory." As a consequence of this theoretical turn, there is a multitude of maps that picture different images of the same social world. This plurality reduces the quality of the discourse, since a disagreement on the composition of the territory impedes on the usefulness of the signs and directions provided by the maps. In order to mitigate this problem, this book tries to draw itself a map of a higher order. It tries to give signs and directions to the reading of maps in global legal thought, a meta-map so to speak.

I hope such a map proves helpful for the exploration of law's challenges in globalization. When I was confronted with the unconstrained plurality of legal thought beyond the state for the first time, I was immediately fascinated—and fundamentally confused. Without the effort of many people giving me directions on this way, this book would not have been possible.

The story of this book begins in 2009 with a remarkable coincidence at a seminar of the *German National Academic Merit Foundation*, where I met the woman who would later become my wife, and Bardo Fassbender,

who turned me into a committed constitutionalist. Following this Kelsenian thread to the *Institut des Hautes Études Internationales et du Développement*, it was in the seminars of Andrea Bianchi that this constitutionalism was soon put in perspective. I remember well being stunned and confused, when Professor Bianchi told us that law is a matter of stories and narratives instead of sources and formal text. This book owes a lot to his courses, and even though we occasionally disagree in our views, it was only through these fundamental tensions between Stanley Fish and Hans Kelsen, between Kant and Nietzsche, that I have been inspired to write this book.

In Geneva, long discussions on Habermas with Wendelin Federer raised my interest in social philosophy. When I moved to Frankfurt for my doctorate, it was with the help of Marcus Willaschek, who accepted me as a steady (frequently merely listening) guest in his colloquium in analytic philosophy, and the support of Michel de Araujo Kurth, Philipp Schink, and Achim Vesper, that I tried to get an understanding of practical philosophy. Thomas Vesting's colloquium on legal theory and Gunther Teubner (who deserves my special gratitude for writing the second review of my doctoral thesis in an extremely short time) introduced me to the world of systems theory.

I could tell a story like this about many people involved in this project and many audiences in between Ann Arbor to Singapore where I have been privileged to present my ideas. Whether in shorter or longer talks, in seminars or at the breakfast table, Tilmann Altwicker, Matej Avbelj, Thomas Biersteker, Stefano Bertea, Nehal Bhuta, Sergio Dellavalle, Pierre-Marie Dupuy, Anuscheh Farahat, Isabel Feichtner, Andreas Fischer-Lescano, Cyril Gradis, Klaus Günther, Gleider Hernández, Thomas Kleinlein, Ralf Michaels, Bruno Migowski, Anne Peters, Tobias Schaffner, Ronny Thomale, and Lars Viellechner have contributed, among many others, to the formation of the concrete shape of the project. I am grateful to all of them for their intellectual support and interest in this book.

The cluster of excellence "The Formation of Normative Orders" and the Institute for Public Law at Goethe University have been my intellectual homes for the past five years. I am extremely grateful for the relentless support for my work that I was experiencing here. At the cluster, its managing director Rebecca Schmidt and Sigrun Wassum helped answering my queries and supported many of my projects and travels. The same holds true for Patricia Psaila at the Institute for Public Law, who made many of my office days begin with a smile.

Since I arrived in Frankfurt in April 2012, it is the continuous dialogue with my mentor Stefan Kadelbach that nourishes my academic writing. As a teacher, as a supervisor, and as an intellectual, he continues to impress me with his intellectual curiosity, his humility, and his selfless support. What my thinking and my personal development owe to his generosity is beyond the scope of words.

Last but not least, I am grateful to John Martin Gillroy for his interest in the project and for accepting this book in the *Philosophy, Public Policy and Transnational Law* series. Special thanks go to Michelle Chen and John Stegner at Palgrave Macmillan who have supportively pushed this project to publication.

This book is dedicated to my family, Lilli, Tinka, Theo, Angela, and Thomas, who are and have been my personal compass. They continue to teach me that instead of relying on maps and theories, it may as often be best simply to start walking.

Frankfurt on Main, Germany David Roth-Isigkeit

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CHAPTER 1

Introduction: Theory, Practice, and Meta-Theory

Around the turn between the sixteenth and the seventeenth centuries, the audience in the London *Globe Theatre* witnessed the première of *Hamlet*—and arguably the invention of a new form of argument. In order to reveal the true circumstances of the death of his father, Hamlet produces a play within a play, called the *Murder of Gonzago*.[1] The audience thus views how the play is taken to a meta-level: Shakespeare constructs within the fictional reality of the play a second theatrical performance, in which actors are staged as actors playing a second role. Hamlet confronts the suspected murderer with a performance that is similar to the actual events leading to his father's death, in order to see "if his occulted guilt do not itself unkennel in one speech."[2]

With the play within a play, Shakespeare conveys a theory of theatrical performance by suggesting how such performances take effect: if the suspicion is true, the murderer will show a reaction. The play within a play is thus an element of self-reflection. At the same time, however, the play within a play moves the main story forward. It remains integrated in the presentation of the play and, as such, contributes to its effects on the

[1] William Shakespeare, *Hamlet* (London: John Miller, 1814), Act 2 and Act 3. See also, Gerhard Fischer and Bernhard Greiner, "The Play Within a Play: Scholarly Perspectives," in *The Play Within the Play: The Performance of Meta-theatre and Self-reflection*, eds. Gerhard Fischer and Bernhard Greiner (Amsterdam/New York: Rodopi, 2007), xi.

[2] Shakespeare, *Hamlet*, Act 3, Scene 2, 44.

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audience. The theoretical perspectives on the role and functions of theatre cannot escape the confines of the frame of the stage. As part of a play, they are theatre.

Being theatre, however, they do not remain detached from the practice they purport to reflect. As a way of telling the story, the play within a play is inevitably performative for the impression on the audience. It articulates a theory on how meaning is conveyed with theatrical instruments and subtly influences the way in which the play will be received by the audience because, paradoxically, it makes itself a background condition of its own understanding.

The same holds true for law and theory. Like a play within a play, theory makes itself a background condition for practicing law. It is not the detached observation of a physical object, but is an essential part of the construction of the legal performance. This does not have merely stylistic consequences. Theory is a powerful instrument that shapes the contours of our legal practices. This is what I claim in the first chapter.

This acknowledgment of the political role and the power of theory prepares the ground for the project of the book—the case for a meta-theory of law. Unlike theatrical performances, law is normative, and legal decisions have immediate effects on humans of flesh and blood. As a consequence of this potential effect, the performativity of legal theory is a political issue. There is an urgent need to understand how theory works, on what basis it can be legitimate, and what alternatives are available in order to make an informed choice between them. This aspect has been largely ignored in legal-theoretical scholarship, in particular in approaches to law beyond the state. This book is an attempt to mind and ultimately to bridge this gap in the literature—a playbill for the performances of global legal thought.

1.1 Theory and Practice

That theory and practice are intrinsically related is not a new argument, neither in general legal studies[3] nor in the theory of international law.[4] Yet, the relationship of theory and practice in the law is difficult to write about,

[3] E.g., Jules L. Coleman, "Legal Theory and Practice," *Georgetown Law Journal* 83. (1995): 2579. Cass R. Sunstein, "On Legal Theory and Legal Practice," *Nomos* 37 (1995): 267. Stanley Fish, *Doing What Comes Naturally – Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989). See also, Matthias Jestaedt, *Das mag in der Theorie richtig sein… – Vom Nutzen der Theorie für die Rechtswissenschaft* (Tübingen: Mohr Siebeck, 2006).

[4] See, among others, Andrea Bianchi, "Reflexive Butterfly Catching: Insights from a Situated Catcher," in *Informal International Law-Making*, eds. Joost Pauwelyn, Ramses

for it is precisely this relationship, which is a watershed mark between sometimes diametrically different conceptions of the law. Instead of a comprehensive introduction to this topic, for which one would have to study the history of legal thought *in extenso*, I will constrain myself to a few remarks that illustrate the way of analysis that I will follow in the book.

1.1.1 Performativity of Theory

Theory is the continuous search for answers to persisting questions. How should law be applied? How do we determine the sources of the law? What is the relationship of one legal rule to another? What are the rules of interpretation? What is the purpose of law in a society? How does law relate to other sources of societal normativity, like ethics or etiquette? In this non-exhaustive list, every question consists of many sub-questions. All of them, however, have one thing in common: released from the constraints of concrete cases, they are abstract conceptions on what law is and what it should be.

Law is not a physical but a cognitive object. An abstract view of the law is thus fundamentally different from an abstract conception of an apple. While our thoughts on apple trees, the process of growing, or the inner organic structure of the fruit leave the physical appearance of the apple unchanged, theoretical beliefs about the law decide what the law is. As a social practice, law is what a certain group of people treat as part of this practice.

Immanuel Kant expressed this relation in terms of theory and practice. He argued that "[a] collection of rules, even of practical rules, is termed a *theory* if the rules concerned are envisaged as principles of a fairly general nature, and if they are abstracted from numerous conditions, which, nonetheless, influence their practical application. Conversely, not all activities are called *practice*, but only those realizations of a particular purpose which are considered to comply with certain generally conceived principles of procedure."[5] The *generally conceived principles of procedure*, in this picture, are those principles that we believe are common to a practice of law.

Wessel and Jan Wouters (Oxford: Oxford University Press, 2012), 200. Iain Scobbie, "A View from Delft: Some Thoughts about Thinking about International Law," in *International Law*, 4th edn., ed. Malcolm Evans (Oxford: Oxford University Press, 2014), 53. Jochen von Bernstorff, "The Relationship of Theory and Practice in International Law," in *International Law as a Profession*, ed. Jean d'Aspremont et al. (Cambridge: Cambridge University Press, 2017), 222.

[5] Immanuel Kant, "On the common Saying: 'This may be true in Theory, but it does not Apply in Practice'" in *Kant – Political Writings*, ed. Hans Reiss (Cambridge: Cambridge

Like the Hartian *rule of recognition*, these principles define the sources of law.[6] They may include black letter, but they may also acknowledge custom. They may deal with rules, but they may also promote soft law. As there is no general and unanimous view on what law is, these principles of procedure that define the law are indeterminate. In some areas, they may be more disputed than in others (global law is such an example), but in all areas, they are subject to theoretical discussions. Views on what the law is impact our understanding of practice because they make themselves a background condition of understanding the law: they define what law is in the first place.

Theory does not only impact our view of what law is. More fundamentally, it determines how we do law by providing the daily toolkit for legal interpretation ("the rules of the game").[7] Elsewhere, I have described this methodological basis as a legal grammar—the conceptual and linguistic foundation on which legal decisions rest—law's meta-structure, its argumentative techniques, and its systematicity.[8] This *methodological* element is pervasive throughout theoretical approaches, even though we rarely find open commitments to this influence. Ronald Dworkin's interpretivism is a notable exception,[9] where other approaches prefer to conceal their methodological aspirations in analytic terms. Yet, giving answers to the questions of what law is and what we should do with it shapes those principles that define and produce our perception of the legal performance.

University Press, 1970). Kant's distinctions on theory and practice are curiously popular among international legal theorists. See Scobbie, "A View from Delft," 63. Anne Peters "There is nothing more Practical than a Good Theory: An Overview of Contemporary Approaches to International Law," *German Yearbook of International Law* 44 (2001): 25.

[6] Cp. Herbert L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 110. See, for the argument of legal theory as source, Iain Scobbie, "Legal Theory as a Source: Institutional Facts and the Identification of International Law" in *The Oxford Handbook on the Sources of International Law*, eds. Jean d'Aspremont and Samantha Besson (Oxford: Oxford University Press, 2018), 493.

[7] Andrea Bianchi, "The Game of Interpretation in International Law," in *Interpretation in International Law*, eds. Andrea Bianchi, Daniel Peat, and Matthew Windsor (Oxford: Oxford University Press, 2015). See also Bianchi, "Reflexive Butterfly Catching," 215 and Peters, "There is nothing more Practical," 25–26.

[8] See David Roth-Isigkeit, "The Grammar(s) of Global Law," Critical Quarterly for Legislation and Law 99, no. 3 (2016): 175. Here I have distinguished two ways to think about this grammar. The first way of thinking appeals to grammar as a stabilizing factor. The second way of thinking highlights the asymmetries of power within this structure and perceives the legal grammar as the medium carrying the ideological commitments of the law.

[9] Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), 45f. For further detail, see Sect. 5.1.

Theory appears here as a frame of justification against which legal practice is evaluated. As any other form of normative order,[10] theory contains assumptions on the justification of social rules, norms, and institutions. As Rainer Forst and Klaus Günther have noted, normative orders provide the basis for political authority, distributory patterns, and individual freedom.[11] Such orders presuppose *and* generate justifications in a continuous process of interaction between normativity and social world. A social practice is oriented on narratives of justification that provide its conceptual background.[12] These narratives may be the result of contingent historical constellations, but as they are collectively memorized, they become an institutional basis for the social practice.

The impact of theory is pervasive even in frameworks that are usually considered non-theoretical. For example, the method of legal positivism attributes a high value to the concept of legal validity as the distinction between *lege lata* and *lege ferenda*. Thus, it is frequently depicted as a method "against theory." In a positivist's paradigm, theory should be little more than creative writing. Theoretical views can be used to influence processes of legislation, but they should not inform legal judgments before they are incorporated in the body of positive law. In particular, the normative distinction between theory and practice holds true for legal officials. As Jeremy Waldron notes, the rule of law "is the principle that an official should enforce the law even when it is in his confident opinion unjust, morally wrong, or misguided as a matter of policy."[13] The official is not supposed to make own theoretical assumptions of a part of the practice. Rather, officials should engage in a mechanical application of the law to a given social world.

Cass Sunstein has illustrated that even in a strictly positivist framework that puts utmost importance on the isolation of law from theory, the theoretical influence is inevitable. Practice translates rules into decisions, and this process of translation requires theoretical views. The most precise

[10] See Rainer Forst and Klaus Günther, "Die Herausbildung Normativer Ordnungen: Interdisziplinäre Perspektiven," in *Die Herausbildung Normativer Ordnungen: Interdisziplinäre Perspektiven*, eds. Rainer Forst and Klaus Günther (Frankfurt am Main: Campus, 2011), 11.

[11] Forst and Günther, "Die Herausbildung Normativer Ordnungen," 11.

[12] In detail, Rainer Forst, "Noumenal Power," *Journal of Political Philosophy* 23, no. 2 (2015): 111.

[13] Jeremy Waldron "Kant's Legal Positivism," *Harvard Law Review* 109 (1995–96): 1539.

account of rules contains abstract concepts and definitions. Even in simple cases, there are always open questions on how to put these concepts into practice. "A legal system must answer this […] by reference to something – and that something must be a conception of autonomy, or utility, or efficiency, or welfare, or something else. Even mundane areas of the law of contracts are therefore pervaded by theoretical claims about the reasons for social obligations."[14] According to Sunstein, even with a rigorous positivist method, theoretical views are a necessary background condition in order to decide practical cases.

Sunstein's argument relies on the fact that law is language. In postmodern philosophy, this has raised the idea of a *radical indeterminacy* of the law. According to Martti Koskenniemi, this radical indeterminacy goes much further than ambiguities of the grammar and the language of legal rules; it is not merely a semantic indeterminacy. Decisions in the law are not predetermined by the application of legal rules, Koskenniemi argues.[15] With the same rules you can justify one or another policy. "It follows that it is possible to defend any course of action – including deviation from a clear rule – by professionally impeccable legal arguments that look from rules to their underlying reasons, make choices between several rules as well as rules and exceptions, and interpret rules in the context of evaluative standards."[16] Here again, theories play an important role in delivering a framework for the justification of practical decisions. In the picture of radical indeterminacy, they can even overrule the legal text.

1.1.2 Theory as Politics

Since law is authoritative for its subjects, humans of flesh and blood, what makes the law is political. Through its interaction with the frames of justification which social practices are measured against, theory takes a share from this inherently political dimension of legality.[17] This political dimension of theory is inevitable: since theories are performative, they are also *normative*. There is no neutral description of the law from an unsituated observer, so that even the accounts striving for utmost objectivity describe the law "as they see it," in the biased perspective that is a result of their contingent historical experiences.

[14] Sunstein, "Theory and Practice," 269.

[15] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2nd edn. (Cambridge: Cambridge University Press, 2006), 595.

[16] Koskenniemi, *From Apology to Utopia*, 591.

[17] See for this political dimension, Scobbie, "A View from Delft," 58.

Theories provide their views and answers to these questions on form and purpose of the law on the basis of perceptions and reasons that they collect in different societal epistemologies. For example, the claim that multinational corporations are increasingly accepted as subjects of international law depends on one's perception of their role in global society and the assumed requirements for this status. These requirements are normative-theoretical. What are the conditions under which agents receive legal subjectivity in a legal system? Even seemingly empirical claims rely on a theoretical frame of justification and thereby receive a normative dimension.

These normative claims are embedded in a larger theoretical framework. For example, the claim that international law should recognize "soft law" as an official source is embedded in a set of beliefs of how the world works, and what role law plays and should play in it. Academic claims are constructed on the basis of background assumptions on the functioning of society, its central values, goals, and instruments. I will refer to these sets of beliefs as societal epistemologies.

As these background assumptions fundamentally differ between academics, both the perception of the *status quo* and the normative views for the future are diametrically different between theories. Like a play within a play, they come with a theory of the stage and integrate this set of ideas into the legal performance. They merge their pre-theoretical assumptions with their perception of the law and construct a world after this image. By providing answers to questions for the role and purpose of law in a society as a whole, these societal epistemologies construct an intellectual frame for theories of law.

Some of these epistemologies have been more successful than others, clustering around schools of thought or intellectual mentors.[18] Defining paradigms and trends, they have exercised considerable power. The basic mechanism, however, remains the same, independent of the scale of influence. In describing the world in the concepts and assumptions of the societal epistemology, theories suggest what is acceptable to do in a practice of law. A legal system does not function on the basis of a coherent theory but often has many of these unacknowledged background assumptions.

[18] For international law, see initially Hersch Lauterpacht, "The so-called Anglo-American and Continental Schools of Thought in International Law," *British Yearbook of International Law* 12 (1931): 31. See also, Bardo Fassbender, "Denkschulen im Völkerrecht," in *Paradigmen im Internationalen Recht*, ed. Bardo Fassbender et al. (Heidelberg: C.F. Müller, 2012), 1.

A theoretical claim interacts with the prevailing structure of justification through two different movements of construction and erosion. On the one hand, theories might build up new narratives and try to replace old intellectual frames that they consider overcome. For example, there are approaches that suggest that global law needs to refer to a global community of mankind as its frame of justification. On the other hand, theories might simply erode old frames by suggesting their inadequacy for future challenges. Instead of providing an alternative model of reasoning, approaches might also (merely critically) suggest that understanding international law in terms of national states is insufficient. In the first case, theory tries to build up a new frame of justification. In the second case, it merely erodes the prevailing narratives.

Oftentimes, but not always, theory combines both movements. A good historical example is Francisco de Vitoria's development of a doctrine of political sovereignty as a reaction to the Spanish colonization of Central and South America, which arguably provided an important milestone for the development of today's international law.[19] On the one hand, Vitoria's writings eroded the medieval theory that the Pope or the Emperor could exercise political domination over the colonized territories that, ultimately, allowed for the justification of atrocities.[20] On the other hand, this needed to be replaced by a new doctrine of political community, which served to construct a plausible alternative.[21]

Vitoria's writings equally exemplify another trait of the political character of theory. On the one hand, theoretical writings emerge from a specific context and might necessarily require to be resituated in this frame in order to be adequately understood and explained. This is the claim of the *Cambridge School* of intellectual history: theories and ideas will appear fundamentally distorted if they are released from their original context and

[19] See, Martti Koskenniemi, "Vitoria and Us – Thoughts on Critical Histories of International Law," *Rechtsgeschichte – Legal History* 22 (2014): 119. Kirstin Bunge, "Francisco de Vitoria: A Redesign of Global Order on the Threshold of the Middle Ages to Modern Times," in *System, Order, and International Law – The Early History of International Legal Thought*, eds. Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (Oxford: Oxford University Press, 2017), 46. For a differentiated view, see Stefan Kadelbach. "Mission und Eroberung bei Vitoria. Über die Entstehung des Völkerrechts aus der Theologie," in *Die Normativität des Rechts bei Francisco de Vitoria*, eds. Kirstin Bunge, Anselm Spindler and Andreas Wagner (Stuttgart: frommann-holzboog, 2011), 289. Scobbie, "A View from Delft," 58 refers to Vitoria in order to illustrate the relationship of theory and practice.

[20] Francisco de Vitoria, *De Indis*, section 2, title 1, 410–31.

[21] As Stefan Kadelbach highlights, Vitoria's normative perspective to colonization remains ambivalent. Kadelbach, "Mission und Eroberung," 301–303.

translated to other understandings of social and political life.[22] On the other hand, there are always parts of this scholarship reaching out of this specific context to a general, shared dimension of social life, appealing and contributing to a discussion on universal values.

1.1.3 Legal Thought

In this picture, theory is political because it interacts with prevailing frames of justification that are a requirement for any practice of law through the movements of construction and erosion. It promotes a debate on the future of human social organization, in which insights from different disciplines are merged and reflected. Yet, the subtitle of this book refers to *legal thought* instead of legal theory. The reason for this is that this allows for a greater conceptual precision: what has just been said does not hold true for any kind of theory that has the law as its object. Rather, there are two kinds of projects that stand in a particular opposition to such a view.[23]

In the common understanding of the word, analytic jurisprudence in the Kelsenian tradition is the paradigmatic case for *legal theory*. In contrast to what has been stated earlier in the chapter, Hans Kelsen describes his theory of law as pure, "because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements."[24] This tradition that has been continued by Herbert Hart and Joseph Raz, among others, excludes the societal context in order to allow for the description of the *internal* structure of the law. Even though it is questionable whether these promises can be kept, legal theory is an apolitical attempt in "descriptive sociology."[25]

[22] See, Mark Bevir, "The Contextual Approach," in *The Oxford Handbook of the History of Political Philosophy*, ed. George Klosko (Oxford: Oxford University Press, 2011), 11. For an application to the intellectual history of international law, see Benedict Kingsbury and Benjamin Straumann, "State of Nature versus Commercial Sociability as the Basis of International Law. Reflections on the Roman Foundations and Current Interpretations of the International Political Legal Thought of Grotius, Hobbes, and Pufendorf," in *The Philosophy of International Law*, eds. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 51.

[23] See, in further detail, David Roth-Isigkeit, "Was ist Rechtsdenken? – Beobachtungen des Rechts der multipolaren Gesellschaft zwischen Wissenschaft und Politik," *Ad Legendum* No.4 (2017): 265–272.

[24] Hans Kelsen, *Pure Theory of Law*, trans. Max Knight (Berkeley: University of California Press, 1967), 1.

[25] Hart, *Concept of Law*, v.

The second kind of project that does not resonate with what has been suggested earlier is the Hobbesian tradition of realism.[26] In this picture, legal normativity is blinded out to bring the function of power in the focus of observation. This view is prominent in realist approaches in international relations. It does not attribute any role to normative frameworks of justification. Rather, it aims to explain legal normativity with the rational pursuit of self-interest, while arguments from values or morality can be neglected.

Legal Thought, in contrast, is the reflection of the law's complex interdependence with the whole of the social space, with its interplay of power, politics, culture, and legal norms. It tries to establish a middle way between these two patterns. Neither in its scope nor in its notion of "thought" is this approach new.[27] Even though its opposition has been particularly prominent in the literature on international law, for example, in the clash between the positions of Wolfgang Friedmann and Hans Morgenthau,[28] the extreme positions of isolation or ignorance of legal normativity are little more than a curious exception in the history of ideas.

Stefan Kadelbach, Thomas Kleinlein, and I have suggested that *international legal thought* is a discourse that begins in its modern form with the scholarship of Niccolò Machiavelli where the medieval world of order, dominated by the idea of a *civitas Dei* and a universal monarchy, cedes to a notion of state as commonwealth with interests vis-à-vis other entities of the same nature.[29] For earlier thinkers like Augustine or Thomas Aquinas,

[26] See, for an overview of the historical genesis of realism, Ashley J. Tellis, "Reconstructing Political Realism – The Long March to Scientific Theory," *Security Studies* 5, no. 2 (1995), 3. For a differentiated view, see Noel Malcolm, "Hobbes's Theory of International Relations," in *Aspects of Hobbes*, ed. Noel Malcolm (Oxford: Clarendon Press, 2002), 432.

[27] In fact, there are so many approaches working with the idea of legal thought or legal thinking to describe theoretical approaches that they can hardly be enumerated in this frame.

[28] See, e.g., Wolfgang Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1966); Hans J. Morgenthau, "Positivism, Functionalism and International Law," American Journal of International Law 34, no. 2 (1940): 260, Martti Koskenniemi, "Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations," in *The Role of Law in International Politics: Essays in International Relations and International Law*, ed. Michael Byers (Oxford: Oxford University Press, 2000), 17. Richard A. Falk, "The Adequacy of Contemporary Theories of International Law – Gaps in Legal Thinking," Virginia Law Review 50, no. 2 (1964), 231.

[29] Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit, "Introduction," in *System, Order, and International Law – The Early History of International Legal Thought*, eds. Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (Oxford: Oxford University Press, 2017), 11–12.

what we consider today as *legal* problems were essentially theological or ethical questions.[30] The conceptual beginning of the modern state with Machiavelli[31] opened up the possibility to translate these questions into the language of positive law—according to the received account with the sixteenth-century scholarship of Vitoria and Suárez.[32]

Also, as a consequence of this genesis between academic disciplines, international legal thought has combined jurisprudential scholarship on the law-internal dimension of normativity with a view on (international) society as a whole. Only later has this discourse been canalized in academic disciplines that isolated originally connected thinkers from each other in order to sort them in academic canons.[33] Today's perception of the history of international legal thought is often structured via traditions. For example, international legal scholarship refers to Gentili, Grotius, and Vattel. Machiavelli, Bodin, Rousseau, and Montesquieu are thinkers of political philosophy and the discipline of International Relations. Looking at the actual *thought* of these alleged founding fathers, we considered their traditions as partly invented, as mere stories of the respective disciplines.[34] Our historiographical project then involved going beyond these narratives in order to appreciate the complexity of the history of ideas without undue disciplinary simplifications.

In this form, legal thought is a discourse that takes place between the boundaries of academic disciplines. It does not entirely belong to political or moral philosophy, and it is not legal theory in the classic sense of the term. It is not merely the external observation of the law, and is more than a course in method. Rather, it is a distinctive discursive sphere that is concerned with the particularities of human social organization. The imaginative

[30] Kadelbach, Kleinlein and Roth-Isigkeit, "Introduction," 11, note 41.

[31] David Roth-Isigkeit, "Niccolò Machiavelli's International Legal Thought – Culture, Contingency, Construction," in *System, Order, and International Law – The Early History of International Legal Thought*, eds. Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (Oxford: Oxford University Press, 2017), 24–27.

[32] See, e.g., Nicholas G. Onuf, *The Republican Legacy of International Thought* (Cambridge: Cambridge University Press, 1998), 12–13.

[33] Kadelbach, Kleinlein and Roth-Isigkeit, "Introduction," 3.

[34] Kadelbach, Kleinlein, and Roth-Isigkeit, "Introduction," 3. See also Eric Hobsbawm and Terence Ranger, "Introduction: Inventing Traditions," in *The Invention of Tradition*, ed. Eric Hobsbawm and Terence Ranger (Cambridge: Cambridge University Press, 1992), 1–2. See further, Thomas Kleinlein, "International Legal Thought – Creation of a Tradition and the Potential of Disciplinary Self-Reflection," in *The Global Community – Yearbook of International Law*, ed. Giuliana Zaccardi Capaldo (Oxford: Oxford University Press, 2016), 811.

force of this discourse materializes in particular in the debate on global law. The turmoil of the national state through the effects of economic globalization and digitalization spurred creative thinking as to the very foundations of possible future orders. In continuation of a century-old tradition, the element of global legal thought is the future of political, social, and legal order beyond the state.

1.2 Making a Map: The Case for Meta-Theory

After having discussed the particularities of the discourse of *legal thought*, this second section sheds some light on the guiding idea of the book. It suggests that the discourse has largely failed to operate in a common framework, that is, to engage in a common search for concepts and meaning. Like in a rhetorical dispute, different approaches highlight different aspects of the social world in order to convince the audience and to raise the chances for the implementation of their preferred social model. Because theories subject practice to demands of justification, this conceptual fragmentation impedes on their capacity to orient the reader in a complex social world.

As mitigation for this problem, the book offers a playbill for the audience. The meta-theoretical project aims at putting these accounts back to their inescapably common frame—the unity of a social space. Even though different accounts pursue diametrically different normative visions for the development of society, they have to inescapably orient themselves on the preconditions of legal, political, and social order. Thus, the project of map-making aims at stripping the discourse from its rhetorical shell and at promoting understanding between different approaches.

1.2.1 Structure of Theoretical Discourse

A precondition for this mapping exercise is to understand the internal architecture of theoretical arguments. What makes a theory attractive? How do we decide that we prefer one theoretical framework to the other? The first step to the answer is simple: we consider a claim as a correct statement to describe and order the world around us. But what makes us accept an argument? If theories are frames of justification, their claims are based on their view on the world. These views are not concrete, empirical descriptions of the world. Rather, they are abstract and generalized—detached from the details of specific cases. A meta-theoretical view relies

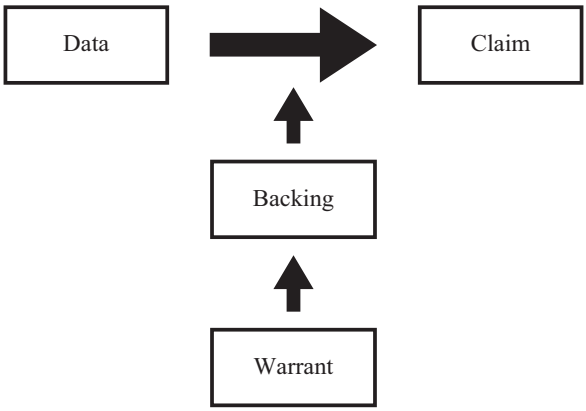

Fig. 1.1 The structure of abstract argument 1

on the possibility to assess the correctness of these abstract arguments and, ultimately, to put them in a common frame.

Jürgen Habermas has suggested that the reason for the acceptance of arguments is inductive, the so-called force of the better argument.[35] In explaining the structure of argument, Habermas refers to Stephen Toulmin. According to Toulmin, any form of argument shares a similar structure (Fig. 1.1)[36]:

As a first step, A makes a claim (e.g., "Dogs are evil."). If B questions this claim, it has to be justified. The basic mode of justification is to invoke data that speak for the claim (e.g., "Dogs bite postmen."). In case B does not accept this justification, B has two possibilities. Either B questions the truth of the data ("I have never seen a single dog biting a postman.")—this would require an empirical answer—or B questions that the truth of the data leads to the truth of the claim (Why should dogs be evil if they bite postmen?).

In this case, the step from data to claim has to be justified. This requires a warrant—a new type of rule in the form "Data such as D entitle one to make claims such as C" or "Animals that bite humans are evil." Technically,

[35] For a good introduction, see *Mary Hesse*, "Habermas' Consensus Theory of Truth," *Proceedings of the Biennial Meeting of the Philosophy of Science Association*, Vol. 2 (1978): 373.

[36] Stephen E. Toulmin, *The Uses of Argument*, rev. edn. (Cambridge: Cambridge University Press, 2003), 97.

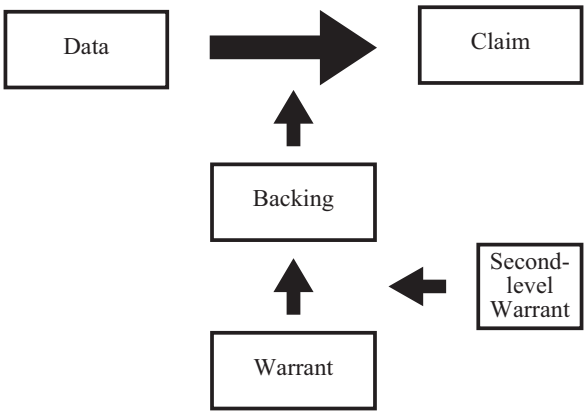

Fig. 1.2 The structure of abstract argument 2

the warrant is a new claim in the form of a rule that needs to be defended. The backing invokes new data for the claim (e.g., "Animal bites can lead to death").

The difficulty in the structure of arguments is that the step from backing to warrant has to be justified again with a new rule, a second-level warrant, so that we are moving in an endless circle of justifications that still require, at some point, the acceptance of a direct relationship between backing and warrant (Fig. 1.2).

The force of the argument, according to Habermas, is the willingness of the audience to accept the step from backing to warrant. Habermas argues that this willingness depends on the appropriateness of the language system of the speaker.[37] The language system determines whether arguments are admissible as backing because it contains cognitive schemes, a reflection of the world, or, put more simply, a certain worldview. These cognitive schemes make induction, the transmission from many singular statements to a general statement, the step from backing to warrant, only a projection of the cognitive schemes (our worldview) on reality and with that a very trivial process. In short, whether a theoretical argument has force depends on whether it resonates with our historical experiences, our language systems, and our specific perspective on the social world.

[37] Jürgen Habermas, "Wahrheitstheorien," in *Wirklichkeit und Reflexion*, ed. Helmut Fahrenbach (Pfullingen: Neske, 1973), 244.

This claim on the functioning of theoretical arguments is analytical: Habermas explains how we happen to be convinced by arguments. In the second step, Habermas combines this approach with a normative perspective on rational discourse—Habermas believes that the goal of discourse is mutual understanding. In a process of understanding, two language systems that are originally coined by different experiences need to approach each other. If we have no consensus in an argument, the discussion should shift on a meta-level to reflexively analyze both language systems. Understanding is only possible if the discourse structurally allows for questioning, modification, and replacement of the language system that interprets speaker's experiences. In the core of Habermas' approach stands the demand for reflexivity in the sense of becoming conscious of one's own position in the world and of one's own worldview. In this view, theoretical arguments are inevitably directed toward mutual understanding, the exchange of differences, and the common search for a shared ground. In other words, theory is necessarily a project of progress.

This normative claim can be contested. In a discourse, not every actor needs to be interested in mutual understanding. Rather, actors may be interested in convincing the audience. Habermas' notorious adversary Michel Foucault held that any discourse is controlled by social forces to contain its powers and threats to the existing structure: "[…] dans toute société la production du discours est à la fois contrôlée sélectionnée, organisée et redistribuée par un certain nombre de procédures qui ont pour rôle d'en conjurer les pouvoirs et les dangers, d'en maîtriser l'événement aléatoire, d'en esquiver la lourde, la redoutable matérialité."[38] As a consequence, there is no such thing as a rational discourse.

Foucault distinguished several factors that lead to that effect, for example, that there are invisible limits to what one is reasonably allowed to say in a discourse.[39] Furthermore, there are rules that govern the admission to the discourse and effect the exclusion of subjects that are particularly dangerous for the discourse community.[40] The basic structure of a discourse is already subject to power relations so that the reflexivity through adaption of the language system is impossible to achieve in practice. Foucault thus discards Habermas' conception of rational discourse as utopian. In practice, instead of rational experiences, the willingness to follow an argument may depend on psychology, social position, or culture.

[38] Michel Foucault, *L'Ordre du Discours* (Paris: Gallimard, 1971), 10–11.
[39] Foucault, *L'Ordre*, 11.
[40] Foucault, *L'Ordre*, 43.

This is a well-known debate that has been continued *in extenso* in approaches to the philosophy of language. For our purposes, it suffices to highlight three outcomes of the discussion: (1) theory is able to convince, via induction, when the experiences suggested in the approach resonate with experiences of the reader; (2) understanding works via mutual adaptation and exchange of the basic experiences contained in the conceptual framework of theory; and (3) in practice, there are limitations to this mechanism because actors might have a strategic attitude in order to convince the audience.

I tend to reject Habermas' conviction that there is a moral duty to engage in mutual understanding. Theory is both, a common search for truth *and* an instrument of power. In a discursive climate that is inevitably distorted by power relations, strategic behavior can be necessary and appropriate.[41] What we should learn from Habermas, however, is that the possibility of understanding *and* convincing others relies on the existence of a common vocabulary. Theory can only work if it succeeds to resonate with the conceptual frame of its addressees.

1.2.2 Conceptual Fragmentation

A common conceptual basis is thus a precondition for the performance of theory. It is required to orient and inform the reader in the complex territory of the social and, ultimately, to convince her of the normative appropriateness of the social model that the theory advocates. A shared grammar allows for the inductive resonance of the theorists' experiences with the reader and provides the basis for qualified agreement and disagreement on the basis of mutual understanding.

My observation is that in legal thought in general and in global legal thought in particular, we witness conceptual fragmentation. Instead of trying to refer to a shared grammar and vocabulary, approaches try to coin new concepts that they develop from the specific preconditions of their own theory. This trend toward self-reference limits the practical possibilities of exchanging knowledge—the fluctuation of which ultimately secures academic progress. Instead of a network of knowledge, legal thought

[41] See Karl-Otto Apel, "Diskursethik vor der Problematik von Recht und Politik: Können die Rationalitätsdifferenzen zwischen Moralität, Recht und Politik selbst noch durch die Diskursethik normativ-rational gerechtfertigt werden?" in *Zur Anwendung der Diskursethik in Politik, Recht und Wissenschaft*, eds. Karl-Otto Apel and Matthias Kettner (Frankfurt am Main: Suhrkamp, 1992), 29. See also Klaus Günther, *The Sense of Appropriateness*, trans. John Farrell (Albany: SUNY Press, 1993), 67.

develops in a tree-like structure, where large branches develop the trends of research, but the twigs and leafs, on the basis of these branches, remain unconnected.

A closely related phenomenon is the cultivation of knowledge in schools of thought.[42] A school of thought is commonly understood as a number of scholars who are disciples of a particular master or share a general approach to principles and methods of an academic field.[43] In antiquity, since no shared grammar and vocabulary for academic inquiry existed, the attempts of schools of Plato or Aristotle allowed for a systematic exploration of knowledge.[44] The original function of these schools was thus to enable academic inquiry through suggesting a conceptual basis.

Today, however, in most of academic fields including legal thought, such shared vocabulary already exists. Trying to coin concepts that differ from the general grammar and vocabulary thus has the opposite effect. Instead of enabling the fluctuation of knowledge, theories encapsulate their inquiries in increasingly complex constructions of meaning. A prime example for this trend is Luhmannian systems theory that has developed a vocabulary that is hardly accessible to the theoretical outsider. Complexity, instead of clarity, becomes a rhetorical tool.

The common counterargument suggests that, if the world is increasingly complex, theories have to become as complex in order to provide an adequate representation of the world. This seems to be an incomplete picture since the task of a theory is to rearrange and simplify the relations that can be empirically observed through abstraction. If theory merely tries to reflect the complexity of the world in which it is situated, it fails to deliver this abstraction that allows for recognition of some form of bigger picture. On the contrary, a specialized vocabulary allows for the inductive moment only for those who are already familiar with (and convinced of) the theoretical instruments of a theory. Through its excessive focus on particular developments of the social world, it limits the angle of view of a theory, and thus the complexity that it can explain. Academic inquiries thereby risk losing their systematicity as a precondition for meaningful generation of knowledge.

[42] See, for international law schools, Andrea Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking* (Oxford: Oxford University Press, 2016).

[43] See Fassbender, "Denkschulen im Völkerrecht," 1 who cites the Oxford English Dictionary.

[44] This becomes particularly clear in Harold F. Cherniss, *The Riddle of the Early Academy* (Berkeley: University of California Press, 1945), 1–30.

One remarkable exception to this trend is analytic legal theory. As a part of practical philosophy, this branch of knowledge has adopted the style of philosophical action theory, in order to explain the functioning of a legal system. While the vocabulary is as complex, the academic enterprise is a common exploration of the meaning of shared concepts. Through their blinding out of the dimension of law as a living societal practice, this might be somehow easier to achieve. Recalling the debates of Hart with Dworkin and Fuller, for example, the structure of the discourse (as a real academic discourse) allows to identify and to compare different positions of thought.[45] For analytic legal theorists, this is a precondition for the systematic exploration of their academic field.

Conceptual fragmentation is a significant weakness of theoretical approaches. They risk becoming *legal artifacts*—highly contingent narratives without generality and use for academic inquiry as a project of progress.

1.2.3 Unity of the Social

The degree of conceptual fragmentation is surprising since legal thought refers to a common object: the social, political, and legal order. Even though "society" might be an essentially disputed notion, it centers on the physical existence of humans of flesh and blood. The recognition of the physical existence of individuals seems to be a common denominator across all kinds of theories. Even post-modern approaches that consider most of what we understand as the social world as contingent and consequently reject the artificial construction of the legal subject, recognize this essentially material dimension of social life.[46]

[45] For a summary, Scott J. Shapiro, "The 'Hart-Dworkin' Debate – A Short Guide for the Perplexed," in *Ronald Dworkin*, ed. Arthur Ripstein (Cambridge: Cambridge University Press, 2012), 22; Nicola Lacey, "Philosophy, Political Morality and History: Explaining the Enduring Resonance of the Hart-Fuller Debate," *New York University Law Review* 83 (2008): 1059.

[46] See for an overview, Razmig Keucheyan, *The Left Hemisphere: Mapping Critical Theory Today*, trans. Gregory Elliott (London: Verso, 2013), 90. See also Michael Hardt and Antonio Negri, *Empire* (Cambridge: Harvard University Press, 2000), 393. Jacques Rancière, Das Unvernehmen – Politik und Philosophie, trans. Richard Steurer (Frankfurt am Main: Suhrkamp, 2002), 46. This is what I consider in the sixth chapter as action-based normativity.

Theories of the social world are thus inevitably directed at explaining or impacting the actual life of human beings. Accordingly, they appeal to models of the good life for humanity as a whole—beyond particular communities. In this sense, they presuppose a conceptual and logical unity of the social space. This aspirational dimension vanishes in the conceptual fragmentation where approaches appear as separate images painted in ivory towers resembling windowless monads.

To recognize this aspirational dimension does not mean to assume a dialectical structure of theory.[47] Jürgen Habermas, for example, suggests that the discursive method is suitable to overcome differences on normative views. By continuously approaching different language systems, we initiate a dialectical process toward truth. Derek Parfit has famously suggested that the actual possibility of a resolution of our normative conflicts of sociality is a precondition for engagement.[48] I do not think that we should burden theory with such a role.[49] Different views carry normative pre-commitments that consist in particular assumptions on what a "good" society looks like. The claims made in this context are claims on which there might be what Rawls called "reasonable disagreement."[50] Like in a lively political climate, there might be different normative views on what is appropriate to do in a polity, but we must agree that it is one and the same polity, one and the same problem we are talking about.

In the last section, I have denoted a discourse that is conceptually fragmented as highly contingent. In contrast to this, I consider a discourse that contains different normative views on the same object of study as contingent in a weaker form. To show that global legal thought is only weakly contingent and—as a consequence of this—to develop a meta-theory of global legal thought is the project of this book.

[47] It is the purpose of the ambitious project of Sergio Dellavalle to prove such a structure. Sergio Dellavalle, *Paradigms of Order* (New York: Palgrave Macmillan, forthcoming).

[48] Derek Parfit, *On What Matters*, Volume II (Oxford: Oxford University Press, 2001), 155. To this general theme, see David Roth-Isigkeit, "Konvergenz und Regulative Funktion: Parfit über moralischen Fortschritt," *Zeitschrift für Praktische Philosophie* 3, no. 2 (2016), 255.

[49] I am particularly grateful to Sergio Dellavalle for a helpful discussion on this topic.

[50] Many authors have a conception of reasonable disagreement, though Rawls is the most prominent among them. See Thomas Porter, "Rawls, Reasonableness, and International Toleration," *Politics, Philosophy, & Economics* 11 no. 4 (2012): 382. Jonathan Quong, "Public Reason," *The Stanford Encyclopedia of Philosophy* (2013), http://plato.stanford.edu/archives/sum2013/entries/public-reason/.

1.3 About This Book

The law of globalization is a prime example for the intrinsic connection of theory and practice and one of the most vibrating fields of legal thought. Economic globalization and digitalization have induced significant insecurity about the future of human social organization. Will the model of the nation-state prevail? Is the era of collective self-determination over? How will the relationship between public and private power develop? What roles will alternative models of organization play, when their societies ascend? The discourse has developed an impressive imaginative force in discussing these questions on the basis of different societal epistemologies.

In an area with a low degree of path-dependency, where a large variety of outcomes are technically possible, this has equally led to conceptual fragmentation. This fragmentation is particularly harmful because, as a result of the indeterminacy of future legal ordering, academic claims play a significant role in shaping the contours of global law. We can almost observe in real time the genesis of new narratives of justification in academic scholarship. Thus, in order to mitigate this fragmentation, the project of this book is a meta-theory—a systematic assessment of global legal thought.

1.3.1 Aim: Cutting Through the Complexity of Global Legal Thought

The field of global law is very complex. The literature reflects the growing tendency of plural interactions between legal orders on very different levels. This complexity of the discourse impedes on the capacity of theoretical approaches to respond to the challenges plurality comes with. The aim of this work, accordingly, is thus to offer a guidebook to this complexity by presenting different strands of thought within the context of their societal epistemologies. On a second level, this mapping exercise tries to find shared conceptual ground. Thus, it aims to reduce the high level of contingency that has been diagnosed in the first step, to a weaker level. This means that it is possible and necessary to put these specialized paradigms within the overall context of global law and to locate them in the unity of the social space of law beyond the state. By promoting the understanding of the relations between theories with different starting points, the goal is to work against the self-encapsulating tendencies of theories sharing an epistemic paradigm that, ultimately and as a consequence of internal specialization, only become accessible to specialists who share their own epistemic pre-commitments.

On a meta-theoretical level, this book tries to highlight in how far the discourse on global law is a political discourse. This is not necessarily meant as a critical perspective; the political nature of theory and law is not a problem as such. Rather, the aim is to identify different positions and commitments on what the approaches consider a good global society. This means to show how single legal–theoretical claims are connected with the respective societal epistemologies. The world and normative claims on its nature will look different for you if you believe in the possibility of rational discourse, than if you do not. The central epistemic element of this study, then, is to show the relations of the underlying epistemologies to the respective theories.

While one goal of the study is to lay bare these normative commitments, it does not aim to judge on whether particular views are normatively adequate or not. As long as they are theoretically and epistemically consistent, I take them to be plausible and valuable claims. The result is a theoretical landscape that carries the same limitations that the political-theoretical discourse within the context of the constituted nation-state comes with. A challenge of a particular normative position would not challenge the theoretical reconstruction in the narrow sense, in terms of consistency or epistemic correctness, but would rather devaluate the theory's normative pre-commitments to one value of a "good global society" or another.

If my assumptions hold true, global legal thought shows a structure of weak contingency. The contingency is only weak because different normative propositions can be expressed with an interchangeable conceptual basis developed from the claim of a unity of the social space. Yet, contingency remains because, as the sixth chapter demonstrates, the impossibility of resolving these foundational conflicts on a theoretical level leads to a dilemma (or, as I say later, a *trilemmatic* situation, as I identify three main claims around which the discourse is structured). This weak form of contingency entails the more easy-going claim that it is impossible to find a one-size-fits-all solution for plurality in global law that adequately reacts to all that is *new*, yet preserves all virtues of what is *old*. If we conceptualize global law in one way, we might lose a particular element or virtue that other reconstructions consider to be particularly important for political reasons. This is what I later call the *Plurality Trilemma*.[51]

As will become clear in the last chapter, this also involves certain claims on the nature of the discourse on global law that are themselves political.

[51] See, in detail, Chap. 6.

In particular, based on my thoughts on the results of this study, I reflect on the role of scholars and thought in global law. Here, the book should provide a motivation to engage in legal thought as a project of collective progress instead of adding fuel to the increasing trend of conceptual fragmentation. I hope that this project will be able to promote the reflexive capacity of the discipline and to stimulate the discursive community that has developed around it.

1.3.2 Method: Contextualizing Societal Epistemologies

In methodological terms, a start with the respective societal epistemologies requires a bottom-up exploration of the respective theories situated in their epistemic and normative commitments. This means following these pre-commitments to some extent with a non-judgmental, observatory attitude, and trying to devise and to follow the author's theoretical plan.

This method allows for an understanding of the reasons that construct the theory on a very basic level and should lead to understanding them better. Yet, it also means brushing the respective theory against the grain so that value judgments within the theories, which often remain hidden in their semantic complexity, become openly visible. Most importantly, the aim is to show that what is often suggested to be a "fact" is itself a constructed element that carries normative implications. It tries to strip the approach of its rhetorical shell, to devise its marketing strategy, and to highlight the pathways a theory has taken at the crossings of the social space.

In the light of what has been said earlier, I take claims on what the law "is" equally as ought—claim on how the law should be applied. This explains the particular power that the legal discursive community has not only to monitor, but also to influence legal practice directly. As every theoretical inquiry makes assumptions on the nature and interpretation of the law, it carries propositional content that can be taken up in legal argument and, ultimately, influences the way legal decisions are taken in everyday legal practice. This means even though some of the approaches presented in this study come with a self-description as analytical, being able to objectively reflect the processes of global law, all of them are interpreted as methodological claims that have particular *normative* commitments.

In his *Critique of Pure Reason*, Immanuel Kant draws a sketch about theoretical thinking that I believe to be a fitting picture here. Kant writes: "We have found, indeed, that, although we had purposed to build for

ourselves a tower which should reach to Heaven, the supply of materials sufficed merely for a habitation, which was spacious enough for all terrestrial purposes, and high enough to enable us to survey the level plain of experience, but that the bold undertaking designed necessarily failed for want of materials—not to mention the confusion of tongues, which gave rise to endless disputes among the laborers on the plan of the edifice, and at last scattered them over all the world, each to erect a separate building for himself, according to his own plans and his own inclinations."[52]

Kant's answer to conceptual fragmentation (this time in the understanding of reason, not global law) is to start from the bottom, with an understanding of what is already there: "Our present task relates not to the materials, but to the plan of an edifice; and, as we have had sufficient warning not to venture blindly upon a design which may be found to transcend our natural powers, while, at the same time, we cannot give up the intention of erecting a secure abode for the mind, we must proportion our design to the material which is presented to us, and which is, at the same time, sufficient for all our wants."[53] Translated to global legal thought, Kant thus suggests a careful assessment of the raw materials without necessarily giving up the broad intention of understanding and forming global order.

The purpose of what I call a geometrical method is to start at this very basic methodological level that Kant suggested. The basic idea is to identify claims from this fragmented universe not according to their self-description, but according to their use of certain epistemic concepts that make them comparable. Rather than looking at the labeling, we can map and compare them in order to come to a comprehensive picture that might serve as an understanding of the similarities and the differences. The theoretical approaches can be mapped in a unified system of coordinates, while at the same time occupying different points and axes within that system. Presenting the theoretical landscape in this form allows the identification and comparison of claims that have very different starting points in their societal epistemologies. In this way, it highlights a form of unity of global legal thought, while at the same time uncovering and allowing for the essentially political nature of the particular claims within this unity.

[52] Immanuel Kant, *Critique of Pure Reason*, trans. John M. D. Meiklejohn, (New York: Colonial Press, 1900), 397.

[53] Kant, *Critique*, 397.

When I refer in Chaps. 3, 4, and 5 to Habermasian, Luhmannian, and Dworkinian societal epistemologies, I do not consider these thinkers as the founding fathers of a specific way of thinking. Rather, these authors share a general commitment to a pattern of social order,[54] with the other approaches discussed in the respective chapters. I do not want to engage in the invention of intellectual traditions. In contrast, as a consequence of this understanding of claims on global law as methodological, this study groups the material of global legal thought in a way that is not necessarily in line with their self-descriptions. This means that on some occasions, the material is rearranged in a way that might seem unusual even to those familiar with the respective positions. Therefore, I would respectfully ask the reader not to give in to possible temporary confusion, and to follow the argument all the way through.

1.3.3 Structure: Habermas—Luhmann—Dworkin

This opening chapter tried to lay the conceptual foundation of this book. The second chapter aims at sketching the different problem constellations of global law, plurality, and its accompanying discourse. Following this, there are three chapters on ways of thinking about global law, which entail different normative pre-commitments. Each chapter entails some general themes as overarching foundational commitments and presents variations of these themes in its subsections. These three chapters aim at illuminating the different theoretical starting points in Habermasian, Luhmannian, and Dworkinian thought and their consequences as the theory evolves. In the sixth chapter, the results of these three chapters are synthesized and presented in a geometrical form, so that it will be possible to understand their relation. Ultimately, in the seventh chapter, I make some (political) claims on the enterprise of law-production in legal scholarship.

The second chapter argues that plurality challenges the law on different levels, reaching from the very basic capacities of judges to make legal decisions to its theoretical reconstruction in scholarly discourse. In its tendency to erode the traditional framework in which international law has

[54] For a similar approach, see Sergio Dellavalle, *Paradigms of Order*. For the classification of these patterns, see also, Armin von Bogdandy and Sergio Dellavalle, "Universalism and Particularism: A Dichotomy to Read Theories on International Order" in *System, Order, and International Law – The Early History of International Legal Thought*, eds. Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (Oxford: Oxford University Press, 2017), 482.

been situated for some decades, it raises important questions of coordination and normativity, which have to be addressed in attempts dealing with consequences and solutions to the pluralization of legal orders. Plurality and fragmentation is a phenomenon that applies to the law as well as to the academic discourse that accompanies it.

The third chapter is dedicated to the Habermasian idea that formal legal rationality ought to structure global legal relations and thus transfer the legitimacy of the constituted national state to the global realm. Approaches that are grouped in this framework tend to highlight the importance of legal argumentation and, in particular, the necessity of a public form of ordering. While Habermas himself always preferred the hierarchical forms of the constitutional state to heterarchical models, the heterarchy of modern formalist conflict-of-laws approaches tends to highlight the same conceptual elements.

The fourth chapter is dedicated to a post-modern variation of Luhmannian thought. In contrast to the Habermasian approaches, scholars in this realm tend to see fragmentation of legal knowledge rather than unity, and hegemony rather than discourse. The task here is to stimulate a kind of heterarchical common learning, so that "at the level of the self-consolidating world society, it is no longer norms (in the form of values, prescriptions or purposes) that steer the prior selection of knowledge." [55] Conflict and contestation receive an ontological dimension in the struggle for the new global law. The span of the theories reaches from relatively modest doubts on rationalistic forms of public ordering to more radical views rooted in French political philosophy.

The fifth chapter inquires into Dworkinian legal thought that reconstructs global legal relations as a domain of value. According to the foundational commitments of these approaches, the law is a distinctive part of political morality and has to be interpreted in this line. The main idea is to support the emptiness of the legal form with additional considerations and find ways how they can enter the law. This brings together approaches that stress the central values of human dignity, be it as abstract value or in the form of rights, and approaches that highlight the importance of supporting the law with interdisciplinary knowledge instead of openly appealing

[55] Niklas Luhmann, "Die Weltgesellschaft" in *Soziologische Aufklärung 2*, ed. Niklas Luhmann (Opladen: Westdeutscher Verlag, 1975), 60 (this quote translated by Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press 2012), 94).

to values. In order to allow for these additional considerations to enter the law, the law is mostly understood as a process in which norms and principles support the way legal decisions are taken.

The sixth and synthesizing chapter sets all these claims in a particular relation to each other. It suggests a geometry of global legal thought by identifying theoretical determinants that the single approaches use, notwithstanding their different epistemic pre-commitments. It works out in detail their convergences, divergences, and oppositions to come to a comprehensive picture of the global legal space.

The seventh and ultimate chapter contains my perspective on the intellectual and practical project of global legal thought. It tries to give tentative answers to some of the questions identified earlier. Does legal thought have to be legitimate? How do we choose theoretical models? How can we make sense of legal thought as a profession? Here, I advocate that the discipline is already flooded with self-reflection and currently does not need more theorizing. Rather, scholars should take part in a practical turn and in the critical project of meta-theory, the non-innovative search for common conceptual ground.

This book is an attempt to make sense of some of the challenges legal scholarship is confronted with. I hope that it will be read with a critical glance because it is conceptual engagement that promotes intellectual progress.

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CHAPTER 2

Global Legal Thought and Plurality

Law beyond the state has experienced an unprecedented boom in the almost three decades since the end of the Cold War. The end of the bipolarity of international relations has effectuated a major increase in public and private legal actors that transcend the protective state veil toward a participation in the now multipolar processes of law. Public law, before a more or less restricted set of relations between sovereign states, has turned into a vibrant body of dynamically emerging rules and processes that all compete in shaping living conditions on earth, extending to almost every area of our everyday lives.

This increase in complexity of global law challenges our traditional understanding of law beyond the state. This chapter explains why. It familiarizes the reader with the essential knowledge to understand global law and plurality as a field of study and gives a first overview of the discourse of global legal thought, discussing its central problems and concepts.

2.1 Global Law and Plurality: Three Levels of Discourse

Plurality is pervasive. Be it in international standard-setting or Internet governance, be it in access to customer goods or in the question which court provides for the normative content of constitutional rights, law in and beyond the state can hardly be conceived without taking multipolarity

D. Roth-Isigkeit, *The Plurality Trilemma*,
Philosophy, Public Policy, and Transnational Law,
https://doi.org/10.1007/978-3-319-72856-8_2

into account. The turn toward legal plurality already began early in international law with the emergence of specialized regimes such as the law of the *World Trade Organization* (WTO) or the law of the sea. The advantage of specialized tribunals such as the WTO *Appellate Bodies* or the *International Tribunal of the Law of the Sea* was the improved availability of specialized knowledge in cases that became more and more widespread as a consequence of economic globalization. Today, the increase of regulatory complexity has further accelerated the tendency toward the construction of specialized regimes that are often located in very narrow, but important issue areas.

At the same time, the emergence of these regimes triggered a debate on the fragmentation of international law.[1] Whereas many praised the new opportunities of integration through law, scholarship accompanied the early construction of specialized regimes in international law with critical voices also, prophesying the loss of the unity of international law as a coherent system.[2] Today, given the extent of plurality in the law in and beyond the state, a vibrant global debate has developed.

In order to make sense of this complex discursive sphere of legal thought, we can roughly distinguish between three levels of discourse with a rising level of abstraction. On a first level, we encounter a debate that describes and comments on the empirical change, referring to case law or areas of regulation where plurality becomes openly visible. On this level, two crucially interrelated phenomena come together. On the one hand, non-state actors play a growing role in the development of the legal areas in question, so that law is in the process of transnationalization. On the

[1] See the initial report of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN4/L.682 (2006); Eyal Benvenisti and George W. Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law," *Stanford Law Review* 60, no. 2 (2007): 595; Ralf Michaels and Joost Pauwelyn, "Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law," in *Multi-Sourced Equivalent Norms in International Law*, ed. Yuval Shani and Tomer Broude (Oxford: Hart Publishing, 2011), 19; Andreas Fischer-Lescano and Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," *Michigan Journal of International Law* 25 (2004): 999.

[2] See Pierre-Marie Dupuy, "L'Unité de l'Ordre Juridique Internationale. Cours Général de Droit International Public," *Recueil des Cours* 297 (2002). See further Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford: Oxford University Press, 2014) and *infra*, Chap. 3.2.

other hand, actors in different layers of law are extending their regulatory activities and as a consequence find themselves frequently in collision with other regimes. Both aspects, transnationalization and regime collisions, coin the debates on the new constellations of law beyond the state.

On a second discursive level, we find scholarly work commenting on the empirical material. These writings devise patterns and develop strategies on how to deal with the resulting conflict of different legal actors and orders. The discourse on the second level addresses questions like the coordination of different layers of law and the legitimacy of dispute settlement between them. It is thus concerned with the production of order from the empirical chaos—the design of general solutions to the conflicts of plurality grounded in different societal epistemologies.

Finally, a third level of discourse compares and maps the different solutions advocated by the second level. This endeavor sets them in a broader, meta-theoretical perspective and highlights their different features so that different solutions become comparable. It tries to shed a new light on the approaches of the second level with the intention of using these insights for a better understanding of the concept and methodology of global law situated in a broader view of global society. Ultimately, I argue that scholarship has failed to provide a *systematic* approach on this level, which would be necessary to live up to the promise of meta-theory.

2.1.1 First-Order Plurality: Regime Conflict and Transnationalization of Law

On the empirical level of global legal practice, we can observe a reunion of two phenomena. In regime collisions, cases fall into the area of application of more than one legal order. The central problem here is how to allocate legal authority in a multilevel normative environment. Cases in which two or more legal orders collide are challenging for the coordination and legitimacy of decision-making. In the process of transnationalization, private, non-state, and hybrid actors appear in the law. Here again, questions of coordination and legitimacy come up since it is unclear to what extent private norm creation should be recognized and treated as law. Both challenges culminate in transnational regime collisions, the paradigm case for the plurality of global law, in which private and public norms collide across different regulatory levels.

Transnationalization leads to the emergence of a multitude of normative systems that are not exclusively dependent on the sovereignty of the national state. Attempts to define transnational law usually include several factors.[3] Philip Jessup, who apparently first used the term "transnational law"[4] for law that regulates actions transcending national frontiers, meant to integrate public and private law rules.[5] Newer approaches favor a definition that involves the hybrid character of transnational law between the international and the domestic.[6] For Harold Koh, who coined transnational legal process as a distinctive field of study,[7] it is precisely the hybrid, decentral norm creation between the international and the domestic that makes up for the phenomenon.[8] Ralf Michaels remarks that "in a transnational paradigm, national and international are no longer strictly separated. Private actors appear in the global sphere; states become in some respects more like private actors."[9] There seems to be a relatively wide agreement that transnational law involves, in varying degrees, a weakening of both the public–private and the national–international distinction.

The paradigm case for transnational law is the emergence of a global *lex mercatoria*.[10] The *lex mercatoria*, the customs of globally active merchants,

[3] A helpful discussion on the different meanings of the term can be found in Lars Viellechner, *Transnationalisierung des Rechts* (Weilerswist: Velbrück, 2013), 165f.

[4] Philip Jessup, *Transnational Law* (New Haven: Yale University Press, 1956), 2: "all law which regulates actions or events that transcend national frontiers."

[5] Philip Jessup, "The Concept of Transnational Law: An Introduction," *Columbia Journal of Transnational Law* 3 (1963–1964): 1.

[6] Nye and Keohane defined transnational interactions as "movement of tangible and intangible items across state boundaries when at least one actor is not an agent of a government or an intergovernmental organization" and opposed these to transgovernmental interactions, an interaction between the subunits of different governments. See Joseph S. Nye and Robert O. Keohane, "Transnational Relations and World Politics: An Introduction," *International Organization* 25, no. 3 (1971): 332.

[7] See Harold H. Koh, "Transnational Legal Process," *Nebraska Law Review* 75, no. 1 (1996): 181 and *infra*, Chap. 5.2.

[8] Harold H. Koh, "Bringing International Law Home," *Houston Law Review* 35 (1998): 641.

[9] Ralf Michaels, "Three Paradigms of Legal Unification – National, International, Transnational," *Proceedings of the Annual Meeting of the American Society of International Law* 96 (2002): 335.

[10] The literature is huge. See A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge: Cambridge University Press, 2003); Nils Jansen, *The Making of Legal Authority: Non-Legislative Codifications in Historical and Comparative Perspective* (Oxford: Oxford University Press, 2010); Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Oxford: Hart Publishing, 2010); Thomas

is nothing new in itself. Commercial law beyond national states has existed ever since, in particular given that the history of trade dates back much further than the history of sovereignty.[11] The codification of national trade law in the course of the eighteenth century and the regulation of trade through sovereign states had temporarily replaced the more direct and unmediated law production by merchants themselves. But as in the course of the 1950s the importance of the transnational interconnectedness of the global economy grew again, the pressing need to account for an unmediated merchant's law paved the way toward transcending the regulatory frame of the sovereign state again.

The sources of the *lex mercatoria* exemplify the hybrid character of transnational law. Whereas most of the law has been developed in customs and individual principles that made their way up to general principles of trade, the codification and development are located in private entities, such as the *International Chamber of Commerce* (ICC), whose arbitral awards and procedural rules have a prominent position for the development of transnational commercial law.[12] The development of the *lex mercatoria* also takes place in international agreements and organizations, such as the *United Nations Convention on Contracts for the International Sale of Goods* (CISG),[13] the *United Nations Commission on International Trade Law* (UNCITRAL),[14] or the *International Institute for the Unification of Private*

Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford: Oxford University Press, 2014). See initially, Gunther Teubner, "Breaking Frames: Economic Globalisation and the Emergence of Lex Mercatoria," *European Journal of Social Theory* 5, no. 2 (2002): 199.

[11] See Sheilagh Ogilvie, *Institutions and European Trade* (Cambridge: Cambridge University Press, 2011), 264–266. For a critical discussion on the use of history in the debate, see Ralf Michaels, "The True Lex Mercatoria: Law Beyond the State," *Indiana Journal of Global Legal Studies* 14, no. 2 (2007): 447.

[12] See, for example, Thomas H. Webster and Michael Bühler, *Handbook of ICC Arbitration: Commentary, Precedents, Materials*, 3rd edn. (London: Sweet & Maxwell, 2014), 28; Ilias Bantekas, *An Introduction to International Arbitration* (Cambridge: Cambridge University Press, 2015); Erik Schäfer, Herman Verbist and Christophe Verboos, *ICC Arbitration in Practice* (The Hague: Kluwer, 2005), 86.

[13] *United Nations Convention on Contracts for the International Sale of Goods* (CISG) U.N. Doc. A/CONF.97/18, Annex 1, S. Treaty Doc. No. 98–9, 1489 U.N.T.S. 3, 19 ILM. 668 (Apr. 11, 1980).

[14] Resolution 2205 (XXI), Adopted by the General Assembly at its 1497th Plenary Meeting on 17 December 1966, "Establishment of the United Nations Commission on International Law," UN Doc. A/RES/2205 (XXI).

Law (UNIDROIT).[15] Next to these major institutions stands a huge body of small-scale enterprises that find their issue area within the law of global commerce, such as codes of conduct for multinational enterprises,[16] or private labeling systems, such as the *Forest Stewardship Council* (FSC)[17] or the *Marine Stewardship Council* (MSC). All these processes contribute to the development of transnational commercial law.

In analogy to the laws of commercial customs, other equally transnational regimes have come into focus. The *lex sportiva* as the body of transnational sports law autonomously regulates cross-border activities in sports, with a similar multitude of actors. The *Court of Arbitration for Sports* (CAS), the *International Olympic Committee* (IOC), or the government-like international football federation (FIFA) shape like no other the global development of sports and, with that, the conditions that athletes are confronted with.[18] The global law of the Internet, the *lex digitalis*, is another example of a rapidly evolving transnational field. The *Internet Corporation for Assigned Names and Numbers* (ICANN), a private non-profit organization, attributes domain names. It develops a regulatory body that balances concerns of intellectual property, human rights, and freedom of the markets.[19] The *lex constructionis* deals with specialized concerns of big construction projects that use the standard contracts of the *Fédération Internationale des Ingénieurs-Conseils* (FIDIC). The *lex financiaria* is a privately created inter-bank law of the global capital markets. In all these cases, the complexity of the matter makes the advantages of special rules beyond the borders of the state immediately understandable.

Leaving the rapid emergence of transnational law aside for a moment, the second macro-phenomenon of pluralization is an increase in practical

[15] The institute was founded in 1926 as an auxiliary organ of the League of Nations and after the latter's dissolution set up in 1940 as an intergovernmental organization on the basis of the UNIDROIT statute, http://www.unidroit.org/about-unidroit/institutional-documents/statute.

[16] See, for example, Gunther Teubner, "Self-constitutionalizing TNCs? On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct," *Indiana Journal of Global Legal Studies* 18, no. 2 (2011): 617.

[17] Maria S. Tysiachniouk, *Transnational Governance through Private Authority* (Wageningen: Wageningen Academic Publishers, 2012), 35f.

[18] Antoine Duval, "Lex Sportiva: A Playground for Transnational Law," *European Law Journal* 19, no. 6 (2013): 822; Franck Latty, *Lex sportiva: Recherche sur le Droit Transnational* (The Hague: Martinus Nijhoff, 2007).

[19] See, for a detailed application of the ICANN example to transnational law theory, Viellechner, *Transnationalisierung*, 127f.

regime collisions. Conflicts occur when two legal orders share an area of application so that there is a practical overlap in claims to authority, an overlap that is not resolved by shared conflict rules.[20] A problem that is well known from private law, where the substantive rules of two civil jurisdictions can apply to one and the same case with a cross-border relationship, the emergence of the phenomenon in public law is rather recent. It entered the discourse first in terms of the fragmentation debate, the beginning of which falls together with the re-emergence of the *lex mercatoria* in the 1950s.

Regime collisions challenge the unity of the law. Trying to protect this unity, Wilfred Jenks observed that there might have been conflicts between law-making treaties as early as 1953 and suggested procedures and principles for their resolution.[21] Debates on unity have continued ever since.[22] In particular, the increasing separation of trade law from general international law and the publication of the 2006 report of the *International Law Commission* (ILC), highlighting the threat of these self-contained regimes for legal unity,[23] brought fragmentation to the top of the agenda.

Self-contained regimes, as Bruno Simma and Dirk Pulkowski define them, are "subsystems […] that embrace a full, exhaustive and definitive set of secondary rules,"[24] thus preventing the application of general international law to wrongful acts.[25] Quite similar to private transnational bodies, self-contained regimes emerge when a treaty body secures a capacity of its own to develop its law, thus uncoupling from the general framework.[26] As exemplified by the case of WTO law, this meant a continuous development

[20] See, for further details, David Roth-Isigkeit, "Promises and Perils of Legal Argument: A Discursive Approach to Conflicting Legal Orders" *Revue Belge de Droit International*, no. 2 (2014): 96.

[21] Wilfred Jenks, "The Conflict of Law-Making Treaties," *British Yearbook of International Law* 30 (1953): 403.

[22] See, in great detail with respect to the different dimensions of unity in public international law, Oriol Casanovas, *Unity and Pluralism in Public International Law* (The Hague: Martinus Nijhoff, 2001).

[23] International Law Commission, *Fragmentation of International Law*, 11f.

[24] Bruno Simma and Dirk Pulkowski, "Of Planets and the Universe: Self-Contained Regimes in International Law," *European Journal of International Law* 17, no. 3 (2006): 493.

[25] Simma and Pulkowski, "Self-Contained Regimes," 493.

[26] Simma and Pulkowski, "Self-Contained Regimes," 485. For a practical example, see David Roth-Isigkeit, "Die General Comments des Menschenrechtsausschusses der Vereinten Nationen – ein Beitrag zur Analyse der Rechtsentwicklung im Völkerrecht," *MenschenRechtsMagazin* 17, no. 2 (2012): 196.

of the law by the appellate bodies, independent of concerns of general international law. As soon as the body of law uncouples from its traditional origin, the question arises which relationship it retains to the framework of general international law, which it has grown out of. This, precisely, is one of the central questions of the ILC's report on fragmentation.[27]

One of the milestone cases in that regard was the seminal *Shrimp/Turtle* WTO dispute settlement, in which the *Appellate Body* clarified that environmental concerns in general international law might re-enter the narrow focus of trade law (not without deciding the case in favor of the considerations of trade).[28] At the time, however, there was widespread optimism to retain the unity of international law with procedures and principles of the Vienna Convention, such as *lex specialis* and *lex prior* rules, as well as with the principle of systemic interpretation. In that sense, the ILC noted that "even single (primary) rules that lay down individual rights and obligations presuppose the existence of (secondary) rules that provide for the powers of legislative agencies to enact, modify and terminate such rules and for the competence of law-applying bodies to interpret and apply them,"[29] thus stressing the systematic, unified character of international law. Now, more than ten years after the publication of the report of the ILC study group, old questions remain and more difficulties come to play. The emergence of new regulatory levels puts the old solutions under pressure. Traditional international law as a law for a relatively closed and coherent circle of national states has difficulties to accommodate plurality, in particular as the national–international divide has become more complex through the emergence of the *European Union* (EU).

Situated between both regulatory levels, the confrontational approach of the *European Court of Justice* (ECJ) has secured the EU's place among global legal regimes. While the basic credentials of this willingness to secure the autonomy of the European legal order had already become visible in the early 1960s in the *Costa v Enel* case,[30] the ECJ has continuously insisted on its constitutional nature, arguing in the first case of the *Kadi* series that international treaties could not overrule the foundational pillars of the EU.[31] Here, it is not only the fact that the ECJ has secured the place

[27] International Law Commission, *Fragmentation of International Law*, 33f.

[28] United States – Import Prohibition of Certain Shrimp and Shrimp Products (6 November 1998) WT/DS58/AB/R, VII *Dispute Settlement Reports* (1998), 2794f.

[29] International Law Commission, *Fragmentation of International Law*, 20.

[30] Case 6/64, *Flaminio Costa v. ENEL,* ECR 585 (1964).

[31] Case C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v. Council and Commission,* ECR I-6351 (2008), para. 285.

of EU law in the global landscape and has torn down some of the most fundamental principles of international legal order, which is remarkable in this context, but rather the confrontational way in which the ECJ has proceeded. By now it finds itself in institutional conflicts with the WTO,[32] the *United Nations*, as in the cases on targeted sanctions,[33] and the *European Court of Human Rights*, by rejecting the draft agreement for the EU's accession to the *European Convention on Human Rights* (ECHR).[34]

This rigorous approach shifts the perspective from a common search for principles and procedures to contestation and open conflict. It is not surprising that the ECJ in particular accounted for this modulation as it had been in the need continuously to secure the EU's integrative potential through safeguarding its autonomy from the member states. This has become particularly visible in the issue of constitutional rights interpretation, in the famous *Solange* disputes with the *German Federal Constitutional Court*,[35] and with the intensely debated *Åkerberg Fransson* judgment.[36]

[32] Case C-35/96 *Hermés International v. FHT Marketing Choice BV,* ECR I-3603 (1998); Francis Snyder, "The Gatekeepers: The European Courts and WTO Law," *Common Market Law Review* 40, no. 2 (2003): 313.

[33] See, for example, Juliane Kokott and Christoph Sobotta, "The Kadi Case – Constitutional Core Values and International Law – Finding the Balance?" *European Journal of International Law* 23, no. 4 (2013): 1015; Matej Avbelj and David Roth-Isigkeit, "The UN, the EU and the Kadi-case: A New Appeal for Genuine Institutional Cooperation," *German Law Journal* 17, no. 2 (2016): 153. Stefan Kadelbach and David Roth-Isigkeit, "The Right to Invoke Rights as a Limit to Sovereignty – Security Interests, State of Emergency and Review of UN Sanctions by Domestic Courts under the European Convention of Human Rights," *Nordic Journal of International Law* 86, no. 3 (2017): 275.

[34] Opinion 2/13 of the Court of 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454.

[35] German Federal Constitutional Court, BVerfGE 37, 271 (1974): "Solange der Integrationsprozess der Gemeinschaft nicht so weit fortgeschritten ist, dass das Gemeinschaftsrecht auch einen von einem Parlament beschlossenen und in Geltung stehenden formulierten Grundrechtskatalog enthält, der dem Grundrechtskatalog des Grundgesetzes adäquat ist […]"; German Federal Constitutional Court, Decision of 22 October 1986, 2 BvR 197/83, BVErfGE 73, 339 (1986): "Solange die Europäischen Gemeinschaften, insbesondere die Rechtsprechung des Gerichtshofs der Gemeinschaften einen wirksamen Schutz der Grundrechte gegenüber der Hoheitsgewalt der Gemeinschaften generell gewährleisten, der dem vom Grundgesetz als unabdingbar gebotenen Grundrechtsschutz im wesentlichen gleichzuachten ist, zumal den Wesensgehalt der Grundrechte generell verbürgt […]".

[36] Case C-617/10 (judgment of 26 Feb 2013) Akerberg Fransson, ECLI:EU:C:2013:105.

Similarly, the skepticism against external normative intervention has always been prominent in the rulings of the *United States Supreme Court* (USSC). One may only think back to the famous *LaGrand* case, in which Germany was denied an appearance in front of a US court to file a complaint against the authorities,[37] which contradicted the rules of international law, as the *International Court of Justice* (ICJ) later confirmed.[38] In similar lines are the decisions *Medellín*, in which the USSC rejected the direct applicability of rules of international law to domestic law and opted for a strict dualism,[39] and *Kiobel*, in which the USSC ruled against the extraterritorial application of the *Alien Tort Statute*, thereby preventing legal actions directed against violations of international law.[40]

In contrast, the extension of this development to European courts is new. ECJ opted for a strictly dualist interpretation of international law. For example, in Switzerland, there is a remarkable debate on the compatibility of the ECHR with popular sovereignty.[41] And finally, the *Italian Constitutional Court*, in its *Sentenza 238/2014*, refused to give effect to a judgment of the ICJ in *Jurisdictional Immunities of the State* and paved the way for legal action against German property in Italy, explicitly endorsing the ECJ's *counter-limits* doctrine.[42] Many courts thus redefine their relationship to international law from relative verticality toward a more horizontal approach, in which international law appears as one legal body among many. As Chris Thornhill argues, "transnational courts and other appellate actors have assumed a remit that substantially exceeds arbitrational functions, and they now increasingly focus on objectives of 'norm-advancement.'"[43]

Precisely this horizontal understanding of international law lifts regime collisions to a new level of complexity when the transnational dimension is involved. How do transnational arrangements relate to traditional norms of international law? What level of human rights protection is appropriate

[37] Federal Republic of Germany v. United States, 526 U.S. 111 (1999).

[38] LaGrand Case (judgment of 27 Jun 2001) Germany v. United States, 40 ILM 1069.

[39] *Medellín v. Texas*, 552 U.S. 491 (2008). For discussion of Medellin with respect to Kadi, see Gráinne de Búrca, "The European Court of Justice and the International Legal Order after *Kadi*," *Harvard International Law Journal* 51, no. 1 (2010): 1.

[40] *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ____ (2013).

[41] See, for example, Daniel Moeckli, "Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights," *Human Rights Law Review* 11, no. 4 (2011): 774.

[42] Corte Constitutionale, Sentenza 238/2014 (judgment of 22 Oct 2014), para. 3.2.

[43] Chris Thornhill, "A Sociology of Constituent Power: The Political Code of Transnational Societal Constitutions," *Indiana Journal of Global Legal Studies* 20, no. 2 (2013): 551.

in the emerging Internet governance?[44] This question has come to prominence through the so-called *companynamesucks.com* cases. What are the rights and duties of multinational corporations under international law? Given that the power of private actors has dramatically increased and that they start to exercise ordering functions, this is a topic that finds its relevance not only under the equally expanding and separating international investment law.[45] The diversity of actors of this plural law further increases the challenge. From metropolitan networks to the Troika, there is a multitude of actors participating in the shaping of legal processes that are difficult to grasp in traditional terms.[46]

A consequence of plurality in the law is that the role of courts and tribunals established through public or private agreement has immensely grown, as they are in charge of the development of the interaction of this vast, plural body of norms. Cross-fertilization between judgments across legal orders has become a prominent feature of global legal interactions.[47] Courts are actively looking for models of reasoning, which could justify their dealing with norms stemming from other orders, while at the same time retaining the stabilizing function of law.

2.1.2 Second-Order Plurality: Legitimacy and Global Order

The apparent complexity of the matter and the demand for solutions led to an unprecedented theoretical boom. Scholarship offers suggestions on how to resolve the challenges of regime conflict and transnationalization.

[44] See Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press 2012), 56.

[45] For the relationship of transnational corporations and human rights, see John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (New York: W. W. Norton, 2013). For the specialization of investment law, see Anne van Aaken, "Fragmentation of International Law: The Case of International Investment Protection," *Finnish Yearbook of International Law* 17 (2008): 91; Stephan W. Schill, "W(h)ither Fragmentation? On the Literature and Sociology of International Investment Law," *European Journal of International Law* 22, no. 3 (2011): 875. See also, Jakob Kadelbach, *Regimeübergreifende Konkretisierung im Internationalen Investitionsrecht* (Baden-Baden: Nomos, 2014), 103f.

[46] See, for example, Tatjana Chionos and Sué González Hauck, "Städtenetzwerke zur Krisenbewältigung – Neue Völkerrechtsakteure als Herausforderung für die Konstitutionelle Idee," in *Konstitutionalisierung in Zeiten globaler Krisen*, eds. Jonathan Bauerschmidt et al. (Baden-Baden: Nomos, 2015): 191.

[47] Ruti Teitel and Robert Howse, "Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order," *NYU Journal of International Law and Politics* 41, no. 1 (2009): 959. See also, Kadelbach, *Regimeübergreifende Konkretisierung*, 103.

Grounded in different societal epistemologies, academics have developed vastly different ideas for the future of human social organization. On the level of legal thought, a second-order plurality, a plurality of approaches to understand the first-order plurality, has arisen. The differences between epistemologies and methods to approach the complexity problems of global law have continuously increased, so that today, on this second level of discourse, it might be reasonable to say that we experience a similar kind of fragmentation as on the first level.

In this respect, most of the approaches of the second level are recognizing the limits of traditional rule positivism to account for the radical changes with which global law is confronted. It seems impossible to shield the concept of international law as a system of positive rules from the turbulences in its environment. With the exception of some relentless defenders, most scholars accept relative normativity in international law, a legality of different degrees, and a development that Prosper Weil had warned about 35 years ago.[48]

Since the tension between the traditional body of international law and societal change has grown too large, the quest for alternatives becomes a heated dispute. From global democracy to radical pluralism, the suggestions reprocess old disputes about an adequate reorganization of society. In the midst of all, after the fall of old divides with the Iron Curtain and a fixation on a liberal political model for the nation-state, the debate on global law becomes a field where future global political order is negotiated.[49] In this respect, however, there is wide and unmediated disagreement.

The fragmentation of the discourse extends to the conceptual basis of the approaches. The different fields of thought have transformed into "self-contained regimes," discussing the validity of their propositions in the specialized vocabulary that is merely accessible to the theoretical insider. At the same time, the approaches of the second level remain concerned with the same empirical phenomena: transnationalization and regime collisions. Along the different approaches it is always the criteria of legality and legitimate legal authority that are at stake.

[48] Prosper Weil, "Towards Relative Normativity in International Law," *American Journal of International Law* 77, no. 3 (1983): 413.

[49] See, for a discussion how the concept of the state is related to claims on social organization: Nehal Bhuta, "State Theory, State Order, State System – Ius Gentium and the Constitution of Public Power," in *System, Order and International Law – The Early History of International Legal Thought*, eds. Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (Oxford: Oxford University Press 2017), 398.

One line along which the debate has developed is the divide between hierarchical and heterarchical models of political order. The hierarchical model tries to retain central and procedurally defined law making as a model adopted from national constitutions. Here, a common set of meta-norms or procedures provides a frame for the multitude of primary rules. The heterarchical model assumes the contrary and has a preference for decentral law-making. In the beginning of the debate, the latter paradigm has been associated with pluralist models of political order, whereas the hierarchical model could be found in constitutional models.[50] As a result of conceptual fragmentation, this distinction does not hold anymore.[51]

The debate on hierarchy and heterarchy of the law is in the midst of a struggle for the definition of global legality. This struggle extends to other classic methodological aspects. On the one hand, there is a challenge of the distinction between public law and private law.[52] The "private" has an important role to play in the changes with which international law is confronted. Transnationalization involves the recognition of private law-making, while regime collisions have a horizontal structure that is known from conflict-of-laws. Similarly, this development has promoted a special regard for the role of international courts and tribunals as actors in the shaping of global law.[53]

[50] In legal discourse several differing claims to global constitutionalism have been made. See, for an overview, Jan Klabbers, Anne Peters and Geir Ulfstein, eds., *The Constitutionalization of International Law* (Oxford: Oxford University Press, 2009); Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization," *Theoretical Inquiries in Law* 8, no. 1 (2007): 9; Anne Peters, "Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures," *Leiden Journal of International Law* 19, no. 3 (2006): 579; Erika de Wet, "The Emergence of International and Regional Value Systems as a Manifestation of the Emerging Constitutional Order," *Leiden Journal of International Law* 19, no. 3 (2006): 611. For pluralism, see for example, David Kennedy, "One, Two, Three Many Legal Orders: Legal Pluralism and the Cosmopolitan Dream," *New York University Review of Law and Social Change* 31, no. 3 (2007): 641.

[51] Teubner, *Constitutional Fragments*, 13; See also, Andreas Fischer-Lescano, *Globalverfassung – Die Geltungsbegründung der Menschenrechte* (Weilerswist: Velbrück, 2005), 20.

[52] Horatia Muir Watt, "Private International Law Beyond the Schism," *Transnational Legal Theory* 2, no. 3 (2011): 347.

[53] Armin von Bogdandy and Ingo Venzke, "On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority," 26 *Leiden Journal of International Law* 26, no. 1 (2013): 49; Ole Fauchald and André Noellkaemper, eds., *The Practice of International and National Courts and the (De-)Fragmentation of International Law*

On the other hand, the disciplinary separation of law from other social sciences is increasingly called into question. There is a call for cooperation with other disciplines in order to accommodate the new complexity. In particular, the debate on potential cooperation between the disciplines of International Law and International Relations as disciplines has produced high waves.[54] Political science approaches apparently have fewer problems to account for the hybrid character of legal norms, as illustrated in the International Relations-triggered debate on soft law.[55] In this process, lawyers have turned toward the understanding of legal authority instead of a rule-based approach.[56] As a consequence of plurality, they increasingly exhibit openness toward a variety of influences that often come with a reduced fixation on rules and pedigree criteria.

2.1.3 Third-Order Plurality: Meta-Theory

The sheer amount of different methodologies and concepts to approach the plurality of global law has amounted to the establishment of new journals, forums, and research projects.[57] This discursive complexity has even led to a plurality of a third order, that is, approaches that try to make sense of the different theoretical suggestions and to map the field of global legal

(Oxford: Hart Publishing 2012); See also Miguel P. Maduro, "Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism," in *Ruling the World?—Constitutionalism, International Law and Global Governance*, ed. Jeffrey L. Dunoff and Joel Trachtman (Cambridge: Cambridge University Press, 2009), 356.

[54] For an overview, see Jeffrey L. Dunoff and Mark A. Pollack, eds., *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press 2013).

[55] Kenneth Abbott and Duncan Snidal, "Hard Law and Soft Law in International Governance," *International Organization* 54, no. 3 (2000): 421. For a discussion, see David Roth-Isigkeit, "The Blinkered Discipline? – Martti Koskenniemi and Interdisciplinary Approaches to International Law," *International Theory* 9, no. 3 (2017), 410.

[56] See, for example, Armin von Bogdandy et al., eds., *The Exercise of Public Authority by International Institutions. Advancing International Institutional Law* (Heidelberg: Springer, 2010); Nicole Roughan, *Authorities: Conflicts, Cooperation and Transnational Legal Theory* (Oxford: Oxford University Press, 2013); Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press, 2014); Basak Çali, *The Authority of International Law* (Oxford: Oxford University Press, 2015).

[57] See, for example, *PluriCourts*, located at the University of Oslo, *iCourts*, located at the University of Copenhagen, and *Normative Orders*, located at the University of Frankfurt. New journals are among many others, *Transnational Legal Theory*, *Journal of International Constitutional Law*, and *Global Constitutionalism*.

thought. Instead of making practical suggestions on how to resolve the first-order conflicts, these contributions try to explain how the different research strands are related. They try to devise common lines linking the approaches of the second order. This meta-theory is not primarily addressed to those situated in the first-order plurality, courts, or executive organs of single regimes; rather, it should support the legal thinkers of the second order to take other views into account, ultimately improving their theoretical knowledge and reflexivity.

One of the prime examples for this third-order discourse is Neil Walker's *Intimations of Global Law*.[58] Walker illustrates the conceptions of the second order with images that describe what global law is or should be. His seven images (pyramid, umbrella, vessel, thread, chain, flow, and segment) illustrate the different degrees of solidity/hybridity, hierarchy/heterarchy, and universality/particularity that the authors of the second order describe. Whereas the traditional positivist would imagine global law as a pyramid, with central constitutional obligations at the top of it, a conflict-of-laws vision of regime conflict would prefer the chain image. Seen in that way, the circuit from pyramid to segment illustrates the different preferences on the role of law in political society.

In his book, *International Law Theories*, Andrea Bianchi presents different methodological approaches to international law. "International Law," in this case, intends to denote the discipline instead of the subject so that the book equally includes approaches dealing with the global dimension of law. Bianchi argues that the language of international law is not universal anymore.[59] Rather, lawyers use a vast amount of different methods: "At times, the same dialect appears to be spoken; at others, it is as if entirely different languages were involved."[60] Bianchi describes approaches to legal method as a difference between mother tongues, emphasizing cultural contingency. This depiction resonates with what has been described as conceptual fragmentation.

Another example for a contribution on this third level is Friedrich Kratochwil's *The Status of Law in World Society*, which equally to Walker's

[58] Neil Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2015).

[59] Andrea Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking* (Oxford: Oxford University Press, 2016), 2 citing Andrea Bianchi, "Looking ahead: International Law's Main Challenges," in *Routledge Handbook of International Law*, ed. David Armstrong (London: Routledge, 2009), 407.

[60] Bianchi, *International Law Theories*, 2.

Intimations uses the term "images of law." Though in different style and form, Kratochwil provides a meta-theory on the approaches of the second order. The concept of "image" shows the aesthetic, artificial character of all the conceptions of the second order. This is equally reflected in Kratochwil's subtitle *Meditations on the Role and the Rule of Law*, where meditation addresses a certain form of non-scientific reflection, inspired by Pascal and Montaigne.[61] The concept of legal thought as "image" highlights the inevitability of its fragmentation as a matter of different perspectives.

According to Walker, these images cannot convey comprehensive conceptions of the good life: "the various species of global law are unable to express or develop any such sharply competing visions, or dedicated pathways in pursuit of such visions."[62] This view seems to be shared by Bianchi's concept of method as language suggesting that theories are contingent upon their institutional history and their respective starting points. Both views agree that global legal thought involves partly preconfigured academic choices.

While these projects describe and evaluate the contingency of legal thought, they are lacking an attempt to transcend this contingency toward a more comprehensive framework that not only allows positing different images of global law, but makes their relationship and different preferences openly visible. Walker justifies the lack of reference to overarching visions because theories "as practical forms of endorsement or commitment to particular normative legal positions [they] cannot assume the institutional *tabula rasa* that would allow them the latitude to do so."[63]

Yet, such evaluation of the theories on the second discursive level does not resonate very well with the actual readings of the debates, which often appeal to philosophical models of the good life, to aspects of justice, and to what it means to develop international society in one direction or another. They appeal to a *transcendence* of the contingent sociological fact of place and time in the universe. The approaches of the second level thus contain an important aspirational dimension that is only insufficiently reflected in their presentation as largely unrelated images.

[61] Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014), 20.

[62] Walker, *Intimations*, 136.

[63] Walker, *Intimations*, 136.

If one did not at least consider a transcendence of the context-embeddedness of the respective theoretical positions, the discourse on the second level would merely be describing *legal artifacts*: contingent aspects of societal history that cannot possibly transcend the narrow situational frame in which they have been posited by institutional fortune. Neither is legal thought merely situated in practical constraints nor is it painted in ivory towers. The problem is that debates and disputes either take place in a discursive sphere that is too narrow to refer to the underlying epistemic concepts and comprehensive political–theoretical models for world society, or else they are presented in a style that rejects the possibility of any non-contingent relations between them. There is hardly a discursive sphere between self-contained specialists and conversations with the *weltgeist*.

A fruitful debate would require an in-depth engagement precisely with the different epistemologies, mapping the reasons why different images of law are created in the first place. This means, in order to make sense of global legal plurality, we need to inquire into the different societal epistemologies to understand why one image of global law is preferred over the other. To do this right seems overly ambitious; yet, quite broadly, it is the intention of this book.

2.2 Plurality as a Problem of Legal Theory

A central topic of global legal thought is the problem of the traditional positivist method to account for this enormous increase of plurality. Before mapping different solutions, I will spare some lines for the problem. What are the dynamics that led a broad majority of legal academia to think that the traditional view of international law needs refurbishment? In the history of international law, state and non-state actors have frequently challenged the law by disobedience and claims to their own relevance, while the doctrine of state consent as a primary source has persisted. In order to understand what is different in today's appearance of plurality, I will shortly introduce the traditional doctrine of sources and attempts to frame plurality in state consent. The problem of plurality in global law, as I will argue ultimately, consists precisely in the practical limitations of a state-focused sources doctrine in the light of the vicious combination of fragmentation and transnationalization. The weakening of international law as a frame of coordination and legitimacy and the emergence of plurality as a challenge result in a mutually reinforcing process: the continuous erosion of international law.

2.2.1 The Doctrine of Sources and Plurality

In order to understand the challenge, it is helpful to step for a few moments into the shoes of a committed positivist. Positivism, as previously the mainstream methodology in public international law, derives the validity of the rules of the legal system not from its substantive content, but from its pedigree. Theorizing the sources of law is therefore central to the plausibility of positivist doctrine. According to the most prominent account of this belief, Herbert L. A. Hart's *Concept of Law*, a legal system must have a rule of recognition that defines the criteria of legal validity. This rule of recognition is not itself part of the system in that it could be valid or invalid; it just exists as a matter of contingent sociological fact. In Hart's own words, "the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials and private persons in identifying the law by reference to certain criteria."[64] The existence of a legal system thus depends on the acceptance and application of the rule of recognition. This means looking into the sources that the rule of recognition specifies and, ultimately, finding out what the law *is*.

Hart's own discussion of international law is often criticized by international lawyers as redundant and reductionist.[65] Already in the introduction to his *Concept of Law*, Hart admits that his interest for international law is limited, and that his theory will deal with it only as a part of what he calls "borderline cases."[66] He argues that, even though international law is law proper, the rules of international law for lack of a rule of recognition do not make up for a legal system. Hart apparently believed that all international law is customary.[67] Probably this was already wrong when Hart wrote these lines, but it is certainly wrong today.[68] Today, Article 38(1) of the *Statute of the International Court of Justice* with its reference to treaties and customs provides for a positivized reflection of a possible

[64] Herbert L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 110.

[65] See, International Law Commission, *Fragmentation of International Law*, 23; Mehrdad Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A. Hart," *European Journal of International Law* 21, no. 4 (2010): 967. For further critique, see Ronald Dworkin, "A New Philosophy for International Law," *Philosophy & Public Affairs* 41, no. 1 (2013): 4.

[66] Hart, *Concept of Law*, 15.

[67] Liam B. Murphy, *What Makes Law?* (Cambridge: Cambridge University Press: 2014), 146.

[68] Payandeh, "Jurisprudence of Hart," 994; Jeremy Waldron, "Hart and the Principles of Legality," in *The Legacy of H.L.A. Hart: Legal, Political and Moral Philosophy*, Matthew H. Kramer et al., eds., (Oxford: Oxford University Press, 2008), 67.

rule of recognition of international law. The legislative elements that Hart admonished to be missing now appear at many corners of international law, so that it is reasonable to say that international law is a legal system properly speaking.[69]

The interest of international lawyers in Hart's theory and the appeal to the systematic character of international law is well justified. The rule of recognition accounts for a comparably closed definition of a legal system. Hence, positivist theory has a certain capacity to simply ignore factual plurality. Since the rule of recognition of a legal system stipulates quite precisely which normative information should be treated as law and which actor's behavior counts as relevant legal actions in the sense of the legal system, plurality is no reason in itself to believe that positivism as an approach to international law should be problematic. Quite the contrary: a legal system distinguishes the normativity that is relevant in the legal sense from the normativity that is not. Even further, it is the task of law not to recognize any source of normativity as legitimate and constrain the influx of unregulated normativity into the system. It seems a bit odd in the first place that transnationalization, that is, the emergence of new actors, is perceived as so utterly problematic for the positivist method.

Another advantage of a positivist paradigm in international law is that it largely shields international law from the relevance of disobedience. Even if powerful states do not comply with international legal norms, this does not challenge its validity as a body of norms. Even though these appeals to relevance have continuously constituted one of the main reasons why the positivist method has been challenged with the argument that it insufficiently reflected the realities of international relations, this has not substantially damaged the positivist paradigm.[70] Arguably, international law has even been quite independent from concerns of disobedience, because even if international law was not complied with, its general validity as normative order was not put into question.

Similarly, understanding law as social fact leaves spaces for the recognition of other legal orders. There is nothing complicated about acknowledging that other legal orders with different rules of recognition exist. This debate is partly reflected in the old monism/dualism debate that deals with the relationship of international and domestic laws. According to monist theories, there would be merely one rule of recognition that

[69] International Law Commission, *Fragmentation of International Law*, 23–25.
[70] See Roth-Isigkeit, "Promises and Perils," 96.

couples international and domestic laws to one and the same legal system. Contrarily, dualist theories advocate the existence of separate rules of recognition between two legal orders. A plurality of legal orders describes the case of fragmentation: a large-scale dualism, where not only two, but a multitude of legal orders and their respective rules of recognition coexist.[71]

Looking at the empirical change summarized in the first part of this chapter, it seems that positivism as an approach to law can potentially frame plurality. Transnationalization and the collision of regimes are not in themselves new challenges to the positivist, and neither is disobedience. Some positivists thus contend that there is nothing to feel uncomfortable about with the present turn away from international law, pointing to positivism's capacity and past achievements just to endure these situations.[72] And they have a point: there is nothing particularly new or discomforting that should require us to take a completely new stance toward legal method. But there is a sense in which international law enjoys reduced acceptance, and acceptance is the first currency of the positivist. This reduction in acceptance can be made visible, not in international law itself, but in the relationship other orders define for themselves toward international law. When legal orders stand in conflict with international law, they increasingly take another way than suggested by international law's normative principles.

Conflict as such is a standard case in every legal system. One might just think of the case of a federal system in which state law conflicts with constitutional law. This is an uncomplicated case because the relationship between these two normative systems is uncontested. A similarly clear relationship can be found in monist theories of the relationship between international law and domestic law. In this case, the legal system is supposed to have a pyramid-like structure with international law at its top. In both cases, there is just one conflict rule. One legal order, whatever it will decide, prevails over another.

In the dualist case, things already become more complicated. Here, it is not one, but two conflict rules that define the relationship between legal

[71] Plural*ism,* finally, already implies some normatively structured relationship between the plurality of legal orders. Whereas legal positivism can undoubtedly frame a plurality of legal orders, the case with pluralism proves to be more complicated.

[72] See, for example, the argument by Samantha Besson, "Theorizing the Sources of International Law," in *The Philosophy of International Law*, eds. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 163.

orders and that stipulate when and whether one or the other legal order prevails. In dualist theories of international law, it was often supposed that these conflict rules are symmetrical to each other. Even though international law and domestic law were assumed to constitute two different and independent legal systems, the cases of practical conflict were rare because the symmetrical conflict rule suggested a default preference for international law.

As much as these paradigms count for the relationship of domestic law to international law, they are equally relevant in the debate on fragmentation. Here, one of the main issues is the loss of unity of international law. If trade law and environmental law developed into separate self-contained regimes with different rules of recognition, there was the threat of normative conflict. Trade law has one preference, while environmental law has another. Not only is it now impossible to find out what international law says, because formally both regimes belong to the body of international law, but it is also impossible for subjects to simply comply with international law on the basis of a clear relationship between both orders. Rather, subjects have to decide whether to comply either with trade law or with environmental law, which obviously complicates the matter. The fragmentation of law thus impedes on the coordinative capacity of the law.

In terms of legal theory, this puts legal authority at stake. According to Joseph Raz, the authority claim consists in claims to supremacy and legitimacy.[73] Raz holds that law claims to have supremacy over non-legal normative systems and over other legal systems that operate in the same issue area. If a legal system contains a specific rule governing a specific case, then it claims to be superior to other legal and non-legal systems regulating the same case. Finally, bringing the second claim to authority in the equation, law even claims to be legitimate in demanding that its own authority is supreme.

The source of authority is social acceptance of the law. Acceptance is a result of the advantages of a situation of legality. Law solves the coordination problem of multiple actors in a complex society and stabilizes the normative expectations of the actors involved. The law, as a result of the claim to legitimate authority, generates reasons for actions for its subjects that are not necessarily dependent on its merits. Rather, it generates these reasons *qua law*.[74] According to this reason-based conception, legal

[73] Joseph Raz, *The Authority of Law*, 2nd ed. (Oxford: Oxford University Press, 2009), 118f.
[74] Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988), 23.

authority changes the structure of actor's reasons. It pre-empts reasons that are directed at the merits of a rule and replaces them with the formal sense of obligation, that is, content-independent reasons to comply.[75] The general reasons for the acceptance of a legal system translate into content-independent reasons when the law is applied to the single case.

However, this authority crucially depends on the precision of the law. If it is unclear what obligation precisely one has to comply with, or it seems as if there were different ways to comply with the law, fragmentation becomes a problem for legal authority. It cannot provide for *content-independent* reasons for compliance anymore because it becomes particularly unclear what compliance means in the first place. When several sources of normativity concur, a legal system has to protect its content-independent reasons for compliance through defining the relationship of the different sources. As in the case of a constitution, the hierarchy of different sources of law stabilizes the coordinative tasks of the law facing plurality.

Thus, defending the unity of international law through harmonizing principles and collision rules, such as *lex specialis*, *lex posterior*, *ius cogens*, or the principle of systemic integration in Article 31(3)c of the *Vienna Convention on the Law of Treaties*, is a plausible strategy to contain plurality and to protect legal authority. This connection of legal authority to the unity of law is equally highlighted in the report of the ILC study group: "[I]f legal reasoning is understood as a purposive activity, then it follows that it should be seen not merely as a mechanic application of apparently random rules, decisions or behavioral patterns but as the operation of a whole that is directed toward some human objective."[76] The problem of fragmentation from the positivist's perspective thus lies in the threat for the reason-giving nature of law.

2.2.2 Contested Collision Rules

Legal authority in circumstances of plurality depends on the symmetry of the collision rules that connect different legal orders. Now, empirically, what we observe in global law is not symmetry but mutual contestation.

[75] The notion of content-independent reasons is an idea by Hart, see Herbert L.A. Hart, Essays on Bentham (Oxford: Oxford University Press, 1982), 254f. For further discussion with respect to global legal fragmentation, see Keith Culver and Michael Giudice, *Legality's Borders: An Essay in General Jurisprudence* (Oxford: Oxford University Press, 2010), 114.

[76] See International Law Commission, *Fragmentation of International Law*, 23.

Instead of accommodation and recognition, plurality is competitive. Each order intends to secure some ground for its own area of application. Reflecting these developments, Nicole Roughan argues that we should understand the authority of international law in a relative rather than a supreme, reason-giving sense.[77] Given the dramatic changes we have discussed earlier, this seems to be analytically accurate.

There are two main reasons for this increasing competition between legal orders. First, since the end of the Cold War, international institutions have been more active. They have started to impede on the domain that was exclusively reserved for the national state before. The prime examples for contestations of international law from this direction are the quasi-legislative measures of the *Security Council*, targeting individuals in the fight against terrorism. Here, the extension of the regulatory activity triggered a reaction from legal systems that contained legal provisions for the protection of individuals. The second reason exemplified in the re-emergence of the *lex mercatoria* is the inadequacy of the interstate system to account for the complexity of globalization with its own means. Transnationalization does not necessarily disregard international law; it often merely accounts for a new level of complexity in regulation that would be impossible to achieve in the traditional legal form.

Both aspects are general reasons for acceptance of a legal system: the provision of legitimate solutions of coordination problems. On the one hand, the legitimacy of the expansion of international law was questionable, while on the other hand the state-based system could not account for the coordinative complexity that economic globalization required. Looking at the judgments and decisions introducing the deviation from formerly clear conflict rules with a preference for international law, they invoke precisely these reasons in order to challenge the supremacy of international law. Either they question the legitimacy of international law, or they admonish the insufficiency of an interstate system to provide for adequate coordination.

These initial cases of disobedience were, in an *ex post* perspective, the dam-breakers for the horizontalization of international legal order in which the preference for international law was increasingly called into question. The symmetry of conflict rules breaks up and the relationship

[77] Roughan, *Authorities*, 173f. Nicole Roughan, "The Relative Authority of Law: A Contribution to Pluralist Jurisprudence," in *New Waves in the Philosophy of Law*, ed. Maks del Mar (New York: Palgrave Macmillan, 2011), 254.

between legal orders changes from default deference into a different mode: a competitive conflict of legal orders. The formerly clear and symmetric collision rules that illustrated the general acceptance of the legitimate authority of international law are replaced by a more relational approach.

These relational approaches produce dilemmas for decision-makers. As an example, the famous *Solange I* construction suggests default rejection of the other order, whereas *Solange II* suggests default deference. In the case that both orders contain different normative positions, there is no argumentative way from the single norm to a legal decision that would not violate the authority of at least one of the respective orders. Since there is a conflict on the collision rules, there is no way to mediate the conflict merely with legal authority. The overlap in jurisdiction poses a dilemma for an actor in one legal order, in most of the cases a court. Either it can take a self-referential decision and ignore the authority of the colliding order or it can take an extra-referential approach and give due regard to the other order's authority by violating its duties toward its own legal order.

In terms of legal theory, *content-independent* reasons provide no solution. As there are conflicting claims on these reasons, the conflict has to involve an additional consideration: the requirement to comply with the legal order as a whole. Its emergence in legal argument reverses the process that occurs in the formation of legal authority. There is no content-independent justification for a legal decision anymore. As a consequence, the necessity to recur on substantive arguments in the case of a collision of conflict rules substantially weakens legal authority.

The replacement of the *content-independent* reasons with *content-dependent* reasons thus weakens the coordinative capacity of the law and with that equally impedes on its legitimacy. One of the main achievements of legal authority is to provide legal certainty by liberating the individual reasoning from recurring to all details of the substance of a case.[78] From this capacity to provide for guidance in complex decision situations, law receives a large share of its legitimacy. The situation of conflict between legal orders thus deprives the law of one of its main functions.

[78] This is, for example, one of the leading ideas of Scott Shapiro's planning theory of law or Joseph Raz's service conception of legal authority. See Scott J. Shapiro, *Legality* (Cambridge: Harvard University Press, 2013); Raz, *Morality*, 56.

2.2.3 Losing Ground: The Erosion of the Traditional Framework

The empirical material shows that the move toward collisions and new actors is a self-accelerating, exponentially growing process. In short, this is because the result of the process, contestation, and legal uncertainty is also one of its main causes. Once legal authority is weakened, and there is a breach in the dam, the erosion of the traditional legal framework is hard to stop. As we have seen, legal authority provides content-independent reasons for action. These reasons for action arise *qua* legitimate legal authority. The law can fulfill its coordinative task, the stabilization of normative expectations, through pre-empting the reasons connected with the merits of its guidance. Contested collisions reduce the capacity of a legal system to provide for clear guidance and the capacity to stabilize normative expectations.

Let us go back to the judge who, in charge of a case where such a contested collision occurs, tries to take a reasonable decision. In the case of an uncontested symmetry between international law and domestic law, the domestic court takes a decision in preference of international law because of the formal, content-independent reason that international law is binding. This preference even exists at the expense of countervailing content-dependent reasons.

The situation of conflict replaces content-independent with content-dependent reasons. Content-dependent reasons will speak for a resolution of the conflict with a preference for the order in which the decision-maker is situated. The case of conflict between legal orders thus gives incentives toward self-referential reasoning. In the cases that have been discussed in the first part of this chapter, we can precisely observe the prevalence of self-referential reasoning oriented toward the preferences of the own legal order instead of extra-referential reasoning, taking preferences of other orders into account.

The dominance of self-referential reasoning increases fragmentation because it leads to further competition in standard-setting and norm creation. The general acceptance of international law shrinks at the expense of its authority. Once a growing number of actors have started to deviate from the preference of a formal international law framework to a preference of self-referential decisions, the capacity of the international legal order to stabilize normative expectations becomes more and more limited, with the result that the general reasons to submit to international law are

further weakened. This again motivates further actors to claim this normative space and to replace the content-independent reasoning of international law with their own self-referential reasoning. This self-aggravating spinning process effectuates the degradation of international law into a legal order that stands in a merely horizontal relationship to state law. The international legal order loses its elevated position. As Roughan suggests, the authority of international law becomes relative to other legal orders.[79]

For international lawyers committed to positivism, the problem occurs only on a secondary level. The language of international law continues to exist, because its preconditions are not challenged. The doctrine of sources, its methods, all can persist. The challenge only occurs with respect to the relevance of the international legal order. International law as a body of law with only weak institutional backbones is crucially dependent on the acceptance and implementation by other legal entities. When these start marginalizing the international legal argument, replacing it with other forms of coordination, this indeed poses a problem if one considers the international legal framework as an important achievement of peace and justice. This way of putting the fragmentation and transnationalization problem in terms of legal theory serves to highlight two aspects. Firstly, it explains why many theoretical approaches focus on either reconstituting or modifying the argumentative links between legal systems. And secondly, it explains in analytical terms the dramatic loss in practical authority that international law has experienced in the past years.

2.3 Coordination, Normativity, and the Theoretical Turn

The loss of a holistic understanding of legal authority in global law leads to uncertainty in answering questions of the relationship between legal orders and the nature of law in general. Pragmatically speaking, this boils down to three questions, which have been extensively discussed in conflict-of-laws approaches. The first question points to the *venue*: In which legal order do we allocate the actual decision-making? Which factors let us determine who has jurisdiction? The second question points to the *law*: Which law should be applied? Which foreign norms do we recognize as law and what should be the preconditions for recognition? To what extent should norms of other orders be taken into account? The third question points to *normative*

[79] Roughan, *Authorities*, 173f.

difference: Do we accept and tolerate decisions of other legal orders? Is there a normative core of one order that must persist in any conflict? All three questions have practical and normative dimensions.

In practical terms, it seems unclear whether the new global law, with its authority scattered across different regimes and considerably weakened, can fulfill the coordinative demands that were largely stabilized under the traditional paradigm. Can decentralized legal authority account for conflict resolution? Does it have the capacity to coordinate public action as efficient as the traditional international law framework? In normative terms, finally, how can the new paradigm account for standards of justification and human rights, when the reference to state law as a legitimacy resource is increasingly eroding?

2.3.1 Coordination

The function of law, as Habermas, Rawls, and Luhmann unanimously contend, is to stabilize normative expectations. Through the stabilization of expectations, law fulfills its coordinative task. The merits of the traditional framework of international law are closely related to this coordinative capacity. Probably the most important of them is conflict resolution between states, so that the necessity to resort to war as a consequence of unresolved conflicts is ruled out. Another aspect of the unity of the traditional framework is the capacity for collective action, for example, when dispute resolution fails. Both aspects are threatened in the weakening of legal authority.

In terms of conflict resolution, the increasingly winded path from norms to decisions raises some structural concerns that are related to the instability of global law. Some actors with good institutional prerequisites can draw advantages by navigating gaps between legal orders, whereas others are worse equipped to deal with uncertainty, so that one problem with the lack of clear coordination is the distribution of burdens that comes with it. Even though every actor finds itself confronted with the very same instability, there are some who, as a matter of fact, are better prepared than others to deal with the consequences of legal uncertainty. Destabilization hits the actors with weaker institutional power. As legal argumentation becomes increasingly self-referential, regimes that are dependent on decentral enforcement suffer the most. One prime example is the implementation of international environmental law. The famous free-riding problem, which holds that it is rational for every actor to want environmental agreements to happen, but at the same time to opt out of

binding obligations when it comes to the actor's own constraints, requires an atmosphere of mutual trust and cooperation to be avoided. The weakening of legal authority and the uncertainty on which values have to be taken into account obviously have counterproductive effects here.

This effect increases further through the possibility of private actors to choose the jurisdiction in which they want to pursue their claims. Particularly in the light of the difficulty of global regulation that constrains market forces, it is usually the public sphere that suffers when private actors have a choice in jurisdiction. Forum-shopping erodes the capacity of effective regulation. In contrast, the instability of some static arrangements through the possibility of forum-shopping might as well have normatively desirable consequences. Without the existence of the possibility to challenge *Security Council* sanctions at the ECJ, the insufficient due process concerns in the UN sanction system would not have been addressed. Still today, we can see that due process safeguards are in place only in those areas where sanctions are dependent on external implementation. In most of the sanctions regimes, there is no due process protection at all, since there have been no challenges from national courts.[80]

The example of sanctions similarly illustrates the problem of a loss of public action capacity. There is no body like the *Security Council* for collective action to safeguard peace and security. The challenge of these universal bodies thus has dramatic consequences. The development of global law thus steps down to the national and regional levels. This return to small-scale agreements may be ambiguously evaluated, yet the promise of the *United Nations* to account for the very universality of the order might be difficult to hold in any other framework. It is one of the major achievements of international law after World War II to have precisely avoided these scattered diplomatic arrangements, but rather to have addressed problems on a global level. Even though some admonish the failure of these attempts, there is a common vision that is in danger of getting lost.

2.3.2 Normativity

While many authors appreciate a more limited role for the *Security Council*, others highlight the risks. On the one hand, one reason for the disobedience was a perceived illegitimacy of international arrangements, so that a destabilization of the current order obviously bears some chances for a

[80] Avbelj and Roth-Isigkeit, "UN, EU and Kadi," 169.

new beginning. This reflects in the search for a new concept of law on the global level, which dissociates from state-related constitutionalism[81] with a preference for the rule of law.[82] Critical accounts welcome the fact that the fixation on sovereign power in the nation-state can finally be overcome, while others see this as a threat to the achievements of the past.

On the other hand, normative concerns arise in the turn away from the public character of global law. Private action, in some circumstances, might improve the legitimacy of an order, but it might equally fail to provide for an order at all. It is not particularly clear who will tame the centrifugal forces of the market economy if not an emerging global public sphere that constrains private actors through the medium of law. The failure of horizontal arrangements without universal public institutions seems already apparent in the area of global tax law, where the lack of coordinated public action allows multinationals largely to avoid tax payments. This case illustrates the free-rider problem: the incentives for single actors to opt out are too tempting, whereas it seems impossible to agree on a public framework to close the gaps. This, too, is a problem arising from instability and fragmentation.

Secondly, the state has been an important mediator for the global protection of human rights, which undoubtedly constitutes a success model.[83] But the periodical reporting system crucially depends on the existence of the state as entity. In areas beyond the control of the national state, such as the Internet, it seems particularly problematic who stands guard for human rights in the same way. Yet, a new understanding of the form and content of human rights equally involves chances, such as the possibility to bind private actors to human rights standards. But all these new forms are to date insufficiently developed and established, so that highlighting the problems that are connected with a turn away from state-centered law seems to be a legitimate concern.

[81] For this search, see, for example, Nico Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010).

[82] See Martin Krygier, "The Rule of Law. Legality, Teleology, Sociology," in *Relocating the Rule of Law*, ed. Gianluigi Palombella and Neil Walker (Oxford: Hart Publishing, 2009), 45.

[83] See Nehal Bhuta, "The Frontiers of Extraterritoriality: Human Rights as Global Law," in *The Frontiers of Human Rights*, ed. Nehal Bhuta (Oxford: Oxford University Press, 2016), 1. For discussion, see Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law* (Oxford: Oxford University Press, 2016), 408f.

Finally, the legitimacy of norm creation seems one of the most important achievements of the national state. If this norm creation now occurs first and foremost in private regulation, it cannot access the legitimacy resources of the national state. Yet, there is no clearly formulated alternative in sight that would be able to safeguard all actors' interests in the same way. Here, in the quest for the new global law, it is ultimately the criteria for the legitimacy of authority in general which have been developed in democratic terms since the French Revolution, and which are now at stake.

2.3.3 Theory and Practice in the Formation of Global Law

Given these divergences on how to deal with the changed circumstances of global law, it is not surprising that the discourse on law's theoretical foundations skyrocketed. At the beginning of the theoretical turn in international legal thought, the reference point had been a practical dimension of international law. Ultimately, the goal was to understand the language that is spoken in the Peace Palace in The Hague and to reflect a law that is "ensuring the survival of mankind on the eve of a new century".[84] This discourse culminated in the thesis on the constitutionalization of international law and it embodied a changed, but coherentist understanding of the doctrine of sources, actors, and legal methodology. The point of reference remained an adequate reflective reconstruction of legal practice. In a traditional positivist understanding with its attachment to the distinction between *lege lata* and *lege ferenda*, theory would not constitute much more than creative writing. Since everything beyond the legality in the narrow sense would be external to law as social practice, it would not count in determining what the law as social fact could possibly be.

In the first chapter, I have argued that theory impacts the formation of law because it makes itself to a background condition of legal practice. This equally holds true with respect to global law. The plurality on the second discursive level reflects this development as the focus of theoretical works has shifted. In light of the chaos of multilevel legal order interactions, new sources are steadily incorporated in the legal process, so that instead of an orderly spoken and state-focused language, a complex noise of overlapping voices has come into life. Walker insists with respect to the

[84] Christian Tomuschat, "International law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law," *Recueil des Cours* 281 (1999).

shifted theoretical focus that it is "not only rhetorical and structural in its manifestations and effects, but also epistemic. For it also speaks to a shift in how we think about and seek to develop and present law's basic credentials as law."[85]

In addition to this general relationship of theory and practice in the law, the weakening of the positivist's paradigm and a loosened understanding of the legal form have a direct effect on the role theoretical reconstructions play in the formation of law. In a climate of fragmented legal authority, the applicable law and methods of interpretation are increasingly difficult to identify with precision. Actors, such as courts, are required to engage in a process of searching for creative solutions in order to decide cases. In this creative search, academic concepts play an important role.

Academic concepts are thus more likely to be received by legal practice in a context of legal plurality. Scholarship has reacted to this demand and effectuated a change in the discursive structure of legal theory. Claims on legal methods become a placeholder for larger discussions on the (self-) organization of humanity on the global scale. Scholarship trying to make sense of the development of global law thus reacts to a delicate combination of concerns. On the one hand, uncertainties still remain as to how to understand the rapid development of global law and its changing actors and methods, so that scholarship has to shed a reflexive light on practice. On the other hand, as scholarship is always *part* of this practice; the reflexive dimension is intertwined with a normative dimension implementing models of political order that one considers to be desirable on a global scale. As will be argued in the following section, many of the new research programs of the second discursive level have quickly gained considerable influence in the discourse.

2.4 Concepts, Labels, and the Need for Signposts

With the claim that theory and theoretical models matter for deciding cases, the literature on global law becomes important not only in analyzing global order, but equally in designing it. This opens the door for a shift in the level of discourse. The theoretical discourse is not primarily directed on an understanding of global order through epistemic mediation of theoretical concepts and attempts to build a shared knowledge base on the

[85] Walker, *Intimations*, 26 (emphasis omitted). Walker refers here to a specific redescription as "global law".

processes of global law; rather, approaches increasingly take the strategic way. Now, many of the theoretical endeavors in the field are directed toward convincing a fictional audience of the adequacy of one's conception, taking science to the level of rhetoric.

The discourse is deeply intertwined with normative preferences and models of political order that accompany the different visions of global law, so that it becomes extremely difficult to understand right away which particular model is promoted. Concepts become discourse strategies: the use of familiar constitutional or pluralist vocabulary, as well as the labeling of approaches as global, transnational, or traditionally international law.

This strategic occupation of theoretical concepts intends to coin the level of discourse in different fields. This development has consequences. As a result of the increasingly strategic claims, the discourse becomes more and more fragmented. Quite frequently, theoretical concepts are no longer directed at a general audience, but only at a specialized epistemic community that accepts their underlying normative claims. This leads to the specialization of different discourse communities, which appeal to similar concepts in a very different manner.

Before we approach the theoretical models, it seems appropriate to briefly introduce the different labels that global legal thought comes with. The different uses of concepts become especially visible in two fields. Firstly, in the adjective that accompanies the word "law"—be it "transnational," "international," "administrative," or "global." Here, we find unsystematic uses of the single concepts, which make theoretical dialogue difficult. Secondly, the preference for models of global order is expressed in terms of constitutionalism, pluralism, or a combination of both, while even defenders of the same concepts differ remarkably in their vision of global order. Some prefer to tame plurality, while some want to unleash it completely. Some want to rebuild a legal order, while others want it to go to dust.

2.4.1 Spatial Differentiations: From National to Global

With the formation of the modern national state, it became common to differentiate between different models of law according to their spatial applicability.[86] One central element of the discourse on global legal plurality is the

[86] See, for the relationship between the history of legal thought and the formation of the modern state, Bhuta, "State Theory," 398.

revision of the formerly undisputed frame of reference for law beyond the state. On the one hand, suggestions come with an empirical claim that aims to observe a specific shift of the new plurality to the state. On the other hand, it is a normative-strategic claim on the level of reference and the kind of appropriate reaction to plurality. It is therefore important to look at the particular use of concepts like international, supranational, transnational, and global laws.

The traditional concept, international law, refers to the law between national states. As has been argued earlier, it seems doubtful whether this traditional distinction holds.[87] The multipolarity of global legal relations challenges the assumed binary distinctions of national/international and public/private that provide for a comparably static understanding of law beyond the state. While it is unnecessary to restate that global legal relations have developed beyond the horizontal relationship between states, the continuous use of the concept is neither a sign for academic neglect of this pluralization nor a romantic adherence to the traditional state frame. Rather, it is common to continue to use the denomination "international law" as a name for the discipline. The factual plurality is not necessarily a reason for renaming, particularly in light of the fact that it seems difficult to find new concepts that capture the whole dynamic of law beyond the state.

Closely connected to this traditional term is the distinction between public and private international laws as two separate fields of study. While public international law is the horizontal law between sovereigns, in this regard showing structural similarities to private law, private international law is the domestic law that applies in the conflict of different jurisdictions. It is, strictly speaking, neither private nor international, but simply national public law. It is often more accurately called conflict-of-laws. In the course of pluralization, this distinction becomes increasingly blurred, as the coordination between different jurisdictions becomes one of the most pressing problems in the fragmentation of global law.[88] Private international law scholarship plays an increasingly important role in providing solutions for

[87] Catherine M. Brölmann, "Deterritorialization in International Law: Moving Away from the Divide Between National and International Law," in *New Perspectives on the Divide Between National and International Law,* eds. Janne Nijman and André Noellkaemper (Oxford: Oxford University Press, 2007), 84.

[88] To this general theme, see Alex Mills, *The Confluence of Public and Private International Law* (Cambridge: Cambridge University Press, 2009) and Peer Zumbansen, "Neither 'Public' nor 'Private,' 'National' nor 'International': Transnational Corporate Governance from a Legal Pluralist Perspective," *Journal of Law and Society* 38, no. 1 (2011): 50.

horizontal inter-regime conflicts.[89] It is also an emergence of a real private space that contributes to this plurality. In transnational commercial law, public bodies like UNIDROIT accompany rather than shape the development of private governance through arbitration proceedings. Private initiatives increasingly exercise governance functions, as can be exemplified in the formation of voluntary codes of conduct that apply at the borders of global competition.[90]

Transnational law is probably the most prominent term to characterize plurality. The uses and the conceptual foundations of transnational law, however, are equally disputed.[91] As one of its first defenders, Philip Jessup referred to the concept of transnational law as synthesizing the common spatial distinctions and providing for a new umbrella concept of law beyond the state.[92] Other views pinpoint the transnational characteristic to the effect, the content, or the author of transnational law.[93] The last of these characteristics, which highlights the provenance of legal authority, has become particularly prominent in approaches that stress the paradigm change toward private law-making.[94] One of the important elements that the concept of transnational law can capture is the span between an acknowledgement of the hybridity between public and private laws, on the one hand, and the fact that this hybridity, though not tied to a clearly identifiable spatial legal order, is not completely deterritorialized in nature, on the other hand. Rather, the spatiality that was before comparably stable becomes hybrid in its oscillation between different regulatory levels.

The attribute supranational law in its original meaning applies to all law *above* the state. Supranational thus means a certain degree of obligation and organization that is higher than with mere intergovernmental agreements. While in the original meaning of the term, all law could be understood as supranational that could produce "obligations for states arising

[89] See, for example, Ralf Michaels and Nils Jansen, "Private Law Beyond the State? Europeanization, Globalization, Privatization," *American Journal of Comparative Law* 54, no. 4 (2006): 843.

[90] Teubner, "Self-constitutionalizing TNCs," 617.

[91] Viellechner, *Transnationalisierung*, 165f. discusses and explains the different conceptions of transnational law.

[92] Jessup, *Transnational Law*, 106.

[93] As suggested by Viellechner, *Transnationalisierung*, 171–180.

[94] See, for example, Janet Koven Levit, "Bottom-Up Lawmaking: The Private Origins of Transnational Law," *Indiana Journal of Global Legal Studies* 15, no. 1 (2008): 49. See also Calliess and Zumbansen, *Rough Consensus.*

without or against their will",[95] the erosion of the traditional international law framework leads to a contemporary discourse that only rarely appeals to this universal, obligatory level anymore. Supranational law is increasingly understood merely as a form of regional public law for which the emergence of EU law is the prime example.[96] Supranationality thus understood denominates law on a middle level of regulation, between national and international laws.

There is only a small step from the more comprehensive models of supra- and transnationality to an understanding of law that incorporates all regulatory levels as an umbrella term. These universal concepts tend to come with aspirations. The idea of a common and universal law of mankind is inscribed in some of the most prominent proposals.[97] Mireille Delmas-Marty has proposed a "droit commun de l'humanité", while Rafael Domingo understands the "New Global Law" as being intricately related to the normative concern of human dignity.[98] The all-encompassing notion of universal spatiality and therefore the end of the technical possibility to refer to spatiality as a source of division apparently triggers certain normative demands that grow beyond the particularities of different legal orders. While this normative component is certainly an important and positive aspect, it seems unclear why it is precisely the end of spatial division that triggers these normative concerns.

Besides this aspirational dimension of universalism, there is also an important part of the current discourse that refers to a comprehensive model from an analytical perspective. The term that is most frequently used is global law. Global law, according to Neil Walker, indicates a legal model that increasingly goes beyond the scope of traditional concepts of law.[99] Going global allows for recognition of the "own momentum of globalization" in the concept of law, while not presenting for itself a

[95] Paradigmatically, Christian Tomuschat, "Obligations Arising for States Without or Against their Will," *Recueil des Cours* 241 (1993).

[96] Achilles Skordas, "Supranational Law," *Max Planck Encyclopedia of Public International Law*, http://www.mpepil.com.

[97] Harold J. Berman, "World Law," *Fordham International Law Journal* 18, no. 5 (1995): 1617; Antônio A. Cançado Trindade, *International Law for Humankind: Towards a New Ius Gentium* (The Hague, Martinus Nijhoff, 2010); Ruti Teitel, *Humanity's Law* (Oxford: Oxford University Press, 2013)

[98] Rafael Domingo, *The New Global Law* (Cambridge: Cambridge University Press, 2011), 131–136.

[99] Walker, *Intimations*, 8.

category that carries the salvation of humankind in its name. Rather, it may be understood with Walker as an open claim: "The new global law does *not* specify any particular source or pedigree, and so may account for itself in many different ways and may claim or assume authority on many different grounds."[100] In this modest version, I believe the term "global law" is a useful analytical tool, and it is in this way that I shall refer to it in this book.[101]

While the plurality of law in the process of globalization might only be understood from a universal perspective, scholars like William Twining argue that it is still inappropriate to use umbrella concepts, as one tends to lose sight of the details that make up the processes of legal globalization. First, this might lead to "loose talk about global governance".[102] Second, and more importantly, "the literature on globalization tends to move from the very local (or the national) straight to the global, leaving out all intermediate levels."[103] Both points are taken to be warnings from painting with too broad a brush. Yet, they cannot undo the fact that the phenomenon of plurality with all its consequences is an encompassing one for which, if we are to give it a name, "global" might be the most appropriate term.

2.4.2 Conceptual Differentiations: Constitutionalism, Pluralism, Constitutional Pluralism

As the territorial argument ceases to be the decisive factor for the frontiers of legal orders, a picture unfolds in which the normative-conceptual dimension becomes increasingly important in defining what law is. According to Hans Lindahl, spatial delimitations are but one form in which a legal order seeks to define its boundaries.[104] Other dimensions refer to time, acts, and subjects—all of which constitute the defining

[100] Walker, *Intimations*, 19.

[101] Global law is described as a "multicultural, multinational and multidisciplinary legal phenomenon, finding its roots in international and comparative law and emerging through the international legal practice that was prompted by the globalization of world economy." See Pierrick Le Golf, "Global Law: A Legal Phenomenon Emerging from the Process of Globalization," *Indiana Journal of Global Legal Studies* 14, no. 1 (2007): 128.

[102] William Twining, *General Jurisprudence – Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009), 14.

[103] Twining, *General Jurisprudence*, 14.

[104] Hans Lindahl, *Fault Lines of Globalization – Legal Order and the Politics of A-Legality* (Oxford: Oxford University Press, 2013), 43.

features of a politics of legality.[105] Understood in this way, the analytic claims of territoriality add up to a broader picture in which the forms of spatial distinction that have been discussed earlier are themselves to be taken as normative-conceptual claims on the design of the global order.

A similar argument can be found in sociological scholarship, suggesting that the development of global law will not take place along spatial lines, but rather along the divides of functional differentiations.[106] Approaches inspired by Niklas Luhmann's systems theory appear more promising to provide insights into the complex dynamics of global law. Their epistemic presuppositions are not limited to legal rules; rather, they focus on fluid networks of knowledge or structural couplings between functional regimes. According to Luhmann, "at the level of the self-consolidating world society, it is no longer norms (in the form of values, prescriptions or purposes) that steer the prior selection of knowledge."[107] While Luhmann's perspective is global from the outset, working with the "fact" of a world society, it requires a turn toward more substantive elements of global plurality than the merely formal (territorial) delimitations of legal orders.

These claims resonate with the conceptual history of global legal thought.[108] The Roman origin of *ius gentium*, still conserved in the German term *Völkerrecht*, carries a more substantive implication in its name. The revival of this more conceptual term, appealing to a form of thin natural law starting with John Rawls' *Law of Peoples*, similarly indicates a shift in the discourse.[109] Today, concepts of *ius gentium* seem fruitful in providing a thin form of normativity, while at the same time allowing for a consistent horizontality of relations. Accordingly, they mostly appear in approaches that aim at conceptualizing relations between horizontal regimes or that appeal to the normativity of the human rights discourse.[110]

[105] Lindahl, *Fault Lines*, 18–31.

[106] See in particular Chap. 4.

[107] Niklas Luhmann, "Die Weltgesellschaft," in *Soziologische Aufklärung 2*, ed. Niklas Luhmann (Opladen: Westdeutscher Verlag, 1975), 60 (this quote translated by Teubner, *Constitutional Fragments*, 94).

[108] See, quite generally, Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit, "Introduction" in *System, Order and International Law – The Early History of International Legal Thought*, eds. Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (Oxford: Oxford University Press 2017), 1.

[109] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999).

[110] Jeremy Waldron, "Foreign Law and the Modern Ius Gentium," *Harvard Law Review* 119, no. 1 (2005): 129; Alex Mills, "The Private History of International Law," *International and Comparative Law Quarterly* 55, no. 1 (2005): 1; Domingo, *New Global Law*.

By far the most prominent conceptual terminological debate in the discourse on plurality takes place through the lens of constitutional and pluralist vocabulary. The conceptual terms of constitutionalism and pluralism and the multitude of their hybrid overlapping forms have replaced the territorial definitions of law beyond the state. This, however, does not mean that spatial differentiations have ceased to be of relevance. On the one hand, this debate illustrates like no other the resilience of the discourse to overcome notions of territoriality when thinking about global law, as the discourse often tries to redefine the relationship between different regulatory levels on the basis of the rules of hierarchy.[111] On the other hand, the diverse forms of constitutionalism willingly refer to concepts of spatiality in their arguments between hierarchy and fragmentation. But instead of purely territorial connotation, these conceptual terms carry a more distinguished relationship toward the organizational forms of world society.

Constitutionalism appeared in the 1990s primarily as mitigation for the legitimation gap as a consequence of the exercise of non-state authority.[112] This legitimacy framework presupposes first and foremost the existence of a political community beyond the nation-state.[113] It is through the assumption of political unity beyond the state, often suggested in the vocabulary of a cosmopolitan community, that constitutionalism can suggest a frame of reference for the exercise of non-state authority.[114] In a form with reduced normative demands, the same move can be observed in the model of *Global Administrative Law*.[115] The unity of political order is the most prominent element here. The unity of *legal* order, in contrast, comes

[111] See, for further illustration, Roth-Isigkeit, "Promises and Perils," 98.

[112] Stefan Kadelbach, "Konstitutionalisierung und Rechtspluralismus – Über die Konkurrenz zweier Ordnungsentwürfe," *Archiv für Rechts- und Sozialphilosophie*, Beiheft 153 (2017), 97.

[113] See paradigmatically the Habermasian approach described in Chap. 3.

[114] See, for example, Mattias Kumm, "The Cosmopolitan Turn in Constitutionalism: On the Relationship in Constitutionalism in and beyond the State" in *Ruling the World? – Constitutionalism, International Law and Global Governance*, eds. Jeffrey L. Dunoff and Joel Trachtman (Cambridge: Cambridge University Press, 2009), 258. Matej Avbelj and Jan Komarek, "Four Visions of Constitutional Pluralism," *European Journal of Legal Studies* 2, no. 1 (2008): 325. For criticism, see Krisch, *Beyond Constitutionalism*, 67: "It embodies a peculiarly modern trust in the ability of mankind to rationally govern itself."

[115] Nico Krisch, "Global Administrative Law and the Constitutional Ambition" in *The Twilight of Constitutionalism*, eds. Petra Dobner and Martin Loughlin (Oxford: Oxford University Press, 2010), 245.

rather as a necessary precondition for the functioning transfer of the legitimacy of the political order to the practical exercise of authority.

Other constitutional models observe that order beyond the state increasingly appears in the organizational forms that national constitutionalism tends to provide, such as building of internal norm hierarchies and the development of secondary rules that draw the boundary between law and non-law from the order's internal perspective. Observations of this kind have been made both in relation to single segments of law beyond the state, such as the law of the WTO and the system of human rights protection,[116] and in relation to the international legal system with the system of UN collective security as its main component.[117] The constitutionalization of international law appears here as a fact, rather than as a claim.[118]

Pluralism in its clearest empirical expression is first and foremost the antithesis to these models of constitutionalism. Where some view unity and move toward hierarchy, the internal dimension of pluralism highlights the radical fragmentation of all forms of law in the process of globalization.[119] A complementary picture suggests an external pluralism, a multitude of legal orders that do not stand in a hierarchical, static relationship to each other, and is prominent in particular among private international lawyers.[120] Epistemic pluralism in its most radical form combines these elements to a

[116] Stephen Gardbaum, "Human Rights and International Constitutionalism," in *Ruling the World? – Constitutionalism, International Law and Global Governance*, ed. Jeffrey L. Dunoff and Joel Trachtman (Cambridge: Cambridge University Press, 2009), 233. See also, David Roth-Isigkeit, "Konstitutionalisierung des Internationalen Menschenrechtsschutzes," in *Suprastaatliche Konstitutionalisierung*, eds. Bardo Fassbender and Angelika Siehr (Baden-Baden: Nomos, 2012), 185.

[117] Stefan Kadelbach and Thomas Kleinlein, "Überstaatliches Verfassungsrecht," *Archiv des Völkerrechts* 44, no. 3 (2006): 235; Andreas Paulus, "The International Legal System as a Constitution," in *Ruling the World? – Constitutionalism, International Law and Global Governance*, ed. Jeffrey L. Dunoff and Joel Trachtman (Cambridge: Cambridge University Press, 2009), 69; Bardo Fassbender, *The UN Charter as the Constitution of the International Community* (The Hague: Martinus Nijhoff, 2009).

[118] See also Thomas Kleinlein, *Konstitutionalisierung im Völkerrecht* (Heidelberg: Springer, 2012).

[119] This does not only place on a technical level, but also in the deep structure of the law. See Karl-Heinz Ladeur, "Globalization and the Conversion of Democracy to Polycentric Networks – Can Democracy Survive the End of the Nation State?" in *Public Governance in the Age of Globalization*, ed. Karl-Heinz Ladeur (Farnham: Ashgate Publishing, 2004), 98; Lindahl, *Fault Lines.*

[120] Paul Schiff Berman, *Global Legal Pluralism* (Cambridge: Cambridge University Press, 2014); Ralf Michaels, "Global Legal Pluralism," 5 *Annual Review of Law and Social Sciences* 5 (2009): 243.

kind of "double deformalization."[121] In addition, both of these pluralist views may be taken to be normative, with the ambition of heterarchical ordering. While weaker forms of normative pluralism pragmatically appeal to the impossibility of coordinating the plurality of law centrally, more radical variants point to the undesirability of central coordination.[122]

Yet, even in these supposedly pluralist models, we do not encounter clear-cut categories. The final subversion of the grammar comes with concepts that use both constitutional and pluralist semantics. In the attempts to mediate between the multitudes of legal orders, we find suggestions of meta-norms between legal orders mitigating the consequences of the lack of coordination.[123] The so-called constitutional pluralists both normatively propose and empirically diagnose the existence of modest constitutional elements within an uncoordinated, pluralist landscape.[124] From a sociological perspective, Teubner observes societal constitutionalism within the context of vast legal pluralism.[125] While there might be an internal logic to their conceptions of law beyond the state, which aims at transcending the constitutionalism/pluralism divide in intellectual terms, these hybrid claims endanger the capacity for orderly and systematic thinking about global law. In their subversion and mixture of different concepts and ideas, they have unnecessarily fragmented the debate.

Ultimately, looking at the multitude of overlapping diagnosis and cure programs for global legal plurality, it seems clear that the discourse lacks the basic capacities to promote understanding. The debate on concepts and labels seems helplessly fragmented. One consequence of this is that it is only possible to engage if one disentangles this conceptual landscape and the relations of the different empirical and normative claims without being dependent on their conceptual self-description. We need to move

[121] For this expression, see Walker, *Intimations*, 114: "In the first place, the focus is no longer exclusively or mainly upon state parties as the classic subject of formal agreements or other general rules of international law. In the second place, the contexts in which choice of law questions arise are as likely to be horizontally as vertically shaped."

[122] For the stronger model see Fischer-Lescano and Teubner, "Regime-Collisions." Weaker models include constitutional pluralists.

[123] Krisch, *Beyond Constitutionalism*; Miguel Poiares Maduro, "Contrapunctual Law: Europe's Constitutional Pluralism in Action," in *Sovereignty in Transition*, ed. Neil Walker (Oxford: Hart Publishing 2003), 501.

[124] Neil Walker, "The Idea of Constitutional Pluralism," *Modern Law Review* 65, no. 3 (2002): 317.

[125] Teubner, *Constitutional Fragments.*

beyond the claims of single approaches to what they purport to be, but we must go directly to their underlying societal epistemologies to promote an understanding of the law of the global order.

2.4.3 The Geometry of Global Legal Thought

The deficiencies of the discursive considerations on plurality pre-structure the methodological foundations of this study. We have seen that what I have called first-order plurality raises substantial problems of coordination and normativity that erode the traditional legal framework of international law. The academic discursive community addresses these problems on a theoretical level. Yet, this discourse is not merely superficially fragmented in the phenomenon that I have earlier called second-order plurality. Rather, as this section has argued, it is equally fragmented when it comes to its own grammatical structure, that is, its use of concepts and labels to distinguish the different epistemic and normative claims.

This grammatical fragmentation impedes on the capacity of the discourse to engage meaningfully and, ultimately, adequately respond to the problem of plurality. Here again, we encounter internal and external discursive limitations. Internally, the degree to which basic contents are already disputed limits the complexity of information that can be conveyed. On the one hand, every contribution to the debate needs to lay down its specific understanding of concepts so as not to be inaccurate. On the other hand, this leads to a vast amount of merely conceptual pages that do not in the least address plurality as such and are exceedingly time-consuming to read. Externally, this fragmentation limits the extent to which suggestions can be received by practitioners, as scholars not embedded in the discursive structures of global legal argument can hardly access the substantive propositions in their original context.

Ironically, this discursive fragmentation thereby equally increases the risk of self-referentiality. At the same time, the discursive community carries a substantive potential for addressing the problems of coordination and normativity that have earlier been highlighted. All the differences notwithstanding, they still occupy the same social space, that is, thoughts on how to conserve or change the conditions of legality in the global realm. While the grand rhetoric of today's theoretical attempts appeals to this promise, the potential is not nearly realized in the current form. The challenge ahead is thus to find a methodological approach to systematize the approaches of the second level in order to put the promise of global legal thought into practice.

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CHAPTER 3

Taming Plurality Through Formal Legal Rationality: Habermasian Approaches to Global Law

This chapter deals with attempts to tame plurality in a framework that shows similarities to the constitutional architecture of nation-states. One of their most forceful defenders is certainly Jürgen Habermas, who argues that "the challenge before us is not to *invent* anything but to *conserve* the great democratic achievements of the European nation state, beyond its own limits."[1] Yet, these approaches must not be reduced to uncritical restatements of national constitutional law. Rather, they have internalized the insights from Critical Legal Studies. Many of these attempts include the belief that the combination of popular sovereignty and law, that is, discursive procedures interlinked with mostly strict understandings of the legal form, is the most adequate answer to plurality beyond the state. In that, they highlight the necessity of a public sphere and discourse for the possibility of legitimacy. Whether this turns out to be a plea for global democracy as in the Habermasian formulation of constitutionalism, just a protection of discursive rationality on the basis of a horizontal relationship between legal orders, or even merely a romantic restatement of legal formalism as in the case of Martti Koskenniemi, all unite in the belief that law has a role to play in the formation of global order as self-government.

[1] Jürgen Habermas, "Why Europe Needs a Constitution," *New Left Review* 11, no. 5 (2001): 5.

D. Roth-Isigkeit, *The Plurality Trilemma*,
Philosophy, Public Policy, and Transnational Law,
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The chapter starts with Habermas' cosmopolitanism and explores the origin of his democratic conception of law. While the strict interpretation of Habermas' preconditions leads to the unlikely and static vision of global democracy, there are other, more modest ways to make sense of a public concept of law. Finally, the chapter turns to varieties of discursivity that approach the conflict of legal orders from a strictly horizontal perspective in the conflict-of-laws paradigm, yet recognize and highlight the rationality potential in the legal form. The conflict-of-laws approaches presented in this chapter subscribe to the strategy of legitimacy preservation as a response to plurality. That relying on the emancipatory potential of law is neither uncritical nor rationalistic, nor needs reference to the public-private distinction, can be seen in more critical approaches, most prominently Martti Koskenniemi's formalism.

3.1 Habermas and the Civilization of Legal Authority in the Global Realm

As one of the approaches with the strongest normative guidance, Habermas' democratic proceduralism gives reasons to lift democracy to the level beyond the state. These reasons, however, are not necessarily connected with the pluralization of law; rather, he addresses a general weakness of international norms. He argues that the dimension of public self-determination is closely intertwined with the legal form, so that law beyond the state will inevitably remain primitive if it remains disconnected from the demands of a reconstruction in democratic terms. His answer for the problem of weakened legal authority in the global realm is thus a reinstitution of law through addressing its legitimacy problem. His conception is utopian, as it relies largely on institutional change, which seems difficult to bring about. Yet, even though it seems unlikely that his conception in the narrow sense has any chances of being realized, these demands for protection of the co-originality of popular sovereignty and rule of law contribute greatly to understanding why a global public sphere is necessary and how it could come about.

3.1.1 Democratic Legal Authority and International Relations

Habermas' cosmopolitanism is inextricably linked to his general thinking on legal authority. The main question that Habermas first discussed in *Between Facts and Norms* is the relationship between legitimacy and

legality.[2] The relationship of legality and legitimacy, as it has been extensively discussed in talks on global constitutionalism,[3] is paradoxical. If only those laws are legitimate that are created in a procedure that is itself posited, then what is the nodal point for assessing the system's legitimacy as a whole? Legal positivism blinds out this question by referring either to a Kelsenian basic norm or to an adopted custom, such as Hart's rule of recognition, whereas natural lawyers would refer to the recognition of universally valid cosmological constants. In between these unsatisfying options, Habermas develops a third alternative with his procedural concept of law, which explicitly highlights the dimension of collective self-government in the form of law.[4]

Habermas' discourse theory of law and democracy locates the nodal point of legitimacy in the legal procedures that create the law, given that they fulfill two conditions. Firstly, these procedures must ensure the inclusion of everyone concerned, and secondly, the laws must be created in a deliberative process of collective will formation.[5] This combination then solves another apparent paradox. It serves for a plausibilization of the two seemingly contradictory principles of popular sovereignty and the rule of law by uniting them in a third: democracy. This means that, in the principle of democracy as the central axis of the legal system, the legal form and legal procedures are co-originally constituted.

This co-original constitution of legal form and the discourse principle translates into high demands for the legitimacy of global law. An understanding of law as practice of collective self-government requires the *active* role of those subordinated to the law. This active role is an indispensable part of Habermas' reconstruction of the legal form. As a consequence, a global understanding of civil rights that guarantee the status of citizens as addressees and authors of the law is a central element of Habermas' conception of law beyond the state.

Habermas illustrates this active role for individuals through a discussion of the Kantian distinction between the law of nations and the cosmopolitan constitution.[6] For Kant, only international relations governed by law could

[2] See, in particular, Jürgen Habermas, *Between Facts and Norms*, trans. William Rehg (Cambridge: MIT Press, 1998), Chapter 3.

[3] See e.g., Martin Loughlin and Neil Walker, eds., *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007).

[4] Habermas, *Between Facts and Norms*, 123.

[5] Habermas, *Between Facts and Norms*, 121–23.

[6] See also Jürgen Habermas, "Does the Constitutionalization of International Law Still Have a Chance?" in *The Divided West*, ed. and trans. Ciaran Cronin (Cambridge: Polity,

guarantee perpetual peace. Under the influence of the American and French revolutions that presented the first example for a transition toward a Republican state, Kant translates this into a utopian sketch for a world republic. Habermas argues that, as a consequence of this origin in national political thought, the Kantian model can deal only insufficiently with factual plurality beyond the state. "[I]t was immediately discredited when confronted with the asymmetrical distribution of power and the overwhelming complexity of a world society marked by striking socioeconomic disparities and cultural divisions."[7] Habermas, though interested in a foundational sketch for global order, recognizes the practical problems of plurality that such a sketch might be confronted with. He dismisses Kant's narrow conception of the world republic, yet focuses on the innovative core—the transformation of a law of states into a cosmopolitan law of individuals, which penetrates the state-based international order.

Plurality, in its tendency to subvert traditional forms of order, thus might have catalyzing effect toward the formation of a cosmopolitan law. Yet, this plurality has to be transformed through the constitution of a new political community. In Habermas' words, "the binding force of the republican constitution would disperse the […] legally untamed power of self-assertion toward other states. 'Political' power […] would lose its last domain of untrammeled exercise with the eclipse of the international stage."[8] In principle, the transformation of global plurality thus incorporates two different levels. On the one hand, there is institutional transformation, that is, legal authority exercised through institutions. On the other hand, however, there is a structural transformation in legal-theoretical terms, which Habermas calls a changed "composition of the medium of law."[9]

While the institutional transformation is merely concerned with the law-external dimension of enforcement, the relationship of law and political power, it is the law-internal dimension of a reunion of popular sovereignty and legal form that provides for a qualitative change on the global stage. The double transformation of plurality, in Habermas' view, thus allows us to enter the realm of civilized authority, tamed through procedures of rational legal argumentation. This entails a concept of law

2006), 123–25. Habermas understands his reconstruction of co-originality of popular sovereignty and the rule of law as a combination of Kant's and Rousseau's political theory.

[7] Habermas, "Constitutionalization," 127.

[8] Habermas, "Constitutionalization," 124.

[9] Jürgen Habermas, The Lure of Technocracy, trans. Ciaran Cronin (Cambridge: Polity, 2015), 54.

that receives its rationality from a communicative structure, that is, legal reasoning with a strong conception of procedural rationality that bridges individual and universal reasons.[10] "[A] change in composition of the legal medium" means that law's "decisionistic core is being broken down once again in the crucible of the communicative currents of transnational negotiations and discourses."[11] The transition from the decisionism of political power to a legal discourse is the qualitative change that Habermas observes with regard to international law.

Habermas locates this shift toward a rationalization of political authority through the medium of law first and foremost in the prohibition of war, the loss of the *ius ad bellum* for sovereign states, and constraints of their functional autonomy in the dense web of international institutions.[12] Yet, it is precisely this rationalization of political authority which has implications on the growing legitimacy demands of the global order: "we cannot qualify this trend as a *civilizing process* as long as international organizations only exercise their mandates on the basis of international treaties, hence *in forms* of law, but not yet *in accordance with democratically generated* law – that is, legitimately."[13]

Habermas claims thus combine in the following way: international relations experience a *rationalization* of political authority through the expansion of the medium of law. This rationalization is for now an empirical observation. Yet, the *civilization* of political authority in the light of the co-originality of popular sovereignty and the legal form requires input legitimacy. For Habermas, falling back on the legitimacy reserves in national democracies would not be sufficient, insisting on a cosmopolitan community as the point of reference.[14] At the same time, the legitimacy conception arising from a transnational understanding of popular sovereignty seems demanding and even meets Habermas' skepticism. A common political culture that would be necessary to support the formal dimension of democracy through elections with a deliberative element is missing.[15] "[W]orld citizens do not form a collective that would be held together by a political interest in the self-assertion of a way of life that shapes their identity."[16]

[10] Habermas, *Between Facts and Norms*, 228.
[11] Habermas, *Lure of Technocracy*, 55.
[12] Habermas, *Lure of Technocracy*, 55.
[13] Habermas, *Lure of Technocracy*, 56.
[14] Habermas, *Lure of Technocracy*, 56.
[15] Jürgen Habermas, *The Crisis of the European Union: A Response*, trans. Ciaran Cronin (Cambridge: Polity, 2014), 64–65.
[16] Habermas, *Crisis of the European Union*, 63.

3.1.2 Institutional Reform as a Response to Plurality

Habermas' prominence within global legal thought can be explained with his far-reaching institutional suggestions as a response to plurality. Though sharing some skeptics' concerns, he points to the chances that are connected with the transcendence of the state veil.[17] On the one hand, he recognizes the conservative reasons that citizens of a national state may have to defend their standard of living. Yet, the same citizens who defend their historical achievements equally have reasons that are derived from their status as world citizens. These reasons, in turn, are directed at equality in status and distribution of mankind as a whole.[18] Both types of reasons are equally legitimate, the first ones as a product of contingent history and the latter as a requirement of Kantian justice.

A balance of these reasons involves a *particularistic* perspective, on the one hand, which views concerns of single polities as legitimate, and a *universal* perspective that does away with the question of perspectives in the plural, on the other hand. This squaring of the circle involves an institutional model that relies on a split in issue areas. Matters relating to peace and security are delegated to a democratically inclusive *United Nations* (UN), whereas distributive questions are addressed by interstate negotiation systems. With this conceptual split, Habermas tries to make sense of a democratic concept of law, while at the same time recognizing that the necessary democratic culture is missing on a global level. The basic idea is that security governance involves norms with reduced legitimacy requirements, such as human rights and the prohibition of the use of force. These norms, as they are the basic principles of a discursive procedure of collective will formation, do not need to be separately legitimated. These reduced legitimacy demands, in turn, make a qualified democratic procedure dispensable for security governance, that is, the political culture that is necessary to support the formal dimension is replaced by the universality of the norms of human rights and the prohibition of the use of force. Accordingly, the threshold for inclusively legitimating distributive questions is higher.

Habermas suggests that the UN be reconstituted as an organization of states *and* citizens, while at the same time limiting their activities to the

[17] Habermas' institutional visions have developed significantly since he started theorizing about world order. In order to present his thoughts in the best version, this reconstruction refers to his latest works that were published in 2011 and 2013.

[18] Habermas, *Crisis of the European Union*, 59.

core functions of safeguarding peace and security and global enforcement of human rights.[19] This involves a reform of the *Security Council* (SC) and the *International Court of Justice* (ICJ), but in particular an extended role for the *General Assembly* (GA). The GA, as parliament substitute consisting of representatives of states and citizens, would take on the tasks of developing binding minimum standards for human rights and providing a legal basis for the peacekeeping activities of the SC and the jurisdiction of the ICJ. It has the competence to bind states in the matters of human rights standards and develop normative frameworks for the distributive questions that are to be addressed in interstate negotiations.

Habermas argues that the effectiveness of the UN could be ameliorated if its tasks are limited to its core function, that is, an enforcement of the prohibition of the use of force, securing and rebuilding failed states, human rights enforcement, including the responsibility to protect, and post-conflict management after humanitarian interventions.[20] Through its coupling with the GA, interventions would be legalized and rationalized. Whereas the GA would give a mandate for intervention, an adapted humanitarian law provides the guidelines for its execution. Both legal bodies are subject to the control of the ICJ. Whereas the coordination of the interventions is now completely in the hands of a supranational body, national states would still provide the means to enforce its decisions. By subordinating their sovereignty to the UN, they would equally experience a shift in status toward members of the international community.[21]

How could these political decisions be legitimated, given that there is, as Habermas contends, a lack of global political culture in which a qualitative understanding of democracy could be embedded? Habermas finds a way out by remodeling the legitimacy standards that the prohibition of the use of force and the protection of human rights require. With respect to the legitimacy demands, he asks: "But is this also true of the two interests whose responsibility is the protection of the cosmopolitan community? […] Isn't this a matter of *a fortiori* 'general' interests which are 'depoliticized' to such an extent that they are 'shared' by the world population beyond all political-cultural divisions – and, when they are violated, are judged exclusively from the *moral point of view*?"[22]

[19] Habermas, *Crisis of the European Union*, 60–61.
[20] Habermas, *Crisis of the European Union*, 61.
[21] Habermas, *Crisis of the European Union*, 61.
[22] Habermas, *Crisis of the European Union*, 63–64.

According to Habermas, the prohibition of the use of force and the protection of fundamental human rights have precisely the status of laws that do not need further positive foundation because they can be understood as indispensable for the functioning of an inclusive discourse community. This resonates with a discourse-theoretical conception of *ius cogens* as principles that protect the existence of civilized order as such.[23] While the clear overlap of morality and law has the advantage of reducing the legitimacy demands for the UN, this does not mean that the decisions that are taken in its framework are not of a legal nature. On the contrary, they are in accordance with the democratic-procedural concept of law that Habermas develops in *Between Facts and Norms*. Decisions of the UN would be distinctly *legal* decisions.

This reduction in legitimacy demands is not available in questions of distributive governance in which different life models stand in competition.[24] Questions of climate governance or trade are rooted in different conceptions of a good life on which one could rationally disagree. A hierarchical model, such as one for peace and security issues, would require a political culture that provides for decentral opinion and will formation in a qualitative democratic procedure. Habermas thus pays tribute to the absence of this political culture and locates the solution for distributive questions in a heterarchical model of transnational negotiation contexts on which the reformed GA as parliamentary body has no direct impact. The redistributive tasks are thus outsourced to issue-specific regimes.

The issue-specific negotiations might effectuate a rationalization of contexts that are predetermined for market failures, such as climate governance. But since there are no prospects for direct input legitimacy, the world parliamentary body can merely take a loose supervisory role.[25] Instead, the negotiations should draw on the legitimacy reserves that can be found in the public spheres of the national states. Accordingly, country delegates' positions should be connected to national discourses on the issue and make use of the public resources to underline their substantial positions. Further, actors of civil society should be allowed to participate in the negotiations to allow for a gradual emergence of a transnational public sphere.[26]

[23] See, for the linkage of *ius cogens* to a discourse-theoretical view, Stefan Kadelbach, *Zwingendes Völkerrecht* (Berlin: Duncker&Humblot, 1992), 160f.

[24] Habermas, *Crisis of the European Union*, 68.

[25] Habermas, *Crisis of the European Union*, 65–66.

[26] See, for this argument, Patrizia Nanz and Jens Steffek, "Global Governance, Participation and the Public Sphere," *Government and Opposition* 39, no. 2 (2004): 314.

Even though heterarchical negotiation contexts do not suffice to provide for a civilization of political authority through democratic law, Habermas still sees a chance that these are "embedded in the context of the constituted world society."[27] When national states understand themselves as members of an international community in the context of security governance, they will not immediately abstract from this position in negotiations on climate governance. What seems decisive is a possible transfer of *reasons*, which could change the *mode* of international decision-making. States would understand themselves as sovereign decision-makers, while at the same time being only part of a global constituent power. They are getting entangled in a discursive cooperative mode, which allows them to abstract from their short-term self-interest. However, Habermas admits, any serious attempt to make sense of an institutional model for global law has to observe the historical disparities and injustices that have been perpetuated in a long history of national states. Whereas the long-term goal must be to overcome these historically contingent injustices, a pragmatic model for the world must take into account the complexities of the case: "the historical asynchronicity of regional developments and the corresponding socio-economic disparities cannot be erased overnight."[28]

3.1.3 Between Kant's Utopia and Normative Pragmatism

This careful location of his theoretical conception in between ideal theory and pragmatic concerns, between facts and norms, separates Habermas from the Kantian model of the world republic. This thought leads us back to the start of the Habermasian reconstruction. Habermas argues against Kant's model that "it was immediately discredited when confronted with the asymmetrical distribution of power and the overwhelming complexity of a world society marked by striking socioeconomic disparities and cultural divisions." Kant's cosmopolitanism appears as utopia, whereas Habermas' own concept tries to walk the line between vision and pragmatism.

Yet, this pragmatism does not come without a price. Arguably, Habermas offers a remedy for global law at the expense of consistency with his own concept of law. Within his sketch for a legitimate global order he downplays the legitimacy requirements for the tasks of the SC. In principle, the

[27] Habermas, *Crisis of the European Union*, 68.
[28] Habermas, *Crisis of the European Union*, 69.

reduced legitimacy demands for the prohibition on the use of force and human rights might sound plausible, yet, in practice, it is precisely the balance between both that constitutes one of the most fundamental problems of global security law, as the case of humanitarian intervention shows.

Rather, the problem seems to be that, in the present internal procedures of the council, community interest arises merely as a sum of the national interests of the member states. Normative considerations enter the discourse in rhetorical terms but usually find their limits in national interests. As membership status in the council is a historically contingent presumption, this model aggravates the legitimacy problem. It is hard to justify why some national interests should be more important than others in the constitution of community interest. This, among others, provides a reason why the legitimacy problem cannot be solved with a mere expansion of membership. Habermas' pragmatism goes too far with the argument that the balancing between sovereignty and human rights can be outsourced in a non-fully inclusive body. It finds its limits in the highly debated questions of humanitarian intervention and responsibility to protect, where the fundamental principles of non-violence and human rights stand in conflict with each other.

Despite its limitations, the Habermasian conception has been hugely influential. It has initiated, on the one hand, a debate on constituent power beyond the state, which tries to overcome the difficulties of institutional reform that the Habermasian model is confronted with.[29] On the other hand, it has stimulated discussions on global constitutionalism. By arguing for a monist conception of security governance, the model has triggered a debate on the constitutionalization of core areas of international law.[30] Further, it represents one of the first attempts to lift the deliberative model of decision-making in areas concerning political and social rights to a global scale.[31] Many questions remain, such as whether a global public sphere can be established and whether national publics can take into account global interests as a whole. Yet, reading the Habermasian perspective as a demanding utopia that requires us to take steps in that direction, it provides a valuable perspective even without clear chances of being put into practice.

[29] See, for an introduction to the discussion, Markus Patberg, "Constituent Power beyond the State: An Emerging Debate in International Political Theory," *Millennium – Journal of International Studies* 42, no.1 (2013): 224.

[30] For references to global constitutionalism, see Sect. 2.4.2.

[31] See e.g., Nicole Deitelhoff, *Überzeugung in der Politik – Grundzüge einer Diskurstheorie Internationalen Regierens* (Frankfurt am Main, Suhrkamp, 2006).

One of the possible pitfalls of the Habermasian conception is that a demanding legitimacy model might fail to meet pragmatic challenges raised by the hard facts of economic globalization. What is missing is an immediate response to the two kinds of problems, legitimacy and coordination, that arise through plural regime collisions. Trying to extend Habermasian theory to these areas, Paul Schiff Berman has illustrated this coordination problem as the possibility of jurispathic and jurisgenerative responses to a conflict between legal systems.[32] In the jurispathic case, a legal system denies competing law by drawing a straight line separating law and non-law. "They kill off competing interpretations by authoritatively saying that *this* is the law and *that* is not."[33] This denies the productive potential of interaction between different levels of law and the hybridity of legal decision-making. To come to a more plausible and communicative framework, Berman suggests a jurisgenerative constitutionalism, that is, procedural principles to manage and tame legal plurality.

Explicitly relying on Habermas, Berman argues: "[A]lthough people may never reach agreement on norms, they may at least acquiesce to procedural mechanisms, institutions, or practices that take pluralism seriously rather than ignoring pluralism through assertions of territorially-based power or dissolving pluralism through universalist imperatives."[34] The mechanisms Berman suggests largely rely on this concept of productive interaction between legal systems.[35] Interactions between legal systems must take a more dialectical form, and margins of appreciation give courts leeway to respond to this requirement. Subsidiarity and inclusive hybridity help in recognizing non-state actors, whereas jurisdictional redundancies should as far as possible be avoided.[36] The key to these procedural mechanisms is how to incorporate them in practical legal interactions, that is, in legal argumentation. Berman's basic concepts on a productive interaction between different actors and systems are further developed in the accounts

[32] Paul Schiff Berman, "Jurisgenerative Constitutionalism – Procedural Principles for Managing Global Legal Pluralism," *Indiana Journal of Global Legal Studies* 20, no. 2 (2013): 673.

[33] Berman, "Jurisgenerative Constitutionalism," 673.

[34] Berman, "Jurisgenerative Constitutionalism," 669.

[35] Berman, "Jurisgenerative Constitutionalism," 680f.

[36] One of the main problems of Berman's account seems to be a combination of more radical ideas of Chantal Mouffe and Robert Cover in the Habermasian framework. The incorporation of these radical critiques on the Habermasian discourse model constrains him not to tackle the issue of down-to-case legal argumentation as a precondition to recognize "otherness." This, however, would be required in the mapping of procedural principles.

of this chapter, mapping a communicative strategy in these conflicts to fulfill the demands of the "jurisgenerative" paradigm and to preserve as many virtues of the Habermasian concept of law as possible.

3.2 Normative and Systemic Unity Through Argumentative Rationality

Habermas' institutional conception finds its limits in the empirical conditions of plurality. Yet, this does not necessarily touch upon the underlying claim of a procedural concept of law, focusing on the distinctiveness of legal language and, in particular, the function of legal argumentation. The task set to these "jurisgenerative" solutions is to find a non-institutional response to plurality that conserves the essential characteristics of the Habermasian concept of law. In the first subsection, Klaus Günther argues that the normative criteria that Habermas suggests in his system of laws are inscribed in the legal meta-language, a *universal code of legality* that exists in virtue of the tradition of legal culture. This code provides for unified criteria according to which the appeal to legality of communication in the circumstances of plurality could be evaluated. In the second subsection, Dirk Pulkowski argues that the argumentative rationality of the law prevails even in the fragmentation of global law. According to him, conflict laws and the requirement of harmonic interpretation provide for systemic unity through legal language.

3.2.1 Legal Communication Culture: A Universal Code of Legality?

A plausible response to the challenge that plurality poses for the Habermasian account is the assumption of a *universal code of legality*. Günther observes that, even though the pluralization of global law challenges the traditional, unified picture of the law, legal communication in circumstances of plurality continues to reflect the achievements of a historically grown democratic concept of law as one of the achievements of the constitutional national state.[37] He argues that "from an internal point of view actors in the various and multi-leveled networks of interlegality still communicate with one another by referring to a, at least hypothetically,

[37] Klaus Günther, "Legal Pluralism or Uniform Concept of Law – Globalization as a Problem of Legal Theory," *No Foundations – Journal of Extreme Legal Positivism* 5 (2008): 16f.

uniform concept of law."[38] The *universal code of legality* thus represents a normative threshold for the legality of norm that exists as a social fact. "Such a uniform concept can be spelled out in terms of a legal meta-language which contains basic legal concepts and rules, like the concept of rights and of fair procedures, and the concept of sanction and competence."[39]

The conceptual elements that Günther includes in the universal code reflect Habermas' system of rights. "[T]he universal code of legality already contains the demand for its interpretation within fair procedures which are institutionalized by law and which guarantee the minimum requirements of democratic self-determination: the right to change the role between author and addressee of legal norms, transparency of procedures of opinion and will formation, imputability of decisions and responsibility for consequences, equal access to procedures and equal rights of participation for third parties."[40] Yet, Günther acknowledges that this might be merely a rudimentary, cultural expression of what legality might mean. It does not specify the content of the law. It is a legal meta-language "deeply penetrated by historical legal experiences."[41]

The positive content of the law remains radically indeterminate. In the formation of global law, the universal code takes a double role in which it is a subject and a medium at the same time.[42] Günther argues: "The more we struggle about contested universals in the universal code of legality, the more we get entangled into the requirements of fair procedures which meet democratic requirements as the legitimate medium for the interpretation and institutionalization of the code of legality."[43] According to this view, the discourse on legal plurality promotes rather than endangers the concept of one single transnational community.

In the Habermasian conception, the system of rights is inevitably connected with a perspective on democratization. The *universal code of legality* already contains this perspective, though Günther recognizes the difficulties that are connected with a transposition of democratic concepts

[38] Günther, "Uniform Concept of Law," 16.
[39] Günther, "Uniform Concept of Law," 16.
[40] Günther, "Uniform Concept of Law," 18.
[41] Günther, "Uniform Concept of Law," 16. For further discussion, see David Roth-Isigkeit, "The Grammar(s) of Global Law," Critical Quarterly for Legislation and Law 99, no. 3 (2016): 175.
[42] Günther, "Uniform Concept of Law," 19.
[43] Günther, "Uniform Concept of Law," 19.

to the global sphere. The demands for democratic legitimacy—though currently not realized—accompany the concept of law as a universal aspiration. Günther remains optimistic: "In the last step, we have to trust the historical experience of the democratic constitutional nation state to ground our hopes that people will reactivate the idea of a constitutionalized democratic self-legislation against the networks of legal experts who only administer the universal code of legality."[44]

The hypothesis suggests that there is a particular normative threshold for the acceptance of communication as belonging to the space of legality. This threshold could already constitute a preliminary system of rights in the Habermasian sense. The code of legality in this sense is not understood as normatively universal, as one might think. Rather, it is embedded in a process of history and culture. On the one hand, it is distilled from past legal experiences that have shaped the law, in particular the democratic revolutions. On the other hand, the process of fragmentation itself is understood as a temporary interruption of legal systematicity. Yet, through the deeply embedded cultural knowledge, the legal system will reassemble on a higher organization level. The *universal code of legality* thus provides guidance with regard to the legality of global fragmented communication. What it does not address, however, is a solution to the problem of interruption of legal systematicity through fragmentation. While Günther accepts that, from an internal perspective, practicing lawyers must treat the material under a hypothesis of coherence,[45] he does not suggest conflict rules besides the normative minimal standard of legality.

3.2.2 Systemic Unity Through Language

While the coordination problem remains unresolved in the meta-language of the *universal code of legality*, other approaches have tried to shed light on the relations between fragmented regimes on the basis of the same Habermasian argumentative strategy. In line with Günther, Dirk Pulkowski has illustrated the relations between legal regimes through rules of interpretation. He suggests that the shared language of international law can provide for a non-constitutional, yet epistemic unity between different

[44] Günther, "Uniform Concept of Law," 20.
[45] Günther, "Uniform Concept of Law," 16.

legal actors and regimes.[46] Even though there is neither normative hierarchy nor common values to structure the relationship between legal regimes, there are discourse rules, a "grammar," which is universally shared by treaty-based regimes.[47] These procedural discourse rules are able to mediate between the different rationalities at stake in a productive process of translation.

Drawing on insights of Habermasian discourse theory and Robert Alexy's concept of legal argumentation, Pulkowski argues that international law has the capacity to close the gaps of plurality.[48] It is precisely the link between the single rules and regimes that makes up for this meaningful, systematic quality. The recognition of these links is one of the lawyer's crafts. Pulkowski argues that "in the course of legal training, lawyers learn how to relate these concepts to one another in preformatted argumentative strategies, drawing on wording, precedent, systemic categories, and legislative history."[49] Only the conceptual and practical knowledge of this grammar gives lawyers the ability to interact in a meaningful way.

Law is thus understood as a special type of communicative action. Pulkowski identifies elements among these argumentative principles that are particularly well suited to provide for the emergence of argumentative rationalities between legal systems.[50] In the case of doctrinal borrowing, concepts that are developed under one legal system may be transferred to one another, if the situation is comparable, so that the same technical procedures have the ability to contain the effects of heterarchical fragmentation. Additionally, arguments can always recur on the conflict-solving principles of general international law. Finally, shared interpretive techniques, most prominently Article 31 of the *Vienna Convention on the Law of Treaties* (VCLT), are in place to relate legal systems to each other. Ultimately, a systematic view of international law entails giving special weightage to arguments of coherence. This, according to Pulkowski, does

[46] Dirk Pulkowski, The Law and Politics of International Regime Conflict (Oxford: Oxford University Press 2014), 238f.

[47] Pulkowski, *Regime Conflict*, 238–39.

[48] This seems to be largely in line with the suggestions made in the ILC report on fragmentation. See the report of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN4/L.682 (2006). See also Chap. 2.1.

[49] Pulkowski, *Regime Conflict*, 243.

[50] Pulkowski, *Regime Conflict*, 244f.

not in itself require that international law is actually coherent. Rather, coherence appears as a requirement of rational justification, "a decision that can relate the rules of various international regimes to common values or principles is more likely to appear as a rational decision."[51]

The application of Habermasian discourse theory to a communicative field, such as the fragmented inter-regime discourse, comes with high prerequisites. A valuable communicative structure needs a context of shared understandings.[52] Pulkowski thus argues that, even though there is legal fragmentation, international relations are not fragmented when it comes to societal rationalities: "the discipline of international law retains a common culture."[53] This culture may not be a thick consensus on values. But, Pulkowski argues with Searle, international legal argument is not placed in a vacuum. There are certain institutional facts as a result of collective intentionality that provide for shared background assumptions of international legal argument.[54] "These agreed-upon facts apply across the various national communities that human beings inhabit; and they apply across the various functional regimes that make up the international legal order."[55]

Pulkowski resists the fragmentation hypothesis, insisting on the systemic character of global law. Technically, the tools of international legal interpretation are sufficiently equipped to provide for a resolution of inter-regime conflicts. The prime strategy to reunite seemingly fragmented laws is harmonizing interpretation, which is positivized in Article 31 of the VCLT, recognized as a general principle, and thus constitutes a general obligation under international law.[56] When interpretation fails, a second strategy is the selective import of conflict-of-laws methods as general principles in the body of international law, which replace the static collision rules of *lex posterior* and *lex specialis*.[57] Pulkowski thus conceptualizes systemic unity through language by describing non-hierarchical coherence requirements. These discourse rules exist through the argumentative rationalities that the shared system of laws contains as an institutional fact.

[51] Pulkowski, *Regime Conflict*, 255.
[52] Pulkowski discusses this as reference to the lifeworld. Pulkowski, *Regime Conflict*, 258.
[53] Pulkowski, *Regime Conflict*, 261.
[54] Pulkowski, *Regime Conflict*, 265.
[55] Pulkowski, *Regime Conflict*, 270.
[56] Pulkowski, *Regime Conflict*, 287–98.
[57] Pulkowski, *Regime Conflict*, 319f.

3.2.3 Structural Coherence of Global Legal Rationality

Both Günther and Pulkowski argue for a structural coherence of global legal rationality. They perceive the argumentative, discursive culture deeply rooted in the structure of global law. Whether this is merely a meta-structure or a partly positivized systemic unity through established conflict laws, both highlight the aspect of cohesion of global law even in the light of its partial fragmentation. Fragmentation is thereby understood as a deviation from normality, a state of exception that threatens the argumentative-constructive rationality in the law. Cohesion is made possible through a mastery of the legal craft, be it in the individual interpreter or in legal culture as a whole. As a normative program, both approaches contain a preference for a systemic understanding of the law with all its (democratic) prerequisites. Technically, they have to walk the line between an acknowledgment of global legal realities and a defense of the argumentative structure of the law. While global law might indeed be fragmented, it could also be too early to give up aspirations of unity.

The decisive feature of Pulkowski's approach is the interpretive unity from a practical perspective. Since argumentative pathways that link different regimes can be found, the unity of international legal argument can prevail. This convincingly responds to the challenge to find measures to retain legal unity that the *International Law Commission* (ILC) had once formulated in its report.[58] But already in the ILC report, it seemed that decisive elements of plurality were treated in isolation or simply overlooked. Put differently, the argument implies that there is no such thing as fragmentation of international law because the legal body is still united by common legal argumentation. Understood as an empirical claim, the denial of fragmentation can easily be discarded. Harmonizing interpretation and intra-systemic conflict rules might be toothless attempts. Regimes beyond the state start considering themselves as being independent from international law, which implies that plurality has grown out of being a problem of international law properly speaking. Rather, it has become a problem of multi-legal order interaction for which positivized rules might find its limits.

Yet, the systemic unity through legal language involves another, non-empirical element. In Günther's *universal code of legality*, coherence enters the law as a fiction. While actual legal relations might be fragmented,

[58] International Law Commission, *Fragmentation of International Law*, 23.

systemic unity is a requirement of meaningful legal argumentation. Günther thus reflects on the argumentative rationality of the law from an external perspective of legal theory, while Pulkowski retains the perspective of a practicing international lawyer. Arguing from the internal perspective of international law as an argumentative craft, Pulkowski cannot draw on this doubling of perspectives.

Both arguments can thus be read complementarily to each other. Pulkowski's harmonization rules may be understood as precisely those demands of unity and coherence that, in Günther's view, practicing lawyers must satisfy if they are to participate in legal communication in a meaningful way. Systemic interpretation, for example, forces the interpreter to step back from the particular rationalities of the own legal regime to gain a view on the relationships of the larger whole. The interpretation rules that Pulkowski suggests may be understood as an essential part of the *universal code of legality*. On the other hand, the institutional facts that Pulkowski requires for the grown adherence to specific rules of interpretation and systemic unity remain considerably empty, if they cannot draw on Günther's description of a common legal cultural history.

Here, the coherence of global legal structure might be understood less as an empirical claim, rather than as a form of cultural safeguard against the total fragmentation of global law. A common legal culture might be the glue that holds systemic unity together even in circumstances of fragmenting tendencies of single regimes. A denial of such a common culture, Günther argues, "works with the far more serious fiction that there are normative systems which are completely detached from the modern code of legality."[59]

3.3 Preserving the Publicness of Global Law

The approaches of the last section have defended the non-constitutional coherence of structure in global law that persists through internal demands of legality. The conceptions of this section are less optimistic about the possibility of a coherence of structure. Rather, they take the fragmented character of legal relations as a fact. Yet, they share the cultural argument insofar as they assume normative prerequisites for a concept of public law. One of the most prominent features for a Habermasian response to plurality is the intention to preserve the virtues of the legitimacy chain in

[59] Günther, "Uniform Concept of Law," 17.

constitutional democracies. While this proves difficult to achieve in the fragmented context, the approaches of *Global Administrative Law* and *International Public Authority* try to protect at least one pillar of the Habermasian concept of law. Both suggest procedural safeguards to protect the standards of a public concept of global governance, while at the same time recognizing that the traditional, constitutional legitimation chains might be difficult to achieve on a global level. In their view, it is the non-constitutional application of criteria of publicness that provides for legitimacy in the global realm.

3.3.1 Global Governance as Administrative Action

The research strand of *Global Administrative Law* (GAL) locates itself between constitutional ambitions and legal positivism.[60] Today, it is one of the most influential schools of global legal thought dealing with plurality and the legitimacy of global governance. The foundational thesis is that most global governance in its plural and hybrid forms can be characterized as administration. In the widest sense, their empirical assessment relates to the same phenomena that have been characterized as "plurality" for the purpose of this study.[61] In short, law beyond the state transforms from a contractual basis into a "global administrative space."[62] In this space, a variety of public and private actors produce legal acts with external effects on states and individuals through rule generation, interpretation, and application that are not subject to judicial review.[63] Remedy for this lack of review can be found by drawing analogies to rights in administrative procedures.

[60] Initially, Benedict Kingsbury, Nico Krisch, and Richard B. Stewart, "The Emergence of Global Administrative Law," *Law and Contemporary Problems* 68 (2005): 15. Sabino Cassese, "Administrative Law without the State? The Challenge of Global Regulation," *New York University Journal of International Law and Politics* 37 (2005): 663. See further Benedict Kingsbury and Nico Krisch, "Introduction: Global Governance and Global Administrative Law in the International Legal Order," *European Journal of International Law* 17, no. 1 (2006): 1.

[61] See, in particular, Sect. 2.1.1.

[62] Kingsbury and Krisch, "Global Governance," 1.

[63] GAL distinguishes between two general types of administrative action, constitutive and substantive. Sometimes the category of procedural law is added. See Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law," *European Journal of International Law* 20, no. 1 (2009): 34. The first type, constitutive administrative law, concerns the delegation of power to administrative bodies and their internal structure. GAL counts these constitutive rules, that in most jurisdiction would classify as constitutional law in the narrow

One of the central legitimation problems of this global administrative space stems from the lack in accountability, transparency, and participation.[64] On the one hand, the goal of GAL is to transpose existing models for remedies to the global level. For example, notice-and-comment procedures could enhance the legitimacy of rule-making and provide transparency guidelines or alternative inclusive systems of review.[65] On the other hand, GAL aims at the recognition of a global dimension. This involves complexities that arise through the transfer of administrative models to the global scale. In the area of SC sanctions, for example, the norm of transparency might involve complexities in its application that are not ultimately foreseeable on the level of theory.

How can these suggestions be integrated in a constitutional framework of legitimacy? The first two sections of this chapter have demonstrated that problems with a constitutional variant of legitimation begin with the necessity for bottom-up proceduralization. In turn, the administrative analogy allows for providing criteria for a review of this normative output, without necessarily having to relate back to the legitimacy chain that starts with constituted *demos*. These lower demands make the design and control of review procedures easier to achieve. Here, the contribution of GAL is to offer a viable way to design review procedures for global administrative bodies. Referring to administrative law vocabulary, similar to constitutional discourse, entails the hope to be able to connect to conceptual debates in domestic law to understand phenomena of law beyond the state.

Methodologically, GAL adds criteria of publicness to the positivist concept of law. Publicness, according to GAL, consists of five principles. These principles are legality, rationality, proportionality, rule of law, and human rights.[66] The argument is that for law that regulates and frames public authority, a different threshold for legality is required "by reference to the

sense, to a body of emerging administrative law. The primary advantage of GAL is the capacity to address the second type of global administrative action, which they define as substantive. This type refers to the output of global administration, which can be understood in general terms as producing norms and decisions. Both types have external effects on other global administrative entities, states, or individuals, which have to be legitimated through the administrative process.

[64] Kingsbury and Krisch, "Global Governance," 4f.

[65] Kingsbury and Krisch, "Global Governance," 4f.

[66] Kingsbury, "Concept of Law," 32–33.

attributes, constraints and normative commitments that are immanent in public law."[67] The concept of publicness thus constitutes the decisive focal point.

In opposition to positivists, Benedict Kingsbury does not see the rule of recognition as crystallizing from legal practice as Hart would have it. Rather, he intends to bring about a change in the actual rule of recognition and shift it toward the criteria of publicness. In this sense, Kingsbury claims that "the articulation of a concept of law to clarify and describe the phenomenon to be evaluated is an element in the evaluation of law."[68] The best way to make sense of this claim for a normative concept of law combined with Hartian insights seems to be to understand these criteria of publicness as a negative rule of recognition. In case the norms and decisions do not conform to the criteria of publicness, they are not to be recognized (by other bodies) as legal. This negative rule of recognition apparently solves the problem created through the disentanglement with constitutional vocabulary: an illegitimate arrangement can thus be excluded on the level of legal methodology. Technically, GAL thus operates with a normative notion of legality that draws on law's roots in national law, yet sets a lower threshold than a democratic constitutional perspective.

3.3.2 Preserving the Publicness of International Public Authority

Another appeal to public law criteria starts from the premise that there are legitimacy deficits in decisions of international courts and tribunals as they have expanded their functions from interstate dispute settlement to shaping the global order, reaching out even to spaces within democratic national states.[69] According to the authors of the *International Public Authority* (IPA) project, this substantially erodes the traditional narrative of legitimation through state consent. In contrast to national polities, it is not clear from the outset "in whose name" the decisions are taken. Transnational decision-making lacks a frame of reference to ground its authority. With this research agenda, the project addresses familiar questions—what are the

[67] Kingsbury, "Concept of Law," 30.

[68] Kingsbury, "Concept of Law," 26.

[69] Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press, 2014). See also Matthias Goldmann, *Internationale öffentliche Gewalt. Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung* (Heidelberg: Springer, 2015).

global conditions of authority and what is required to make it legitimate? This question, broadly framed, contributes to the understanding of how law reacts to plurality.

One of the central aspects of the approach is to provide a frame of reference for the different roles courts and tribunals play in the formation of global law, only one of which is the traditional dispute settlement. Rather, courts make law through controlling and legitimating public authority,[70] defined "as the capacity, based on legal acts, to impact other actors in their exercise of freedom, be it legally or simply *de facto*."[71] The legitimation of such multifunctionality of courts' decisions, so the argument goes, needs a more complex frame of analysis.

Similarly to GAL in the previous section, IPA insists on the *publicness* of authority, highlighting the importance and the persistence of the public-private distinction, which other authors have discarded as antiquated.[72] Authority is public when it is "exercised on the basis of a competence instituted by a common international act of public authorities, mostly states, to further a goal which they define, and are authorized to define, as a public interest."[73] The publicness of an exercise of authority, as well as its international character, therefore depends on the *legal* foundational act. In the democratic tradition, every exercise of public authority thus conceived must be legitimate.

To convey an understanding of the legitimacy of IPA, the proposal involves a recalibration of what democracy means on the global level. The authors find inspiration for this recalibration of democracy in the Articles 9–12 of the *Treaty of the European Union*, which are supposed to provide a vision of an international democracy.[74] The principles contain basic procedural rules, such as democratic elections of judges, publicness of decisions, and due process guarantees.[75] They guarantee a global citizenship on the basis of "equality, representation, transparency, participation, deliberation, and responsiveness."[76] The exercise of authority is legitimate when it observes these principles.

[70] Von Bogdandy and Venzke, *In Whose Name?*, 9f.

[71] Von Bogdandy and Venzke, *In Whose Name?*, 112.

[72] See, for example, Horatia Muir Watt, "Private International Law Beyond the Schism" 2(3) *Transnational Legal Theory* 2, no. 3 (2011): 347.

[73] See, Armin von Bogdandy, Philip Dann and Matthias Goldmann, "Developing the Publicness of Publicness of Public International Law: Towards a Legal Framework of Global Governance Activities," *German Law Journal* 9, no. 11 (2008): 1383.

[74] Von Bogdandy and Venzke, *In Whose Name?*, 135f.

[75] Von Bogdandy and Venzke, *In Whose Name?*, 157f.

[76] Von Bogdandy and Venzke, *In Whose Name?*, 147.

This legitimacy differs considerably from the Habermasian public law picture. It assumes pragmatically that an understanding of democracy as popular sovereignty is unrealistic. The alternative shifts the focal point of international democracy from self-determination to political inclusion.[77] Since a conception of citizenship is already deeply embedded in global law, particularly through the worldwide acknowledgment of human rights, this legitimation resource allows for departing from the necessity that every exercise of public authority needs justification "based on a particularistic understanding of democracy that stops at national borders and conceives of states as self-sufficient entities."[78]

3.3.3 Public Sphere Without Democratic Input?

Both projects thus formulate non-constitutional concepts to evaluate the legitimacy of global governance. GAL and IPA are exemplary for attempts to preserve the virtues of public law, starting with concerns about the protection of third-party interests in the pluralization of law. How can the legitimacy of public arrangements be preserved and what are the circumstances under which private norm creation can become a legitimate factor in global law? The task set by both of them is thus to balance the contingency of a plural order, with some elements of procedural universality inherent in the public concept of law that are either necessary from the perspective of law as reconstruction of a practice of collective self-determination (IPA) or can be derived from a comparative study of public law (GAL).

While the analytical framework in which both projects are situated remains the area of national constitutional law, both projects assume reduced legitimacy demands on the global scale. For Kingsbury, the central argument against treating the body of global law as global constitutional law is functional in a double nature. On the one hand, "a less representative body may function successfully if its rules allow for high transparency and wide consultation with relevant civil society and industry groups."[79] On the other hand, "constitutionalism also implies a coherence of structure which global legal and institutional arrangements do not currently have and are unlikely soon to get."[80] The argument against

[77] Von Bogdandy and Venzke, *In Whose Name?*, 146.
[78] Von Bogdandy and Venzke, *In Whose Name?*, 19.
[79] Kingsbury, "Concept of Law," 35.
[80] Kingsbury, "Concept of Law," 36.

constitutional thought is thus not its perceived normative inadequacy; rather, Kingsbury considers it unrealistic to reconstruct global law with constitutional vocabulary. The normative framework thus remains an attempt to preserve the procedural component in national constitutionalism. This is the Habermasian element in the suggestion.

Yet, as Nico Krisch has remarked, such a formulation implies considerable danger. If the constitutional type of legitimacy demands is taken out of the picture, GAL might end up legitimating administrative action that is in fact illegitimate.[81] The deliberately chosen limited focus might then involve a considerable backdrop, and the attempted middle ground turn into an abyss. If a global administrative body correctly implements illegitimate laws, this will not serve the legitimacy of the system as a whole. On the contrary, it will give an illegitimate arrangement the appearance of legality. In the absence of input legitimacy, GAL deals with only one part of the democratic concept of law. But, as we have seen, in the Habermasian vision, it is precisely the co-originality of procedures with input legitimacy that provides for the democratic concept of law.

IPA, in turn, explicitly relies on the term democracy. It seemingly escapes the problem that has been diagnosed in the discussion of GAL by shifting the discourse to the level of authority. Yet, in Habermasian terms, authority can be legitimate only on the basis of legality, so that the same legitimation requirements enter through the backdoor. While it might bring advantages to start with positive rules instead of a free-standing normative theory, their alternative to rely on positive law seems equally problematic. Here, the decisive caveat is the origin of these provisions. *European Union* (EU) law is not only *not* globally accepted, but also situated in a very delicate and dense legal and institutional environment. It seems all the more optimistic to understand this expression in positive law as providing for universal principles of democratic legitimacy. By subverting this definition of democracy as a foundational concept, the authors enter dangerous terrain.

Both approaches thus come with the basic problem that administrative action or the exercise of public authority receives the legitimating stamp of (democratic) legality. If interpreted in democratic terms, it might be better to assume that the authors formulate necessary, instead of sufficient, conditions for legitimate global governance. If these conditions are

[81] Nico Krisch, "Global Administrative Law and the Constitutional Ambition," in *The Twilight of Constitutionalism*, eds. Petra Dobner and Martin Loughlin (Oxford: Oxford University Press, 2010), 245.

not complied with, the presumption is that authority has been wrongfully exercised. By disconnecting the link between the redefinition of what democracy means on a global level and the analytical part of public authority, the plausible claim remains that authority must be bound to principles to be legitimate. Seeing the importance of international courts in their speaking "in the name of the peoples and citizens whose freedom they ultimately shape"[82] provides an important perspective of what kind of plurality we are dealing with.

What remains in circumstances of this plurality is a comparably empty concept of requirements that are intimately connected with legality. In the absence of input legitimacy, it might be possible to understand the preservation of the legal form and the conditions of legality as a placeholder for democratic revolutions in the future. Yet, it is important to insist that law as discursive tool working through the complementary functioning of formality and argumentation should not be uncoupled from the discursive creation of legal norms. A consensus justified by legal norms suffers from asymmetries when the legal norms themselves are not justified in a discursive process of opinion and will formation. The emancipatory character of a discourse with unequal preconditions is limited, notwithstanding all discursive optimism.

Finally, this attempt to safeguard the idea of public law through the turbulences transports essentialisms on rational governance and ideas of objective order. The public is understood as a hierarchical, overarching framework against which individual action has to be protected. There are justified doubts whether this liberal-hierarchical model adequately reflects the huge power disparities in the plurality of global law. Heterarchical threats through transnational corporations seem as challenging, and the public answer to endow them with human rights obligations in trade for their legal subjectivity transpires as difficult and dangerous at the same time. Discursive proceduralism, however, is not dependent on a classic interpretation of public order. Normative demands in language and argumentation can equally arise in heterarchical relationships. This argument turns the study in a direction that has gained considerable prominence in discussions on global law: the conflicts-of-law approaches.

[82] Von Bogdandy and Venzke, *In Whose Name?*, 5.

3.4 Conflicts-of-Law Approaches

Given what has been said so far, conflicts-of-law approaches disagree with the theoretical attempts of Pulkowski and others to recognize plurality, yet contain it in the framework of public international law. Conflicts law (or private international law) only comes to the fore if we are dealing with conflicts across the borders of legal systems. We have thus arrived at those approaches that consider the framework of general international law unsuitable to provide a containment of plurality. They recognize the gravity of fragmentation not exclusively *of* international law itself, but equally of the relations of recognition *toward* international law for which an exclusive focus on international law cannot provide the answer. The central aspect of this change is the fall of another bastion of a traditional understanding of law. While the approaches of the previous section already questioned the persistence of the dichotomy between national and international laws, yet still insisted on the public/private distinction, it is this latter distinction that is challenged in the conflict-of-laws approaches.

What remains comparably stable, however, is the appeal to a form of legal unity. Similar to the defenders of a uniform concept of law in the preceding section, however, they advocate a non-institutional proceduralism that draws on the methodology of a different legal branch. This proceduralism, some proponents argue, is suitable to mitigate the legitimacy problem that Habermas has sketched. Yet, it turns out that the conflict-of-laws methodology appears diverse, so that it cannot be allocated in one simple paradigm.[83] In order to convey an understanding of the debate, the first subsection illustrates the basic prerequisites for the use of conflict-of-laws methodology as legitimacy model. The concrete shape of the method, however, crucially depends on the different theoretical schools within the discipline.[84] While the second subsection shortly sketches these schools, the third subsection ultimately discusses some normative and conceptual aspects related to this choice.

[83] There are Luhmannian and Dworkinian models, as well as Habermasian models competing for the dominant methodology of the branch. For reasons of space and convenience, the discussion is concentrated in this chapter.

[84] For an initial overview, see Moritz Renner and Andreas Maurer, "Kollisionsrechtliches Denken in der Rechtstheorie," *Archiv für Rechts- und Sozialphilosophie* 125, Beiheft (2010): 207.

3.4.1 Conflicts-Law (Constitutionalism) as Legitimacy Model

Paradigmatically for the conflict-of-laws approaches, Christian Joerges' *conflicts-law-constitutionalism* (CLC) aims at squaring the circle by entering the inter-systemic, heterarchical space, yet remaining committed to the constitutional form of legal unity.[85] It does not start from the level of general international law, but has its origins in the regime collisions within the EU. According to Joerges, the development of the EU can be described as the first constitutionalization of conflicts law through the mechanisms of the Rome Statutes and the European Courts' jurisprudence on the common market.[86] Departing from these experiences, CLC suggests addressing the legitimacy and coordination problems in world society without the imposition of unilateral regimes, drawing on the sophisticated techniques of balancing that have been developed in private international law methodology.[87]

Joerges illustrates CLC in three dimensions.[88] As a consequence of its origins in European law, the focus of the first dimension lies on multilevel conflicts that arise in economic regulation and the complexity that comes with regulatory cases. Precisely in this area, the limits of democratic constitutionalism and "solipsistic national decision-making"[89] become apparent. At the same time, the legitimacy deficits of the overarching (European) legal order prevent a shift of the decision to the supranational realm.[90] Here, the regulatory decision must entail more complexity than simply the choice of a particular legal order.[91] Rather, "the legislature and the judiciary might instead be better advised to develop substantive answers to conflicts, which retain the function of a conflict rule."[92]

[85] Christian Joerges, Poul F. Kjaer, and Tommi Ralli, "A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation," *Transnational Legal Theory* 2, no. 2 (2011): 153; Christian Joerges and Michelle Everson, "Reconfiguring the Politics-Law Relationship in the Integration Project through Conflicts-Law Constitutionalism," *European Law Journal* 18, no. 5 (2012): 644; Christian Joerges, "The Idea of a Three-Dimensional Conflicts-Law as Constitutional Form," *Recon Online Working Paper* 5 (2010), available at http://www.europeanrights.eu/public/commenti/joerges_testo.pdf

[86] Joerges, "Three-Dimensional Conflicts-Law," 15–16.

[87] Joerges, "Three-Dimensional Conflicts-Law," 24.

[88] Joerges, "Three-Dimensional Conflicts-Law," 15–23.

[89] Christian Joerges, "Conflicts-Law Constitutionalism: Ambitions and Problems," in *Reflections on the Constitutionalization of International Economic Law*, ed. Marise Cremona et al. (The Hague: Martinus Nijhoff, 2014): 114.

[90] Joerges, "Conflicts-Law Constitutionalism," 116.

[91] Joerges, Kjaer and Ralli, "A New Type of Conflicts Law," 158.

[92] Joerges, Kjaer and Ralli, "A New Type of Conflicts Law," 159.

The second dimension of the approach is then concerned with an increase in transnational regulation and the eroding potential of national states to address the legitimacy concerns that arise from it. The adequate reaction to transnational regulation is their procedural constitutionalization, which means "the institutionalization of transnational decision-making processes; their openness for the concerns raised not only by governmental actors, but also by non-governmental organizations: the recognition and de-limitation of exit options for the participating jurisdictions."[93] This constitutionalization without institutions, a "deliberative supranationalism," should then be compatible to democratic legitimacy standards.[94]

A third dimension addresses techniques to deal with the new actors arising in plurality, such as "non-state institutions and para-legal regimes,"[95] and aims at finding appropriate criteria for the evaluation and accountability of these hybrid actors. The empirical assessment of the setting of regime collisions thus largely overlaps with the approaches that have been discussed in this chapter.

One decisive feature of CLC is the capacity to transcend the public/private distinction and to take "diagonal" conflicts into account.[96] In these diagonal conflicts, it is not necessarily different legal orders, jurisdictions, or courts that collide; rather, conflicts concern cross-cutting scenarios, such as consumer/producer, employers/employees, professionals/clients. This choice of law in between jurisdictions reflects the reality of conflicts law. In down-to-earth cases, it is the parties' interests that collide—not primarily interests of the overarching legal orders. It is for them, and for affected third parties, that a legitimate solution of the case is required. Understanding these diagonal conflicts as private conflicts with a public dimension for which private international law applies seems to reflect the private dimension of plurality.

The use of conflicts law, as we can see, thus first and foremost addresses here the legitimacy dimension of plurality and the failure of new regulatory

[93] Joerges, "Conflicts-Law Constitutionalism," 119.

[94] Christian Joerges and Michelle Everson, "Re-Conceptualising Europeanisation as a Public Law of Collisions: Comitology, Agencies and an Interactive Public Adjudication," in *EU Administrative Governance*, ed. Herwig Hofmann and Andreas Türk (Cheltenham: Edward Elgar, 2006), 512. Christian Joerges and Jürgen Neyer, "From Intergovernmental Bargaining to Deliberative Political Processes," *European Law Journal* 3, no. 3 (1997): 273.

[95] Joerges, Kjaer and Ralli, "A New Type of Conflicts Law," 160.

[96] Joerges, Kjaer and Ralli, "A New Type of Conflicts Law," 155.

forms to fulfill the high demands of the Habermasian paradigm that those who are subject to the effect of laws must be in a position to understand themselves as the authors of these laws.[97] Constitutionalist vocabulary thus does not refer to the institutional side of normative hierarchies, but rather to the promise of horizontal inclusiveness. In the context of the EU, Joerges' practical suggestions point toward more modesty and a slower appropriation of competences. Yet, as Joerges and others argue, we find the same challenges to traditional concepts of law on all levels of governance. A global application of his paradigm offers the understanding of the law of the *World Trade Organization* as conflicts law.[98] In the recent and manifold reformulations of CLC, the conflicts-of-law paradigm has been claimed applicable to all problems of plurality in global law.

Joerges' account stands paradigmatically for the foundational idea to legitimize the complex societal interactions through conflict laws. The claim that conflicts-of-law can be particularly helpful in this endeavor is widespread, relying on the capacity of private law to reflect the transcendence of the public/private distinction. While the basic mechanism of importing private law principles is largely the same, the difference between these principles lies in the details of the discipline. There are different methodological schools competing for the dominant paradigms in conflicts-of-laws, so that conflict resolution (and thus the legitimacy of the global order) crucially depends on the adherence to one or the other school.

3.4.2 Spectrum of Balancing: Savigny, Currie, and Interest Analysis

The previous section has illustrated the particular understanding of global legal relations that recommends the application of conflict-of-laws methods. The methodological potential to address the legitimacy problems, however, crucially depends on a more specific aspect. In order to understand the differences between the approaches, we must take into account the methodological differentiations within the branch. Joerges and others rely on a perspective on balancing through interest analysis that was *inter alia* coined by the American conflict-of-laws pioneer Brainerd Currie.[99]

[97] See e.g., Joerges, Kjaer and Ralli, "A New Type of Conflicts Law," 158.

[98] Joerges, "Three-Dimensional Conflicts-Law," 25.

[99] See Joerges, "Three-Dimensional Conflicts-Law," 5–6. See further, Ralf Michaels, "Post-Critical Private International Law," in *Private International Law and Global*

In short, Currie was concerned with politicizing the conflict-of-laws methodology against its allegedly apolitical Savignyian heritage. The antinomies between a formalist and a substantive conflict-of-laws methodology will be discussed in this section, fading out the many middle-ground positions. Quite schematically speaking, there is a considerable difference between civil and common law schools in private international law.[100]

The intellectual heritage of the European civil method of private international law dates back to Carl Friedrich von Savigny.[101] In mid-nineteenth century, the dominant method to determine the applicable law was still statutism, 500 years old at the time, which looked at the nature and regulatory content of statutes in order to derive their area of application. Yet, statutism as a theory was not suitable to respond to the growing demands of increasingly interconnected international codification.[102] Savigny established a modified understanding of private international law in which the location of the "legal relation" is the decisive criterion. Practically, this will often lead to the same results. Yet there is a difference. Now, it is not the statutes (that essentially reflect the will of the sovereign) that are decisive for the question whether or not a law applies to a case; rather, it is the legal relation that determines the adequate source of law. This establishes an argumentative primacy for the "private" dimension of private international law.[103]

Governance, ed. Horatia Muir Watt and Diego P. Fernández Arroyo (Oxford: Oxford University Press, 2014), 55.

[100] For the aspect of different techniques, see Ralf Michaels and Joost Pauwelyn, "Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of International Law," in *Multi-Sourced Equivalent Norms in International Law*, ed. Yuval Shani and Tomer Broude (Oxford: Hart Publishing, 2011), 19. See, for the different schools in conflict-of-laws doctrine, Friedrich K. Juenger, "American and European Conflicts Law," *American Journal of Comparative Law* 30, no. 1 (1982): 117.

[101] For an introduction to Savignyan thought, see Frederick C. Beiser, *The German Historicist Tradition* (Oxford: Oxford University Press, 2011), 214f.

[102] Responsible for the paradigm change were mainly Carl Georg Wächter, "Über die Kollision der Privatrechtsgesetze verschiedener Staaten," *Archiv für civilistische Praxis* 24 (1841): 230; and Friedrich Carl von Savigny, *Geschichte des römischen Rechts im Mittelalter*, Vol. 5 (Heidelberg: Mohr, 1849). See, Christiane Wendehorst, "Denkschulen im Internationalen Privatrecht," *Berichte der deutschen Gesellschaft für Völkerrecht* 45 (2012): 36.

[103] See Ralf Michaels, "Globalizing Savigny? The State in Savigny's Private International Law and the Challenge of Europeanization and Globalization" *Duke Law School Legal Studies Research Paper Series* 74 (2005): 15.

This primacy of the private relation was perfectly in line with Savigny's conception of the public-private divide. Deeply skeptical about the emerging national legal systems, Savigny argued that private legal relations were to be autonomous from public intervention. The role of private international law was thus not more than an apolitical, technical tool to coordinate the different private interests among different legal systems. Since private international law is state law, the state retains a certain (limited) role, but the choice-of-law principles are not at its political disposition.[104] While this argument for an apolitical legal construction is (similar to Kelsen's) a substantive political claim that is connected with a vision of a political community, its (fairly liberal) spirit is still today an important foundation of European private international law doctrine.

The American doctrine went another way. Around the middle of the 1950s, when international law was split in the positivism versus realism debate,[105] a similar concern grew in the private international law branch. And similar to the debate in international law, a strand developed in the United States, first and foremost through the work of Brainerd Currie,[106] who suggested a politization of the principles on the choice of law. Currie considered the formal approach toward conflicts law as inflexible because a formal response would not classify the applicable law according to the nature of the conflict; rather, it would simply strike down one of the legal bodies without regard to the circumstances.[107]

Currie's approach, which he called "governmental interest analysis," considered the court of the state where a case was decided as a part of the state government.[108] This implied the result that, if the government of the state where the forum was located had an interest in the outcome of a case, the court was to decide the case by preferring state law instead of foreign law.[109] This approach, sometimes called the "American choice-of-law

[104] Michaels, "Globalizing Savigny."

[105] For that argument in relation to American approaches to international law, see Martti Koskenniemi, *The Gentle Civilizer of Nations – The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2014), Chapter 6.

[106] Brainerd Currie, *Selected Essays on the Conflict of Laws* (Durham: Duke University Press, 1963), 189.

[107] For the case of a false conflict, see Currie, *Selected Essays*, 189f.

[108] Herma Hill Kay, "Curries Interest Analysis in the 21st Century: Losing the Battle, But Winning the War," *Willamette Law Review* 37 (2001): 123.

[109] See Kay, "Curries Interest Analysis," 123.

revolution,"[110] thus used a modified set of statutory methods. What is called a revolution, thus, in fact, turned back the wheel. The main conceptual tool that Currie introduces is balancing of governmental interest. Currie departs from the interest of the forum here:[111] when the forum of decision has an interest in a case, forum law is applied. If only the foreign regime has an interest, but the forum has none, the foreign law applies (false conflict). In the case of competing interests, the forum law equally enjoys preference (true conflict).

Case orientation, instead of rule orientation, provides three advantages for Currie's proposal. Firstly, one could avoid the distortions that the formalist method causes in false conflicts. Secondly, one could admit different substantive solutions in different forums. Finally, interest analysis allows for the effective use of conflict-of-laws as a tool for the implementation of governmental policies. At the time of its introduction, Currie's governmental interest analysis reflects a part of the broad turn toward legal realism with all its accompanying concerns—law's calls for adequacy and relevance, adaption to the real-world interest, and its conversion into a tool for the policy-maker.

3.4.3 Political and Apolitical Readings of Private International Law

Today, the legal realists' version of the choice-of-law principles seems to dominate not only large parts of the US-American doctrine, but arguably also the approaches to globalization.[112] The three main advantages of Currie's version of conflicts law (avoid formalist distortions, admit fragmentation, and implement policies) just seem very helpful tools to respond to the challenge of plurality. Yet, to understand the methodological turn, it is again helpful to inquire into the substantive views of the (global) political community, which are connected with these methodological choices.

The background for Currie's reformulation is political. It recognizes that the private law of a state is part of the public order. Currie argues that

[110] Cp. Symeon C. Symeonides, *The American Choice-of-Law Revolution: Past, Present and Future* (The Hague: Martinus Nijhoff, 2006).

[111] Brainerd Currie, "On the Displacement of the Law of the Forum," *Columbia Law Review* 58 (1958): 964.

[112] See, for example, Michaels, "Post-Critical Private International Law," 55–56.

private law methodology is an important political tool to implement policies. That the state makes use of this tool is a requirement of its political constitution—politicizing private law is thus a matter of implementing democracy through expanding collective self-determination in different issue areas, in particular in private legal relations.[113] This is precisely the reason why Joerges and others conceptualize it as a possible remedy of the legitimacy problem beyond the state—a politicized private law might be effective through the implementation of public (governmental) interest in supranational courts.

Yet, the origin of Currie's doctrine in national constitutional law raises some doubts about the globalism interest analysis can provide. Currie had a strong preference for the forum where the case is decided, which would back up the broad turn toward the reterritorialization of decision-making. One might appeal to the comparably strong role of the courts that, once freed from rule-constraints, have remarkable interpretive power.[114] Yet, it seems that the peculiar trust might be overly optimistic. It relies on the assumption that there are cases in which the pursuit of self-interest of the forum state remains modest, so that there are cases where it declares its lack in interest.[115] If the self-restraint does not materialize in practice, interest analysis is more like a *carte blanche* for unilateralism. The advantage of interest analysis, the admission of different solutions in different courts, and better equipment to deal with fragmentation could backfire when it further increases fragmentation.

Other elements of the theory seem more promising: interest analysis seems more plausible in the neglect of the public-private divide that arguably reflects the new plurality more adequately than traditional thinking. Here is the link between the supposedly Habermasian legitimacy concerns, as expressed by Joerges, and the Luhmann-inspired critical theories that are the subject of the next chapter. Horatia Muir Watt, for example, has argued that "adopting a planetary perspective means reaching beyond the schism between the public and private spheres and connecting up with

[113] Brainerd Currie, "The Constitution and the Choice of Law," *University of Chicago Law Review* 26 (1958): 9.

[114] Kay, "Curries Interest Analysis," 125.

[115] Currie, *Selected Essays*, 525.

the politics of international law."[116] She argues that the focus on the public-private divide distinguished transnational economic relations from the moral constraints of the *ius gentium*.[117] But things did not get better with the turn to interest analysis: Muir Watt argues that the traditional Roman law categories that Savigny formulated were simply not suitable to deal with a rapidly internationalizing world.[118] This development, in her opinion, then led to the rejection of conflict-of-laws altogether in the "neo-statutist, unilateralist" approaches.[119] Whereas in Europe the inadequacy was denied, the American choice-of-law revolution simply got rid of the rules. Her synthesizing argument then goes along lines that will be discussed in the next chapter.

Yet, in the context of the Habermasian approaches, it is important to highlight the possible virtues of a formalist, rule-oriented understanding of conflicts-of-law. The difference between both approaches might be best illustrated in their different understanding of the comity doctrine. Comity, in a famous understanding of the US *Supreme Court*, "in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons was are under the protection of its laws."[120] Duty and convenience can be read in opposition to Savigny's conception, to whom there was no discretion for the court whether or not it was convenient to give effect to a foreign jurisdiction's judgments.[121] Comity was a legal duty to take foreign jurisdictions into account.[122]

Against the pragmatic concerns of today's plurality, Savigny's traditional sketch does not seem to be much more than a cultural artifact. Yet,

[116] Muir Watt, "Private International Law," 347. See also, Robert Wai, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization," *Columbia Journal of Transnational Law* 40 (2002): 209.

[117] Muir Watt, "Private International Law," 359.

[118] Muir Watt, "Private International Law," 414–15; For disagreement see Michaels, "Post-Critical Private International Law," 55.

[119] Muir Watt, "Private International Law," 415.

[120] *Hilton v. Guyot* 159 U. S. 113, 163–64.

[121] Alex Mills, "The Private History of International Law," *International and Comparative Law Quarterly* 55, no. 1 (2005): 36.

[122] See, for example, Alex Mills, *The Confluence of Public and Private International Law* (Cambridge: Cambridge University Press, 2009), 58–59.

there is an important dimension in Savigny that, despite all practical difficulties, has a specific utopian beauty. For him, emphasizing the public and private distinction, private law was to be a universal system of laws for mankind. Differences in private law between national states were thus merely owed to the incomplete state of development in global law.[123] Private international law and the necessity to coordinate these different legal systems could therefore only have a temporary character. Savigny thus shows a holistic view of private international law—constantly keeping the international community in mind as a point of reference.

Another universalistic reason for the rule-oriented version, even though Savigny would not have endorsed it, is the Habermasian dimension of democratic self-determination, which appeals to legitimacy through legality. If legal collisions are not decided on a *legal* basis of conflicts law as state law, but instead in a judge's monological reasoning, legal decisions cannot be justified to those subject to it.[124] Anti-formalism thus threatens the intersubjective theory of justification that Habermas promotes. Both Savigny and Habermas are thus driven by the universal promise that the law comes with, instead of a pragmatic focus on the single conflict.

Obviously, and very rightly so, these universal promises have been uncovered many times as false prophecies. But maybe there is a possibility to claim a space for formalism even in the face of hegemonic domination and colonial heritage. Ralf Michaels has suggested a turn to formal technique in a "post-critical" private international law. Since neither uncritical formalism nor critical anti-formalism has proved to be successful, Michaels and others have suggested a political use of technique in which one has to find the way between the mechanistic European and the decisionist American.[125] According to them, it is, in particular, reflexivity about the fictionality of legal discourse that could provide remedy.[126] Combined with reflexive techniques, Michaels then favors a rule-oriented approach.[127]

Within the different approaches to conflict-of-laws methodology as a legitimacy model for the plurality of global law, the formalist paradigm resonates with the Habermasian conception. It highlights aspects of

[123] Michaels, "Globalizing Savigny," 15. Mills, "Private History," 36.

[124] Compare further Habermas' critique on the Dworkinian method in Sect. 6.3.3.

[125] Michaels, "Post-Critical Private International Law," 67.

[126] See Karen Knop, Ralf Michaels, and Annelise Riles, "From Multiculturalism to Technique – Feminism, Culture and the Conflicts Of Law Style," *Stanford Law Review* 64 (2012): 589.

[127] Michaels, "Post-Critical Private International Law," 67.

rationalization and unity through legal formality, while insisting on the importance of addressing diagonal conflicts between private actors. This model stands in competition with a substantive approach to balancing that resembles the Dworkinian technique. While approaches related to the latter model will be addressed in detail in the fifth chapter, the fifth and last section of this chapter discusses some aspects related to formalist technique and legal plurality.

3.5 Formalism Between Koskenniemi and Kelsen

So far, this chapter has been exploring hierarchical and heterarchical answers to plurality that endorsed formalist methodology. The prime virtue that authors associate with such a concept is to make use of the inherent rationality potentials of legal argumentation. The law-internal rationality can serve either within one imagined legal system as a source of integration (in Sects. 3.1, 3.2, and 3.3) or even connect different legal systems with formal-procedural rules (in Sects. 3.3 and 3.4). Debates on the adequacy of formalism to accommodate plurality often deal with the emptiness of formalist argument confronted with a world beyond the rule of law. Some authors have therefore made suggestions how we are to understand the structure of legal argument if it is to make sense for a global law confronted with plurality beyond its own borders. And whereas the limits moved some to depart from the traditional formalist understanding of the law, others have tried to set the traditional method in a new, critical light to preserve the virtues of the form, yet to mitigate its problematic aspects.

It is the work of Martti Koskenniemi in which the attempt for a reflexive and critical formalism has most prominently appeared in global legal thought. In order to understand whether or not a formalist approach to legal methodology can accommodate plurality, it is important to focus on the structure of (formal) legal argument. Such an understanding specifies and extends the analyses of this chapter. Habermas' view of legal discourse is closely connected to his theory of law in the national state, and others follow the way through. Yet, they miss an important chance, for in the discourse on plurality, one element of legal thought that would otherwise be considered its tragedy, the oscillation between normativity and concreteness, equips legal discourse with the necessary tools to adapt.

3.5.1 Koskenniemi's Oscillation Hypothesis

Koskenniemi and Habermas, to start with, share a commitment to the same intellectual foundations, the linguistic and critical turn in philosophy influenced by authors like Wittgenstein, Austin, or Freud. Yet, understanding Koskenniemi as a committed Habermasian would be incorrect. This becomes particularly clear in the way they receive another shared intellectual resource: Max Weber. Habermas gives his reading of Weber a clear prospect of procedural, rational governance, whereas Koskenniemi rejects this aspect and points to Weber's warning of the dangers that institutions come with.[128] Both, however, share Weber's call for an ethics of responsibility instead of an ethics of ultimate ends.[129] Reading Koskenniemi often leaves many questions unanswered, in particular with respect to his own normative commitment. Yet, interpreting his scholarship as approximating Habermasian ideas highlights the constructive dimension of his writings over the critical.[130] May the reader judge whether this is appropriate or not.[131]

Koskenniemi describes international law as a practice-oriented language,[132] which aligns him with the authors discussed in this chapter, starting with Savigny. This legal language, for which the professional discipline of international law provides the native speaker, is the form in which legal arguments can be expressed. Focusing on different aspects of reality, in this legal language almost everything can be expressed with valid legal arguments. Yet, to make these arguments, one has to master the "grammar" of law, which Koskenniemi describes as "the system of production of good legal arguments."[133] This form has a relative emptiness, as

[128] Martti Koskenniemi, "Human Rights, Politics and Love," in *The Politics of International Law*, ed. Martti Koskenniemi (Oxford: Hart Publishing, 2011), 166.

[129] Martti Koskenniemi, "The Lady Doth Protest Too Much – Kosovo, and the Turn to Ethics in International Law" *Modern Law Review* 65, no. 2 (2002): 170.

[130] In any event, Koskenniemi would object to being read in any of these categorical ways.

[131] Koskenniemi agrees and disagrees with the German constitutional tradition and their approach to international law. See Martti Koskenniemi, "Between Coordination and Constitution – International Law as a German Discipline," *Redescriptions* 15 (2011): 45.

[132] "International Law is what international lawyers do." Martti Koskenniemi, "Between Commitment and Cynicism: Outline of a Theory of International Law as Practice," in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law*, ed. United Nations (1999), 495.

[133] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2nd ed. (Cambridge: Cambridge University Press, 2006), Epilogue, 568.

Koskenniemi notes: "A grammar is not what native language-speakers say in fact – it is an account of what it is possible to say in that language."[134]

The project of law, according to Koskenniemi, is a project of justification of practical decisions. Whether a justification in terms of law succeeds under the practical circumstances of legal discourse is not a matter of the validity of arguments as *legal* arguments. But this does not mean that every legal argument is as good as any other. There are means to distinguish good and bad legal arguments, as native speakers hear the difference between formulations of sentences in their languages. Yet, this (aesthetic) difference does not necessarily impact the legal decision. Legal arguments do not determine outcomes, yet they do not leave outcomes completely unattached. Other factors, such as the structural bias of the deciding institution and the structural indeterminacy of the law, imply a choice in the moment of decision.

This choice, which might be understood as a proximity to Schmittian decisionism,[135] implies the necessity of a legal decision. "The argumentative architecture allows any decision, and thus also the critique of any decision without the question of the professional competence of the decision-maker ever arising."[136] This decisionism highlights the political dimension of the law, so that the final justification of a decision is always informal. "It is even a hegemonic act in that precise sense that though it is partial and subjective, it claims to be universal and objective."[137] The indeterminacy of the law, importantly, does not arise on the level of interpretation of norms or principles; rather, it arises on the level of the grammar, that is, the deep structure that binds these norms and principles together. International legal discourse, so the famous argument goes, oscillates between *Apology* and *Utopia*, between concreteness and normativity, always tragically required to give preference to one over the other.

This tension is a central aspect of debates on global plurality. In the doctrine of sovereignty and sources, the grammar of international law is most visibly articulated.[138] The structure of legal argument thus not only

[134] Koskenniemi, *From Apology to Utopia*, 589 (emphasis omitted).

[135] For this argument and the related response, Emanuelle Jouannet, "Koskenniemi: A Critical Introduction," in *The Politics of International Law*, ed. Martti Koskenniemi (Oxford: Hart Publishing, 2011), 26–27.

[136] Koskenniemi, *From Apology to Utopia*, 589 (emphasis omitted).

[137] Martti Koskenniemi, "What Is International Law For?," in *The Politics of International Law*, ed. Martti Koskenniemi (Oxford: Hart Publishing, 2011), 260.

[138] Koskenniemi, *From Apology to Utopia*, 576.

takes place *between* these opposing poles; rather, sovereignty and sources are again internally split into arguments from normativity and concreteness.[139] The meaning of sovereignty is determined through weighing effective and legitimate state power. Sources can be assessed through will and justice. The result is a self-reproducing, inescapably circular structure: "As 'sovereignty' and 'sources' merge into and yet remain in tension with each other, their relationship will ensure the endless generation of international legal speech – and with it, the continuity of a profession no longer seeking a transcendental foundation from philosophical or sociological theories."[140] Formalism as a strategy to frame global plurality entails the virtues of this structure, which are positively highlighted in the Habermasian approaches and the vices, such as societal inadequacy and normative emptiness that are criticized in the following chapters.

In Koskenniemi's argument, these vices merely serve to highlight the political nature of law, rather than to reject legal argument altogether. Koskenniemi advocates a critical formalism, a "contextual prudence"[141] that is reflexive about the essentially political nature of legal decision, yet retains its emancipatory potential that is rooted in the promise of equality. "[…T]he legal idiom itself reaffirms the political pluralism that underlies the Rule of Law, however inefficiently it has been put into effect; or, more accurately still, it is the primacy of the formal rule that makes possible this political pluralism."[142] Again, this universal promise should not be understood as a normative endorsement of positivism. Rather, it is a denunciation of the alternatives: "[A]gainst the particularity of the ethical decision, formalism constitutes a horizon of universality, embedded in a culture of restraint, a commitment to listening to others' claims and seeking to take them into account."[143]

This reliance on the formalist promise links Koskenniemi to the propositions of this chapter. Yet, Koskenniemi does not share their optimism concerning the possibility of an intersubjective foundation of the law, even though the *use* of the law in legal discourse certainly carries some intersubjective elements. The oscillation of legal argument between normativity of concreteness, as Habermas suggested, is the central element of his account

[139] See, in detail, Koskenniemi, *From Apology to Utopia*, Chapter 4.
[140] Koskenniemi, *From Apology to Utopia*, 575.
[141] Jouannet, "Koskenniemi," 27.
[142] Koskenniemi, "What Is International Law For?," 257.
[143] Koskenniemi, "Turn to Ethics," 174.

of legal discourse. Yet, the rational-constitutional vision with its desire for the closure of this indeterminacy is rejected. For him, formalism is (with reference to Kelsen) a counter-hegemonic strategy.[144] This strategy suggests politicization from within. If the law is already irreducibly political, lawyers are always already "part of the problem." International law and its theory thus always entail questions of political strategy that require choices. "From this perspective, the task for lawyers would no longer be to expand the scope of the law so as to grasp the dangers of politics but to widen the opportunity of political contestation of an always legalized world."[145]

3.5.2 Critical Formalism and Plurality

How is this critical formalism, which the approaches of this chapter align with, equipped to deal with an increase in plurality beyond the state? Firstly, as we have seen, plurality uncovers the inadequacy of the traditional international legal system to account for fragmentation. The result is a loss in practical authority.[146] Secondly, plurality poses a considerable risk for the traditional argumentative structures of international law. Technically, the legal grammar depends on the systemic character of the law, and as plurality destabilizes the authority of that system, it endangers its argumentative rationalities. Both phenomena together constitute the formalist's anxieties from plurality. Yet, as has sometimes been remarked in a form of *ridicule*, this anxiety does not need to be a romantic attachment to the *status quo*. Rather, from a formalist's point of view, it is not quite clear what kind of other system should take its place.

A subversion of the old brings new life into an overcome body of law that has not proved to be adequate for the developments of globalization. This is the critical hope: perhaps new actors and new regimes will equip the law with the needs to adapt its universalizing promise to a new future. Critical formalists, as the authors discussed in this chapter reflect, tend to see both aspects. Plurality, in their view, has an ambivalent connotation. On the one hand, there are dangers connected with the step beyond the relatively functioning legitimacy model of the national state. Yet, at the

[144] See Koskenniemi, *From Apology to Utopia*, 602. See also, Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen*, trans. Thomas Dunlap (Cambridge: Cambridge University Press, 2010), 268.

[145] Koskenniemi, *From Apology to Utopia*, 615.

[146] For this argument, see Chap. 2.3.

same time, this offers the possibilities to reassemble the rule of law on a broader basis to construct "one transnational legal community."[147]

Many seem to have already written a requiem for traditional methodology. Naïve public law statism was not seen suitable to adapt to the fluidity of today's world. Yet, if we look at critical linguistic analyses of legal argument, we see that the formalist's method is far more flexible than often asserted. This, paradoxically, is a result of what has often been misunderstood as a shortcoming—the inescapable tension between normativity and concreteness, and its oscillation between apology and utopia. Since legal argument even in its traditional setting involves realist elements, it has some organic capacity to adapt to new circumstances, even though the adaptation works far more slowly than suggested in unilateral dynamism.[148] The form of law shifts this organic adaptation to the level of discourse, in which more than one perspective is concerned. Even if one does not believe in democratic prospects for world order, this again highlights a Habermasian intersubjective perspective. Facing fragmentation, critical formalism works as a constraint of unilateralism—either as a democratic legal change, or as an intersubjective adaptation in legal discourse.

As Günther has noted, it is only through this intersubjective perspective that this critical formalism can refer to the perspective of universalism and, ultimately, to the value of the rule of law. Legal discourse, in Günther's view, is a continuous debate about universals.[149] Koskenniemi, similarly, has described this as "constitutionalism as a mindset."[150] It means adhering to the universal promise in an intersubjective perspective, albeit neither overstating its chances of realization nor underestimating its risks. Yet, the internal perspective in intersubjective legal discourse needs the reference to contested concepts to stabilize. Critical formalism, understood in this way, walks the line between promise and kitsch. It works as a constraint for power, but not necessarily as positive determination.[151]

This requires recognizing the political character of the struggles that take place in and through the law. In Habermas' vision, law provides the

[147] See e.g., Günther, "Uniform Concept of Law."

[148] For environmental adaptation as a capacity of the law, see Chaps. 4 and 5.

[149] Günther, "Uniform Concept of Law," 19.

[150] Martti Koskenniemi, "Constitutionalism as Mindset: Reflections on Kantian Themes about International Law and Globalization," *Theoretical Inquiries in Law* 8, no. 1 (2007): 9.

[151] This concept of a procedural understanding of law bears similarities to Max Weber's concept of proceduralization. To this theme, see Hauke Brunkhorst, Critical Theory of Legal Revolutions (New York: Bloomsbury Academic, 2014), 146.

arena in which the participants of political discourse can stand their ground from relatively secure positions. The plurality of global law unsettles this domestic analogy in which a comparably closed diplomatic circle produces norms and decisions from quite untouchable standpoints. Rather, plurality arguably introduces a new level of law-internal politics and throws legal actors into the political arena. In the formalist argument, politicization should remain within the constraints of legal rules, not as a broad appeal to proportionality balancing on the basis of universal values. The power to adjudicate the multilevel conflicts arising in circumstances of plurality should not be left to courts, a monological reconstruction in a judge's view of the practice. Habermas and Koskenniemi are united in their opposition to the alternatives.[152]

The critical dimension of formalism has put the project at some distance to its most discredited proponent: Hans Kelsen. Today's formalists are conscious that the Kelsenian concept of jurisprudence as science is difficult to uphold in practice. Interests are always already part of the legal process. Yet, the strict Kelsenian distinction between *lege lata* and *lege ferenda* implies a meaningful reference that is relevant, even if it cannot be translated into legal practice. Kelsen's fetishism with neutrality and objectivity is rooted in a very modest epistemology.[153] His argument was epistemologically dualist, constantly asserting the distinction between *Sein* and *Sollen*. This conviction that we cannot derive knowledge about what constitutes *the* good life from our earthly existence led him to fight constantly against ideology and ideological discourses. This equally leads to the Kelsenian aspects that are often considered as problematic: an empty formalism detached from reality. His *political* project was to free the world from ideological discourse through peace in economic interdependence. The primacy of international law would channel the interests through a formalist, administrative apparatus.

Even though his suggestions were ultimately mistaken, epistemological modesty as one important foundation of formalism deserves recognition. The Habermasian project combines the recognition of the necessary particularity of perspectives with an intersubjective paradigm. The goal is not to keep law free from politics, as Kelsenian formalism suggests, but rather

[152] See, in particular, the Dworkinian approaches of Chap. 5. For further discussion, see Sect. 6.3.3.

[153] See Mónica García-Salmones, *The Project of Positivism in International Law* (Oxford: Oxford University Press, 2013), 126f.

to recognize law's potential to lead the political struggle into tracks. It is the form of law that serves both the powerful and the weak, because it provides a space for argument that is indeterminate, influenceable, and never imperative. The German nineteenth-century lawyer Rudolf von Jhering has memorably praised the legal form: "The form is the sworn enemy of arbitrariness, the twin sister of liberty. Since the form resists the seduction of the freedom to anarchy, it directs the substance of the liberty in tracks, that it does not dissolute, get lost, it strengthens it to the inside and protects it from the outside. […] They [forms] can only be broken, not bent."[154]

3.5.3 Two Dimensions of Validity

Positivism relies on a concept of law that can be formulated as a static and time-stable model of validity. In this model, which is inspired by Kelsen's theory of norms, law is produced through a certain procedure of positing in accordance with hierarchically superior norms of law production. Validity is reduced to an act of will or to a practice. This interpretation is one of the most important thresholds for Habermasian approaches. At the same time, this understanding of validity is often used to reject the static model *analytically*. This rejection will appear in the following two chapters on the dynamist axis. Yet, to foreshadow a response to these critiques at this point, I believe there is no substance to the analytical claim, leaving their *normative* rejection of formalism undisputed.

The analytical rejection appears in the dynamist approaches of Chaps. 3 and 4. From a legal realist perspective, it is often argued that formalism misconstrues the way legal decisions are taken. As Rosalyn Higgins classically argues in line with the process approaches of the fifth chapter: "International law is the entire decision-making process, and not just the reference to the trend of past decisions which are termed 'rules'."[155] One

[154] My translation. In German the passage reads "Die Form ist die geschworene Feindin der Willkür, die Zwillingsschwester der Freiheit. Denn die Form hält der Verlockung der Freiheit zur Zügellosigkeit das Gegengewicht, sie lenkt die Freiheitssubstanz in feste Bahnen, daß sie sich nicht zerstreue, verlaufe, sie kräftigt sie nach innen, schützt sie nach außen. […] sie [Formen] lassen sich nur brechen, nicht biegen," Rudolf von Jhering, *Geist des Römischen Rechts auf den Verschiedenen Stufen Seiner Entwicklung* (Leipzig: Breitkopf und Härtel, 1869), 455.

[155] Rosalyn Higgins, *Problems and Process – International Law and How We Use It* (Oxford: Clarendon Press, 1995), 2.

of the main arguments that realists continue to highlight is that "if international law was just 'rules', then, international law would indeed be unable to contribute to, and cope with, a changing political world."[156]

A defense of formalism against this charge might point to two different levels, of which one can conceptualize the notion of validity. These two perspectives on validity appear most clearly in the original Luhmannian writings. The Luhmannian concept of law describes this distinction by referring to time. Here, it reads: "The law is a historical machine that with every operation transforms into a new, different machine." Validity becomes a signifier in legal communication, which works according to the code law/non-law. Relating to the terminology of Talcott Parsons, Luhmann describes the concept of validity as a "circulating symbol."[157] This circulating symbol is not static, as in a rule-oriented theory.

Luhmann, however, recognized that this sociological description of the legal process does not invalidate the Kelsenian rule model. Rather, he opens the field toward a difference of legal theory and legal methodology.[158] Whereas the first must be oriented toward epistemic correctness, the latter might be the fictional reference to the law/non-law code. By understanding Kelsen as a methodologist instead of someone claiming the epistemic reality, we can accept both claims: whereas lawyers making a legal decision on a specific case tend to assess the validity of norms as time-stable, being formalists from the internal perspective of legal participants, an extension of the time frame leads to the dissolution of these clear categories toward a process in which validity appears as a circulating symbol.

Kelsen's epistemological dualism clarifies how we are to understand the formalist doctrine's relationship to the insight that the factual world is more plural than we can read it from a system of legal norms. The distinction of *Sein* and *Sollen*, the fact that the legal system does not reflect the world "as it is," does not invalidate the positivist's thesis. Rather, it constitutes a form of secondary reality, which might sometimes be fictional.

[156] Higgins, *Problems and Process*, 3.

[157] For Luhmann, however, this relation to time also has an ontological dimension: Time is not something that passes by—not a movement. Rather, all being, all communication is a consequence of time that connects as a historical unity of simultaneous moments. The autopoietic system is not more and not less than the history of its own movement.

[158] See, Niklas Luhmann, *Law as a Social System*, trans. Klaus A. Ziegert (Oxford: Oxford University Press, 2004), 54–55 (see also 32 and 310).

Both readings of validity are thus not necessarily conflicting. The approaches of this chapter reflect this from the internal perspective of legal argumentation. Günther argues in the second section that, from an internal perspective, participation in legal discourse might presuppose the willingness to incorporate particular normative demands of coherence in the own argumentation. Participation in legal discourse thus entails a specific mode, an attitude. These traits of legal argumentation have already been described, in their basic features, in the Hartian concept of the "internal aspect of rules," which constitutes the obligatory nature of the law.[159] In an adequate description, this turns post-critical legal argumentation into an "as if" mode.[160] Legal discourse can only function if it can—in awareness of the political nature of the law—ignore the politics for the purpose of argumentation.[161]

At the same time, as this chapter has been attempting to show, the formalist model comes with a certain normative agenda that makes the case for a statist understanding of validity. This agenda highlights the chances of preservation of the achievements of rational-procedural governance in the global realm over the risks that are connected with a failure to transform the model accordingly, so that it fits the conditions of plurality.

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[159] Herbert L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 86.

[160] Knop, Michaels, and Riles, "From Multiculturalism," 642f.

[161] Knop, Michaels, and Riles, "From Multiculturalism," 647.

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CHAPTER 4

Unleashing Conflict: Post-modern Luhmannian Approaches to Global Law

This chapter takes Luhmannian thought on global law as its starting point. If Luhmann had had the chance to contribute to today's debates on global law, he would certainly be among the discipline's most respected thinkers. The few thoughts Luhmann spared on the global dimension of law in the context of his general theory offer a completely different image from the observations of the third chapter. In contrast to Habermas, Luhmann asserted that, "at the level of the self-consolidating world society, it is no longer norms (in the form of values, prescriptions or purposes) that steer the prior selection of knowledge."[1] This foundational assumption predetermines the way in which remedies for the problems of world society can be found.

According to Luhmann, society is composed of a combination of the factors of identity and difference.[2] Whereas for centuries the factor of difference had been hierarchy, "the predominant relation is no longer a hierarchical one, but one of inclusion and exclusion."[3] Traditional answers,

[1] Niklas Luhmann, "Die Weltgesellschaft," in *Soziologische Aufklärung 2*, ed. Niklas Luhmann (Opladen: Westdeutscher Verlag, 1975), 60 (this quote translated by Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press 2012), 94).

[2] See instructively, Niklas Luhmann, "Globalization or World Society: How to Conceive of Modern Society?" *International Review of Sociology* 7, no. 1 (1997): 67.

[3] Luhmann, "Globalization or World Society," 70.

D. Roth-Isigkeit, *The Plurality Trilemma*,
Philosophy, Public Policy, and Transnational Law,
https://doi.org/10.1007/978-3-319-72856-8_4

such as the theoretical approaches of the third chapter, still operate within the paradigm of hierarchy: "[i]f we see stratification we will tend to see […] injustice, exploitation and suppression; and we may wish to find corrective devices or at least formulate normative schemes and moral injunctions that stimulate a rhetoric of critique and protest."[4] Since these answers fail to describe the factors of difference at work in world society appropriately, they fail to provide a remedy.

An adequate description of world society points to functional differentiation and the autonomy of function systems, "to their high degree of indifference, coupled to high sensitivity and irritability in very specific respects that vary from system to system. Then, we will see a society without top and without centre, a society that evolves but cannot control itself."[5] A society operating with a functional instead of a hierarchical paradigm as a principle of differentiation requires different solutions: while central and causal planning (through the form of law) necessarily fails, one has to face the meta-code of inclusion and exclusion[6] through stimulating a form of heterarchical common learning.

Approaches subsequently inspired by Niklas Luhmann's systems theory appear promising to provide insights into the complex dynamics of transnational law. Their epistemic presuppositions are not limited to legal rules, but instead focus on fluid networks of knowledge or structural couplings between functional regimes. Here, the works of Gunther Teubner and Karl-Heinz Ladeur stand out particularly prominently. Both combine a system-theoretical method with post-modern legal analysis through which they aim to address the two central concerns of plurality: coordination and normativity. Both have suggested making the objective dimension of constitutional rights fruitful to resolve transnational regime collisions. In this endeavor, the horizontal effect doctrine of constitutional rights is understood as a collision rule that holds functional regimes in a balance between autonomy and self-restraint. It is through this balance, as Lars Viellechner has argued, that responsivity is progressively being established as a legal principle that applies in transnational legal collisions.[7]

[4] Luhmann, "Globalization or World Society," 74.
[5] Luhmann, "Globalization or World Society," 74.
[6] Luhmann, "Globalization or World Society," 76.
[7] Lars Viellechner, "Responsive Legal Pluralism: The Emergence of Transnational Conflicts Law," *Transnational Legal Theory* 6, no. 2 (2015): 323.

Since the discourse on system-theoretical approaches is comparably closed and thus only fully accessible to the theoretical insider, the following two sections will line out in great detail the legal thought of Gunther Teubner and Karl-Heinz Ladeur, carving out their societal epistemologies and concepts of law. The reader may be warned: systems theory has developed a specialized vocabulary that might be difficult to grasp at first sight. This introduction to the discourse will prepare the ground for an understanding of how and in which different ways the objective dimension of constitutional rights provides potential collision laws between functional regimes in the third section. In the fourth section, to convey an understanding of the model of global political society in the background of post-modern Luhmannianism, the chapter will turn toward a conception in which this focus on conflict, the claim for inclusion, has been radicalized. In a concluding section, these claims will be re-connected with the discourse on global law.

4.1 Societal Fragmentation: Teubner's Autopoietic Law Between Autonomy and Self-Restraint

Gunther Teubner's work on transnational law is situated in the context of his general legal thought that adapts Luhmann's systems theory to law.[8] Systems theory describes society as a plurality of subsystems that consist in communicative acts. Within these systems, communicative acts are related only to preceding communication of the system itself. Society, in this picture, appears as a self-referential, autopoietic communication system.[9] A system reproduces itself as all communication relates to its own history.

While Teubner describes the legal system as such as a self-referential and autopoietic communication system, he claims that Luhmann only insufficiently reflects on elementary concerns of justice.[10] He therefore combines this adaptation of systems theory to the law with further influences, particularly with post-modern readings of Jacques Derrida and the sociological legal pluralism of Eugen Ehrlich.

[8] Gunther Teubner, *Law as an Autopoietic System*, trans. Ruth Adler (Oxford: Blackwell Publishers, 1993).

[9] For an application on the legal system, Niklas Luhmann, *Law as a Social System*, trans. Klaus Ziegert (Oxford: Oxford University Press, 2008), 76–141.

[10] Gunther Teubner, "Self-Subversive Justice: Contingency or Transcendence Formula of Law?," *Modern Law Review* 72, no. 1 (2009): 1.

4.1.1 Global Bukovina

A central concern of Teubner's legal thought is the idea that law is not merely a text. His "Global Bukovina"[11] is a reference to Eugen Ehrlich's discovery that a complex legal structure evolved due to the overlapping between the societies of Bukovina villages at the eastern border of Austria-Hungary and the overarching administrative structure of the Empire.[12] Ehrlich claimed that, in contrast to what his fellow lawyers believed, the center of the development of the law was in the societies themselves.[13] Ehrlich was interested in the epistemological conditions of the "living law" beyond formal jurisprudence.

In the realm beyond the state, Teubner observes a timely asymmetry in the development of the legal system and global communication. Whereas the legal system remains on the level of the national state due to its structural coupling with domestic politics, other systems have transcended territorial boundaries. Since global communication exists in absence of a state-like structure that contains it, Ehrlich's societal legal pluralism returns. Just as in the Vienna countryside, global law develops in self-regulation beyond the eyes of the state to satisfy the demands for order. For Teubner, the transnational arena is an example for the emergence of private regimes that do not require the mediatization of politics. It is thus the fact of transnational communication that accounts for the reality of transnational law.

The primary example for this transcendence is the evolution toward a global *lex mercatoria*.[14] There is no state-like structure encountering global economic communication, yet there is a pressing need for regulation. This situation initiates a process of self-constitutionalization: operating systems

[11] Gunther Teubner, "Global Bukowina: Legal Pluralism in the World-Society," in *Global Law Without A State*, ed. Gunther Teubner (Aldershot: Dartmouth, 1996), 3–28.

[12] A detailed introduction to Teubner's relationship to Ehrlich's sociology of law can be found in Ralf Seinecke, *Das Recht des Rechtspluralismus* (Tübingen: Mohr Siebeck, 2016), 230–259.

[13] Eugen Ehrlich, *Grundlegung der Soziologie des Rechts*, 4th edn. (Berlin: Duncker & Humblot, 1989 [1913]), 12.

[14] See e.g., Gunther Teubner, "Breaking Frames: Economic Globalization and the Emergence of lex mercatoria," *European Journal for Social Theory* 5, no. 2 (2002): 199. For critique, see Ralf Michaels, "The True Lex Mercatoria: Law Beyond the State," *Indiana Journal of Global Legal Studies* 14, no. 2 (2007): 447, and Armin von Bogdandy and Sergio Dellavalle, "The Lex Mercatoria of Systems Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective," *Transnational Legal Theory* 4, no. 1 (2013): 59.

will provide themselves for these requirements in referring to the distinction legal/illegal—the legal code. The legal code creates an internal structure of the system on the one hand, and an external barrier on the other. This creation of a legal system *ex nihilo*, constitutional moments, can be observed in other functionally differentiated subsystems, so that the laws of the global social systems are many (*lex sportiva*,[15] *lex digitalis*, *lex constructionis*, *lex financiaria*, or *lex humanis*). The emerging regimes are issue-specific and therefore concerned with specific rather than universal problems, and they are self-contained in that they are not merely organs of a hierarchical superstructure.[16]

Teubner applies constitutional vocabulary to these emerging regimes.[17] Even though they do not self-constitutionalize in the public law understanding of holistic couplings between constituent power and constitutional form and remain merely fragments, they contribute to some public common good "not centrally, in the political system, which sets out the public interest requirements in all areas of society, but rather decentralized within each and every single social system."[18] As a consequence of this partial vision of the common good, they are concurring with traditional understandings of constitutions in the national state.[19]

For example, these constitutional fragments emerge in the adoption of voluntary codes of conduct by transnational corporations.[20] Corporate codes are private law fragments and constitutional fragments at the same time. The genesis of codes of conduct takes place in the global economic system. Because of their adherence to the communicative sphere of the economic system, they are primarily not more than socioeconomic norms.

[15] Antoine Duval, "Lex Sportiva: A Playground for Transnational Law," *European Law Journal* 19, no. 6 (2013): 822.

[16] Andreas Fischer-Lescano and Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," *Michigan Journal of International Law* 25 (2004): 999.

[17] Teubner is aware of the semantic difficulties of using constitutional concepts beyond the traditional understanding of the nation-state. Yet, he believes only constitutional vocabulary lives up to the complexity of the processes that he observes in private regimes. Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press 2012), 60.

[18] Teubner, *Constitutional Fragments*, 72.

[19] Teubner, *Constitutional Fragments*, Chap. 6.

[20] See e.g., Gunther Teubner, "Self-Constitutionalizing TNC's? – On the Linkage of 'Private' and 'Public' Corporate Codes of Conduct," *Indiana Journal of Global Legal Studies* 18, no. 2 (2011), 617.

Yet, their formulation in terms of legal/illegal—that is, in the terms of the legal code—allows them subsequently to enter the legal system. In methodological terms, these communicative transfers between different social systems are productive misunderstandings.[21] The legal system "observes" the emergence of corporate codes that are formulated using the differentiation of legal/illegal and incorporates them in its own communication. The recognition of fragments of communication stemming from other social systems is an important component of this method.

4.1.2 Ecological Jurisprudence

Teubner advocates a pluralist doctrine of sources that facilitates the transfer of these fragments: actors are supposed to treat something as law as soon as regimes themselves treat it as such. The reference to the legal code alone (rather than some *Grundnorm* or pedigree criterion) is decisive for the determination of legality.[22] The project of sociological jurisprudence thus transfers the normative decision on the validity of the law from pedigree to actual claims of social systems. Teubner's normative project is directed at the recognition of a plurality of communication in the law.

This responsive legal doctrine is the basis for Teubner's societal constitutionalism. In this project, he attempts to modify the hierarchical concept of law into a lively legal pluralism.[23] Teubner fundamentally mistrusts the structural coupling of the political and legal system, which allegedly aims at hegemonic influence over other societal systems.[24] In the modern concept of law, all power converges in the political system. With dramatic consequences, politics subjects other societal subsystems to its own logic. His normative concern is to preserve the plurality of functional subsystems and to prevent hegemony of single systems over others.

[21] Teubner, *Constitutional Fragments*, 94–96. Here, however, Teubner tells a more straightforward story of an intentional translation process.

[22] For detailed account of these claims, see Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford: Oxford University Press, 2001) and William Twining, *General Jurisprudence – Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009).

[23] See, for an account of the project of law without a state, Stefan Kadelbach and Klaus Günther, "Recht ohne Staat?," in *Recht Ohne Staat? Zur Normativität Nichtstaatlicher Rechtssetzung*, eds. Stefan Kadelbach and Klaus Günther (Frankfurt am Main: campus, 2011), 9.

[24] This suggests a comparison with Habermas' concept of the colonization of the lifeworld. See Jürgen Habermas, *Theory of Communicative Action*, Volume 2, trans. Thomas McCarthy, (Boston: Beacon Press, 1985), 355.

Pluralist jurisprudence in Teubner's sense thus avoids a holistic concept of law that could be universally applicable across different function systems. This does not mean, however, the neglect of any criteria to distinguish between law and non-law. Teubner knows that the "law is dependent upon criteria by which it can determine its own boundaries."[25] Yet, function systems themselves must decide what counts as law. Teubner's concept of law is thus not dependent on the state, yet can be applied from the internal perspective of legal participants.

In this concept, legal argumentation plays a crucial role. Legal argumentation does not decide cases, but it supports the decision in that it carves out the conflict: conflicts between societal rationalities do not enter the law directly, but only via reconstruction in the artificial language of the legal system.[26] Since the legal system is operationally closed, the law does not deal with the actual societal conflict, but only with the insufficient translation in its own code. This alienation of the original conflict resolves the initial problem of undecidability, since the actual conflict is transformed using legal vocabulary into arguments that can be hierarchically sorted in terms of the legal system. The law does not decide conflicts; it produces judgments.[27]

Sociological jurisprudence allows a certain context sensibility of the law. For Teubner, this is a requirement of justice.[28] The necessary undercomplexity of law toward its environment leads to a perspective of steady oscillation: law cannot adequately represent its environment, and

[25] Gunther Teubner and Peter Korth, "Two Kinds of Legal Pluralism: Collision of Transnational Regimes in the Double Fragmentation of World Society," in *Regime Interaction in International Law: Facing Fragmentation*, ed. Margaret A. Young (Cambridge: Cambridge University Press, 2012), 32.

[26] Gunther Teubner and Peer Zumbansen, "Rechtsentfremdungen: Zum Gesellschaftlichen Mehrwert des Zwölften Kamels," *Zeitschrift für Rechtssoziologie* 21, no. 1 (2000): 189.

[27] Gunther Teubner, "Altera Pars Audiatur: Law in the Collision of Discourses," in *Law, Society and Economy*, ed. Richard Rawlings (Oxford: Oxford University Press, 1997), 165; Karl-Heinz Ladeur, *Kritik der Abwägung in der Grundrechtsdogmatik* (Tübingen: Mohr Siebeck, 2004), 12.

[28] Teubner develops his sociological jurisprudence enriching his Luhmannian epistemology with a perspective committed to Jacques Derrida's *fondement mystique*. Jacques Derrida, "Force de Loi: Le Fondement Mystique de l'Autorité," *Cardozo Law Review* 11 (1989–90): 920. Teubner argues: "Justice begins where the law ends. This is the point where the hiatus between structure and operation gapes, where the legal paradox emerges and where the discourse of justice is forced to overstep the limits of legal signification." Teubner, "Self-Subversive Justice," 18–19.

this requires it to incorporate sociological knowledge. With the selective incorporation into the legal code, new injustices are created. These injustices again require the legal system to take a step toward its environment—an ecological process of law and justice, an eternal becoming. "What remains is nothing but a desperate searching which produces the permanent inner restlessness of law. New criteria of justice are relentlessly invented and new legal arguments constructed, and these very constructions destroy the possibility of justice. The search for justice becomes the addiction of law, destructive and inventive at the same time."[29]

To improve law's capacity to respond to these concerns of justice adequately, Teubner suggests a sociological enlightenment of the law. The law needs to be sensible toward its environment. This can be done with the help of dogmatic concepts that "develop conceptual sensors as to whether or not its treatment of collisions has harmful effects on its social environment."[30] Law should equally become reflexive about its negative externalities. What the law needs are thus sociological descriptions of the world that it can process internally. Yet, law remains an autopoietic system: sociological knowledge cannot enter directly into its communication, and the system can merely be irritated by sociological communication. The law decides itself which use of sociological arguments is legitimate.[31] Even Teubner recognizes that the choice that the law makes in that regard may be limited.[32]

4.1.3 Societal Constitutionalism Beyond the State

Societal constitutionalism describes the self-constitutionalization of autonomous function systems. The frictions that the colliding universality discourses produce require an adaptation of the law that creates a balance between autonomy, on the one hand, and self-limitation, on the other.[33] The reflexive legal doctrine thus aims at holding the balance in legal collisions beyond the state. Autonomy is conserved as a concept from the statist–sovereigntist tradition of law, but re-formulated in terms of functionally

[29] Teubner, "Self-Subversive Justice," 20.

[30] Teubner, "Altera Pars Audiatur," 168.

[31] Teubner, "Altera Pars Audiatur," 165–166.

[32] Teubner, *Law as an Autopoietic System*, 95, 123f.

[33] Gunther Teubner, "Constitutionalising Polycontextuality," *Social and Legal Studies* 20 (2011): 209. For a discussion, see Neil Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2014), 99.

differentiated subsystems. Hierarchical conflict management as provided by the state steps back for heterarchical self-organization of autonomous regimes.

Constituent power does not merely appear as a semantic artifact. Rather, it is constantly generated in communicative processes.[34] Constitutional power is "a communicative potential, a type of 'social energy', literally as a 'power' that, via constitutional norms, is transformed into a 'pouvoir constitué', but which remains as a permanent irritant to the constituted power."[35] Yet, this does not reduce his conception to being merely interested in communication rather than in flesh and blood. Teubner does not want to go as far in his uncoupling from the traditional perspective. "The *pouvoir* presents itself in the structural couplings between social systems and the consciousness and corporeality of actual people."[36]

Decentralized constitutions provide a space for self-reflection of the given function system. As no single function system can define the common good for the others, the constitutional question is thus a question of balancing the relation of self to other: "The double connection between autonomy and responsibility – of individuals and of social systems – is possibly the most important message to arise from a sociology of constitutions […]. The answer is that only reflexion within the social system, in its specific historical situation, can determine its own function and contribution."[37]

On the one hand, Teubner allocates the conflict resolution in the entities themselves. On the other, he assumes that self-restraint in practice might require considerable external pressure. In the competition between different societal subsystems, "self-correction seems only possible at the very last minute."[38] Constitutional moments are therefore crucially connected with the experience of crisis. "Ultimately, then, it is a system's pathological tendencies that bring forth the constitutional moment, the moment of catastrophe, in which the decision is made between the energy's

[34] These ideas seem very close to Andreas Fischer-Lescano, "Redefining Sovereignty Via International Constitutional Moments," in *Redefining Sovereignty: The Use of Force after the Cold War*, eds. Michael Bothe, Mary Ellen O'Connell, and Natalino Ronzitti (The Hague: Martinus Nijhoff, 2005), 335–364. See also Teubner, *Constitutional Fragments*, 62–64.

[35] Teubner, *Constitutional Fragments*, 63.

[36] Teubner, *Constitutional Fragments*, 63.

[37] Teubner, *Constitutional Fragments*, 71–72.

[38] Teubner, *Constitutional Fragments*, 82.

complete destruction and its self-restraint."[39] In the collision of the constitutional rules of different regimes, traditional conflict-of-laws approaches fail since they always require the reference to a common good.[40] Yet, "the tunnel vision of function regimes makes it difficult to orient them to the public interest of a polity."[41]

What is thus needed is a method that grants regimes their autonomy, but avoids this tunnel vision. Thus, functionally or territorially differentiated regimes formulate a regime-specific *ordre public transnational*. Single regimes project what, from their perspective, is a global public interest. They use the idea of a unitary constitution as a fiction: "The 'unity' of a constitution is then only to be understood as a project of an 'imaginary fabrication' in the cultural sphere and as a 'fictional reality'. Each regime develops its imaginary world constitution as it were 'holographically' (i.e. from a perspective in which the public interest appears differently depending on the viewpoint), to which it orients its own operations and limits its options."[42] The reason why function systems project this fictional *ordre public transnational* can be both the specific necessity to externalize the paradox of its own foundation[43] and external pressure.

Teubner's transnational law brings together the fact of autopoiesis and normative demands for the adequacy of the law with its environment as a requirement of justice. It combines (seemingly paradoxical) autonomy and isolation in autopoiesis with ecological responsivity. Both elements oscillate in societal constitutionalism, which becomes half sociological study and half plea for a better world. Yet, his formulation of regimes as *pouvoir constituant* nourishes suspicions on Teubner's fidelity to his postmodern starting points. These suspicions and a possible alternative appear in the writings of Karl-Heinz Ladeur.

[39] Teubner, *Constitutional Fragments*, 82.

[40] See the discussion in Chap. 3.4.

[41] Teubner, *Constitutional Fragments*, 156.

[42] Teubner, *Constitutional Fragments*, 158.

[43] Gunther Teubner, "Exogenous Self-Bindung: How Social Systems Externalise their Foundational Paradox in the Process of Constitutionalisation," in *Sociology of Constitutions: A Paradoxical Perspective*, ed. Alberto Febbrajo and Giancarlo Corsi (London: Routledge, 2016), 30.

4.2 Compatibility of Fluctuating Knowledge: Ladeur's Networks of Global Law

At first glance, there are similarities between the transnational law conceptions of Karl-Heinz Ladeur and Gunther Teubner. Both approach the conflicts of transnational law with a perspective influenced by systems theory and post-modern philosophy, and both have been pointing to the importance of the network concept. Yet, Ladeur admonishes the insufficiency of Teubner's societal constitutionalism.[44] More radically, constitutionalized regimes "are not themselves closed, but are defined by a dynamic consisting of overlapping norms and practices of varying provenance."[45] According to Ladeur, Teubner's attempt to construct a unity of law through harmonizing collision rules fails because the fluid relations are not accessible to closure.

4.2.1 Radical Fragmentation of the Knowledge Society

For Ladeur, globalization is but one phenomenon that illustrates a radical transformation of social systems, most visibly the economic system, into the "knowledge society."[46] Since society loses its transcendental foundation, it ceases to provide for collectively and universally shared knowledge. Rather, this knowledge becomes fragmented in differentiated societal subsystems. This transformation takes place on many levels, so that what can be observed in the transnational realm does not structurally differ from the development in national law.[47]

Ladeur's legal analysis is informed by Jean-François Lyotard's *differend* that leaves the unitary (Cartesian) subject moving toward a plurality of heterogeneous language games.[48] Similar to Derrida, Lyotard observes

[44] Karl-Heinz Ladeur, "The Evolution of the Law and the Possibility of a 'Global Law' Extending beyond the Sphere of the State," *Ancilla Iuris* (2012): 241.

[45] Ladeur, "The Evolution of the Law," 242.

[46] Karl-Heinz Ladeur, "Globalization and the Conversion of Democracy to Polycentric Networks – Can Democracy Survive the End of the Nation State?" in *Public Governance in the Age of Globalization*, ed. Karl-Heinz Ladeur (London: Routledge, 2004), 89, 98.

[47] Ladeur, "The Evolution of the Law," 236.

[48] For a critique of Ladeur's use of this terminology, see Matthias Kronenberger, "Theorien der Radikalen Fragmentierung: Ladeur, Weber, Wiethölter," in *Neue Theorien des Rechts*, eds. Sonja Buckel, Ralph Christensen and Andreas Fischer-Lescano, 2nd edn. (Tübingen: Mohr Siebeck, 2008), 229.

the moment of legal decision: "As distinguished from a litigation, a differend would be a case of conflict, between at least two parties, that cannot be resolved for lack of a rule of judgment applicable to both of the arguments. One side's legitimacy does not imply the other's lack of legitimacy. However, applying a single rule of judgment to both in order to settle their *differend* as though it were merely a litigation would wrong (at least) one of them (and both of them if neither side admits this rule)."[49] Discourses, according to Lyotard, are closed off and isolated because of the differences in their internal grammar. The result is no *litige* as fair trial, but a *differend*—which only has illegitimate solutions.

Lyotard's focus on language allows Ladeur to account for a radical indeterminacy of law and its knowledge structure.[50] The differend does not merely focus on the legal dispute; instead, it is "the unstable state of language wherein something which must be able to be put into phrases cannot yet be."[51] Lyotard claims that language itself is radically fragmented, and fragments receive different meanings when they are in different contexts; a fragment in the law will be understood differently than in arts, economy, or sports.[52] Thus, the process of interpretation of the law is bound to its social environment. Legal discourse, however, tends to blind out the socially determined narrative character of legal decisions in seemingly scientific argumentation. Yet, according to Lyotard, it is the narrative that contains the important dimensions of decisions, making assumptions about political, economic, and ethical conditions that are not sufficiently addressed in the use of legal language.

It is Ladeur's political agenda to bring these narrative background conditions of legal decisions back into the focus of legal analysis. He combines this analysis of language with the functional differentiation of society in systems theory and connects to Teubner's analysis of autopoietic law. Yet, he is not convinced by the classical answer given by systems theory that the subsystems are linked via structural coupling. Rather, he asks: "How are we to present to ourselves the evolution of the legal system, if the market has to be regarded as having a 'dissipative structure' that is subject to

[49] Jean-François Lyotard, *The Differend*, trans. Georges Van Den Abbeele (Minneapolis: University of Minnesota Press, 1988). See also Simon Malpas, *Jean-François Lyotard* (London: Routledge, 2002), 60.

[50] Karl-Heinz Ladeur, *Postmoderne Rechtstheorie*, 2nd edn. (Berlin: Duncker&Humblot, 1995), 80f.

[51] Lyotard, *Differend*, 13.

[52] Kronenberger, "Fragmentierung," 240.

turbulence?"[53] This requires the management of the internal conflicts that arise due to the complexity of the interplay of the differentiated subsystems.[54] This leads him to require a higher level of reflexion in the law: "The coordination of operations of legal subjects requires a procedurally reflected form of the production, maintenance and variation of models of legal action and of the 'common knowledge' within the law."[55]

4.2.2 Weak Compatibility Through Meta-Rules

For Ladeur, the basic currency of the legal decision is knowledge, not form. This means that the model of rules has to be replaced by a network structure of knowledge fluctuation. The function of law is then to allocate competences and build institutions that facilitate the fluctuation of societal knowledge.[56] Law is a flexible cognitive mechanism that allows for continuing adequacy of social systems toward their social environments through adaptive learning. For Ladeur, a network is "more than a variously densified grouping of negotiated relationships among stable subjects."[57] Rather, network analysis has the capacity to understand the complementarity and interdependences of relations and the autopoietic character—the network writes itself.[58] It focuses on the structure and connections of the nodes, which stabilize the system. It is supposed to be more powerful than traditional legal analysis, which merely looks at the single parts and tries to isolate them from their surrounding environments.

Yet, the law retains a certain kind of autonomy that must not be confused with the autonomy it receives in formalist-statist accounts. "As we look at the law, this interplay of reciprocal observation, the processing of 'anonymous conventions', models of behaviors and standardizations is easily lost to our view behind the myth of the 'unity of the legal system'."[59] Rather, the law has an autonomous and central function in the moderation

[53] Ladeur, "The Evolution of the Law," 226 citing Marc Amstutz, *Evolutorisches Wirtschaftsrecht* (Baden-Baden: Nomos, 2002), 77, 81f.

[54] Ladeur, *Postmoderne Rechtstheorie*, 161.

[55] Ladeur, "The Evolution of the Law," 229.

[56] Lars Viellechner, "The Network of Networks: Karl-Heinz Ladeur's Theory of Globalization," *German Law Journal* 10, no. 4 (2009): 519.

[57] Karl-Heinz Ladeur, "Towards a Legal Theory of Supranationality – The Viability of the Network Concept," *European Law Journal* 3, no. 1 (1997): 47.

[58] Ladeur, "Supranationality," 48.

[59] Ladeur, "The Evolution of the Law," 225–226.

of knowledge and the stabilization of institutions under conditions of uncertainty. This could be described as a more fundamental *autopoiesis* concept than in Teubner's theory. The legal system has autonomy not only in relation to its own reproduction, but it has become independent from outside interventions.

With the rejection of unitary subject formation comes the opposition to traditional constitutional theories that rely on the discursive will formation of constitutional power.[60] Constitutional theories support a hierarchical model of knowledge formation, which assumes it is possible centrally to collect and administrate the knowledge necessary for legal decisions.[61] This assumption, however, is detrimental to law's capacities of adaptation to an increasingly dynamic environment, and it crucially underestimates society's capacity to self-governance. The function of the law must be re-formulated as supporting, rather than constraining, this heterarchical self-governing rationality. The cure is the emergence of a relational-procedural rationality of the law that adapts law to a continuous collision of legal regimes, "for which compatibilization meta-rules can only be developed on a case-by-case basis which no longer allows of any substantial unity of the law."[62]

4.2.3 Networks of Global Law

Ladeur's legal analysis thus places an emphasis on knowledge and learning. Borrowing from economic vocabulary, the problem seems to be how to prevent market failures in these fluid networks of knowledge. The formulation of the problem resembles Teubner's concern of preventing hegemonic influences of single societal rationalities on others and preserving system plurality. A central aspect of this theoretical endeavor is an adequate perception of the radically fragmented character of global law and the change in perspective on law's functions which this fragmentation requires. On the one hand, global law must be understood procedurally, "as a law which produces its own preconditions for validity and recognition."[63] On the other hand, this model of law provides forms that can stabilize the exercise of political power.[64]

[60] Karl-Heinz Ladeur, "Discursive Ethics as Constitutional Theory – Neglecting the Creative Role of Economic Liberties?," *Ratio Iuris* 13, no.1 (2000): 95.

[61] Ladeur, *Kritik der Abwägung*.

[62] Ladeur, "The Evolution of the Law," 233.

[63] Ladeur, "The Evolution of the Law," 238.

[64] Ladeur, "The Evolution of the Law," 238.

Ladeur's theory thus reshapes public governance into a "network of networks" that facilitates observation and reflexive self-observation.[65] In line with its heterarchical focus, it supports institutional models that are comparably weak: Ladeur favors a loose structure for the *European Union* (EU), because this provides the necessary openness and flexibility for the societal rationalities to unfold.[66] The key for links between single entities of networks and between networks is the knowledge base. This base is shared via accountancy rules and provisions of openness and through inclusion mechanisms in which institutions appear as mediators for fluctuating knowledge.[67] Basing the account of global law on shared knowledge makes it "possible to conceive of law as an emerging 'far from equilibrium' phenomenon, if the underlying transitional phenomena have not yet stabilized."[68]

In order to support such structure, Ladeur re-formulates the role of constitutional rights as negative liberties.[69] He claims that the negative dimension of constitutional rights is misconceived simply as a defense against public intervention. In his view, they allow for the constant self-reproduction of society in private actions. Society, as "positive externality of private action," requires a legal structure that allows for the (unconscious) cooperation between decentralized actors that share knowledge and make decisions precisely because and when they are not held responsible for unexpected consequences of their actions. Under conditions of uncertainty, negative liberties create spaces for private action and knowledge production through experimenting.[70]

Ladeur suggests this re-formulated concept of constitutional rights as a restrictive collision rule between societal rationalities. The idea seems to be to restrict interventions into concurring rationalities only and insofar as private action brings about negative externalities, that is, having a disruptive effect that would finally lead to the self-destruction of the said substructure. Judicial decisions shall thus be oriented simply toward avoiding destructive relations within network structures, and not trying to implement social rationalities on the basis of a reconstruction of a common

[65] Viellechner, "Network of Networks," 525.

[66] Ladeur, "Supranationality."

[67] See Viellechner, "Network of Networks," 526–528 for further illustration.

[68] Ladeur, "The Evolution of the Law," 228.

[69] Karl-Heinz Ladeur, *Negative Freiheitsrechte und Gesellschaftliche Selbstorganisation* (Tübingen: Mohr Siebeck, 2000).

[70] For a summary, see Viellechner, "Network of Networks," 521.

whole. In the transnational arena, the concept of constitutional rights as collision rules would then implement small-scale coordination between networks through national and international courts, which prevents intervention as long as the intervening actor is not confronted with effects that impede on its own existence.

4.3 Horizontal Effect of Constitutional Rights as Collision Rule

Based on a redefinition of constitutional rights as negative liberties that defend societal rationality against the state, Ladeur suggests the "transsubjective" dimension of constitutional rights as collision rules to decide conflicts between functional subsystems.[71] Negative liberties can defend single societal rationalities against the hegemonic influence of others and, ultimately, secure their independent existence. This section discusses the implications of this claim. It will show how Teubner modifies Ladeur's concept by adding an additional component to the objective dimension of constitutional rights: the active status. The objective dimension of constitutional rights as collision rules, comprising the active and negative status, is then synthesized by Lars Viellechner's theory of responsivity. According to him, we can observe how the horizontal effect of constitutional rights enters legal discourse through a customary principle of responsivity.

4.3.1 Responsivity and the Active Status

The negative dimension of constitutional rights as collision rules is also shared by Teubner, who describes them as collective, institutional discourse rights that are directed against any social system with totalizing tendencies and that extend to different "communicative matrices" in societal discourses.[72] Teubner and Ladeur thus agree on the reformulation of constitutional rights as negative liberties, allowing for a "self-defense" of social systems. A practical example for the doctrine of the horizontal effect of constitutional rights is the so-called publication bias,

[71] Karl-Heinz Ladeur and Lars Viellechner, "Die Transnationale Expansion Staatlicher Grundrechte: Zur Konstitutionalisierung Globaler Privatrechtsregimes," *Archiv des Völkerrechts* 46, no. 1 (2008): 42.

[72] Gunther Teubner, "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors," *Modern Law Review* 69, no. 1 (2006): 327.

summarizing the mechanisms that transnational pharmaceutical groups use to influence the publication of scientific results.[73]

In his application, Teubner crucially modifies the concept. He argues: "Instead of imposing duties to protect exclusively on state actors, third party effects must actually address the private actors who violate constitutional rights themselves and *at the same time activate counter-forces within society*."[74] The formulation points to a more active role of empowerment. A solution for the collision of subsystems of science and economy, for example, "takes up the particular dynamic of the conflict and protects the integrity of science from the inside, by motivating large numbers of private actors to become involved on the basis of their respective functional rationalities. In so doing it mobilizes social forces to combat the expansionary tendencies of the pharmaceutical networks. […] There is certainly a political element here, but it does not operate as external state control, on the contrary it alters the internal self-reproduction of academic activity."[75] This active dimension of the horizontal effect of constitutional rights introduces the dimension of autonomy in the argument, which allows regimes to defend their preferences actively.

This positive component of empowerment in the doctrine of horizontal effects has been further developed by Lars Viellechner, who argues for a new style of collision laws in the collision of transnational regimes.[76] In line with both Ladeur (transsubjective rights) and Teubner (institutional discourse rights), Viellechner's theory extends constitutional rights to an objective dimension, comprising active and negative status, which protects the specific functions of the sub-regimes.[77]

[73] Isabell Hensel and Gunther Teubner, "Horizontal Fundamental rights as Conflict of Laws Rules: How Transnational Pharma-Groups Manipulate Scientific Publications," in *Contested Regime-Collisions – Norm Fragmentation in World Society*, eds. Kerstin Blome et al. (Cambridge: Cambridge University Press, 2016), 139.

[74] Hensel and Teubner, "Horizontal Fundamental Rights," 144 (my emphasis).

[75] Hensel and Teubner, "Horizontal Fundamental Rights," 158–159.

[76] Lars Viellechner, *Transnationalisierung des Rechts* (Weilerswist: Velbrück, 2013), 217f. See also Lars Viellechner, "The Constitution of Transnational Government Arrangements," in *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, eds. Christian Joerges and Josef Falke (Oxford: Hart Publishing, 2011), 435.

[77] Viellechner, *Transnationalisierung*, 218–219.

Viellechner derives this from a recurrence to the internal logic of constitutional rights as "trumps" in the absence of a world legislator.[78] His argument builds on a historical perspective, which points to the increasing positivation of constitutional rights.[79] Yet, Viellechner admits that it would be inappropriate if courts merely transposed the own constitutional rights doctrine on cases with transnational concern.[80] Rather, a *substantive law approach* should apply, suggesting that "the views of all legal orders which have significant claims to control a multistate situation should be recognized to the degree of concern each possesses in the given situation."[81]

4.3.2 Reflexive Decentral Conflict Resolution in Theory and Practice

Observing legal practice, Viellechner suggests a customary principle of responsivity. Different legal orders "constrain themselves because they acknowledge that each of them takes up a regulatory task that none of the others may accomplish on its own. Such structural openness […] presupposes the different legal orders to develop a capacity of 'reflexion' on their own identity," allowing for the insight that they form part of a larger legal system.[82] The interdependences between the different layers of law thus induce the necessity for systemic reflexivity. The recognition of the complex interplay of functional regimes then ultimately increases the likelihood of self-restraint.

[78] Viellechner, "Transnational Government Arrangements," 454–455 refers to a concept by Oliver Gerstenberg, "Private Law, Constitutionalism and the Limits of the Judicial Role," in *Torture as Tort: Comparative Perspective on the Development of Transnational Human Rights Litigation*, ed. Craig M. Scott (Oxford: Hart Publishing, 2001), 702.

[79] Viellechner, "Transnational Government Arrangements," 450. See also Gunther Teubner, "Transnationales Recht: Legitimation durch Grundrechtswirkung," *Juristenzeitung* 70, no. 10 (2015), 506–510, who explicitly subscribes to this suggestion.

[80] Viellechner, *Transnationalisierung*, 293.

[81] Viellechner, *Transnationalisierung*, 295 with reference to Arthur von Mehren, "Special Substantive Rules for Multistate Problems," *Harvard Law Review* 88, no. 2 (1974): 347. See, in further detail, Sect. 3.4.2 and 3.4.3.

[82] Viellechner, "Responsive Legal Pluralism," 324. It is the discursive perspective that ultimately comes to mind in his reformulation of constitutional rights as "trumps" referring to Oliver Gerstenberg who argues that the performative goal of invoking constitutional rights is to trigger demands of justification and, ultimately, public deliberation. See Viellechner, "Transnational Government Arrangements," 454, citing Gerstenberg, "Private Law," 700.

According to Viellechner, the principle of responsivity "combines complementarity and subsidiarity as flipsides of the same coin. On the one hand, the different legal orders may expand their scopes of application if there are gaps in the foreign law. On the other hand, they must confine their scopes of application in cases of overlap. On no account, however, may any one of them be compelled to relinquish its proper identity."[83] Viellechner claims that we can observe the emergence of a responsive transnational conflicts law in positive law and in legal practice.[84] In order to provide empirical evidence, he refers to the emergence of transnational Internet governance and the well-known decisions of the European multilevel judiciary: *Bosphorus*, *Solange I and II*, *Görgülü* and *Kadi*.

With respect to the empirical evidence, it might be overly optimistic to describe the judgments in question as examples for the emergence of responsivity.[85] As the analysis of the second chapter has demonstrated, the recent development in plurality rather points to unmediated confrontation instead of responsivity. In *Kadi*, for example, responsivity is difficult to maintain. The *European Court of Justice* (ECJ) regarded due process protection of individuals on the so-called terror lists as deficient. It challenged the application of the sanctions in its jurisdiction and forced the *Security Council* to introduce due process procedures. The *United Nations* sanctions system subsequently self-constitutionalized—yet the ECJ was unwilling to deviate from the standards it applied in its own constitutional order.[86] There was not much to see of responsivity or dialogue. A similar argument applies to *Sentenza 238 of 23 October 2014*, decided at the *Italian Constitutional Court*.[87] Where core identities of the respective orders collide, no actor in either order would accept a collision law deviating from the bottom line.

Rather, we see a contrasting development toward reterritorialization. The *ordre public* of the court of last resort is implemented, which is still in most cases a territorially bound regime. Viellechner notes that the actual, positive collision law has mostly been adopted in the framework of the EU and the *European Convention of Human Rights*.[88] That this collision law

[83] Viellechner, "Responsive Legal Pluralism," 328.

[84] Viellechner, "Responsive Legal Pluralism," 326f.

[85] See, in further detail, the analysis of Chap. 2.1.

[86] Matej Avbelj and David Roth-Isigkeit, "The UN, the EU and the Kadi-case: A New Appeal for Genuine Institutional Cooperation," *German Law Journal* 17, no. 2 (2016): 153.

[87] See Sect. 2.1.1.

[88] Viellechner, "Responsive Legal Pluralism," 326–327.

has only been established in the European legal order is not necessarily a counterargument for the prospects of the expansion of this idea to the rest of the world society. Currently, however, understanding the empirical evidence as pointing in the direction of an emerging principle of responsivity might be overly optimistic.

Independently of the empirical considerations, the normative claim for reflexive decentral conflict resolution could be evaluated in a different light. For Viellechner, responsivity can serve to solve the legitimation problems of transnational law. He claims that this active status is required to mitigate the consequences from the absence of democratic procedures. "They [constitutional rights with horizontal effect] institutionalize procedures of norm-creation, in that they found and limit it at the same time."[89] This allows Viellechner to envisage a sort of constitutionalization from the outside, in which the regimes are forced into responsivity.[90]

All three variants of the horizontal effect of constitutional rights show strong resistance against any third-party involvement in these internal processes of balancing. This resistance, in the theories of Ladeur and Teubner, is understandable given the violent character of legal decisions that are described in post-modern theories. And it is in line with Luhmann's *Grundnorm* of world society: "[I]t is no longer norms (in the form of values, prescriptions or purposes) that steer the prior selection of knowledge."[91] Yet, the interesting dimension of reading Teubner and Ladeur in contrast to each other is revealed in the notions of adequacy that both authors establish in order to justify their reformulation of constitutional rights.

For Teubner, the goal is retaining the balance between competing social systems. Only a subsystem itself can define its *ordre public* from its own system-internal perspective. This unity of particularistic views is what Teubner aims to protect. Adequacy for Ladeur, on the other hand, means not to constrain the self-regulative potential of society. He claims: "The law must go hand in hand with a more abstractly defined 'public logic' as a rule of reflexion, which helps to keep the process of the law in motion, if the law is no longer to assume any spontaneous reproduction of a set of behavior models."[92] This spontaneous reproduction should

[89] Viellechner, *Transnationalisierung*, 224.
[90] Viellechner, *Transnationalisierung*, 285.
[91] Luhmann, "Weltgesellschaft," 60.
[92] Ladeur, "The Evolution of the Law," 230.

moderate progress in allowing for a free flow of knowledge. A public logic serves to make interventionism dispensable and ensures a free flowing of societal forces.

Both notions of adequacy raise concerns of plausibility. Teubner's attempt at creating a procedural rationality entails the equality of social subsystems. But this claim seems ultimately no more plausible than the claim that aims to prefer some rationalities over others. In Ladeur's theory, the preference lies on a free processing of knowledge. Yet, it might be at least questionable whether the knowledge of the market society should be freely processed. Here, the problem is rather that in the collision of different knowledge bases, it is most of the time a specific kind of knowledge that is established as major narrative in society. The point is that arguments about adequacy are arguments about societal ideal types and their problem constellations. Both system-theoretical approaches collide in their views on this question of adequacy.

Teubner seems to subvert his claim for balance by supporting the active dimension of the horizontal effects doctrine as collision laws. Precisely, this dimension is not about merely negative self-restraint; it is about the active emancipation of social subsystems. The concept of emancipation, however, is directed to the outside and potentially supports hegemonic tendencies of single subsystems. The negative dimension following Ladeur's theory trusts in a market-like expansion of societal knowledge, held in balance by an "invisible hand." This might be overly optimistic, given that the fact of social crises seems all too obvious. Teubner uses these crises as a starting point to induce societal constitutionalization. The result is simply that subsystem restraint is as problematic as subsystem activism.

4.3.3 Post-modern Epistemology or Normative Closure?

The reason for this, one might argue, is a wrong choice of the basic unit of normativity. While Ladeur unduly narrows his perspective on the process of knowledge fluctuation, Teubner's balance merely addresses functional subsystems. This section argues that these theoretical moves involve a conception of societal collisions that does not live up to its own prerequisites. If only function systems or knowledge is colliding, then it is indeed difficult to find a precise line between autonomy and self-restraint.

The post-modern readings of Derrida and Lyotard, on which the societal epistemology of Teubner and Ladeur is based, have laid special emphasis on the necessity to resist closure facing the relationship between law and

society. Particularly for that reason, these conceptions seemed enlightening in the transnational realm, since their concept of law is not dependent on essentialist notions of state and sovereignty. In comparison to traditional state-based concepts, they enjoy a certain kind of epistemic superiority. Yet, this epistemic superiority can only be turned into actual normative arguments when it proves to follow its own rules consistently. Here, for example, we can recall Ladeur's critique of the self-constitutionalization thesis, in which he shows that Teubner ignores that regimes "are not themselves closed, but are defined by a dynamic consisting of overlapping norms and practices of varying provenance."[93] In that, Ladeur claims, Teubner tries to construct a unity of law.

The post-modern readings demand an avoidance of the construction of essentialist subject positions and the attempt to reach for normative closure. Teubner finds his subjects not in humanity in the first place, but in social subsystems. These are the ones lifted into the subject positions that Teubner wants to protect. With that, Teubner runs into the paradoxical situation that on a normative level he protects his empirical premises.[94] Teubner's normative pluralism is directed against structural couplings of politics, law, and economics, which represent the progress narrative of democracy and welfare. This normative direction is the static determinant in his dynamic theory. And here, the system-theoretical critique of normativity applies to Teubner himself: statism establishes structures that prevent a clear look at complexity. The post-modern starting point would precisely prevent him from taking a stand in these debates, if he followed it consistently.

With regard to Ladeur's approach, subject positions are more difficult to identify. Not accidentally, Ladeur's criticism of Teubner served to identify normative subject positions in his writings. The reformulation of constitutional rights as negative liberties to defend societal rationalities was introduced to strengthen the potential of society for self-organization. Ladeur thus swaps the protected subject from individual to society as a whole. Yet, society remains subject, and its market society-adequate emancipation Ladeur's normative goal, which can be scrutinized for its adequacy as well.

Both positions thus do not resist closure and combine an in-depth analysis of the legal process in between paradoxes and linguistic fallacies with a considerable normative preference. This normative stand is what makes both theories interesting and valuable contributions to global legal

[93] Ladeur, "The Evolution of the Law," 242.
[94] Seinecke, *Rechtspluralismus*, 259–260.

thought. Yet, their appeal to post-modernity seems questionable when it comes to the consistent thinking in that framework. To stay with Lyotard would have meant to stay on the level of analysis of the differend and to take him seriously when he says that the *differend* is "a case of conflict, between at least two parties, that cannot be resolved for lack of a rule of judgment applicable to both of the arguments."[95] For Lyotard, the narrative element in the judgment means the absence of subjectivity—in the moment of decision, the subject positions constructed by the law cease to exist, be they functionally differentiated subsystems or society as a whole.

These formulations of subject positions lead to a foundational problem. Since the source of normativity is not dependent on societal articulations by subjects made of flesh and blood, the line between activism and self-restraint becomes blurred. Both models intensively rely on comparative observations of different forms of organization. Yet, humanity as the basic unit of societal normativity is missing as a legal subject, so that it becomes difficult to take a clear stand in contested collisions. One option that will be further explored in the next section is thus the reintroduction of human articulations as a source of normativity in the model.

4.4 Radicalizing the Active Dimension of the Horizontal Effects Doctrine

Leading the system-theoretical model back to this basic source of normativity requires a radicalization of the active dimension of the horizontal effects doctrine that avoids granting subject positions to functional systems or market expansion. This section explores approaches that understand social movements as the colliding constitutional subjects in world society. Taking the legal-methodological assumptions of systems theory as its starting point, it equally carves out an understanding of the political model behind the Luhmannian formulation in line with a specific strand of radical left politics.

4.4.1 Social Movements as Constitutional Subjects

Equally starting with a systems-theoretical perspective, Andreas Fischer-Lescano qualifies social movements as constitutional subjects of world society. His claim combines the methodological assumptions that have been presented in this chapter so far with a radical view on the political

[95] Lyotard, *Differend*, 13.

process. As the law creation is not exclusively dependent on the political system, protests and articulations can contribute to legal change. In particular in the area of human rights, the development of the law depends ultimately on articulations by a global *colère publique*.[96] Fischer-Lescano exemplifies this theoretical perspective with the successful claim for justice of the *Madres de la Plaza de Mayo*.[97] The *Madres* are a civil society movement that protested against the practice of forced disappearance by the Argentinean military dictatorship from 1976 to 1983 as a method to intimidate dissidents. Every Thursday, the mothers of the *desaparecidos* went round the Plaza de Mayo with white headscarves protesting for justice. And they were successful—the laws of amnesty for those responsible for the forced disappearances were declared unconstitutional.

The reformulation of social movements as constitutional subjects draws on the pluralist doctrine of legal sources.[98] The recognition of a norm as legal depends on whether it is vested with the validity symbol. As this symbol is transported through communication, law creation does not exclusively belong to the realm of the political system. Rather, it can occur in the periphery of functionally differentiated subsystems.[99] This conceptual move is possible as the Luhmannian concept of law is dependent neither on pedigree nor on sanction criteria, but exclusively on counterfactual normative expectations. If counterfactual normative expectations arise in civil society, they can induce legal communication.

In Fischer-Lescano's view, this incorporates a call to arms: "If global law wants to be more than simply oscillating between apology and utopia, then it has to take its politization as occasion to take the right choices between *colère publique* and *colère politique*. It has to fight for its independence."[100] Here, the Luhmannian model can be plausibly combined with a view of radical emancipation, in which the plurality of global law induces legal and, ultimately, social change.

[96] Andreas Fischer-Lescano, *Globalverfassung – Die Geltungsbegründung der Menschenrechte* (Weilerswist: Velbrück, 2005), 68–71.

[97] Fischer-Lescano, *Globalverfassung*, 31f.

[98] See above, Sect. 4.1.2.

[99] My translation. See, Fischer-Lescano, *Globalverfassung*, 260: "Rechtsetzung ist ein Vorgang in der Peripherie des Rechts. […] Diese Operationen können auch der globale Skandal, der völkerrechtlich bindende Vetrag und sonstige *settlement*-Prozesse sein […]."

[100] My translation. See Fischer-Lescano, *Globalverfassung*, 276: "Will das Weltrecht mehr sein, will es nicht zwischen Apology und Utopia oszillieren, dann muss es seine Politisierung zum Anlass nehmen zwischen *colère publique* und *colère politique* die richtigen Entscheidungen zu treffen. Es muss sich seine Unabhängigkeit erkämpfen […]."

Such a radicalization avoids the normative closure that has been diagnosed in the previous section. Subjectivity arises here not for functionally differentiated subsystems, but instead depends on actual series of articulations. This result, however, is not a consequence of systems-theoretical analysis: Luhmannian thought does not necessarily lead to a radical emancipatory stance. Rather, as a sociological theory, it remains open to diverse normative reformulations. At the same time, the mistrust in law creation in the political system and the remedy through social movements are common elements of the post-modern Luhmannian approaches.

A similar theoretical perspective appears in traditional radical left scholarship that diagnoses an imperialistic core for global law. In Michael Hardt's and Toni Negri's *Empire*, it is the plurality of international law that turns it into an important tool for a new form of imperialism. While traditional models of imperialism rely on sovereignty, state, and interstate conflicts, Hardt and Negri argue that the shift of global legal relations, away from the paradigm of sovereignty, complicates the problem. This fluidity makes imperial relations more difficult to capture. "In this smooth space of Empire, there is no place of power – it is both everywhere and nowhere."[101] *Empire*, according to Hardt and Negri, aggravates the traditional hegemonic relations within and across nation-states. "[It] establishes no territorial center of power and does not rely on fixed boundaries or barriers. It is a decentered and deterritorializing apparatus of rule that progressively incorporates the entire global realm with its open, expanding frontiers."[102] International legality, in difference to earlier forms of imperialism, plays an important role in these new power relations.

Similar to Fischer-Lescano, Hardt and Negri seek remedy in an unfolding of social forces, the *Multitude*. In contrast to the system-theoretical formulation, however, the *Multitude* is distinguished from other conceptions of political subjectivity in that it cannot be defined under any specific principle of unity.[103] The creative and cooperative capacity for society lies in this unconstrained plurality of the *Multitude*, whereas *Empire* needs to

[101] Michael Hardt and Antonio Negri, *Empire* (Cambridge: Harvard University Press, 2000), 190.

[102] Hardt and Negri, *Empire*, Preface, xii.

[103] This view on plurality arises under the necessity to construct a post-Marxist theory, which does not rely on the concept of the working class as a subject of emancipation. Hardt and Negri, *Empire*, 393f.

constrain this capacity in order to exist.[104] The *Multitude's* call to arms involves the claim that "the power of the proletariat imposes limits on capital and not only determines the crisis but also dictates the terms and nature of the transformation. The proletariat actually invents the social and productive forms that capital will be forced to adapt in the future."[105] In both conceptions, an unleashing of societal conflict will help to overcome the power relations within a fundamentally technocratic society. The plurality of global law appears as an ideological, self-expanding machine and as a threat that overgrows societal life. The next section examines the preconditions of this claim in greater detail before ultimately sketching the political model behind these assumptions.

4.4.2 Ideological Deep Structure of International Law

In global legal thought, the basic assumption that law ultimately serves as an ideological tool to implement powerful interests appears in many different forms.[106] Here, it is the technical dimension of the law that constitutes its ideologically deep structure. Throughout the readings of this chapter, legal analysis with Foucauldian flair addresses the everyday techniques in which practices are formed and perpetuated.[107] In Teubner's reference to Derrida, Ladeur's reading of Lyotard, and Hardt and Negri's *Empire*, the law consists in what is below the surface, hidden in the seemingly harmless perpetuation of practices that deceive the unsuspecting practitioner.

For approaches on the left dealing with techniques of ideology, the reference to the scholarship of the Italian Marxist Antonio Gramsci and

[104] Razmig Keucheyan, *The Left Hemisphere: Mapping Critical Theory Today*, trans. Gregory Elliott (London: Verso, 2013), 90.

[105] Hardt and Negri, *Empire*, 268.

[106] See, for example, David Kennedy, "Law and the Political Economy of the World," *Leiden Journal of International Law* 26, no. 1 (2013): 7. See also, for further references, Jason Beckett, "Critical International Legal Theory," *Oxford Bibliographies* (last modified April 2012), available at oxfordbibliographies.com

[107] See Michel Foucault, "Governmentality," in *The Foucault Effect: Studies in Governmentality*, eds. Graham Burchell, Colin Gordon and Peter Miller (Chicago: University of Chicago Press, 1991), 87. See also, for further illustrations, Colin Gordon, "Governmental Rationality: An Introduction," in *The Foucault Effect: Studies in Governmentality*, eds. Graham Burchell, Colin Gordon and Peter Miller (Chicago: University of Chicago Press, 1991), 1.

his concept of *hegemony* is pervasive.[108] *Hegemony* is not merely a set of ideas; rather, it is intimately connected with societies' everyday practices. It is a form of moral, political, and intellectual leadership in that one's own interests are universalized and equated with the interests of society as a whole.[109] The decisive element in Gramsci's sketch is that hegemonic relations need the consent of those subject to it.[110] *Hegemony* thus depends on the provision of a particular ideology that has the intellectual power to unify society to secure its consent. Power, in this conception, cannot be understood as coercion—mechanistic and stemming from a unified subject. Rather, relations of power diffuse into all areas of society, implementing a certain kind of vision of a common good. It is "an organic and relational whole, embodied in institutions and apparatuses, which welds together a historical bloc around a number of basic articulatory principles."[111]

Fragmented plurality in the context of world society, Ernesto Laclau and Chantal Mouffe argue, supports the emergence of a hegemonic logic.[112] The indeterminacy of social articulations and the absence of social order facilitate the emergence of the so-called *hegemony apparatuses*,[113] which institutionally secure the educational relationship at the foundation of the hegemonic relation. The international judiciary and their intellectual leadership perpetuate the hegemonic order.[114] The institutional side of international law as mediator thus allows hegemonic politics to suppress the social conflicts that would otherwise endanger societal stability, so that

[108] See, in particular, Antonio Gramsci, *Prison Notebooks*, Volume 3, trans. Joseph A. Buttigieg (New York: Columbia University Press, 1992), notebook 6, where Gramsci develops his concept of hegemony.

[109] Terry Eagleton, *Ideology – An Introduction*, 2nd edn. (London: Verso, 2007), 116.

[110] This is one of the reasons Gramsci relied heavily on Machiavelli's concept of unity. See David Roth-Isigkeit, "Niccolò Machiavelli's International Legal Thought – Culture, Contingency, Construction," in *System, Order, and International Law – The Early History of International Legal Thought*, eds. Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (Oxford: Oxford University Press, 2017), 23.

[111] Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy*, 2nd edn. (London: Verso, 2001), 67.

[112] Laclau and Mouffe, *Hegemony*, 13.

[113] Gramsci, *Prison Notebooks*, notebook 6, para. 87, 782.

[114] See Sonja Buckel and Andreas Fischer-Lescano, "Gramsci Reconsidered: Hegemony in Global Law," *Leiden Journal of International Law* 22, no. 3 (2009): 449. See also Robert W. Cox, "Gramsci, Hegemony and International Relations: An Essay in Method," in *Approaches to World Order*, ed. Robert W. Cox and Timothy J. Sinclair, (Cambridge: Cambridge University Press, 1996), 124–143.

hegemony can be established not only "between the various forces of which the nation is composed, but in the international and world-wide field, between complexes of national and continental civilizations."[115]

The central function of hegemony is the management and bureaucratization of conflicts, so that they remain below the surface of the political system. On the one hand, it appears through legal institutions as *hegemony apparatuses*. On the other hand, however, it pervades the law not necessarily as content, but on a more foundational level, as technique. Fischer-Lescano and Buckel argue that "the law is equally an opaque, congealed social relationship and a postponement, delaying, and hampering of the direct assertion of claims of power by the political or economic systems."[116] In the present grammatical structure of the law, the normativity of social movements cannot directly enter the legal system, yet they are facing legal restrictions. Legal argumentation thus secures the asymmetric consensus of hegemony. It is "the substantive reference framework of various norms and decisions that fixes in time solutions once found and thus makes them reproducible, establishes legal figures, enables systematization and stores manifold model solutions and bygone conflicts. Doctrine […] acts as a stopping rule for justification-seeking argument."[117] While in the third chapter, particularly through the work of Martti Koskenniemi, the grammatical structure of law served its normativity, it carries here its ideological elements. The constraints of legal grammar are understood as a perfidious tool of hegemonic rule to which subversion is the only plausible answer.[118]

4.4.3 Ontology of Conflict: Radical Democracy as Political and Legal Theory

This difference, openly visible in the concept of the legal grammar, is ontological. In the constitutional vision, the focus lies on consent, while counter-hegemonic politics rely on dignifying conflict. A radical democratic version would reject global law as a cosmopolitan constitutional

[115] Gramsci, *Prison Notebooks*, notebook 6 (this passage cited after John Schwarzmantel, "Introduction," in *Gramsci and Global Politics*, ed. Mark McNally and John Schwarzmantel (London: Routledge, 2009), 9).

[116] Buckel and Fischer-Lescano, "Gramsci Reconsidered," 445–446.

[117] Buckel and Fischer-Lescano, "Gramsci Reconsidered," 446.

[118] See, in further detail, David Roth-Isigkeit, "The Grammar(s) of Global Law," *Critical Quarterly for Legislation and Law* 99, no. 3 (2016): 175.

utopia that transports the hegemony of Western modernity.[119] The reason for the focus on conflict lies in the lack of alternatives. Law creation in the political system is understood as a sphere of asymmetrical authority and, hence, must be broken through the resistance of individual rights that exist outside the frame of institutions.

The main argument against consensus-based theories is their distorted image of reality, which arises, in particular, through representative democratic structures. While representative democracy is only seemingly based on real equality, it is a discursive structure based on a fiction "of the presence at a certain level of something, which, strictly speaking, is absent from it."[120] This fiction, again, is part of a hegemonic practice. While seemingly societal will (and the Habermasian consensus) constitutes a full presence of a societal structure, radical democratic practice, in contrast, highlights what is absent from this presence through revealing the antagonisms in society. "The limit of the social must be given within the social itself, as something subverting it, destroying its ambition to constitute a full presence."[121] Consequently, the model of radical democracy aims at a direct and non-moderated impact of social normativity on the decision-making processes.

Traditional attempts in global law to construct a more inclusive and discursive structure fail because they rely on particularistic identities that do not adequately capture the totality of humankind, as they appear in identities created through citizenship or rights.[122] Institutional remedies, for example, through increased participation of non-governmental organizations in legal processes, do not suffice. Rather, democratic practice is understood as resistance against the legal-institutional constraints of emancipatory energies.[123] "The characteristic of democracy is that the whole […], as existence of a people, is never organized in dependence of a part, that is the constitution."[124] It aims at the multiplication of political spaces, the prevention of concentrations of power, and the definition of social rights only

[119] Chantal Mouffe, *Agonistics – Thinking the World Politically* (London: Verso, 2013), 19.
[120] Laclau and Mouffe, *Hegemony*, 119.
[121] Laclau and Mouffe, *Hegemony*, 127.
[122] Laclau and Mouffe, *Hegemony*, 163.
[123] Carlos Becker, "Gegen das Recht oder Gegen das Volk? Zum Spannungsvollen Verhältnis von Demokratie und Widerstand in der Aktuellen Französischen Politischen Theorie," *Critical Quarterly for Legislation and Law* 97, no. 3 (2014): 170.
[124] My translation. See Michel Abensour, *Demokratie Gegen den Staat – Marx und das Machiavellistische Moment* (Berlin: Suhrkamp, 2012), 152.

in the context of social relations. As it is directed against any form of institutional constraint against human action, it is also transnational in character. As democratic theory, it does not have the same problems as consensus-based theories to deal with the loss of a *demos*.

Radical plurality in this context means that "each term of this plurality of identities finds within itself the principle of its own validity, without this having to be sought in a transcendent or underlying positive ground for the hierarchy of meaning of them all and the source and guarantee of their legitimacy."[125] The positive vision behind the radical model is a form of cultivation of the conflict between identities that, in recognition of the plurality, do not end up in antagonist struggles, but in agonistic differences that can be constructively treated.[126] In terms that could be translated to a legal understanding, the foundational idea is a revolutionary understanding of human rights that takes equality as its moral motive. According to Rancière, equality is the principle that belies human rights their force, yet it is a principle that is impossible to capture in any institutionalization.[127] Equality is thus the starting point for the radical democratic practice of resistance—against the law and legal institutions.

4.5 Beyond Constitutionalism a New World Order Is Waiting

Arguably, the complete rejection of the legal-institutional dimension of law might prove difficult for global legal thought. At the same time, however, elements of the radical democratic vision are among the candidates for managing plurality. Most prominently, Nico Krisch's *Beyond Constitutionalism* has emphasized the value of contestation over the hierarchical coordination of normativity. The central claim is that global law fares better if it embraces plurality, rather than trying to tame it in an institutional model.

[125] Laclau and Mouffe, *Hegemony*, 167.

[126] Mouffe, *Agonistics* suggests a comprehensive theory of such constructive non-institutional treatment of disagreement.

[127] Jacques Rancière, Das Unvernehmen – Politik und Philosophie, trans. Richard Steurer (Berlin: Suhrkamp, 2002), 46.

4.5.1 Translating Radicalism to Global Law Discourse

Krisch's claim in *Beyond Constitutionalism* points to the failure of constitutionalism, roughly described here as Habermasian approach to global law, to provide for a convincing normative model. In line with the radical democratic alternative, he argues for a radical pluralism of free and unconstrained interaction between legal regimes, while explicitly relying on the radical democratic theory of politics.[128] A fixed hierarchy might not only be undemocratic, since relationships between the different levels are continuously renegotiated, but "will hamper this process of change – and later produce friction when formal rules and factual allegiances diverge."[129] In his model, similar to the system-theoretical conceptions, each suborder constructs its own interface norms that "bring[s] inclusiveness and attention to particularity into a plausible balance."[130] The arising responsive decision-making provides for a higher degree of stability than hierarchical models, since it is less likely to be challenged when it accommodates difference in the first place.[131]

On the technical side, this stability depends on the links between different institutions or regimes. Krisch suggests working with so-called interface norms, which regulate the relationship between the different entities.[132] These norms are not necessarily legal and merely "regulate to what extent norms and decisions in one sub-order have effect in another."[133] Rather, they are "normative, moral demands that find (potentially diverging) legal expressions only within the various sub-orders."[134] According to the radical pluralist model, there are no legal relationships between the different sub-entities of global law.

With a traditional understanding of the rule of law, the pictured relationship between different entities would be problematic since the justificatory links between the exercise of legal authority and norm production seem considerably impaired. While Krisch recognizes that "the rule of

[128] Nico Krisch, *Beyond Constitutionalism. The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010), 83. Yet, Krisch distances himself from the post-modern vision of *any* foundation of rational deliberation.

[129] Krisch, *Beyond Constitutionalism*, 276.

[130] Krisch, *Beyond Constitutionalism*, 104. In other passages, Krisch disagrees with Fischer-Lescano and Teubner (232).

[131] Krisch, *Beyond Constitutionalism*, 262.

[132] Krisch, *Beyond Constitutionalism*, 285f.

[133] Krisch, *Beyond Constitutionalism*, 285.

[134] Krisch, *Beyond Constitutionalism*, 296.

law's aspiration to tame politics through legal rules will conflict with the deep contestation characteristic of postnational politics – a contestation prone to undermine the sense of settlement or depolitization typically associated with a shift to law,"[135] this is not necessarily a negative phenomenon. Rather, it rests on a misunderstanding of the rule of law. To insist on a narrow relationship between legal argumentation and court decisions regularly misperceives how legal decisions are taken. "[It] attaches too much importance to form and fiction and too little to fact. As much as we may hope that legal argument is distinct from political and strategic considerations and instills a particular rationality into decision-making, the empirical record in this respect is not overly strong. […] Which laws govern those issues may then be less important than who decides, in which procedures, and in which broader political constellation."[136] Krisch, at the very least, concedes that most contemporary accounts "conceive of the rule of law […] as rule on the basis of a particular form of argument or set of institutions that condition the open pursuit of self-interest or negotiating power"[137] and that radical pluralism might have difficulties to include this claim.

While the resistance to the normative meaning of the rule of law might be grounded in the radical democratic elements in Krisch's proposal, and thus be justified on the basis of a different societal epistemology, a problematic aspect seems to rest on the assumption, throughout this chapter, that conflicts without legal institutions or procedures take an unconstrained and productive way toward cooperation. The peculiar element here is that law and legal argumentation—in line with the radical democratic suggestion—appears as an impediment rather than as a means to finding an equitable solution that is accepted by everyone concerned. This basic constellation, productive conflict without procedures, deserves some scrutiny.

4.5.2 Productive Conflict Without Procedures?

In the political-theoretical models that subscribe to the paradigm of productive conflict without procedures, contestation arises through the private exercise of rights placed in an extraterritorial sphere. These rights are

[135] Krisch, *Beyond Constitutionalism*, 69.

[136] Krisch, *Beyond Constitutionalism*, 279.

[137] Krisch, *Beyond Constitutionalism*, 278 citing Jürgen Habermas, *Between Facts and Norms*, trans. William Rehg (Cambridge: MIT Press, 1998), Chapter 5.

precisely not the rights that are linked to the state as we find it in the rights of citizens. Rather, the democratic core consists of an autonomous sphere of subjective rights beyond the state, equality, and liberty, which has to be defended against outer intervention.

Relying exclusively on this rights-based understanding of democracy seems insufficient to provide for productive conflict. A practice that is merely oriented on the private exercise of subjective rights presupposes the protection of individual rights of resistance as public interest, while at the same time missing the point that the extent of protection would require a societal consensus on what one can legitimately claim.[138] Absent such consensus, the pluralist sketch provides little more than a theory of resistance. Under this impression, it is little more than a corrective for a democratic practice based on the fiction of popular sovereignty. In contrast, the question arises whether one can imagine popular sovereignty and contestation without the support of procedures that guide the communicative potential into tracks. How without basic procedural guarantees is the value of contestation preserved in a climate of fairness?

A conception that wants to dispel the doubts has to rely on a theory of institutional self-restraint. In democratic theory, such a comprehensive sketch can be found in the model of an "agonistic democracy," as formulated by Chantal Mouffe. Opposing the concepts of Habermas and Rawls, she sees the task of democracy to provide for a forum of conflict that does not necessarily require the self-abstraction of the individual in a political process that refers to and aims at defining a common good.[139] Yet, she admits, "the kind of 'conflictual consensus' based on divergent interpretations of shared ethico-political principles […] presupposes the existence of a political community that is simply not available on the global level."[140] Thus, even the radical-conflictual version of democracy fails in the absence of a global public sphere.

The challenge seems to be to use the emancipatory virtues of conflict without endangering society's social foundations. Fischer-Lescano's radical version, based on a revolutionary reformulation of subjective rights, did not seem suitable to be such a comprehensive conception. Teubner circumnavigates these problems consciously. He retains elements from

[138] See also Becker, "Gegen das Recht," 181.

[139] For example, in Chantal Mouffe, *The Return of the Political* (London: Verso, 1993) or in Chantal Mouffe, *The Democratic Paradox* (London: Verso, 2000).

[140] Mouffe, *Agonistics*, 23.

radical political philosophy, in that he is skeptical about the structural coupling of law and politics as in the domestic realm. Yet, his conception entails requirements for reflexivity and self-restraint that are supposed to ensure that conflictual opposition does not come with destructive effects. While avoiding the perspective of a collective *practice*, popular sovereignty as the dangerous structural coupling of law and politics, he brings in the collective *perspective* in the formulation of regime-specific *ordres publics*.

The general motivation of the approaches discussed in this chapter seems to be a reasonable starting point. Responsivity, as a normative claim, can and should be a principle that applies in the collision of legal orders. The question is rather where to locate responsivity and how to conceptualize it as part of the social process. Responsivity in all its variants crucially depends on the development of a capacity for reflexion to retain the balance between autonomy and self-restraint. The difficulty of this model lies in its demands for abstraction. This poses particular challenges for legal practice, which might overstretch the capacity of courts in their everyday work. It is hard to imagine that actors within a legal order are capable of determining the degrees of concern surpassing their own legal order. Even if they are willing to do so, the *substantive law approach* as an ideal model disregards the limits of reflexivity imposed on actors due to their specific position. The reliance on monological reflexivity is dangerous because it comes with a Kantian flair of universal reason. It assumes that courts have the capacity to grasp the spirits of two legal orders at the same time and formulate only those "maxim[s] whereby you can at the same time will that it should become a universal law."[141]

This illustrates in how far the argument for the active status is on a slippery slope. The question is whether this active and subject-centered dimension of horizontal rights can serve as a collision rule and hold its reflexive promise while legitimating decentral decision-making. Looking at the epistemological foundations of the argument in the works of Teubner and Ladeur, it has become clear that the constructions have been developed to oppose the hegemonic impact of some societal rationalities over others. Subsequently, however, the institutional rights itself are turned into subjective, interventionist rights with an active political direction. This move seems to overstretch its prerequisites. It cannot be derived

[141] Immanuel Kant, *Grounding for the Metaphysics of Morals*, trans. James W. Ellington, 3rd edn. (Indianapolis: Hackett Publishing, 1993), 30.

from the internal logic of the relation between law and society or a theory of constitutional rights.[142] This is where the claim moves beyond the analytical scheme of systems theory.

The active status of the horizontal effects doctrine combined with a monological theory of reflexivity is one step too much toward a *carte blanche* for marginalization of external positions. Viellechner cites Ladeur to defend his proposal: "If state and international organizations fail, then society itself has to take the task of rule-formation. Collective order can merely be unintended side-effect of societal interaction."[143] As the approaches of this chapter have demonstrated, this type of order is fundamentally unstable, as it relies on the decentral capacities of reflexion of the plural entities. In the case of failure, however, the pluralist system is much more at risk of falling prey to power asymmetries. A radical democratic conception, in the worst case, might then appear as a justificatory scheme for neoliberal policies.

4.5.3 Toward a New World Order

If securing productive conflict without procedures proves difficult, there is only a thin line between a democratic utopia and an imposition of single rationalities over others. Klaus Günther has warned that the balancing exercise that either trusts market structures or the dialectic of autonomy and self-restraint is always at risk of falling prey to power asymmetries.[144] Instead of a balance, he observes a process of refeudalization that is not constrained to the exercise of private power in a public context. The increased level of cooperation between governments and private corporations in the area of information and communication technologies circumvents public structures and critical societal discourses.[145] Here, the initial goal of the approaches seems ultimately threatened. Whereas establishing a horizontal logic was required to *answer* a legitimacy problem, the detrimental effect on individual freedom by non-state actors, the active status

[142] But see Viellechner, "Transnational Government Arrangements," 449–455.

[143] Viellechner, *Transnationalisierung*, 223 citing Karl-Heinz Ladeur, "The Role of Networks and Contracts in Public Governance," *Indiana Journal of Global Legal Studies* 14, no. 2 (2007): 329.

[144] Klaus Günther, "Normativer Rechtspluralismus – Eine Kritik," in *Das Recht im Blick der Anderen*, ed. Thorsten Moos, Magnus Schlette und Hans Diefenbacher (Tübingen: Mohr Siebeck, 2016), 51.

[145] Günther, "Normativer Rechtspluralismus," 51.

seems to *produce* a legitimacy problem itself, in that it breaks the commitment to self-restraint. Günther empirically diagnoses the impact of reflexivity limits of single subsystems. These limits become problematic insofar as the extension of the horizontal effects doctrine to an active status justifies some regimes forcing others into responsivity.

If the empirical observation is correct that a deformalization by default does not lead to self-restraint, but rather motivates courts to take a more activist role,[146] then this open methodology might be fueled by other substantial considerations that, instead of social emancipation, implement other normative goals in global law. All approaches that have been considered in this chapter show resistance against any third-party involvement in these internal processes of balancing. This resistance is understandable given the violent character of legal decisions that are described in postmodern theories. And it is in line with Luhmann's *Grundnorm* of world society: "[I]t is no longer norms (in the form of values, prescriptions or purposes) that steer the prior selection of knowledge."[147] Yet, if it proves impossible to capture the expanding tendencies of economic rationalities over other functional systems, the pluralist model might be overlapping, to a large extent, with liberal theories of global law. While the Kelsenian-Hayekian argument of the decisive link between legal formalism and neoliberalism is often made with reference to certainty and predictability through the rule of law as most important individual liberties to secure the expansion of the markets,[148] similar concerns apply to the deformalization alternative.

In *A New World Order*, for example, Anne-Marie Slaughter emphasizes the replacement of traditional modes of legal governance with intergovernmental networks. Similar to the system-theoretical approaches, Slaughter rejects the constitutional paradigm for its failure to provide a

[146] See, for example, Chris Thornhill, "A Sociology of Constituent Power: The Political Code of Transnational Societal Constitutions," *Indiana Journal of Global Legal Studies* 20, no. 2 (2013): 551.

[147] Luhmann, "Die Weltgesellschaft," 60.

[148] See Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960), Chapters 14 and 15. See also Krisch, *Beyond Constitutionalism*, 280. For Kelsen, see Mónica García-Salmones, *The Project of Positivism in International Law* (Oxford: Oxford University Press, 2013), 246f.

solution for the fragmented character of world society.[149] World society therefore needs coordinated action by networks of government officials who can close the gaps existing between states and at the same time promote a new form of legitimacy. These government networks are free from national democratic constraints, so that in contrast to radical plurality, they involve a strengthening of executive power. In this context, it is important to highlight that it is possible to combine the same network and process-based methodology with normative premises that are completely different from those that the authors of this chapter have advocated. One cannot but suspect that most of what has been said in the analysis of this chapter works quite well without the democratic perspective on contestation.

There is a counterargument that system theorists could invoke—a radicalized understanding of human rights amounts to an equally radicalized understanding of the legal form, a *hyper-* rather than *anti-*formalism. Fischer-Lescano's argument, for example, has emphasized the importance of the autonomy of the legal system.[150] But is the autonomy that systems theory suggests, with ever-changing secondary rules, sufficient to fulfill these demands? Here, the analyses of this chapter are confronted with their own epistemic presuppositions that go beyond the Luhmannian distinction between theory and method. Similarly, in Teubner's view, it is not the market mechanism that replaces legal formality—it is a reconstructive movement of continuous searching.[151] Yet, what is a market mechanism other than a continuous search for elements that work while sorting out those that do not? It seems very difficult to distinguish between these equally reconstructive movements. One important question that can be formulated after discussing post-modern Luhmannian approaches to global law is therefore whether it is methodologically possible to differentiate between anti-formalist approaches emphasizing democratic spaces of contestation and those subverting the democratic logic by focusing on output legitimacy. This question, among others, will be discussed in the context of the Dworkinian approaches to global law.

[149] See Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004), 8.

[150] Fischer-Lescano, "Redefining Sovereignty," 335–364.

[151] See above, Sect. 4.1.2.

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CHAPTER 5

Process and Harmonizing Principles: Dworkinian Approaches to Global Law

Ronald Dworkin's legal methodology provides an umbrella concept for a third group that includes Dworkin's own view, but also several other approaches toward global law. Dworkin, as I take him, combines a process-oriented understanding of the law with moral realism.[1] In this picture, the law is a domain of real rights and obligations, not just a contingent psychological fact. While discussing Dworkin in this framework does not serve to reopen the debate of the relationship between law and morality, this chapter shows that a reliance on a community of principle and moral realism facilitates some ways of thinking about legal plurality, while rendering others more difficult. On the one hand, taking substantive concerns of morality into account when deciding cases or when figuring out the content of the law makes it easier to bridge those gaps and overlaps in the law that occur as a result of legal plurality. On the other hand, a moral interpretation of the law that is released from the institutional framework of a domestic legal system risks falling prey to decisionism resulting from the limited guidance by rules. Questions of political morality are disputed, so that a moral reading might increase the indeterminacy of the law. These and other concerns are reflected in the approaches of this chapter.

[1] For a short introduction to Dworkin's legal philosophy, see Liam Murphy, *What Makes Law* (Cambridge: Cambridge University Press, 2014), 45f.

D. Roth-Isigkeit, *The Plurality Trilemma*,
Philosophy, Public Policy, and Transnational Law,
https://doi.org/10.1007/978-3-319-72856-8_5

After an introduction to Dworkin, the chapter argues in Sects. 5.2 and 5.3 that the dynamism in his legal methodology resembles in many ways the process schools in international law that were influenced by legal realism. According to them, law serves to further the implementation of certain policy goals, notably the notion of human dignity. Related to this is the turn toward interdisciplinarity as one of the most important trends in today's North American law and political science scholarship. Both research strands ultimately walk the line between the promises of dynamism—to overcome a narrow, rule-focused view of the global legal system that has its limits when confronted with plurality—and its decisionistic pitfalls. The chapter proceeds, in Sects. 5.4 and 5.5, with another dimension in which Dworkin's methodology has been fairly influential, namely, his argument of a community of principle. Principled reasoning is a candidate to overcome gaps between normative orders. In line with different conceptions on the normativity and sources of international law, some view this community of principle as being established between different polities, thus conserving the traditional area of application of international law. Others even view a community of principle arising with individuals as the ultimate grounds of law. It is here that one encounters some of the most progressive views on global law.

5.1 Dworkinian Method and International Law

Dworkin's view on international law combines his general legal and philosophical methodology with an adaptation to the differences between the common-law jurisprudential realm in which it was developed and the international arena. Dworkin's concept of legal argumentation, interpretivism, is guided by his underlying conviction that law is a domain of value. Ultimately, he transposes this model, developed for a general understanding of law, to the international realm by arguing that international law must be understood as a specific part of political morality.[2] This section demonstrates how Dworkin combines his theories of interpretivism and unity of value to construct a *New Philosophy for International Law*.

[2] See Ronald Dworkin, "A New Philosophy for International Law," *Philosophy and Public Affairs* 41, no. 1 (2013): 22.

5.1.1 Interpretivism

Interpretivism is a theory of legal interpretation.[3] It aims at understanding the existence and modifications of legal obligations through institutional practice. In contrast to rule-based models of law, Dworkin's focus on principles captures the dynamism in the development of the law. This dynamism is particularly enlightening when it comes to understanding law as a process of continuous decision-making. This position challenges two main propositions of positivism, arguing that neither the content of law can be determined as a result of examining the validity of legal rules on the basis of pedigree criteria, nor that rules constitute the basis of legal obligations.[4] In contrast, Dworkin holds that, instead of merely rules, the law also contains principles and policies that allow judges to take decisions in hard cases.[5] Where positivists would assume *lacunae* in the law, such as in the case of legal fragmentation, Dworkin argues that law possesses the argumentative resources to bridge any gap with interpretive reasoning. Whereas conflicts between rules pose an all-or-nothing decision in the law, the fact that principles can be balanced turns the law into a more flexible and adaptive instrument.[6]

Dworkin has a specific view on political community in mind when arguing for such a structure of reasoning in the law. According to Dworkin, it is implausible to understand legal decisions merely as derived from past social practice because they require some form of moral reasoning. Law creates a community of principle between people who are living together as a result of contingent geographical and historical circumstances. Only law turns these unrelated beings into a political community.[7] Legal obligations, just as obligations that one owes to the members of a family, arise through membership in this community. The duty to fidelity with the law originates in this bond, the concept of associative obligations.[8] Law and morality are thus interwoven right from the start. Yet, Dworkin's view on what role precisely morality has when figuring out the content of legal obligations has changed in the course of his scholarship. While *Law's*

[3] See, in detail, Ronald Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986), 45f.

[4] This position is set out most clearly in Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 17f.

[5] Dworkin, *Taking Rights Seriously*, 22f.

[6] Dworkin, *Taking Rights Seriously*, 24.

[7] Dworkin, *Law's Empire*, 201–24.

[8] Dworkin, *Law's Empire*, 195f.

Empire combines a view of the legal system as social fact with moral considerations, the later scholarship imagines law as a moral inquiry altogether.

In *Law's Empire*, Dworkin sketches interpretivism as a three-step argumentative process.[9] The first stage starts with law as a matter of institutional history, cases that everyone considers as cases of valid law. The interpretive process as the second stage reviews the bulk of cases and systematizes them by finding out those principles that best justify past legal practice. This systematization is a form of moral reasoning, as Dworkin understands principles to stand in a certain relationship to political morality as a whole. Yet, it is still not merely moral in this picture, since it tries to make sense of law as a product of institutional history. Finally, the last stage reviews the pre-interpretive materials and sorts out those cases that do not fit the principles according to which the body of law has been reconstructed. A part of the institutional history might then turn out as a mistake.

Dworkin believes that both institutional facts and political morality play a distinctive role in determining the content of the law. While intuitively plausible, one decisive question has been how to imagine the different roles of the both factors in determining law's content. The original conception of the relationship between law and morality in Dworkin's work appeared in *Law's Empire*. According to this view, the pre-interpretive materials are morally processed and adapted to an abstract, principled view of legal practice that takes into account central features of political morality. Validity thus exists as a combination of both pre-interpretive materials and principles that reconstruct legal practice in the light of political morality. Because of the combination of both spheres, social facts and political morality, this view has been called hybrid interpretivism.[10]

Objections to this view have highlighted that the indeterminacy of the relationship between legal materials and legal principles prevents hybrid interpretivism from being a systematic theory on the nature of law.[11] We cannot assume that legal rules with different institutional histories boil down to a coherent set of principles, or that a set of rules lead to one single

[9] Dworkin, *Law's Empire*, 65f.

[10] See Nicos Stavropoulos, "Legal Interpretivism," *Stanford Encyclopedia of Philosophy* (last revised April 2014), sections 3–4, available at http://plato.stanford.edu/entries/law-interpretivist

[11] Stavropoulos, "Legal Interpretivism," section 3, for critique and further references.

(rather than a different) set of principles.[12] While these objections have been developed in national legal contexts, one might imagine that a fragmented legal environment would further aggravate the difficulties.

The difficulties seem to stem from the fact that in the order of explanation for the content of the law, neither law nor political morality can assume to have the last word. Possibly as a consequence of these objections, Dworkin embraced a different version of interpretivism in the period in which he dealt with international law.[13] The adaption he suggests consists in a clear fixation of the hierarchies of law and morality. Law is a moral inquiry in which a successful institutional practice can be reason-giving in discovering real rights and obligations. Institutional history does play a role insofar as it can be reconstructed as a moral practice. But it does not, ultimately, determine the content of the law. In methodological terms, the move shifts the object of inquiry from legal materials to moral facts. *This* approach, in contrast to the hybrid version of interpretivism, might be particularly suitable to overcome worries of fragmentation. Even in the light of a plurality of legal actors, materials, and institutions, the holistic structure of morality provides for a constitution of global law. The object of inquiry thus shifts to assumptions on the nature and form of moral values.

5.1.2 Unity of Value

Non-hybrid interpretivism thus makes an argument about the relationship of law and morality. To support this view, it relies on assumptions on the structure of morality itself. One central claim of Dworkin's argument consists in the idea that, when we are figuring out our rights and obligations in the law, we are dealing with claims that are to be evaluated as true or false in an epistemological sense. This claim appeals to a position that is often called moral realism.[14] The claim that obligation is a matter of truth and objectivity resonates with the claim that law always provides an answer

[12] For general criticism and in particular for the first objection, see Joseph Raz, *Ethics in the Public Domain* (Oxford: Oxford University Press, 1995), 222–26.

[13] See Ronald Dworkin, *Justice for Hedgehogs* (Cambridge: Harvard University Press, 2011), 400–15.

[14] Raz argues that Dworkin takes a position between realism and constructivism. See Joseph Raz "A Hedgehogs Unity on Value," in *The Legacy of Ronald Dworkin*, eds. Wil Waluchow and Stefan Sciaraffa (Oxford: Oxford University Press, 2016), 17–19.

to hard cases.[15] Both can rely on the non-fragmented structure of an objective account of morality.

The argumentative structure with which Dworkin claims the existence of objective morality is inverted. In his essay *Objectivity and Truth: You'd Better Believe It*, he argues that all scepticist rejections of objectivity in ethics appealing to the contingency of moral claims contain an orientation toward truth.[16] This orientation toward truth in any moral argument, even in its negation, turns the question of value into an interpretive endeavor. There are no real conflicts of values; rather, interpretive reasoning shapes out what is valuable. In case of success, interpretive reasoning leads to truths that are independent from the particularistic beliefs of individuals. The unity of value thus refers to the interconnectedness of all that is valuable: "the various concepts and departments of value are interconnected and mutually supportive."[17] Paradoxically, interpretation can link these different areas and produces "truth" while at the same time referring to it.[18]

For Dworkin, the central determinant of value is an encompassing concept of human dignity, consisting of self-respect and authenticity.[19] All political and social rights are rooted in this notion. Yet, it is not a norm from which one could deduct conditions of behavior; rather, it is merely a name for the dense network of obligations that are to be determined through interpretation. It is a systematic approach that views all legal obligations in its manifestation in political and social rights rooted in a consistent, interpretive concept of political morality.

[15] Ronald Dworkin, "Objectivity and Truth: You'd Better Believe it," *Philosophy and Public Affairs* 25, no. 2 (1996): 136.

[16] Dworkin distinguishes between internal and external skepticists. While internal skepticists use standards stemming from morality to distinguish true from false legal claims, external skepticists discard the objectivity of morality altogether. The latter are already caught in the discursive context of moral argument, so that they cannot escape from holding some fundamental beliefs about the structure of morality. See Dworkin, "Objectivity and Truth," 87–91. This argument is similar to the Habermasian classification of moral discourse.

[17] Dworkin, *Justice for Hedgehogs*, 10.

[18] Here, one could think that Dworkin takes a constructivist position. But as Raz notes, his argument contains elements of both theoretical positions. He asks "[I]s the interpretation in question an epistemic activity, namely one aimed at discovering what is there, what is the truth, independently of it? Or is it an innovative interpretation that constitutes [the] object through the activity of interpretation when correctly done?" See Raz, "A Hedgehog's Unity," 21–22. Dworkin, *Justice for Hedgehogs*, 116–17.

[19] See Dworkin, *Justice for Hedgehogs*, 91f.

In order to make sense of the different features of Dworkin's view, this chapter maps some of the more narrow approaches from global legal thought that entertain some commonality to this basic structure. In the course of this chapter, I will also consider some objections to the reconstruction of global law as a domain of value. The points here will neither necessarily be that Dworkin's ideas as an approach to moral philosophy are wrong, nor that the thesis that the law is a domain of real rights and obligations is problematic. Rather, it will be important to address the capacity of the different methodological approaches to moderate disagreement on the moral values according to which global law should be reconstructed. If there is substantial disagreement on what is right or wrong to do, this might not be a problem for moral philosophy. Yet, if this disagreement leads to the loss of law's function to provide for stability, this indeed would pose a problem for legal theory.

5.1.3 Dworkin's New Philosophy for International Law

Dworkin's considerations on the nature and origin of value, as well as the relationship of law and morality, are reflected in his moral concept of international law.[20] *Inter alia* relying on American legal realism, he insists on the circularity of attempts to found international law on the consent of states as an interpretation of a Hartian *rule of recognition*.[21] The principle of consent, though facilitating the paradoxical claim that states are sovereign, yet bound to law, leads to interpretive confusion, particularly in the application of customary international law.[22] Similar to political realists, he points to the impossibility of distinguishing law and non-law in an environment where there is no formal treaty: "This assumes that in some way nations decide for themselves whether some constraint they accept is imposed as a matter of law and not just decency."[23] Yet, since international law imposes obligations on subjects, and consent is not convincing to explain the nature of these obligations, there must be a more basic principle at work.

[20] Note that it is a philosophy "for" international law not "of" it. Philosophy and theory appear here as a purposive activity right from the start of the inquiry.

[21] Dworkin, "New Philosophy," 5, in n 6.

[22] Dworkin, "New Philosophy," 9–10.

[23] Dworkin, "New Philosophy," 9.

In order to explain this basic principle, Dworkin argues, it is not simply enough to appeal to what he calls a "criterial concept." A criterial concept would aim to define international law in the sense that it wants to find properties that are intrinsic to law and subsume whether international law is law in the first place. This is what Hart's terminology in international law does: "his analysis was therefore like the recent discussions among astronomers whether it would be sensible to continue to use the word 'planet' in such a way as to make Pluto a planet."[24] Dworkin, in contrast, already assumes that there is an obligation to defer to some body of law. His question therefore is different: he wants to find out what the law says, assuming that it always says something.

In line with his general legal thought, Dworkin argues that "[a]ny theory about the correct analysis of an interpretive political concept must be a normative theory: a theory of political morality about the circumstances in which something ought or ought not to happen."[25] This indicates the choice of the non-hybrid version of interpretivism, as discussed earlier. In order to abandon the positivistic view, yet not to remain without a viable theory of obligation, we must imagine a hypothetical world court and develop a persuasive account of obligation that is in line with a globally constructed political legitimacy. The two central concepts that this picture boils down to are a theory of appropriateness and a theory of persuasion. We need to choose the most persuasive account on what is appropriate as a demand of political morality. The distinction between law and non-law then becomes a hypothetical question of political right. "Which political rights and obligations of people and officials are properly enforceable on demand through institutions like courts that have the power to direct coercive force? That is a moral question whose answer is a legal judgment."[26]

Dworkin's international law thus modifies the principle of sovereign equality in the light of the political legitimacy of a state.[27] States have to accept constraints to their own power, particularly when they cannot live up to their responsibilities in relation to their own citizens. This can lead to the justification of coercive measures against states, be it in the context of ensuring the effectiveness of the fight against climate change or in the case of systematic human rights violations, always conditioned upon the

[24] Dworkin, "New Philosophy," 5. See also Dworkin, *Justice for Hedgehogs*, 165–66.
[25] Dworkin, "New Philosophy," 11.
[26] Dworkin, "New Philosophy," 12.
[27] Dworkin, "New Philosophy," 17.

question whether interventions improve the political legitimacy of the international system as a whole.[28] In this light, Dworkin suggests a principle of *salience*: "If a significant number of states, encompassing a significant population, has developed an agreed code of practice, either by treaty or by other form of coordination, then other states have at least a *prima facie* duty to subscribe to that practice as well, with the important proviso that this duty holds only if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole."[29]

Dworkin's legal thought presents a strong claim to regulate the relationships between legal orders on the basis of substantive theories of political legitimacy. "If law is understood as a special part of political morality, and if it serves its community well, its doctrines will crystallize over time. […] A rigid separation between legal and moral argument in the development of international law would be premature now […] We need, now, to nourish the roots, not the twigs, of international law."[30] The roots of international law, which are the underlying principles that define what part of political morality international law is, have to be carved out in a moral and dynamic inquiry that disregards the body of positive norms as far as necessary. International legal argument in Dworkinian form draws its legitimacy from the underlying values that are distilled in a process of interpretation. The concept of validity exists in virtue of the relation to the justification of moral principles through interpretive reasoning, so that the social fact of a positive body of legal norms is merely a provisional indicator for legal obligations.

5.2 The Turn to Process

A trend that bears similarity with Dworkin's argument is the turn toward a dynamic understanding of law that started in American legal scholarship in the 1990s. Accordingly, Dworkin explicitly references the scholarship of Myres McDougal in his reconstruction of international law. This section maps and describes the turn to a process-oriented understanding of law and points out the similarities to a Dworkinian conception of a dynamic legal order based on values. While recalling the early process-approaches

[28] Dworkin, "New Philosophy," 19–20.
[29] Dworkin, "New Philosophy," 19.
[30] Dworkin, "New Philosophy," 30.

might seem to be merely a kind of time travel in global legal thought, the argument will be that the basic conception of the legal order as a dynamic, value-oriented body of norms is highly pervasive in American international law scholarship today. It will prepare the ground for an understanding of the virtues and vices of such a conception for providing a solution for the problem of plurality.

5.2.1 Transnational Legal Process and the Policy-Oriented Jurisprudence of the New Haven School

As for much of American international law scholarship in the 1990s, the initial task of *Transnational Legal Process* (TLP) is the explanation of compliance with international law despite its lack of a compulsive sanctioning system.[31] This discussion is situated in a similar setting as the plurality of global law: positivism had reached its limits to account for the hybrid status of international law and could not provide for a convincing explanation for legal practice. Scholarship turned to American legal realism that was first formulated as a distinctive theoretical strand in the 1920s by Karl N. Llewellyn.[32] Similar to the sociological insights that have been the object of the fourth chapter, the idea was to look beyond the formality of rules. Yet, different to Ehrlich's "living law" describing the plurality of legal orders beyond positivism, the focus here lies on how decisions are taken by courts in practice.

Harold Koh, the founder of TLP, argues that international law matters through the process of norm internalization and the social pressure that is connected with the specific situation of states in the international community.[33] He argues that TLP breaks down the dichotomies between

[31] See, for example, Thomas M. Franck, *The Power of Legitimacy among Nations* (Oxford: Oxford University Press, 1990), 3: "Why do powerful nations obey powerless rules?"

[32] In the 1930s there was a debate between two of realism's popular proponents. Quite frequently, debates on today's realism are traced back to this debate. See Karl N. Llewellyn, "A Realistic Jurisprudence – The Next Step," *Columbia Law Review* 30, no. 4 (1930): 431; Roscoe Pound, "The Call for a Realist Jurisprudence," *Harvard Law Review* 44, no. 5 (1931): 697; Karl N. Llewellyn, "Some Realism about Realism – A Reply to Dean Pound," *Harvard Law Review* 44, no. 8 (1931): 1222. See, for a comprehensive collection of texts, *American Legal Realism*, eds. William W. Fisher, Morton J. Horwitz and Thomas A. Reed (Oxford: Oxford University Press, 1993).

[33] Koh fused Jessup's transnational law with Chayes et al.'s international legal process. See, respectively, Philip Jessup, *Transnational Law* (New Haven: Yale University Press, 1956) and Abraham Chayes, Thomas Ehrlich and Andreas W. Lowenfeld, *International*

domestic and international and between public and private by including a diverse set of actors. Ultimately, the process is normative: "[T]he concept embraces not just the descriptive workings of a process, but the normativity of that process. It focuses not simply upon how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions: in short, how law influences why nations obey."[34]

For Koh, the "legal transactions within the context of international regimes are […] law-creating."[35] The trademark of a dynamic approach, to find the source of law in something other than pedigree or sanction, is addressed here through the lens of compliance. "If nations regularly participate in transnational legal interactions in a particular issue area, even resisting nations cannot insulate themselves forever from complying with the particular rules that govern that area."[36] Compliance is achieved through a certain form of social pressure in which norm violators are "encouraged" to internalize the rule in their own set of values.[37]

The model thus focuses on the dynamics of reception and incorporation of international legal norms. Rather than following a formalist concept of rules, Koh observes the practical effect legal and other norms have in informing a set of normative practices. The central aspect of TLP is to account for the role of internalization. Koh assumes that the stand that someone can take toward a legal rule oscillates between external coercion and internalized obedience.[38] Compliance with international law depends on its internalization through a set of vertical and horizontal repeated practices that can be classified in three different cases: social internalization (adherence because of public legitimacy), political internalization (acceptance of a norm by political elites), and legal internalization (incorporation in the domestic legal system).[39]

Legal Process – Materials for an Introductory Course (Boston: Little, Brown, 1968). See Harold H. Koh, "Transnational Legal Process," *Nebraska Law Review* 75 (1996): 186.

[34] Koh, "Transnational Legal Process," 184.

[35] Harold H. Koh, "Bringing International Law Home," *Houston Law Review* 35 (1998–99), 641.

[36] Koh, "Bringing International Law Home," 641–42.

[37] Harold H. Koh, "Transnational Legal Process after September 11," *Berkeley Journal of International Law* 22 (2004): 338.

[38] Koh, "Bringing International Law Home," 635.

[39] Koh, "Bringing International Law Home," 642.

The framework explains norm internalization as a repeated process of four stages (interaction, interpretation, internalization, and compliance).[40] This shifts the focus toward the actors in the process: governments, international governmental and non-governmental organizations, multinational corporations, and expert networks. All receive their share in accounting for norm creation on the global stage. Similar even to Habermas' conception of norm internalization and the Luhmannian approaches, communication plays a major role to explain the incorporation of norms. Koh argues: "The most effective legal regulation thus aims to be constitutive, in the sense of seeking to shape and transform personal identity."[41]

This focus on identity allows TLP to have a strong theoretical sense for what makes up the obligatory dimension of norm internalization. Yet, through his equal treatment of legal and social norms, TLP runs into another problem. For Habermas, the question of internalization of social norms through communicative action was independent of the formation and reception of legal norms. Whereas compliance is a term that can be equally applied to law and social norms, legal process seems to blur the distinctions between both. In the system-theoretical approaches, this distinction has been deliberately weakened to unleash the conflictual nature of a fragmented political society.[42] This, quite clearly, is not what Koh wants to do.

In contrast, Koh takes an almost paradoxical position to the normativity of TLP. On the one hand, he claims that the role of scholars is an activist one, influencing and enforcing legal process.[43] On the other hand, he refuses to identify with substantive norms that could back up this activism. While identifying broadly with a Dworkinian approach, he claims that the internalizations and interactions itself "comprise the normativity of the process."[44] This, quite frankly, falls short of the mark. The normative value of compliance inevitably depends on the substantive norm that is complied with.

[40] Harold H. Koh, "Why Do Nations Obey International Law?" *Yale Law Journal* 106 (1996–97): 2599.

[41] Koh, "Bringing International Law Home," 629.

[42] See above, in particular Sects. 4.4.2 and 4.4.3.

[43] Koh, "Transnational Legal Process," 207.

[44] Koh, "Transnational Legal Process," 205. One possible explanation for this might be that in the context of the resistance of US-American courts to take norms of international law into account, any norm internalization could be regarded as a progress. Yet, as TLP retains a general focus, this explanation cannot be generalized.

The normative emptiness of TLP's procedural methodology is avoided in another closely related strand. The *New Haven School* (NHS) combines process-oriented American legal realism with substantive moral claims. It represents the normative counterpart to Koh's epistemological focus. NHS originated in a cooperation between the political scientist Harold Lasswell and the lawyer Myres McDougal, both scholars at Yale.[45] It shares with TLP the origin in legal realism.[46] While TLP put a focus on norm obedience, NHS provides tools for the policy maker to steer the process of decision.[47]

NHS identifies seven stages that are part of any legal decision process, which consists of intelligence, promotion, prescription, invocation, application, termination, and appraisal.[48] For each of the seven stages, NHS offers insights on how to influence decision-making from different perspectives from individuals over non-governmental organizations to the state department. The understanding of how the legal process works is here a precondition for the implementation of substantive goals. In contrast to TLP, which contains an almost discursive normativity in the interactions of the process, everything in the policy-oriented jurisprudence is in place to facilitate the implementation of normative goals. This is reflected in the account of formal legal structures: "Conventional usage must here yield to 'functional' analysis, because no dependable relationship exists between formal structures and the facts of authority and control on the global scale. […] Myth system must be distinguished from operational code, the law-in-the-books from the law-in-action."[49]

[45] See, in detail, Harold D. Lasswell and Myres S. McDougal, *Jurisprudence for a Free Society*, Volume I (The Hague: Martinus Nijhoff, 1992).

[46] Lasswell and McDougal, *Jurisprudence*, 249f.

[47] W. Michael Reisman, one of the main proponents of the school, describes its goals as follows: "The New Haven School defines law as a process of decision that is both authoritative and controlling; it places past such decisions in the illuminating light of their conditioning factors; both environmental and predispositional, and appraises decision trends for their compatibility with clarified goals; it forecasts, to the extent possible, alternative future decisions and their consequences; and it provides conceptual tools for those using it to invent and appraise alternative decisions, constitutive arrangements, and courses of action using the guiding light of a preferred future world public order of human dignity." W. Michael Reisman, Siegfried Wiessner and Andrew R. Willard, "The New Haven School: A Brief Introduction," *Yale Journal of International Law* 32 (2007): 575.

[48] W. Michael Reisman, "The View from the New Haven School of International Law," *American Society of International Law Proceedings* 86 (1992): 118.

[49] Reisman, Wiessner and Willard, "New Haven School," 577.

With this clear commitment toward implementation of policy goals, NHS seems to surpass an epistemic dimension of dynamism central to Luhmannian approaches and to Koh. In TLP, for example, the internalization of a norm always comes with a transformation of the respective identity of that actor. The epistemic dimension of dynamism reveals that, whatever action the system performs, it looks different afterward. Since for NHS identities are comparably fixed, that is, distinguished by the liberal/illiberal states dichotomy, their appeal to dynamism seems only little more than an attempt to override legal constraints with policy vocabulary. This is exemplified in their reactions to the pluralism of legal orders: "But the policy and intellectual problem in both national and international law is to determine when and how the legal arrangements of one system should trump another. […] Opening the concept of law to non-state communities would include not only religious communities, but also racial and ethnic groups, corporations, gangs, terrorist cells, etc."[50]

NHS commits openly to the policy goals it wants to implement: "A public order of human dignity is defined as one which approximates the optimum access by all human beings to all things they cherish: power, wealth, enlightenment, skill, well-being, affection, respect and rectitude."[51] While this promotes a very specific view on public order that stands in contrast to the pluralist approaches of the previous chapter, it has frequently been criticized for its openness. Here, it was suggested that a flexible concept of dignity potentially justifies American interventions in the name of liberty all over the world.[52] Dynamic legal methodology combines with substantial and fairly general views on normativity to a theory that makes it easy to justify the implementation of one's own normative belief on the basis of legality.

5.2.2 Global Law as Government Networks

A reformulation of this methodology appears in Anne-Marie Slaughter's network analysis of global law based on liberal principles. Connecting to the debates between TLP and NHS, she highlights the necessity to draw

[50] Reisman, Wiessner and Willard, "New Haven School," 581. The passage refers to an article by Paul Schiff Berman.

[51] Reisman, Wiessner and Willard, "New Haven School," 576.

[52] Richard A. Falk, "Casting the Spell: The New Haven School of International Law," *Yale Journal of International Law* 104, no. 7 (1994–95): 2000.

boundaries between liberal and non-liberal states, pointing to the differences in norm internalization between both societal types. According to her, the internal structure of liberal states relying on decision-making through courts and legislature ensures that international norms are constructively incorporated. In contrast, in non-liberal states, the focus on executive power makes it more difficult to observe the same internalization processes.[53] The result is a theory on isolation. The central authority in authoritarian states prevents the interstate cooperation of courts and legislators. This allows her to draw a line between states that should be involved in shaping the new world order and those that should not.

Similar to Ladeur's networks of global law, Slaughter observes the radical fragmentation of liberal society into nodes of authority, a phenomenon that she calls "disaggregated sovereignty."[54] This paradigm is the point of departure for her claim of the *New World Order* where disaggregated states "relate to each other not only through the Foreign Office, but also through regulatory, judicial, and legislative channels."[55] Slaughter suggests a new system of decision-making at the global level that does not rely on formal institutions and procedures.[56] States should not formally act through forms of international law. Rather, "primary political authority would remain at the national level except in those cases in which national governments had explicitly delegated their authority to supranational institutions."[57] Government officials are the central actors in the *New World Order*. They are the backbone of informal decision-making on the basis of the "soft" power of persuasion and information, exercised through the forming of clubs or interest groups.[58]

Slaughter openly contends that her account is closely related to the implementation of national interest. The soft power of persuasion similarly makes it more likely that US foreign policy is accepted in the international community. Slaughter writes: "More recently, the United States has pushed the even more informal approach of 'coalitions of the willing,' both at the unitary state level of enlisting military allies and at the disaggregated state

[53] Anne-Marie Slaughter, "International Law in a World of Liberal States," *European Journal of International Law* 6 (1995): 523.

[54] Slaughter, "World of Liberal States," 534.

[55] Anne-Marie Slaughter, *A New World Order* (Princeton: Princeton University Press, 2004), 5.

[56] Slaughter, *New World Order*, 263.

[57] Slaughter, *New World Order*, 7.

[58] Slaughter, *New World Order*, 4.

level of networking to combat terrorist financing, share intelligence on terrorist activity, and cooperating in bringing individual terrorists to justice. Promoting actual government networks in all these areas is a far better approach, as it would institutionalize the cooperation that already exists and create a framework for deepening future cooperation in virtually every area of policy."[59]

The coordination of overlapping legal orders is left to a decentral network of judges, performing the same functions and drawing upon the same resources as government networks. Judicial networks transcend the state-sovereigntist paradigm, and they "are not motivated by respect to international law *per se*, or even out of any conscious desire to build a global system. They are instead driven by a host of more prosaic concerns, such as judicial politics, the demands of a heavy caseload, and the new impact of international rules on national litigants."[60] Yet, there are principles in this community of courts such as a conception of checks and balances, a principle of positive conflict, pluralism, and legitimate difference.[61]

The relations between courts are largely informal, organized under the principle of comity.[62] Judges, as a form of transnational elite, "are in many ways creating their own version of such a system, a bottom-up version driven by their recognition of the plurality of national, regional, and international legal systems and their own duties of fidelity to such systems. … [T]heir relations are shaped by a deep respect for each other's competences and the ultimate need, in a world of law, to rely on reason rather than force."[63] This reliance on reason can be exemplified in US courts not giving effect to foreign legal judgments, invoking the defense of liberal principles.[64]

In Slaughter's view, authority in government and judicial networks must be understood as persuasive, rather than coercive. The substantial question of what constitutes one's legal obligations is simply the most persuasive account of a specific form of political morality. This is the

[59] Slaughter, *New World Order*, 265.

[60] Slaughter, *New World Order*, 67–68.

[61] Slaughter, *New World Order*, 68–69. The rhetorical similarity to the radical democratic principles in Sect. 4.4.3 is striking.

[62] Slaughter, *New World Order*, 86.

[63] Slaughter, *New World Order*, 102.

[64] Slaughter, *New World Order*, 88f.

Dworkinian element in the process schools. In a second step, persuasive authority is combined with a theory of what persuades. Transnational judicial deliberation thus turns into a coalition of willing judges.

5.2.3 Pluralist Jurisprudence: Reformulating Process as Relative Authority

Today's adaptation of the process approaches to circumstances of plurality is reflected in a technically similar, but normatively more balanced view. Nicole Roughan's *Authorities* argues through an analysis of the jurisprudential concept of legitimate authority that the fact of plurality challenges the plausibility of the traditional model of law.[65] Neither procedural views (basing the legitimacy of global law on consent) nor substantive views (basing the legitimacy of global law on common good)[66] can provide plausible answers for the management of global plurality. While connecting to the analytical problems diagnosed in the second chapter, Roughan reformulates the coordination problem.

The problem of plurality, according to Roughan, consists in the technical uncertainty as a result of the overlap of authorities.[67] Whereas technically both conceptions can deal with a situation of overlap—subjects can consent to contradicting normative notions or have institutions with overlapping tasks—this challenges the legitimacy of the respective authorities.[68] In the absence of conflict rules between both authorities, the subject has to decide to defer either to one or the other authority. While in the traditional case, the legal norm functions as a separate reason for action that replaces all applicable considerations of the subject in that particular situation,[69] if the subject is confronted with a multitude of authorities that pose contradicting demands, a decision is required as to which authority it

[65] Nicole Roughan, *Authorities: Conflicts, Cooperation and Transnational Legal Theory* (Oxford: Oxford University Press, 2013).

[66] Roughan invokes Raz' *service conception* as a major example. See, in detail, Joseph Raz, "The Problem of Authority: Revisiting the Service Conception," *Minnesota Law Review* 90, no. 4 (2006): 1003.

[67] See, in detail, Roughan, *Authorities*, 87–122.

[68] Roughan, *Authorities*, 105f.

[69] According to the Razian conception, for example, the "service" of authority is that the subject that is supposed to take a specific course of action can replace its own considerations by the command of a legitimate authority. Joseph Raz, *Between Authority and Interpretation* (Oxford: Oxford University Press, 2009), 148.

should defer to. Since traditional models of legitimate authority are supposed to preempt substantive reasoning from subjects, they have problems facing plurality.[70]

Roughan's normative response to this overlap in authority redefines it as *relative* and replaces the standard account with a new model. The central claim here is that, in order to be legitimate, authorities need to conceive of themselves as interdependent instead of independent.[71] The traditional conception of legitimacy as arising from the constitution of a regime itself is replaced by the idea that legitimacy can only be assessed in relation to other regimes. In order to test the legitimacy of a regime, Roughan refers to a form of balancing procedure that she calls *conjunctive justification*, combining procedural and substantive reasons for and against a mode of an inter-authority relationship.[72]

Methodologically, her proposal stands in line with the process schools. At the beginning of the inquiry stands the realist assumption that international law cannot plausibly claim supreme authority given the multitude of regimes around it. This realist claim is then again combined with legitimacy vocabulary that endorses a substantive justification based on an overall assessment of political legitimacy. This schematic combination of a realist assessment of the law with a claim on values is a characteristic of the scholarship of this section.

Roughan acknowledges the difficulties of balancing the relationship between legal orders on the basis of substantive theories of political legitimacy[73] and, thus, aims to turn the moral realism in a more constructivist

[70] Nicole Roughan, "The Relative Authority of Law: A Contribution to Pluralist Jurisprudence," in *New Waves in the Philosophy of Law*, ed. Maks del Mar (New York: Palgrave Macmillan, 2011), 258.

[71] Roughan, *Authorities*, 136f.

[72] This boils down to the following suggestion: "Authority is justified if: (1) there is an undefeated reason to have authority rather than private decision-making; (2) a particular person or body has the standing of authority conferred upon it through a justified procedure; (3) that authority is supported by or is consistent with the balance of governance reasons; (4) that authority is supported by or is consistent with the balance of side-effect reasons; and (5) its exercise would better enable subjects to conform to the reasons for action that apply to them, including both primary and secondary reasons to follow or exclude the directives of other relevant authorities." See, Roughan, *Authorities*, 134.

[73] "Working that out would require a full-blown moral theory about value, a theory of the person and their practical reasoning that explains the value of autonomy, a theory of the determinants and value of the political community, a political theory that explains how autonomy can be applied to generate political legitimacy, and sensitivity to any other

direction. Her conception of balancing claims to endorse a Habermasian discursive view,[74] yet the procedural element seems to be not more than a corrective to the dominant views of political legitimacy. In particular, the difference with Habermas on legal formality turns her theory in the Dworkinian direction.[75] In substantive terms, her theory suggests that "a really good dictatorship, even one which generally produces substantively better results than private decision-making would produce, cannot be authoritative if it carries no procedural values; while a thoroughly democratic and participatory regime cannot be authoritative if it generally produces worse substantive results than could be reached through private action."[76] While this open formulation is likely to be universally endorsed, the proposal would require a higher degree of concreteness in order to mitigate global law's problems.

5.3 Interdisciplinarity

Process approaches orient the law toward values that they take to exist as a matter of moral fact. This renders legal technique superfluous, as it is not the wording incorporated in the legal form, but instead the underlying political morality that determines the content of a legal obligation. Critical approaches have therefore admonished that with a policy- or value-laden dynamic conception of the law, one could justify literally everything.[77] In this view, the indeterminate character of values induces a decisionistic element. While deliberate appeals to morality and values are difficult to maintain in a secularized discursive structure, interdisciplinary approaches potentially offer a strategy of dealing with this problem, supplementing the dynamist paradigm with a different form of knowledge. The foundational idea is to open the law toward other disciplines to allow for scientifically informed policy and value choices.

restrictions imposed upon autonomy and legitimacy that are required by theories of justice. These are the core questions of liberal political philosophy, and I cannot recount the work that has been done on them or offer any original alternative to the contending approaches." Roughan, *Authorities*, 128.

[74] Roughan, *Authorities*, 128, n 8.

[75] Here, it is also helpful to consider that Dworkin's jurisprudential views are equally skeptical about the Razian concept of authority.

[76] Roughan, *Authorities*, 134.

[77] See Martti Koskenniemi, *The Gentle Civilizer of Nations – The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2014), chapter 6. See further, David Roth-Isigkeit, "The Blinkered Discipline?! Martti Koskenniemi and Interdisciplinary Approaches to International Law," *International Theory* 9, no. 3 (2017): 410.

One version of these interdisciplinary approaches considered in the first subsection proceeds along the lines of the liberal process schools. Drawing on scholarship from the discipline of International Relations to supplement a process-oriented notion of law with additional content, it is a liberal natural law in a new form in which science provides for the normative content.[78] A second version of interdisciplinarity considered in the second subsection can be located in constructivist scholarship trying to avoid the unidirectional imposition of value in favor of a gradual emergence of normativity in an interactional process. This strand, ultimately, tries to escape the charge of decisionism made against process scholarship.

5.3.1 Rationalist Interdisciplinary Mainstream

Just like the approaches that have been considered in this chapter so far, the turn toward interdisciplinarity in legal method starts with a rejection of positivist methodology. In 1989, Kenneth Abbott took the first step toward an interdisciplinary turn, urging international lawyers to give up their rule formalism and instead to learn to generate hypotheses.[79] He combines a dynamist and procedural concept of law with the functionalism of rationalist political science. In 1993, Anne-Marie Slaughter's *Dual Agenda* hit the spirit of the time with the suggestion to "redefine the form of law, moving in some measure from rules to process."[80] This transformation required drawing on the resources of political science, since the new processes of global law needed a refined understanding of law's extended functions: "Whereas rules guide and constrain behavior, providing triggers for sanctions, processes perform a wider range of functions: communication, reassurance, monitoring and routinization."[81]

Open normative commitments have accompanied the interdisciplinary agenda since its foundation. At its very beginning, interdisciplinarity is supposed to provide the justificatory resources for a liberal agenda. Paradigmatically, Slaughter argues that "[i]f it could be reliably shown that a great-power condominium was the best guarantee of international

[78] See, for example, Martti Koskenniemi, "Miserable Comforters: International Relations as New Natural Law," *European Journal of International Relations* 15, no. 3 (2009): 395.

[79] Kenneth W. Abbott, "Modern International Relations Theory: A Prospectus," *Yale Journal of International Law* 14 (1989): 335.

[80] Anne-Marie Slaughter, "International Law and International Relations Theory: A Dual Agenda," *American Journal of International Law* 87, no. 2 (1993): 209.

[81] Slaughter, "Dual Agenda," 209.

peace, then international law and organization should accommodate and support an arrangement that confers special privileges on a group of these powers."[82]

Technically, it was with the turn toward norm properties that the research strand took off. With the notion of soft law, a legality of different degrees, rationalist political science had found a playing field.[83] Interdisciplinarity thus understood involves a typology of more or less "legalized" regimes on a spectrum ranging from hard to soft law. This typology reflects different kinds of norms in light of the costs that come with choosing one or the other option—constraints on governments are weighed against the reduction in transaction costs through legal certainty. Advising governments on how to institutionalize degrees of obligation, precision, and delegation, cost and benefit analysis ultimately suggests "considerable skepticism about the significance and contingency of the international and domestic effects of legalization."[84]

This toolkit approach is particularly useful in the circumstances of plurality, since it avoids a systematic approach to legality. Yet, the outlook for international law in this picture is rather dark. "No assumption is made that legalization is a wave of the future. […] Interstate legalization, as reflected in the jurisprudence of the International Court of Justice has not transformed world politics."[85] Rationalist interdisciplinary scholarship thus ultimately culminates in the famous claim that "there is a more sophisticated international law literature in the International Relations subfield of political science."[86] It replaces the Dworkinian appeal to values with a notion of effectiveness, while the basic methodological assumption remains the same—the legal process needs the support of law-external sources of normativity.

[82] Slaughter, "Dual Agenda," 206.

[83] Kenneth W. Abbott and Duncan Snidal, "Hard Law and Soft Law in International Governance," *International Organization* 54, no. 3 (2000): 421. See also, Judith Goldstein et al., "Introduction: Legalization and World Politics," *International Organization* 54, no. 3 (2000): 388.

[84] Goldstein et al., "Introduction," 399.

[85] Goldstein et al., "Introduction," 399.

[86] Jack Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005), 15.

5.3.2 Dworkinian Turn in Constructivism

The second perspective on interdisciplinarity that seems promising for a better understanding of legal plurality is constructivism in International Relations. In contrast to rationalism, constructivism endorses a positivist understanding of rules as an important factor in an actor's identity formation through interaction. Through this interactional framework, constructivism is capable of shedding light on the relationship of law and other sources of normativity. While early constructivist approaches, in particular in the scholarship of Nick Onuf and Fritz Kratochwil,[87] have been hesitant to redefine legal formality, newer approaches can be read in the line of a process-oriented implementation of value, an argument in the Dworkinian style. The contrast of both approaches serves to prepare the ground for a first theoretical engagement of a dynamic reading of international law.

In constructivism, law plays a role in constructing identities of polities, in building social norms, and in influencing behavior through interaction. For Kratochwil, law consists in a particular process of reasoning.[88] Onuf suggested an image of law as ordering system built on speech act theory.[89] While drawing extensively on traditional understandings of legal obligation, both were careful to redefine the criteria of legality suggested by analytic positivism. Interdisciplinary cooperation was understood here as drawing on each other's insights without necessarily trying to subvert or redefine the other discipline's grown understandings of the own subject.

Onuf tackles the phenomenon of law through an analysis of language. According to him, language and the construction of the world are mutually constitutive. He writes about the mutual construction: "When we speak of order, we choose a fiction to believe in. 'Order' is a metaphor, a figure of speech, a disguise. It is constituted by performative speech and constitutes propositional content for this speech."[90] By frequent repetition, a speech act, used in a specific manner, can be instituted as a rule.

[87] See Nicholas Onuf, "Do Rules Say what they Do? From Ordinary Language to International Law," *Harvard International Law Journal* 26, no. 2 (1985): 385; Nicholas Onuf, *World of our Making: Rules and Rule in Social Theory and International Relations*, reissue (London: Routledge, 2013). Friedrich V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge: Cambridge University Press, 1989).

[88] Kratochwil, *Rules*, 205.

[89] Onuf, *World of Our Making*, 138.

[90] Onuf, *World of Our Making*, 155.

Onuf thus stays within a formalist framework of validity, yet is able to conceptualize law as a process.[91] His concept of "rules" as general prescriptive statements relies on the jurisprudence of Hart.[92] Yet, in contrast to Hart, Onuf is more optimistic that the growing *United Nations* system could satisfy more sophisticated criteria of formalization, external validation, and enforcement procedures.[93]

Similarly, Kratochwil examines how rules shape decisions, drawing on critical discussions of Wittgenstein, Habermas, and Hart.[94] Kratochwil suggests that rules guide action and are able to solve problems of sociality, linking the individual to a social world in which the necessity of coordination arises out of the scarcity of resources.[95] Rules simplify this social interaction, but more importantly, they constitute our social world.[96] In exploring the relationship to decisions through deliberation and interpretation, Kratochwil focuses on the generation of law-internal normativity. In discussing the "systemic concept of law,"[97] Kratochwil argues that rules only establish an indicator, but never a conclusive proof for a decision.[98] Law belongs to the realm of practical discourse dependent on the use of analogies and contextual adaptations. Its application is as much a matter of context and rhetorical figures as it is a matter of rules. Acknowledging the realist critique, in Kratochwil's view, does not impede on a formalist understanding of rules.

Early constructivist models are easy to reconcile with the sociological interpretation of Hart's concept of law that roots legal validity in practical acceptance by legal subjects. The rule of recognition identifies criteria that allow us to answer the question what counts as valid law in a legal system.[99] One of the charges made against a positivist view of obligation is a lack of explanation on how law can be obligatory. How can someone (or a State) subject to law regard it as a legal obligation—that is, to treat the law as

[91] For an illustration of these two dimensions, see Chap. 3.5.

[92] See, Nicholas Onuf, "The Constitution of International Society," *European Journal of International Law* 5 (1994): 13.

[93] Onuf, "Constitution," 18–19.

[94] A recent restatement and discussion of these claims in Friedrich V. Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014).

[95] Kratochwil, *Rules*, 70.

[96] Kratochwil, *Rules*, 11.

[97] See, for example, his discussion of Hart and Kelsen. Kratochwil, *Rules*, 187–93.

[98] Kratochwil, *Rules*, 192.

[99] Herbert L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 110.

reason-giving for one's own actions? Through the rule of recognition, it is possible to identify criteria of legality that allow for a determination of the content of the law. But none of these criteria explain in themselves why we should follow the social practice of law in the first place.

These (seemingly unresolved) foundational questions of the obligatory nature of law led the next generation to depart from Onuf's and Kratochwil's premises. Today's constructivists like Jutta Brunnée and Stephen Toope claim that analytic positivism is one of the main theoretical obstacles in a meaningful dialogue with law.[100] While, on the one hand, early constructivism fails to explain the obligatory nature of law through its positivist methodology,[101] normative criteria for legality, on the other hand, should not collapse in the instrumentalism of the process schools.[102]

Drawing on the jurisprudence of Lon Fuller, their third way understands legal obligation in interactional terms. The interdisciplinary research program, they insist, should turn toward norm properties to explain better than legal theorists what constitutes the obligatory force of law. Legality, in this view, stems from normative instead of formal criteria, and the normativity of legal obligation is created through a process of reciprocal interactions. Fuller argued that legality involves adherence to certain minimal-normative criteria such as generality, clarity, and constancy.[103] Brunnée and Toope suggest that when norm creation conforms to Fuller's demands, a practice of legality arises.[104] These practices ultimately generate a law-internal legitimacy and a sense of obligation.[105]

Technically, their proposal resembles in many respects the early process schools. Most significantly, it makes the same assumptions about legal formality. While the realist insight did not lead Kratochwil to reconceptualize legal formality, Brunnée and Toope's reference to normative criteria

[100] Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010), 119, 127.

[101] Brunnée and Toope refer to approaches from Hurd, Risse, Sikkink, and Finnemore. See Jutta Brunnée and Stephen J. Toope, "Constructivism and International Law," in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, eds. Jeffrey L. Dunoff and Mark A. Pollack (Cambridge: Cambridge University Press, 2013), 128.

[102] Brunnée and Toope, "Constructivism," 130.

[103] Brunnée and Toope, *Legitimacy and Legality*, 20f. See also Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

[104] For the criteria of legality, see Brunnée and Toope, *Legitimacy and Legality*, 28f.

[105] Obligation is thus connected to compliance. Brunnée and Toope, *Legitimacy and Legality*, 94f.

accounts for a Dworkinian turn. In line with the process schools, they define the validity of a legal norm with reference to an evaluation of normative criteria that are, in principle, external to the legal system. While Fuller's criteria seem more reasonable and specific than a general reference to the concept of "human dignity," the technical definition of legality does not stem from the legal system itself, but from another (external) source of normativity.

5.3.3 Process, Interdisciplinarity, and Decisionism

Throughout this chapter it has been argued that, while arguments drawing on external sources of normativity to reconstruct the law have advantages in bridging the gaps that the increasing plurality of international law opens up, they collapse into a form of decisionism.[106] At least in theory, in the Hartian framework, which is criticized and discarded by the approaches of this chapter for its inadequacy to provide for convincing explanations of the effectiveness of law, rules can provide a certain resistance to power politics. This claim relies on a technical view of a specific discursive community that formal law establishes.

The Hartian view differentiates between different attitudes that one can take toward a rule. Legal obligation becomes a matter of perspective.[107] While the obligatory nature of law appears through an internal perspective of legal participants, the external perspective points to the functional dimension. To accept a social rule means to suppose behavior "as a general standard to be followed by the group as a whole."[108] Even though the external observer might examine the attitudes of the legal speakers and incorporate every particularity of legal discourse, she can only inadequately take into account the participant's point of view.[109] Hart explains: "For such an [external] observer, deviations by a member of the group from normal conduct will be a sign that hostile reaction is likely to follow, and nothing more. His view will be like the view of one

[106] Koskenniemi, *Gentle Civilizer*, chapter 6.

[107] For similar perspectives, see Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, Volume I, eds. Guenther Roth and Claus Wittich (Berkeley: University of California Press, 1978), 311; Jürgen Habermas, *Between Facts and Norms*, trans. William Rehg (Cambridge: MIT Press, 1998), 66.

[108] Hart, *Concept of Law*, 56.

[109] For further discussion and explanations, see Scott J. Shapiro, "What is the Internal Point of View?" *Fordham Law Review* 75 (2006): 1157.

who, having observed the working of a traffic signal in a busy street for some time, limits himself to saying that when the light turns red there is a high probability that the traffic will stop. He treats the light merely as a natural sign that people will behave in certain ways, as clouds are a sign that rain will come."[110] This perspective resonates well with rationalist cost and benefit analyses.

According to Hart, however, such a description of the law remains fundamentally incomplete. Hart argues that "[i]n so doing he will miss out a whole dimension of the social life of those whom he is watching, since for them the red light is not merely a sign that others will stop: they look upon it as a signal for them to stop, and so a reason for stopping in conformity to rules which make stopping when the light is red a standard of behavior and an obligation."[111] This aspect of obligation, in the Hartian picture, avoids decisionist tendencies through the opening of a critical discursive space. One criticizes actors (even oneself) for non-conformity using normative expressions, and one even considers this criticism legitimate.[112] Yet, this critical function can be upheld only insofar as one takes a participant's view of legal discourse. In this picture, law's anti-decisionist promise is that conflicts of values are carried to a shared language that offers the opportunity to move discussions about coordination of a complex society from a context of arbitrary confrontation of metaphysical claims into a specific context, the language of law.[113]

The law-external sources of normativity in process approaches impede on this function. For the dynamist, the determination whether a norm belongs to the body of law requires an examination of the norm properties, like the realization of Fuller's criteria or "human dignity." Whenever a state (or an individual) is criticized for disobeying the law, such a concept of validity opens an easy defense that blurs its necessity for justification. Since validity is to be examined before the facts, one needs to argue *why* the law, on an abstract level, should be valid. In the absence of formal criteria, this will lead you to an argument about other criteria for validity: effectiveness or morality. As this general level of argument allows for more justifications than the narrow interpretation rules of legal discourse, a

[110] Hart, *Concept of Law*, 89–90.

[111] Hart, *Concept of Law*, 89–90.

[112] Hart, *Concept of Law*, 98 and 137–38.

[113] See, for a similar claim, Philipp Allott, "Language, Method and the Nature of International Law," *British Yearbook of International Law* 45 (1971): 124–6.

dynamist concept of law makes it easier to justify actions that would otherwise be constrained by law. Though this flexibility allows for a better bridging of the gaps that occur as a result of legal plurality, it equally reduces the constraints law has to offer. This, in short, is the decisionist element in Dworkinian approaches.

5.4 Global Legal Principles Between Governmental Interest and Humanity

One characteristic feature of a Dworkinian approach to global law has been explored in the last two sections—the dynamic understanding of legal validity on the basis of science, policies, or values. Another dimension of Dworkinian thought relates to the establishment of a community of principle, which provides guidance for the interpretive process. While the two preceding sections have shed light on what an interpretive approach to global legal thought might look like, the next two sections concentrate on the second part of the equation—the reconstruction of global law as a community of principle.

This section maps this initial conception of a community of principle in two different directions. The first considers individuals as ultimate bearers of value in international relations. Principles in this interpretation are individual rights that structure the plurality of fragmented regimes. More traditionally, on the other hand, it is possible to understand states as the legal entities, which constitute the community of principle. Both aspects are reflected in the diversity of approaches in this section.

5.4.1 Rights as Constitutional Principles

One of the approaches that have gained prominence in debates on global law is rights-based constitutional pluralism, which understands constitutional rights as fundamental principles.[114] Advocates of this strand believe that the principles structuring plurality should be constructed through a

[114] See e.g., Neil Walker, "The Idea of Constitutional Pluralism," *Modern Law Review* 65, no. 3 (2002): 317; Miguel P. Maduro, "Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism," in *Ruling The World? Constitutionalism, International Law and Global Governance*, eds. Joel P. Trachtman and Jeffrey L. Dunoff (Cambridge: Cambridge University Press, 2009), 356; Alec Stone Sweet, "Constitutionalism, Legal Pluralism, and International Regimes," *Indiana Journal of Global Legal Studies* 16, no. 2 (2009): 621.

transnational interpretation of individual rights. As a consequence of continuous dialogue on the content of these principles, an overlapping consensus will emerge, which has the capacity to structure global legal plurality. The normative concept that stands behind these approaches is cosmopolitanism, the idea that all human beings belong to one single community, which, in the ideal case, turns into a legal community.

Alec Stone Sweet, one of the defenders of rights-based constitutional pluralism, argues that "[a] cosmopolitan legal order is a transnational legal system in which all public officials bear the obligation to fulfill the fundamental rights of every person within their jurisdiction, without respect to nationality or citizenship."[115] Drawing on Kant's conception of cosmopolitanism, he defends that we should understand the global spread of constitutional rights interpretation as a promotion of cosmopolitan right.[116] Yet, since rights cannot possibly be absolute under conditions of scarcity, the challenge of a rights-based approach boils down to proportionality and balancing exercises. In Stone Sweet's view, the institutional side of a cosmopolitan system might come about through a global community of courts under the coordination of the *European Court of Human Rights* (ECHR).

The system of rights is therefore constructed in dialogical fashion between the different levels of adjudication. In between these different levels, there is no central coordination. One central aspect of the cosmopolitan system is decentralized sovereignty, which, as we have noted earlier, leads to coordination problems under the circumstances of plurality. In the rights model, however, this open structure of the system turns into something positive—the individual has a spread of possibilities to choose the applicable jurisdiction, which in the best case can lead to competition between courts and a rise in human rights standards.[117]

Kai Möller, who argues for a new model of constitutional rights, shares this commitment to an openly normative theory.[118] Whereas the old model imposed merely negative obligations on states to protect individuals in mostly hierarchical relationships, the new model turns on the positive dimension of rights, guaranteeing the equal freedom of all individuals,

[115] Alec Stone Sweet, "A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe," *Journal of Global Constitutionalism* 1, no. 1 (2012): 53.

[116] Stone Sweet, "Cosmopolitan Legal Order," 57.

[117] Stone Sweet, "Cosmopolitan Legal Order," 62.

[118] Kai Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press, 2012).

including their horizontal effect and conceptions of their collisions. Möller's basic assumption is that human beings enjoy in principle a *right to everything*, which might only be constrained under specific circumstances.[119] Möller and Stone Sweet underline their claims by drawing extensively on human rights practice, in particular the ECHR. Their methodology, in line with Dworkinian thought, relies on a moral reconstruction of practice. Möller aligns with Dworkin in regard to his interpretive methodology. He argues that balancing essentially means moral reasoning on the basis of an intelligible reconstruction of a practice. Legal argument thus turns into questions of substantive morality.

According to Möller and Stone Sweet, this positive dimension of constitutional rights can solve the coordination problem through proportionality balancing. In this picture, individual rights are an important part of global order, effectuated and promoted by a global community of courts. Their ideas reflect a development of global law in which individual rights are increasingly in the legal focus. Rights, in this view, become a pervasive feature of law in general. The interesting aspect of a rights-based solution to the problem of plurality is that it does not require a political reconstitution of order. Rather, the development of global constitutional rights is promoted by a networking judiciary that develops form and content of rights, transcending national borders, yet not relying on governmental power.

It is important to note how the implementation of rights through a networking judiciary differs from the abstract intellectual formulation of values that have appeared in the earlier sections of this chapter. The judicial dialogue mitigates the decisionism inherent in open appeals to values to some extent. Yet, this loose form of transnational consensus is not yet a dialogue in the Habermasian sense. There are no legal procedures in place to secure equal participation for different voices. If consensus fails, the model turns back to the monological structure of moral realism. This problem is further aggravated through the open texture of constitutional rights balancing, which is always at risk of becoming normatively empty if it does not stabilize in compulsory and repeating procedures.

One pathway to endow the system with more stability is not only to root it in an abstract balancing of constitutional rights, but to extend the spectrum to general international law doctrine. Stefan Kadelbach and Thomas Kleinlein maintain, similarly to the approaches of Stone Sweet and Möller,

[119] Möller, *Global Model*, 85.

that the constitutional argument essentially consists of a practice-based reconstruction of principles.[120] In contrast to these models, however, they do not orient their approach on the practice of human rights courts. Rather, recognizing the potential problems that these open appeals to values come with, their proposal is rooted in international law doctrine. Relying on an interpretation of the general principles clause in Article 38 of the statute of the *International Court of Justice*, they argue that "the constitutional principles of universal respect for human rights, of democratic legitimacy or accountability and of the rule of law, but also the principle of respect for the environment, can be established as general principles of international law."[121] They find guidance for their concept of principles in the theoretical accounts of Robert Alexy, who qualifies legal principles as optimization requirements. Individual rights can thus be understood as optimization requirements that are a constitutional feature of the global order.

By including structural principles in the larger picture, they bring their view closer to a Habermasian framework. Though further mitigating the problem of decisionism in abstract balancing, their view does not aim at satisfying the high legitimacy requirements that allow for legitimacy through legality.[122] Their reconstruction provides an important mediating perspective in contrast to the top-down universalisms that are prominent among the Dworkinian approaches.

Fundamental rights might be a particularly attractive option in circumstances of plurality. According to Stefan Kadelbach, conceptions of fundamental rights have always oscillated between different layers of law and normativity.[123] Arguments stemming from the general assumption of cultural relativity are therefore in themselves not suitable to discard the universal aspiration of rights. Rather, both claims are complexly interrelated in a multilayer legal environment. He argues that, since the process of pluralization in the law began in the early 1990s, we can observe "vertical and horizontal transfers from the world of 'liberal' states to other systems, be it by way of private entities, states' foreign and development politics or

[120] See Stefan Kadelbach and Thomas Kleinlein, "International Law – A Constitution for Mankind? An Attempt at a Re-appraisal with an Analysis of Constitutional Principles," *German Yearbook of International Law* 50 (2007): 303, 338.

[121] Kadelbach and Kleinlein, "Constitutional Principles," 338.

[122] See Chap. 3.1.

[123] Stefan Kadelbach, "The Territoriality and Migration of Fundamental Rights," in *Beyond Territoriality – Transnational Legal Authority in an Age of Globalization*, eds. Günther Handl, Joachim Zekoll and Peer Zumbansen (The Hague: Martinus Nijhoff, 2012), 295.

international organizations."[124] The rights discourse has reacted to the pluralization of law by way of extra-territorialization and started to attach obligations to actors rather than territorial entities.[125] In his view, plurality appears as the cultural reflection of universal principles in the respective jurisdictions.[126] This universal norm content creates a thin layer of normativity that has the potential to bridge the gaps between the particularistic content of legal orders that appears in the course of fragmentation.

This strategy ultimately relies on a plurality of avenues that may contribute to an adequate reconstruction of principles. In addition to procedural concerns derived from general international law, fundamental rights are refracted through the particularistic prisms of culture and religion situated in domestic contexts. While retaining the methodology of a Dworkinian perspective, Kadelbach bridges the moral realism with more careful expressions of normativity in order to construct a normative model that largely avoids the charge of decisionism. In legal practice, this view reflects the emerging approach of the ECHR to set limits to the exercise of sovereignty in national states of emergencies. Here, the court has defended a *right to invoke rights*, requiring that no situation can justify that individuals are deprived of their right to independent review of their fundamental rights.[127]

While the incorporation of this model in the jurisdiction of the ECHR is a promising start, its universalization might prove challenging. As the framework of interpretation is mostly situated in (national) political communities, the last word remains in these political entities, universal norm content notwithstanding. Instead of looking at the norms themselves, in a critical perspective, it might be more appropriate to focus on the framework in which the principled discourse is situated. Plurality, in this view, appears still most prominently at the level of conflict between different conceptions of polities,– instead of different conceptions of rights.

[124] Kadelbach, "Territoriality and Migration," 297.

[125] Kadelbach, "Territoriality and Migration," 316.

[126] Kadelbach, "Territoriality and Migration," 323.

[127] Stefan Kadelbach and David Roth-Isigkeit, "The Right to Invoke Rights as a Limit to Sovereignty – Security Interests, State of Emergency and Review of UN Sanctions by Domestic Courts under the European Convention of Human Rights," *Nordic Journal of International Law* 86, no. 3 (2017): 275.

5.4.2 External Evaluation of Plural Regimes

Approaches that attach a higher value to the setting in which the individual is situated provide an alternative to the interpretive framework of individual rights. Rights play a role, but they are always mediated by a political community. The collision between different layers of law thus occurs on a more systematic level. Conflict resolution requires an evaluation of the adequacy of one form of political organization against another. Principles appear on a middle level as a standard according to which different regimes are evaluated. They therefore provide comprehensive views of adequacy according to which the structure of political communities (or fragments thereof) is put under scrutiny.

One version of such a principled conception is John Rawls' *Law of Peoples*.[128] In analogy to the reasoning of a *Theory of Justice*,[129] he first defines principles that an idealized society of peoples has to observe in order to coexist and cooperate peacefully. Rawls then breaks down these principles to the *status quo* and infers principles for a non-ideal world. These theoretically constructed principles are largely in line with the basic principles of international law.[130] As the only difference, they apply between peoples, neither states nor individuals. The *Society of Peoples* consists of liberal and non-liberal, but decent peoples, which Rawls altogether calls "well-ordered societies." Liberal peoples base their organizational form mainly on three related ideas: (1) basic rights and liberties of the kind familiar from a constitutional regime, (2) special priority for these rights, liberties, and opportunities, with respect to the claims of the general good and perfectionism values, and (3) guaranteeing all citizens the requisite primary goods in order to enable them to make intelligent and effective use of their freedoms.[131] The difference between them and non-liberal

[128] John Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999).

[129] John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971).

[130] Rawls, *Law of Peoples*, 37. The principles are that peoples are free and independent, and their freedom and independence are to be respected by other peoples; peoples are to observe treaties and undertakings; peoples are equal and are parties to the agreements that bind them; peoples are to observe a duty of non-intervention; peoples have the right of self-defense but no right to instigate war for reasons other than self-defense; peoples are to honor human rights; peoples are to observe certain specified restrictions in the conduct of war; peoples have a duty to assist other peoples living under unfavorable conditions that prevent their having a just or decent political and social regime.

[131] Rawls, *Law of Peoples*, 14.

peoples reflects the fundamental problem of plurality. Cultural plurality will lead to diverse political forms, and there is a line to be drawn for which ones are to be tolerated and which are not.

Toleration of plurality, however, requires the law of peoples to encompass non-liberal, but decent peoples. Rawls explains: "A decent people must honor the laws of peace; its system of law must be such as to respect human rights and to impose duties and obligations on all persons in its territory. Its system of law must follow a common good idea of justice that takes into account what it sees as the fundamental interests of everyone in society. And, finally, there must be a sincere and not unreasonable belief on the part of judges and other officials that the law is indeed guided by a common good idea of justice."[132] This is what, according to the liberal view, represents the outer line of toleration.[133] All other political communities stand outside the society of peoples.

This comprehensive conception of a society of peoples is Rawls' view on ideal theory, that is, an application of liberal political morality to the global sphere. Yet, ideal theory cannot answer "the questions arising from the highly non-ideal conditions of our world with its great injustices and widespread social evils."[134] There are "outlaw states" and "burdened societies" which do not conform to these ideals. Foreign policy then walks the line between possibly enlarging the society by assisting these peoples to become liberal and, at the same time, defending the society of peoples against threats from these entities.

Rawls does not talk about plurality as such. His central concern is what a liberal foreign policy can or cannot do, in particular in the circumstances of armed conflict. Yet, the structure of argument fits in as a medium position of principled approaches toward plurality. The main question that Rawls is concerned with is the question what is to be tolerated as a legitimate form of societal organization, and what is not. In circumstances of plurality, the same question arises, with the difference that it is not only peoples colliding, but many forms of different entities. All these entities, however, originate in some form of political community, so that it is possible to take the internal constitution of these communities into account when deciding conflicts between them.

[132] Rawls, *Law of Peoples*, 67.
[133] See also Charles R. Beitz, "Rawls' Law of Peoples," *Ethics* 110, no. 4 (2000): 676.
[134] Rawls, *Law of Peoples*, 89.

In Rawls' picture, the approach retains some similarity to adjudication on a formal level. Conflict resolution in a particular case is mediated and replaced by a more general argument on the adequacy of the constitution of the conflicting parties. Technically, the artificial construction of the "normative identity" of an actor precedes the conflict resolution. In a second step, the constructed identities are set into an (equally) artificial conflict with each other and judged on the basis of preexistent principles that apply on their relation. Taking the Rawlsian standard as a basis, this leads to a liberal threshold for the legitimate participation in the plurality of global law.

5.4.3 Regime Obligations Toward the International Community

A third way to locate a principled conflict resolution is between single entities and an (imagined) larger international community. Approaches of this kind ask how single political entities can legitimately exercise political authority given that they are always situation in a larger community. One example for such a view is Matthias Kumm's *Cosmopolitan Constitutionalism*. In order to make sense of plurality, Kumm suggests an approach based on liberal principles. He promotes a concept of global political society as a collective self-construct, in which the current state-based order is but one organizational form that must reflect basic, preexistent universal principles.[135] The overarching constitutional cosmopolitan order obliges every regime to take these principles into account.

Kumm deliberately constructs these principles in a procedure relying on the Rawlsian concept of public reason.[136] In contrast to Habermasian approaches, the *cosmopolitan paradigm* seeks a justification that "has to meet a complex standard of public reason, established by the principles of cosmopolitan constitutionalism, not by the will of a demos."[137] This

[135] Mattias Kumm, "The Cosmopolitan Turn in Constitutionalism – An Integrated Conception of Public Law," *Indiana Journal of Global Legal Studies* 20, no. 2 (2013): 605f. For an Introduction, see also Neil Walker, *Intimations of Global Law* (Cambridge: Cambridge University Press, 2015), 80–81.

[136] Mattias Kumm, "The Cosmopolitan Turn in Constitutionalism – On the Relationship between Constitutionalism in and beyond the State," in *Ruling The World? Constitutionalism, International Law and Global Governance*, eds. Joel P. Trachtman and Jeffrey L. Dunoff (Cambridge: Cambridge University Press, 2009), 263.

[137] Kumm, "Relationship between Constitutionalism in and beyond the State," 268.

cognitively constructed standard is supposed to replace the collective will as a point of reference for the exercise of legitimate authority. In line with the Dworkinian paradigm, it suggests proportionality tests and interpretive methodology.[138] Public reason, in this picture, involves the requirement to take the legitimate interests of other parties into account.[139] Kumm thus promotes a split of responsibility of sovereign power. While the state bears obligation toward its citizens, it also has to find its place in the international community.

If national legislation fails to conform to obligations toward the international community, it appears illegitimate.[140] As an example, Kumm imagines a case in which an inclusively reformed *Security Council* (SC) decides with a four-fifths majority that India must conform to predetermined emission limits.[141] This resolution, however, stands in contradiction to India's domestic legislation. Since climate change is of universal concern, and emissions have the potential to cause externalities, the SC decision appears legitimate.[142] Containment of plurality, in this version, works through universal obligations to a cosmopolitan community, which sets limits to the legitimate exercise of authority.

Kumm's conception of legitimacy ultimately frames a decisive difference to the Habermasian approaches of the third chapter. Kumm argues that "[t]he principle of legality, in its thinnest interpretation, establishes that wherever public authority is exercised, it should respect the law."[143] This move turns the argument of legitimacy through legality upside down. Authority is legitimate insofar as it does not *contravene* the law, instead of having to be positively legitimated. However, a public reason test in itself might be too unspecific to solve the problem of plurality. While formalism tends toward overdetermination, conceptions relying on balancing are always at risk of saying nothing specific at all.

[138] Kumm, "Relationship between Constitutionalism in and beyond the State," 269.

[139] In this idea rests a risk of circularity. Whether interests are legitimate depends on the public reason test.

[140] Kumm, "Relationship between Constitutionalism in and beyond the State," 290.

[141] Kumm, "Relationship between Constitutionalism in and beyond the State," 298f.

[142] Kumm, "Relationship between Constitutionalism in and beyond the State," 301.

[143] Kumm, "Relationship between Constitutionalism in and beyond the State," 274.

5.5 The Dworkinian Approach to Plurality

The Dworkinian approach to plurality comes with a technical side, a dynamic and interpretive concept of law, and a normative side, the construction of a community of principle. While the technical argument that law has to be interpreted in light of its underlying values has been discussed in great detail, the question of political morality seems pressing. The ultimate decision on the content of the law depends on those values reflecting the political morality of global law. But what are these values? And how could they be legitimately determined? This is a substantive question of moral philosophy with a direct impact on the question of legal obligation. In order to attempt an answer, the most promising way seems to be the determination of basic unities of political morality in global law.

Before that, the first subsection will discuss a seemingly easy way out of the problem. Procedural principles, it could be argued, can capture the advantages of both Dworkinian and Habermasian approaches. On the one hand, it seems, they escape the problem of determining substantive moral conceptions by rationalizing global law through procedures that conform to rule-of-law standards in the domestic realm. On the other hand, the problems that arise through a transformation of democracy to the global sphere can be avoided. Yet, in practice, by failing to conform to either demand, procedural principles offer no middle way. While too thin from a Dworkinian perspective, they fail to meet the requirements of the identity principle in the Habermasian conception. Since procedural principles have found considerable support in the discourse, however, this question needs to be discussed in more detail.

5.5.1 Habermasian Hoax: The Threshold of the Identity Principle

Procedural principles suggest that the internal proceduralization of the law would make input legitimacy in the Habermasian sense dispensable. At the same time, procedural principles would live up to the demands of justification structures in democratic constitutional societies. On the one hand, the proposal aims at constraining the decisionistic tendencies that a deliberate appeal to process comes with.[144] On the other hand, they do not overload their concept of law with the high requirements of a *demos*.

[144] See Sect. 5.3.3 above.

On the face of it, there seems to be the chance to kill two birds with one stone. Procedural principles seem to combine the virtues of Habermasian and Dworkinian approaches. Yet, as this section shall demonstrate, they end up missing both. While appeals to a Habermasian democratic procedure require reaching the threshold of the identity principle, a Dworkinian response needs more than merely the appeal to a thin set of procedural principles.

To recall the idea of procedural principles from the third chapter, the scholarship under the label of *International Public Authority* (IPA) came with the argument that procedural principles can provide for a democratic standard, explicitly relying on Habermas' scholarship.[145] In contrast to the traditional conception of self-determination, IPA suggests that international democracy requires merely a standard of inclusion.[146] Articles 9–12 of the *Treaty of the European Union* reflect a vision of international democracy.[147] Containing basic procedural rules, such as democratic elections of judges, publicness of decisions, and due process guarantees,[148] they guarantee a global citizenship on the basis of "equality, representation, transparency, participation, deliberation, and responsiveness."[149] When the exercise of public authority conforms to these principles, it is legitimate.

A similar claim to proceduralism (though not explicitly Habermasian) appears in the concept of *Global Administrative Law* (GAL).[150] The strategy here is to identify certain criteria indispensable for a public concept of law (legality, rationality, proportionality, rule of law, and human rights).[151] As has been argued earlier, these principles function in the terminology of GAL as a *negative rule of recognition*.[152] An illegitimate arrangement can thus be excluded on the level of legal methodology. While referring to a Hartian concept of law,[153] the approach redefines legality as a normative

[145] See, most clearly, in Armin von Bogdandy and Ingo Venzke, "In Whose Name? An Investigation of International Courts Democratic Authority and its Justification," *European Journal of International Law* 23, no. 1 (2012): 7.

[146] Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press, 2014), 146.

[147] Von Bogdandy and Venzke, *In Whose Name*, 135f.

[148] Von Bogdandy and Venzke, *In Whose Name*, 157f.

[149] Von Bogdandy and Venzke, *In Whose Name*, 147.

[150] See the discussion in Chap. 3.3.

[151] Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law," *European Journal of International Law* 20, no. 1 (2009): 32–33.

[152] See Sect. 3.3.1.

[153] Kingsbury, "Concept of Law," 26.

concept that depends on conformity with normative principles without a requirement for input legitimacy. This move aligns GAL with the process scholarship of this chapter.[154]

Part of the confusion might stem from the fact that, for Habermas, values and principles are also an important part of the law.[155] Habermas is no committed positivist in the formalist sense. In contrast to Dworkinian approaches, however, values enter the law not via substantial moral argument. Rather, input legitimacy is an indispensable requirement for the Habermasian concept of law. This foundational threshold is already reflected in an aspect of German constitutional history that might serve to illustrate why input legitimacy is such a central value for a Habermasian view. It enters the law through different readings of the identity principle, which paradigmatically collide in the scholarship of Hans Kelsen and Carl Schmitt. The central aspect of the debate is the relationship of legal form and state power.[156]

After the democratic revolutions, at the end of the eighteenth century, the claims for popular sovereignty had subsided in Germany. The primacy of the will of state dominated the political system. Citizens were held to refrain from trying to influence state matters.[157] Being voluntary self-constraints rather than obligatory,[158] the methods of law stood at the disposition of policy makers, increasing the effectiveness of state rule. This interpretation effectively led to a subversion of the historical achievements of the revolutions. It was not the people who created the state, but the state that created the people.[159] In contrast to this factual situation, the Weimar constitution stipulated in its first article that all state power had to originate in the people. This formulation was generally understood to reflect Rousseau's identity theory—ruler and ruled must be identical.[160]

[154] Walker, *Intimations*, 104.

[155] Habermas, *Between Facts and Norms*, 211f.

[156] For a discussion of this theme, see Nehal Bhuta, "State Theory, State Order, State System – Ius Gentium and the Constitution of Public Power," in *System, Order and International Law – The Early History of International Legal Thought*, eds. Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (Oxford: Oxford University Press 2017), 398.

[157] Hauke Brunkhorst, *Legitimationskrisen – Verfassungsprobleme der Weltgesellschaft* (Baden-Baden: Nomos, 2012), 100 calls this the etatist principle of non-intervention.

[158] Michael Stolleis, *Öffentliches Recht in Deutschland – Eine Einführung in seine Geschichte* (München: C.H. Beck, 2014), 55–60.

[159] Dieter Grimm, *Die Zukunft der Verfassung* (Berlin: Suhrkamp, 1991), 266.

[160] Hans Kelsen, *Vom Wesen und Wert der Demokratie*, 2nd ed. (Aalen: Scientia, 1963), 12f. Kelsen equally differentiates between idealistic and realistic conceptions of this identity, 18. See also, Carl Schmitt, *Verfassungslehre*, 10th ed. (Berlin: Duncker & Humblot, 2010), 234.

For Hans Kelsen, the identity principle meant that anybody subjugated to an authority must have the actual possibility to partake in the formation of that authority. This formulation required procedures in which the people can make effective use of its sovereignty.[161] In this understanding, the identity principle leads to inclusive and conclusive procedures of law-making. The decisive turn is the participation in the creation of legal norms. Since the state is created through inclusive procedures, state power is conceptually impossible without popular sovereignty. The state has no separate subjectivity independent of its citizens: executive power is only legitimate insofar as it is legal.

In contrast, for Carl Schmitt, legality could only serve legitimacy. Since the "political" is a friendship of equals, non-equals are not part of the requirements set out by the identity principle.[162] This move subverts formal equality with a material principle—the distinction between friend and enemy. The pre-legal distinction of who belongs to a political community is structurally superior to legality. In contrast, in Kelsen's view, the axiomatic understanding of formal equality avoids pre-legal distinctions.

The threshold of the identity principle distinguishes clearly between Habermasian and Dworkinian thought on global law. In the Dworkinian picture, this involves a different view of legality that can be illustrated with Kumm's conception of legitimacy.[163] He argues that "[t]he principle of legality, in its thinnest interpretation, establishes wherever public authority is exercised, it should respect the law."[164] This move turns the argument of legitimacy through legality upside down. Authority is legitimate insofar as it does not *contravene* the law, instead of having to be positively legitimated.

Procedural principles do not provide for the midway solution. Rather, they collapse in a weak version of Dworkinian thought, failing to observe the threshold of the identity principle. For if the question of political morality cannot be plausibly delegated to the decision of the people, a more comprehensive view of a polity than simply procedural interaction is required. Aligning with the realist assessment, and going far beyond the divisive distinction between friends and enemies, the approaches of this chapter presented complex inquiries into political philosophies instead of thin procedures.

[161] Kelsen, *Wesen und Wert*, 23f.

[162] As Brunkhorst shows, this does not only stand in contrast to Rousseau's conception, but also leads to a complete dissolution of the concept of popular sovereignty. Brunkhorst, *Legitimationskrisen*, 114.

[163] Section 5.4.3 in detail

[164] Kumm, "Relationship between Constitutionalism in and beyond the State," 274.

5.5.2 Principles for Whom? Basic Units of Political Morality

One of the central questions within these political philosophies is a determination of the basic moral units of global law. With Habermas, the construction of order starts from the smallest political entities. As we have seen, this is not necessarily the case with Dworkinian approaches, which can construct values and principles on many political levels. While an important strand of the discourse highlights individual rights as the basic principles of political morality, suggesting that law has to be reconstructed in their light, other approaches stress more comprehensive conceptions of values and principles for states, regimes, or the overarching political community.

The viability of principled arguments crucially depends on the level on which they are conceived. The larger this frame to which values are attributed becomes, the more difficult it is to provide for its adequate normative reconstruction. At the same time, constructing smaller frames and appealing to individual rights are in danger of missing the political realities of the pluralization process. From a realist perspective, approaches like Rawls' *Law of Peoples* or Kumm's *Cosmopolitan Constitutionalism* rightly attribute principles to entities that are actually in charge of resolving conflicts. Rights adjudication takes place in larger institutional settings, so that it seems implausible not to take into account their respective normative constitution. Through the appeals to citizenship, it becomes clear that individuals are part of larger political communities and their rights are mediated through these frames.[165]

At the same time, more pragmatic approaches capture the fact that there is something more to the public domain than a formal claim. In this picture, Teubner's balance between autonomy and self-restraint[166] originally conceived for functional regimes could be translated to relations between collectivities or societies. Such a view, however, seems to remain implausibly conservative. Embarking upon a departure from formal claims, why should one stop at a middle level of peoples or collectivities? Such pragmatism seems to miss an important dimension of what constitutes the current development of international law. The decay of sovereignty is accompanied by the idea that the assumption that polities within national states are unified and coherent communities might be overstated. Rather, it is individuals directly, unmediated by polities, who claim rights.

[165] Cp. von Bogdandy and Venzke, *In Whose Name*, 135f.
[166] See, in further detail, Sect. 4.1.3.

Consequently, the role of human rights in theories addressing the relations between single polities or states is comparably weak. Rawls, in his treatment of human rights, does claim significantly less than contained in the *Universal Declaration of 1948*,[167] while at the same time holding a quite high standard of liberalism as reasonable when it comes to collective self-determination. Kumm stays within the framework of analysis of relations between different collectivities that free and equal persons build, instead of looking at the relationship of these persons directly. In a similar vein, suggested procedural rights are frequently rights for inclusion of peoples and citizens—rights that remain ultimately connected to a particular political community. Yet, as the vibrant development of global human rights discourse shows, there is a more fundamental conception of humanity beyond citizenship.[168]

A counterargument to this tendency might appeal to the public functions that these unities may have in the absence of a centralized world state.[169] Political culture might require the mediation from smaller political subunits. A suitable response to plurality might necessarily address these subunits instead of the people themselves. A decision on the appropriate framework is a philosophical rather than a methodological question. Yet, while traditional international law might have a clear preference for the state framework, pluralization might be a starting point to reconsider an adequate reconstruction of political morality in different terms.

In line with this assumption, Jeremy Waldron radicalizes the focus of some of the discussed approaches on individual rights and subsequently reconceptualizes the concept of the rule of law in the global realm.[170] In short, he argues that the goal of international law requires seeing individuals instead of states as the ultimate beneficiaries of the global legal order. This means, according to Waldron, that states have merely an intermediary position. This claim could be seen as an illustrating cutting edge for the promises and perils of the Dworkinian approaches that have been examined in this chapter.

Waldron argues that the fact of plurality, that is, the absence of a centralized sovereign, makes it more difficult to make sense of the concept of

[167] Rawls, *Law of Peoples*, 65.

[168] See further, Anne Peters, *Beyond Human Rights – The Legal Status of the Individual in International Law* (Cambridge: Cambridge University Press, 2016), 408f.

[169] For a discussion of this aspect in Rawls, see Beitz, "Law of Peoples," 681.

[170] Jeremy Waldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law?" *European Journal of International Law* 22, no. 2 (2011): 315.

the rule of law. Since the rule of law is commonly conceptualized in close relationship to the protection of individuals' liberty and equality from a sovereign power, does the absence of that sovereign power not make the rule of law unnecessary? Waldron argues that there is no ultimate need to protect states in the same way from arbitrary exercise of power as individuals in the national realm.[171] Rather, he reformulates the purpose and object of international law in terms of its *telos*, which is to improve the lives of individuals. The orientation of international law on national sovereigns is, seen in that light, not more than "narrow scholasticism."[172] States, in this argument, are merely trustees of humanity, not ends in themselves. "A state's sovereignty is an artificial construct, not something whose value – like that of the human individual – is to be assumed as a first principle of normative analysis."[173] According to Waldron, this involves a reconfiguration of the rule of law: since an open, indeterminate, principles-based methodology might serve individuals more than one based on rules, the rule-of-law requirement must not be confused with a rule of rules.[174]

Yet, a combination of traditional views of the state from continental public law and value-based methodology is potentially explosive. Approaches focusing on the individual as a basic unit of political morality might avoid the pitfalls of legitimating larger frames. Rather, these approaches recognize plurality on a far deeper level that is not bound to mediation by political communities. The emergence of globally recognized human rights that transcend state borders is probably one of the most important features of what Rafael Domingo calls the *New Global Law*.[175] In contrast to the traditional international law values, his conception endorses principles that directly focus on individuals. Whereas most conceptions of global law in history somehow promoted utopias, the newer ones have left behind the top-down metaphysical universalism to embark upon a horizontal conception of equality. In this sense, it seeks to recognize the plurality of individuals instead of regimes or cultures.

[171] Waldron, "Sovereigns," 323.
[172] Waldron, "Sovereigns," 325.
[173] Waldron, "Sovereigns," 328.
[174] Waldron, "Sovereigns," 337.
[175] Rafael Domingo, *The New Global Law* (Cambridge: Cambridge University Press, 2011).

5.5.3 Dworkinian Approaches Between Governmental Interest and Humanity

Whether Dworkinian legal thought provides for normatively convincing perspectives depends on the principles of political morality that are established in the legal process. If cosmopolitan rights become the major narrative for global political morality, one might consider this methodology more adequate than if sovereignty remains in the central role. Dworkinian approaches contain the potential for both ways. The ultimate purpose of international law will be conceptualized differently depending on whether the question goes to a human rights lawyer or a government advisor. Value-based reconstructions are crucially based on the perspective that one takes toward international law's *telos*.

The first part of this chapter has illustrated the governmental perspective that comes with a conception of the public in which a central role for the protection of humanity is assigned to states. In this perspective, Waldron's argument that there is no intrinsic value for the states' freedom of constraint will not be accepted. The second part has illustrated a focus on the individual, in the strongest version of which states keep only a mediating role. There is no need to take a stake in these debates to accept that for both sides convincing arguments can be made. Both narratives have always been a crucial part of international legal thought.[176]

However, combining a value-based methodology with the idea that states are the ultimate bearer of rights, we are on a direct way to legitimating Schmittian themes, according to which the individual merely retains a symbolic role. The difference of both approaches is not part of the methodology itself. It merely comes as a matter of perspective. On the one hand, it seems obvious in the human rights and dignity-laden statements to be found throughout global legal materials. Looking at a multi-level human rights system that receives more and more grip on global politics, one might be optimistic that rights could be established as constitutional principles and build a rights-based cosmopolitan order. On the other hand, from the perspective of the government advisor, this claim can be easily discarded as merely rhetorical, which looks very different in practice. The point here is not to invalidate one or the other value-based point.

[176] For illustration, see Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit "Introduction," in *System, Order, and International Law – The Early History of International Legal Thought*, eds. Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (Oxford: Oxford University Press, 2017), 1.

Rather, the steady "in-between" of Dworkinian approaches highlights that issues dealing with reconstructions of values in one or the other way are most likely to be complicated and difficult, and that imprecision in this matter is most likely to be fought out on the back of the weakest, whom international law is supposed to serve.

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CHAPTER 6

The Plurality Trilemma: The Contingent Geometry of Global Legal Thought

In the first chapter, I have suggested that meta-theory is a project of map-making. The drawing of a map requires the observation of its object with a certain degree of abstraction. It relies on symbolic depictions and simplifications, and it is only through this reduction in information that the map becomes useful for the reader. Showing the world in a smaller scale might guide the view toward patterns and regularities and, in this way, facilitate access and understanding.

As part of their usefulness, different forms of maps highlight different aspects. A map of the New York City subway might distort the reader's impression on distances between places ("Let's walk, it is not more than two stations."). In order to fulfill the function of orienting the reader in a closed system, it leaves geographic accuracy aside. A geographical map, in contrast, claims to show an aspect of space in a reduction of complexity but yet in an accurate way. If distances between places were distorted on a city map, this would indeed be problematic because in contrast to a subway map, city maps are drawn in order to allow for a decision on whether to walk or not. The geometrical relations within the map need to coincide with the actual geometry of the depicted space.

In this chapter, I try to distill such a geometrical map of global legal thought from the discussions of Habermasian, Luhmannian, and Dworkinian approaches. In this inquiry, I suggest that the approaches make claims on the same social space. While the discourse seems to be

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highly contingent because it is conceptually fragmented, the fact that it relates to the same social phenomena enables a process of translation to a common vocabulary that lets us reduce the degree of contingency.

If this proves successful, this has mainly two consequences. On the one hand, it can show that approaches operate in the same conceptual space. Approaches are only *weakly* contingent because they have different normative preferences on ordering the same social space. On the other hand, they are still *contingent* because their preferences on the future of social order are different. The search for a single right answer of global legal method is a tilting at windmills.

This futility of a single, unified theoretical approach is what I call the *Plurality Trilemma*. The approaches described as Habermasian, post-modern Luhmannian, and Dworkinian have incompatible preferences on social order. Their different foundational commitments predetermine the intellectual path from claims about the nature and purpose of society in general and their global legal thought. In every single model, global law has virtues that are lacking in one of the other approaches. For example, while the post-modern Luhmannian model might provide for the most plausible theory of input legitimacy, it cannot adequately take into account the role of values in the law. While in the Dworkinian model, values occupy a central place, the democratic links of justification tend to get blurred. Ultimately, the Habermasian model, in the attempt to combine both virtues in a theory of constitutionalism/formalism, is confronted with the charge of not adequately reflecting the actual processes of global law. All three approaches have virtues in their own right, which cannot possibly be combined.

The *Plurality Trilemma*, the argument that the one-size-fits-all solution is unavailable, turns global legal thought into a clash of strategies. In this picture, the discourse is a playing field for strategic considerations on the role and nature of the law in which choices for the most appropriate model have to be made. Choices involve a decision *for* something, a virtue that the law has in one model, yet it means at the same time a decision *against* a virtue another model might have. With a discussion of the arguments that speak for and against the different approaches to plurality, the last three chapters have attempted to contribute to this discourse.

The first section of this chapter illustrates the geometrical method. From the second to the fourth section, the chapter discusses the geometric relations between the approaches. The fifth section, ultimately, pictures the *Plurality Trilemma* as a coordinate system of global legal thought.

6.1 The Geometrical Method

Geometry deals with points, lines, curves, and angles. It originates from the ancient Greek γεωμετρία, composed of *geo-* (earth) and *-metron* (measurement). Its central concern is a systematic inquiry of the properties of space. What I understand as geometry of legal thought is a transfer of this method from the physical to the social space. In the same way that it is possible to construct an adequate representation of physical space in the form of relations between points, lines, and angles, it is feasible to systematically map the social space with respect to its central determinants.

6.1.1 A Systematic Inquiry

The last three chapters have tried to give evidence for the claim of conceptual fragmentation that has been described in Chap. 2 as second-order plurality. Different societal epistemologies translate into largely separated sub-discourses on the nature and purpose of global law. At the same time, it has been the goal of these chapters to bring the main patters of global legal thought to a common vocabulary. This common vocabulary will be the basis of the present inquiry. A geometrical approach thus shifts the level of understanding from a bipolar comparison of approaches to locating the respective theory in the conceptual space of global law.

In this shared conceptual space, we can observe that even approaches with very different societal epistemologies share basic assumptions in the nature and the purpose of the law. These shared basic assumptions are located on an intermediate level of theoretical abstraction. While their abstraction is uncoupled from their foundational epistemology, they are abstract views on legal method independent of concrete cases. Hence, the geometry of global legal method is a form of illustration of a systematic understanding of these shared assumptions.

This intermediate level of theoretical abstraction tries to avoid the foundational dispute between these views. Thus, it is not a dialectical perspective. It does not claim that through the process of theorizing, humanity can resolve their fundamental disagreements.[1] Rather, it suggests that by mapping the initial starting points of different views, we merely come

[1] See, for such a perspective that is ultimately inspired by Habermas and Hegel, Sergio Dellavalle, *Paradigms of Order* (New York: Palgrave Macmillan, forthcoming).

to understand their respective normative commitments. Yet, as we have seen, much of what is translated to the global realm are modified versions of beliefs that already collide in the foundational discourse on the theory of the constitutional state. These debates, starting with ancient Greek thinking on political theory, cannot simply be resolved through conceptual thinking, since they work with basic, yet colliding assumptions on the basis of human sociality.

Given that a resolution on this level is impossible, the adequate method for understanding their differences illustrates (rather than tries to mediate between) their differences in foundational commitments. With the geometrical perspective, it is thus possible to understand the methodological approaches partly without their foundational baggage. The focus on method ultimately facilitates cutting through the complexity of different epistemologies and constructing a discursive sphere, even if approaches stem from separate epistemological planes.

The appropriateness of this method, however, does not depend on whether one accepts the terminology associated with these three thinkers, which has been introduced to describe the different ways to conceptualize global legal methodology. While the reader might consider the interpretation of Habermas terribly wrong, the approaches of the third chapter continue to exhibit the characteristics that I considered as Habermasian. It is these characteristics, instead of the names, that are important for the argument.

In search of a term, I will refer to this structure as *weak contingency*. It tries to highlight that, while the different approaches that have been presented in this study are structurally contingent with respect to their political preferences, they are still occupying the same conceptual space. They are confronted with non-contingent rules and structures of global law while the positions they take within this space are not predetermined.

As a consequence of this, the *meta-theoretical* approach as a systematic assessment of this conceptual space claims to be non-contingent. It is an epistemic argument about an actual discourse. In difference to the strategic claims of legal methodology, it aims to represent its territory with geometric accuracy. Appreciating the geometric relations within the same conceptual space in which the different theoretical approaches operate, a systematic map of the literature in the field unfolds. This map represents a geometry of global legal thought.

6.1.2 Elements of Geometry

The central precondition for a geometrical approach is to understand global legal method as a conceptual *uni*-verse instead of an unrelated *pluri*-verse.[2] There is a meaningful communicative sphere of global legal thought, which, though starting from different societal epistemologies, still occupies the same conceptual space—the future of political, legal, and social order beyond the nation-state, which has regulative impact on human life.

As concepts engaging with the same social phenomena, global legal thought can be evaluated, mapped, and compared. Within this universe, there is a comparably stable set of internal distinctions. At the same time, their internal structure imposes particular limitations on the plausibility of arguments. The space of global law is literally confronted with the laws of space. The relative stability of this internal structure is the second larger feature of the geometrical method. Put differently, as in a geometrical coordinate system, there are particular combinations of claims that are technically possible, or internally plausible, and others that are not.

A systematic understanding is concerned with the position of certain objects in an (imagined) space. It is not necessary to be proficient in higher mathematics to understand the most basic element of this geometrical approach. A shared assumption of the nature and purpose of global law of otherwise different approaches is an intersection within the coordinate system of global legal method. A point, in the sense of this description, is one particular claim about legal methodology. To illustrate this in the terms of this study, the normative requirement for formalism is one point according to which one can orient one's own thinking; dynamism is a point in opposition to this claim. Many points are possible in the methodological coordinate system, and one single approach in global legal thinking mostly combines different points in order to come to a comprehensive picture of legality and its environment. While points can easily stand alone, they can also be intersections between otherwise different approaches, illustrating one shared assumption on the nature and function of law.

On the next level of geometrical complexity, the conceptual space contains different lines that I have termed axes. An axis reflects certain patterns in the distribution of points in the conceptual space. To continue with the aforementioned example, when it comes to the different points of formalism and dynamism, Habermasian approaches tend to prefer the

[2] For a different view, see Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press, 2012), 245f.

formalist hemisphere, while post-modern Luhmannian and Dworkinian approaches prefer the dynamist hemisphere. Connecting the points in the dynamist hemisphere leads us to the dynamism axis. This axis collects methodologies that share a commitment to dynamism, yet are very different otherwise.

In a last step, the dynamism axis running along from post-modern Luhmannian to Dworkinian approaches can be combined with the point of Habermasian formalism. The result, put in a geometrical form, is a triangle, in which the dynamist approaches form the base and the formalist approaches form the tip. This triangle maps the conceptual space of global law with respect to one single property of norms. Any claim on global legal method with a propositional value, so the geometrical argument goes, can be located somewhere on this triangle. Ultimately, moving away from the distinction of formalism and dynamism, which has been used to illustrate the geometrical method and incorporating the relationships of other normative preferences, a systematic, triangular understanding of the coordinate system of global legal thought with three axes (dynamism, value base, and democracy) unfolds.

6.1.3 Three Conceptual Triangles: Legitimacy, Values, Dynamism

This section applies the geometrical assumptions suggested earlier to the discourse of global legal thought and plurality. It starts with the observation that there are certain concerns that are particularly important for the approaches that have been discussed. One aspect has been the debate between an adequate reflection of the legal process in all its complexity, on the one hand, and a focus on rules, on the other. This debate can be captured in the different positions of formalism and dynamism. A second aspect points to the question of how the normativity of global law can be generated. While some rely on popular input, sometimes in adapted form, others are concerned with a valuable output. Ultimately, the last aspect is concerned with the way normativity can be transferred from the source to the form. On one side of the spectrum, there are action-based mediums, while the other side consists of value-based mediums.

In order to make it clear why to understand the systematicity of global legal methodology as a trilemma, I will highlight different combinations of (1) input legitimacy/output legitimacy, (2) formalism/dynamism, and (3) action-based mediums/value-based mediums. Understanding how these distinctions combine and can be read together as meaningful models of law leads to a systematic understanding of global legal thought.

1. *The democracy axis and the distinction between input- and output legitimacy*

One central aspect of the debates has been the question if and how democracy can be extended beyond the borders of the nation-state. There is a convergent view that a model of popular sovereignty has to be transmitted to the global realm (though in somehow different form) in the Habermasian and post-modern Luhmannian approaches. These approaches form the democracy axis. On the other hand, there is the view that this is neither possible nor desirable in the Dworkinian approaches. When it comes to the question of input legitimacy, the Dworkinian view forms the tip of the triangle. Put in a geometrical form, this is the way I imagine their relationship (Fig. 6.1):

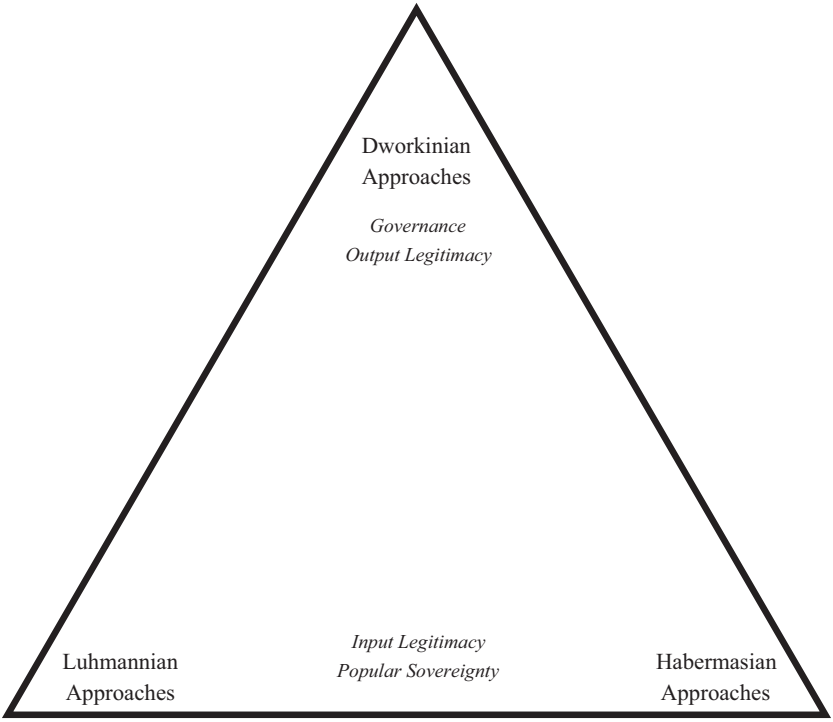

Fig. 6.1 The democracy axis

2. *The dynamism axis and the distinction between formalism and dynamism*

Taking the distinction between formalism and dynamism into account, we arrive at a different set of positions. Both post-modern Luhmannian and Dworkinian approaches converge in the view (though in detail differently) that the law has to be understood in a dynamic process, rather than a formalist/statist body of rules. A Habermasian approach would thus form the tip of the triangle, while Luhmannian and Dworkinian approaches together constitute the base, the dynamism axis. Put in a geometrical form, this is what it looks like (Fig. 6.2):

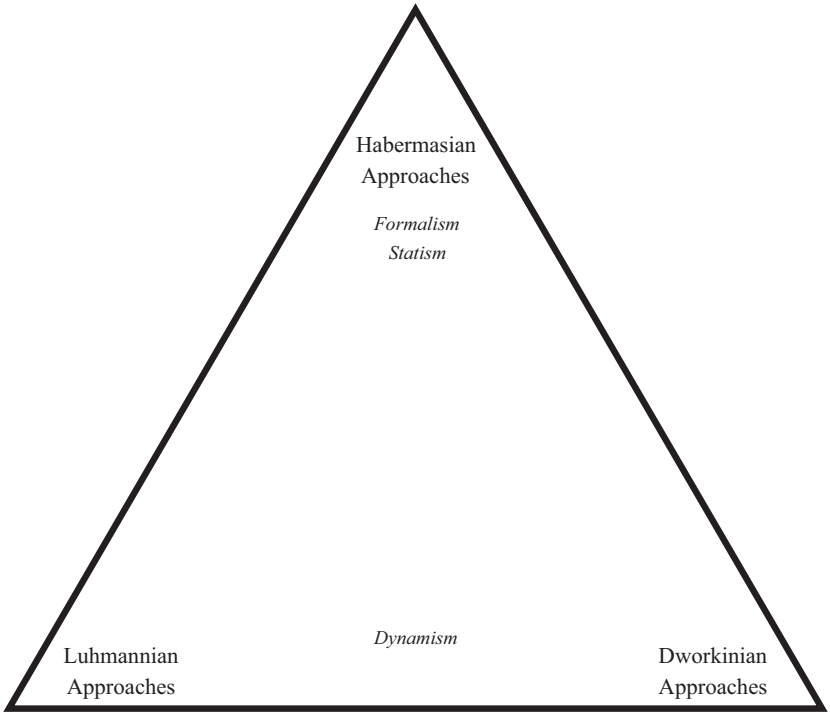

Fig. 6.2 The dynamism axis

3. *The value axis and the distinction between action-based and value-based mediums*

Ultimately, the third and last pair of points is concerned with the question of how normativity should enter the law. In the Habermasian and Dworkinian view, though very differently, the mediation through values plays an important role, while post-modern Luhmannian approaches would reject a value-based account in favor of direct, action-based mediums. The latter, again, are the tip of the triangle, while Dworkinian and Habermasian approaches form the base, the value axis (Fig. 6.3).

The argument leaves us with three models for dealing with global plurality: (1) the Habermasian strategy, described here as a democratic,

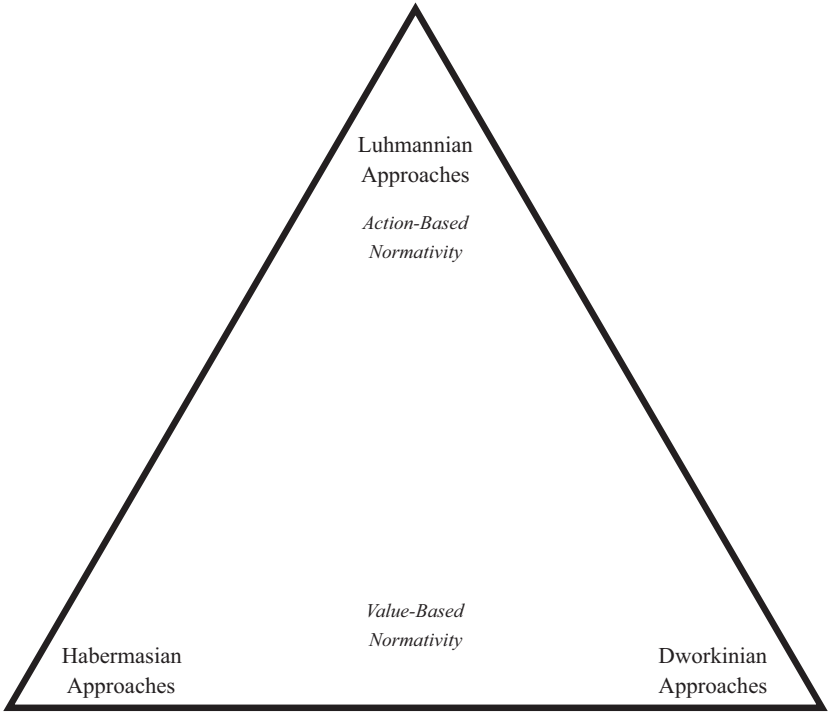

Fig. 6.3 The value axis

value-based formalism, (2) the post-modern Luhmannian strategy, illustrated as democratic, action-based dynamism, and (3) the Dworkinian strategy pictured as governance-oriented, value-based dynamism.

The next three sections discuss in detail the single axes and their relationships by going through the different constellations. Section 6.2 discusses the constellation from the perspective of the democracy axis where the virtues of input legitimacy collide with the output orientation of Dworkinian approaches. While there is some internal tension to the axis in respect of different models of democracy advocated, the foundational opposition to the output orientation is their central unifying element. Section 6.3 sheds light on the value axis where value-based normativity suggested by Habermasian and Dworkinian approaches collides with the action-based normativity of post-modern Luhmannianism. The rejection of the unmediated impact of social normativity unites the value axis. Section 6.4 illustrates the dynamism axis. Post-modern Luhmannian and Dworkinian approaches share a rejection of the formalism that constitutes the basis of the Habermasian conception of legitimacy through legality.

6.2 Democracy Axis

This second section discusses in further detail the relations around the democracy axis that is constituted through a convergence of Habermasian and post-modern Luhmannian approaches with respect to their source of normativity. Both approaches rely on the democratic requirement of input legitimacy. The democracy axis thus stands in opposition to Dworkinian approaches, which mostly regard output legitimacy as sufficient for legitimating global law. While on the democracy axis there is general agreement that law must ultimately be derived from the people who are subordinate to it, the axis unites different views on how input legitimacy should be realized on a global level.

6.2.1 Convergence: Input Legitimacy

The exercise of political authority in any form—and this is the convergent theme on the democracy axis—can only be justified with reference to those subject to this political authority. In line with the enlightenment model, legitimation requires the identity of the ruler and the ruled.[3] A legitimate

[3] Rousseau discusses these questions in the *Social Contract*. See Jean-Jacques Rousseau, *Discourse on Political Economy and the Social Contract*, trans. Christopher Betts (Oxford:

global law thus needs to rely on a transfer of democratic authority to the global sphere. A translation of popular sovereignty in circumstances of plurality meets difficulties,[4] which Habermasian and Luhmannian approaches attempt to overcome in very different ways. Yet, both are conservative insofar as they rely on a model stemming from the constitution of the nation-state.

This linkage of popular sovereignty to the constitution of the national state appears most clearly in Habermas' understanding of law as a practice of collective self-government.[5] Explicitly highlighting that a response to plurality should conserve the achievements of the democratic revolutions on a higher level, Habermas insists on a cosmopolitan community as a decisive point of reference.[6] This involves a global understanding of civil rights that guarantee the status of citizens as addressees and authors of the law.[7] The hope is that, through the interpenetration of popular sovereignty and legal form, the legitimacy model of constitutional democracy reassembles on the global level.

The same concerns are prominent in Günther's formulation of the *universal code of legality*. In line with Habermas' views on global law, Günther contends that a transnational concept of law requires paying tribute to the conceptual connection of legal form and democratic legitimacy.[8] Even though this element is still rarely observable in global law, "the universal code of legality already contains the demand for its interpretation within fair procedures which are institutionalized by law and which guarantee the minimum requirements of democratic self-determination: the right to change the role between author and addressee of a legal norms, transparency of procedures of opinion and will formation, imputability of decision and responsibility for consequences, equal

Oxford University Press, 1994). See further, Christopher Bertram, "Jean Jacques Rousseau," *The Stanford Encyclopedia of Philosophy*, available at <http://plato.stanford.edu/archives/win2012/entries/rousseau/>. In Habermas' legal theory, Rousseau occupies a central position. Jürgen Habermas, *Between Facts and Norms*, trans. William Rehg (Cambridge: MIT Press, 1998), 32.

[4] For an initial discussion of the problem, see Thore Prien, *Fragmentierte Volkssouveränität – Recht, Gerechtigkeit und der Demokratische Einspruch in der Weltgesellschaft* (Baden-Baden: Nomos, 2010).

[5] See above, Sect. 3.1.1.

[6] Jürgen Habermas, The Lure of Technocracy, trans. Ciaran Cronin (Cambridge: Polity, 2015), 56.

[7] See above, Sect. 3.1.1.

[8] See above, Sect. 3.2.1.

access to procedures and equal rights of participation for third parties."[9] With respect to the chances of its realization, Günther is mildly optimistic.[10]

While sharing these conservative reasons, *Global Administrative Law* (GAL) and *International Public Authority* (IPA) modify the legitimation model in important respects.[11] While the authors take the missing correspondence to the constitutional model as an argumentative starting point, both try to circumvent the high legitimacy demands of the constitutional model. IPA downsizes the concept of democracy to political inclusion with reference to the difficulties that more complex models have in the global realm.[12] GAL deliberately focuses on administrative governance since this, in the view of the authors, reduces the legitimacy demands of the traditional model to procedural requirements, such as participation and transparency. The constitutional type of authority, however, shall be left to the classic domain of states. This halfway solution of GAL and IPA has been illustrated as a *Habermasian Hoax*.[13] The normativity of the legitimation model in the Habermasian tradition prevents its modification as a result of scholarly pragmatism.

Neglecting the chances to lift democratic legitimacy to a global level, the more plausible option seems to be a conservation of the legitimacy reserves on the national level, while relying on the horizontal coordination mechanisms of conflicts-of-laws.[14] In its formal variant, conflicts-of-laws approaches have given up the perspective of a universal political community, yet they retain the vision of a legal community, held together by a system of conflicts laws. Since these conflict laws are technically state laws adopted through national democratic procedures, the requirement of input legitimacy is protected.

[9] Klaus Günther, "Legal Pluralism or Uniform Concept of Law – Globalisation as a Problem of Legal Theory," *No Foundations – Journal of Extreme Legal Positivism* 5 (2008): 18.

[10] Günther, "Uniform Concept of Law," 20.

[11] See above, Sects. 3.3.3 and 5.5.1.

[12] Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (Oxford: Oxford University Press, 2014), 146.

[13] See above, Sect. 4.5.1.

[14] Paradigmatically for this kind of projects (and its limits), is Joerges' Conflicts-Law-Constitutionalism. See, Christian Joerges, Poul F. Kjaer and Tommi Ralli, "A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation," *Transnational Legal Theory* 2, no. 2 (2011): 153.

Such concern with complexity is at the center of the post-modern Luhmannian epistemologies. While starting with a horizontal, conflicts law-based system, they incorporate the normative requirement for input legitimacy, albeit in a different form. Teubner, for example, reformulates the concept of constituent power in system-theoretical terms. In his view, constitutional power is "a communicative potential, a type of 'social energy', literally as a 'power', which, via constitutional norms, is transformed into a 'pouvoir constitué', but which remains as a permanent irritant to the constituted power."[15] The origin of this social energy remains connected to the traditional Habermasian perspective. "The *pouvoir* presents itself in the structural couplings between social systems and the consciousness and corporeality of actual people."[16] The legitimacy of constituent power thus crucially relies on the input paradigm.

While the fourth chapter has brought up the question whether Teubner's conception can live up to its promise,[17] the requirement of input legitimacy becomes ultimately clear in Fischer-Lescano's global law shaped by social movements as constitutional subjects. His example, the *Madres de la Plaza de Mayo*, illustrates a more basic way of input, and a form of law creation that does not originate in the political system. The direct and unmediated social input leads to a shift of the validity symbol, which can be directly law-creating.[18] This claim highlights a radical interpretation of the input requirement. Input-based normativity should impact the law creation directly without any institutional mediation.

The democracy axis shows variations of a common theme—the principle of popular input as a requirement for the legitimacy of global law. To complete the picture of the space around the democracy axis, the next subsection maps the conceptual opposition to this claim. The last subsection then addresses divergences between the different models of input that have been debated here.

[15] Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford: Oxford University Press 2012), 63.

[16] Teubner, *Constitutional Fragments*, 63.

[17] The criticism was here that in contrast to the theory's post-modern set of ideas, it grants a form of legal subjectivity to functional regimes. See above, Sect. 4.3.3.

[18] Andreas Fischer-Lescano, *Globalverfassung – Die Geltungsbegründung der Menschenrechte* (Weilerswist: Velbrück, 2005), 68–71.

6.2.2 Opposition: Output Legitimacy

The central role of popular sovereignty unites Habermasian and Luhmannian approaches in their opposition to the Dworkinian models. While in the output-based conception of these approaches procedural legitimacy with a formal origin in popular sovereignty plays no significant role, the concept of law receives its legitimacy from an adherence to certain principles of common good that are not merely assessed in dependence of formal procedures. In the formation of legitimate governance, criteria of legality are merely important as a sub-aspect of political legitimacy as a whole. Yet, there is no distinctively *legal* contribution to the formation of this overall assessment of legitimacy.

Here, the relation between legitimacy and legality follows a hierarchy that is the opposite of the hierarchy on the democracy axis. The value of the concept of law crucially depends on its contribution to political legitimacy as a whole. Dworkin writes: "Any theory about the correct analysis of an interpretive political concept must be a normative theory: a theory of political morality about the circumstances in which something ought or ought not to happen."[19] The plurality of global law, in this picture, rather illustrates a fragmented assessment of political morality with international law as its most prominent part. Legal constraints—and this has been described as a decisionistic tendency in Dworkinianism—[20] can simply be overridden if this has a positive impact on the political legitimacy as a whole.

In technical terms, the principle of formal equality is replaced with a principle of salience that allows obligations for states arising against their will.[21] For Dworkin, it is then unproblematic to view the law as a specific part of global morality. Interventionist policies in all kinds of areas crucially depend on the question whether they can have a positive impact on the legitimacy of the system. The principle of formal equality is replaced by custom formation against state consent, "[…] if a more general practice to that effect, expanded in that way, would improve the legitimacy of the subscribing state and the international order as a whole."[22]

[19] Ronald Dworkin, "A New Philosophy for International Law," *Philosophy and Public Affairs* 41, no. 1 (2013): 11.

[20] See above, Sect. 5.3.3.

[21] In Dworkin's view, this goes further than simply *ius cogens*. A view which is also shared by formalists, see Christian Tomuschat, "Obligations Arising for States Without or Against their Will," *Recueil des Cours* 241 (1993).

[22] Dworkin, "New Philosophy," 19.

This basic hierarchy between values and law is clearly formulated in the process approaches. Here, values are increasingly understood in line with a model of political liberalism. Reisman exemplifies this in describing the policy goals of the NHS: "A public order of human dignity is defined as one which approximates the optimum access by all human beings to all things they cherish: power, wealth, enlightenment, skill, well-being, affection, respect and rectitude."[23] Some of the process approaches regard this liberal model as legitimated out of itself. While Koh is hesitant to embrace such a structure of values painted with a broad brush, in Slaughter's approach it becomes clear that the legal process is supposed to serve American foreign policy interests.[24] Whatever one might think of this implementation of interest, it certainly does not reflect a model of *global* law in an equitable sense.

The picture of output legitimacy relies on the capacities of the implementing actors, that is, government officials and judges. In this light, Slaughter bases her proposal for global law on government and judicial networks to improve and harmonize decision-making. The advantage of these network-based structures is a better transfer of knowledge to support the decision-maker in taking a most efficient decision and, ultimately, to improve the legitimacy of the political system as a whole. A similar motivation is involved in the turn toward other disciplines to enlarge the knowledge base. Parts of the interdisciplinary project between International Law and International Relations should be understood in this light.[25]

While the strong claims of the necessary connection of law and political morality stem exclusively from North American scholars, moderate versions of the Dworkinian output paradigm have appeared in European approaches as well. Mattias Kumm's *cosmopolitan paradigm*, for example, relies on a concept of public reason as elaborated by John Rawls.[26] Rejecting the requirement for input legitimacy in global law,[27] Kumm replaces the collective will as a point of reference with the "relatively mundane demand

[23] W. Michael Reisman, Siegfried Wiessner, and Andrew R. Willard, "The New Haven School: A Brief Introduction," *Yale Journal of International Law* 32 (2007): 576.

[24] See above, Sect. 5.2.2.

[25] See above, Sect. 5.3.1.

[26] Mattias Kumm, "The Cosmopolitan Turn in Constitutionalism – On the Relationship between Constitutionalism in and beyond the State," in *Ruling The World? Constitutionalism, International Law and Global Governance*, eds. Joel P. Trachtman and Jeffrey L. Dunoff (Cambridge: Cambridge University Press, 2009), 268.

[27] Kumm, "Cosmopolitan Turn," 268.

to ensure that appropriate forms of transparency, participation, representativeness, and accountability become an integral part of governance practice."[28] Kumm openly commits to the conceptual move that GAL justifies with reference to a global comparison of public law principles and that IPA hides under a Habermasian veil.[29]

Ultimately, the option to reformulate rights as constitutional principles also relies on a form of output legitimacy. While rights discourse can potentially start with any basic unit,[30] the technique at the heart of the legal decision between rights is balancing. In this balancing process, at least under circumstances of plurality,[31] criteria of legality play only a minor role. Independent of whether one weighs individuals', states', or even regimes' rights against each other, a decision involves reference to a substantive output that is evaluated in moral terms. This form of abstraction ultimately shifts the central element of the legal decision to criteria of output legitimacy.

In order to explain these conceptual disparities, one might refer to the difference in conceptions of the political system. Dworkinian approaches resonate with an understanding that is prominent in the Anglo-Saxon tradition. Politics, in this view, is not the formation of a common will, as in Rousseau's sketch of legitimate government.[32] Rather, it is a realm where substantive interests stand in competition.[33] The will of the people limits this struggle of interests, but it does not determine political decisions. This translates into different conceptions of political legitimacy. In the input-based model, the question for legitimate order is largely independent from pragmatic concerns. Whether something is legitimate or not cannot depend on whether the legitimacy model pragmatically fits the facts. Rather, the facts must suffice the normative demands of the legitimacy model. On the other hand, the Dworkinian model is highly contextual. Whether one option is legitimate has to be weighed against other options on the basis of an overall assessment of the context. This, in the input-based view, could not justify political authority.

[28] Kumm, "Cosmopolitan Turn," 273.

[29] Von Bogdandy and Venzke, *In Whose Name?*, 146.

[30] See above, Sect. 5.5.2.

[31] Arguably, this could be avoided in a democratic environment where the content of rights is increasingly positivized.

[32] Rousseau discusses these questions in the *Social Contract*.

[33] See, paradigmatically, Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (New York: A. A. Knopf, 1948).

6.2.3 Divergence: Aggregative and Radical Models of Democracy

After having debated the views taking output legitimacy as a decisive criterion for global law, the discussion returns to the base of the triangle. While both models on the democracy axis defend the requirement of popular sovereignty in global law, the practical conceptions of global order differ considerably. For Habermasian approaches, the legalization of plural authority in the creation of supranational institutions is the superior normative goal. For Luhmannian approaches, it is precisely the avoidance of such (state-like) arrangements that best reflects the exercise of popular sovereignty. The difference between both views corresponds to a debate in political theory. According to the traditional conception, the law institutionalizes the procedural frame for the exercise of political autonomy, whereas the more radical model regards the frame merely as a constraint for the free articulation of social forces.[34]

Habermas relies on a democratic model that institutionalizes the exercise of popular political autonomy in formal legal procedures.[35] Law is legitimate insofar as it corresponds to the rightful exercise of this autonomy. A democratic transformation of global law thus depends on an institutionalization of the cosmopolitan community in the global sphere. Institutions are necessary to ensure the rationality and symmetry of the process of opinion and will formation of those subordinate to global political authority. Formal procedures moderate this bottom-up process, so that "[t]he decisionistic core is being broken down once again in the crucible of the communicative currents of transnational negotiations and discourses."[36]

The democratization ideal behind this view requires us to bridge the gap of *representation* that arises through the disaggregation of the sovereign national state in the new plurality of global law. The principle of representation, in Habermas' sketch, allows for a practical and inclusive consensus-oriented deliberation in the institutional forms provided by the law. While representation ensures that everyone concerned is included in the deliberative process, formal procedures provide for the rationalization of the discourse. Correct and inclusive representation is capable of transmitting the opinion and will formation from the bottom to the top of the

[34] See, for this debate, Sect. 4.4.3.
[35] See Sect. 3.1.1.
[36] Habermas, *Lure of Technocracy*, 56.

deliberative sphere by protecting the argumentative rationalities within the law. Both elements have prominently appeared in the approaches of the third chapter.

Since the legitimacy reserves of this aggregative model of democracy are rooted in national states, where they are solidly established through domestic public discourse and elections, a gap arises with regard to the plural authority beyond the state, which cannot build on the very same pillars of legitimate government. This gap in representation cannot simply be bridged by an inter*national* agreement.[37] Since the status of citizens has changed from national to world citizens, adequate representation is required on the supranational level. The implementation of this correct representation on a global level is thus one of the central elements of the Habermasian concept.

In contrast, post-modern Luhmannian approaches argue for the counter-model. According to their view, it is illusionary to believe that such a bottom-up transfer of collective will can provide for legitimate law. On the one hand, this has functional reasons, as Ladeur's approach illustrates. A democratic theory starting with collective will formation on the basis of representation will not be able to manage the complexity that global law requires.[38] On the other hand, representation and formal legal procedures have a normatively distorting effect on the formation of public will.

The counter-model is a conflictual understanding of democracy. Instead of consensus-oriented deliberative procedures, proponents of radical democracy highlight the antagonisms within society and the plurality of identities that are allegedly suppressed in the Habermasian model. A radical democratic practice aims at the multiplication of political spaces, the prevention of concentrations of power, and the definition of social rights only in the context of actual social relations.[39] Importantly, as the claim with the most relevant practical implications, it aims at a revolutionary understanding of human rights that promotes a radical understanding of equality that is impossible to capture in an institutional framework. Popular sovereignty, in this view, does not mean self-governance. Since, as Marx famously remarked, the revolutionary understanding of human rights

[37] Habermas, *Lure of Technocracy*, 55.

[38] Karl-Heinz Ladeur, "Globalization and the Conversion of Democracy to Polycentric Networks – Can Democracy Survive the End of the Nation State?" in *Public Governance in the Age of Globalization*, ed. Karl-Heinz Ladeur (London: Routledge, 2004), 89, 98.

[39] See above, Sect. 4.4.3.

ceases in the very moment of their institutionalization,[40] self-determination turns into a practice of resistance. In this view, institutional law creation is understood as a sphere of asymmetrical authority, which inevitably ends up in oligarchic structures and, hence, must be countered through the resistance of individual rights existing outside the institutional frames.[41]

While certainly exotic in global legal thought, these claims resemble the suggestions of critical and post-colonial legal studies. In a moderate understanding, between the extremes of German constitutional thought and French post-structuralism, there is some leeway for moderation. Even though they all seem too different, unlike the Dworkinian approaches, they insist on a legitimation of global order through subjects of flesh and blood. Their main difference concerns the methodological translation from the single articulation to a decision. This difference between both theories plays a role in the next triangle on the role of values where both theoretical suggestions are placed at opposite ends.

6.3 Value Axis

The second triangle describes the structure of normativity of the approaches to global law. The question here is how normativity enters the law and how it is transferred to the single decision. In the Habermasian and Dworkinian approaches, which together form the value axis, there is always some form of mediation between decisions and their underlying basis. Quite broadly, this means that there is a timely asymmetry between the formation of a normative proposition and a practical evaluation. Methodologically, this leads to the formation of a normative superstructure. In contrast, in the post-modern Luhmannian view, normative evaluations cannot exist independently of the actual, unmediated articulations that constitute the social practice. The first section explains the convergence on the value axis, while the second section presents action-based methodology in the Luhmannian approaches, discarding any possibility of the recognition of "higher" norms and principles that structure global law. Ultimately, in the details of the value axis, we can distinguish between different methodologies of Habermasian and Dworkinian origin to determine the procedure according to which this normative superstructure can be constructed.

[40] Karl Marx, "Zur Judenfrage," in *Karl Marx / Friedrich Engels – Werke* (MEW), Volume 1 (Berlin: Dietz, 1990), 367–368.

[41] Possible emancipatory models in this respect are discussed in Daniel Loick, *Kritik der Souveränität* (Frankfurt am Main: Campus, 2012), 279f.

6.3.1 Convergence: Value-Based Normativity

In a value-based structure of legal normativity, the law functions as a form of storage. The basic currency in this storage is value. It allows for the law to mediate its societal normativity from its source to the decision. This value-based structure explains why some basic credentials of the Habermasian and Dworkinian approaches look very similar, sharing the value axis, though their source of normativity is different.

As summarized in the previous section, in the Dworkinian picture, values play an important role right from the start.[42] While frequently this turns out as a set of specifically liberal values, there are also more moderate conceptions, based on a procedural understanding of due process, or a complex understanding of individual rights. The law not only has an active role in bringing these basic goods about, but it *is* part of this basic set of values. Its content cannot be conceived without this specific model of a successful individual life. In Dworkinian approaches, the ethical argument on the law consistently appears not only in the interpretation of the law, but also in determining the sources.

The restatement in this section serves to emphasize the technical side, through which decisions are taken in this model. Institutionally, Dworkinian approaches have tended to prefer addressing the coordination problem through a cooperation of courts and tribunals across the borders of national legal systems. Substantive political conflicts, in this view, are transformed into questions of rights and principles, which can ultimately be weighed against each other with a differentiated methodology of proportionality. Such reliance on transnational rights interpretation allows for a decentered network in which different balancing preferences encounter each other. Decisions in the law thus adapt legal normativity, abstractly stored in the form of value, to specific cases.

In the Habermasian picture, though relying on a rule-based conception, the basic mechanism is the same. Values and balancing have the same intermediate function in the process between source and decision. Such a fictitious value-based universality condition is part of the deep structure of legal discourse. Günther, for example, describes legal discourse as an ongoing contestation about universals.[43] In this view, legal discourse allows for a synthesis of different sets of values by providing a space for

[42] See above, Sects. 5.1.1 and 5.1.2.

[43] Günther, "Uniform Concept of Law," 19.

their contestation. This legal discourse does not occur in a value-free space; rather, what counts as an argument depends, in Koskenniemi and Pulkowski's words, on the legal grammar that is penetrated by historical experiences.[44] Legal grammar thus works as the value storage of a formalist concept of law. It is this grammar that mediates between source and decision. This value-storage conception of legal grammar equally appears in the different horizontal approaches. While GAL and IPA insist that there are value-based criteria of publicness,[45] the location of the value storage in private law approaches is either a transnational *ordre public* or a reference to the resources of national legal systems.[46]

In Pulkowski's view, it is questionable whether this structure transports a thick consensus on values.[47] Yet, also for him, there are certain institutional facts as a result of collective intentionality that provide for shared background assumptions of international legal argument.[48] Habermas uses these background assumptions to find a way out of the legitimation crisis. Confronted with the problem that peacekeeping on the level of the *United Nations* could not be positively legitimated, he argues that human rights and the prohibition of the use of force are so fundamental for any meaningful understanding of a global legal community that, for the justification of their status as law, moral reasons suffice.[49]

This value-based storage of normativity exists in a very strong sense in the Dworkinian conception, in which law becomes virtually impossible to distinguish from its defining values, and in a weaker sense in the Habermasian view, in which the value basis is stored in the legal grammar. Both approaches, however, stand in clear opposition to the alternative, an action-based view of normativity.

[44] See above, in particular, Sect. 3.5.1.

[45] Benedict Kingsbury, "The Concept of 'Law' in Global Administrative Law," *European Journal of International Law* 20, no. 1 (2009): 32–33. Armin von Bogdandy, Philip Dann and Matthias Goldmann, "Developing the Publicness of Publicness of Public International Law: Towards a Legal Framework of Global Governance Activities," *German Law Journal* 9, no. 11 (2008): 1383.

[46] For the differing views in this respect, see the discussion in Sects. 3.4.2 and 3.4.3.

[47] For a recent and equally thin view of ethics—yet situated in the Dworkinian paradigm. Steven R. Ratner, *The Thin Justice of International Law* (Oxford: Oxford University Press, 2015).

[48] Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (Oxford: Oxford University Press 2014), 265.

[49] See the discussion in Sect. 3.1.2 and critique in Sect. 3.1.3.

6.3.2 Opposition: Action-Based Normativity

The value-mediated structure of the law finds its counter-model in action-based normativity. Quite frequently, it appears as criticism of the value-based model. Here, the argument is that every mediated articulation, every form of representation, is subject to the hegemonic forms which stabilize the *status quo*.[50] In the traditional path of operations of a legal system, the value structure in the law prevents real change. Within the balancing of values, the institutions are biased, the values preconfigured, the subject positions merely constructed. Real conflicts are led into tracks, and defused.

One of the argumentative lines along which this critique goes highlights the lack of impact from action-based normativity, that is, the deafness of traditional legal process to articulations and protests while concealing the grave sufferings all over the world. In the traditional understanding of a legal system, articulations are forced to adapt its form and are therefore subjected to the structural violence that global law inhabits. In global legal thought, these lines of radical critique are usually associated with proponents of *Critical Legal Studies*. This form of critique, however, is normative rather than analytical. The claim that law actually functions as storage of value remains unchallenged. The decisive question is rather whether this should be so.

Action-based normativity means the absence of this compulsory mediation between articulation and law. The fourth chapter has suggested that, in these primarily critical arguments, there is a positive propositional value on what action-based normativity could mean for a progressive understanding of global law. The main argument supporting this view claims that the said structural violence can only be avoided by recurring to the very foundations of normativity—unmediated, direct articulations by individuals, which are not preconfigured through criteria of reason or value. Fischer-Lescano's claim that social movements are the constitutional subjects of the new world order is exemplary in that regard.[51] In his view, the unmediated and direct articulations through social protests are suitable to contribute to the legal process. Here, the Luhmannian concept of law proves helpful to incorporate this claim. If law and legal validity can be formulated as a specific form of communication vested with a validity

[50] See in particular Sect. 4.4.2.
[51] See above, Sect. 4.4.1.

symbol, it is not the formulation of values, but rather actual acts and events that can shift this symbol. This allows action-based normativity to be valid in the sense of the legal system.

This conceptual move defines the legal process as a struggle. Law is constantly reshaped in the fight for a just world order. The rights-claiming subject who articulates her opposition to the current system moves in a central position in the legal process. However, this opposition is not subjected to the prerequisites of a value-based conception of the legal form where institutionalized rights-systems are balanced against each other. Rather, the opposition is in place to subvert this institutional stability to pave the way for a revolutionary understanding of human rights.

In French political philosophy, this radical understanding of human rights that takes equality as its (moral) motive plays a central role. Radical equality, according to Jacques Rancière, cannot be institutionalized, because in the very moment of its institutionalization, subject positions are created that force a radical understanding of equality into the traditional, conservative tracks in which it is weighed, balanced, and defined in legal procedures.[52] It is precisely because the emancipatory potential of human rights is action-based that it cannot be incorporated in this process. Action-based normativity is thus unmediated and direct—but ultimately non-constructive. It is always directed at the corrective subversion of what is already there.

Whether this radical plurality is a comprehensive normative vision or merely a corrective instrument is sometimes difficult to say. Strictly understood, there is not much leeway for a conciliatory utopia. Teubner attempts to incorporate this action-based normativity through his ecological concept of law. According to him, law must be responsive toward its environment through allowing the expression of injustices as irritants in the legal process. Constitutional power is "a communicative potential, a type of 'social energy', literally as a 'power', which […] remains as a permanent irritant to the constituted power."[53] Action-based normativity, in his view, thus works as a continuous corrective to the established forms of law.

Both conceptions have a foundational value that makes it impossible to mediate between them. An action-based conception of normativity would cease to exist if it grounded itself in a political practice with a foundation in value. As soon as the radical normativity is channeled in institutions

[52] Jacques Rancière, Das Unvernehmen – Politik und Philosophie, trans. Richard Steurer (Berlin: Suhrkamp, 2002), 46.

[53] Teubner, *Constitutional Fragments*, 63.

reflecting particular assumptions on a political community as a whole, it loses its force. Tamed in the deliberative paradigm, the influx of radical normativity as an articulation is already mediated. While value-based accounts tend to suggest that it is necessary to direct the uncoordinated articulations into tracks, action-based accounts would aim at avoiding precisely this.

6.3.3 Divergence: Monological and Dialogical Method

Dworkinian and Habermasian accounts share a common ground in that they endorse value-based understandings of normativity. On a technical level, both agree that values enter the law via principled reasoning. On the value axis, however, there is a tension with respect to how law should internally construct these values. While in the Dworkinian perspective, conscientious reflection of the decision-maker is potentially capable of assessing the normative truths transported through the legal process, the Habermasian perspective shifts this monological assessment to the discursivity of a correct argumentation procedure. Both approaches thus reflect the difference between realism and constructivism in moral philosophy.

The Dworkinian perspectives are grounded in the tradition of liberal political philosophy, combining the value thesis with moral realism. This combination leads to the claim that a conscientious observation of the world around us allows us to recognize those normative facts that are constitutive for law's political morality. While this political morality has continuously grown, conditioned by current and past circumstances, it is still accessible to everyone. This leads to a perspective allowing for considerable certainty in evaluating what is right and what is good. With respect to the legal system, the Dworkinian model translates into a strong emphasis on the judicial role. It is the judge who reconstructs and determines law's value basis in the form of principles. To illustrate his realism, Dworkin refers to the ideal model of judge Hercules, a judge who knows all valid principles in a legal order and the reasons underlying the web of concurring legal obligations. Hercules spots gaps and errors in positive law and corrects them, yet never leaves his merely reconstructive position.[54] For all cases, in Dworkin's view, there is a single right decision that a conscientious and capable judge could find.[55]

[54] See, Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 132f.

[55] See, Dworkin, *Taking Rights Seriously*, in particular Chapter 13.

Habermas rejects Dworkin's realism with reference to the normative requirement of collective self-determination: "Who represents the authority of the constitution best, the citizenry as a whole or the judge?"[56] Values, in this view, are something discursively constructed. To understand in the light of which values the legal system should be operating, we need a plurality of perspectives. In order to allow for this plurality of perspectives, Habermas puts special emphasis on the practice of legal argumentation: "[A] theory of legal argumentation, ground[s] the procedural principles that henceforth bear the brunt of the ideal demands previously directed at Hercules."[57]

In the constructivist view, however, the value basis fictitiously appealing to a universality condition remains present. Technically, this is effectuated through a strong conception of procedural rationality, which responds to the ideal reconstructions in the communication by participants, at the same time taking into account the pragmatic constraints of a discourse situation.[58] Here, the concept of truth is something relative to the participants in a discourse. Even though it aspires to the unconditionality of philosophical realism, it is constrained to the participants in an actual discourse situation.

As has already been discussed in the previous section, this results in different conceptions of the value base. According to Habermasians, it is mostly procedural values that secure the rationality of the discourse situation and the undistorted common search for normative truths. Dworkinians, in contrast, tend to promote substantive views of a cosmopolitan society. Most views seem to have difficulties to decide for either of the two. While a strict reliance on procedural principles might produce theoretical demands that are difficult to fulfill in the real world and, ultimately, require abstention from clear judgments in the balancing exercises, the realist method carries the risk of a wrongful imposition of one's own universalized beliefs on others.

6.4 Dynamism Axis

The divergence between Habermasian constructivism and Dworkinian realism translates directly into the distinctions on the dynamism axis. The latter shares with post-modern Luhmannian approaches a dynamic

[56] Habermas, *Between Facts and Norms*, 222.
[57] Habermas, *Between Facts and Norms*, 225.
[58] Habermas, *Between Facts and Norms*, 228.

conception of legal methodology, focusing on the legal decision. Their choice of a process-oriented concept finds opposition in the Habermasian notion of legitimacy through legality that highlights the procedural rationality of legal argumentation. Ultimately, while both dynamist approaches reject this picture in favor of an open politicization of the law, the division between them consists in a different understanding of the political realm.

6.4.1 Convergence: Dynamic Methodology

The methodological starting point for dynamism is that the operations of a legal system cannot be adequately understood by merely focusing on the body of legal norms. On the dynamism axis, law is a process, involving different actors who influence this process in a variety of ways—legislators, courts, civil society, and other factors contribute to a complex social dynamic that produces legal decisions and shapes behavior. Such a dynamic understanding has an epistemic and a normative component. While the epistemic claim that law is a complex social process that involves a multitude of different actors might be a truism, the normative claims tends to diminish the internal rationality of rules in favor of the legal environment. The approaches on the dynamism axis thus introduce a normative demand to take the dynamics *around* the formation of legality into account *as legality.*

The central aspect for dynamism is the interaction of a social sphere of values or communication with a practice of legality. The Luhmannian terminology is particularly helpful to explain how legality can be understood in a procedural light. Since this understanding of society consists exclusively in communicative acts, it is only the validity symbol that indicates the difference between legal communication and other societal normativity.[59] Here, it is just a small conceptual step to argue that the validity symbol can be transferred not merely through the internal processes of a legal system, but also equally through knowledge, rhetorical power, and articulations. This is the normative core of the post-modern variation of systems theory. Societal processes, in this picture, play a dominant role in law formation.

In the Dworkinian approaches, social processes are equally dominant. Here, it is information and persuasion that constitute the core theme.

[59] This becomes particularly clear in Teubner's theoretical project. See, Sect. 4.1.1.

Rules, in the formal understanding, matter for legal communication as a style of reasoning or as an indicator of what is acceptable to say in the law. Yet, since law is always reconstructed in the light of an underlying morality, it continues to interact with the actual societal normativity. In the Dworkinian paradigm, this has become prominent through the debate on a legality of different degrees, making the distinction between hard law and soft law.[60]

These internal modifications of legality allow for a more sophisticated functional understanding of law: "Whereas rules guide and constrain behavior, providing triggers for sanctions, processes perform a wider range of functions: communication, reassurance, monitoring and routinization."[61] In both versions, the law is confronted with communicative claims and challenges that weaken the validity symbol. Since the practice of legality becomes one communicative sphere among many, this reconfigures the nature of legal relations from hierarchical to horizontal. Slaughter and Ladeur, for example, use the image of the network as a more appropriate description of the legal structure.[62]

The interaction between these different layers in a communicative structure opens the door toward a support of legal arguments with knowledge that belongs to other disciplinary discourses, such as sociology or ethics.[63] Whereas Luhmannian approaches refer to system-theoretical sociological insights and post-modern normative philosophy, Dworkinian approaches borrow from International Relations theory and liberal normative ethics. Though advocating a similar approach toward the legal process, much of their difference stems from diverging opinions on the expansion of the legal knowledge base.

A further similarity is the focus on actors in the legal process. Both approaches on the dynamism axis shift their understanding of law toward the participants in legal communication. In the Luhmannian account, the focus on non-state actors is exemplified in the emergence of a *lex mercatoria* with a certain distance to politics and states. Ultimately, in this view,

[60] Kenneth Abbott and Duncan Snidal, "Hard Law and Soft Law in International Governance," *International Organization* 54, no. 3 (2000): 421.

[61] Anne-Marie Slaughter, "International Law and International Relations Theory: A Dual Agenda," *American Journal of International Law* 87, no. 2 (1993): 209.

[62] Ladeur explicitly draws on Slaughter's account, yet criticizes her focus on state organs. Karl-Heinz Ladeur, "Towards a Legal Theory of Supranationality – The Viability of the Network Concept," *European Law Journal* 3, no. 1 (1997): 47.

[63] See, for the illustration of the different aspects, Sect. 4.1.3 and 5.1.1.

the most important non-state actor remains the individual. In Teubner and Ladeur's understanding, the concerns of the individual appear as a requirement of justice, while Fischer-Lescano shifts the perspective to individual articulations. In the Dworkinian approaches, we find a similar focus on actors, ranging from individuals in the more progressive variants to nation-states and governments. Slaughter, paradigmatically, focuses on the emergence of government networks that deliver a better explanation for the development of global law than a focus on a holistic understanding of the state.

These claims on additional knowledge or actors are only meaningful when we understand them as claims with a propositional value. The idea is always that the law *should* be oriented to this or that form of knowledge or actors. After all, as the following subsection shall demonstrate, this is the central point of disagreement with the Habermasian approaches.

6.4.2 Opposition: Legitimacy Through Legality

Frequently, the argument for dynamism starts with a criticism of rule-based accounts. Initially, this argument often has an epistemic direction. It is claimed that international law is very different from what fellow lawyers believe; it is not "rules"[64] with supreme authority[65]; it is not "international"; its authors are in the "vain search for legal unity"[66]; and its rational-formal style cannot account for its expression in "enigmatic language, in irreal idealization, in parables, symbolization, literature, delirium, utopia."[67] Rule formalism is presented as an uncritical endeavor of almost manic application of whatever kind of rules to cases where they rather distort the reasonable, non-legal, and almost automatic process toward justice. The object of critique is mostly the traditional positivist school grounding international law in state consent.

[64] Rosalyn Higgins, *Problems and Process – International Law and How We Use It* (Oxford: Clarendon Press, 1994), 2.

[65] Nicole Roughan, *Authorities: Conflicts, Cooperation and Transnational Legal Theory* (Oxford: Oxford University Press, 2013), 136f.

[66] Andreas Fischer-Lescano and Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law," *Michigan Journal of International Law* 25 (2004): 999.

[67] Gunther Teubner, "Self-Subversive Justice: Contingency or Transcendence Formula of Law?," *Modern Law Review* 72, no. 1 (2009): 19.

In short, this claim is mistaken. As the third chapter has demonstrated, formalism is a diverse set of methods, sufficiently equipped to reflect critically on the role of rules in the legal process. The isolated epistemic claim is, to a large extent, a disproportionate attack on a straw man. Where the opposition of formalism and dynamism becomes interesting is in their different preferences in social ordering. On this level, the opposing claims refer to models of political philosophy that can be meaningfully contrasted. In the formalist conception of law, the law is understood as a constraint against a specific kind of politics. In contrast, the dynamic models aim at unleashing this model of politics from the limits imposed by formalist methodology. It is ultimately three different models of politics that are colliding.

The formalist opposition to dynamism has its roots in the Kantian-Kelsenian understanding of the rule of law that keeps law largely free from conflict, and thus the decisionism of political power.[68] The political process is channeled in the genesis of formal rules, while the application of these rules shall remain free from ideological struggles. Proponents of formalism do not claim that one can avoid the struggle; rather, the form of law can guide the ideological and political disputes into tracks, so that they finally become resoluble. The formalist model of politicization in the generation of legal normativity thus promotes a specific mode of political decision that attempts to provide for legitimacy of the social order through the legality of authority. It is trying to do justice to the democratic requirement that political authority must be authored by everyone subordinated to it.

In contrast to dynamism, plurality of authority causes conceptual problems for the formalist, since it erodes the systematic justificatory links between the exercise of authority and the democratic practice of legality. Even though a global democratic model is not in reach, the formalist response to plurality tries to protect the virtues that are connected with this ideal model. The starting point of Günther's *universal code of legality* is thus to question the effect of plurality on this basic legal function to legitimate authority.[69] Accordingly, Habermas gives in to the pragmatic demands of factual plurality, with the argument that there are some core norms of human rights and collective peacekeeping that have to be accepted even without democratic legitimation.[70]

[68] This is the point of reference for the Habermasian approaches in Chap. 3.
[69] Günther, "Uniform Concept of Law," 5–6.
[70] See above, Sect. 3.1.2.

A less pragmatic (and arguably internally more consistent) variant within the formalist strategy negates the possibilities of extending the democratic legitimacy chain to the realm beyond the state. Subscribing to a concept of democracy as a combination of inclusion and deliberation in the medium of law, the plausible reaction to the impossibility of realizing this model on a global level is to argue for a reformalization of the national state. We find this combination of arguments in the writings of Ingeborg Maus.[71] According to Maus, a contractual model would better illustrate the situation between different democratically constituted *demoi*.[72] While Habermas is looking for an accommodating frame, Maus highlights the dangers that are connected with globalization. According to her, "processes of supranational organization shall continuously be critically accompanied by unadapted normative principles."[73]

The propositional value of formalist approaches can be located in the argumentative perspectives that preserve the internal rationality of the legal form. While the systematic aspect of formalism might be increasingly challenged through the pluralization of legal authority, their virtue might be a negative one—the resistance against different views of politics that split the dynamism axis.

6.4.3 Divergence: The Understanding of the Political

The underlying motivation behind the dynamist rejection of the formalist concept of legitimacy through legality points to a revitalization of the political realm in the process of law. Rather than constraining political conflicts within the form, law has to remain open toward the productive potential of politics. Both approaches thus share a view that a formal understanding of law distorts the political process. Yet, it is precisely through their different assessment on what this politicization should mean that we arrive at the central normative difference on the dynamism axis.

On the Dworkinian side, the understanding of the political realm has close ties to its meaning as government. Politicization, in this view, means making law available as an instrument for global governance. Understanding law as a process serves here to reduce the constraints for political power.

[71] These remarks are collected in Ingeborg Maus, *Über Volkssouveränität* (Berlin: Suhrkamp, 2011).

[72] Ingeborg Maus, "Verfassung oder Vertrag? Zur Verrechtlichung Globaler Politik," in *Anarchie der Kommunikativen Freiheit*, eds. Peter Niesen and Benjamon Herborth (Berlin: Suhrkamp, 2007), 381–382.

[73] Maus, "Verfassung oder Vertrag," 382.

This perspective overlaps with concepts of the effectiveness of governance or arguments on the relevance of law. This perspective of dynamism, conceptualized from the perspective of global executive power, understands the implementation of policies and values as the decisive dimension of the politicization of the law.

This understanding stands in tension with post-modern Luhmannianism. Here, in the picture of politics as struggle, global law is directed precisely against the governmentality[74] that appears on the Dworkinian side. For Rancière, for example, the realm of the political is opposed to this merely administrative, institutional realm of governmental power.[75] "Politics exists when the natural order of domination is interrupted by the institution of a part of those who have no part."[76] Politics appears here as a radical form of resistance against any form of inequality. This view resonates with Fischer-Lescano's radical conception of human rights as a specific form of articulation. It is precisely in this meaning that politics in its dimension of radical equality enters the picture in the post-modern Luhmannian approaches.

Sometimes, the post-modern version of Luhmannianism is understood as hyperformalism instead of dynamism.[77] Hyperformalism is supposed to appear in the legal substructure as a consequence of a radical, formal understanding of equality as a precondition of the political. Since the political in its radical understanding negates every form of order as a relation of inclusion and exclusion, it involves an equally radicalized claim of formal equality. This, however, is merely a rhetorical move. The subversion is the same dynamism that appears in the Dworkinian approaches and merely replaces the subject of political struggle.

Both dynamist views thus have different ideas in mind when arguing for a politicization of the law. While the Dworkinian variant highlights a positive dimension of politics as an expression of value, the Luhmannian strand takes the counter-position of politics as contestation.[78]

[74] Michel Foucault, "Governmentality," in *The Foucault Effect: Studies in Governmentality*, eds. Graham Burchell, Colin Gordon and Peter Miller (Chicago: University of Chicago Press, 1991), 87.

[75] See, Jacques Rancière, *Disagreement: Politics and Philosophy*, trans. Julie Rose (Minneapolis: University of Minnesota Press, 1998), 21f.

[76] Rancière, *Disagreement*, 11.

[77] See, for this argument, Andreas Fischer-Lescano and Ralph Christensen, "Auctoritatis Interpositio – How Systems Theory Deconstructs Decisionism," *Social Legal Studies* 21, no. 1 (2012): 93.

[78] This foundational difference is reflected in theoretical similarities. Ladeur and Slaughter understand law as networks, though from different perspectives. It is further reflected in the

6.5 The Geometry of Global Legal Thought

To recapitulate briefly what has been said earlier, the last three sections served to illustrate three different claims. They meant to highlight the fact that the three main approaches, starting with completely different epistemologies, are still located in one single conceptual space. Since their claims can be combined and put in opposition to each other, all of them think about the same phenomenon—global law. All three axes have illustrated virtues that global law is supposed to have in their respective model. While moving along on the triangular structure, each time one aspect that seemed most relevant for the respective other approaches went missing. The Habermasian approach is confronted with the counter-factual character of a rule-based model; the Dworkinian approach fails to capture the internal legal rationality by introducing a strong focus on the legal decision; and the post-modern Luhmannian approach is at odds with the value-based structure of the law. No single approach combines it all.

6.5.1 A Common Coordinate System of Global Legal Thought

In order to pull the strings together and to live up to the demands of a systematic approach, we can picture one last triangle: the coordinate system of global legal thought. Every approach that has been described in this book forms part of an axis twice and is once the tip of the triangle. The three triangles can be brought into one, and their combination creates a fourth triangle (Fig. 6.4).

This last triangle is what I believe to be the coordinate system of global legal thought. This coordinate system defines the laws of the global legal space. The first law is that, whenever one considers plausible and coherent claims on global legal method with a propositional value, it will be possible to locate them in this coordinate system. On the other hand, the second law of internal conceptual constraints says that whatever the approach one chooses to take, one cannot possibly combine the virtues of all three axes. This, in short, is the *Plurality Trilemma*.

curious fact that the scholarship of Carl Schmitt is received by the political left and right. See Martti Koskenniemi, *The Gentle Civilizer of Nations – The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2014), chapter 6; For a discussion of the changing roles of Carl Schmitt, see David Dyzenhaus, "Putting the State Back in Credit," in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe (London: Verso, 1999), 75–91.

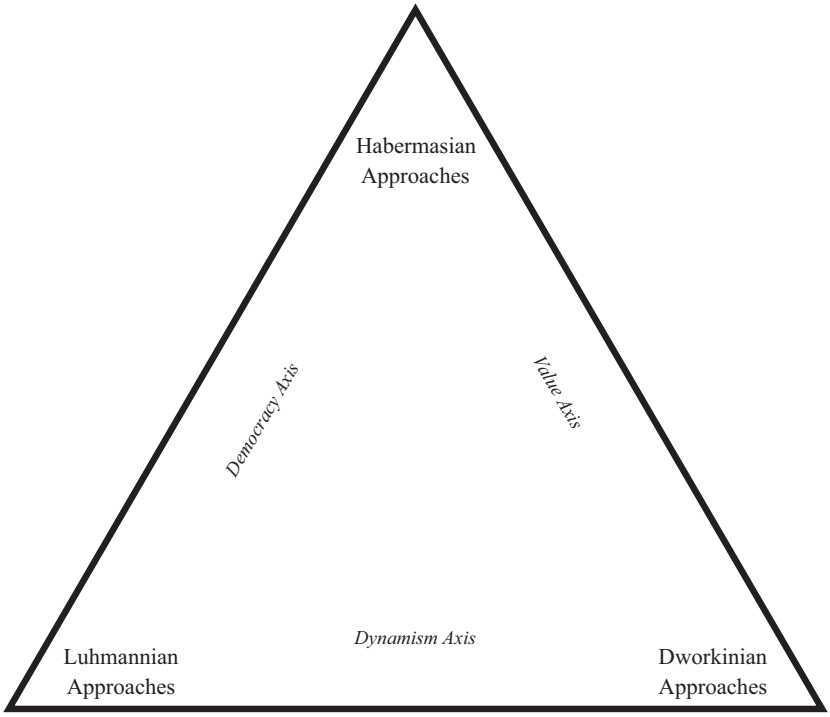

Fig. 6.4 The coordinate system of global legal thought

6.5.2 The Plurality Trilemma

The trilemma hypothesis thus highlights the (geometrical) fact that any intersection on the triangle combines the virtues of two different axes, while missing out on a third one. The systematic interplay of different methodological approaches constrains the choices that can be made in this regard. As a matter of internal consistency, no other conceptions of global law are possible. If the claims made here are true, understanding the space of global legal thought reflects that there is no single right answer for the methodological strategies dealing with plurality. Rather, since the different points exert gravity, there remains always an element of opposition that cannot be captured in the initial model.

This resonates with the view that there is a zone of reasonable disagreement around most conflicts of political morality. It consists of

"positions that would be taken if all members of the community were reasoning competently with the available concepts – were proceeding appropriately within the context of their judgmental histories."[79] Given the different societal epistemologies, thinking in the Habermasian, Luhmannian, or Dworkinian paradigms produces plausible and coherent views on global law.

While a Habermasian view of plurality might be able to conserve the traditional virtues of the constitutional state, that is, a plausible combination of value-based normativity and input legitimacy, its formalism will tend not to reflect the dynamic development of global law. If one intends to capture this dynamism, one needs to move away either on the value axis and arrive at a form of Dworkinianism with a concept of input legitimacy missing, or, in the alternative, one conserves the dimension of input legitimacy in the post-modern Luhmannian approaches and replaces value-based with action-based methodology.

6.5.3 Weak Contingency: The Global Law of Choice

If the trilemma hypothesis holds true, it can prove that unlike the appearance of the discourse, its degree of contingency is merely weak. As has been suggested earlier, weak contingency means that, while the different approaches that have been presented in this study are structurally contingent with respect to their political preferences, they are still occupying the same conceptual space. They are confronted with non-contingent rules and structures of global law while the positions they take within this space are not predetermined.

Given that global legal thought shows the suggested weak form of contingency, this has implications on the structure and the value of the academic propositions that have been the objects of this book. The comparably closed geometrical coordinate system allows us to understand the contributions in the debate as political-strategic considerations that aim at a redesign rather than an understanding of the global order. Because the precise design of global order is not predetermined, global legal thought is a matter of political choice instead of academic inquiry directed at propositions with truth-value.

[79] See, Christopher McMahon, *Reasonable Disagreement: A Theory of Political Morality* (Cambridge: Cambridge University Press, 2005), 93.

Academic contributions with a propositional value on legal methodology are political statements in exceedingly complex form that raise questions on legitimacy and practical capacity about the role of academics. Ultimately, these considerations, and the failure of the academic community to address them, might recommend a return of the global legal academic to its core functions. A practical turn that implicitly rather than explicitly takes account of the collected theoretical knowledge could help to structure plurality. These considerations will be discussed in the last chapter.

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CHAPTER 7

Conclusion: Icarus

Everybody knows the following classical story of Icarus. As a punishment for helping Theseus to kill the Minotaur, King Minos imprisoned Icarus and his father Daedalus in the labyrinth. In order for them to escape, Daedalus made two pairs of wings from feathers and wax. Daedalus warned Icarus to fly neither too close to the sun nor too close to the sea so that his wings remain dry and the wax hard. Too euphoric about the new ability, Icarus flies too high, melting the wax on his wings. Flapping his arms, he falls in the sea. The myth of Icarus is a symbolic depiction of the consequences of personal overambition—someone who wants too much ends up getting nothing at all. I believe this to be a fitting picture for the discourse of global legal thought that increasingly releases itself from its connection to legal practice.

The views expressed here are personal, rather than analytic. They are not a logical consequence of the previous argument but the result of my bias for the persistence of multilateral cooperation carried by the conviction that it is the best way to make sure that the relatively peaceful condition under which mankind has been flourishing endures. I believe that pluralization bears the risk that the necessary support for the existence of the traditional international legal system vanishes, and what I suggest here is a possible strategy to avoid (or at least delay) this. In order to prepare this discussion, I will briefly summarize the meta-theoretical argument of the book before providing my view of concerns and perspectives that may arise as a result of the changing structure of global legal thought.

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7.1 Wrap-Up of the Argument

The previous chapter ended with the suggestion that the structure of global law requires choices between mutually incompatible positions. These choices matter because how lawyers conceive of the law impacts on how they do the law: what we think, we become. The conceptions of legal thought provide background conditions of legal argument that serve as frames of justification. As such, they do have an important influence on the formation of the law. It was the aim of this book to shed a reflexive light on these conceptions by providing a meta-theory of global legal thought. In an extremely condensed version of this argument, I have suggested three argumentative steps.

7.1.1 Pluralization of the Law and the Impact of Legal Thought

As a first step, I have argued that the pluralization of law challenges the fundamentals of the international legal system.[1] The combination of transnationalization and fragmentation weakens the authority of the law because the effectiveness of a legal system crucially depends on certainty about the body of legal norms and methods of their interpretation. What is called transnationalization involves the rise of new actors and layers of regulation. In the process of fragmentation, collision rules that serve to solve conflicts between different levels of law become increasingly contested. As both phenomena produce chaos and uncertainty with respect to norms and methods, the result is a weakening of global legal authority.

This weakening of legal authority impedes on the performance of law's central function: effective coordination.[2] As the traditional body of law ceases to perform its most important functions, legal authority is spiraling downward. Since effective coordination is a precondition for subjects to submit to a body of law, the weakening of authority initiates a vicious circle of erosion.

In this process of erosion, legal scholarship has a particularly prominent role. Since the traditional frames of justification (in the form of legal rules) become increasingly under pressure, practice is searching for alternatives. The vacuum in authority thus increases the relative impact of scholarly

[1] Chap. 2.2.
[2] Chap. 2.3.

suggestions because the absence of clear coordination rules in the law requires that legal decision-makers become creative in their search for solutions to concrete cases of collision. In their search, courts and other decision-making authorities have frequently put academic sketches into practice.

The erosion of the traditional legal system (and the rising power of academia) has not remained unnoticed: legal scholarship has been intensively preoccupied with suggesting models and criteria which would allow to reorder global law. Since the 1990s, the discipline of international law has been experiencing a theoretical turn. This increase in the quantity of contributions, however, did not translate to the quality of the discourse. Instead of trying to shape a common academic project, scholars have tended to work on monolithic conceptions of legal thought. Legal knowledge is organized in schools of thought that—referring to their own conceptual vocabulary—remain largely unrelated to each other. As a result, legal thought suffers from conceptual fragmentation that impedes on the rationality of the debate.

7.1.2 The Geometry of Global Legal Thought: Three Patterns

What I have described as a geometrical approach is the meta-theoretical attempt to go beyond the self-referential vocabulary and to reunite the discourse in a common conceptual space of global legal thought. I have proceeded from the claim that the reasons for which academics prefer one solution to the other are contingent: they are the result of their specific perspective on the law. Academic claims are founded on a set of beliefs on how the world works, and what role law plays and should play in it. These societal epistemologies are normative as they mostly follow the theoretical influences that academics have been confronted with. The specialized vocabularies that the different streams have developed reflect these theoretical influences.

The result of the geometrical exercise is the diagnosis of three patterns of global law. The Habermasian pattern is characterized by a democratic formalism in the traditional form that is based on the conviction and development of shared values in global society. The Luhmannian pattern shares a conflict-based radical democratic conception that is skeptical about formal legal procedures and common values. The Dworkinian pattern is governance-oriented and oriented on shared values, that are, however, not to be contained in rule-based language. All contributions

that make claims on the future architecture of world order can be located in a common coordinate system of global law, in which the three patterns occupy schematic positions.

7.1.3 Plurality Trilemma and Weak Contingency

In a last step, I have tried to analyze the relationship between the three patterns. Looking at these approaches systematically leads us to recognize a trilemma: all three patterns fail to satisfy at least one of the fundamental concerns of the other approaches.[3] In every normative model, there is a missing element that is present in one of the other approaches. The *Plurality Trilemma* thus highlights that there is no universal solution but that the choice of models of global law is a matter of reasonable disagreement.

At the same time, however, it illustrates that the different models of global law actually imply choices. While the fragmented nature of the discourse could make us believe that different approaches have nothing to say to each other, the fact that choices between alternatives are available points to a shared object: the legal, social, and political order that is authoritative for humans of flesh and blood. The idea of *weak contingency* illustrates that even though approaches suggest different normative models, they operate in the same social space. They share a view on the conceptual unity of global law.

7.2 Risks and Concerns

So far, the analysis of the structure of global legal thought has not been judgmental. Rather, I believe that most of the political-theoretical models that have been presented here are conscious transfers from suggestions that produce irreconcilable tensions already in discussions on the constitution of the national state. As such, there are no reasons that force us to believe one strategy to deal with plurality is superior to another. The case is different, however, with respect to the *style* in which these theoretical models try to build global order. The form of argument is increasingly abstract and released from the positive law of the international legal system. It disregards the rules of argumentation that have been cultivated in the discipline and replaces them with abstract philosophical considerations.

[3] Chap. 6.5.

This development is problematic because the argumentative structure of the law, however it may be conceived, is a central precondition for law's ordering functions.

7.2.1 Activists and Their Projects

Several times in this book, I have argued that legal thought is "political" because it is performative. It is likely that, for many readers, this has not been surprising, because it is one of the central post-modern narratives that "everything is political."[4] And indeed, this narrative is as true as it is trivial. If our perception of something is crucially influenced by background assumptions that are not part of the physical process of seeing, these assumptions inevitably and unconsciously become part of our normative judgments. This is the fact that we, as people making normative judgments, are ourselves constructed from historical experiences, processes of learning, interpretive communities, and biases that are part of what kind of person we happen to be. We find this truism as early as in Aristotle's *Nicomachean Ethics* who holds that "[politics] determines which sciences ought to exist in states, what kind of sciences each group of citizens must learn, and what degree of proficiency each group must attain."[5]

In order to gain a better understanding of what it means to engage in a "political" discourse, we need to be more precise. This is particularly important because, when it comes to the question of neutrality in thinking, scholarship seems to be insisting on absolutes. Everything is political. If everything is political, nothing is.[6] Nothing is political but everything

[4] See initially, Frederic Jameson, *The Political Unconscious – Narrative as a Socially Symbolic Act* (Ithaca: Cornell University Press, 1981), 5.

[5] Aristotle, *Nicomachean Ethics*, trans. Martin Ostwald (Indianapolis: Bobbs-Merrill, 1962), Book I, 1094b.

[6] Iain Scobbie ends his take on the theory of international law with a quote from historian Tony Judt: "If everything is 'political,' then nothing is. I am reminded of Gertrude Stein's Oxford lecture on contemporary literature. 'What about the woman question?' someone asked. Stein's reply should be emblazoned on every college notice board from Boston to Berkeley: 'Not everything can be about everything.'" See, Iain Scobbie, "A View from Delft: Some Thoughts about Thinking about International Law," in *International Law*, 4th ed., ed. Malcolm Evans (Oxford: Oxford University Press, 2014), 80, citing Tony Judt, *The Memory Chalet* (London: Heinemann, 2010), 189–90.

can be politicized.[7] I believe that in particular with respect to the political nature of thinking about law, these absolutes are rarely constructive. This is because these absolute views have a tendency to terminate arguments. If everything is political, we might as well stop thinking about what *precisely* makes a specific concept of law more political than another. The concept of "political" loses its value as a categorical watershed mark. Absolutes blur the fact that in a fluid social environment, most distinctions will be in degree rather than in category.

For example, looking at political morality as a related area of thought, few people would believe that just because there is some conceptual imprecision in determining our moral obligations, and everything is somehow immoral, everything goes. There are areas with greater precision than others, comparing the moral status of wearing clothes made in exploited, low-wage environments with that of killing and eating animals, but these imprecisions do not imply that trying to find out what *precisely* contributes to a moral case for and against these practices does not matter.

My interest in this book has focused on the performativity of legal thought, that is the question in how far abstract reconstructions of the law influence processes of legality. I have characterized the "political" dimension of legal thought as residing in its authoritative character as an intervention in these processes. Here again, whether or not legal thought is capable of and aims at influencing legal practice is a question of degree. In every academic claim there is a varying combination of an epistemic dimension, the observation of legal practice, with a strategic dimension of participation in the legal knowledge production. Given this, there are approaches with a more active, bellicose attitude where the strategic dimension is more dominant. And there are others, in which the political nature is hardly more than a side effect from a conscious reconstruction of legal practice.

Looking at the "political" nature of legal thought in these gradual rather than absolute terms, the results of this study point to a politization of the discipline, an increasing number of scholars with the open aim of influencing international practices of legality. This is a development of the past 25 years. In the mid-1990s, the procedures of international law were largely undertheorized, and it was with the publication of Martti

[7] See, on this reading of Foucault and Schmitt, Astrid Deuber-Mankowsky, "Nothing is *Political*, Everything Can Be Politicized: On the Concept of the *Political* in Michel Foucault and Carl Schmitt," *Telos* 142 (2008): 135.

Koskenniemi' *From Apology to Utopia* that lawyers turned to philosophical thinking about the law.[8] Today, this lack of reflection on international law is history.[9] Academic activism pervades scholarly agendas.

7.2.2 Legal Thought as a Profession

This distinction between degrees of political influence pervades the different roles professionals working on legal thought happen to take. Through the active participation in the genesis and change of global law, legal academics exercise considerable influence. This development is new for a discipline in which the self-restraint of the "invisible college" has been setting the standards for professional behavior.[10] In this picture, legal development occurs in a constant process of interpretation and re-interpretation. Statutes and their status develop with generations, opinions developed by one legal body are taken up by another, and what was once a merely a bypassing note becomes a trend, customary law, constitutional principle.[11] Legal experts discuss and pick up these notes, make suggestions, and sometimes become judges themselves. In traditional international law, the slow institutional processes are supported by a self-restraining academia with humanistic ideals.

Today's college is far from invisible. Rather, it has appeared on stage, claiming the antiquated character of the traditional order in the light of global problems. In particular in global legal thought, there is a current turn toward an image of legal scholars as political activists, who aim at implementing their preferred models of political and legal order in the global realm. In *Critical Legal Studies* (CLS), this image has been culti-

[8] See, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 2nd edn. (Cambridge: Cambridge University Press, 2006).

[9] See also, Jean D'Aspremont, "Martti Koskenniemi, the Mainstream, and Self-Reflectivity," *Leiden Journal of International Law* 29, no. 3 (2016): 625. For a different opinion, see Andrea Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking* (Oxford: Oxford University Press, 2016), 6, who seems to believe that international law is still non-theoretical.

[10] See, Oscar Schachter, "The Invisible College of International Lawyers," *Northwestern University Law Review* 72, no. 2 (1977–78): 217.

[11] See, for a defense of this mechanism in the United Nations, *Pierre-Marie Dupuy*, "Some Brief Conclusions," in *System, Order, and International Law – The Early History of International Legal Thought*, eds. Stefan Kadelbach, Thomas Kleinlein and David Roth-Isigkeit (Oxford: Oxford University Press, 2017), 505.

vated as a role model for academics.[12] Interestingly, however, the models of political organization for which global legal scholars opt are not constrained to typical CLS content. Rather, as in Dworkinian legal thought, we find conservative and liberal views among them. Activism in legal thought is pervasive.

This is closely connected with a development, in which international lawyers increasingly perceive themselves as intellectuals rather than as practitioners. This might be due to the fact that it is often conceived to be a part of the responsibility of the professional to recognize the contingency of the own position.[13] Yet, a merely intellectual community has different tasks and functions than a professional discipline concerned with authoritative decision-making. Even more, it could be counterproductive for the internal aspect of a practical position to exceedingly question the fundamentals of the own role, because this has the potential to erode the perceived necessity to take decisions following the rules of the practice.[14]

Following the self-concept of the intellectual, however, scholars have developed an increasing concern with their own role. Reflexivity and self-reflection are keywords for a discourse that increasingly centers upon itself rather than to engage in practical problem-solving.[15] There has been an enormous increase in publications on questions what lawyers are and do, their attitude, their role models,[16] and their responsibility.[17] Even the attribution of guilt for the *status quo* in critical scholarship is part of this picture because it attributes the developments of the past to the power of

[12] Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, reprint (London: Verso, 2015), 96f.

[13] Bianchi, *International Law Theories*, 6.

[14] For illustration, David Roth-Isigkeit, "The Blinkered Discipline? – Martti Koskenniemi and Interdisciplinary Approaches to International Law," *International Theory* 9, no. 3 (2017), 410.

[15] See, for a discussion on the focus on self-reflection, Euan MacDonald, *International Law and Ethics after the Critical Challenge: Framing the Legal Within the Post-Foundational* (The Hague: Martinus Nijhoff, 2011), 23f. See also, D'Aspremont, "Martti Koskenniemi," 638–39.

[16] Matthew Windsor, "Consigliere or Conscience? The Role of the Government Legal Adviser," in *International Law as a Profession*, ed. Jean d'Aspremont et al. (Cambridge University Press, Cambridge, 2017), 355–88.

[17] Gleider Hernández, "The Responsibility of the International Legal Academic," in *International Law as a Profession*, ed. Jean d'Aspremont et al. (Cambridge University Press, Cambridge, 2017), 160–88.

individual decisions.[18] The peak of the intellectual turn has been a cultivation of the myth of international lawyers through a personalization of their (even contemporary) history, which has nothing in common with the critical origin of the historical turn anymore.

This overemphasizing of the "intellectual" in the law prepares the ground for the turn away from practice toward philosophy. Today's international lawyers have preferred to remain distant to the actual practice of politics and commented on global order in appealingly vague safe distance. In the pursuit of ever-larger theoretical frames, lawyers have been believed to speak in the name of the international community, with the voice of humankind, or even in defense of eternal moral laws.

In the post-traditional model of justification, academic interventions as implementations of subjective ethical concerns of world order require political legitimacy. These models do not only come from the respective constitutional traditions from which academics stem, but they are also based to a considerable extent on their personal preferences. In particular, the abstract normativism of the Dworkinian approaches is confronted with this invocation.[19] How can an academic community that is mostly situated in European and North American universities have knowledge about what would be best for world society?

These limits of reflexivity cannot be overplayed with a call of duty. Even though the challenges posed by plurality are a fact, and no institutional solution seems in reach, the demands for political and normative legitimacy are ultimately unavoidable. Activism and intellectualism combined has a Kantian flair, in which the universal reason of scholars grasps the spirits of world orders and formulates only those "maxim[s] whereby you can at the same time will that it should become a universal law."[20]

[18] For this narrative, see Martti Koskenniemi, *The Gentle Civilizer of Nations – The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2014). See also, Anne Orford, "International Law and the Limits of History," *The Law of International Lawyers: Reading Martti Koskenniemi*, eds. Wouter Werner, Marieke de Hoon and Alexis Galán (Cambridge: Cambridge University Press, 2017), 297.

[19] Other perspectives seem more suitable to solve this legitimacy problem. With its radical democratic approach, post-modern Luhmannianism offers a bottom-up constitution of global order. This radical form, however, involves a perspective against the state or other forms of constituted communities. In the absence of a Habermasian proceduralist solution to bridge the legitimacy gaps between the different governance levels, the trilemmatic structure even returns in the question whether global academic governance is legitimate in one or the other form.

[20] Immanuel Kant, *Grounding for the Metaphysics of Morals*, trans. James W. Ellington, 3rd ed. (Indianapolis: Hackett Publishing, 1993), 30.

I think we should develop a critical distance to this trend. On the one hand, the legitimacy of scholarly interventions that become part of the practice of law is unclear. On the other hand, even more important, the turn toward activism tends to replace the legal groundwork that is an essential part of the legitimacy resources of the *status quo*.

7.2.3 Replacement of Legal Language

The political-utopian nature of the discourse in itself does not constitute a problem. In principle, there is nothing wrong with utopian sketches of global order. The problem is rather that the normative sketches in this book offer self-descriptions that make believe that they belong to a legal-theoretical discourse that begins its reconstruction of the law with legal practice. *This* discourse, in turn, claims a specific form of legitimacy in the form of the conservative reasons of the *status quo*. An argument for a change in societal practices needs not only to show that the old forms expressed in the law are historically contingent, but it equally requires the proof that the new practice comes with better reasons. If normative arguments for change in societal practices are hidden under the cover of legal thought, this is indeed problematic because it unduly bridges the burden of proof that a new practice is obliged to meet.

A distinguishing factor between these approaches, for example, is the provenance of arguments.[21] The self-acclaimed surplus value of *legal* thought is not a start from nowhere, but a foundation in actual legal and political practice. While any observation of this practice is made from a specific (biased) point of view, there is a certain difference to those sketches that are merely contingent suggestions on what political order should look like. The legitimacy of legal thought resides in its reference to actual practices, the interpretation of rules, norms, and decisions that have been produced in an institutional stalemate.

Many of these arguments have been initially discussed in the context of interdisciplinary approaches to international law ("International Law and …").[22] What has been central for defenders of the specificity of legal

[21] Martti Koskeniemmi diagnosed and criticized an ethical turn, in Martti Koskenniemi, "The Lady Doth Protest Too Much – Kosovo, and the Turn to Ethics in International Law" *Modern Law Review* 65, no. 2 (2002): 170.

[22] For illustration, see Roth-Isigkeit, "The Blinkered Discipline?" 410.

discourse is the institutional autonomy of the law. Christian Reus-Smit, for example, argues that there is an autonomous legal discourse that triggers demands of justification and thereby provides a certain form of resistance against the pursuit of self-interest.[23] A merely philosophical perspective is external to legal reasoning and, hence, will not be able to explain processes of legality.[24] In turn, the legal perspective is required because a merely philosophical model of global order alone is not suitable to replace the ordering functions of legal relations.

Yet, even from a perspective within the discipline, reconstructions from actual practice apparently seem less attractive than the abstract-normative sketches because developments in legal practice are slow and complex to monitor. The easy solution that normativism offers occupies a large part of the disciplinary resources. But it comes at a price. It bears the risk that it might replace the original grammar of legal discourse oriented toward the practice of law. The loss of the legal knowledge conserved in the discipline would be a setback for the global legal project as a whole. In legal academia, instead of a constant monitoring and commenting of courts and other actors, practice is understood as a phenomenon at the periphery of legal argument.[25]

Since progress in legal practice is partly dependent on suggestions from academia, and abstract normativism offers little help in down-to-earth legal reasoning, this trend might become a self-accelerating process. In a general turn away from international law as the body of rules linking the different legal and functional systems of the world, judges and advisors cease to understand themselves as international lawyers. They start to build an identity that is fairly different from the cosmopolitan spirit that once tied the discipline together. As practice becomes less innovative as a consequence of the lack of practical suggestions, academics might even turn toward more normativism. This process, leading away from the practice of law and a professional identity as lawyers, promotes rather than delays developments that lead to law's erosion.

[23] Christian Reus-Smit, "The Politics of International Law," in *The Politics of International Law*, ed. Christian Reus-Smit (Cambridge: Cambridge University Press, 2004), 37–38.

[24] Roth-Isigkeit, "The Blinkered Discipline?" 410.

[25] In a German international law blog, the *Völkerrechtsblog*, there is a section that is called *Practioner's Corner*. Though inadvertently, the authors provide for a strong illustration of the turn away from practice.

This erosion is what we can observe in today's scholarship on plurality. This study has argued that the discourse turns away from a practice in which the original grammar of international law, with its long-developed doctrine of sources and actors, is replaced with abstract-normative considerations. As a consequence of the legal argument's dissolution in political utopias, the specificity of legal discourse gets lost.

7.3 Perspectives

Assuming for a moment that this analysis is correct, this raises questions on the project of global legal thought. These questions are political questions because, translated through processes of legal argumentation, legal thought may become authoritative for the practice of law and its subjects. Legal thought has become a distinct part of the legal profession with a specific role that, however, requires a certain responsibility. In this third section, I discuss what may be required to live up to this responsibility—a conception of legitimacy for global legal thought. I suggest that an acknowledgment of the political nature of the discourse does not mean "anything goes," but instead requires a certain balance between epistemic and political-strategic considerations.

7.3.1 Toward a Balance of Academic Activism and Professional Self-Restraint

In the first chapter, I have considered the enterprise of legal thought as being located between two poles. In every approach that has been presented in this book, there is an epistemic dimension that tries to observe consciously a part of legal practice as its object, and there is a strategic dimension that influences and shapes this object through the process of theorizing by providing the background knowledge for "how to do the law." Analogously, I have argued that the propositions of legal thought serve two purposes. On the one hand, they inform the reader about some aspects of the legal system and shed a reflexive light on the practice of law. On the other hand, they aim to convince the reader of the correctness of this view and to make her follow a specific course of action.

Theory, in order to fulfill its functions, must satisfy balances between both aspects. Based on the results of this book, the previous section has diagnosed a tipping of this balance toward strategic considerations—an abstract normativism that sketches political utopias rather than orienting

itself on legal practice. Rather than to shed a reflexive light on practice, theoretical sketches in global legal thought prefer to take a shortcut to convince the reader. Let today's practice go—we need to think about the world order of tomorrow. The relationship of theory and practice turns into a case of the tail wagging the dog. In this section, I aim to explain why, in theoretical terms, this is the wrong way. A theorist, to paraphrase Cicero, is a man speaking to men. "The very cardinal sin of oratory is to depart from the language of everyday life and the usage approved by the community."[26]

Discussing Habermas' concept of mutual understanding, the first chapter has suggested that the impact of theory depends on induction, when the experiences in the approach resonate with experiences of the reader. This inductive moment, the practical acceptance of arguments, is a precondition for the function of theory because statements can only promote reflexivity, when they succeed to pick up the audience at their specific location and, hence, rely on a shared conceptual framework. Importantly, this shared framework is also a precondition for the second function of theory—to convince. Informational *and* convincing speech has to start with the conceptual basis of the audience. This understanding resonates with the disciplinary framework of *rhetoric*. I believe that rhetoric concepts might help to find a natural balance between epistemic and strategic considerations in legal thought.

For centuries, the combination of science and rhetoric has been disapproved of. Persuasion in scientific contexts comes with connotations of insincerity, ornaments without substance. In particular, the art of persuasion has been considered to obstruct the way toward truth. This view has become particularly pervasive in the eighteenth-century rationalism of the enlightenment, but originally goes back to Plato's *Gorgias*.[27] Here, rhetoric is the main tool of politics that merely flatters the people.[28] In this context, Plato makes his famous remarks that only "from a standpoint of [true] philosophy could one get a comprehensive view of what was right, for the social order as for individuals; so that mankind would never be rid of its miseries until philosophers, in the genuine sense of the term, gained

[26] Cicero, *On the Orator – Books 1–2*, trans. Edward William Sutton and Harris Rackham (Cambridge: Harvard University Press, 1942), 1.3.12.

[27] For Karl Popper, Plato is responsible for this negative view through his attacks on the Sophists. See, Karl Popper, *The Open Society and its Enemies*, 5th edn. (London: Routledge, 1966), 130f.

[28] Brian Vickers, *In Defence of Rhetoric* (Oxford: Clarendon Press, 1998), 84–85.

political power, or else, by some miracle, the governing classes took to genuine philosophy."[29] As Brian Vickers shows, this view of rhetoric strongly influenced the history of philosophy until modern times.[30] While global legal thought approaches this picture of philosopher kings, there are alternatives.

Already with Aristotle, the understanding of the functions of rhetoric becomes more sober.[31] Today, it is widely acknowledged in theory that rhetoric is more than the art to persuade.[32] My suggestion is that in its application to the legal thought, it provides a regulative frame for arguments. This is because social practices are contexts of frequent repetition. Institutionalized social cooperation works with a history of trust: since we know how an actor behaved in the past, we make assumptions how that actor will behave in the future. In game theory, such a situation is called a repeated game that improves cooperative outcomes.[33] The continuous building of this trust between states through multilateral cooperation is a central aspect of international law.

In a practical context, to convince an actor of the truth of something is not enough. Rather, the conviction has to be qualified, because it needs to motivate the actor to a certain course of action. If we understand legal thought as having an activist and strategic dimension, its claims need to be suitable as *qualified convictions*. Legal thought needs to be formulated in a way that allows its reception by actors in the practical realm.

I believe that such qualified convictions require at least the adherence to conditions of precision and facticity. First, in order to possibly lead to a course of action, scholarship needs to be sufficiently concrete in order to be effective. To paraphrase Antonio Cassese, the utopia needs to be

[29] Plato, *Gorgias*, ed. Eric Robertson Dodds (Oxford: Clarendon Press, 1990), 326a.

[30] Vickers, *In Defence*, 200–201.

[31] Vickers, *In Defence*, 161.

[32] See, for an overview, Thomas M. Conley, *Rhetoric in the European Tradition* (Chicago: University of Chicago Press, 1990), 285f. See also Iain Scobbie, "Rhetoric, Persuasion, and Interpretation in International Law," *Interpretation in International Law*, eds. Andrea Bianchi, Daniel Peat and Matthew Windsor (Oxford: Oxford University Press, 2015), 62–64, who refers to concepts by Ivor Armstrong Richards, *The Philosophy of Rhetoric* (Oxford: Oxford University Press, 1936); James Boyd White, "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life," *University of Chicago Law Review* 52 (1985): 684; Chaïm Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric*, trans. John Wilkinson and Purcell Weaver (Notre Dame: University of Notre Dame Press, 1991).

[33] For an introduction, see Martin J. Osborne and Ariel Rubinstein, *A Course in Game Theory* (Cambridge: MIT Press, 1994), 133f.

realistic.[34] Abstract utopias that do not orient themselves on the practices of the law are unlikely to fulfill this condition. Second, scholarship needs to provide a reliable fact basis. In situations of frequent repetition, overstretching the boundaries of truth will lead to the erosion of one's argument. With a rhetorical frame, scholarship will return automatically to a balance between epistemic and strategic considerations because concreteness and truth are preconditions of theory's effectiveness.

Rhetoric can equally shed light on an understanding of international law *as practice*. Iain Scobbie has argued that rhetoric can provide a conceptual frame for understanding processes of interpretation in international law. Drawing on Chaïm Perelman, he argues that universal values might play a persuasive role in arguments operating as empty frames of justification.[35] For example, the process of the adoption of the *Universal Declaration of Human Rights* operated with such a method. Its concepts and claims are largely abstract, so that they are free from specific cultural tensions, which could prevent their universal acceptance. Since a document was universally agreed on, further dialogue could proceed on the basis of this original agreement.[36]

Here, the discourse is directed into tracks through a textual basis. Arguments do not have to start from an abstract notion of the "good"; rather, they can remain contextualized to very specific words and concepts in a legal text. This form of discourse is a creation of order *in concreto* through the process of systematizing.[37] In this picture, legal discourse oscillates between the concrete and the abstract. It concretizes and systematizes abstract values through processes of interpretation, while the patterns of interpretation subsequently crystallize in abstract depictions of order. System and order are in a constant process of mutual conditioning.

[34] Antonio Cassese, "Introduction," in *Realizing Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press, 2012), xxi.

[35] Scobbie, "Rhetoric," 71.

[36] Elsewhere, I have argued that the processes of standard-setting in the Human Rights Committee proceed in a very similar way. David Roth-Isigkeit, "Die General Comments des Menschenrechtsausschusses der Vereinten Nationen – ein Beitrag zur Analyse der Rechtsentwicklung im Völkerrecht," *MenschenRechtsMagazin* 17, no. 2 (2012): 196.

[37] As Stefan Kadelbach has noted, this "order through system" is a trait that already appears in the scholarship of Hugo Grotius. See, Stefan Kadelbach, "Hugo Grotius: On the Conquest of Utopia through Systematic Reasoning," in *System, Order, and International Law – The Early History of International Legal Thought*, eds. Stefan Kadelbach, Thomas Kleinlein, and David Roth-Isigkeit (Oxford: Oxford University Press, 2017), 157–58.

These short remarks should not be expected to be a detailed theory on how the discipline of rhetoric may help to overcome the crisis of international law in the process of globalization.[38] Rather, they intend to convey an understanding of *how* lawyers might contribute to the rationality of these processes. In my view, the frame of rhetoric points to a project of legal groundwork that I understand as a *practical turn*. Instead of understanding themselves as theorists of the highest order, international lawyers should turn to modest thinking.

7.3.2 A Practical Turn…

If anything concrete may be concluded from this study, then it is a way this modesty could—literally—be put into practice. While theory does have an important influence on the practice of the law, it cannot replace practice. The proposal of a *practical turn* suggests that the discipline should expose diligence and institutional modesty in cultivating their professional language. Instead of engaging in theoretical models of the highest order, scholars should look for the twigs of legal argument that ensure its argumentative precision.

Rather than a transformation into legal positivists, the suggestion advocates to relocate legal scholarship in its context with legal practice. The surplus value of legal reasoning, in comparison to philosophical models, is its grounding in preexistent practice. It does not have to start from nowhere, but can build on the shoulders of its predecessors. In systematizing rules and court decisions, recognizing of transnational patterns and varieties, and highlighting tensions and contradictions in the conflict of legal orders, lawyers will contribute to the slow but steady institutional progress of international law that fixates normative agreement like a semi-permeable membrane, contributing to a dense web of rules and principles. With the rhetorical frame, I suggest that such a moderate resort to the political dimension in scholarship is the best way to ensure normative progress.

Surprisingly, legal debates frequently suggest that such a position would not be open to the lawyer. Frédéric Mégret observes that there is a split in

[38] Yet, I have suggested how theories of argumentation might be suitable to overcome conflicts of legal orders. See, David Roth-Isigkeit, "Promises and Perils of Legal Argument – A Discursive Approach to Normative Conflict Between Legal Orders," *Revue Belge de Droit International*, no. 2 (2014): 96.

the discipline between an "ethos of commitment" and an "ethos of detachment."[39] The detached international lawyer is pictured as a sphinx without any political views, while commitment requires a militant activism. In Ian Hurd's picture of "enchanted and disenchanted" attitudes toward international law, enchantment means uncritical defense of legality, while disenchantment is a reflexive position not committed to the body of law.[40] Yet, it seems to me that international lawyers are confronted with the wrong choices here.

Since the body of law is not neutral in the sense of indifferent, making choices on the basis of law involves taking a normative stand for the general interest that the law embodies. This perspective may be inevitably biased, but it is the best expression of general interest that we have and, as such, trumps the alternatives. The counter-position paradoxically claims that *because* such an unbiased position does not exist, lawyers should "seek legal solutions where needed, and support non-legal ones where they can better accomplish our policy-goals, including that of a more just world."[41] Here, legal thought is a blank check for non-compliance with positive legal provisions.

The argument from international law as practice is not new.[42] In his article *Between Commitment and Cynicism*, Martti Koskenniemi delivered a sketch of the discipline's psychology.[43] He diagnoses that the professional identity not only involves professionalism, but that there is an internal element of commitment to international law's goals in the discipline. Koskenniemi characterizes the different roles that international lawyers may take in their engagement: judges, advisors, and, ultimately, academics. The exercise of responsibility in all of these roles requires a practice-oriented commitment. As this study has attempted to show, this

[39] Frédéric Mégret, "In Search of International Impartiality," *ESIL Reflections* 4, no. 8 (2015): 3.

[40] See Ian Hurd, "Enchanted and Disenchanted International Law," *Global Policy* 7, no. 1 (2016): 96.

[41] Steven R. Ratner, "International Law's Impartiality – Myth and Reality," *EJILTALK!*, 26 October 2015, available at http://www.ejiltalk.org/international-laws-impartiality-myth-and-reality/

[42] Isabel Feichtner, "Realizing Utopia Through the Practice of International Law," *European Journal of International Law* 23, no. 4 (2012): 1143.

[43] Martti Koskenniemi "Between Commitment and Cynicism: Outline of a Theory of International Law as Practice," in *Collection of Essays by Legal Advisers of States, Legal Advisers of International Organizations and Practitioners in the Field of International Law*, ed. United Nations (New York: United Nations, 1999), 495.

commitment is currently eroding in a general turn away from the rules of international law.

In the institutional practice of international law, such a commitment to practice is reflected in the politics of Dag Hammarskjöld. For him, as his legal advisor Oscar Schachter wrote, the responsibility of the "impartial" legal scholar meant adherence to the principles of the Charter.[44] The scholar's position was thus a position of active effort, "positive neutrality" as Hammarskjöld once coined it.[45] Importantly, this view did not require him taking a positivist stance on legal method. Accordingly, Hammarskjöld understood the law "not merely as a technical set of rules and procedures, but as the authoritative expression of principles that determine the goals and direction of collective action."[46]

This traditional approach avoids an open struggle of concurring political ideologies in the legal discipline. Its Kelsenian spirit might seem odd in the light of the challenges of global law.[47] Paradoxically, in this constellation, the adherence to tradition requires an irrational trust in the endurance of the legal argument despite its challenges. This study ultimately aims at facilitating this trust in some ways. If the debate on the future political order is structurally contingent, and the geometry of global law requires the making of choice between different elements as a foundation for global order, the academic discourse on plurality is a simple expression of substantive preferences put in the form of legal thought. There is nothing like a riddle to solve, but merely a choice to make. The role of the academic should be to shed a reflexive light on these choices and to put them in the perspective of the contexts of decision instead of trying to make the choices herself. This requires contextual instead of abstract work,

[44] Oscar Schachter, "The International Civil Servant: Neutrality and Responsibility," in *Dag Hammarskjöld Revisited*, ed. Robert S. Jordan (Durham: Carolina Academic Press, 1983), 47.

[45] See Pål Wrange, "Neutrality, Impartiality and our Responsibility to Uphold International Law," in *The Law of War – The Law as it was and the law as it should be*, ed. Pål Wrange and Ola Engdahl (The Hague: Martinus Nijhoff, 2008), 278.

[46] Oscar Schachter, "Dag Hammarskjöld and the Relation of Law to Politics," *American Journal of International Law* 56, no. 1 (1962): 1.

[47] Mónica García-Salmones remarks, in her biography of Kelsen, that "[t]he most authentic experience that Kelsen observed, in political, economical, and sociological life, was that individuals or states were constantly struggling for their interests." Kelsen tried to avoid this struggle through an excessive clarity of the law. Mónica García-Salmones, *The Project of Positivism in International Law* (Oxford: Oxford University Press, 2013), 129.

a cultivation of lawyer's professional language, and a close orientation on legal practices, even those that have almost disappeared.

7.3.3 … And a Critical Project

This book is a project of meta-theory. Its function is to systematize global legal thought and to highlight the fact that the choice of a theoretical model is a choice between different alternatives. Through providing a common conceptual ground, it tries to add transparency and rationality to the process of academic choices. Even though many of them will be predetermined through academic hierarchies and culture, resisting biases and legal traditions, highlighting the very fact that there are choices to be made might promote the reflexivity of the discipline.

The choices within legal practice are often at the crossroad of different methodologies. For example, whether one argues for the general admissibility of reservations in human rights treaties depends on the theoretical status of the document: A constitutional charter where reservations are invalid? A statement of value that exemplifies principles that gradually becomes a new consensus so that it might be worth allowing those states to join that have reservations to some provisions? A document addressed to the international community as a whole, including non-state actors, so that it is conceptually impossible for states to make reservations because the document applies to subjects independent of states' consent? These conceptual choices rely on different theoretical views, and it is through their relocation within these views that they become comprehensible.

Conceptual choices equally predetermine the preferences for legal change. For example, the argument for transparency in legal procedures beyond the state depends on a specific perspective. In a Habermasian view, transparency of decision-making processes is an important element of the principle of publicness. Yet, the value of transparent procedures might be evaluated completely different in a Luhmannian or Dworkinian view. In one picture, transparency merely illustrates that the legal subject is excluded from the moment of decision in the global realm—publicness will not undo its violence. Even more, from a governmental perspective, transparent procedures in a body like the *Security Council* will crucially impede on its ability to act. In the debate on due process protection against sanctions, these different positions have been advocated.

International (or global) lawyers will need methodological consciousness in order to understand these academic choices. The chaotic transmission

between different paradigms of authority, the weakening of the economic meaning of the national state and its simultaneous overstatement from within the political system, and the growing pressure through streams of migration—all these factors of turmoil will continue to challenge the systematic understanding of legal order in the future. Even more, it is required not to give up the achievements of the international legal system too easily because they may not be replaced. Legal academics do have the duty to restrain their (in other circumstances well-founded) activism in order to protect these achievements.

On a second level of abstraction, the project of systematization might itself be a rhetorical project. It aims at convincing scholars from a specific course of conduct—engaging in legal practice. It might also be a political project, as its representations of the different theoretical approaches are inevitably biased and subjective. Ultimately, it might even be a case of "armchair theorizing," as Andrea Bianchi characterized approaches that are quite far removed from the reality they purport to explain.[48] I believe that we should understand meta-theory as a continuous challenge to search for overlapping opinions and agreements, for shared views and concepts. This book has tried to illustrate that even though we do not know whether we will find agreement, the very search for common concepts might be a precondition for engagement. Or, as Benjamin Franklin once said, "the discontented man finds no easy chair."

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[48] Bianchi, *International Law Theories*, 7.

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