

Special Workshop No. 51: Globalization as a Challenge to Legal Philosophy?

Convenors:

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General workshop description: Legal thinking is anchored upon a series of dichotomies. The concept of a (state) legal order is often explained upon the basis of distinguishing the internal and external, public and private, local and global, and ultimately law from non-law. Globalization is said to call these divisions into challenge. If taken seriously, this entails a series of transformations for legal philosophy, e.g., what should be the point of departure for legal theory? Should more traditional debates in legal philosophy (e.g. on positivism and non-positivism, or the nature of the authority of law) be reorganized? Which criteria are relevant for this? At a fundamental level, the direction of possible research questions remains unsettled. There is the possibility of questioning the significance of globalization to legal philosophy, or reappraising the state in legal philosophy. These orientations can serve as a preemption, or consequence, of 'statist' arguments as a strand of anti-globalist developments.

The contributions to this workshop will span the following topics: proposals for methods to analyze, compare and map the claims of legal theories with regards to our contemporary globalized and pluralist contexts; an examination of methodological universalism with regards to global legal pluralism; considerations on the import of moral philosophy for conflicting normativities (especially values and legalities); on the application of group agency theory to deflate the 'democratic deficit' in law beyond the state; assessments of theories on cosmopolitan constitutionalism, and the account of the globalizations of legal thought offered by Duncan Kennedy; contributions situating debates on fundamental questions of law (such as its relation to morality, power, and unity) in the international sphere; discussions on the nature of legal conceptual inquiry, theory change in jurisprudence, and prospects for the debate on legal positivism in a pluralist setting; reflections on the import of conceptual inquiries in transnational settings; and methodological questions on recasting legal pluralism as a normative argument to balance substantive and procedural reasons across jurisdictions.

Schedule (paper titles link to individual abstracts):

| Monday 8 July: Museggstrasse 316 | |
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| 14:00 | David Roth-Isigkeit (Goethe University, Frankfurt) <i>A Geometrical Approach to Global Legal Thought</i> |
| 14:30 | Shun Kaku (Waseda University): <i>The Concept of Law in the Era of Globalisation</i> |
| 15:00 | Thomas Riesthuis (Utrecht University): <i>Making Sense of the Intertwinement of Legal Orders: The Method of Critical Reconstruction</i> |
| 15:30 | Constanza Núñez Donald (University Carlos III de Madrid / University of Chile): <i>Legal Philosophy and Cosmopolitan Constitutionalism: A Few Theses' Reformulation Proposal</i> |
| 16:00 | Coffee Break |
| 16:30 | Punsara Amarasinghe (Scuola Superiore Sant'Anna, Pisa): <i>Towards Fourth Globalization in Legal Thought: Missing Point of Duncan Kennedy</i> |

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| 17:00 | Mauro Zamboni (Stockholm University): <i>“A Legal Pluralist World”... Or the Black Hole for Modern Legal Positivism</i> |
| 17:30 | Orlando Scarcello (Scuola Superiore Sant’Anna, Pisa): <i>Does Legal Pluralism Need Theories? An Account of Theory-Change in Legal Theory</i> |
| 18:00 | Keisuke Kondo (Kyoto University): <i>Accommodating Global Legal Pluralism? An Examination of Methodological Universalism</i> |
| Thursday 11 July : HS 3 | |
| 08:30 | Brian Flanagan (Maynooth University): <i>Deflating the Problem of the Democratic Deficit by Reconceptualizing the Agential Role of the Demos</i> |
| 09:00 | Dagmar Topf Aguiar de Medeiros (University of Edinburgh): <i>Bridging Normativity and Authority beyond the State through International Constitutionalism – A Case Study of the United Nations Framework Convention on Climate Change</i> |
| 09:30 | Gabriel Alejandro Encinas Duarte (Scuola Superiore Sant’Anna) <i>Recasting Legal Pluralism as a Piecemeal ‘Weighting’ of Validity? Institutional Fora, Criteria and Sequencing</i> |
| 10:00 | Karolina Gawron (Jagiellonian University, Kraków): <i>Confrontation of Values</i> |
| 10:30 | Coffee break |

Individual paper abstracts in foreseen order of presentation:

David Roth-Isigkeit (Goethe University, Frankfurt) *A Geometrical Approach to Global Legal Thought*

Globalization questions many established legal concepts. Yet, a common conceptual basis is a precondition for the performance of theory and the possibility of understanding. 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.

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

A closely related phenomenon is the cultivation of knowledge in schools of thought.¹ 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.² In antiquity, since no shared grammar and vocabulary for academic inquiry existed, the

¹ See, for international law schools, Andrea Bianchi, *International Law Theories – An Inquiry into Different Ways of Thinking* (Oxford: Oxford University Press, 2016).

² See Fassbender, “Denkschulen im Völkerrecht,” 1 who cites the Oxford English Dictionary.

attempts of schools of Plato or Aristotle allowed for a systematic exploration of knowledge.³ 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 for the theoretical outsider. Complexity instead of clarity becomes a rhetorical tool. 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.

As a response to this challenge, I have tried to develop a geometrical approach to global legal thought.⁴ This approach tries to reduce the main patterns of global legal thought to a common vocabulary. The central precondition for a geometrical approach is to understand global legal method as a conceptual *uni*-verse instead of an unrelated *pluri*-verse.⁵ 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.

The main goal of the geometrical method is a promotion of a systematic understanding of global legal thought. 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.

In my presentation, I would like to discuss with the audience the viability of a systematic approach to global legal thought, engage with criticism, and come to a common understanding of the role of theory to provide an epistemology of the social world.

Shun Kaku (Waseda University): *The Concept of Law in the Era of Globalisation*

One aspect of globalisation is the proliferation of norms at supra- and transnational levels, ie, norm creation by international organisations and other non-state bodies. This has lent additional force to legal pluralists' attack on the mainstream approaches to law in the contemporary legal philosophy. In their view, the conceptual analysis of law in which most legal philosophers engage following HLA Hart has had a number of limitations in its scope: Law composes a self-contained system, ie, a system more or less independent of other legal systems; Law is equated with officially recognised law of the state; Law is essentially the standard for judges in making decisions in court; The law of historical or non-western societies is not fully taken into account. In sum, the contemporary legal philosophical debate about law is biased towards the official law of the contemporary western state, and therefore

³ This becomes particularly clear in Harold F. Cherniss, *The Riddle of the Early Academy* (Berkeley: University of California Press, 1945), 1-30.

⁴ David Roth-Isigkeit, *The Plurality Trilemma – A Geometry of Global Legal Thought* (New York: Palgrave Macmillan, 2018).

⁵ For a different view, see Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press, 2012), 245f.

leaves the multiplicity of legal phenomena in reality unattended.

This has resulted in theories of law that are 'unrealistic', according to B Tamanaha, which fail to see how law operates in society from a wider perspective. Once it is clear that people are bound by not only official state law but also unofficial or non-state law, the moral importance of official state law as the basis of the exercise of coercive power by the state becomes hardly self-evident. It also becomes doubtful to make legal philosophical debate implicitly based on the austere concept of law exclusively focusing on official state law.

At first glance, these challenges from legal pluralism are to be easily dismissed. It is far from clear how far the validity of legal pluralism's contention extends. After all, its primary basis is the empirical observation that there are various kinds of law-like norms that give guidance to people's conduct, and thus it is vulnerable to what is in line with HLA Hart's rebuttal to rule scepticism. To the extent that the state has incomparable coercive power and official state law provides the basis for exercising that power, while what is called unofficial or non-state law only play a marginal role in practice just as morality or foreign law, conceptual analysis focusing on official state law has important implications for some such as J Raz, as it lays basis for further normative enquiry. Moreover, the alternative concept of law, either thinly functional (W Twining) or conventional (B Tamanaha), fails to grasp the defining characteristics of law that separate law from other normative orders.

However, as I will argue in the paper, the recent development of globalisation casts a different light on the issue. The establishment of international courts at the supra- or transnational level has made it difficult to identify the relevant group of officials or judges for the purpose of determining what the law is. This raises doubt about the merit of legal positivism, since it lies in that only legal positivism can explain law's authority in achieving social cooperation by basing law on factual grounds without recourse to the inevitably controversial discussion of morality. If legal pluralism has its point, it is unnecessary to adopt its all-encompassing concept of law. Any concept of law inevitably involves a choice of perspective, and the choice must be made in the light of whether the concept brings a deeper understanding of law in our society and, perhaps, contributes to our better cooperation through law. It is because the observer sees the Nazi laws as representative of the situation of a moral dilemma which might face judges and citizens in any contemporary society that he regard them as law. It is because common ends and functions are perceived that the law of a distant society is considered to be the same enterprise as a modernised legal system. In other words, historical and contemporary instances of law *ought to* be regarded as such insofar as they are seen as sharing the same fundamental problems of organising society by means of law. This greatly depends on how an observer understands the relevant characteristics of the law practised in her society, and in particular the principle of legality. In this sense, *pace* R Dworkin, an enquiry into the sociological concept of law is an interesting part of legal philosophy.

Thomas Riesthuis (Utrecht University): *Making Sense of the Intertwinement of Legal Orders: The Method of Critical Reconstruction*

Many leading theories of jurisprudence are unable to give an adequate account of law that goes beyond state legal systems. However, globalization problematizes the idea that an adequate account of law can limit itself to state legal systems. In the first part of my paper, I argue that theories of jurisprudence should be able to make sense of how state legal systems and international law are interrelated. On this view, legal theories should explain

the intertwining of legal orders as a central characteristic of law and legal practice in Western liberal democracies. I will explore two possible lines of objection to this claim. Firstly, it may be argued that globalization does not pose a challenge to theories of jurisprudence. For example, the intertwining of legal orders may be considered an important but not a central characteristic of law. On this view, legal theories should explain law by describing its essential or constitutive features. I will maintain that this objection should be considered problematic because it misconceives the social nature of the concept of law. Secondly, it may be argued that globalization does not pose a serious challenge to theories of jurisprudence. The validity of a legal theory depends on the soundness of the arguments it provides and not on its conception of law it offers. However, I will claim that no clear distinction can be drawn between philosophical arguments that a theory offers, and the conception of law it puts forward on the basis of its arguments.

In the second part of the paper, I will explore how legal philosophers may redeem existing theories of jurisprudence that are unable to account for processes of globalization in law. I will claim that Rawls' method of reflective equilibrium may be used as a method to critically reconstruct existing legal theories. The method of reflective equilibrium has been used by Rawls to justify a moral theory that achieves a balance between considered judgments and general moral principles. When critically reconstructing legal theories, new elements are introduced to these theories to explain central characteristics of the practice it should explain. The aim of critical reconstruction is to find a balance between the continuation of the central insights of a theory and the revision of a theory to account for a central characteristic of law and legal practice. Lastly, I will argue that in some cases the method of critical reconstruction leads to a dilemma. The critical reconstruction of a theory may lead to the rejection of its central insights or the denunciation of a central characteristic of law and legal practice. I will illustrate this dilemma with Kelsen's theory of law.

Constanza Núñez Donald (University Carlos III de Madrid / University of Chile): *Legal Philosophy and Cosmopolitan Constitutionalism: A Few Theses' Reformulation Proposal*

Cosmopolitan Constitutionalism is a specific discourse in the international debate, the goal of which is the application of constitutional principles in the global scenario to achieve the universal guarantee of human rights. It is a discourse that has descriptive dimensions (it is a hermeneutic frame to understand the reality) and normative, because it is a political project for the future. It is transformative and critical. Transformative, because even though it uses constitutional language, it does not apply the "domestic analogy" as a strategy. It seeks to develop a new criteria to understand the creation and legitimacy of law, beyond the national and international perspective: the cosmopolitan. It is critical because it recognizes the diversity and complexity of the international community, but even with these difficulties it does not renounce the possibility of the idea of cosmopolitan constitutionalism.

Even though this concept (cosmopolitan constitutionalism) has been developed having as a frame of reference the theory of law and democracy related to statist constitutionalism, the characteristics of the global scenario requires these concepts to be adapted or revisited so they are able to explain or transform the reality.

Considering these reflections, the principal objective of this work will be to show the principal challenges that cosmopolitan constitutionalism present for the classic debates of legal philosophy in the light of the current conditions of the international sphere. In this paper the

three topics I will consider are the debates between moral and law, law and power and law and unity.

i) **Moral and Law.** The tension between moral and law is relevant in this context because cosmopolitan constitutionalism is a concept based on the universality of human rights, which is an affirmation where its content has a strong axiological commitment. For that matter the question raised is whether or not it is possible to have a legal cosmopolitanism that is divorced from the moral sphere in the context of the theory? Or, does a legal understanding of cosmopolitan constitutionalism necessitate a natural rights perspective to be understood?

ii) **Law and power.** The traditional debate about the relation of law and power in the international sphere has been represented in the dispute between realists and legal pacifists. This debate has to be updated since the power that has to be regulated is wild and diffuse and is no longer held by individual states. So, we can ask if it possible to design a model that is able to coordinate and regulate a power with these characteristics?

iii) **Law and unity.** In recent years, pluralism has arisen as a third alternative in the traditional debate between monism and dualism. In the light of cosmopolitan constitutionalism it is necessary to revisit the terms of this debate to ask which perspective is better for developing a cosmopolitan comprehension of law. It will be sustained that a possible solution is a more complex understanding of the rule of recognition.

The topics will be problematized from the perspective of two contemporary scholars of cosmopolitan constitutionalism: Luigi Ferrajoli and Jürgen Habermas. I have chosen these scholars because they have developed a normative proposal of law and democracy that culminates with a cosmopolitan aspiration.

Punsara Amarasinghe (Scuola Superiore Sant'Anna, Pisa): *Towards Fourth Globalization in Legal Thought: Missing Point of Duncan Kennedy*

Background: Being a pioneer in Critical Legal Studies movement Duncan Kennedy has elucidated the overarching factors that carved the path of evolution of legal consciousness in Anglo American jurisprudence and the West in his monumental work *Three Globalizations and Legal Thought*. As Kennedy acknowledged the essential objective of his work lies in narrating the first two overlapping periods of the legal institutional and conceptual change in the West. Kennedy has depicted the classical legal thought dominated between 1850 -1914 as the first globalization which has traced the rise of Positivism in 19th century international law and furthermore the contribution of German historical school's attempt to develop positivist version of normative formalism has been well captured by Kennedy in his notion on first globalization of law. In the second era of globalization Kennedy's attention has been given to how Social factor began to spread around the realm of law in a decisive manner. The abuse of legal right in individualistic form was changed in the second generation of globalization of law between 1900 to 1968 as result of emergence of post-colonial states and new social movements. This era significantly gave prominence to social rights and Kennedy shows it as "The Social as a transnational legal consciousness". Finally Kennedy has sought to examine whether there would be a third globalization in law in the wake of modern legal consciousness. On the basis events occurred after 1968 in both West and Global South, Kennedy has illustrated the rise of new legal speculations such as human

rights, rule of law, federalism etc are akin to the emergence of third globalization of legal thought.

Argument: Having examined the broader version of legal thought or consciousness bloomed under Kennedy's three globalizations phenomena, this article seeks to go further on what lies beyond Duncan Kennedy propounded as third globalization in legal thought. This paper mainly argues that in the process of portraying third globalization in legal thought, Kennedy has given a least concern over the role of international institutions as a global governing body and their discursive influence upon the state sovereignty in Global South. This paper will trace to which extend International Institutes have expended its authority over every nook and corner of international relations by limiting the state sovereignty. The cardinal thesis expected to construct in this paper is consisted of two elements. Firstly the fervent influx of Neo Liberalism into International Economic Institutes or commonly known Bretton Wood institutes such as WTO, IMF and World Bank would be taken into consideration as the crucial factor curtailing the state sovereignty of third world countries. Especially in terms of obtaining financial loans, the conditions imposed upon developing states by international economic institutes are entangled with many conditions and more or less those conditions urge the governments of developing states to embrace liberalization of economy, privatization and de regularization of the state structure. Secondly this paper will seek to prove how international institutes have paved the way to the formation of global imperial system that undermines the subaltern class in the Third World. The mechanism drawn in UN Charter such as Article 51 of self-defense has metaphorically justified the preemptive use of force and the recent military interventions by UN or other institutions such as NATO have shown the undue influence of international institutions over state sovereignty. While tracing under given two elements this paper will further argue the modern legal thought would reach the fourth globalization period going beyond the epoch of three globalizations of Duncan Kennedy. As it has been illustrated in this abstract, the dominating role of international institutions as a crucial factor in in the recent time should be taken into consideration as the fourth of globalization of legal consciousness.

Methodology: This paper is founded on the thesis brought by critical legal theorist Duncan Kennedy in his work *Three Globalization and Legal Thought* and this is an endeavor to create the idea of dominating role of international institutions as fourth globalization in legal thought. In order to reach the research objective this paper would take a doctrinal approach based on how critical legal studies movement has viewed legal thought thus far and its loopholes, also the international conventions and UN charter, primary documents on Bretton Wood institutes would be used as supporting tools to develop this paper.

Conclusion: The results of this paper will lead to re consider current legal thought under severe impacts of international institutions as globalizing agents and this paper will emphasize on including a due concern over the role of international institutions and state sovereignty in critical legal scholarship.

Mauro Zamboni (Stockholm University): *"A Legal Pluralist World"... Or the Black Hole for Modern Legal Positivism*

Let's be honest: modern legal positivism is not experiencing one of its best days. In addition to the traditional attacks from competing legal theories (from natural law to postmodern approach), now legal positivists seem to be approaching a sort of "event horizon" situation when looking to the black hole of what is going on in the real world. In astrophysics, "event

horizon” designates the “point of no return” of a black hole, i.e. the point at which the gravitational pull of a black hole becomes so great as to make escape impossible. Similarly, legal positivists seem to be placed at a point of no return when looking at the effects of globalization upon the legal phenomenon. The reality offers to legal positivists countless examples of soft-law, i.e. law which is not law (at least according to certain modern legal positivism standards) but is perceived and applied by the vast majority of the legal actors as law (i.e. it is law according to other modern legal positivist paradigms). Similarly, and in connection to this, a plurality of sources of law, usually lacking the “official imprint” by the state as being legitimized sources for legal regulation (one apparently essential component for the modern legal positivism), occupies the stage of the law-making of fundamental areas like transnational commercial law or international environmental law.

Faced with this radically changed reality, most contemporary legal positivists appear to be caught in the dilemma that an astronaut would probably experience when becoming aware of approaching the point of no return at the fringes of the black hole: either he or she will stare motionless into the abyss of the reality in front of him or her, paralyzed by the magnitude of the phenomenon and not knowing what to do in order to deal with this unprecedented danger. In this respect, one should for instance consider the recent shifting of Jules Coleman, one of the founding fathers of contemporary legal positivism: in several of his latest works, Coleman has faced the brute truth and declared (more or less) dead the major axioms of legal positivism in favor of shifting to a quasi-natural law position.

Leaving aside the science-fiction metaphor, one can see how the modern legal positivism, on one hand, is in front of a reality of legal globalization and increasing legal pluralism in many areas of law, that is a reality (e.g. soft-law) challenging some of the fundamental paradigms endorsed by this legal movement (e.g. the pedigree thesis). On the other hand, modern legal positivists have taken a quite passive attitude toward this challenge, either by abandoning the legal positivism as a whole to its destiny (as done by Coleman) or by simply continuing to focus upon traditional (i.e. pre-globalization) issues as the fundamental ones to be tackled.

In this respect, the goal of this paper is to suggest a shift of attention among legal positivists towards questions which have always been present in their program (though often in secondary terms), as also their solutions (often already present in the legal positivist works). This shift would possibly help the legal positivism movement to circumvent the black hole represented by legal globalization (and its legal pluralism), a black hole where the distinction between law and non-law (i.e. the major tenant of legal positivism and, I would dare say, of the modern Western legal culture) seems to vanish, putting the very existence and legitimacy of the legal phenomenon (at least as generally perceived by legal actors) under question.

In order to fulfill this task, this paper will start in Part One by describing what it means nowadays to have a legal positivist approach and in particular what its core message to the legal (and non-legal) community is. In this respect, Herbert L. A. Hart’s idea as to the nature and role of the rule of recognition will be briefly sketched. Once it has been established what being a legal positivist actually means, Part Two will present some of the reasons why the ongoing process of globalization, and the consequent establishment of a pluralist legal world, appears to threaten some of the fundamental tenants of modern legal positivism (or, as I will try to show, “supposedly fundamental” tenants). Finally, in Part Three, some changes of focus in the legal positivist program will be suggested, in order for this legal theoretical movement not only to be able to survive the challenges of the legal globalization

but also in order for it to keep its predominant position among the legal actors in a pluralist legal world.

Orlando Scarcello (Scuola Superiore Sant'Anna, Pisa): *Does Legal Pluralism Need Theories? An Account of Theory-Change in Legal Theory*

Legal pluralism represents one of the most outstanding legal phenomena of the last decades. It implies the coexistence of several, genuinely normative sources of law, unreducible to a single and unified pyramid of norms and authorities, as in the model of XX century State-centered positivism. Thus, pluralism seems to entail the need for a new theory to replace the previous (and inadequate) account.

In this essay I will try to understand what it means that theory-change is needed in legal theory. I will claim that, surprisingly, it is in the meta-theoretical underpinnings of a positivist, namely H.L.A. Hart, that we can find an interesting answer. Hart's theory, I will claim, can be interpreted as grounded on two meta-theoretical underpinnings, an ontological and a methodological one. Both derive from his theoretical closeness to Wittgenstein's late philosophy.

Relying on this framework, I will point out that theories in jurisprudence must be clearly separated from scientific ones and so does theory-change in the two fields. On the other hand, a certain amount of theoretical work is possible as analysis of the rules of application of legal concepts, their "grammar" (descriptive jurisprudence) or as their stipulative redefinition (normative jurisprudence).

Finally, I will apply this framework to the special case of European constitutional pluralism, as described by Neil MacCormick, to show in what sense old theoretical lenses must (or must not) be changed when it comes to the question of pluralism.

Keisuke Kondo (Kyoto University): *Accommodating Global Legal Pluralism? An Examination of Methodological Universalism*

'Law is plural.' This is a basic condition in the age of globalization. Where we live today is the complex world in which multiple legal systems – not only national law, but also international law, transnational law supranational law, subnational law and non- national law – overlap and interact with each other. Any jurisprudential inquiry into the nature of law should not neglect this contemporary legal situation.

I thus completely agree with Ralf Michaels arguing that, because '[p]lurality is built into the very reality of law,' '[w]e no longer need a concept of *law*. We need a concept of *laws*.' What Michaels suggests is, to my understanding, the necessity of a *pluralist* concept of law that, acknowledging the possibility of the plurality of law, incorporates a 'relational' element, or in my words, the *terms of external engagement*.

I nevertheless diverge from Michaels regarding where to start the discussion. This means that, though both Michaels and I share the same approach that utilizes an existing theory of law with adding some appropriate modifications to it for the aforementioned purpose, the theory that is called upon is different. Michaels starts from H.L.A. Hart's legal theory, whereas I start from Neil MacCormick's.

MacCormick himself has never provided any pluralist concepts of law. This is true, though he is famous for his attempt of bringing the idea of 'pluralism' into the realm of jurisprudence through the analysis of the structure of the European legal configuration. MacCormick's concept of law has never taken a relational element or the terms of external engagement as necessary, or at least important.

However, this does not necessarily imply that MacCormick's concept of law is totally incapable of adopting this element – far from it. Rather, a clue for such modification can be found within MacCormick's own legal theory in a broader sense⁶. Put this in other words, MacCormick could have elaborated his version of the pluralist concept of law without overstepping his own thoughts about law.

The purpose of this article is two-fold. First, I will attempt to provide a possible path towards the construction of the pluralist concept of law, as Michaels does. This attempt is going to be conducted through the examination of MacCormick's legal theory. Thus, secondly and accordingly, I will seek to develop MacCormick's concept of law in the pluralist direction.

Brian Flanagan (Maynooth University): *Deflating the Problem of the Democratic Deficit by Reconceptualizing the Agential Role of the Demos*

The growth in the range and reach of transnational governance has brought increased scrutiny of the legitimacy of such authority (Buchanan and Keohane 2006, 406). The European legal order, whose independence from national legislatures is without precedent, faces a deepening normative controversy. On the one hand, any consequentialist claim to legitimacy (e.g., MacCormick 1997; Majone 1998) has been undercut by the repercussions of the 2008 financial crisis (e.g., Weiler 2012). On the other, the EU lacks an ostensible prerequisite of democracy, namely, a demos comprised of the population that is subject to its territorial jurisdiction. Having achieved ever closer union, it stands accused of undermining the political values that it was founded to advance.

For sceptics, the absence of an EU demos means that, to redeem their democratic commitments, Member States must exit the EU, à la Brexit (e.g., Lapavistas 2019; Johnson 2017; Streeck 2014). For optimists, the EU faces an impediment to legitimacy, namely, a 'democratic deficit', that can be adequately compensated by, e.g., the EU's tendency to eventually generate an EU demos (e.g., Habermas 2001; Follesdal and Hix 2006), deliberative attention to the perspectives associated with each constituent demos (e.g., Dryzek and Niemeyer 2008; Liebert 2012), or by Europe's, 'invent[ion of] a different kind of democracy' (Nicolaidis 2012, 251; similarly, Besson 2006). An assumption common to sceptics and optimists alike is that, without an EU demos, an individual cannot, through her membership of a demos, co-author the EU laws to which she is subject. This assumption depends on a hidden, and, ultimately, contestable, distinction between the scope of individual and group agency.

Challenging this distinction, I explore the possibility that each of a set of peoples can attribute independent weight to each other's attitudes on some common matter without thereby acting as a group. Contrary to the assumption of a one-to-one relation between polity and people, they might then, in coordination, severally author a law that they would not all have otherwise

⁶ Inclusion of moral theory

separately chosen. Suppose, further, that a demos is the author of the applicable laws just in case those laws are determined in accordance with a popular constitutional regime. Accordingly, if a set of popular constitutions commonly invoke a particular transnational institution, policy outcomes that partially share the same provenance in the act of that institution may be democratically legitimate for different peoples (demoi). It follows that a polity such as the EU might invoke, ‘the... primacy of the national communities as the... source of [its] “legitimacy”’ (Weiler 2012, 268), and thereby undercut the criticism that it discharges the functions of those communities without possessing a comparable source of legitimacy of its own. The absence of a pan-EU demos would then present no impediment to legitimacy whatever.

This paper introduces an approach to the democratic deficit that is revisionist in respect of both the nature of problem itself and the theoretical apparatus with which it is proposed to solve it. In Part I, I characterize the deficit as to how a so far people-less European project can exhibit a commitment both to democracy and to broad-scope pan-European government. I propose to elucidate the puzzle in two steps: first, I establish a dimension along which to compare how heavy a burden, relative to the state, different transnational forms of polity must discharge to claim legitimacy; second, I show how optimism that the EU can discharge its particular burden cannot rely on any strategy of mitigating the absence of a pan-EU demos. In Part II, I begin articulating a two-stage resolution of the described puzzle that invokes insights from the theory of group agency. The foundational stage is to show that the principle of developing models of group agency by analogy with individual agency entails recognition of the scope for groups, like individuals, to treat voting procedures as tools of mere inter-agent coordination rather than of the expression of any collective will. On the proposed account, the role of the demos may be discharged in full in relation to each member jurisdiction of a transnational polity by the respectively associated demos. In Part III, I identify a theory of the basis of the agency of a demos that supplies a plausible account of the EU as a site of the form of inter-group coordination just described. The identified theory both builds on Robert Dahl’s hybrid conception of ‘procedural’ democracy and synthesizes two leading approaches to the nature of decision-making group agency generally, including institutional groups such as courts and committees.

Dagmar Topf Aguiar de Medeiros (University of Edinburgh): *Bridging Normativity and Authority beyond the State through International Constitutionalism – A Case Study of the United Nations Framework Convention on Climate Change*

The United Nations Framework Convention Climate Change (UNFCCC)⁷ provides an excellent case study for questions regarding the normative status of law beyond the state and the justification of the exercise of authority through global regimes, because the nature of climate change requires a globally coordinated response. This paper discusses the legitimation of governance through the institutional arrangements of the UNFCCC on the basis of constitutionalism and falls within the sub theme of normativity and authority in law beyond the state.

This paper explores the topic of constitutionalism beyond the state with a focus on the presence of constitutional features in the UNFCCC. In order to do this, the paper sets out a framework of constitutional features against which the UNFCCC can be measured. This

⁷ UNGA United Nations Framework Convention on Climate Change (adopted 20 January 1994, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC); 31 ILM 849 (1992).

framework draws on the literature of constitutional law and constitutionalism beyond the state. In addition, the framework highlights the importance of constitutional legitimation in the context of law beyond the state. The original aspect of this paper is to relate these two bodies of literature to the UNFCCC and explore the impact of reading this treaty through a constitutional lens. The main question in this paper is: How and to what extent can the UNFCCC be read in terms of constitutionalism? What conclusions can be drawn from the answer to this question in relation to other international legal regimes?

The UNFCCC creates a forum to facilitate the continued development of globally coordinated national policies aimed at stabilizing greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.⁸ While it is called a framework convention, the UNFCCC is known for being a hybrid between a framework treaty and a substantive treaty.⁹ This means that the UNFCCC simultaneously creates an institutional framework for states to globally coordinate decisions relating to climate change, while also creating rights and obligations for states. What makes the UNFCCC stand out, compared to other treaties, is that for it to achieve its objective, states must be willing to subject themselves to certain long term pre-commitments in a context of relative uncertainty. In order to influence greenhouse gas concentrations in the atmosphere, long term commitments are required. States need to make these long term commitments under uncertain circumstances, without knowing exactly how their actions impact the development of greenhouse gas concentrations in the atmosphere.

The concept of the modern constitution is a known and trusted instrument through which citizens accept long term pre-commitments in order to achieve a specific purpose (to exit the state of nature) in exchange for safeguards in the form of procedural safeguards and substantive rights. Considering the UNFCCC's need for long term pre-commitments, and its provision of an institutional framework as well as inclusion of substantive rights and obligations it is interesting to explore to what extent the UNFCCC may be approached through a constitutional lens. In considering the relevance of constitutionalism to the UNFCCC, this paper focuses on those key features of constitutionality that exist in relation to the modern constitution. However, this paper is limited to a consideration of those key features of constitutionalism that can be relevant in the context of treaty law. For example, there is no need to consider the feature that the constitution has the state as its object. Clearly, this is not the case in treaty law generally or in relation to the UNFCCC specifically. Rather, this paper focuses on a functional approach that reflects the ambitions of the constitution: to create a framework for the exercise of authority to which actors willingly submit themselves in the knowledge that the framework will both aid in the accomplishment of a specific desired purpose and protect from arbitrary interference.

This paper proceeds in three steps. First it highlights specific characteristics of the UNFCCC which invite an examination of the treaty's potentially constitutional features. Secondly, it sets out a framework of constitutional features and examines whether the constitutional expectations set out in the first part live up to it. Finally, the last step justifies looking at the UNFCCC through constitutional lenses both in terms of motivation as well as in terms of

⁸ Article 2 UNFCCC.

⁹ Bodansky, Daniel. "The United Nations Framework Convention on Climate Change: A Commentary." *The Yale Journal of International Law* 18, no. 2 (1993): 451–558.

outlining and engaging with some of the criticisms and obstacles such an undertaking faces.¹⁰

Gabriel Alejandro Encinas Duarte (Scuola Superiore Sant'Anna) *Recasting Legal Pluralism as a Piecemeal 'Weighting' of Validity? Institutional Fora, Criteria and Sequencing*

A normative demand stands as a point of departure for this paper. It sustains that, in situations of conflicting norms from different jurisdictions, the aims of legality (at least: coordination and justice) are best served by providing reasons which take all relevant norms and therefore legal orders into account. This puts us beyond both the legal method of subsumption and interpreting norms sourced from one single legal order.

The aim of this paper is to inquire into the extent to which the challenges of pluralization, *qua* transformed structures (a 'turn to principles') and intensified relations between legal orders, can be addressed through the normative and analytical tools of principles theory as developed by Robert Alexy and related authors. For this, I take stock of proposals leading to what I tentatively call 'interlegal balancing'.

In certain areas, constitutions structure these relations through 'interface' norms dealing with the interpretation and protection of human rights. Even if these are to be understood as substantive normative arguments, procedural or formal principles (e.g. on the protection of constitutional decisions and democratic self-government) enter the question mediately: qualifying the results of balancing substantive principles. An open question here is whether this constellation obtains in the same way when the relevant formal principles for a case are implicit and brought to bear through judicial reasoning.

In contrast, a different picture obtains when reference is made to international law in its broad variety from the premises of constitutional orders. Do broader questions such as the 'internalization' of international law lend themselves to reconstruction in the language of formal principles?

In this regard, recent models of the overlap between legal orders, or jurisdictional conflicts beyond the state, combine substantive and procedural normative arguments. After a preliminary discussion on more general criteria of legality beyond the state, I offer a contrast of two structural contributions: the argument for relative authority as elaborated by Nicole Roughan and the practical-institutional concordance of competences provided through balancing by Matthias Klatt. On the one hand, I take stock of their generalization to the regimes of international law. On the other hand, I emphasize their potential for incorporating hierarchic presumptions when dealing with basic rights and multilevel structures.

I conclude remarking that the considerations in this paper carry a general thrust toward two open questions: on the one hand, on the epistemic dimensions of democracy as an empirical standard of general (i.e. not universal in the strict sense) norms; and, on the other hand, the conceptual necessity (or contingency) of characterizing legal validity as relative to the point of view of each forum.

¹⁰ For a summary of the key criticisms and obstacles see Walker N, 'Taking Constitutionalism Beyond the State' (2008) 56 *Political Studies* 519.

Karolina Gawron (Jagiellonian University, Kraków): *Confrontation of Values*

As far as we recognise that there is no unitary state legal order that can be relevant individually, there is no matter which exact conception of plural system we prefer, to consider some problems involved by this idea as such. The aspects like relationship between regulations of different origin, the hierarchy of norms or the influence of non-state actors are usually discussed in the context of their impact on domestic order from the formal direction. However, there is also an issue of values they represent and protect, associated with particular regulations and based on the core of fundamental source.

Different single rules settling the same concern may not be counter to each other at the first glance, but actually they may support a bit distinct values. Being part of multicentric legal order (or just being affected by some external factors) means to particular domestic system that it incorporates different views, different content of particular notions (e.g. being in good/bad faith) and need of confrontation and taking a stance about institution that may not exist in it (e.g. by the transcription of same sex couple child's birth certificate). So that, there is no more rationale of some long-term argumentations commonly established by national practice. But on the other hand the culture, the economic status of average citizen, the attitude that people have towards different institution and even actual functioning of those institutions are equally important dimensions to be taken into consideration. Copying the solutions and replicating some regulations unconsciously without a consideration of the result in specific environment (to what e.g. some post-soviet countries like Poland has visible tendency) are made exactly including being careless of thinking the hierarchy of values and aims over.

Sometimes it may manifests in overproduction of law – not damaging, but probably unnecessary. Referring again to polish example (most familiar to me), the recent amendment, which orders having regard to limitation period ex officio in litigations between consumers and contractors is highly questionable. It may seem to be right according to european proconsumer policy. But does still capture the very essence of it? Sometimes though it leads to the much more intense problems like some sort of arbitrary in both courts proceedings and government policy. The people in this situation are not only uncertain of the final shape of their rights as well as usually even unaware of them. It takes a long time until some individuals decide to demand their rights and that open the way for others. Although it should not be a standard under no circumstances in any country governed by Rule of law. It is also the matter of fact that with nonestablished hierarchy of values is easy to shuffle them constantly by ruling class to obtain social acceptance and that validate their activities.

What is more, it is not only that disputes enter upon consequences of coexistence different legal orders just divide into two aspects. As I think, today, when theory of law has passed through the debates about basics of legal pluralism, those both issues should not be considered separately any more, specially as they are closely combined together. The consequences of underestimating the sphere of values are already visible. After all they can also seriously affect the final shape and way the law exists under particular circumstances. And that is a double challenge to legal philosophy. It is not possible (in the times of growing nationalist tendencies in particular) to achieve the consistent cooperation of legal orders at global level ignoring significant differences in particular environment.