Goettingen Journal of International Law 4 (2012) 2, 599-623

Constitutionalism as a Cipher: On the Convergence of Constitutionalist and Pluralist Approaches to the Globalization of Law

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doi: 10.3249/1868-1581-4-2-viellechner

Abstract

Global constitutionalism still remains an essentially contested concept. While both its descriptive and normative usages remain unclear, the possibility and the desirability of framing the postnational constellation in constitutionalist terms meet equally strong objection. Yet, recently, even pluralist approaches to the globalization of law which call for a more radical departure from the statist legacy explicitly or implicitly refer to the notion of constitutionalism. Animated by democratic concerns for the inclusion of all those concerned by a rule as well as legal certainty and equality, they envisage a new kind of conflicts law that allows for a mutual recognition and reconciliation of the different legal orders and regimes emerging in world society. Hence, constitutionalism, when employed in a global context, appears but as a reminiscence of an historical achievement. It serves as a cipher under which the reconstruction of law under conditions of globalization has begun and will continue until more adequate concepts will be discovered.

A. Introduction

Until recently, the transformation of law under conditions of globalization has been analyzed under two apparently opposing rubrics: "constitutionalization",[1] or "global constitutionalism",[2] on the one hand, and "fragmentation",[3] or "global legal pluralism",[4] on the other hand. Both approaches recognize an increasing overlap of the national legal orders and

1 J. Klabbers, A. Peters & G. Ulfstein, *The Constitutionalization of International Law* (2009); T. Kleinlein, *Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente einer idealistischen Völkerrechtslehre* (2012).

2 R. A. Falk, 'The Pathways of Global Constitutionalism', in R. A. Falk, R. C. Johansen & S. S. Kim (eds), *The Constitutional Foundations of World Peace* (1993), 13; A. Peters, 'The Merits of Global Constitutionalism', 16 *Indiana Journal of Global Legal Studies* (2009) 2, 397.

3 M. Koskenniemi & P. Leino, 'Fragmentation of International Law? Postmodern Anxieties', 15 *Leiden Journal of International Law* (2002) 3, 553; G. Hafner, 'Pros and Cons Ensuing from Fragmentation of International Law', 25 *Michigan Journal of International Law* (2004) 4, 849.

4 G. Teubner, 'Global Bukowina: Legal Pluralism in the World Society', in G. Teubner (ed.), *Global Law Without a State* (1997), 3; P. S. Berman, 'Global Legal Pluralism', 80 *Southern California Law Review* (2007) 6, 1155.

various newly emerging regimes of international as well as transnational law. In this respect, they concurrently depart from the older theories of monism and dualism which assumed a clear separation in subject matters of national and international law.[5]

However, both approaches are generally supposed to disagree about the relationship between the different legal orders. The constitutionalist perspective purportedly tries to transfer domestic concepts to the global level. The pluralist counter-narrative, by contrast, allegedly proposes a radical break with tradition.[6] Hence, the choice is ostensibly between two irreconcilable alternatives: a hierarchically structured legal system on the global plane or a "disorder of normative orders"[7] all of which remain legally unconnected. While the first vision is often considered as impossible to realize,[8] the second is frequently claimed to be undesirable to achieve.[9] In this respect, both approaches are imputed to reproduce arguments from the earlier debate between monism and dualism.[10] Moreover, as in the earlier debate, descriptive and normative perspectives seem to intermingle.[11]

5 See A. v. Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law', 6 *International Journal of Constitutional Law* (2008) 3/4, 397, 400: "Monism and dualism […] are intellectual zombies of another time and should be laid to rest, or 'deconstructed.'"

6 See, e.g., N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2010), 14-17.

7 N. Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders', 6 *International Journal of Constitutional Law* (2008) 3/4, 373.

8 See, e.g., P. W. Kahn, 'Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order', 1 *Chicago Journal of International Law* (2000) 1, 1; D. Grimm, 'The Constitution in the Process of Denationalization', 12 *Constellations* (2005) 4, 447.

9 See, e.g., J. Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement', 14 *European Law Journal* (2008) 4, 389; P. Eleftheriadis, 'Pluralism and Integrity', 23 *Ratio Juris* (2010) 3, 365. But see N. Krisch, 'The Case for Pluralism in Postnational Law', in G. de Búrca & J. H. H. Weiler (eds), *The Worlds of European Constitutionalism* (2012), 203.

10 See A. Somek, 'Monism: A Tale of the Undead', in M. Avbelj & J. Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (2012), 343.

11 For the incommensurability of perspectives in the debate between monism und dualism see H. Wagner, 'Monismus und Dualismus: Eine methodenkritische Betrachtung zum Theorienstreit', 89 *Archiv des öffentlichen Rechts* (1964) 2, 212.

Indeed, the cleavage of opinion might never have been as straightforward as commonly reported. Rather, two aspects render the issue more opaque. First, none of the approaches acts as a unitary school. On the contrary, both of them find expression in various and at times contradictory ways.[12] Second, parts of their positions are often misrepresented, or at least overstated. Sometimes, they are even depicted as a specter to be subsequently deconstructed.[13] Not surprisingly, then, a convergence of both approaches can lately be observed. Such development becomes most clearly visible in attempts to elaborate theories of "constitutional pluralism".[14]

After come clarification on the theories of global constitutionalism (B.) and global legal pluralism (C.) as well as their discontents, respectively, their recent fusion will be pointed out (D.). This leads to the conclusion that constitutionalism merely serves as a cipher in contemporary legal theory, under which law is rethought beyond the State (E.).

B. Global Constitutionalism

Although it has been employed for some time now, the concept of global constitutionalism still remains essentially contested. Even proponents of its use have not yet agreed on a shared understanding. However, on closer analysis, at least four mutually supportive significations come to the fore that most supporters explicitly or implicitly seem to share.

12 For global constitutionalism see the contributions in J. L. Dunoff & J. P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (2009); P. Dobner & M. Loughlin (eds), *The Twilight of Constitutionalism?* (2010). For global legal pluralism see the overview in R. Michaels, 'Global Legal Pluralism', 5 *Annual Review of Law and Social Science* (2009), 243.

13 See, e.g., Krisch, *supra* note 6, 27-105, who presents constitutionalism as diametrically opposed to pluralism.

14 The idea goes back to N. MacCormick, 'Juridical Pluralism and the Risk of Constitutional Conflict', in N. MacCormick, *Questioning Sovereignty* (1999), 97, 104. See M. Avbelj & J. Komárek, 'Introduction', in Avbelj & Komárek, *supra* note 10, 1, 2-4.

I. Association

At the outset, the concept of global constitutionalism refers to the idea, or the "achievement",[15] of a legal constitution which was established in the wake of the civic revolutions in the United States of America and France at the end of the 18th century, and has spread all over the Western hemisphere since then. After the upheavals in Eastern Europe at the end of the 20th century, it even succeeded in formerly communist regimes.[16] It is precisely its triumph in the domestic sphere that explains its appeal for re-instantiation in other contexts.

However, law and globalization scholarship rarely refers to the constitution as a single written legal text. Rather, it resorts to constitutionalism as a "prism",[17] a "mindset",[18] a "framing mechanism",[19] or a "Weltanschauung",[20] carrying along with it a certain historically established meaning which initially found its legal expression in the constitution of the nation State. In this sense, global constitutionalism is, first and foremost, a concept of association.[21]

15 D. Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World', in Dobner & Loughlin, *supra* note 12, 3; N. Luhmann, 'Verfassung als evolutionäre Errungenschaft', 9 *Rechtshistorisches Journal* (1990), 176.

16 See J. Elster, 'Constitutionalism in Eastern Europe: An Introduction', 58 *University of Chicago Law Review* (1991) 2, 447; G. Frankenberg, 'Verfassungsgebung zwischen Hobbesianischem Naturzustand und Zivilgesellschaft: Die Verfassung der Republik Albanien', 49 *Jahrbuch des öffentlichen Rechts der Gegenwart* (2001), 443.

17 J. H. H. Weiler, 'The Reformation of European Constitutionalism', 35 *Journal of Common Market Studies* (1997) 1, 97, 99.

18 M. Koskenniemi, 'Constitutionalism as Mindset: Reflections on Kantian Themes About International Law and Globalization', 8 *Theoretical Inquiries in Law* (2007) 1, 9, 31.

19 N. Walker, 'Taking Constitutionalism Beyond the State', 56 *Political Studies* (2008) 3, 519, 525. See also E. de Wet, 'The International Constitutional Order', 55 *International and Comparative Law Quarterly* (2006) 1, 51, 52: "frame of reference".

20 L. C. Backer, 'From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems', 113 *Penn State Law Review* (2009) 3, 671, 719.

21 But see B. Fassbender, 'The Meaning of International Constitutional Law', in R. St. J. Macdonald & D. M. Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (2005), 837, 848: "autonomous concept". However, *id.*, 'The United Nations Charter as Constitution of the International Community', 36 *Columbia Journal of Transnational Law* (1998) 3, 529 [Fassbender, 'United Nations Charter'], himself equates the United Nations Charter with the constitution of a nation State.

II. Assimilation

The concept of constitutionalism may not be detached from the nation State as its historical point of reference without any self-transformation. Rather, transferring it to other contexts requires some adaptation.[22] Therefore, global constitutionalism is, second, a concept of assimilation. Such characteristic finds expression in the usages of the concept that identify constitutionalization as a process.[23] According to this understanding, assimilation proceeds in two directions. Both the ideal and the reality of the law are approaching each other in a yet unfinished double movement. On the one hand, there is the claim for the law to improve in a certain direction, while, on the other hand, such improvement is already observed, especially as expressed in the jurisprudence of international courts, without however excluding further demands on the law which, on their part, are adapted to the changing circumstances.[24]

For example, the Court of Justice of the European Union (ECJ) early recognized unwritten fundamental rights as general principles of law restricting all actions of European Union (EU) organs.[25] Public international law, for its part, increasingly addresses the individual due to the emergence of international human rights and international criminal law,[26] while, at the

22 See T. Cottier & M. Hertig, 'The Propects of 21st Century Constitutionalism', 7 *Max Planck Yearbook of United Nations Law* (2003), 261; U. K. Preuss, 'Disconnecting Constitutions from Statehood: Is Global Constitutionalism a Viable Concept?', in Dobner & Loughlin, *supra* note 12, 23.

23 See M. Loughlin, 'What is Constitutionalisation?', in Dobner & Loughlin, *supra* note 12, 47; R. Wahl, 'Konstitutionalisierung: Leitbegriff oder Allerweltsbegriff?', in C.-E. Eberle, M. Ibler & D. Lorenz (eds), *Der Wandel des Staates vor den Herausforderungen der Gegenwart: Festschrift für Winfried Brohm zum 70. Geburtstag* (2002), 191.

24 See A. Peters, 'Global Constitutionalism in a Nutshell', in K. Dicke *et al.* (eds), *Weltinnenrecht: Liber amicorum Jost Delbrück* (2005), 535; W. Werner, 'The Never-Ending Closure: Constitutionalism and International Law', in N. Tsagourias (ed.), *Transnational Constitutionalism: International and European Perspectives* (2007), 329.

25 See Case 29/69, *Stauder v. City of Ulm*, [1969] ECR 419, 425, para. 7; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125, 1135, paras 3 & 4.

26 See M. W. Janis, 'Individuals as Subjects of International Law', 17 *Cornell International Law Journal* (1984) 1, 61; H. Mosler, 'Die Erweiterung des Kreises der Völkerrechtssubjekte', 4 *Berichte der Deutschen Gesellschaft für Völkerrecht* (1961), 39.

same time, through concepts like "jus cogens"[27] and obligations "erga omnes",[28] disconnecting from the will of the States. Both developments have been interpreted as processes of constitutionalization.[29] But in both cases, further claims, especially for institutionalizing procedures of democratic law-making, have been articulated.[30] Thus, constitutionalization implies both a descriptive and a normative component.

III. Compensation

Most importantly, constitutional structures on the global level are sought after in order to regulate the public power that is increasingly exercised beyond the State. They are hence contemplated to ensure the legitimacy of global governance.[31] In this regard, the principle of State consent, which was central to modern international law, no longer appears adequate.

The national constitutions, for their part, due to their limited reach, are no longer able to regulate the exercise of public power in their areas of application comprehensively. From a global perspective, they are receding

27 L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988); H. Mosler, 'Ius Cogens im Völkerrecht', 25 *Schweizerisches Jahrbuch für internationales Recht* (1968), 9.

28 M. Ragazzi, *The Concept of International Obligations Erga Omnes* (1997); J. A. Frowein, 'Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung', in R. Bernhardt *et al.* (eds), *Völkerrecht als Rechtsordnung, Internationale Gerichtsbarkeit, Menschenrechte: Festschrift für Hermann Mosler* (1983), 241.

29 For EU law see E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', 75 *American Journal of International Law* (1981) 1, 1; J. H. H. Weiler, 'The Transformation of Europe', 100 *Yale Law Journal* (1991) 8, 2403. For international law see J. A. Frowein, 'Konstitutionalisierung des Völkerrechts', 39 *Berichte der Deutschen Gesellschaft für Völkerrecht* (2000), 427; Peters, *supra* note 24.

30 For EU law see A. Føllesdal & P. Koslowski (eds), *Democracy and the European Union* (1997); E. O. Eriksen & J. E. Fossum (eds), *Democracy in the European Union: Integration through Deliberation?* (2000). For international law see G. H. Fox & B. R. Roth (eds), *Democratic Governance and International Law* (2000); S. Wheatley, *The Democratic Legitimacy of International Law* (2010).

31 See D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 *American Journal of International Law* (1999) 3, 596; M. Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis', 15 *European Journal of International Law* (2004) 5, 907.

to subsist as "partial constitutions"[32] only. The normative claims articulated in terms of constitutionalism therefore aim at making up for the losses that the national constitutions incur due to the transfer, or loss, of competencies to international organizations and other transnational institutions.[33] In this sense, global constitutionalism is, third, a concept of compensation.

IV. Condensation

The transfer of constitutionalism from the nation State to other contexts, for most proponents, may be carried out in a process of "translation".[34] One proposed method for such enterprise consists in performing a double-step of "generalisation" and "re-specification".[35] Accordingly, the concept of constitutionalism is to be stripped from its link to the nation State in order to bring it to bear in different contexts, thus preserving its original connotation under changing circumstances. What emanates as a normative substratum from most efforts in translation is essentially democracy and the rule of law, including fundamental rights.[36] Hence, global constitutionalism comes in, fourth and finally, as a concept of condensation.

32 C. Walter, 'Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law', 44 *German Yearbook of International Law* (2001), 170, 194; A. Peters, 'The Globalization of State Constitutions', in J. Nijman & A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007), 251, 257. The term is borrowed from D. Grimm, 'Die Zukunft der Verfassung', 1 *Staatswissenschaften und Staatspraxis* (1990) 1, 5, 28.

33 See A. Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures', 19 *Leiden Journal of International Law* (2006) 3, 579.

34 N. Walker, 'Postnational Constitutionalism and the Problem of Translation', in J. H. H. Weiler & M. Wind (eds), *European Constitutionalism Beyond the State* (2003), 27.

35 G. Teubner, 'Societal Constitutionalism: Alternatives to State-Centred Constitutional Theory?', in C. Joerges, I.-J. Sand & G. Teubner (eds), *Transnational Governance and Constitutionalism* (2004), 3, 5.

36 See A. Wiener *et al.*, 'Global Constitutionalism: Human Rights, Democracy and the Rule of Law', 1 *Global Constitutionalism* (2012) 1, 1.

Crucially, constitutionalism is also widely expected to provide for the hierarchy and unity of the law.[37] At this point, some authors refer to the perception of the "Constitution of the International Legal Community"[38] as exposed by Alfred Verdross in the first half of the 20th century.[39] Others reduce their expectations of systematicity to demanding a certain degree of "coherence" or "integrity"[40] of the law as imagined, for example, by Ronald Dworkin within the constitutional State.[41] While the constitutionalist movement, in all regards, first concentrated on particular international organizations,[42] such as the EU[43] and the World Trade Organization (WTO),[44] it now constructs a vision of the global legal order entirely in terms of a "multilevel"[45] constitutionalism. Here, some commentators recognize the United Nations Charter at the apex.[46]

37 See K. Greenawalt, 'The Rule of Recognition and the Constitution', 85 *Michigan Law Review* (1987) 4, 621; R. Wahl, 'Der Vorrang der Verfassung', 20 *Der Staat* (1981) 4, 485.

38 A. Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (1926) (translation by the author).

39 See A. L. Paulus, 'The International Legal System as a Constitution', in Dunoff & Trachtman, *supra* note 12, 69.

40 R. Dworkin, *Law's Empire* (1986), 225-275. See also N. MacCormick, 'Coherence in Legal Justification', in W. Krawietz, H. Schelsky & G. Winkler (eds), *Theorie der Normen: Festgabe für Ota Weinberger zum 65. Geburtstag* (1984), 37; R. Alexy & A. Peczenik, 'The Concept of Coherence and its Significance for Discursive Rationality', 3 *Ratio Juris* (1990) 1, 130.

41 See S. Besson, 'From European Integration to European Integrity: Should European Law Speak with Just One Voice?', 10 *European Law Journal* (2004) 3, 257.

42 See E.-U. Petersmann, 'Constitutionalism and International Organizations', 17 *Northwestern Journal of International Law & Business* (1997) 2/3, 398; A. Peters, 'The Constitutionalisation of International Organisations', in N. Walker, J. Shaw & S. Tierney (eds), *Europe's Constitutional Mosaic* (2011), 253.

43 See G. F. Mancini, 'The Making of a Constitution for Europe', 26 *Common Market Law Review* (1989) 4, 595; I. Pernice, 'The Treaty of Lisbon: Multilevel Constitutionalism in Action', 15 *Columbia Journal of European Law* (2009) 3, 349.

44 See E.-U. Petersmann, 'The WTO Constitution and Human Rights', 3 *Journal of International Economic Law* (2000) 1, 19; D. Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (2005).

45 I. Pernice, 'The Global Dimension of Multilevel Constitutionalism: A Legal Response to the Challenges of Globalisation', in P. M. Dupuy *et al.* (eds), *Völkerrecht als Wertordnung: Festschrift für Christian Tomuschat* (2006), 973; E.-U. Petersmann, 'International Integration Law and Multilevel Constitutionalism', in A. Epiney, M.

V. Discontents

As should be noted, however, the modern concept of constitutionalism, contrary to a wide-spread belief which is currently resurging in the debate between global constitutionalists and global legal pluralists, has always displayed an inherent tension between unity and diversity, as well as universalism and particularism, respectively.[47] First, as regards its societal basis, most interpreters today agree that constitutionalism does not presuppose a homogeneous community. Rather, the concept, at least as commonly understood in the liberal-democratic tradition, allows for collective self-determination even in pluralist societies.[48] Since it does not preordain any perception of the common weal, but, by protecting fundamental rights, only negatively forecloses certain prescriptions of the law, it may content itself with an "overlapping consensus".[49]

Second, as regards its normative contents, it combines a universalist aspiration with a particularist implementation. On the one hand, notably its human rights element seeks worldwide dissemination.[50] From this angle, it occurs as a cosmopolitan concept. On the other hand, its democratic element allows for singularity in many respects: "Democratic peoples are permitted,

Haag & A. Heinemann (eds), *Die Herausforderung von Grenzen: Festschrift für Roland Bieber* (2007), 429.

46 See Fassbender, 'United Nations Charter', *supra* note 21.

47 See S. Holmes, 'Precommitment and the Paradox of Democracy', in J. Elster & R. Slagstad (eds), *Constitutionalism and Democracy* (1988), 195; M. Rosenfeld, 'Modern Constitutionalism as Interplay Between Identity and Diversity', in M. Rosenfeld (ed.), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (1994), 3.

48 See S. Tierney, *Constitutional Law and National Pluralism* (2004); E. Fraenkel, 'Der Pluralismus als Strukturelement der freiheitlich-rechtsstaatlichen Demokratie', 45 *Verhandlungen des Deutschen Juristentages* (1964) II, B5. But see C. Schmitt, *Constitutional Theory* [1928] (2008), 257-264.

49 J. Rawls, 'The Idea of an Overlapping Consensus', 7 *Oxford Journal of Legal Studies* (1987) 1, 1. See also U. Scheuner, 'Konsens und Pluralismus als verfassungsrechtliches Problem', in G. Jakobs (ed.), *Rechtsgeltung und Konsens* (1976), 33.

50 See B. Ackerman, 'The Rise of World Constitutionalism', 83 *Virginia Law Review* (1997) 4, 771; T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (2003).

even expected, to take different paths. They are permitted, even expected, to go to hell in their own way."[51]

C. Global Legal Pluralism

The pluralist counter-narrative to law and globalization equally divides into several branches uneasily reduced to a common denominator. Yet most approaches defend a view which, apart from some legal sociologists within the modern nation State,[52] only legal historians reporting on the Middle Ages[53] and legal anthropologists analyzing colonial settings[54] approved of: the fact that "in a social field more than one source of 'law', more than one 'legal order', is observable".[55]

I. Fragmentation

Pluralism, as an approach to describing the law under conditions of globalization, finds its roots in the fragmentation thesis that became prominent when the Study Group of the International Law Commission (ILC) headed by Martti Koskenniemi delivered its final report on the development of international law.[56] By way of conclusion, the report states

51 J. Rubenfeld, 'Unilateralism and Constitutionalism', 79 *New York University Law Review* (2004) 6, 1971, 2013. See also B. Ackerman, 'Rooted Cosmopolitanism', 104 *Ethics* (1994) 3, 516.

52 See, e.g., J. Griffiths, 'What is Legal Pluralism?', 24 *Journal of Legal Pluralism and Unofficial Law* (1986) 1, 1; M. Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law', 19 *Journal of Legal Pluralism and Unofficial Law* (1981) 1, 1.

53 See H. J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983), 10; P. Grossi, *L'ordine giuridico medievale* (1995), 223-235.

54 See M. B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (1975); F. v. Benda-Beckmann, *Rechtspluralismus in Malawi: Geschichtliche Entwicklung und heutige Problematik des pluralistischen Rechtssystems eines ehemals britischen Kolonialgebiets* (1970).

55 Griffiths, *supra* note 52, 38.

56 M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, UN Doc A/CN.4/L.682, 13 April 2006 [*Fragmentation of International Law*].

that the diversification and expansion of international law into areas that used to be reserved as the internal affairs of the States is accompanied by its splitting into a plurality of legal regimes:

> "What once appeared to be governed by 'general international law' has become the field of operation for such specialist systems as 'trade law', 'human rights law', 'environmental law', 'law of the sea', 'European law' and even such exotic and highly specialized knowledges as 'investment law' or 'international refugee law' etc. – each possessing their own principles and institutions."[57]

As regards trade law, for instance, the WTO with its Dispute Settlement Understanding (DSU) epitomizes a fully developed specialist legal regime on the global plane.[58]

According to the findings of the ILC report, the special regimes of international law are characterized by functional specialization and relative autonomy. As regards their functional specialization, that is their confinement to a single subject matter, they supposedly reflect within the law the "functional differentiation"[59] of society at large as described by sociologists in terms of systems theory. Consequently, they may follow their own rationality only: "Each rule-complex or 'regime' comes with its own principles, its own form of expertise and its own 'ethos', not necessarily identical to the ethos of neighbouring specialization."[60] All of them are therefore suspected to exhibit "relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law".[61]

However, human rights law regimes such as the International Covenant on Civil and Political Rights (ICCPR) with its Human Rights Committee (HRC)[62] and regionally confined legal regimes such as the EU[63]

57 *Id.*, para. 8.

58 See J. H. Jackson, *Sovereignty, the WTO, and Changing Fundamentals of International Law* (2006).

59 N. Luhmann, *Social Systems* (1995), 12-58.

60 *Fragmentation of International Law*, *supra* note 56, para. 15.

61 *Id.*, para. 8.

62 See T. Buergenthal, 'The Evolving International Human Rights System', 100 *American Journal of International Law* (2006) 4, 783; C. Tomuschat, *Human Rights: Between Idealism and Realism*, 2nd ed. (2008).

prove that the fragmentation of global law does not exclusively follow a functionalist logic.[64] Moreover, international law has always been characterized by "decentralization",[65] or fragmentation, "due to the diversity of national legal systems that participated in it",[66] as the ILC report also points out.

From the viewpoint of legal theory, the specialist legal regimes attain a relative autonomy by exclusively aligning themselves with their own "secondary rules"[67] as understood by Herbert Hart. Such secondary rules do not only include "rules of recognition" which allow for the conclusive identification of the primary rules of obligation, but also "rules of adjudication" which empower courts to authoritatively determine whether a primary rule of obligation has been violated on a particular occasion.[68] In many instances, it is only the "proliferation of international courts and tribunals"[69] which brings about the very legal pluralism to which it owes its prior existence. In this way, the various legal regimes may operate self-referentially. Thus, the Court of Justice of the European Union, for example, solely decides according to "the law stemming from the treaty, an independent source of law", and therefore maintains that is has constituted "its own legal system".[70]

Admittedly, the ILC report concedes that all special regimes of international law are simultaneously subjected to general international law. From this angle, they still share some common background norms. First,

63 See C. Schreuer, 'Regionalism v. Universalism', 6 *European Journal of International Law* (1995) 3, 477; W. Mattli, *The Logic of Regional Integration: Europe and Beyond* (1999).

64 See *Fragmentation of International Law*, *supra* note 56, paras 195-219.

65 H. Kelsen, *General Theory of Law and State* (1945), 325-327.

66 *Fragmentation of International Law*, *supra* note 56, para. 16.

67 H. L. A. Hart, *The Concept of Law*, 2nd ed. (1994), 79-99.

68 See K. C. Wellens, 'Diversity in Secondary Rules and the Unity of International Law: Some Reflections on Current Trends', 25 *Netherlands Yearbook of International Law* (1994), 3; A. Marschik, 'Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International Legal System', 9 *European Journal of International Law* (1998) 1, 212.

69 C. P. R. Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle', 31 *New York University Journal of International Law and Politics* (1999) 4, 709; R. P. Alford, 'The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance', 94 *American Society of International Law Proceedings* (2000), 160.

70 Case 6/64, *Costa v. E.N.E.L.*, [1964] ECR 1253, 1269-1270.

general international law ascertains the conditions according to which all regimes of international law enter into force. Second, general international law complements the special regimes of international law where they suffer from lacunae.[71] Conflicts of norms may then be resolved pursuant to the "principle of systemic integration"[72] as expressed in Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT). Under the terms of this provision, a treaty shall be interpreted by taking into account "any relevant rules of international law applicable in the relations between the parties".[73] Yet the question arises whether general international law today includes any other rules apart from those enshrined in the VCLT.

II. Differentiation

Moreover, as the approach to law and globalization from systems theory emphasizes, some legal regimes may operate beyond both international and domestic law.[74] Carried to its extreme, the thesis that the law follows the functional differentiation of society giving rise to "long-term structural linkages of sub-system specific structures and legal norms"[75] implies a more pronounced departure from the statist legal paradigm. It also suggests the emergence of "transnational"[76] legal regimes which are predominantly, though not exclusively, erected by private actors.

71 See *Fragmentation of International Law*, *supra* note 56, paras 172-185. See also B. Simma & D. Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law', 17 *European Journal of International Law* (2006) 3, 483.

72 *Fragmentation of International Law*, *supra* note 56, paras 410-480. See also C. McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *International and Comparative Law Quarterly* (2005) 2, 279.

73 *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 31, 1155 U.N.T.S. 331, 340.

74 See G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012); A. Fischer-Lescano & G. Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 *Michigan Journal of International Law* (2004) 4, 999. See also K.-H. Ladeur, 'Ein Recht der Netzwerke für die Weltgesellschaft oder Konstitutionalisierung der Völkergemeinschaft?', 49 *Archiv des Völkerrechts* (2011) 3, 246.

75 Teubner, *supra* note 35, 20.

76 L. Viellechner, 'The Constitution of Transnational Governance Arrangements: Karl Polanyi's Double Movement in the Transformation of Law', in C. Joerges & J. Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (2011), 435; G.-P. Calliess, 'Transnational Civil Regimes: Economic Globalisation

The Internet Corporation for Assigned Names and Numbers (ICANN), which distributes domain names on the Internet, counts among the most prominent examples.[77] ICANN was founded as a private non-profit public benefit corporation according to the Californian corporate law. It operates upon the basis of multiple bilateral contracts, including a memorandum of understanding with the U.S. government, which supported early research on the Internet and therefore still claims authority over the root zone file in which the top-level domains, such as ".com", are inscribed. Second level domains, such as "google.com", are allocated to Internet users via several registrars and registries according to a "first come, first served" principle. ICANN even established an arbitration procedure, the Uniform Domain Name Dispute Resolution Policy (UDRP),[78] in order to respond to "cybersquatting",[79] that is the registration of domain names corresponding to famous trademarks with the intent of resale to the rights holders. Submission to the UDRP is mandatory for all registrants, but Paragraph 4(k) UDRP allows for recourse to national courts.[80] According to Paragraph 15(a) of the UDRP Rules of Procedure, the approved dispute resolution providers, which include both international organizations, such as the World Intellectual Property Organization (WIPO), and private institutions, such as the National Arbitration Forum (NAF) based in Minneapolis, decide complaints "in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable".[81]

and the Evolution of Commercial Law', in V. Gessner (ed.), *Contractual Certainty in International Trade: Empirical Studies and Theoretical Debates on Institutional Support for Global Economic Exchanges* (2009), 215.

77 See A. M. Froomkin, 'Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution', 50 *Duke Law Journal* (2000) 1, 17; M. L. Mueller, *Ruling the Root: Internet Governance and the Taming of Cyberspace* (2002).

78 See L. A. Walker, 'ICANN's Uniform Domain Name Dispute Resolution Policy', 15 *Berkeley Technology Law Journal* (2000) 1, 289; L. R. Helfer & G. B. Dinwoodie, 'Designing Non-National Systems: The Case of the Uniform Domain Name Dispute Resolution Policy', 43 *William and Mary Law Review* (2001) 1, 141.

79 J. D. Mercer, 'Cybersquatting: Blackmail on the Information Superhighway', 6 *Boston University Journal of Science and Technology Law* (2000), 290.

80 *Uniform Domain Name Dispute Resolution Policy*, 26 August 1999, available at http://www.icann.org/en/help/dndr/udrp/policy (last visited 26 September 2012), para. 4.

81 *Rules for Uniform Domain Name Dispute Resolution Policy*, 30 October 2009, available at http://www.icann.org/en/help/dndr/udrp/rules (last visited 26 September 2012), para. 15.

Hence, the transnational legal regimes also elude general internal law. The approach from systems theory therefore recognizes a more "radical"[82] version of legal pluralism which conceives of "a heterarchy of diverse legal discourses".[83] In that view, none of the various legal orders concurring in world society may claim ultimate authority so that the search for hierarchy and unity within the law is in vain.

III. Pluralism

The findings from systems theory are shared by certain novel theories of global legal pluralism, some of which explicitly reject the constitutionalist perspective.[84] Those theories reconnect with the pluralist theory of the State which Harold Laski, among others, famously advocated in England at the beginning of the 20th century.[85] In that view, which essentially rests upon the freedom of association, the State is "but one of the groups to which the individual belongs".[86] Since allegiances can be divided between several associations, including clubs, guilds, and unions, sovereignty means "no more than the ability to secure assent".[87]

Indeed, the pluralist approach to the globalization of law reaches back to the theory of corporations which Otto von Gierke developed in Germany in the middle of the 19th century.[88] It also finds predecessors in federalist theory which developed notions of divided or suspended sovereignty.[89]

82 N. MacCormick, 'Risking Constitutional Collision in Europe?', 18 *Oxford Journal of Legal Studies* (1998) 3, 517, 528.

83 G. Teubner, 'The Two Faces of Janus: Rethinking Legal Pluralism', 13 *Cardozo Law Review* (1992) 5, 1443, 1451.

84 See notably Krisch, *supra* note 6. See also Berman, *supra* note 4; P. Zumbansen, 'Transnational Legal Pluralism', 1 *Transnational Legal Theory* (2010) 2, 141.

85 See H. J. Laski, *The Foundations of Sovereignty and Other Essays* (1921). See also E. Barker, *Political Thought in England: From Herbert Spencer to the Present Day* (1915); G. D. H. Cole, *Social Theory* (1920).

86 H. J. Laski, 'The Sovereignty of the State', 13 *Journal of Philosophy, Psychology and Scientific Methods* (1916) 4, 85, 90.

87 *Id.*, 92.

88 See O. v. Gierke, *Political Theories of the Middle Age* [1881] (1900).

89 See R. Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (2009); O. Beaud, *Théorie de la fédération*, 2nd ed. (2009); C. Schönberger, 'Die Europäische Union als Bund: Zugleich ein Beitrag zur

Thus, Alexis de Tocqueville, when analyzing federalism in the United States of America, recognized "two governments between which sovereignty was apportioned".[90] Before, Alexander Hamilton, in the Federalist Papers, had already considered the proposed U.S. Constitution to leave "certain exclusive and very important portions of sovereign power"[91] in the possession of the State governments. Similarly, the U.S. Supreme Court had stated in an early decision: "Every State in the Union, in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered."[92] In Germany, Georg Waitz, after the failed revolution of 1848, adopted Tocqueville's notion of divided sovereignty in order to underscore the possibility of building a federal State from sovereign monarchies. In his view, both the central and the individual States were sovereign within their respective spheres.[93] Carl Schmitt later developed a concept of the federation in which the question of sovereignty, that is the question of deciding an existential conflict, "always remains open"[94] unless the association is to dissolve. The essence of a federation thus resides in "an intermediary condition"[95] between unity and pluralism of several political entities.

IV. Discontents

Eventually, however, the pluralist theory of the State has never come to prevail. As regards federalism, the distinction between a confederation in which the individual States remain fully sovereign and a federal State in which the State collective as such gains sovereignty has widely taken hold. In the United States of America, civil war settled the issue.[96] In Germany,

Verabschiedung des Staatenbund-Bundesstaat-Schemas', 129 *Archiv des öffentlichen Rechts* (2004) 1, 81.

90 A. de Tocqueville, *Democracy in America* [1835] (2000), 107.

91 A. Hamilton, 'The Federalist No. 9' [1787], in J. E. Cooke (ed.), *The Federalist* (1961), 50, 55.

92 *Chisholm v. Georgia*, [1793] 2 U.S. 419, 435.

93 See G. Waitz, 'Das Wesen des Bundesstaats' [1853], in G. Waitz, *Grundzüge der Politik nebst einzelnen Ausführungen* (1862), 153, 166.

94 Schmitt, *supra* note 48, 390.

95 *Id.*, 389.

96 See A. R. Amar, 'Of Sovereignty and Federalism', 96 *Yale Law Journal* (1987) 7, 1425.

Paul Laband and Georg Jellinek established that view by distinguishing sovereign and non-sovereign States, the latter disposing of their own competences but not of competence-competence, that is the power to allocate competences.[97] Schmitt, for his part, stressed that the antinomy of the federation rests upon the homogeneity of all its members as an essential presupposition which ensures that the extreme case of conflict does not emerge.[98]

As regards corporatism, even its fiercest advocates later changed their minds. Thus, Laski, who had initially contended that "the State does not enjoy any necessary preeminence for its demands",[99] in hindsight conceded that the State must necessarily claim an absolute and indivisible sovereignty in order to guarantee and balance the legal entitlements of society.[100] Hence, legal pluralism within the modern State was only accepted in an extenuated version.

D. Convergence

Most recently, reconciliatory efforts of this kind stand out in law and globalization scholarship as well. They are more articulate in pluralist theory than in systems theory. Here, pluralism and constitutionalism finally seem to converge.

I. Systems Theory

The approach from systems theory acknowledges that the various legal regimes emerging in world society might achieve some sort of "loose coupling",[101] understood as a weak degree of compatibility. For this purpose, it envisages the development of a new kind of "conflict of laws"[102] following the model of private international law.[103]

97 See P. Laband, *Das Staatsrecht des Deutschen Reiches*, vol. 1, 5th ed. (1911), 55-62; G. Jellinek, *Die Lehre von den Staatenverbindungen* (1882), 36-58.

98 See Schmitt, *supra* note 48, 392.

99 Laski, *supra* note 86, 92.

100 See H. J. Laski, *A Grammar of Politics*, 4th ed. (1938), xi-xii.

101 Fischer-Lescano & Teubner, *supra* note 74, 1004.

102 *Id.*, 1018. See also C. Joerges, 'A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation', in C. Joerges & Falke, *supra* note 76, 465; P. S.

The mutual recognition and reconciliation of the various legal regimes would then have to rely on an inner impetus, though. For lack of external compulsion, each of them would have to restrict itself. Such auto-limitation presupposes a capacity of "self-reflexion"[104] at least. The legal regimes must reflect on their own identity as parts of a larger whole and assure that they are "suitable as components of the environment"[105] of their companions.

Yet legal practice proves that transnational conflicts law in this sense is gradually evolving. Some conflicts rules are already anchored in the basic charters of particular legal regimes. European human rights law, for example, contains a rule of subsidiarity.[106] Thus, Article 53 of the European Convention on Human Rights (ECHR) provides that the convention shall not be construed "as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party".[107] International criminal law, by contrast, contains a rule of complementarity.[108] Thus, according to Article 17(1)(a) of the Rome Statute

Berman, 'Conflict of Laws, Globalization, and Cosmopolitan Pluralism', 51 *Wayne Law Review* (2005) 3, 1105; K. Knop, R. Michaels & A. Riles, 'International Law in Domestic Courts: A Conflict of Laws Approach', 103 *American Society of International Law Proceedings* (2009), 269.

103 See R. Wai, 'Conflicts and Comity in Transnational Governance: Private International Law as Mechanism and Metaphor for Transnational Social Regulation Through Plural Legal Regimes', in C. Joerges & E.-U. Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (2006), 229.

104 N. Luhmann, 'Selbstreflexion des Rechtssystems: Rechtstheorie in gesellschaftstheoretischer Perspektive', 10 *Rechtstheorie* (1979), 159.

105 G. Teubner, 'Substantive and Reflexive Elements in Modern Law', 17 *Law & Society Review* (1983) 2, 239, 273.

106 See H. Petzold, 'The Convention and the Principle of Subsidiarity', in R. St. J. Macdonald, F. Matscher & H. Petzold (eds), *The European System for the Protection of Human Rights* (1993), 41; J. A. Pastor Ridruejo, 'Le principe de subsidiarité dans la Convention européenne des droits de l'homme', in J. Bröhmer *et al.* (eds), *Internationale Gemeinschaft und Menschenrechte: Festschrift für Georg Ress zum 70. Geburtstag* (2005), 1077.

107 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, Art. 53, 213 U.N.T.S. 221, 249.

108 See M. M. El Zeidy, 'The Principle of Complementarity: A New Machinery to Implement International Criminal Law', 23 *Michigan Journal of International Law* (2002) 4, 869; W. W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice', 49 *Harvard International Law Journal* (2008) 1, 53.

of the International Criminal Court (ICC), the court may only try a case if a State which has jurisdiction over it "is unwilling or unable genuinely to carry out the investigation or prosecution".[109] EU law, for its part, expresses the idea that the reconciliation of the various legal orders may not touch upon their identity.[110] As such, Article 4(2) of the Treaty on European Union (TEU) prescribes that the Union shall respect "the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government".[111]

For lack of prior experience, however, transnational conflicts law is largely created by national and international courts and tribunals in "dialectical interaction", that is in "a recurrent pattern of dialectical engagement, critique, and counsel, from which learning and innovation can emerge".[112] The "judicial dialogue"[113] ensuing from a "cooperation of courts"[114] is therefore both a precondition for and a corollary of developing transnational conflicts law. The German Federal Constitutional Court (FCC) has turned out to be most innovative in this respect without alluding to the notion of conflicts of law, though. As regards the relationship between the German legal order and EU law, it has spelled out a rule of subsidiarity which has become known as "solange"[115] formula. According to this rule,

109 *Rome Statute of the International Criminal Court*, 17 July 1998, Art. 17, 2187 U.N.T.S. 90, 100-101.

110 See A. v. Bogdandy & S. Schill, 'Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty', 48 *Common Market Law Review* (2011) 5, 1417; I. Pernice, 'Der Schutz nationaler Identität in der Europäischen Union', 136 *Archiv des öffentlichen Rechts* (2011) 2, 185.

111 *Consolidated Version of the Treaty on European Union*, 30 March 2010, Art. 4, [2010] OJEU 13, 18.

112 R. B. Ahdieh, 'Between Dialogue and Decree: International Review of National Courts', 79 *New York University Law Review* (2004) 6, 2029, 2035.

113 F. G. Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice', 38 *Texas International Law Journal* (2003) 3, 547; B.-O. Bryde, 'The Constitutional Judge and the International Constitutionalist Dialogue', 80 *Tulane Law Review* (2005) 1, 203.

114 L. Garlicki, 'Cooperation of Courts: The Role of Supranational Jurisdictions in Europe', 6 *International Journal of Constitutional Law* (2008) 3/4, 509; P. Kirchhof, 'Das Kooperationsverhältnis zwischen Bundesverfassungsgericht und Europäischem Gerichtshof', in P.-C. Müller-Graff (ed.), *Perspektiven des Rechts in der Europäischen Union* (1998), 163.

115 M. Hilf, 'Solange II: Wie lange noch Solange? Der Beschluß des Bundesverfassungsgerichts vom 22. Oktober 1986', 14 *Europäische Grundrechte-*

the court will refrain from deciding on the applicability of EU law in Germany as long as the EU generally ensures a protection of fundamental rights "which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Basic Law"[116]. Subsequently, this rule has not only been codified by Article 23(1) of the Basic Law,[117] it has also been adopted in European human rights law.[118] According to the jurisprudence of the European Court of Human Rights (ECtHR), State action taken in compliance with obligations resulting from the membership in an international obligation is "justified as long as the relevant organization is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides".[119] In the same logic, but in an opposite direction, the ECJ has established a rule of complementarity with regard to the relationship between EU law and United Nations (UN) law.[120] When it scrutinized an EU regulation that implemented a Security Council (SC) resolution requiring member States to sanction certain persons suspected of terrorism, it justified expanding the scope of EU fundamental rights law by arguing that the re-examination procedure offered by the UN Sanctions Committee "does not offer the guarantees of judicial protection".[121]

Zeitschrift (1987) 1/2, 1; N. Lavranos, 'The Solange-Method as a Tool for Regulating Competing Jurisdictions Among International Courts and Tribunals', 30 *Loyola of Los Angeles International and Comparative Law Review* (2008) 3, 275.

116 *Solange II*, [1986] 73 BVerfGE 339, 387.

117 *Gesetz zur Änderung des Grundgesetzes*, 21 December 1992, [1992] I Bundesgesetzblatt 2086, 2086. See also U. Di Fabio, 'Der neue Art. 23 des Grundgesetzes: Positivierung vollzogenen Verfassungswandels oder Verfassungsneuschöpfung?', 32 *Der Staat* (1993) 2, 191.

118 See J.-P. Jacqué, 'L'arrêt Bosphorus, une jurisprudence "Solange II" de la Cour européenne des droits de l'homme?', 41 *Revue trimestrielle de droit européen* (2005) 3, 756; A. Haratsch, 'Die Solange-Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte: Das Kooperationsverhältnis zwischen EGMR und EuGH', 66 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2006) 4, 927.

119 *Bosphorus v. Ireland*, ECHR (2005), No. 45036/98, para. 155.

120 See S. Besson, 'European Legal Pluralism after Kadi', 5 *European Constitutional Law Review* (2009) 2, 237; D. Halberstam & E. Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order', 46 *Common Market Law Review* (2009) 1, 13.

121 Case 402/05 P *et al.*, *Kadi & Al Barakaat v. Council & Commission*, [2008] ECR I-6351, 6499, para. 322.

As regards the relationship of the German legal order and European human rights law as well as other regimes of international law, the FCC has developed another rule of subsidiarity.[122] From the Basic Law's commitment to international law, it has deduced a constitutional obligation of all State authorities "to take into account"[123] the provisions of international treaties and the decisions of international courts when applying domestic law. This rule is above all supposed to mitigate the differences between international and domestic human rights law interpretation in multipolar legal relationships, such as conflicts between the right to privacy and the freedom of the press. On closer inspection, it actually demands compliance with the international legal requirements as long as the result does not violate essential principles of German law.[124] Thus understood, it implies a public policy exception familiar to private international law. The ECtHR, conversely, grants the member States of the ECHR a "margin of appreciation"[125] when curtailing certain convention rights, thereby respecting national peculiarities in both law and fact.[126]

II. Constitutional Pluralism

For the approach from systems theory, the emergence of transnational conflicts law is but an empirical observation. From this perspective, it may provide for some sort of "damage limitation"[127] at best. For certain theories of global legal pluralism, by contrast, the development of "legal

122 See D. Lovric, 'A Constitution Friendly to International Law: Germany and its Völkerrechtsfreundlichkeit', 25 *Australian Yearbook of International Law* (2006), 75; M. Payandeh, 'Völkerrechtsfreundlichkeit als Verfassungsprinzip: Ein Beitrag des Grundgesetzes zur Einheit von Völkerrecht und nationalem Recht', 57 *Jahrbuch des öffentlichen Rechts der Gegenwart* (2009), 465.

123 *Görgülü*, [2004] 111 BVerfGE 307, 315; *Vienna Convention on Consular Relations*, [2006] 9 BVerfGK 174, 191.

124 See L. Viellechner, 'Berücksichtigungspflicht als Kollisionsregel: Zu den innerstaatlichen Wirkungen von völkerrechtlichen Verträgen und Entscheidungen internationaler Gerichte, insbesondere bei der Auslegung und Anwendung von Grundrechten', in M. Hong & N. Matz-Lück (eds), *Grundrechte und Grundfreiheiten im Mehrebenensystem: Konkurrenzen und Interferenzen* (2012), 109.

125 *Handyside v. United Kingdom*, ECHR (1976), No. 5493/72, para. 48.

126 See R. St. J. Macdonald, 'The Margin of Appreciation', in MacDonald, Matscher & Petzold, *supra* note 106, 83; G. Letsas, 'Two Concepts of the Margin of Appreciation', 26 *Oxford Journal of Legal Studies* (2006) 4, 705.

127 Fischer-Lescano & Teubner, *supra* note 74, 1045.

mechanisms for managing hybridity",[128] rules for "relations of interconnection and interaction",[129] or "interface norms"[130] amounts to a normative claim presented in terms of constitutionalism. Thus, Mattias Kumm, for example, expects both the national legal orders and the various regimes of international law to commit to some "basic constitutional principles" which "lie at the heart of the modern tradition of constitutionalism" and "provide a framework that allows for the constructive engagement of different sites of authority with one another".[131] Quite similarly, though in different vocabulary, Miguel Poiares Maduro imagines a set of "harmonic principles of contrapunctual law" shared by all legal regimes which, "while respecting their competing claims of authority, guarantees the coherence and integrity" of the legal system at large.[132]

In gross oversimplification and with deliberate neglect of subtle discrepancies between the theories, the argument may be restated as follows. Allegedly, constitutionalism as an overarching framework does not only call for consistent human rights protection, but, through its rule of law component in its emanation of legal certainty and its principle of legal equality, it also requires avoiding conflicting norms as far as possible.[133] However, it is further asserted, within the concept of constitutionalism, the rule of law must be balanced against the principle of democracy. Therefore, the self-determination of the various legal regimes is to be accepted as long as decisions do not have negative spill-over effects on outsiders.[134] In other words: "If – and to the extent that – a polity can make a claim to strike a reasonable balance between the depth of self-government of its members

128 Berman, *supra* note 4, 1192.

129 Walker, *supra* note 7, 378.

130 Krisch, *supra* note 6, 285.

131 M. Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State', in Dunoff & Trachtman, *supra* note 12, 258, 271-272. See also D. Halberstam, 'Systems Pluralism and Institutional Pluralism in Constitutional Law: National, Supranational and Global Governance', in Avbelj & Komárek, *supra* note 10, 85, 96: "a common commitment to limited collective self-governance through law".

132 M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (2003), 501, 524-525.

133 Cf. MacCormick, *supra* note 82, 530.

134 Cf. C. Joerges & J. Neyer, 'From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology', 3 *European Law Journal* (1997) 3, 273, 294; Kumm, *supra* note 131, 296-301.

and the inclusiveness of its scope, other polities ought to respect its norms as a matter of principle and not just on a case-by-case basis."[135]

Following this formula, legal pluralism and constitutionalism finally merge into one. The unity of the law as well the internal relation of democracy and the rule of law, including fundamental rights, which characterize the constitution of the nation State,[136] find their legal expression in a new kind of conflicts law. Hence, not surprisingly, some authors conceive of the networked global legal system under the hybrid notion of "constitutional pluralism".[137] Others explicitly suggest "a new type of conflicts law as constitutional form in the postnational constellation".[138] For Poiares Maduro, such a theory adequately reformulates the tension of universalism and particularism which is inherent in modern constitutionalism under changed circumstances and therefore appears as "the best representation of the ideals of constitutionalism for the current context".[139] According to Daniel Halberstam, it even reflects "a constitutional practice that is more true to the ideals of constitutionalism than the traditional model of consolidation and hierarchy itself".[140] As should be noted, however, constitutionalism applied to the nation State serves to work out the tension of universalism and particularism in relations between individuals, whereas constitutional pluralism in the postnational constellation refers to different collectives confronting each other.

This construction, which still allows for conflict and contestation, but, more positively, sees further democratic potential here,[141] might even be

135 Krisch, *supra* note 6, 295.

136 See J. Habermas, 'On the Internal Relation between the Rule of Law and Democracy', in J. Habermas, *The Inclusion of the Other: Studies in Political Theory* (1998), 253.

137 N. Walker, 'The Idea of Constitutional Pluralism', 65 *Modern Law Review* (2002) 3, 317; M. Kumm, 'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism', in Avbelj & Komárek, *supra* note 10, 39; M. Poiares Maduro, 'Three Claims of Constitutional Pluralism', in Avbelj & Komárek, *supra* note 10, 67; D. Halberstam, 'Local, Global and Plural Constitutionalism: Europe Meets the World', in de Búrca & Weiler, *supra* note 9, 150; J. L. Cohen, 'Constitutionalism beyond the State: Myth or Necessity? (A Pluralist Approach)', 2 *Humanity* (2011) 1, 127.

138 C. Joerges, P. F. Kjaer & T. Ralli, 'A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation', 2 *Transnational Legal Theory* (2011) 2, 153.

139 Poiares Maduro, *supra* note 137, 78.

140 Halberstam, *supra* note 131, 86.

141 See Krisch, *supra* note 6, 271-275. See also K.-H. Ladeur, 'Globalization and the Conversion of Democracy to Polycentric Networks: Can Democracy Survive the End

compatible with more rigid notions of legal hierarchy. Thus, Hans Kelsen, in his later works, influenced by his disciple Verdross, conceded that legal norms may conflict without endangering the unity of the law. One of the conflicting norms may be voidable, but it is not automatically void. Therefore, Kelsen claimed, there is no logical contradiction: "A norm that, as one says, is enacted in 'violation' of general international law, remains valid even according to general international law. General international does not provide any procedure in which norms of national law which are 'illegal' (from the standpoint of international law) can be abolished."[142] Arguably, then, the question of primacy loses importance: The contents of domestic law conceived of as delegated by international law is identical to that which is thought to be superior to international law.[143]

E. Conclusion

The reason why all approaches to the globalization of law, in one way or another, fall back to the concept of constitutionalism may, after all, not be difficult to divine. Niklas Luhmann once remarked that the much too simplistic notions of old European social philosophy tend to travel well beyond their time and thereby threaten to misdirect both our perceptions and expectations. But, at the same time, he admitted that, for lack of alternative experience, we have no other choice than to build more visionary concepts "from the ruins of our philosophical heritage".[144] In this sense, constitutionalism is but a reminiscence of an historical achievement. It serves as a "placeholder"[145] – or a cipher – under which the reconstruction of law under conditions of globalization has begun and will continue until more adequate concepts will be discovered.

of the Nation-State?', in K.-H. Ladeur (ed.), *Public Governance in the Age of Globalization* (2004), 89.

142 Kelsen, *supra* note 65, 372.

143 See *id.*, 373-383.

144 N. Luhmann, 'Die Weltgesellschaft', 57 *Archiv für Rechts- und Sozialphilosophie* (1971) 1, 1, 28 (translation by the author).

145 N. Walker, 'Multilevel Constitutionalism: Looking Beyond the German Debate', in K. Tuori & S. Sankari (eds), *The Many Constitutions of Europe* (2010), 143, 164.