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**INTERNATIONAL LAW AND
INTERDISCIPLINARITY**

Sergio Dellavalle



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ABSTRACT

The article presents three main arguments in favour of an interdisciplinary opening of international law. The first emerges from the transition from traditional international law to transnational law, as a result of which specialized legal subsystems increasingly overcome the boundaries of nation states and, by making themselves independent of the pyramidal structure of the constitutional order, tend to overlap one another. Consequently, the transnational sphere is characterized by a significant intersection of competences, so that contemporary international law cannot be understood properly without a substantial expertise in fields that transcend its usual understanding. The second argument in favour of interdisciplinarity is related to the content of law in general and of international law in particular. Because a set of norms fulfils the task of stabilizing the normative expectations that are generated within a specific social subsystem, it inevitably incorporates the kind of rationality that characterizes the functioning of that same social subsystem. Thus, to understand how a legal subsystem works, it is necessary to take into account the fundamental constituents of that kind of rationality which makes up the rules of interaction within the social subsystem related to that particular set of norms. The third argument for interdisciplinarity derives, finally, from the overall rationale of law. In fact, beyond the functional rationality that the legal norms acquire insofar as they fulfil the task of stabilizing the normative expectations generated within specialized social subsystems, the law also enshrines a more inclusive understanding of a metasystemic rationality, namely a comprehensive idea of social order. Therefore, law is to be interpreted as the system of formal propositions that lay down the rules and principles that govern human interaction according to a specific view of how the “well-ordered society” should be defined. While law’s relation to the specialized subsystems is the expression of its functional rationale, its link to the idea of how the “well-ordered society” is understood manifests its more encompassing social rationality and, by reflecting what we can define as the paradigms of order, incorporates the knowledge developed within extra-legal discourses.

KEYWORDS:

international Law, interdisciplinarity, transnational law, paradigms of order, rationality of legal subsystems, dialogue between courts

International Law and Interdisciplinarity

by Sergio Dellavalle *

1. Three Reasons for Interdisciplinarity

Presently, almost all disciplines are caught in a curious contradiction. On the one hand, their languages have become increasingly specialistic, making each of them into an exclusive field for experts, thus excluding even well-educated laymen from participating in the discourse. On the other hand, the reference to interdisciplinarity has surged to the status of a kind of mantra, bearing the traits of a *conditio sine qua non* for academic recognition and research funding. International law is no exception to this rule. Only a couple of decades ago, its *corpus juris* was essentially made of a manageable number of inter-state treaties, whose validity was limited to the signing parties. This *corpus* of inter-state legal agreements was completed through an essential body of norms – to be led back, initially, to natural law, and later laid down in written covenants and treaties – which was assumed to have a worldwide and almost all-encompassing validity. In recent years, however, some new phenomena have triggered a significant increase in complexity. Among them were – just to make a few examples – the fragmentation of international law into distinct legal subsystems, the establishment of an impressive number of international courts, the creation of a system of global governance through international organizations, the emergence of global administrative law, the strengthening of private international law and the involvement of powerful private actors as subjects of international agreements, as well as, finally, the introduction of new categories of norms, such as the codes of conduct. We can generally assume that a society, to perform its tasks, has to differentiate itself into specialized social subsystems and that each social subsystem tends to increase the specificity of its own flow of internal information on the basis of its idiosyncratic rationality in order to implement its social function properly. Consequently, the language of each legal subsystem – which itself is a social subsystem – becomes more and more the matter for highly trained professionals. Teaching international law, therefore, must comprise specialized courses in which the language of the legal discipline (or disciplines) is properly introduced and the students are trained in the use of its (or their) instruments.

Nonetheless, the other side – namely the side of interdisciplinarity – should not be neglected either, both in research and teaching. There are three main arguments that speak in favour of an interdisciplinary opening of international law: the first deals with a change in international law's *scope* which occurred in the last decades, the second with the *content* of law in general and of international law in particular, and the third with the *overall rationale* of law. Starting with the first argument, it should be kept in mind that traditional international law has been, for a long time, either a law between states or a law that aspired to supersede nation states. Yet, in both cases it was assumed to maintain the internal unity and coherence of the legal system, regardless of whether the system whose unity had to be preserved was referred to national law, to international law, or to some kind of cosmopolitan law. With the transition from traditional international law

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to *transnational law* – as a result of two driving forces, namely globalization and the inherent tendency of national social subsystems to expand beyond the borders of the state – we are confronted, for the first time in modern Western history, with specialized legal systems that, by overcoming the boundaries of nation states and by making themselves independent of the pyramidal structure of the constitutional order, increasingly tend to overlap one another. In the transnational sphere, therefore, we essentially have a significant intersection of competences, so that international lawyers cannot do their job appropriately without having a substantial expertise in fields that transcend the usual understanding of international law, such as constitutional law, administrative law, cyberlaw, investment law, law of the financial markets, and so on.

After having highlighted, in Section 2, some aspects of the emergence of transnational law and the increase in interdisciplinarity triggered by this new development, Section 3 will focus on the content of law as a driving force of a parallel strengthening of interdisciplinarity. At this point, our gaze extends from international law to law in general. Indeed, it is the analysis of the content of any kind of law that requires an interdisciplinary approach. This becomes evident if we consider both the achievements and the failures of that strand of legal theory which, like no other, advocates the independence and self-reliance of the law as a system, thus explicitly rejecting any recourse to interdisciplinarity, namely legal positivism. Regardless of the different accents highlighted by its exponents, legal positivism always focused on the formal requisites for a sentence to be justifiably considered a legal norm. Yet, legal propositions are not only characterized by a specific form but also by a content that is expected to be properly channelled by those formal requirements and is ultimately based on a specific dimension of the social function of the law. In other words, inasmuch as a set of norms fulfils the task of stabilizing the normative expectations that are generated within the social subsystems,¹ it inevitably incorporates the kind of rationality that characterizes the functioning of that same subsystem.² As a result, if we want to understand how a legal subsystem works, we have to take into due account the fundamental constituents of that kind of rationality which makes up the rules of interaction within the social subsystem related to that particular set of norms. In plain words, this means – for instance – that teaching law and artificial intelligence or cyberlaw cannot refrain from giving sufficient information about what artificial intelligence is or about how information technology operates. In the same vein, human rights law is not only about the formal principles and rules that are thought to protect the fundamental entitlements of human beings but also presupposes a sufficiently sophisticated awareness of the ways in which those entitlements are justified as well as of which claims are arguably to be regarded as binding human rights. Only this way can the interpretation of the existing norms as well as their further development be properly substantiated.

Yet, the rationality of the law – regardless of whether in its general meaning or, more specifically, as international law – cannot only be limited to its functional dimension. Indeed, beyond the functional rationality that the legal norms acquire insofar as they fulfil the task of stabilizing the normative expectations generated within specialized social subsystems, the law also expresses and enshrines a more inclusive understanding of a metasystemic rationality, namely a comprehensive *idea of social order*. In other words, law is to be interpreted, too, as the system of formal propositions that lay down the rules and principles that govern human interaction according to a specific view of how the “well-ordered society” should be defined. While law’s relation to the spe-

¹ Niklas Luhmann, *Das Recht der Gesellschaft*, Suhrkamp, Frankfurt a. M. 1993, at 125 et seq. (English: *Law as a Social System*, Fatima Kastner et al. eds., Oxford University Press, Oxford/London 2004, at 142 et seq.).

² Andreas Fischer-Lescano, Gunther Teubner, *Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, in: 25 Michigan Journal of International Law (2003–2004) 999–1046, at 1004 et seq.

cialized subsystems is the expression of its functional rationale, its link to the idea of how the “well-ordered society” is understood manifests its more encompassing social rationality. However, if we try to define what the “well-ordered society” is, we will easily find out that it cannot be limited either to inner-state interactions or to inter-state relations. Rather, it covers both the national and the international dimensions at the same time, so that studying and teaching international law from the perspective of a comprehensive idea of social order must include references to traditional issues of constitutional and administrative law. Furthermore, an encompassing idea of social order entails assumptions with reference to both public and private law, as well as to their relation. As a result, the disciplines of public and private international law cannot be kept separated as they were assumed to be following the traditional doctrine, but have rather to be analysed in their mutual balance and interactions. For instance, private actors can supposedly shape global social order in a way that refrains from the usual resort to public law, thus undertaking tasks traditionally allocated to public power. Accordingly, research and teaching must consider whether goals usually referred to common interests can be properly accomplished by private law systems, or whether the “well-ordered society” necessarily needs, on the contrary, public power institutions to foster what the civic debate comes to define as shared purposes. Finally – and most importantly – if the law is to be understood as the formal expression of a certain idea of social order, then those disciplines should be taken into consideration, such as political philosophy as well as social and political sciences, which have the specific task of highlighting the main features of the fundamental patterns of order. Basically, insofar as the different forms of legal order – to be better understood – are to be connected with general and distinct paradigms of social order, we can perform this operation in the best way by resorting to the intellectual instruments and to the knowledge put at disposal by fields of study other than the law. The connection and interdependence between the law and the general paradigms of social order – together with the advantages for research and teaching that can be drawn from them – are addressed in Section 4. A short conclusion – in Section 5 – will draw the strands together.

2. *Interdisciplinarity and the Change in International Law's Scope*

The first reference to interdisciplinarity in international law refers to a deep-going reshape of its scope. Until only a few decades ago, international law was essentially seen – as advocated by the exponents of dualism – as a system of norms, beside domestic law, to regulate the interactions between nation states, or, according to the rather marginal monist approach, as the normative dome located above domestic law and due to encompass the worldwide domain of human behaviour with the aim to guarantee universal peace (2.1.). With the emergence of transnational law, the legal order beyond nation states profoundly changed its form and field of application. In particular, legal systems which had developed within the national domain and under the rule of constitutional public power expanded beyond the boundaries of individual states, broke the former dominance of domestic public law and created a new landscape of specialized and globalized regimes tending to overlap with one another (2.2.). Against this background, different dimensions or variants of transnational law have been outlined, including legal pluralism, the regimes of globalized markets, international public authority and global constitutionalism (2.3.). Within the context of transnational law, the coexistence of overlapping legal regimes, with no established normative priority accorded to anyone of them, not only generates frequent conflicts but makes them also difficult to resolve by traditional means. In fact, the new constellation renders it impossible to re-

sort to the old-fashioned strategy of conflict solution, based on a generally recognized hierarchy of norms and institutions. Since this instrument is unavailable, unprecedented forms of conflict management have been introduced and successfully pioneered (2.4.).

2.1. Monism and Dualism

Historically, the relationship of national and international law has been interpreted along the line of the dichotomy between two powerful narrations: dualism and monism. Dualism – by far the approach with the most supporters – maintains that domestic and international law are two distinct legal systems, which apply to different and largely incommensurable fields of social interaction. The most striking argument in favour of dualism consists in the evidence of conflicts between the two systems of norms. For instance, if a state issues a law that contrasts with international norms, this law is ordinarily assumed to be valid despite the violation. In his defence of monism, Hans Kelsen dismissed the argument by establishing a similarity between this case and a domestic situation in which a constitutional order does not provide for a mechanism to abolish an unconstitutional statute: the statute remains valid, although no doubt can be raised that it has been illegally issued. Even, “certain organs may be tried in court personally for their part in the establishment of the ‘unconstitutional’ statute.”³ Analogously, it may be true that a national law that runs against international norms is nonetheless to be considered valid within the domestic order; yet, it is illegal, and international institutions are justifiably required to create a mechanism to abolish it and to make accountable those responsible for the violation. On the opposite side of dualism, H. L. A. Hart criticized Kelsen’s analysis not primarily because of logical inconsistency, excessive abstraction or lack of evidence, but rather because of a fundamental assumption regarding the validity of law. Indeed, while from the monist point of view law has essentially only one fundament, dualists assume that the fundaments are two: domestic law is grounded on the constitutional order, and international law is based on the agreements between states.⁴

On the opposite side, monism generally assumes that the whole worldwide legal system – in all its international and domestic implementations – has to be considered as a normative unity. The logical consequence of this assumption is that international law, as the most inclusive component of the cosmopolitan legal system, should be granted superiority over every kind of domestic law, be it constitutional or statutory. At this point, it is worth being noticed that Kelsen himself – undoubtedly the most powerful defender of monism – gave two quite significantly different justifications of why the worldwide system of laws should be regarded as a unity with international law at its apex. The most radical interpretation can be found in the first German edition of his *Reine Rechtslehre (Pure Theory of Law)* of 1934, in which no validation of the superiority of international law by the sovereign state is required. Rather, it is international law itself, as the most inclusive legal order, that specifies the range of competences on which the individual state can legally legislate. Indeed – Kelsen argued – a contradiction would arise if we had to admit that the priority of international law should be sanctioned by the domestic constitutional organs. Since we have a large number of individual states, if international law were depending for the specification of its

³ Hans Kelsen, *Reine Rechtslehre. Einleitung in die rechtswissenschaftliche Problematik*, Deuticke, Leipzig/Wien 1934 (*Pure Theory of Law*, English translation from the Second German Edition of 1960 by Max Knight, University of California Press, Berkeley/Los Angeles 1967, at 331).

⁴ H. L. A. Hart, *Kelsen’s Doctrine of the Unity of Law*, in: H. L. A. Hart, *Essays in Jurisprudence and Philosophy*, Clarendon, Oxford 1983, 309–342.

normative range on sovereign decisions taken by each of those single states, then we would also have as many different international law systems as we have sovereign states – with the consequence that no binding law beyond the domestic context would exist. No less incongruous is the circumstance that, given that international law provides for the mutual recognition of states as equal actors in the international arena, exactly this mutual acknowledgment, which is fundamental for the very functioning of the international system, would have to rely upon the free and arbitrary will of each individual state. The result would be that the recognition of every state as equal actor of international law would lie in the hands of every other single state, as well as that each individual state would decide on the international recognition of all other states.⁵ The confusing consequences that would be generated by such an assumption are hardly contestable – and thus Kelsen’s radical solution seems to be, indeed, the most rational outcome. Nonetheless, in the second edition of 1960 – which is better known to the English-speaking readers due to its translation of 1967 – he considerably watered down his position, probably in order to make his theory more realistic and acceptable by taking into due account that, as a matter of fact, international law *is* created by sovereign states. According to the later interpretation, it is ultimately secondary – if not from the conceptual point of view, at least with reference to the results – whether the obligations that derive from international law are validated by the individual states, or international law itself is self-validating. Either assumption guarantees, first, that international law “determines ... the reason and sphere of validity of the national legal order,”⁶ thus ensuring a paramount hierarchical position to the supra-state order, and, secondly, that the whole legal system has a monist character.

From a positivistic perspective, the difference between monism and dualism essentially consists in whether international treaties are directly applicable by domestic courts. Indeed, according to the monist understanding, international law has immediate validity within the national legal order without any intervention by national constitutional organs – more specifically, by the legislature. On the contrary, in monist systems international treaties – to be recognized as valid law of the country and to be applicable by domestic courts – must be transposed into the domestic legal system by a parliamentary act. This distinction, which seems to be clear and evident at first sight, blurs if faced with a more deep-going analysis. In fact, most countries – at least in the Western world – combine some aspects of monism (for example, the possibility of an immediate reference by domestic courts to international law as a valid law of the country) with features deriving from a dualist interpretation of the legal system (for instance, the introduction of some kind of intervention by a legislative organ in order to grant an overall internal validity to the treaty, or the differentiation between some parts of international law, which do not need any intervention by the domestic legislature, and others which require them to be regarded as valid). Ultimately, most countries seem to have adopted, from a formal point of view, a mixture of monist and dualist attributes.

Yet, what Kelsen and Hart hint at in their contributions is not the formalistic difference between procedures of validation, but something more profound, namely the contraposition of two opposite views as regards the foundation of the legitimacy of law. Following Kelsen’s monism, the ultimate legitimacy of the law lies in the most inclusive legal community. In front of this fundamental assumption, it is substantially marginal – even if not formally irrelevant – whether rules and principles that govern this most inclusive legal community of international law are immediately self-executing or whether a parliamentary act is necessary to insert them into the domestic legal

⁵ Kelsen, *Reine Rechtslehre*, *supra* n. 3, at 142 et seq.

⁶ Kelsen, *Pure Theory of Law*, *supra* n. 3, at 340.

order. In fact, by binding it to international norms, even the parliamentary act simply acknowledges that no proper legitimacy of public power is given without taking into account the interrelations within the worldwide community of states, peoples and individuals. Furthermore, since the individual state *is* unquestionably part of this international community, the parliamentary act that binds the individual state to international law is *normatively* due and *factually* realistic. On the contrary, Hart lays the fundament of the legitimacy of the individual legal community in the norms and procedures of every single state.⁷ According to his view, the direct or self-committed obligation towards international law is no necessary condition for a full-fledged internal legitimacy. Going a step beyond what Hart explicitly claims, but arguably not unduly forcing his thought, since it is the internal order that factually creates international law and guarantees its effectiveness, and not vice versa, the legitimacy of international law is based on the free decisions of the single states, while the legitimacy of the domestic legal order does not depend on the recognition of the normative superiority of international law. Therefore, the contraposition between Kelsen's monism and Hart's dualism basically moves along the line of the distinction between *universalism* and *particularism* as the fundamental categories related to the extension of social, political and legal order. This distinction will be further analysed while discussing the relationship between the interdisciplinarity of international law and law's overall social rationale.⁸

Despite their much-discussed opposition, monism and dualism nonetheless share a fundamental assumption, namely that it is not acceptable that two not hierarchically related norms, which derive from two independent legal systems, are both valid if applied at the same time to the same matter. This assumption is quite evident in the monist context: indeed, if all legal norms are worldwide part of a unitary pyramidal system, every conflict that may arise between them can arguably be brought to a solution by clarifying their respective position within the overall hierarchy. In the end, this is the reason why, from the monist perspective, normative conflict is always an illness which, however, can in any event be cured. The question is more complicated from the dualist point of view: here, it is doubtlessly accepted that norms can be trapped in a conflict which cannot find a solution within a shared hierarchy. More specifically, Hart explicitly admitted that international law can contrast with domestic law.⁹ Since the two systems are independent of one another, the way out of the conflict consists, in this case, in giving up on the idea of a common legal order and in identifying to which legal order the norms in question respectively and primarily belong. In other words, if they both belong to the domestic – or to the international – order, their conflict can be resolved by resorting to the hierarchy of their system of reference. But, if they belong to two different systems, we have to understand which rule of recognition applies to which norm, to that each of them can be led back to its context and be interpreted accordingly. Ultimately, in both monism and dualism no normative conflict is irresolvable – and in both of them the main instrument for conflict solution is the resort to hierarchy – simply because no overlapping of legal systems is assumed to exist as a non-pathological condition. It is precisely on this point that the emergence of transnational law intervenes by introducing a groundbreaking novelty.

2.2. What is Transnational Law?

⁷ Hart, *Kelsen's Doctrine of the Unity of Law*, *supra* n. 4, at 317 et seq.

⁸ See *infra*, Section 4.

⁹ Hart, *Kelsen's Doctrine of the Unity of Law*, *supra* n. 4, at 324 et seq.

The definition of transnational law is highly contested – and there are even scholars who deny that there is something like transnational law. For instance, Franz Werro expresses doubts that a body of norms can be singled out with so unique features that the creation of a specific concept would be justified. Rather, transnational law would identify a *method* to approach some legal developments beyond the nation state with quite diverse and non-systemic characteristics. In contrast to international law, these norms do not build a consistent *corpus juris*; nonetheless, they cannot be led back to the domestic legal order either. Therefore, what methodologically distinguishes the discipline of transnational law studies – and not of transnational law as a legal system – is that, first, the analytic view must concentrate neither on domestic law nor on traditional international law, but on the space between them, and, secondly, that lawyers must rely on non-legal competences in order to understand the specific rationality of the most recent developments in their field of expertise.¹⁰ Here we have the first hint to the necessity to take interdisciplinarity seriously while studying contemporary non-domestic law, more specifically with reference to the inevitable relation between law's contents and extra-legal knowledge. I will come back to this point in the next Section. Returning, now, to the possible meaning of transnational law, Werro's low-profile preference had been already voiced, a couple of years before and in an even more radical form, by Claudio Grossman. In his view, "transnationalization" means nothing more than the advisable opening up of legal education, within the programs of law schools and as a result of the globalization process, to both international law – which is quite not obvious, in particular in the US system – and to foreign legal traditions.¹¹ Finally, the turn to transnationalism in legal practice and studies has been accused of being nothing else than an instrument created – during the "decade of greed", namely the 1990s – by hegemonic Western states and companies to foster the interests of the few and to the detriment of the many.¹²

To find an unapologetically positive assessment of transnational law in both its dimensions – namely, first, as a method to understand recent legal phenomena which, secondly, led to the establishment of a body of laws with unique features – it seems to be necessary to go back as far as to the first author who introduced the concept, i.e. to Philip C. Jessup. According to his definition, transnational law includes "all law which regulates actions or events that transcend national frontiers."¹³ Going more into detail, it comprises "both public and private international law ..., as ... other rules which do not wholly fit into such standard categories."¹⁴ On a more philosophical note, Jessup specifies that "in spite of the vast organizational and procedural differences between the national and the international stage, ... there are common elements in the domestic and the international drama", that are lastly rooted in "merely human problems which might arise at any level of human society."¹⁵ Put this way, transnational law appears to be the quintessential realization of a system of norms for the whole humankind and for the protection of its shared interests. Apart from Jessup's overtly optimistic tone, the question remains as to what the novelty of transnational

¹⁰ Franz Werro, *Is There Such a Thing as Transnational Law? Suggestions for defining the Object of Transnational Legal Studies*, in: Marc Amstutz, Stefan Keller, Stefan Wiprächtiger (eds.), *Recht zwischen Dogmatik und Theorie*, Dike/Nomos, St.Gallen/Baden-Baden 2012, 311–328.

¹¹ Claudio Grossman, *Building the World Community through Legal Education*, in: Jan Klabbbers, Mortimer Sellers (eds.), *The Internationalization of Law and Legal Education*, Springer, Dordrecht 2008, 21–35.

¹² M. Sornarajah, *Why "No" to Transnational Legal Studies*, in: Cornelia T. L. Pillard et al., *Why Transnational Legal Education*, Center for Transnational Legal Studies, London, 20–25, <https://www.law.georgetown.edu/ctls/wp-content/uploads/sites/33/2018/01/CTLS-Why-Transnational-Education.pdf> (accessed on the 2nd of January 2020).

¹³ Philip C. Jessup, *Transnational Law*, Yale University Press, New Haven 1956, at 2.

¹⁴ Ibid.

¹⁵ Ibid., at 15 et seq.

law really consists of. Frankly, this novelty cannot be sought in its universalistic scope since international law itself no less emphatically claims – at least in its monist understanding – to be the system of rules for the whole humanity. Nor is the opening up of the law beyond the nation states to new subjects like individuals, private companies, NGOs, and so on, really something unprecedented, as can be proved by having a look at the most recent and post-traditional handbooks of otherwise quite traditionally defined international law. Moreover, transnational law is not the first system to overcome the principle of state consent by giving, in some cases, higher and normatively binding authority to supra-state institutions: indeed, the same outcome has already been advocated by the most uncompromising versions of monism. Finally, also the coexistence of private and public law in the domain beyond the nation states – far from being something unheard of – is a generally accepted component of the discipline of international law. Therefore, once having noticed that none of these elements accounts for the novelty of transnational law, we definitely have to look at something different to find a convincing answer to the questions of what the notion stands for and why its use can be reasonably regarded as a heuristic step forward.

By adopting a new theoretical perspective, we can see transnational law as the result – unprecedented indeed – of the processes of disaggregation that affected the nation states following globalization. According to the point of view of the contemporary neo-liberal theory of international law and relations, the individual state should never be seen as a “billiard ball”, but rather as a conjunction of different social groups with distinct interests and priorities.¹⁶ As soon as the grip of the central public power loosened as a consequence of the international economic interconnections that increasingly built up starting in the last decades of the last century, the public and private components of the domestic fabric found themselves empowered as new actors of the international arena. On the other hand, as pointed out by systems theory, the domestic social and legal subsystems always possess an inherent tendency to become independent from central regulation and to grow globally in order to properly implement their specific functional rationality.¹⁷ In other words, the larger the field of implementation of every single social subsystem is, the likelier it is for each of them – as the doctrine of the economy of scale teaches us – to perform its specific social function in the most rational and successful way. Regardless of which theoretical approach we may prefer – neo-liberalism or systems theory – the outcome is largely the same: recently, we have seen domestic social subsystems – politics, administration, economy, financial sector, and many others – become self-reliant actors in the space beyond nation states. Since the activities of these social subsystems generally need to be regulated by law, also the legal subsystems respectively related to them have gone global. For instance, administrative law has become *global* administrative law, constitutional law has become *global* constitutionalism, and so on. This is precisely the field where transnational law as a new phenomenon in the world of law can be located and conceptually identified. Thus, from this point of view, transnational law is the non-unitary *corpus juris* made of different legal subsystems which, originally located in the domestic sphere, overcame the boundaries of the nation state as a result of globalization. It is almost superfluous to underline that, understood this way, transnational law is indeed something different from traditional international law: while the latter is the law *between* states or the law of the global *civitas maxi-*

¹⁶ Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 *International Organization* 513 (1997); Anne-Marie Slaughter, *A New World Order*, Princeton University Press, Princeton/Oxford 2004, at 12 et seq.

¹⁷ Niklas Luhmann, *Die Gesellschaft der Gesellschaft*, Suhrkamp, Frankfurt a. M. 1997, Vol. I, at 125 et seq. (English translation by Rhodes Barrette: *Theory of Society*, Stanford University Press, Stanford (CA) 2012, Vol. I, at 142 et seq.).

ma, the former is the law of the specialized legal subsystems *beyond* the nation states. More specifically, transnational law overcomes both monism and dualism. It overcomes monism because it does not maintain that law, to be consistent, has to form a unitary and hierarchical system, but presupposes that law is made of different interacting systems. On the other hand, transnational law also overcomes dualism because it does not identify two clearly separate legal systems, but a plurality of overlapping systems.

Yet, there is a second, no less important distinction between international and transnational law. Since the domestic control and the strive for normative consistency that was guaranteed by the nation states have not been replaced by any comparable or even just functionally equivalent mechanism, the specialized legal subsystems that have become self-reliant tend to overlap with one another. Therefore, we have here, as a condition of normality, what was generally assumed to be a dangerous illness of the whole system of laws, namely the contemporary validity of two distinct and even contradictory norms, which originate from two different sources, but are applied to the same matter. Put this way, transnational law is the field of unprecedented horizontal conflicts, the solution of which requires a high-profile intellectual creativity. We can find here a robust justification for the interdisciplinary turn in studying and teaching non-domestic law: insofar as this is now made of a mixture of traditional norms of international law with regulations that were typical for specialized domestic legal systems and are now applied beyond the national domain, legal professionals and experts of post-domestic law must not only be well-versed in the conventional international law doctrine but also possess adequate knowledge of the other fields of law. Inevitably, international law must be studied and taught in combination with constitutional law, with administrative law, with law and finance, with economic law, with private law, and so on. Inasmuch as such a huge task is almost impossible to be undertaken by a single person or course, the teaching of international law must be split into specialized classes.

2.3. Facets of Transnational Law

Transnational law is a quite diverse and multifaceted phenomenon, so that its representation takes different shapes, depending on which aspect prevails. Basically, we have four versions of what transnational law is essentially assumed to be.

2.3.1. Legal Pluralism

The main novelty introduced by transnational law – and, thus, also the most innovative label that has been used to describe it – is *legal pluralism*. The novelty introduced by the approach of legal pluralism into legal theory is underlined by Nico Krisch. In his passionate and eloquent plea, pluralism is presented as a “break”,¹⁸ thus – in epistemological terms – as a paradigmatic revolution which overcomes the old-fashioned idea of the unity of the legal system,¹⁹ paving the way to the acknowledgement of diversity.²⁰ National constitutionalism is criticized because it “not only fails to include but also fails to deliver.”²¹ As regards the first issue, “domestic constitutionalism, which places the national community at the centre of the legal and political universe [...] cannot reflect [the] broader constituency” that “goes well beyond the national community”: therefore, “on

¹⁸ Nico Krisch, *Beyond Constitutionalism*, Oxford University Press, Oxford/New York 2010, at 16, 23 and 68.

¹⁹ *Ibid.*, at 305.

²⁰ *Ibid.*, at 303.

²¹ *Ibid.*, at 21.

transboundary issues, it remains underinclusive.”²² And, referring to the second point, “domestic constitutionalism [...] would require us to withdraw from, rather than extend, effective postnational decision-making structures in order to safeguard control by domestic political processes.”²³ Yet, the criticism is broadened to comprehend cosmopolitan or postnational constitutionalism as well, insofar as it is accused “to provide continuity with the domestic constitutionalist tradition by construing an overarching legal framework that determines the relationships of the different levels of law and the distribution of power among their institutions.”²⁴ On contrast, pluralism is adaptable and enables us to adopt a highly flexible system of checks and balances which can fit into the postnational legal system with its heterarchical character.²⁵ Last but not least, legal pluralism not only defines a theoretical instrument able to describe the present state of the art but also depicts what can be regarded as a normatively attractive perspective.²⁶

By welcoming the coexistence of distinct and non-hierarchically connected legal systems in a sphere that comprises the domestic as well as the international domain, the theory of legal pluralism also acknowledges that these postnational legal systems interact and even overlap with one another. More concretely, “using pluralism, we can conceive of a legal system as both autonomous and permeable; outside norms (both state and nonstate) affect the system but do not dominate it fully.”²⁷ This creates a new phenomenon, which Paul Schiff Berman defines as “jurisdictional hybridity”,²⁸ i.e. a plurality of normative spaces in which norms from different sources – all claiming to be valid and applicable at the same time and to the same cases – contend with one another for priority. Within the context of jurisdictional hybridity, no resort to hierarchy is possible in order to clarify the respective rank of norms, so that the outcome must be seen as the always contestable result of an open-end exchange of arguments. Berman refers to four examples of the phenomenon, the first of which are the “state versus state conflicts of norms”.²⁹ Unlike the traditional jurisdictional disputes between states, contemporary inter-state conflicts – due to globalization and to the development of the cyberspace – have a much broader and more deep-going mutual impact on internal forms of interaction and regulation. The problems related to the territorial reach of free speech regulations – as shown by the cases referring to the removal of contents from the internet – demonstrate that solutions cannot easily be found by drawing boundaries between legal systems, but require an innovative approach that mutually takes into due account the position of the counterpart. The second example is the “state versus international conflicts of norms”, where the international dimension – as in the case of the International Court of Justice (ICJ) or, even more, of the European Court of Human Rights (ECHR) scheme – is understood in a way that “may have impact on various entities within a nation state”, so that “the international forums can provide a source of alternative norms that people then use as leverage in their local settings.”³⁰ Thirdly, Berman introduces the “nation states versus substate conflicts of norms”, in which tensions between regional unities and the central state – in particular in fields such as environmental regulation, foreign affairs and immigration – are characterized by an increasing assertiveness of

²² Ibid.

²³ Ibid.

²⁴ Ibid., at 23.

²⁵ Ibid., at 78.

²⁶ Ibid., at 103.

²⁷ Paul Schiff Berman, *Global Legal Pluralism*, Cambridge University Press, Cambridge/New York 2012, at 25.

²⁸ Ibid., at 23 et seq.

²⁹ Ibid., at 27 et seq.

³⁰ Ibid., at 36 et seq.

the former, even to the point of bypassing the latter.³¹ The last form of jurisdictional hybridity referred to by Berman are the “state versus nonstate conflicts of norms”,³² which seem to blur – arguably for the first time in modern Western legal history – the well-established distinction between formal laws and non-formal social norms.³³

2.3.2. *The Legal Regimes of the Globalized Markets*

Of all specialized legal systems that have developed independently of a central regulation, the most socially powerful and influential are probably the legal regimes that specify the norms for global trade and economic transactions. Two distinct transnational regimes have emerged in this field: the first concentrates on the legal framework and on the praxis of the World Trade Organization (WTO),³⁴ while the second refers to the normative self-organization of private economic actors on global scale, i.e. to the so-called new *Lex mercatoria*.³⁵ What typifies the transnational nature of both regimes is, first, their transfer of regulations that were traditionally under the control of domestic law to the space beyond the state; secondly, their mixture of private and public dimensions; and, thirdly, their export of concepts that were typical for the domestic discourse – more specifically, elements of constitutional language – from the statist to the transnational level.

As regards the first aspect, the domain of economic transactions and the freedom of initiative that was granted to its agents were traditionally limited by the decisions taken by domestic public organs as well as by laws and regulations issued by them, according to the principles that public interest must have priority over private preferences and that public interests can be sorted out best at the level of the individual political and legal community. Within the context of transnational law, the regulation has either been passed over to an international organization, as in the case of the WTO, or it has been left downright to the private actors, insofar as they undertake activities that go beyond national borders, as for the *Lex mercatoria*. With reference to the second transnational dimension of the regimes of the globalized markets, the mixture of public and private elements takes different forms in the two regimes. Being part of public international law – i.e. having been signed by public entities, which are the member states – the WTO has an essentially public core. Nevertheless, while the WTO allows, to a certain extent, waivers from the principle of free trade, especially “non-discriminatory national regulation of protection of human health, the environment, and other public interests,”³⁶ it nonetheless firmly assumes that “international trade liberalization tends to increase the economic welfare of every trading nation, e.g. by reducing the prices of consumer goods, enhancing productivity through specialization, creating new job opportunities, and enabling governments to redistribute part of the ‘gains from trade’ for helping the poor, assisting workers to shift from import-competing to export sectors of the economy, or protecting the environment.”³⁷ In the end, the public dimension is largely overruled by the predominance of private interests, and the incapacity to find a well-balanced solution for the conflict between private and public might be seen as one of the most relevant reasons for the current crisis

³¹ Ibid., at 37 et seq.

³² Ibid., at 41 et seq.

³³ H. Patrick Glenn, *Legal Traditions of the World*, Oxford University Press, Oxford/New York 2010, at 61 et seq.

³⁴ Peter-Tobias Stoll, *World Trade Organization (WTO)*, in: Max Planck Encyclopedia of Public International Law, Oxford Public International Law.

³⁵ Gunther Teubner, *Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors in World Society?*, published in: Karl-Heinz Ladeur (ed.), *Globalization and Public Governance*, Ashgate, Aldershot 2004, 71–87.

³⁶ Ernst-Ulrich Petersmann, *Principles of World Trade*, in: Max Planck Encyclopedia of Public International Law, Oxford Public International Law, 5.

³⁷ Ibid., 3.

of the WTO regime.³⁸ In the case of the *Lex mercatoria*, the search for a balance between public and private went the opposite way. The starting point, here, is undoubtedly private, being located in the transnational activities of private agents. However, since the legal system of the spontaneous agreements between private actors aims at being self-reliant and independent of any external source of authority, it has to incorporate some defining features of public law in order to become self-validating, such as the establishment of a hierarchy of norms, the standardization of contracts and the creation of a judiciary *sui generis* in form of arbitration.³⁹

Finally, as regards the use of constitutional language, this has been introduced into the legal regimes of the globalized markets only at the high price of a significant – and highly questionable – semantic reduction of the concept of constitution. Indeed, it is quite undisputed that the legal regimes of the globalized markets lack most of the essential contents of a full-fledged notion of constitution, such as a comprehensive bill of rights or the guarantee that the hereby established power is democratically legitimated. To grant those regimes nevertheless a constitutional rank, it is therefore necessary to presuppose an extremely narrow definition of constitution, namely as the legal document that contains the rules for the production of secondary norms.⁴⁰ As a result, constitutional law is understood exclusively in its *functional* dimension, or, more concretely, as the legal document that (a) enables the production of norms by specifying the procedures which govern the issuing of valid rules; (b) restrains this production by clarifying in which fields no rule-making should take place; and (c) fills the gaps, in the contexts where rule-making is allowed, which may arise from disparate norm-issuing actions at the transnational level, thus guaranteeing sufficient homogeneity to the legal regime.⁴¹ However, even if we assumed this point of view, some questions would remain unresolved. Starting with the allegedly constitutional regime of the WTO, its most fundamental assumption that the legal documents that lie at the basis of the WTO regime take on the role of a functional constitution insofar as they govern the making of secondary rules is highly contestable. Indeed, it is not by chance that in many circumstances, due to the lack of norms regulating rule-making in the WTO agreements, the tasks of a functional constitutionalization – i.e. enabling, constraining and homogenizing rule-making – have been assumed by the Appellate Body.⁴² However, while on the one hand the intervention of the Appellate Body has covered only singular cases, missing therefore the inherently general scope of constitutional rule-making, on the other hand it could be easily argued that precisely the necessity of this kind of intervention rather proves the absence of a truly constitutional framework.

With reference to the alleged constitutional character of the new *Lex mercatoria* – apart from any other consideration regarding the deficits of an exclusively functional definition of constitution – it remains controversial whether mechanisms for self-validation are really suitable for

³⁸ The Guardian, *WTO Faces Crisis over Disputes Settlement unless Trump Backs off*, <https://www.theguardian.com/world/2019/dec/08/wto-faces-crisis-over-settlement-disputes-unless-trump-backs-off> (accessed on the 4th of January 2020); SWP, *Ways Out of the WTO's December Crisis*, <https://www.swp-berlin.org/10.18449/2019C46> (accessed on the 4th of January 2020).

³⁹ Gunther Teubner, “*Global Bukowina*”: *Legal Pluralism in the World Society*, in: Gunther Teubner (ed.), *Global Law Without a State*, Dartmouth, Aldershot 1997, 3–28.

⁴⁰ Gunther Teubner, *Constitutional Fragments*, Oxford University Press, Oxford/New York 2012.

⁴¹ Jeffrey L. Dunoff, Joel P. Trachtmann, *A Functional Approach to International Constitutionalization*, in: Jeffrey L. Dunoff, Joel P. Trachtmann (eds.), *Ruling the World? Constitutionalism, International Law, and Global Governance*, Cambridge University Press, Cambridge/New York 2009, at 9.

⁴² Jeffrey L. Dunoff, *The Politics of International Constitutions: The Curious Case of the World Trade Organization*, in: Dunoff/Trachtmann, *Ruling the World?*, *supra* n. 41, at 189; Joel P. Trachtmann, *Constitutional Economics of the World Trade Organization*, in: Dunoff/Trachtmann, *Ruling the World?*, *supra* n. 41, at 216.

the task. Furthermore, insofar as the *Lex mercatoria* is undergoing a process of codification, elements are necessarily introduced into its *corpus* which are derived from national codes of private law and through these, due to the usual interconnection of private and public law at national level, also from the national systems of public law.⁴³

2.3.3. *Global Governance and Public International Authority (IPA)*

While the legal regimes of the globalized markets emphasize the private dimension of the turn to transnational law, its third variant highlights precisely the opposite aspect, namely its *publicness*. In other words, transnational law is not only – or not primarily – the expression of the more or less spontaneous regulation of private interactions going global but also the way in which shared interests of the worldwide community are identified and protected. The initial assumption, here, is that global processes like labor and financial markets, migration, ecological crises, terrorism, organized crime, technological and scientific innovation, exploitation of natural resources, etc., need to be met by establishing executive networks composed of members of national governments and of international organizations. In plain words, this means that the world of globalized interactions can only address its most urgent challenges by introducing more *global governance*.⁴⁴ Transnational governance also triggers the development of what has been defined as “global administrative law”⁴⁵ which – not unlike the task of administrative law in the domestic realm – establishes at the same time the legal framework for the measures that transnational executive organizations take in order to guarantee the control of relevant phenomena, and prevents them from overstepping their competences by asserting the principle of the rule of law.⁴⁶

Some authors – with Anne-Marie Slaughter as arguably the most prominent amongst them – see the transnational law of global governance as a mixture of regulations issued by public agents, such as representatives of national governments acting within the context of international organizations,⁴⁷ and rules emerging from agreements taken by private actors, like those at the basis of the *Lex mercatoria*, whereas the line that should separate the two dimensions is not always clear-cut.⁴⁸ Other exponents of this strand, instead, focus unequivocally on the *public* dimension of global governance, which is expressed, in particular, by international public authorities (IPA).⁴⁹ In this case, the “publicness” of the policies that lie at the basis of transnational law is assumed to be guaranteed by the fact that IPAs are expected to pursue shared interests and the common good.⁵⁰ Here, however, the question arises about the definition of the common good and the ways of its realization. Although the theorists of IPA also refer to substantial criteria like freedom or the rule of law, the most relevant feature to ensure the “publicness” of the IPA policies is lastly just formal, namely the very fact that IPAs are endowed with a public mandate, derived from public power, to

⁴³ Armin von Bogdandy, Sergio Dellavalle, *The Lex Mercatoria of Systems Theory: Localisation, Reconstruction and Criticism from a Public Law Perspective*, 4 *Transnational Legal Theory* 59 (2013).

⁴⁴ Slaughter, *A New World Order*, *supra* n. 16.

⁴⁵ Benedict Kingsbury, Nico Krisch, Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *Law and Contemporary Problems* 15 (2005).

⁴⁶ Eyal Benvenisti, *The Law of Global Governance*, Hague Academy of International Law, The Hague 2014.

⁴⁷ Slaughter, *A New World Order*, *supra* n. 16, at 36 et seq.

⁴⁸ Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 *American Society of International Law* 240.

⁴⁹ Armin von Bogdandy, Philipp Dann, Matthias Goldmann, *Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities*, 9 *German Law Journal* 1375 (2008).

⁵⁰ Armin von Bogdandy, Matthias Goldmann, Ingo Venzke, *From Public International Law to International Public Law: Translating World Public Opinion into International Public Authority*, 28 *European Journal of International Law* 115 (2017), at 134.

act for the common good.⁵¹ Insofar as they do so, the acceptance of their policies by at least the majority of individuals and populations involved leads to a sort of output legitimacy, whereas hardly any attention is paid to deliberative and democratic procedures of legitimation of international organizations. Yet, it has also been argued that scaling down the expectations – by giving up on a full-fledged democratic input legitimation, such as the one that is enshrined in domestic democratic constitutions, while concentrating on the form of accountability that can be achieved through global administrative law – is actually the only affective way to convincingly address the legitimacy deficit in the transnational realm.⁵²

2.3.4. Global Constitutionalism

The fragmentation of the legal framework of transnational law and the limitation of its legitimacy claims to the guarantee of an efficient governance or the rule of law – and, therefore, far below the usual standards in democratic political systems – are two of its most relevant problems. The fourth strand of transnational law – generally known as global or transnational constitutionalism – puts their resolution at the top of its agenda.

As far as the question of legal fragmentation is concerned, global constitutionalism responds to the challenge by carrying the promise that “there is something which helps keep the systems together.”⁵³ At this point, however, the problem arises on what this “something” could be and where it is to be located. Substantially, it can be assumed that this role is to be taken on by a conjunction of *jus cogens*, general principles of international law, *erga omnes* principles and human rights,⁵⁴ as they have been laid down in international treaties – in particular in the UN Charter⁵⁵, in the UN Conventions and in the Vienna Convention on the Law of Treaties – as well as in the jurisprudence of the international courts, most prominently in the ICJ *Barcelona Traction* judgement of 1970. Global constitutionalism also builds a fence against an unfettered privatization of the international sphere “by carving out a protected public realm.”⁵⁶ However, it is quite evident that the elements that should set up the core of global constitutionalism are either customary law – thus, anything but formal and generally recognized norms laid down in treaties, in the way in which the norms of domestic constitutions are usually understood – or, if they are enshrined in treaties or judgements,⁵⁷ their content is widely subject to diverging interpretation. In this sense, it is undoubtable that – as Jan Klabbbers puts it – “constitutionalization is an intensely political process.”⁵⁸ Consequently, even if we assume, following the premises of global constitutionalism, that “a constitutional world order is one which has a centre of authority,”⁵⁹ it has nonetheless to be acknowledged that this “authority” is not one issuing binding decisions through top-down processes, but one that, while claiming normative superiority, always attempts to make it concrete through hori-

⁵¹ Ibid., at 138 et seq.

⁵² Nico Krisch, *Global Administrative Law and the Constitutional Ambition*, in: Petra Dobner, Martin Loughlin (eds.), *The Twilight of Constitutionalism*, Oxford University Press, Oxford/New York 2010, 245–266.

⁵³ Jan Klabbbers, *Setting the Scene*, in: Jan Klabbbers, Anne Peters, Geir Ulfstein (eds.), *The Constitutionalization of International Law*, Oxford University Press, Oxford/New York 2009, at 18.

⁵⁴ Ibid., at 16 et seq.

⁵⁵ Bardo Fassbender, *Rediscovering a Forgotten Constitution*, in: Dunoff/Trachtmann, *Ruling the World?*, *supra* n. 41, 133–147.

⁵⁶ Klabbbers, *Setting the Scene*, *supra* n. 53, at 18 et seq.

⁵⁷ Geir Ulfstein, *Institutions and Competences*, in: Klabbbers/Peters/Ulfstein, *The Constitutionalization of International Law*, *supra* n. 53, 45–80.

⁵⁸ Klabbbers, *Setting the Scene*, *supra* n. 53, at 18.

⁵⁹ Ibid.

zonal interactions, open contestation and dialogue. In fact, while hierarchical domestic constitutionalism aims at curbing the plurality of legal systems through the imposition of a centralized legal and institutional structure, global constitutionalism unequivocally recognizes the positive and ineliminable value of pluralism. Put differently, pluralism in the international realm is something which *cannot* and *should not* be reduced to unity, first because such an endeavour would hardly be crowned by success, at least currently, and secondly because even if success were possible, it would not be desirable due to the values – or to the specific and irreducibly different ideas of the “good life” – that are enshrined in national social, political and legal orders.

“In the absence of a unitary world state – Klabbers maintains – ... a constitutional order must somehow find ways of dealing with relations between the whole and its parts.”⁶⁰ Here, the concept of multilevel constitutionalism comes to the aid. Although essentially conceived for an application to the constitutional framework of the European Union, it bears some traits that can also be highly useful if implemented in the context of transnational law.⁶¹ Notoriously, unlike truly federal constitutional orders, the legal framework of global constitutionalism might be regarded, in the most favourable case, as normatively superior – at least in some fields – to national legal orders, but does not enjoy any recognized overall hierarchical supremacy. Therefore, while in the federal tradition a general priority of the law of the federation over that of the federated units is recognized, in multilevel constitutionalism this priority is only partial and always heavily contested. The rationale of this deep-going difference lies in the different roles that individuals play in the multilevel setting, as opposed to the federal one, when it comes to the legitimation of the more inclusive legal framework. Indeed, in a traditional federal system the legitimation of central public authorities is guaranteed by the citizens of the federation *exclusively in this function*. In other words, insofar as they are called to give legitimacy to the central public power, the citizens of the federation suspend their status as citizens of the member states and come into action only in their political identity related to the central unit. In doing so, they are indeed the source of two forms of legitimacy – that of the federation and that of the federated state of which they are also citizens – but the two procedures of legitimation are strictly independent. In contrast, individuals within the cosmopolitan setting never suspend their status as citizens of the individual states when called to legitimize cosmopolitan institutions and norms. As a result, the legitimacy of cosmopolitan constitutionalism is inherently twofold, coming at the same time from two distinct sources: the cosmopolitan community and the individual states. The epistemological fundament, here, is the communicative understanding of society, according to which this is constituted by different contexts of interaction. The most general and inclusive among these is the one in which human beings are involved transnationally and irrespective of their citizenships and belongings. In accordance with this understanding, world – or, to be precise, “cosmopolitan” – constitutionalism is the political project that aims at regulating this kind of transnational interactions with principles and rules in order to make them predictable, inclusive and just.⁶² In a multilayered and stratified, but also horizontally intertwined legal and institutional system, which is characterized by the non-hierarchical coexistence of two legitimacy strands, conflicts between norms cannot be resolved by resorting to a pyr-

⁶⁰ Ibid., at 31.

⁶¹ Jürgen Habermas, *Zur Verfassung Europas*, Suhrkamp, Frankfurt a. M. 2011; Jürgen Habermas, *Im Sog der Technokratie*, Suhrkamp, Frankfurt a. M. 2013; Jürgen Habermas, *Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible*, in: 21 *European Law Journal* 546 (2015).

⁶² Sergio Dellavalle, *Addressing Diversity in Post-unitary Theories of Order*, 40 *Oxford Journal of Legal Studies* (2020), forthcoming.

amid of sources that is presently missing and should not be established in the future, but only through dialogue between institutions and, in particular, between courts.⁶³

The considerations about the way in which the balance between the whole and its parts could be guaranteed in a cosmopolitan setting lead us directly to the second main issue of global constitutionalism, namely to the question of the conditions under which its norms and institutions can be considered legitimate. In particular, we have to address the problem of what kind of legitimacy should be arguably envisaged in the cosmopolitan context and which mechanism can support it. Essentially, the debate offers three solutions. The first one refers to the use of the concept of “reasonableness”.⁶⁴ Leaning on Ronald Dworkin’s work,⁶⁵ Mattias Kumm introduces the notion with the aim to separate, in the field of cosmopolitan constitutionalism, the concept of legitimacy from the praxis of democracy, i.e. from the direct or indirect, but always reflexive involvement of all those concerned. In his view, legitimacy is sufficiently guaranteed, in cosmopolitan perspective, if standards of “public reasonableness” are respected. Consequently, active involvement of the citizens can be substituted by the safeguard of fundamental rights as the main content of public reasonableness.⁶⁶ Apart from the nebulous content of the notion, it remains unclear how the centrality of “the free and equal” – also advocated by Kumm –⁶⁷ can be preserved in front of such a far-going concession to that kind of technocratic paternalism that colonizes a large part of the debate on governance beyond the nation state. Indeed, it is difficult to ascertain who the legitimate holders and guardians of public reasonableness should be – if not those citizens or, in general, fellow humans who are affected by the consequences of the decisions.

The second solution to the question of the legitimacy of a cosmopolitan constitutional order, quite on the contrary, explores bottom-up forms of non-representative and inclusive empowerment of stakeholders, aiming at the safeguard of the social and ecological conditions of life.⁶⁸ On the basis of the hardly contestable assumption that modern constitutionalism has been a bottom-up political project, the purpose of this second approach basically consists in identifying chances for the development of locally based forms of direct democracy. The third and last solution lies somehow between the first and the second – though slightly more on the side of the second due to its specific attention to the direct involvement of citizens in guaranteeing the legitimacy of institutions and norms. Unlike both the reference to “reasonableness” – which seems to favour the institutional point of view of the international organizations – and the appeal to the worldwide and largely unformalized self-determination of the stakeholders, the third solution strives for a balance between the whole and its part in the form of a double two-tier approach. The first leg of the two-tier approach focuses on the institutional setting of cosmopolitan constitutionalism. Taking a two-level perspective, it assumes that cosmopolitan constitutionalism is based on two pillars: a thin layer of international organizations – largely comprised of institutions under the aegis of a reformed UN – with the limited task to protect peace and fundamental human rights,⁶⁹ and the na-

⁶³ See *infra*, Section 2.4.

⁶⁴ Mattias Kumm, *On the Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, in: Dunoff/Trachtmann, *Ruling the World?*, *supra* n. 41, at 269, 273, 290, 301, and 312.

⁶⁵ Ronald Dworkin, *Law’s Empire*, Belknap Press of Harvard University Press, Cambridge (MA) 1986.

⁶⁶ Kumm, *On the Cosmopolitan Turn in Constitutionalism*, *supra* n. 64, at 303.

⁶⁷ *Ibid.*, at 322.

⁶⁸ James Tully, Jeffrey L. Dunoff, Anthony F. Lang Jr., Mattias Kumm, Antje Wiener, *Introducing Global Integral Constitutionalism*, 5 *Global Constitutionalism* 1 (2016).

⁶⁹ Jürgen Habermas, *Der gespaltene Westen*, Suhrkamp, Frankfurt a. M. 2001 (English translation by Ciaran Cronin: *The Divided West*, Polity Press, Cambridge 2006); Stefan Kadelbach, Thomas Kleinlein, *Überstaatliches Verfassungsrecht*, 44 *Archiv des Völkerrechts* 235 (2006).

tion states which make up the international community. However, in contrast with the present situation and with any kind of technocratic idea of governance, *both* pillars should be endowed with adequate democratic legitimation. This implies – on the side of the whole of the international organization – a serious effort towards the parliamentarization of as many institutions of the international community as possible,⁷⁰ and on the other hand a no less heartfelt commitment to the development of democracy inside the individual states. It cannot be denied, however, that this sort of “dual democracy”⁷¹ is severely hampered by the undemocratic nature of many national regimes: indeed, it is difficult to imagine how the institutions of the international community can be made more democratic if a significant number of member states violate the most fundamental democratic rules. Under these circumstances, the role of the democratic representation of the worldwide community of citizens might provisionally and putatively be taken on by a permanent assembly of NGOs, characterized by precise deliberative rules and unequivocally endowed with the right to be heard. The second leg of the two-tier approach aims at building an equilibrium between the participation of the stakeholders and the institutional competence of international organizations. Unlike the plea for a diffuse cosmopolitan direct democracy, dual democracy combines two different levels: first by counterbalancing participation with representation, and secondly by integrating – admittedly, more openly and far-going than in the democratic nation state – the bottom-up source of legitimacy with the expertise and knowledge that settled over time, both nationally and internationally, in the institutions of the executive power. In fact, the legitimacy of the international organizations is ultimately guaranteed not only by the citizens of the cosmopolitan community but also by its member states.

2.4. How to Manage Transnational Legal Conflicts

Transnational law is characterized by the presence of a number of horizontally coexisting legal systems which overlap with one another, while not being hierarchically bound to one another. Taken together, these two aspects account for both the increase of legal conflicts and – even more importantly – the impossibility to resolve them by resorting to the usual procedure, namely by clarifying which norm or institution is superior. Thus, three substantially new strategies have been developed in order to manage transnational conflicts of law. The first one aims at creating “interface norms” and practices, with the essential purpose to “embrace hybridity”,⁷² i.e. to establish a post-hierarchical system of mutual recognition of an almost unlimited equal normative dignity of all involved legal systems, as well as of their substantial self-reliance and independence.⁷³ This approach comprehends mechanisms like the acknowledgement of margins of appreciation⁷⁴ or of subsidiarity schemes,⁷⁵ the acceptance of “limited autonomy regimes”,⁷⁶ “mutual recognition regimes”,⁷⁷ and “conditional recognition” – such as the *Solange II* decision of the German Federal

⁷⁰ Daniele Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy*, Princeton University Press, Princeton 2008.

⁷¹ Anne Peters, *Dual Democracy*, in: Klabbers/Peters/Ulfstein, *The Constitutionalization of International Law*, *supra* n. 53, 263–341.

⁷² Berman, *Global Legal Pluralism*, *supra* n. 27, at 141 et seq.

⁷³ Krisch, *Beyond Constitutionalism*, *supra* n. 18, at 285 et seq.

⁷⁴ Berman, *Global Legal Pluralism*, *supra* n. 27, at 161 et seq.

⁷⁵ *Ibid.*, at 168 et seq.

⁷⁶ *Ibid.*, at 163 et seq.

⁷⁷ *Ibid.*, at 179 et seq.

Constitutional Court of 1986 –⁷⁸ as well as, finally, the recognition of judgements.⁷⁹ This last mechanism – namely the recognition of judgements issued by a court belonging to a different legal system – also constitutes one of the ways in which the second strategy operates. This focuses, indeed, on the dialogue between courts of distinct legal regimes – or, as it has been specified, on the “engagement with foreign precedents”, since the courts’ actions are in many cases one-sided and do not imply any interaction with the counterpart.⁸⁰ The category comprises both the cases in which a domestic court (in most cases a constitutional court) refers to a decision taken by a foreign court (generally, also a constitutional court), and the situations in which – giving a broad meaning to the definition of “foreign” – a domestic court vertically interacts with a supranational court such as the European Court of Justice (ECJ) or the European Court of Human Rights (ECtHR). Regarded by some as a limited and rather marginal phenomenon⁸¹ while utterly praised by others as a fundamental step towards a cosmopolitan jurisprudence⁸² and as a significant contribution “to enhance democracy and inclusion”,⁸³ transnational activities of courts are undeniably growing in numbers and becoming increasingly influential. The third strategy makes the otherwise informal interaction between transnational institutions and, in particular, courts to a formalized procedure by establishing mechanisms of consultation and dialogue. While being the most ambitious of the three strategies, since it institutionalizes dialogue by making it sometimes mandatory and always advisable, it is – probably exactly because of its ambition – also the less broadly developed and applied. Basically we have, indeed, only one example as regards constitutional law – i.e. Art. 39 of the Constitution of the Republic of South Africa – and the same limited number of applications with reference to the interactions between domestic and supranational courts, namely the “preliminary ruling” procedure ex Art. 267 of the Treaty on the Functioning of the European Union (TFEU). Nonetheless, this third strategy is arguably the best way to deal with transnational conflicts of norms in case that we have in mind an overall system of norms and institutions which, albeit non-hierarchical, strives nonetheless for as much consistency as possible.

This last remark anticipates a second question related to how transnational conflicts of norms are addressed, namely its most essential rationale. In other words, which are the rationalities that come into play while dealing, in different forms, with conflicts of norms against a transnational background? And what are their final purposes? Substantially, we can distinguish three understandings of rationality and purposes when we take up the managing of transnational conflicts – which, quite tellingly, correspond to the three post-unitary paradigms of social order.⁸⁴ Considered from this perspective, the managing of transnational conflicts unveils the connection between legal discourse and a specific *weltanschauung*, or a way to define knowledge and justify action. The first understanding takes up the epistemology of systems theory, regardless of whether

⁷⁸ Krisch, *Beyond Constitutionalism*, *supra* n. 18, at 287 et seq.

⁷⁹ Berman, *Global Legal Pluralism*, *supra* n. 27, at 294 et seq.

⁸⁰ Vicki C. Jackson, *Constitutional Engagement in a Transnational Era*, Oxford University Press, Oxford/New York 2010.

⁸¹ Tania Groppi, Marie-Claire Ponthoreau, *The Use of Foreign Precedents by Constitutional Judges: A Limited Practice, An Uncertain Future*, in: Tania Groppi, Marie-Claire Ponthoreau (eds.), *The Use of Foreign Precedents by Constitutional Judges*, Hart, Oxford/Portland (OR) 2013, 411–431.

⁸² Clara Marsan-Raventós, *From Judicial Dialogue to Cosmopolitan Norms: Enhancing Democracy in Globalised States*, in: Amrei Müller (ed.), *Judicial Dialogue and Human Rights*, Cambridge University Press, Cambridge/New York 2017, 435–466.

⁸³ Eyal Benvenisti, George W. Downs, *Between Fragmentation and Democracy. The Role of National and International Courts*, Cambridge University Press, Cambridge/New York 2017.

⁸⁴ See *infra*, Section 4.3.

explicitly or implicitly. It applies if external elements are taken into account only with the purpose of adapting the internal operations of one's own legal system to the challenges coming from outside so as to maintain its original functional rationality. In this sense, law-making happens "through mutual irritation, observation and reflexivity of autonomous legal orders,"⁸⁵ and the rationality of the external system is only interesting insofar as it impacts on the internal procedures. Instead, if the logic that inspires the interaction originates from postmodern thinking, the main aim of the dialogue will be the establishment of positive comity and tolerance, finally leading to a broad acknowledgement of foreign judgements.⁸⁶ In this case, the rationality of the external system is fully recognized as having the same value, although it is also considered incommensurably different since no overarching and all-encompassing rationality is assumed to be possible. Precisely this kind of assumption that an overarching rationality is both arguably identifiable and desirable imbues the third understanding of the rationale of transnational interaction. Indeed, if the epistemological background is the communicative paradigm of order, the goal of transnational interaction arguably consists in the implementation of the normative contents of intersubjective rationality. Because an all-encompassing rationality is presumed to exist, its correct application through horizontal dialogue is likely to lead to consistent solutions of conflicts. Even though no resort to top-down hierarchies is accepted, a relative normative superiority of certain legal regimes is nonetheless recognized, in particular when their internal contents – as in the case of human rights law – more reliably embody the principles of communicative rationality.⁸⁷

3. *Interdisciplinarity and International Law's Content*

The case against the interdisciplinarity of international law was most powerfully advocated by those authors who claimed that the law constitutes a self-contained and self-reliant system. Given this premise, the legal system may be assumed to have a truth content in itself – i.e. without any resort to truth sources located in extra-legal discourses – or to be a mere instrument for the realization of individual preferences, thus being devoid of any truth content. Starting with the first variant – namely with the interpretation that recognizes that the law has a truth content, but denies that this is to be sought outside the realm of legal sentences – the first point of reference cannot but be Hans Kelsen's legal philosophy.

One of the central aims of Kelsen's work – probably the most central at all – was the attempt to lay down the epistemological presuppositions for considering the legal system an object of *scientific* research. In this sense, legal theory had to become "legal science" (*Rechtswissenschaft*). To achieve his goal, he had to find out both the specific form of legal sentences and their ultimate foundation, which, if legal science had to be self-sufficient, could not be sought in extra-legal disciplines, such as morals, philosophy, religion, sociology or political science.⁸⁸ As for the form of legal sentences, Kelsen claimed that they are shaped as hypothetical propositions, according to the structure "Z = if Z₁, then Z₂". In this kind of sentence, Z₂ is validated by Z₁, which is therefore vested with the function to act as a foundation of Z₂. However, the proposition does not say anything about the possible foundation of Z₁, so that the overall validity of Z cannot be seen as guaranteed.

⁸⁵ Fischer-Lescano/Teubner, *Regime Collisions*, *supra* n. 2, at 1018.

⁸⁶ See *supra* n. 79.

⁸⁷ Geir Ulfstein, *The International Judiciary*, in: Klabbers/Peters/Ulfstein, *The Constitutionalization of International Law*, *supra* n. 53, 126–152.

⁸⁸ Kelsen, *Reine Rechtslehre*, *supra* n. 3, at 21.

As a result, we need a higher norm which establishes the rules for the valid production of Z. Such a norm has the form “if X, then Z”, where “X = if X₁, then X₂”. At this point, Z is validated by X and, within X, X₂ is validated by X₁; yet, once again, to find a foundation for X₁ and for X as a whole, we have to climb a step higher, up to the norm “if Y, then X”, where “Y = if Y₁, then Y₂” – but only with the result of being confronted with the same problem as in the previous steps. Indeed, since in the formal pyramid of legal positivism the validity of any proposition is founded on the validity of a norm located at a hierarchically higher level, the whole process runs the risk of a regression ad infinitum, with the consequence that no reliable foundation can be established for the legal system. Kelsen proposed to stop the upward climbing at a certain point, at which the whole system of legal propositions was thought to find its last validation in what he called the “basic norm” (*Grundnorm*).⁸⁹ Following his view, we have to put at the last stage of our regression in the search of the last fundament of the legal system the proposition “if A, then B”, where “B = if B₁, then B₂”. What is remarkable, here, is that A – as the *Grundnorm* – does not have the usual form “if A₁, then A₂”. Indeed, in order to stop the backward process, A cannot display the structure of a hypothetical sentence – which would imply a further regression – but of an apodictic proposition. Put differently, the “basic norm” cannot be – as legal proposition generally are – a sentence formulated and declared as valid on the basis of a hierarchically higher located procedure, or a *lex posita*. Instead of being a set, “posed” (*gesetzt*) or positive norm, it has to be, to stand on its own, a “pre-posed” (*vorgesetzt*) or presupposed assumption. Concretely, the content of the assumption at the basis of a legal system varies from case to case. For instance, the *Grundnorm* can maintain that “all power derives from the people”, or – quite to the contrary – that “all power derives from the monarch” or even from “God”; the only condition is that the pre-positive principle of the whole legal system has to be strong and well-accepted enough to secure effectiveness.⁹⁰

Substantially, Kelsen’s ultimate source of the validity of the legal system neither meets the criteria that generally characterize legal propositions, nor does its content properly belong to the legal discourse. Rather, it seems to take inevitably the form of a general assumption about the extra-legal – i.e. social and political, or even moral and philosophical – fundament of the “order of human behaviour”. On that basis, the conclusion cannot but be that the legal system is not capable of sustaining itself on its own, but requires the resort to an extra-legal *content*. The same problem is shared by the other major exponent of legal positivism, this time from the English-speaking intellectual tradition, namely H. L. A. Hart. In fact, Hart tried to avoid Kelsen’s somehow obscure and explicitly metalegal foundation of the legal system by introducing the notion of the “rule of recognition”.⁹¹ In his theory, the “rule of recognition” is understood as the principle that allows us to identify the context for the valid application of a certain legal norm. For example, it should enable us to “recognize” a norm as belonging to the domestic legal order or, instead, to the international legal system, due to the fact that the norm is produced, in the first case, according to the rules laid down in the national constitution, or is the result, in the second case, of an inter-state treaty. Consequently, the “rule of recognition” is assumed to guarantee the validity of the norms within a specific system, while identifying their scope of application. Thus, Hart’s theory attempted to overcome the quite evident extra-legal connotation of Kelsen’s *Grundnorm* by including the source of validity – which was presumed to be itself a “rule” and not a general assumption – into the system of legal norms. Moreover, it concentrated more on the conditions for the validity of a

⁸⁹ Ibid., at 67 et seq.; Kelsen, *Pure Theory of Law*, supra n. 3, at 193 et seq.; Hans Kelsen, *General Theory of Law and State*, Harvard University Press, Cambridge/Ma. 1949 (1st ed. 1945), at 115 et seq.

⁹⁰ Kelsen, *General Theory of Law and State*, supra n. 89, at 120.

⁹¹ H. L. A. Hart, *The Concept of Law*, Clarendon Press, Oxford 1994, at 100 et seq.

norm than on its content. However, it was Hart himself who admitted that the “rule of recognition” is lastly not a rule of the legal system in the full meaning of the term since “in the day-to-day life of a legal system its rule of recognition is very seldom expressly formulated as a rule.”⁹² If not a proper norm, then the “rule of recognition” must be a non-positive and in the most cases implicit presumption concerning the range of validity of a legal proposition, which provides “both private persons and officials ... with authoritative criteria for identifying primary rules of obligation.”⁹³ From this point of view, therefore, the difference from Kelsen’s approach tends to vanish away. Moreover, putting “recognition” at the basis of the legal system implies that the validity of a norm has to be *acknowledged* by the social community in charge of applying it – and the acknowledgement of the binding character of a normative proposition is always a social process which inevitably goes far beyond the boundaries of the formal system of laws.

Legal positivism denies interdisciplinarity by claiming that the legal system is a self-reliant hierarchical set of normative propositions, characterized by a specific formal structure and an autonomous truth content. This truth content has been identified, by the two main exponents of legal positivism, respectively with the *Grundnorm* or with the “rule of recognition”. However, we can consistently argue that the truth content of the legal system is precisely what links it to extra-legal discourses, thus reintroducing that element of interdisciplinarity which should have been purged from jurisprudence. Faced with the substantial failure of the most essential tasks undertaken by legal positivists and with the evidence that this shortcoming is related to the truth content of the legal system as the Trojan horse of interdisciplinarity and extra-legal discourses, we must now turn to the question on whether a better result in favour of the self-reliance of the legal system could be achieved if we assume that the formalism of the law goes along with the rejection of any kind of truth content, be it inherent or external to the system. In other words, could a legal system without aspiration to possess a truth content be effectively self-sufficient, thus definitively silencing the request for interdisciplinarity? This is precisely the claim made by Martti Koskeniemi, one of the most influential legal theorists of his generation. Koskeniemi’s influences can essentially be traced back to three sources: the Critical Legal Studies, from which he draws the conviction that law is intrinsically linked to power; postmodern thinking, from which he takes up the idea that no universal rationality can be discovered in human knowledge and action, either in the law or elsewhere; and a sort of Wittgensteinian epistemology, according to which propositions do not have a truth content in themselves – be it intrinsic or object-related – but derive their meaning from the context in which they are uttered.⁹⁴ Following along those intellectual paths – in particular the epistemological scepticism of Wittgenstein’s *Philosophical Investigations* – Koskeniemi maintains that legal norms and notions, i.e. legal propositions and their main substantive components, neither contain an inherent truth nor unequivocally refer to external facts.⁹⁵ Having no rationality in its own right, the law is regarded by Koskeniemi as a set of formal sentences⁹⁶ that can be used to foster the priorities of the individual legal professionals.⁹⁷ In the light of the re-

⁹² Ibid., at 101.

⁹³ Ibid., at 100.

⁹⁴ Ludwig Wittgenstein, *Philosophische Untersuchungen*, in: Ludwig Wittgenstein, *Werkausgabe*, Suhrkamp, Frankfurt a. M. 1984 (1st ed. 1953), Vol. I, 225–580 (English translation by G. E. M. Anscombe et al.: *Philosophical Investigations*, Wiley-Blackwell, Oxford 2009, 1st ed. 1953).

⁹⁵ Martti Koskeniemi, *The Politics of International Law*, Hart, Oxford/Portland 2011, at 298 et seq.; Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge University Press, Cambridge/New York 2005, at 478 et seq., 513 et seq.

⁹⁶ Martti Koskeniemi, *The Gentle Civilizer of Nation: The Rise and fall of International Law 1870–1960*, Cambridge University Press, Cambridge/New York 2001, at 500 et seq.

⁹⁷ Koskeniemi, *From Apology to Utopia*, *supra* n. 95, at 536 et seq., 615 et seq.

jection of any truth content of the law, the only task of the schools of law would consist in training the students in the application of legal technicalities in order to acquire the instruments to push forwards in the best way their idiosyncratic preferences. It is almost superfluous to say that, under those circumstances, any reference to interdisciplinarity would be meaningless.

Koskenniemi's position, however, turns out to be rather unconvincing for two main reasons.⁹⁸ First, insofar as the law relies, for its interpretation and application, on individual convictions, these are themselves something that goes beyond the formal character of legal propositions. Consequently, even if we adopt Koskenniemi's perspective, we have to admit that the legal system inevitably finds its meaning in a world outside the overall set of legal norms – and this should always be taken into account while studying and teaching law. Secondly, the interpretation of legal propositions should not be considered as arbitrary as Koskenniemi is prone to assume. In fact, Wittgenstein's radical idea of a language devoid of objective references and, thus, without falsifiable truth content never became mainstream among philosophers of language and epistemologists. Rather, in order to avoid a cognitive scepticism that would prove disruptive, in particular for natural sciences, and to prevent a moral neutralism that would permanently weaken the normative content of human sciences, the post-Wittgensteinian philosophy of language and theory of knowledge were rather committed to mend the rift and to bridge the gap between language and objective reality again.⁹⁹ The most recent linguistic and epistemological research suggests, indeed, that legal propositions – as any other sort of propositions too – should be assumed to have a truth content that research and teaching are committed to explore accordingly.

Yet, what is this truth content that lies at the basis of the legal system and should be properly considered while analyzing the law as well as in the context of legal education? We can get a first hint at a possible answer from Niklas Luhmann's sociology of law. According to his version of systems theory, society necessarily differentiates itself into different social subsystems, the rationale of which is to deliver in the most efficient way the functions whose fulfillment the society as a whole needs in order to persist and thrive. Against this background, every social subsystem is characterized by its own rationality, depending on the priorities and choices of action that guarantee the most effective outcome with reference to the function to be fulfilled.¹⁰⁰ While performing its function, each subsystem inevitably produces expectations in those interaction participants who come into contact with it. In order to prevent the disruptive effects that could arise from the pretensions formulated by social actors, their legitimate expectations are expressed in the form of norms, and the claims appealing to these norms are dealt with through formal procedures following the principles laid down by law. Therefore, law's function lastly consists in stabilizing the normative expectations deriving from other social subsystems.¹⁰¹ Two further aspects are relevant here. First, like society is made of distinct social subsystems, also the whole of the system of legal norms divides itself into specialized legal subsystems, each of them typified by the task of stabiliz-

⁹⁸ Sergio Dellavalle, *Law as a Linguistic Instrument without Truth Content? On the Epistemology of Koskenniemi's Understanding of Law*, in: 77 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2017) 199.

⁹⁹ Donald Davidson, *Problems of Rationality*, Clarendon, Oxford 2004; Donald Davidson, *Subjective, Intersubjective, Objective*, Clarendon, Oxford 2001; Robert Brandom, *Making It Explicit*, Harvard University Press, Cambridge (MA) 1998 (1st ed. 1994); Jürgen Habermas, *Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns*, Suhrkamp, Frankfurt a. M. 1984; J. Habermas, *Nachmetaphysisches Denken*, Suhrkamp, Frankfurt a. M. 1988; Jürgen Habermas, *Wahrheit und Rechtfertigung*, Suhrkamp, Frankfurt a. M. 2004.

¹⁰⁰ Niklas Luhmann, *Die Gesellschaft der Gesellschaft*, Suhrkamp, Frankfurt a. M. 1997 (English translation by Rhodes Barrette: *Theory of Society*, Stanford University Press, Stanford (CA) 2012).

¹⁰¹ Niklas Luhmann, *Das Recht der Gesellschaft*, Suhrkamp, Frankfurt a. M. 1993 (English translation: *Law as a Social System* Fatima Kastner et al. eds., Oxford University Press, Oxford/London 2004).

ing the normative expectations of a specific social context. For example, we have the administrative social system and, related to it, we have also a specialized administrative law; analogously, we have internet and the law of internet, financial markets and the law of finance, and so on. Secondly, every social subsystem organizes the flow of communication within its range of influence on the basis of its own rationality, i.e. following the rational criteria which autonomously emerge as the most appropriate in order to achieve the functional goal of the subsystem. To make once again an example, the rationality of the administration has to be different from the rationality that governs the financial markets. On that basis, every specialized legal subsystem has to make that specific rationality to its own, which shapes the flow of communication of the social subsystem whose normative expectations it has to regulate.

At this point, the second argument in favour of interdisciplinarity – which is applicable not only to international law, but to law in general – stands out with the force of evidence: since every specialized system of legal norms is necessarily imbued by the very same rational principles that we may find in the social subsystem of reference, the analysis and teaching of law cannot refrain from dealing with the systemic rationalities that create the functional horizon of society. In other words, if we want to know why a legal subsystem operates in a certain way, then we have to be aware of the logics that underlie that particular flow of subsystemic communication. As a matter of fact, in the legal sentence “if Z_1 , then Z_2 ”, the second element – namely Z_2 – is determined not only by the formal structure of the proposition but also by the content of Z_1 , i.e. by the social rationale that shapes it. Resorting to an example again, the law of international organizations cannot be understood without knowing their rationality and operating mode. Far from being self-reliant as the *Rechtswissenschaft* wanted to believe, the law is deeply embedded in social processes. It should be the task of research and teaching to take them into due account.

4. *Interdisciplinarity and Law's Overall Social Rationale*

In the last section the interdisciplinary approach to legal research and education has been justified by referring to the essential link between the legal system and the different forms of functional rationality that characterize the social subsystems respectively regulated by the distinct legal subsystems. Yet, there is a further justification, which relies on a broader and intersubjective concept of rationality. Indeed, beyond functional rationality, which focuses on the instruments and procedures that make possible to fulfil fundamental social services in the most efficient way, we can detect a non-systemic or supra-systemic rationality, the task of which consists in determining the conditions for the social life as a whole to be considered ethically justifiable. In other words, the supra-systemic rationality is shaped, in epistemological terms, by the intersubjective exchange of arguments about what a “good social life” is assumed to be. At the basis of the “good social life” are rules which are considered ethically qualified and advantageous by a sufficiently large part of the members of the community. Since the law plays a major role – at least in modern societies – in defining those rules, we can infer that the system of legal norms is directly connected to the way in which the idea of the “good life” is understood in a specific society.

4.1. *Paradigms of Order and Paradigmatic Revolutions*

To clarify the content of the legal system, we have to address the question of the overall rationality that imbues the society whose interactions are regulated by that system. However, we can only undertake this task if we can rely on a notion that enables us to build a conceptual bridge between the two dimensions, i.e. between the system of norms and social rationality. I claim that this role is to be taken up by the notion of *order*. “Order” is the condition in which social interactions are effectively directed by rules that make them predictable, peaceful and, in the most favourable cases, also cooperative. On that basis, the connection between the concept of “order” and the first of the above-mentioned dimensions – namely, norms in general, as well as legal norms in particular – is quite immediate. Yet, the notion of “order” also has a normative qualification: to be accepted, the norms that create the “ordered society” must correspond to the predominant idea of what a social and political community assumes to be a “good social life”. Put differently, the “ordered society”, to persist and thrive, has to qualify as a “well-ordered society” in the eyes of the majority of its members. We have, here, the connection of “order” with the second above-mentioned dimension, i.e. with a general idea of social rationality. Indeed, we can detect different ideas of social rationality and, therefore, as many conceptions of the “well-ordered society” as well as of the legal system based on it. We can draw a map of the distinct understandings of “order” by resorting to the essential components of any idea of “order”. I will come back to this point in short. But, first, it is important to pay attention to the further advantages that can be derived from the use of the notion of “order”.

Beside the advantage of building a bridge between the legal system and overall social rationality, the concept of “order” can be applied – secondly – to a very large number of social, political, legal and economic institutions, making possible to find out at a very abstract level the invariables that bind them, or the differences that divide them. This aspect is of paramount importance in a time in which, as it has been highlighted above,¹⁰² the traditional distinctions – such as between public and private, national and international, and so on – are increasingly blurred and urgently need a redefinition. A third advantage in using the concept of “order” is connected to the relation between the different disciplines of human science. Although they are, to a certain extent, all correlated to each other, and often share a common origin, they have been suffering, in the last decades, from a loss of mutual communication. Yet, dialogue allows the transfer of knowledge deriving from related sciences into the language of one’s own discipline, improving this way also the research results in this field. This leads to the third argument in favour of interdisciplinarity in legal research and education – once again an argument that is not limited to international law, but can be expanded to law in general. In fact, legal theory – but also legal praxis, to some extent – can highly benefit from the knowledge developed by political science, sociology, economy and political theory. More concretely, the engagement with non-legal discourses, often due to their more innovative approaches, helps legal professionals to better understand the society in which law operates. This process does not have only a practical dimension – in the sense that enables legal professionals to be more successful because of their more profound understanding of the reality – but also makes it possible for the law and for those who work with it to become self-reflexive inasmuch as the legal discourse and the preferences of those who use it can be located against a more ambitious background regarding how the society as a whole should be organized. Interdisciplinary dialogue, however, needs some conceptual elements in common, which build the bridges of communication and guarantee that the scholars on each side have a chance to understand each other. The notion of “order” is one of such conceptual bridges. Indeed, “order” is a concept that is

¹⁰² See *supra*, Section 2.

familiar to philosophers and political scientists, lawyers and sociologists, theologians and economists – and some other categories of experts of human sciences could be added.

We can detect, in the history of human thought, different ideas of the “well-ordered society”. I propose to define them as the *paradigms of order*.¹⁰³ More specifically, a “paradigm of order” is a set of concepts and abstract claims as definitions of those concepts, which shape, according to certain parameters, the contours of what a “well-ordered society” is assumed to be. These parameters correspond to three claims regarding how a well-ordered social interaction should be organized, which are necessarily contained in every paradigm of order. The first claim addresses the extension of order, namely whether this is inevitably limited to a homogeneous social community, or can potentially be extended to the whole humankind. The second claim is related to the ontological foundation of order, i.e. whether some kind of organic community builds the basis of social order, or rather the individuals are at the centre of society. The third claim, finally, is about whether a well-ordered society has to be necessarily unitary and hierarchical, with no overlapping and horizontal interaction of norms and institutions, or a pluralist society with an heterarchical normative and institutional system can also be seen as “well-ordered”.

To use a metaphor, we always see the world – and the possible actions that we can carry out in it – through the glasses that the specific culture of that time puts at our disposal. But, glasses must be changed over time. And paradigms change, too. This happens through what we can call *paradigmatic revolutions*. A “paradigmatic revolution” is a huge change of perspective – or, to put more correctly, of the conceptual pre-conditions of knowledge and action – following which our understanding of the world and of the possibility to act in it is profoundly reshaped. We see the world differently, we explain phenomena differently, and we discover new chances for our activities. Put very simply, we get a new idea of what is true and what is right. If applied to the patterns of social order, this means that in every period of human history our understanding of the “well-ordered society” has been shaped by a sufficiently coherent vision containing assumption on all three above-mentioned claims. However, when social changes occurred, making some of those assumptions obsolete, a new paradigm eventually emerged, which was better suited to the new situation, in the sense that it provided a more useful conceptual instrument to understand it and more valuable advice for action. Nevertheless, paradigms of social order – contrary to the paradigms of natural sciences – seem never to die, but only to spend times, even long periods, of recovery, just to reappear in a shape which is thought to be more adequate to meet the challenges of the new era. As a result, even the most ancient paradigms of order are still present in our time, offering an interpretation of society that, even though to some extent old-fashioned, is still capable of deeply influencing the debate.

4.2. *The Unitary Paradigms of Order*

Going through the history of political thought, we become aware of the presence of three historical paradigms of order, characterized by an evolution that lasted many hundred – or even a few thousand – years. Furthermore, we can detect three more recent paradigms, which developed only a couple of decades ago as a result of the last paradigmatic revolution. The most ancient of all paradigms of order maintains – with reference to the claims that essentially characterize each paradigm of order – that, first, a well-ordered society cannot but be limited in range, while be-

¹⁰³ Armin von Bogdandy, Sergio Dellavalle, *Universalism Renewed. Habermas' Theory of International Order in Light of Competing Paradigms*, 10 *German Law Journal* (2009) 5; Sergio Dellavalle, *Dalla comunità particolare all'ordine universale. Vol. I: I paradigmi storici*, ESI, Napoli 2011.

tween limited well-ordered communities only limitation of dis-order is feasible. Thus, it is *particularistic* and not *universalistic*. Secondly, its supporters generally assume that a community, to be well-ordered, must be largely homogeneous, i.e. a *holon*. Accordingly, the first paradigm of order is *holistic* and not *individualistic*. Thirdly, the well-ordered society must be organized as a *unitary* structure, as opposed to a *pluralist* one, since it is not accepted that conflicting norms and institutions of different origins can be valid or have authority at the same time and in the same place. The basic assumptions of this first paradigm of order – which we can call *holistic particularism* – were already laid down for the first time in the Western history of ideas as far back in time as in ancient Greece,¹⁰⁴ to pass then through different stages of development, determined by the respective predominance of concepts such as territorial sovereignty,¹⁰⁵ national identity¹⁰⁶ and continental hegemony.¹⁰⁷

The first paradigmatic revolution addressed the content of the first assertion that distinguishes every paradigm of order, namely the assertion concerning the extension of order. That means that conceptions of order were developed, for the first time, according to which the well-ordered society can extend so far as to comprise the entire humankind. This marked the transition from a *particularistic* to a *universalistic* understanding of order. Nothing changed, on the contrary, as regards the other contents of the paradigm: social order was still based on the assumption of an organic ontological fundament, and order had to be unitary. Due to its characteristics, this second paradigm of order can be defined as *holistic universalism*. Probably, the idea that order can be universal was formulated for the first time in the Buddhist philosophy through the concept of *dharma*.¹⁰⁸ In the Western world, instead, it was the Stoic philosophy that took this step.¹⁰⁹ Later, Stoic universalism was taken up by the upcoming Christian philosophy.¹¹⁰ In fact, the idea of order of Christianity is, in principle, universalistic, since the message of the Gospel is directed to all human beings. Yet, a significant problem arose with Christian universalism: indeed, if the universality of social, political and legal order is grounded on religion, there is an undeniable threat of discrimination, or even of persecution of the “infidels”, who are actually excluded from the order of peace.¹¹¹ Thus, given that the religion-based universalism is always curtailed and incomplete, the attempt was made – in particular by thinkers influenced by the theology of Reformation – to

¹⁰⁴ Thucydides, *The Peloponnesian War*, in: *Hobbes's Thucydides*, Richard Schlatter ed., Rutgers University Press, New Brunswick (NJ) 1975; Plato, *The Republic*, Benjamin Jowett trans., Collier, New York 1901; Aristotle, *Politics*, H. Rackham trans., Harvard University Press, Cambridge (MA) 1959.

¹⁰⁵ Jean Bodin, *Six livres de la république*, Imprimerie de Jean de Tournes, Lyon 1579 (1st ed. 1576) (English transl. by M.J. Tooley, Blackwell, Oxford 1955).

¹⁰⁶ Adam H. Müller, *Die Elemente der Staatskunst* (1809), Fischer, Jena 1922.

¹⁰⁷ Carl Schmitt, *Der Begriff des Politischen* (1932), in: Carl Schmitt, *Der Begriff des Politischen. Text von 1932 mit einem Vorwort und drei Corollarien*, Duncker & Humblot, Berlin 1963, 20–78 (English transl. by George Schwab, The University of Chicago Press, Chicago/London 2007); Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europeum*, Greven, Köln 1950 (English transl. by G. L. Ulmen, Telos, New York 2006).

¹⁰⁸ Rebecca Redwood French, Mark A. Nathan (eds.), *Buddhism and Law*, Cambridge University Press, Cambridge/New York 2014

¹⁰⁹ Johannes von Arnim, *Stoicorum veterum fragmenta*, Teubneri, Lipsiae 1905, Vol. I and Vol. III.

¹¹⁰ Aurelius Augustinus, *De civitate Dei* (413–426), Moretus, Antverpiae 1600 (English translation by Philip Schaff, The Christian Literature Publishing Co., New York 1890); Thomas Aquinas, *Summa theologiae* [1265–1273], W. Benton-Encyclopedia Britannica, Chicago 1980; Thomas Aquinas, *Political Writings*, R. W. Dyson ed., Cambridge University press, Cambridge/New York 2004; Francisco Suarez, *De legibus, ac Deo legislatore* (1612), in: Francisco Suarez, *Selections from three Works*, Clarendon Press, Oxford 1944.

¹¹¹ Francisco de Vitoria, *De Indis et De Jure Belli Relectiones*, Oceana, New York/London 1964.

ground holistic universalism on purely rational arguments.¹¹² Interestingly, to avoid religion-based biases, they justified the possibility to establish a cosmopolitan social order by resorting to an old Stoic argument, namely to the areligious and allegedly purely rational assumption of the universal sociability of humans. In continuity with the past, the belief in the holistic, universalistic and unitary essence of social rationality is still a defining character of contemporary natural law theory.¹¹³

The third paradigm of order was the result of the second paradigmatic revolution, which did not affect – like the first one – the extension of order, but what had to be regarded as the ontological basis of the “well-ordered society”. In the first two paradigms of order this ontological basis was always holistic or organic, in the sense that a community (of more or less broad extension) was assumed to exist which was regarded as axiologically superior to the sum of all its members. Put in a simpler way, the totality of the community was located above the individuals. It was Thomas Hobbes who took the first step on the way to the paradigmatic revolution from holism to individualism in political philosophy. In his view, the logical starting point of social order was not the existing community, but the individuals with their endowment of rights, reason and interests. With the second paradigmatic revolution the hierarchy was thus reversed: the individuals were located above the community, which was presumed to exist only on the basis of their free act of will and in order to protect their rights.¹¹⁴ Accordingly, society was established by a contract stipulated by free and equal individuals – whence the definition of this strand of political philosophy as *contractualism*. Depending on how many rights the individuals, then united to form a society, agreed to transfer to the public power that had been created by the contract, the *individualistic paradigm of order* developed into two different strands: *liberal* contractualism, in which only the right to persecute offenders is handed over to the public power and the parliament is entrusted with strong legislative and control competences,¹¹⁵ and *democratic* contractualism, in which actually all rights are alienated, yet not to the institutions of public power, but to the citizens themselves as a whole, who are now joined to form a political community.¹¹⁶

At first, the supporters of the individualistic paradigm of order had little interest in international relations, so that the question regarding how this paradigm dealt with the extension of order remained unanswered for long time. However, since the individualistic paradigm put at the centre of its idea of order the individuals with their most abstract features – i.e. as holders of rights, interests and reason –, it is difficult to imagine how limits could be set to the extension of the well-ordered society. As a result, individualism is implicitly *universalistic*, so that we can

¹¹² Alberico Gentili, *De Jure Belli Libri Tres* (1589), Typographeo Clarendoniano, Oxonii (Oxford) 1877 (English: Clarendon Press, Oxford 1933); Hugo Grotius, *De Jure Belli ac Pacis* (1625) (English: *The Rights of War and Peace*, Richard Tuck ed., Liberty Fund, Indianapolis 2005); Johannes Althusius, *Politica Methodice Digesta* (1603) (English transl. of the 1614 ed.: Johannes Althusius, *Politica*, Frederick S. Carney ed., Liberty Fund, Indianapolis 1995); Samuel Pufendorf, *De jure naturae et gentium libri octo* (1672) (complete English translation by Basil Kennet, Lichfield et al., Oxford 1703,; partial English translation by Michael J. Seidler, in: Samuel Pufendorf, *The Political Writings*, Craig L. Carr ed., Oxford University Press, Oxford/New York 1994).

¹¹³ John Finnis, *Natural Law and Natural Rights*, Clarendon Press, London 1980; Germain Grisez, Joseph Boyle, John Finnis, *Practical Principles, Moral Truth, and Ultimate Ends*, 32 *The American Journal of Jurisprudence* (1987) 99; Nigel Biggar, Rufus Black (eds.), *The Revival of Natural Law*, Ashgate, Aldershot 2000.

¹¹⁴ Thomas Hobbes, *Elementa philosophica de Cive* (1642), Johan. Jac. Flick 1782 (English translation by Richard Tuck and Michael Silverthorne: *On the Citizen*, Cambridge University Press, Cambridge/New York 1998); Thomas Hobbes, *Leviathan, or the Matter, Form, and Power of a Commonwealth Ecclesiastical and Civil* (1651), Clarendon Press, Oxford 1929.

¹¹⁵ John Locke, *Two Treatises on Government* (1690), Yale University Press, New Haven/London 2003.

¹¹⁶ Jean-Jacques Rousseau, *Du contract social, ou principes du droit politique* (1762), Garnier-Flammarion, Paris 1966 (English translation: *The Social Contract*, in: Rousseau, *The Social Contract and the First and Second Discourses*, Susan Dunn ed., Yale University Press, New Haven/London 2002, 149–254).

properly define the third paradigm of social order as *universalistic individualism*. The first author who became aware of the intrinsically cosmopolitan nature of individualism was Immanuel Kant. Indeed, he not only upheld the idea of the centrality of the individuals in his understanding of social, political and legal order but also explicitly took position in favour of a cosmopolitan framework for order. More specifically, he introduced for the first time a cosmopolitan law (*jus cosmopolitanum*) as one of the three parts of public law – along with state law (constitutional law, especially) and traditional international law (*jus gentium*).¹¹⁷ While traditional international law is a legal framework that governs the relations *among* states, cosmopolitan law is *supra-state law*. More than a century after Kant, Hans Kelsen drew the most radical consequence from the idea of cosmopolitan law by locating international law – and in particular that part of it which has *erga omnes* validity – at the top of his still rigorously unitary and hierarchical system of legal norms.¹¹⁸ His legally shaped *civitas maxima* can be regarded as the most ambitious blueprint for a strongly centralized cosmopolitan order centred on the priority of individual rights.

4.3. The Post-unitary or Pluralist Paradigms of Order

The *third paradigmatic revolution* involved what has been described as the third element that is always present in a paradigm of order, namely the assertion concerning the unitary or non-unitary character of a well-ordered society. Regardless of whether they were particularistic or universalistic on the one hand, holistic or individualistic on the other, the paradigms of order before the third paradigmatic revolutions were all characterized by a *unitary* idea of order. This means that, in all these previous paradigms, the institutional structure and the system of norms are considered “well-ordered” only if they are organized as coherent, vertical and hierarchical unity, as a pyramid in which conflicts between different institutions and norms have to be resolved by defining which institution or norm, respectively, has priority over the conflicting one. Instead, the third paradigmatic revolution has paved the way for an understanding of order in which the well-ordered society is conceived of as a polyarchic, horizontal and interconnected structure that reminds us more of a network than of a pyramid. In this social, political and legal configuration of interrelated decision-makers, conflicts of institutions and norms are not a dangerous threat for order; rather, they can be operationalized in discursive procedures aiming at reaching consent and not at establishing – or re-establishing – hierarchies.

The first contemporary post-unitary paradigm of order is based on the epistemological approach of *systems theory* and has already been introduced before while addressing the question of the truth content of the specialized legal subsystems.¹¹⁹ Resuming its main conceptual tenet, it can concisely be said that, insofar as the law has the function to guarantee the internal order of different social subsystems, the legal system itself loses its unity and develops distinct legal *subsystems*, each of them characterized by the rationality, expressed in legal terms, that underlies the implementation of the subsystemic functions.

¹¹⁷ Immanuel Kant, *Zum ewigen Frieden. Ein philosophischer Entwurf*, in: Immanuel Kant, *Werkausgabe*, Wilhelm Weischedel ed, Suhrkamp, Frankfurt a. M. 1977, Vol. XI, 193–251, at 203 (English translation by H. B. Nisbet: *Perpetual Peace: A Philosophical Sketch*, in: Immanuel Kant, *Political Writings*, Cambridge University Press, Cambridge/New York 1991, 93–130, at 98 et seq.); Immanuel Kant, *Die Metaphysik der Sitten* (1797), in: Kant, *Werkausgabe*, *supra* n. 117, Vol. VIII, 309–634, Part I/II, § 62, at 475 et seq. (English translation by Mary J. Gregor: *The Metaphysics of Morals*, Cambridge University Press, Cambridge/New York 1991, at 158 et seq.).

¹¹⁸ See *supra* n. 5.

¹¹⁹ See *supra* Section 3., n. 100 et seq.

The second post-unitary paradigm of order has essentially developed as a result of the sceptical philosophy of language of the later Wittgenstein¹²⁰ and, even more, as a consequence of the transfer of Michel Foucault's postmodern critical approach into political philosophy and legal science. The explicit target of postmodern criticism is the modern concept of subjectivity, as expressed by the context of the universalistic-individualistic paradigm.¹²¹ In particular, the modern subject is accused to be nothing less than an artificial construct imposed to constrain human experience and action capabilities into a forced and oppressive unity. Therefore, actual human individualities have to realize themselves beyond the boundaries of a unitary – and lastly tyrannical – idea of order, enforced by a diffuse power aiming at the full control over bodies and minds. The specific feature of the paradigm of order that derives from the postmodern criticism of modern individualism, consists in the assumption – made, in such explicit terms and with such a large influence, for the first time in Western thinking – that order, in the sense of rules that the society in its totality has to follow, is in principle a threat to the self-realization of the concrete individualities. At this point, two different strands of the postmodern approach develop, both applying the critical look at the world of social, political and legal interactions. The first variant picks up the most radical interpretation of postmodern criticism, maintaining that, insofar as order is in its essence oppressive, the only possibility to make the society more “human” would consist in opposing, if necessary with violence, the established rules and in substituting them with spontaneous form of self-expression of subjectivity. The second variant is by far less extreme and relies on the more moderate dimension of postmodern critical analysis of the modern society: order in its absoluteness remains threatening, but it does not need to be radically denied and subverted. Rather, it has just to be de-structured as a whole and split into a plurality of *orders* – in plural. Given the context of plurality, order loses its all-embracing, tyrannical comprehensiveness, and the individuals gain a new and better chance to realize their plans according to their priorities in the spaces generated by the break of the former rigid texture.

According to the *communicative paradigm* as the third post-unitary paradigm of order, society is made of a plurality of interactions, each of them characterized by a specific aim that influences decisively the discursive contents of the interaction.¹²² Yet, although the aim of the social interaction is essential to determine the contents of the discourse, the rationality embodied in the communication is, from the perspective of the communicative paradigm, not exclusively and even

¹²⁰ See *supra* n. 94.

¹²¹ Michel Foucault, *L'ordre du discours* (1970), Gallimard, Paris 1971 (English translation in : Robert Young (ed.), *Untying the Text : A Post-Structuralist Reader*, Routledge & Kegan Paul, Boston/London/Henley 1981, 48–78) ; Michel Foucault, *Histoire de la folie à l'âge classique*, Gallimard, Paris 1961 (English translation by Jonathan Murphy and Jean Khalifa: *History of Madness*, Routledge, London/New York 2006); Michel Foucault, *Les mots et les choses*, Gallimard, Paris 1966 (English translation : *The Order of Things*, Routledge, London/New York 1989, 1st ed. 1970); Michel Foucault, *Surveiller et punir*, Gallimard, Paris 1975 (English translation by Alan Sheridan: *Discipline and Punish*, Vintage Books, New York 1995, 1st ed. 1977); Michel Foucault, *Histoire de la sexualité, I : La volonté de savoir*, Gallimard, Paris 1976 (English translation by Robert Hurley: *The History of Sexuality. Volume I: An Introduction*, Pantheon Books, New York 1978); Michel Foucault, *The Subject and Power*, in: Hubert L. Dreyfus, Paul Rabinow (eds.), *Michel Foucault: Beyond Structuralism and Hermeneutics*, Chicago University Press, Chicago 1982, at 208.

¹²² Karl-Otto Apel, *Transformation der Philosophie*, Suhrkamp, Frankfurt a. M. 1973; Karl-Otto Apel, *Diskurs und Verantwortung*, Suhrkamp, Frankfurt a. M. 1990; Karl-Otto Apel, *Selected Essays*, Eduardo Mendieta ed., Humanities Press, Atlantic Highlands (NJ) 1996; Jürgen Habermas, *Theorie des kommunikativen Handelns*, Suhrkamp, Frankfurt a. M. 1981 (English translation by Thomas McCarthy: *The Theory of Communicative Action*, Beacon Press, Boston 1987, 3rd ed., Vol. II).

not primarily functional.¹²³ Rather, the communicative rationality – right from the understanding of communication that is here presupposed – has always a normative core.¹²⁴ Precisely this normative core is what makes communicative rationality universal – and therefore different from the purely systemic rationalities. As regards the legal system, communicative rationality paves the way to a conception in which the manifold articulation of the legal system is recognized, but in a quite different way than in the post-unitary approaches described before. Here, plurality is embedded into an overarching structure, held together by the implementation of communicative reason as a counterpart of systemic rationality – a counterpart that is operating not only from outside the social subsystems but also inside each of them.

4.4. How to Locate the Concepts of Legal Theory within the Context of the Paradigms of Order

Drawing the map of the paradigms of order enables us to understand which social rationality lies at the basis of a system of legal norms as well as of the most relevant legal concepts. Furthermore, it allows us to recognize the reasons why a concept has changed its meaning during time in order to adapt to the way in which the “well-ordered society” was then conceived. Finally, it makes it easier to identify similarities – or differences – between concepts insofar as their contents refer to the same paradigms or to different ideas of order. Let us make some examples of how the procedure works.

a) Originally, the concept of *sovereignty* was undoubtedly part of the conceptual construct of holistic particularism inasmuch as it reinforced the idea that political power had to be necessarily hierarchical, organic and limited in extension. To some extent, this interpretation – though partially softened – is still influential.¹²⁵ However, the transition to the individualistic paradigm – and therefore to the idea that individuals have to be put at the centre of the political community – also transformed the notion of sovereign power in the sense that, from then on, this had to be understood as “power of the people”, or “popular sovereignty”. Moreover, the emergence of a universalistic conception of order requires from sovereign powers to qualify as “trustees of humanity”.¹²⁶ In addition, the turn to pluralism introduced the possibility to conceive of sovereignty as a multilayered structure, in which the identity of the single polity coexists with cosmopolitan responsibility.¹²⁷

¹²³ Jürgen Habermas, *Erläuterungen zur Diskursethik*, Suhrkamp, Frankfurt a. M. 1991 (English translation by Ciaran Cronin: *Justification and Application*, MIT Press, Cambridge (MA)/London 2001, first published 1993).

¹²⁴ Jürgen Habermas, *Nachmetaphysisches Denken*, Suhrkamp, Frankfurt a. M. 1988 (English translation by William Mark Hohengarten: *Postmetaphysical Thinking*, Polity Press, Cambridge 1992); Jürgen Habermas, *Vorstudien und Ergänzungen zur Theorie des kommunikativen Handelns*, Suhrkamp, Frankfurt a. M. 1984 (English translation by Barbara Fultner: *On the Pragmatics of Social Interaction*, MIT Press, Cambridge (MA)/London 2001); Jürgen Habermas, *Wahrheit und Rechtfertigung*, Suhrkamp, Frankfurt a. M. 1999 (English translation by Barbara Fultner: *Truth and Justification*, Polity Press, Cambridge 2003).

¹²⁵ Martin Loughlin, *What Is Constitutionalisation*, in: Petra Dobner, Martin Loughlin (eds.), *The Twilight of Constitutionalism*, Oxford University Press, Oxford/New York 2010, 47–69; Martin Loughlin, *The Foundations of Public Law*, Oxford University Press, Oxford/New York 2010, 209–237.

¹²⁶ Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, in: 107 *The American Journal of International Law* (2013/2) 295.

¹²⁷ Sergio Dellavalle, *On Sovereignty, Legitimacy, and Solidarity: Or: How Can a Solidaristic Idea of Legitimate Sovereignty Be Justified?*, in: 16 *Theoretical Inquiries in Law* (2015/2) 367; Sergio Dellavalle, *Squaring the Circle: How the Right to Refuge Can Be Reconciled with the Right to Political Identity*, in: 16 *International Journal of Constitutional Law* (2018) 776.

b) The second pillar of holistic particularism is the conviction of the central importance of *national identity*.¹²⁸ While some authors still maintain that national identity is the bulwark of constitutionalism,¹²⁹ the supporters of any conception of social order beyond holistic particularism claim that we have entered a post-national constellation – which they explicitly welcome as an important step towards the realization of international peace and social justice.¹³⁰

c) A further support for holistic particularism originates from *religious identity*, which is seen by some as the ideological element that can weld together social communities more diverse and larger than nations, while preparing them for the inevitable existential struggle against other, similarly shaped communities.¹³¹ Yet, from a universalistic point of view the very same religious faith can undertake the opposite task, i.e. it can contribute to forge a cosmopolitan sense of solidarity.¹³²

d) The fourth and last conceptual instrument of holistic universalism is the application of the theory of *rational choice* to international law and relations, according to which only selfish preferences of national states are rationally justifiable.¹³³ However, if we adopt any other understanding of rational behaviour – which does not regard behaviour as rational inasmuch as it increases particularistic payoffs, but rather insofar as it aims, for example, at reaching the largest possible consensus – then the most rational option will take the shape of the strengthening of international cooperation.¹³⁴

e) The claim of the contemporary *Lex mercatoria* to be a self-reliant subsystem of legal norms is much better understandable if we become aware of the social rationality on which it is grounded, namely systems theory.¹³⁵ Indeed, since each subsystem – characterized by a specific functional rationality – is self-referential and independent of the environment made by all other subsystems, it is possible to conceive of the corpus of norms that regulates the interaction of private economic agents as a self-regulating order, and therefore as an autonomous paradigm of order. From the perspective of communicative rationality, on the contrary, the self-reliance of the *Lex mercatoria* appears to be quite questionable.¹³⁶

f) *Legal pluralism*¹³⁷ and *global governance*¹³⁸ are expressions of the postmodern idea of social rationality since both of them reject – explicitly in the first case, implicitly in the second – the existence of an all-encompassing suprasystemic rationality. However, they are subject to criticism

¹²⁸ Anthony D. Smith, *National Identity*, Penguin, London 1991.

¹²⁹ Dieter Grimm, *The Achievement of Constitutionalism and its Prospects in a Changed World*, in: Petra Dobner, Martin Loughlin (eds.), *The Twilight of Constitutionalism*, Oxford University Press, Oxford/New York 2010, 3–22; Dieter Grimm, *Sovereignty*, Columbia University Press, New York 2015.

¹³⁰ Jürgen Habermas, *Die postnationale Konstellation*, Suhrkamp, Frankfurt a. M. 1998 (English translation by Max Pensky: *The Postnational Constellation*, MIT Press, Cambridge (MA)/London 2001).

¹³¹ Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, Simon & Schuster, New York 1996.

¹³² Parliament of the World Religions, *Declaration Toward a Global Ethic*, Chicago (IL) 1993; Foundation Global Ethic, *World Religions – Universal Peace – Global Ethic*, Global Ethic Foundation, Tübingen 2008.

¹³³ Jack L. Goldsmith, Eric A. Posner, *The Limits of International Law*, Oxford University Press, Oxford/New York 2005.

¹³⁴ Thomas Risse, “Let’s Argue!”: *Communicative Action in World Politics*, in: 54 *International Organization* (2000) 1; Sergio Dellavalle, *Opening the Forum to the “Others”: Is There an Obligation to Take Non-National Interests into Account within National Political and Juridical Decision-Making-Processes?*, in: 6 *Göttinger Journal of International Law* (2014/2) 217.

¹³⁵ See *supra* n. 39.

¹³⁶ See *supra* n. 43.

¹³⁷ See *supra*, Section 2.3.1.

¹³⁸ See *supra*, Section 2.3.3.

not only from the supporters of the communicative rationality: indeed, from the point of view of the non-pluralist conception of rationality, both approaches are simply undermining the true meaning of law as the manifestation of a particularistic sovereign power.¹³⁹

g) In its most radical variant, postmodern thinking radically dismisses the very idea of social order as a positive phenomenon – at least in the form in which we have traditionally known it – denouncing it as an instrument of the diffuse oppression that characterizes the “society of control”.¹⁴⁰ Some other authors use the postmodern deconstruction of modern subjectivity, as the bulwark of a centralized, Western-biased, patriarchal and ultimately authoritarian notion of the “well-ordered society”, not to reject order entirely, but to restructure it so as to make it more receptive to the claims raised by non-Western scholars¹⁴¹ and feminist theorists.¹⁴²

h) Cosmopolitan constitutionalism is a central goal of all universalistic paradigms of order. Nonetheless, we can detect different proposals with quite distinct features, depending on their respective epistemological background. Authors who can be led back to holistic universalism, for example, tend to assume a natural law fundament for world constitutionalism, implicitly refer to an alleged sociability of all humans, which would urge them to build a universal community of shared values and interests, and finally assign to the international judiciary the most relevant role in defending world order.¹⁴³ On the contrary, individualistic universalism puts – in Kant’s and Kelsen’s vein – individual rights and freedom of agency at the centre, without postulating any kind of pre-determined universal community which would pre-exist the legal shaping of world order.¹⁴⁴ The universalism of the communicative paradigm, lastly, takes the pluralist turn into due account by locating cosmopolitan cosmopolitanism into a multilayered setting.¹⁴⁵ Furthermore, it emphasizes – much more than its holistic counterpart – the necessity of an adequate democratic legitimacy of cosmopolitan institutions.¹⁴⁶

¹³⁹ Alexander Somek, *Administration without Sovereignty*, in: Petra Dobner, Martin Loughlin (eds.), *The Twilight of Constitutionalism*, Oxford University Press, Oxford/New York 2010, 267–287.

¹⁴⁰ Michael Hardt, Antonio Negri, *Empire*, Harvard University Press, Cambridge (Ma) 2001.

¹⁴¹ B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, in: 8 *International Community Law Review* (2006) 3.

¹⁴² Catharine A. MacKinnon, *Toward a Feminist Theory of the State*, Harvard University Press, Cambridge (MA) 1991 (1st ed. 1989); Hilary Charlesworth, *Feminists Critiques of International Law and Their Critics*, in: 13 *Third World Legal Studies* (1995) 1.

¹⁴³ Christian Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century*, “Collected Courses of The Hague Academy of International Law”, Vol. 281, Nijhoff, The Hague 1999, 56–90; Bardo Fassbender, *Rediscovering a Forgotten Constitution*, in: Dunoff/Trachtmann, *Ruling the World?*, *supra* n. 41, 133–147; Mehrdad Payandeh, *Internationales Gemeinschaftsrecht*, Springer, Heidelberg/New York 2010. For a critique, see: Andreas L. Paulus, *The International Legal System as a Constitution*, in: Dunoff/Trachtmann, *Ruling the World?*, *supra* n. 41, 69–109.

¹⁴⁴ Otfried Höffe, *Demokratie im Zeitalter der Globalisierung*, Beck, München 2002; 1st ed. 1999 (English translation by Dirk Haubrich and Michael Ludwig: *Democracy in an Age of Globalization*, Springer, Dordrecht 2007).

¹⁴⁵ Habermas, *Der gespaltene Westen*, *supra* n. 69; Jürgen Habermas, *Eine politische Verfassung für die pluralistische Weltgesellschaft?*, 38 *Kritische Justiz* 222 (2005); Jürgen Habermas, *Kommunikative Rationalität und grenzüberschreitende Politik: eine Replik*, in: Peter Niesen & Benjamin Herborth (eds.), *Anarchie der kommunikativen Freiheit*, Suhrkamp, Frankfurt a. M. 2007, at 439 et seq.; Jürgen Habermas, *Konstitutionalisierung des Völkerrechts und die Legitimationsprobleme einer verfassten Weltgemeinschaft*, in: Winfried Brugger, Ulfried Neumann & Stephan Kirste (eds.), *Rechtsphilosophie im 21. Jahrhundert*, Suhrkamp, Frankfurt a. M. 2008, at 368 et seq.; Kumm, *On the Cosmopolitan Turn in Constitutionalism*, *supra* n. 64.

¹⁴⁶ Anne Peters, *Dual Democracy*, in: Klabbers/Peters/Ulfstein, *The Constitutionalization of International Law*, *supra* n. 53, 263–341.

5. *Conclusion: The Roads to Interdisciplinarity*

The analysis has shown that, to understand the legal phenomenon in our times and to keep pace with it, the interdisciplinary approach to the law with its many disciplines should be developed along three main lines. The first dimension of interdisciplinarity is internal to the law and refers to the overlapping of the different legal disciplines in the context of law's transnationalization. The second refers to the extra-legal rationality that impacts upon legal norms which regulate specific social interactions. The third dimension of interdisciplinarity finally connects legal subsystems to broader ideas of the "well-ordered society" and, through these, to extra-legal knowledge. Opening up to interdisciplinarity does not mean that the positive and unique contents of legal disciplines should be neglected in research and teaching. Rather, it implies that their analysis in scholarly works has to be integrated by a more focused attention on transnational law and on how, in that context, specialized legal disciplines interact with one another. Furthermore, on a more theoretical level, the ways should be explored in which the positive contents of legal disciplines are imbued by the functional rationalities of the social subsystems to which they are related, as well as by the suprasystemic claims about how a "well-ordered society" is assumed to look like. All this knowledge has to be transferred, then, into didactics through the establishment of both mandatory and optional courses within law schools. In the end, the practical changes would affect the research agenda of legal scholars and the curricula of law students rather peripherally, since the core of legal research and teaching would largely remain the same. Yet, the beneficial effects of such a quite limited move would be anything but irrelevant: by taking up the challenge of interdisciplinarity, in fact, legal research and teaching would prove their capacity to take the most recent social developments into account, while being self-aware of the social role of legal norms as well as of how this is re-adjusting in a rapidly changing world.

Cover: Imbalanced World, 1996, Veronika Dell'Olio (photo: Miriam Aziz)

“Essential to our concept was the establishment of a connection to the work and objectives of the institute. In view of the diversity of the research tasks concerned, we have attempted to highlight an overarching idea that can be understood as the institute’s mission. We see this as the ideal of peaceful relations between peoples on the basis of an internationally validated notion of justice.... The depicted sculpture...[symbolizes] an imbalanced world in which some peoples are oppressed while others lay claim to dominance and power. The honeycomb form of the circular disks denotes the [international] state structure. Glass parts ... [represent] the individual states [The division] of the figure ... into two parts [can] be interpreted as the separation of the earth into two unequal worlds. The scissors-shaped base, on the one hand, makes the gap between them clear, on the other hand, a converging movement of the disks is conceivable.... The sculpture [aims] at what is imagined – the possibility of the rapprochement of the two worlds.”
[transl. by S. Less]

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