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The concept and conceptions of transnational and global law

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Matej Avbelj

The Concept and Conceptions of Transnational and Global Law

Discussion Paper

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Matej Avbelj

The Concept and Conceptions of Transnational and Global Law

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Abstract

The Concept and Conceptions of Transnational and Global Law

by Matej Avbelj

The following contains a transcript of the workshop, which was held in June 2015 at the Graduate School of Government and European Studies in Ljubljana, Slovenia. The workshop marked the final stage of Dr. Avbelj's research project, supported by the Slovenian Research Agency, which was dedicated to the Post-modern challenges of transnational law to the European Union. The workshop gathered four leading scholars in the field of transnational and global legal studies: Jose-Manuel Barreto, Mattias Kumm, Gianluigi Palombella and Neil Walker. They have touched on the contemporary most pressing issues of transnational and global legal regulation.

Key words: transnational and global legal regulation

I. Introduction

How do we conceptually imagine transnational and global law? Is there still room for the conventional understanding of law or do we need to move beyond it? How does the chosen conceptual framework impact on global justice? Is there such a thing and how could or should be brought about? What is the role that legal education on the national level should play in times of transnational and global law? Do transnational and global laws pose a threat or do they present an opportunity for democracy, rule of law and human rights protection? Is this debate only theoretical, about the problems that are largely abstract and of concern to academic elites only; or does it derive from the practical, real historical shifts, connected to demise of the nation state and development of global capitalism? If the latter, are transnational and global law conscious of the context from which they have emerged and in which they operate, so that they will not be used merely as another means of legitimating the world's most powerful? Who is to answer these questions, in which fora, what are the relevant constituencies and, finally, criteria, shared or diverging, for assessing the answers' persuasiveness?

These are some of the questions that the four speakers touched upon in a highly interactive dialogical exchange. The topicality of the issues and especially the quality of the discussion mandate to make the workshop's content available to a larger scholarly community. This is why the substance of the workshop has been transcribed and is now, after several slight editorial touches, reproduced in this journal. While it is certainly departing from the traditional methodological canons of written scholarship, this contribution doubtlessly incorporates the essence of a high quality academic work. It is about original ideas concerning highly interesting practical matters, full of intellectual stimulus for further research and debate. As an editor, I entertain no doubt that this transcript makes a fantastic contribution to the vibrant scholarly field of transnational and global law.

Matej Avbelj:

Good afternoon everyone. First of all, thank you very much for coming today. I am especially grateful to our speakers who came from various places around Europe to be here with us and to make this workshop actually possible. Thank you very much for being here. I would like to start by saying a few words about the idea of the workshop, how it is going to be structured and about the context that it is set in.

This workshop is supported by the Slovenian Research Agency and is envisaged as a final leg of my postdoctoral project, which has been concerned with the question of postmodern challenges of transnational law for the EU. This project addresses many topical issues and challenges – I am thinking about modernity and the shift to postmodernity, reflecting on using legal pluralism as a paradigm through which we can approach the legal questions and challenges spurred by transnational law to the EU. Of course to do so, one has to have a conception and understanding of transnational law, as well as of the EU.

Much of my project has been influenced by my earlier work: by my work at NYU School of Law and at the EUI and other international academic sites where I worked and studied, and it was there where I got in touch with the work, ideas, and theories, thought-provoking challenges by today's distinguished guests. It has been their work that has inspired me a lot, and posed a number of challenges to me, as well as interesting questions, to which I have tried to find the answers. Therefore, it is really my great honour to have these great academics with us today to discuss the elusive nature of transnational and global law and their impact on our (legal) world as we have known it.

Today's workshop is going to ask a question about the concept and conceptions of transnational and global law. It is going to be broken down into two parts. In the first part, we are going to discuss the conceptual and the methodological issues related to transnational and global law. In the second part, we will move more towards normative questions, to the "as-applied" challenges of transnational and global law. We will, in conclusion, also take some questions from the audience.

Having said all that, we should get started. The first question and challenge that I would like to put on the table is about the very subject matter of the today's workshop. Speaking about, the concept and conceptions of transnational and global law, we should ask first: what is global law, what is transnational law and why, if at all, is important to talk about them today?

I would like to start with you Neil, for a very simple reason, since you have recently published a book on *Intimations of Global Law*,¹ in which you, *inter alia*, concentrate precisely on these questions.

Neil Walker:

Thank you very much Matej. It will take me about three and a half hours to read out the entirety of my new book, so you can all sit back and relax! Seriously, thank you for the introduction and it is great to be here. I have been here once before a number of years ago and very much enjoyed it. It is nice to be back, especially among such an interesting group.

Let me start by saying something that might seem fairly obvious. The reason why there is such an emphasis upon concepts such as transnational law and global law - and in due course we can look at the distinction between these two terms - is that there seems to be awareness, an intuition and a sense, certainly within academic community that there has been a "decentering" of state law. State law is no longer viewed as being at the centre of the legal universe in the way it once was. Let me say something about this and how we may characterise this. Obviously, this is a very stylized history - it is no part of my argument that one day we lived in a state-based system that the next day was transformed into something else. The state-based system was always a partial system and also an imperial system, a system organised around western states with their colonies and empires beyond this. It was never a system which was undifferentiated - it knew internal differences and co-existed with other political structures.

The state based system was thus never hegemonic. It was a framework for thinking about law which was nevertheless very powerful. It was a framework based upon the centrality

¹ Neil Walker, *Intimations of Global Law* (CUP, 2014).

of state sovereignty (both externally and internally). I think maybe one way to describe it, and one of the ways I tried to describe it in the 'Intimations' book was to say it was based upon what I called a triple divide – i.e. three sets of divisions. One of the divisions is a straightforward division between what you might call the internal and the external. The idea of the 'internal-external' division is that the internal sovereignty and external sovereignty inhabit quite different domains of law. There is something called domestic constitutional law and something called international law. Through internal sovereignty we have domestic law including constitutional law. Through external sovereignty each of these sovereigns has a voice and a title to participate in international relations. This is a straightforward distinction.

The second distinction in the triple division is what I call the 'internal-internal' division, which is to say that as regards each of the states and each of their internal orders, they are mutually exclusive – they are hermetically sealed off. The domestic law of country A is sealed-off the domestic law of country B. The internal-internal distinction is also important.

But also the third distinction which I call the 'external-external' division is important. There is a further and 'outer' frontier in international relations, which says that the only key actors themselves are states, and that the external or international realm itself is limited to relations between states, with all other transnational actors invisible or consigned to some lesser outer realm.

If that is a starting point then of course there always were examples of public international law in its recognition of international organisations, of private international law, and of various different forms of specialist transnational law, *ius commune et cetera*, that challenged these neat divisions. But what we are seeing in the context of the present wave of globalisation is a massive intensification of the movement which breaks down these three sets of divisions. This could have been through the creation of supranational organisations, such as the EU or international organisations, such as UN, the World Trade Organisation etc. Or could it be from within the state itself, from sub-state federal or quasi-federal units within the states. Or could it be from the private world, i.e. anything from FIFA – a good example for these days. The international Olympic Committee or let's

say ICANN which deals with the regulation of the internet – a hybrid public-private body, or the ISO – International Standards Organisation which e.g. specifies the detailed standards of every piece of furniture in this room. What we are talking about is a vast movement of regulation of a sort which defies the received ‘box-matrix’ model of the three divisions.

I am going to stop here because beyond that it would simply be making too much of a negative point – about the shape of what is no longer there rather than the terms of the new configuration. There are all sorts of questions, e.g. why this has happened, what the normative implications of that are, and also quite crucial to the debate is how we subcategorise and label the parts of the new order e.g. distinguishing, let’s say, transnational law from global law etc. I will leave these questions on the table and answer them later on.

Matej Avbelj:

Thank you very much Neil. Mattias maybe you could jump in here and add something to the previous two questions, as well as taking it a step further to the question of legality of transnational and global law. How do we know that transnational and global law are really law?

Mattias Kumm:

I will try to make at least a little progress towards answering some of these hard questions. There are two basic ways in which the legal world we inhabit has changed since 1990. On the one hand new institutions and new legal norms have been created, as Neil has described. On the other hand the basic normative background understanding – the cognitive frame we use to engage these institutions and norms as lawyers – has changed. Both are connected to political and social changes following the end of the Cold War. Let me elaborate just a little.

After 1990 there was a widespread confidence that the world is no longer best understood as constituted by a number of major powers with their own legal systems competing with

one another economically, politically and militarily. Instead there was the hope and expectation that great power competition, or competition between major ideological opponents was effectively over. The regulative ideal informing the legal imagination after 1990 - not just in the western world - was the idea of a world made up of equally sovereign states, that shared two basic commitments.

First, state's internal constitutional structure would reflect a commitment to human rights, democracy and the rule of law - they would aspire to be liberal constitutional democracies. Post 1990's all the new states that emerged and all new constitutions that were enacted, were basically attempts to contextualise in an appropriate way the idea of liberal constitutional democracy. In that sense a commitment to human rights, democracy and the rule of law had become the foundational grammar for the justification of legitimate authority. These three general principles of law were now understood to effectively constitute the Trinitarian dogma of a global constitutionalist faith. But the shift was not just one that concerned the legal imagination: International law - human rights law, in particular - was now effectively understood as requiring states to institutionalize these commitments as a matter of domestic constitutional law, and gross systemic violations of these commitments might potentially trigger humanitarian intervention in the name of the global community, exercising its responsibility to protect. In that way globalisation goes right to the heart of the constitutional identity of each equal sovereign state.

Second, these liberal constitutional democracies would be legally integrated into a larger global community which itself would have to meet certain rule of law requirements. What made this larger order global rather than just international was not just that new institutions, including new courts and tribunals, that would discipline states more effectively. To effectively organize the global economy non-traditional actors, be they private actors (such as investors), Central Bankers (in the Basel Committee), or NGO non-traditional rule-makers (such as ISO or ICANN) and other institutions were starting to play an important role.

The aftermath of the Cold war thus saw the emergence of the global hegemony of shared constitutionalist background assumptions relating to human rights, democracy and the

rule of law as well as a more powerful network of border-transcending actors and institutions of an increasingly integrated global economy. Both developments challenged classical positivist will-based and state-based understandings of law and produced a plethora of new attempts to conceptualize new phenomena, that Neil's book describes well.

Gianluigi Palombella:

I think that we should better clarify here, for the benefit of the audience, a further aspect of the state of affairs. Let us uphold the question asked by our host Matej, about the concept and the conceptions of global law. In general, the couple (concept-conceptions) was famously elaborated by Dworkin: on the premise of socially shared meanings, that like courtesy and respect, are community dependent.

Global law is a practice, reflected upon mainly by epistemic communities of experts and scholars, and bearing socially elusive features. Unsurprisingly, its very paradigm is contended upon in the hegemonic attempt of at least three separate strands: like private law, public international law and Global Administrative Law (GAL), let alone the attempt to design a further global constitutionalist architecture. Each of them aspire to offer the *clavis universalis*, the explanatory *rationale*: from the pervasive spontaneous new wave of private *lex mercatoria* to the State-dependent public international law control of jurisgenerative fragments; finally to the network of global self referential regulatory entities with administrative capacity enhanced in the perspective of GAL as a brand-new phenomenon irreducible to the private-public international law categories of the past.

Our 'descriptions' and our 'conceptions' have here a constructive and normative momentum. All the more so, if we realize that 'global law' appeals to its higher, comprehensive primacy over lower and less-than-global orders, that are required to abide by it and implement its outputs. Global legality invokes and avails of its coordinative, all-embracing and rationalizing role *vis à vis* the 'particularity' and narrower spectrum of normativity covered by any other interlocutors. And this pretense of directive primacy equates the picture of the multilevel plural legalities on the globe to a Russian-dolls-like image that I believe is precisely the one we should better oppose.

As we might come to discuss later on, I believe we have to bear in mind that ‘being global’ (a global regime, a global regulatory authority, global legislation, norm production and so forth) meant as a matter of planetary reach admittedly amounts to a sheer fact. However, it does not coincide, neither conceptually nor historically, with universality. Contrariwise, the claim to universality is a normative stance, in need of and working as a selective check. It can be conceded only on the basis of criteria of justification, from viewpoints that are independent upon the claimant. The gap between ‘globality’ and universalizability is a fundamental issue in the fight among ‘conceptions’. At the same time it is precisely where dialogue, resistance, confrontation among different concurring or competing legalities should take place and should be about. I stop here, but as you know I have tried to elaborate upon this issue at length, also in my book.²

Matej Avbelj:

Having said that, having shed light on the emergence of transnational and global law through the evolution of actual practices, but also by way of changing the cognitive framework, before moving on to new questions, let me go briefly back to you Neil. To the benefit of the audience and all those interested, could you elaborate a little bit more on the distinction between international law, transnational law and global law?

Neil Walker:

Let’s first stick to these three terms, which are somewhat reductive labels. Each one of these terms is of course contested. So international law is the older term. It comes from what the opposition to state law. Indeed, international lawyers of a certain neo-Kelsenian sort assume that the state law comes from international law, and so treating international law as the fundamental jurisgenerative source, they would happily colonise other areas of transnational law etc. But international law is normally understood more narrowly as the

² Gianluigi Palmobella, *E’ possibile una legalità globale. Il Rule of law e la governance del mondo (Is global legality possible? The Rule of law and global governance)*, Il Mulino, Bologna 2012; but also elsewhere for English readers for ex. Gianluigi Palombella, ‘The Rule of Law in Global Governance. Its normative construction, function and import’, *The Straus Institute Publications*, NYU, New York, 5/2010 (2011) (pp. 1-57).

law between states. Both the 'transactional'; law between states, but also things like *ius cogens* and general principles of international law - the more basic structure of general rules which are not based upon contract or transaction, but the key idea is still *international* - the states are the key actors and subjects here.

Transnational law is actually a term coined by Philip Jessup in the 1950s. It is a very broad term which covers any type of law where as a matter of jurisdiction, source, effect etc. there is a transnational element. Basically any law that is capable of crossing the national border. So this is supposed to be a capacious term - he coined it because he actually thought the notion of international law was becoming insufficient for the world which was already globalising in many ways. The real world of law was already breaking the boundaries of international law.

The term global law is more recent and more contentious. I myself use it in a particular way. Let me just say three ways in which it is used - one way would be as a kind of alternative to the term transnational law. There you have to bear in mind that there is a lot of rhetorical usage of the idea of global law, e.g. global commercial firms will often talk about global law - in ways which are conceptually vague or misleading, but rhetorically perfect for their grandiose self-projections.

A second way in which is used is actually a very thin way, where we are only dealing with global institutions. What the UN does would be called global law from that perspective and few others worldwide, or what you might call planetary institutions. I use it in a different way, namely to describe any form of law where regardless of its source or pedigree, its remit, i.e. the area it affects, its jurisdiction is in theory unlimited - e.g. not limited territorially, or to a particular citizenry, only limited in a way that all laws, as normative propositions, *logically* must be limited, i.e. in terms of its basic material remit or propositional terms

So for example, we might think again of the general principles of international law, or we might think of emerging principles of the so-called 'global administrative law' as norms which are seen as somehow operating in a legal world, but they operate in a way which does not depend on a particular pedigree or particular state authority, and which has no

limitations other than the limitations which are actually imposed by the material content of the law itself.

There is much more to be said about the idea of global law in my recent book. One of the things that interest me is the extent to which through the whole set of trends towards the naming of something in global law terms or in similar language - e.g. from the revival of notions of *ius gentium* or *ius commune*, to ideas of global administrative law, global constitutional law etc. there is a number of different ways of thinking about the normativity of what is involved. Sometimes it is much more conceptual than positive, abstract rather than grounded, more about ways of legal framing or models of law (administrative, constitutional etc) than particular rules. There is also a set of interesting questions about the extent to which something is simply proto-law or law in becoming, as opposed to something that is actually and effectively a legal norm. There is nevertheless an interesting semi-convergence of different ways of thinking about law through this common global imaginary. I will call this global law. This stands alongside international law in its narrower remit as a distinctive part of the broader set of transnational legal rules, though even some conventional rules of international law, *ius cogens* and the like, speak to a form of normativity that is claimed to be universal, so transcending the notion of a law between states, and to the extent that they assume an unlimited jurisdiction they edge into my 'global law' category.

Jose-Manuel Barreto:

I would like to add something here. My intention is to try, on the basis of your comment, to develop a concept of global law. You identify global law as a law whose centre is not the state anymore. For me this has to do with the fact that the state is not the only source of the law. The question thus emerges: Who else creates the law? The contribution of the theory of global law has to do precisely with the realisation that there are other sources of law, like transnational companies and the international financial institutions (the IMF, the World Bank, the WTO). This is why it is important to speak about global law. And this creates the possibility of acting in two directions. You engage with the law of the financial institutions or the law of the companies to legitimate them, or you understand them in

order to resist, or to try to avoid, the negative effects that those laws can have in the life of people, e.g. in the health systems, pensions, or in the sovereignty of a country.

The second aspect I found very interesting in your initial presentation is that state law, even before the theory of global law has emerged, was not the only one. It was very important but it was not completely hegemonic. And you have said that it was an 'imperial system'. I am not sure what exactly do you mean by 'imperial system', but I can understand that expression as an indication of the fact that some states already had such accumulation of power and capital in history that were acting as empires or, simply, were empires. What I am pointing at is the idea that historically there have been at least three main sources of law, namely the state, the empires, the companies associated with imperialism and, more recently, the very powerful international financial institutions.

Matej Avbelj:

So far we have learned that transnational law is any law that has cross boundary effects. On the other hand, global law, as Neil has presented it, is something more of adjectival concept that actually has or aspires to a global, universal reach. And we have also learned that this new phenomena are causing some practically felt consequences and changes to the way the state as a self-contained legal entity used to function. If we take for granted that there is something like transnational and global law, we ought to think deeply about it, including what makes them law in the first place.

Gianluigi, you have written a lot about legality in the global realm. How do you approach this question whether transnational law is law, whether global law is law, or is it more a proto-law and if the overall criteria, the conventional criteria that we knew from the state (source based criteria, pedigree criteria) are not available any more on the global transnational level, what is it that we are left with? Which kind of criteria do we have, according to which we can measure that something is law or not? What are your views on this?

Gianluigi Palombella:

Let me note, the legal theory problem here is certainly a matter of speculation but behind that it is forced by reality, the emergence of the global law problem based upon a material situation made of intertwinement among factors of social, economic and financial, and also historical change. Since we cannot get rid of the reality of global interconnections, as a matter of fact, almost nothing remains self-contained. Except for legal regimes! Or at least that is the self-understanding upon which they work. Let me explain: global interconnections generate a problem of complexity control. In order to get to some control, the answer has been: *divide et impera* – the world has been more or less artificially fragmented into separate, specialised areas and functionally contained fields, that are consequently covered through isolated governance authorities, as many as necessary to organise almost every sector of life. Such authorities have started flourishing, from energy to sport and from finance to trade, to health, environment. And we know, Neil also reminded us, they have a limited capacity as to thematic functional objectives, but a global warrant. This is a quality and a feature we cannot forget.

As a matter of fact, global regimes (as it seems about 2000) expose a massive regulatory capacity and reach, directly or indirectly, an indefinite number of addressees who often have no option, whether to be in or out. The quest for the credentials of 'law' starts consequently. So, summing up, first, material complexity, then, organizational *divide et impera* into specialised fields (fragmentation), the overwhelming regulatory outputs, and the quest for requirements of legality. In the last few years we are defining new series of features of legality that should be thought and conceived of, for the first time, independently of the Law-of-the-State paradigm (to which even international law, traditionally, is traced back). The extension – and the connotations – of legality are all the more a matter of dispute: and I tend to think now that we are not so much focusing on the question, whether something is or is not law: scholarship and practitioners tend to work on the functional presupposition that something is law. Jan Klabbers for example has aptly suggested that we should better work on a presumption (that something is law), one that can be contrasted, however, *a posteriori* by checking credentials of the kind taught by Fuller, or in the opinion of Ben Kingsbury through requirements of 'publicity'. Those and

other suggestions have somehow started a process of adaptation and adjustment, shifting the question to partially recasting the requisites that might qualify legality itself.

The norm-like production on the global sphere is checked above all by relevant officials in the practice of a multiple series of rules of recognition, however segmented and institution-relative: in the lack of a unique and global legal system, where the grand box is clearly missing. There is a network of recognitions that makes up for the legality of much of the present 'global legislation'. But even these 'social sources' based idea of legality-validity is often complemented by increasing requirements of civility, that understandably are placed in the respect for natural justice, the rule of law, basic human rights, rationality, and the like. As I said earlier, though, being global law unable to ensure effectiveness without the acceptance by other legal orders and the compliance of others, foremost states, the very point of such legality lies in its being constantly in progress, and *in itinere*. Properly so. All in all, it depends upon the results of the encounter at the limen of regional or State legal orders. At this conjunction, the question is to be resolved, and as I believe, it is at this point that criteria of justification, legitimacy, substantive arguments from universalizability to proportionality and the like can play a crucial role.

Matej Avbelj:

Mattias, would you like to add something here?

Mattias Kumm:

First of all let's try to get a clear understanding of what the puzzle of legality is actually about. If we start off with a traditional positivist conception of law, that puts sources of law at the centre, then we might be tempted to say that fundamentally not much has changed, at least as far as our basic understanding of law is concerned, as it emerges from the point of view of a practicing lawyer. True, there are now more sources of law that lawyers need to be engaged with. Now, besides legislation or administrative actions by the executives of the states, we also have the EU as a very significant actor, definitely not a state, but it is legislating and providing regulations and directives and decisions which are sources of law. Or we have the UN Security Council enacting binding resolutions under

chapter 7. This is binding and is a source of law. On the other hand ISO standards are not a source of law unless there is a source of law that incorporates those standards by reference. Nor are UN General Assembly resolutions, even though they might be relevant for establishing a norm as part of customary law. Nothing of this is puzzling or confusing to lawyers. Yes, the sources have multiplied and many of them only bear a tenuous relation to the state. But lawyers still work with source based posited norms as legal materials, just as they have been for a long time, there is just more of this stuff and from a greater variety of sources, including a variety of sources that are not state based. So from a lawyerly practical point of view nothing much appears to have fundamentally changed.

But of course this is not the whole story, and there is something deeply misleading in the description I have just provided...

Gianluigi Palombella:

If I just may add to this. What Mattias was saying is an introduction to the big issue. If we go back to our received ideas, the conception of the law in states, we see that it is construed on the premise of a system. First, systemic authorities, the organic frame: and then we have the proliferation of legislative or otherwise authorised enactments. So laws are thought to be 'valid' inside a premised system (one that we have known – conceptually contingent – as a state relative system). Now, it is very different in this case, because we do not have a global system and in a way the point is the inversion. It is like a relationship between software and hardware (in our PC). Normally we started from hardware and we got to the necessary specific software for that hardware to work. The legal system (and the state legal system) as we know them, were the hardware. So the software came after. In these global law heights it is precisely the opposite, it is reversed. We see a flourishing of diverse sources' software, but we do not know precisely what the general hardware is. We try to answer and make up for some systemic frame, for software that to the old eyes seems flourishing out of our control.

Mattias Kumm:

I want to jump in there, because there is a very traditional image underlying this choice of analogy, an image of the state somehow preceding law and creating law. This image has been, I think correctly, criticized by Kelsen as deeply metaphysically loaded and ultimately misguided.

Gianluigi Palombella:

I am not submitting such an idea. It is not my point. The relevant point in my analogy is not placed outside the law, the analogy fulcrum is not the state, it is the legal system. And as a matter of fact, we were used to conceive of mature law starting from a legal system.

Mattias Kumm:

The challenge is, and we might agree on this, to describe the variety of sources that we have in fact and that no lawyer would deny exist, as a coherent whole. Whereas traditionally – at least from the domestic context – the very idea of constitutionalism (something that holds everything together) reinforces the idea of unity and system. It is exactly this idea of unity and system that is threatened, when we try to describe the existing legal practice. We have no generally accepted account of how the world of law hangs together, and a deeply fragmented complex practice. So when someone talks about transnational law, global law, global constitutionalism etc. they are trying to give an account of how the world of law is structured, how things hang together. Each of these concepts comes with distinct cognitive orientations and normative assumptions about how to make sense of the world of law.

These cognitive orientations and normative assumptions are not relevant only as part a philosophical pie in the sky speculation about how we might best understand the world of law; how we conceptualize the legal world, how we account for various legal sources is central to how we determine what counts as a persuasive legal argument. If there is a conflict between sources, we have to be able to say, which one of them takes precedent over the other, or how we might interpret the conflict between them, how to assess their

relative authority. We have to work with these multiple sources to come up with a concrete answer to the questions that arise. So as we need a unified conceptual framework, we need the idea of a system. Concepts such as global law, global constitutionalism, global public law, transnational law etc. are all attempts at creating new paradigms of order, after the old order has broken down.

Neil Walker:

Can I come in there? What is really interesting is that we have to bear in mind that the points at which and the ways the people try to think systemically, in the way that Mattias and Gianluigi have talked about, are different in many ways. So it may come up in the context of a big case. So take a case that everyone knows about – the Kadi jurisprudence (of the CJEU in recent years). The question was to what extent the EU had to obey the edict of the UN in terms of their specification of the list of terrorist suspects who should have their financial assets suspended. There are a lot of stages to this saga over a number of years. But finally, it is dependent upon the model of a legal order – which model should prevail?

One model of legal order was a pluralist model. For these purposes the world is made up of a number of regional jurisdictions and effectively Europe is a king of its own castle. And for these purposes it can decide independently of the UN, what the standards should be by which this sort of decisions should be made. So the EU is not necessarily a message boy. And then there are two more models. One is a kind of top-down model, which sees hierarchical structures organised around the UN especially on questions of peace and security. There was, thirdly, a more normatively explicit model, which says it is not necessarily who wins between the UN and the EU. It is rather about there being some universal idea of human rights, which should apply between these two different sorts of orders. So, the model we are looking for here, is the model of normative coherence.

Each of these different ways of thinking about it has a systemic component. But the systemic understanding of it has very different implication for how you resolve the cases. Among the interesting things about transnational law is that it increasingly throws up

moments where people are forced to think creatively about the clashes between different systemic understandings.

The point is that it often happens; let's call it the retail question – part of the problem with global law is often these questions come up in a retail context. The world is already there and is already made. There is already the deep structure – the wholesale questions have already been assumed or answered. But at another point there is a broader imaginative exercise, and a broader politics of framing. So the big debate about the reform of the UN is a debate which is also a debate about different models of law. But I don't want to overstate this – it is a debate which takes place at a different point within the system. Gianluigi said something really interesting about control. And, of course, the point is: lawyers are trying somehow to get a handle on the system – sometimes it is a retail handle – how do we re-imagine the whole within this very particular microscopic context. And sometimes it is more about the wholesale handle. It is more likely that it is a retail handle. The way in which we come in to these questions is more likely to be in terms of reimagining in a very particular context the best understanding of a system and answering a very particular question in these terms. I think it is important to build up in our mind that the points and ways of intervention might be very different and also the ways of how people think about global law can be very different.

One final example which probably anticipates things that we are going to be talking about later. If you take Mattias, who is associated with NYU Law School. So, around about 10 years ago NYU Law School announced the global administrative law project. I was invited to this conference, as I happened to be in New York, but I said I could not make it. Little did I know that that was the start of a form intellectual entrepreneurship by which a bunch of people said: “Look! Here is a series of developments in the world and here is an attempt to try to give normative shape to these developments in ways, which somewhere down the line, will have doctrinal effects.”

There are different things that are interesting. Whoever gave academics that kind of authority? One of the reasons they get to be players in that game is because the game is so open in terms of the re-imagination of the system. It will not look so 'open' if you are not a member of NYU Law School or part of the elite. It still tends for a certain set of global

actors to do that. But it is interesting because again it is not people intervening in a particular case, nor is it the ground of political actors of the UN. It is a bunch of jurists trying to think about this in terms of normative principles. But again the same basic exercise is involved. There is a normative re-imagination of the system as a system. But as a system, in which you know that it requires to be reimagined and to be reorganised because the old coordinates are no longer clear - they no longer provide clear answers they once did.

Matej Avbelj:

Jose-Manuel you wanted to jump in?

Jose-Manuel Barreto:

Yes, I would like to come back to something that Neil mentioned a few minutes ago. Because I think it can help to clarify or to respond to the question what is global law, what is going on right now in the theory of law. What I like is the way Gianluigi presented the current situation of legal theory. He said we are trying to figure out legal theories that are able to catch up, to understand what is going on. We have been elaborating certain 'software', which are ideas or concepts like global law, transnational law and global administrative law. Now we need to understand the 'hardware', how all these things share something in common. I like this approach because it shows that law and the world are changing today. It is the historical change modifying the paradigm. And theories are being made. And still these theories are not able to completely grab or understand what is going on right now.

And the second thing I would like to mention is this search for something more fundamental, perhaps going beyond the formal legal analysis. Mattias has said that at the level of the positivist conception of law not much has changed. It is the world that has changed. What if we approach law from a more historical or material point of view? So beyond the 'hardware', let's see if we are able to understand the 'computer' itself. And beyond the 'computer', the process that led to the creation of that 'computer'. And when I mention these material and historical sources, I am thinking of a phenomenon that has

already been mentioned: the social and historical changes in contemporary world – particularly globalisation. Globalisation can be understood in a more social and historical way as a source materially constituting the law we are dealing with. And what is behind globalisation? What if we think about globalisation in connection with the world economy the history of capitalism – accumulation of capital – and global capitalism? What do globalisation and global law have to do with capitalism?

Gianluigi Palombella:

Everything.

Jose-Manuel Barreto:

Yes, everything, but it is something, which we lawyers do not deal with usually.

Neil Walker:

But is it really true? I believe it is a received wisdom that lawyers do not deal with that – do not contemplate the bigger picture. I think about these things much of the time and so do some of my colleagues.

Jose-Manuel Barreto:

Is there a theory of capital accumulation in your understanding of global law? Is there an understanding of the history of capitalism as the engine of global law?

Neil Walker:

It is certainly discussed, but at the end of the day, I do not have to embrace that view as – you know, the unalloyed truth of the matter – there are many forms of understanding of the globalisation. And most of them give a significant, even prime, place to the development of capitalism and economic relations. But it is not the only thing. We talk about other dimensions as well. So anyone that thought about this and did not get

economic factors as significant part of it would be crazy. He would be missing things in doing so. I agree, but I do not think that is true of other than a few complacent triumphalists, who think the globalisation of certain economic models and the Washington consensus etc is an unqualified good thing. And I think that there are not many people out there, who are not at least aware of the questions we are talking about. And I think many academic lawyers today have a decent awareness of these issues.

Gianluigi Palombella:

May I join here by coming back to the hardware-software point? At this stage of our discussion, I am still trying to offer some, say, 'descriptive' overview. I suggested the idea that while legal software flourishes, there is no system available. Nonetheless, we aspire to construct a frame, also due to the fact that global regulatory legality and normativity beyond the state are hardly developed as comprehensive, coherent, complete or organic. There is no need to argue. My suggestion is that instead of running after an all-encompassing architecture in the global setting, we can do a better bottom-up job, trying assessments on a retail basis, i.e. case by case: our concern is how to cope with multiple legalities, the intercourses between them and the array of juris-generating entities. I have pointed often to the search for the rule of law criteria as inter-facial, in order to arbitrate the relations among orders in terms of fairness and justice. Not building up for the constitutional cover. And it is a different perspective.

Mattias Kumm:

I think I understand and have sympathy of Jose-Manuel's criticism, at least if that criticism is targeting those who do legal theory and jurisprudence. These academics are too often preoccupied with formal questions, the concept of law, the idea of sources, of system – they rarely exhibit either a critical understanding of the moral point and purpose of law, or an understanding of how actual legal practice might serve to legitimate relationships of domination. In fact I believe that behind different conceptualizations of the legal world we should make explicit different assumptions about what is normatively attractive and what is not, what works and what doesn't and what is important and what is not. When we think about the competing different paradigms and different ways of imagining of the legal

world, then what we have to do, and need to do, to adjudicate between them is to think what they assume to be the point and purpose of law and what other assumptions they come with. Law is a medium through which the exercise of power is legitimized. But it is also potentially a medium through which the exercise of power – even the exercise of power by formally legal instruments – can be criticized. Once the law fundamentally embraces a commitment to human rights, democracy and the rule of law, we have the resources to subject any part of the law to criticism from the internal point of view established by these commitments. These commitments provide a way of legally constraining and guiding the task of regulating markets, for example, to ensure that they do not produce or recreate relationships of domination, but ensure fair and efficient allocation of opportunities and resources.

We should be critical of ways of conceptualising law that tend to rationalise and legitimise certain forms of dominant power. More attractive is a conception of the world of law that provides the internal resources to criticise forms of domination as deficient. This is one of the criteria for a normatively adequate conceptualization of the world of law. If there is a competition between different paradigms and different ways of reconstructing the world of law here is how we should decide between them: First, we ask whether a conception actually fits the world as it actually exists. Does it reflect to a sufficient degree the conventions central to those who are engaged in the practice of law. Second, among competing conceptions that meet the requirement of fit, we ask which conception is attractive morally: which furthers the ideal of justice and has the resources to critically call out forms of domination covered up in legal form. The idea of coherence and system, I believe, is central to all plausible conceptions of law. But how these ideas are worked out in conceptions of global law, transnational law or global constitutional law, is a question about what best fits legal practice. On this I follow Ronald Dworkin (even if, as an American jurist, he developed his jurisprudential account primarily in the context of US constitutional law and discovered international law as a serious field of inquiry only very late in his career).

Neil Walker:

I think you identify one of the problems and certainly here I would be critical of the limitations of my own work. The problem is actually trying to work out the relationship between the global law and actually a broad conception of global justice. And what Mattias is just getting at here, is one at least partial conception of what global justice might be. But think about this – before we can even begin to frame a substantive conception of justice we also have to engage with all the questions who gets to decide, what voices are heard and what context etc.

So, there are a number of different ways in which we actually disagree and we do not even begin to have a shared horizon of understanding. One is that some people understand global justice as a singular thing – there is only one planet and justice is something that should be organised across that planet. Other people, e.g. John Rawls, think of global justice in plural terms – that actually the globe is *not* one justice community but it is instead a whole bunch of justice communities – let's call them people or states. But this would never be agreed by one-worlder like Peter Singer or Thomas Pogge. So you already have that massive divide about what we are even talking about when we mention global justice. Are we talking about a single unit, or are we talking about an aggregation of different units?

A second distinction we have is between what I would call a holistic and a functionally composite notion of global justice. There is economic justice, environmental justice and all different things – do they all come together organically or can we compartmentalise them and say that we have environmental justice, economic justice and political justice etc. as discrete objects of our political morality? Again, even when before you answer the question, you have to answer the 'meta' question, whether you can think of it as a whole or you think of it in terms of segments. And then there is another set of questions which has to do with scale, scope and intensity. Is global justice a set of general parameters, which is then filtered down in specific areas? Are we interested in notions such as due process, margin of appreciation, ideas of proportionality, subsidiarity, and then we would leave it to the world to develop these in different contexts, or is global justice something that penetrates very deeply into particular communities?

So the problem is that, on the one hand, we have this massive question of whether we can even imagine how global justice might be produced. What is properly 'global' about it? On the other hand, even if you imagine that we were to resolve that in an adequate way, we then have to move on to all the debates about all the contestations that we have amongst ourselves, or sometimes do not have – instead we silently pass over them – about what global justice is? You can have a concept of global law which is largely unconnected to the concept of global justice. And Mattias is not a culprit here – he is one of the few people that have tried to connect them closely together. But not that that many people do so – apparently because it is massively difficult and it raises all sorts of questions. Not only practical questions, but very difficult questions of political philosophy. About how we imagine the world hanging together, and not necessarily in the terms of global law, but in terms of justice and how the world looks like in terms of a range of overlapping justice communities.

Matej Avbelj:

If I may step in there. It is great that Neil has already touched upon the grand question of global justice to which we shall return shortly. However, it would be perhaps appropriate at this stage to put some order onto what has been said in the last hour or so. Neil, I really liked your anecdote about that GAL conference at NYU, because it points to the heart of the matter. We are talking today about transnational and global law not because they are some fancy scholarly inventions, but because they are real. They do really exist and as you have said somewhere in your book, their existence is inevitable. This means, obviously, that people at NYU did not make up global administrative law, but they only provided for a conceptual framework – they invented the glasses through which we have since been able to see that there is indeed something beyond the state, that there is something like global administrative law.

Consequently, this means that when we are talking about transnational and global law, we are in this constant oscillation between practice that is already there and our theories through which we want to understand this practice. By doing so, we are simultaneously socially constructing this very practice through theories that we are developing. What is

very important in this relationship between theory and practice, is a cognitive frame that we start with. What are our normative biases with which we enter this theoretical framing of what is going on? That is one difficult question. But the other one, which is on the lower level of abstraction and with which we might finish this first part of the session, is the following.

Mattias has said that it is obvious for lawyers that there are many sources of law out there, beyond the state. Is this really the case? In many countries people, and not only them, also lawyers still think that they are working inside a cocoon, within a self-sustained and closed solipsistic state, in which only state law is the law of the land. There is indeed the challenge of getting to know about transnational law. And, I believe, it is the legal education that has an important role to play in this. Would you agree?

Neil Walker:

Yes, but one thing you cannot say here, and I do not think that anyone would disagree, is that what I call the state system has disappeared. There is still a way of talking about law in general by reducing it to the state law. Equally, you go to any international law faculty in any country of the world and you will meet people who will use all of their intellectual ingenuity to try to explain to you that, actually, the new diversity of transnational law is a matter of incrementally expanding the sources of international law. And all other legal phenomena can somehow be reduced back to these two sources. And I think it is always a pyrrhic victory when they do that, because you have managed to reduce the world to these terms – well done! And you have provided a framework of understanding which obscures as much as it illuminates by doing that. And, actually, you need these other perspectives as well to make better sense of these debates.

Matej Avbelj:

But the problem might be even worse because you might even have a majority of people arguing that nothing has changed and they do not even care what, if anything, is going on beyond the state. It is not only that they would like to reduce transnational law back to the state as an exclusive source, but their horizon is simply so limited that they think that all

that there is, is their state. And, as far as I can see, it is only by way of legal education that these horizons can be broadened.

Mattias Kumm:

Let me take up Neil's example of global administrative law project, because there was an important normative idea behind it: They noticed there was all this stuff going on – there were all these institutional actors – the World Bank, the IMF etc. making decisions that actually impacted states and the lives of people living in those states, considerably. These were not high level decisions, not the things you read about in the newspapers, generally. These are the kind of mid-level administrative decisions that as an international lawyer you were not likely to have studied. But they are important and they affect people lives. They have real consequences. And there is money being distributed – considerable amounts. National policies are being influenced; and nobody is studying this. Why does nobody study this? Because people are stuck in the cognitive framework of studying only national law or the grand issues of war and peace and diplomatic relations that are at the heart of traditional international law courses. These practices matter a great deal, they affect people's lives, but people and lawyers are only educated within the statist framework, so they do not see it! And because they do not see it, they cannot adequately and intelligently deal with it. They cannot criticize it, they cannot engage it constructively, they cannot strategize how to make things work for the country that is affected by it. Their idea was "we have to study this". We have to make this the focus of study – we are going to build across the continents a group of people studying these things, analyse the procedural and substantive norms governing this practice and the outcomes they produce and then critically assess it.

What then came into view is the fact that in some contexts the procedures used were quite problematic. If you take standard principles that we know from domestic administrative law in liberal constitutional democracies: participation, accountability, transparency, justification, reason giving, etc.. And when we apply these standards to international institutions, we realize that in a number of contexts there are deficiencies and there is a need for reform. But, that will only happen, if there are appropriately informed critical actors who are aware of these practices and who have thought about the normative

significance of those practices and then go on to insist that there are standards that these institutions should meet. So this is a normative agenda associated with the idea of global administrative law.

Let me give you another example: The way that constitutional law is normally taught. The standard way of teaching constitutional law is to use a textbook focused on the provisions of the national constitution and the legal practice that has emerged interpreting these provisions. In Slovenia there will be a textbook on Slovenian constitutional law, just as in Spain it will be about Spanish Constitutional law and in Germany about German constitutional law. Such a textbook is likely to begin with a brief constitutional history of the country. And then you have the text. There are rights, separate branches of government, elections and the democratic process. All of this is taught as if national constitutional law is a distinctive and separate national thing, with hardly any reference to the outside – except perhaps when foreign powers controlled and undermined national independence and prevented the nation from having its own autonomous and independent constitutional law. Maybe on rare occasions a brief comparative reference will be made. Constitutional law is taught in a national cognitive frame.

Of course it is crazy to study constitutional law in the early 21st century in Europe primarily in a national context. Most states, and all states of the European Union share a common DNA: The commitment to human rights, democracy and the rule of law. Thinking hard, in a theoretically informed, interdisciplinary way about what these commitments might mean in a more concrete institutional and doctrinal form is what the discipline of constitutional law should be all about. Drawing on different historical experiences and different interpretations the practice across states would inform the better understanding of what these principles amount to and under what circumstances which interpretations make more sense. It is crazy to study constitutional law only in a national context. These books ought to be rewritten and here is what they should do: they should provide an account of constitutionalism across jurisdictions in a theoretically reflected, comparatively and historically informed way, which would draw on national constitutions as examples and also make you think about the specificity of what we have decided in our jurisdiction and how it is different in others. This would provide a deeper understanding

of the rules that we have and why we have them and how they relate to other possibilities and other arguments why we might prefer them or not.

So in other words, constitutional law as a heart of the classical domestic discipline is a discipline which ought to be, I think, taught a little like a global administrative law. In the sense that you draw on lots of different institutional practices and then you use the national practice as an example or illustration of how these things might work out. If you ask yourselves – what is the model for a textbook of this type (unfortunately I have not yet written one) it might be Carl Schmitt's Constitutional theory (Verfassungslehre) in 1928. He wrote the constitutional theory of the liberal constitutional state, engaging its intellectual history, theoretical debates and comparative concretizations. To be sure, he misinterprets the liberal constitutional state and there is much in the book that is misguided. But it exemplifies what it could mean to teach constitutionalism not as nationally posited law, but as the institutional and doctrinal concretization of a set of basic principled commitments. So this is history, theory and doctrine coming together in kind of a wider, theoretically informed, comparative, global, context. We should seriously ask ourselves: Are there good reasons why do we teach this the way we do? Should we give up teaching core areas of law – constitutional law. Contracts, torts, in a national cognitive frame? Should we not do it quite differently?

Neil Walker:

There is a new degree course in Tilburg in Holland, which is, I would say, the first place since the Middle Ages where the way their undergraduate students study law is by doing an undergraduate degree in global law. And then only at the postgraduate level do they study domestic law. I am not close enough to see how the syllabus works, but it seems to me fascinating intellectually. It is based upon an idea that you can make a coherent sense of the notion of law without reference initially and foundationally to any particular system. So you understand it in general before you understand it in particular. And that it is so much against the intuition of the most people teaching law that it makes it quite an ambitious thing. Of course in the Middle Ages when there was no systematic local law, it made sense that people understood law by a reference to Roman law as a unique recorded

canon for understanding law. That was in a pre-state system. It is much more ambitious to try to do this now in a state based system.

Mattias Kumm:

So, if I may use one daring analogy. Imagine you were an engineer and you wanted to learn about engineering – the law governing the constructions of dams, bridges etc. and imagine you went to a national faculty and that faculty would teach you exclusively and in great detail how the local dam was constructed and how the bridges that go over the major river of the country, how the statics work, how they relate to the materials used and the surface structure. Now you can do that because the general law governing engineering also apply to the local dams and bridges, but it would be weird to construct the curriculum around these bridges, dams and tunnels, rather than seeing these bridges, dams and tunnels as instantiations of generally applicable laws and features applied to a very particular context. And of course the context matters, it matters what the particular grounds and landscape etc. is like and what exactly you want the bridge to be used for etc. So, this is not about the universal laws that are just simply applied, but is about contextualising them and making them fit in within the local culture and history. But it is something universal that you make fit – nobody believes that an engineering curriculum should be designed along national lines. We should think about whether this is perhaps a fitting analogy to what legal studies might become. Even though ultimately we make decisions locally and often at the state level, we do so informed by ideas and legal requirements, which are ultimately linked to commitments of a more universal sort, which are then concretized and specified in a way that is tailored to work in the local context.

Matej Avbelj:

Before we go for a break, let's invite back Gianluigi and Jose-Manuel. Gianluigi you have been critical of normative biases in this discussion, stressing that there is no neutral way to argue about transnational and global law. And, Jose-Manuel, your work has been about a critique of the Eurocentric western cognitive frame through which we are approaching and developing theories to frame what is going on now in the global arena. Before we go for a break, what is your reaction to the debate we have just had, in particular about the

importance of legal education? Those who are teaching, they come with certain epistemic perspectives and reproduce normative biases, aren't they?

Gianluigi Palombella:

The question this time is about the cultural bias. Well, first, that is unavoidable. It is also very important to recognise this, in order to prevent the risk, that I see in some nuances of the discourse here, to imagine legality through some naturalist, universalist lenses, that would make comparative law similar to the study of engineering, physics, and pure sciences. But there is a cultural bias even in the critique of that cultural bias. And this must be recognised as well. I do not think that there are neutral, God's eye positions in these discussions.

Second, by way of example, think of "international law": it is an expression coined by Jeremy Bentham in about 1789 and together with the other leit motiv, that is, "civilised nations", its story is meaningful. So, "international law" was born out of a western bias, not even western, it was European; and not even European, it was France and England. Then it came up the need to go beyond France and England, towards the European civilised nations; and after, even beyond the *Jus publicum Europaeum*, towards the rest of the world, when the latter was conceded the dignity to be part of the international law of civilised nations.

Other expressions, words, concepts might have the same story. We cherish human rights, democracy, equality and morality, dignity, rule of law every time. These are biased notions. Everyone would say are Western notions. What are our attitudes towards them? Those have become so called "universals". They have been mentioned in the foregoing. In my view, our positive attitude towards universals can be treasured despite its inevitable cultural bias. Thus, let me side with Michael Walzer. We do not avail of detached and un-situated, or global, perspectives. Taken in themselves, regardless of any concrete application, these universals are very thin and sometimes appear in need of stronger meaning. They are often waved instrumentally, as an ideological tool in order to conceal inequality, exploitation, truth, and so forth. However, from located and situated points of view normally these universals are voiced with a maximum of thickness and

meaningfulness, bearing a full content that however happens to be relatively changing even along the series of the restricted number of those 'civilised' nations.

Our attempt should, in my view, try to treasure the duality of universals, without missing either of their two sides. I learned my approach from the Frankfurt school since my studies upon its 'critical theory' and the power of ideological tools – that conceal what they should not. But what I learned is also that universals bear a power of emancipation: as it was said, even the depiction of beauty in the bourgeoisie artwork (as well as some other ideas like human rights and democracy) where it is painted and voiced, beyond being an instrumentalizable matter, is also something universally caught and recognised. It brings of itself a "promise of happiness". True. There is a sense that counters – beyond supporting – ideological strategies. Given their, albeit thin, perceivability, universals prompt a vision onto the possibilities, of how any present reality can be judged, confronted, measured, and perhaps overcome.

Accordingly, and turning to the justice question, raised by my colleagues, I like to remind the Preface of Amartya Sen's book, 'The idea of justice', where a sentence of Pip is quoted, from Charles Dickens 'Great expectations': "there is nothing so finely perceived and finely felt, as injustice". In the line I have exposed so far, what we should use our intuition for – in the global setting – is not searching for some shared fully-fledged justice, but eminently curing the problem of injustice, and working with law to avoid it. In the global setting our primary task is not to construe a global justice substantive compact, but to counter so often widely visible injustice. What we should avoid is that law itself becomes a sheer legitimating arm. If we get rid of those universals, we let their ideological power ends, but at the same time we get rid of them as intuitions of injustice and instruments of empowerment.

Jose-Manuel Barreto:

Something about legal education. I would like to mention the case of the Colombian legal education. I think the Law curriculum in Colombia may coincide with the way Mattias and Neil have described as a nationally orientated pensum. However, in Constitutional Law we have something different. In Colombia we have a law degree that lasts five years, with

subjects that are one year long. In the first year we have General Constitutional Law, and in the second Colombian Constitutional Law. So in the first year we learn about the French constitutional history, the English constitutional system, the US constitutional history, and a bit about German and Spanish constitutional law. Because of our Eurocentrism we look for models in Europe. But this is also due to the fact that we created our constitutional regime on the basis of those systems. Already in the late 18th century and early 19th century, the struggle for independence against the Spanish empire was inspired by the French Rights of Man and also by the US Declaration of Independence. So in some way we used a very modern and Eurocentric tradition to fight against another Western tradition, that of imperialism. And when we adopted our first constitutions at the beginning of the 19th century (we had a number of federal constitutions) in every single one, there was a Bill of Rights. Apart from this, in General Constitutional Law we also deal with constitutional theory and we read authors like Carl Schmitt, Karl Lowenstein, and Maurice Hauriou. Drawing from the European legal tradition provides a wide understanding of the law. But there is also a negative side of this study programme: we know sometimes more about European constitutional history than about Latin American history.

Matej Avbelj:

On this note I think it is the right time to make a break. In the second, more normative part, we will be left with three more questions on the table. These are certainly not simple questions, but are big and grand questions that would require a special workshop for each of them.

These three questions are: What is the impact of transnational and global law on the rule of law?; What is the impact of transnational and global law on democracy?; What is the impact of transnational and global law on the idea and practice of justice?

We might start with the first question – are transnational and global law contributing, enhancing the standards and practices of rule of law, and on which level? Nationally, some supranationally or globally? What would be your reflection on this Neil?

Neil Walker:

This goes back to something we have already discussed – we cannot really have an intelligent conversation about the rule of law unless we actually have a theoretical conception of law that we agreed upon. So if we have a positivist conception of law which is about pedigree and social sources, basically we will come to one kind of answer to that question and we will say that one of the things we have to register is that companies and empires are the sources of law as well as states etc. And of course it is broader than that – we actually see one of the features we have talked about re post-national and global law is the sheer diversity of new sources of law. That brings with it certain problems, because within a certain conception of legal pedigree there are all sorts of contested cases concerning whether some bodies are legitimate law makers, legitimate sources of law.

But of course there is another side to this. One of the things that is happening with all of this is that the very idea of particular sources becomes problematic, and so we might concentrate less on this than the general DNA of legality. Mattias used the example of global administrative law. If it were developed further, we would observe that people at global administrative law project, having identified the problem and having said – look, there is something about these structures which look like the kinds of structures which would at the national level attract a certain type of normative discipline. We think therefore that they should also attract that normative discipline within these transnational spaces. Whether it would be some certain private bodies or hybrid bodies or informal intergovernmental institutions that fall between international law and domestic law.

So their argument is of a different kind, which says we do not find law simply by looking at sources. We do not find law by looking at sources and working out, whether it applies if there are gaps. We find law by reference to a system of coherent political morality, which requires that all analogous situations of a certain type be subjected to the same kind of normative structure.

We all know that there is another massive tradition within western – but not just western civilisation – of natural law, of a kind of way of thinking about social order, which say that

you have a whole bunch of problems which are replicable over a very wide range of contexts. Law attracts itself naturally and normatively to that range of context. Klaus Günter who is a Habermasian thinker, defends the idea of a universal code of legality. He says that within the Habermas' framework of communicative rationality you think of a universal code of legality which has things within like the binary distinction between guilt and non-guilt and notions of responsibility/immunity, relationship between duties and powers and a whole range of other basic framing dualities which we take for granted as part of the basic structure of all law. And his point is actually that there is a massive level of general agreement about what legality means. And it has nothing to do with sources. Who thinks this way? Sometimes judges do it this and sometimes administrators do it, sometimes jurists do it, sometimes normal members of the public do it.

When you make such an appeal, whether in the large context of the Nuremberg trial, or whether in the context of the most basic administrative law question, you make an appeal to legality which is not exclusively based upon sources. So in an odd way global law both problematises the rule of law by pointing towards the disorder of different sources, but also re-normativises our sense of the rule of law by forcing people to think about the possibilities of the universal or general codes as normative frameworks that release them from these pedigree questions.

Now, I am not advocating here some notion of free floating legality, where there are certain philosopher-kings who get to decide what the law is. What I am saying is, that there is something within a deep cultural anthropology which dictates that we all always - already think about certain questions in the context of a certain type of a normative framework. And we look at the projects like global constitutionalism, global administrative law in this way. Part of what is going on there is a kind of constructivism underlain by a shared moral intuition. That is an important aspect of legality as much as the rule of law understood as adherence to certain textual constraints.

Jose-Manuel Barreto:

I would like to comment on Neil's insistence on the idea that when we speak about global law, we are speaking not only about sources; that there is another way of approaching

global law, rather than giving too much prominence to the question of sources. I agree with the idea that transnational and global law are not only about sources. But the question of sources is very important. And this is because, if there is a key contribution of global law and transnational law to the contemporary debate is that they point to the legal operators that had been creating the law and having enormous consequences for everybody around the world, without any proper understanding or legal control. From the point of view of the victims of colonialism, the question of having clarity about how empires, corporations and international financial institutions create the law, or enforce it, over or against national law, is crucial. We need to approach these topics with a very historically informed frame of mind, and being politically involved. In fact, I approach this topic in search of ideas or legal arguments that can be used by communities that, all over the world, are fighting, for instance, to keep the sources of water uncontaminated, against companies that are extracting oil using fracking. It is in this sense that the question of sources is very important.

Neil Walker:

And so is the fact that people can see that once they have laid bare the sources of law, what remains is this other conception of law. Let us say there has been a deforestation movement, which is pushed by the forces X, Y and Z, who get to make these unauthorised or dubiously authorised directives within a certain community of interest. Actually we are going to keep coming back in some more general register in the name of some notion of global administrative justice. We actually do not necessary control the sources. So one of the ways to engage in a politics of law is to fight one type of legality or one register of legality with another register of legality. So what we are saying is not incompatible. I think it is important, but it is not just about pointing critically to whom has the norm-conferring power, but also about coming up with other conceptions of legality in the absence of a strong pedigree, or in contestation of that pedigree. So one is intervening in ways to say that we think this should be the law, and this should be the subject of administrative justice, so in the absence of a better way let's kind of bootstrap that conception of administrative justice.

Mattias Kumm:

This is important. On the one hand sources remain important. The idea of sources is a formal idea, but we care about it because each “source” is connected to a particular procedure used to generate law. What we want to know, is who gets to participate in that procedure and who is excluded etc. There is a question of power underlying talk about sources. Say we have UN Security Council enacting a resolution, requiring Member States to freeze assets of individuals on a black list established and maintained by the UN Security Council. On the list are people claimed to be channelling money to terrorist organizations. Their names are proposed by the representatives sitting in the relevant Security Council Committee, who are themselves informed by their relevant intelligence agency. Let’s assume you happen to find yourself on that list. There may be a good reason for why the UN is establishing such lists, but given the nature of the procedure used (there was no hearing of the affected individual) and the lack of available legal remedies this is a deeply problematic procedure from a normative point of view. But now you contest your listing by invoking human rights norms against this source of law – claiming it should not, under the circumstances, be respected – because it does not meet basic requirements of due process. This lack of due process on the UN level, you claim, is sufficient reason for the European court not to effectively enforce these provisions in Europe. So ultimately the authority of any sources of law are measured by their respective respect for basic legal principles, that are implicitly treated as constitutive of law’s claim to authority: If a source based law is clearly violative of these constitutive principles, it’s claim to authority will not be recognized. This is the kind of dynamic between sources and commitments to foundational principles that I take to be constitutive for the idea of global public law in the 21st century.

Neil Walker:

And thankfully it includes the law of law making. It includes that. So you can actually use it more broadly– the ratio/voluntas, or reasons and sources distinction does not then reduce to you saying “ohh it is a shame you did not have the pedigree to do this...”, because the identification of proper pedigree is itself subject to reasoned argument. Say within global constitutionalism or global administrative law, the argument might be that

the rule of law demands that you have title and voice within this decision making structure.

Mattias Kumm:

Yes, exactly, that is how I see the relationship between reason and pedigree in global public law.

Gianluigi Palombella:

The question of sources can be reframed as it has been in fact developed, in terms of different legalities (think of self-referential legal regimes). It is another way to see the sources, even more comprehensively. Since I have already spelled the question of legality before our break, let me touch now on a connected and crucial question, the relations between sources, and that between these legalities. One might construct global law in a monist way under the primacy of the highest and largest legality, given its alleged coordinative role and its overall view (say, the Security Council within the UN, or *mutatis mutandis*, the WTO), one that is clearly unavailable from a particularistic or state or national or country based point of view. The risk here is the warrant of unconditional supremacy of global law upon state legality, for example: in this case we would pave the way to unbalance and asymmetries. We find on the one hand, some deracinated legalities, the global legalities of specialised regimes, that have no democratic credentials, no social embeddedness and no bottom-up legitimacy, but only top-down imperatives to impose. On the other hand, these deracinated global authorities cannot work but penetrating and impinging upon other lower legalities, state legality included. How would the entire setting work? Sovereignty, autonomy and social needs of the communities and polities shall have to surrender the coordinative, world-reaching imperatives supported by a monistic construction of law on the globe. This sounds wrong.

Of course, I understand the argument supported by Neil, mainly about the availability of some universal sense of legality. Again, I already said about the updating of requirements of legality in one of my preceding interventions in this discussion. Now, from the point of view of the concerns that Jose-Manuel was raising some minutes ago, how we construe the

shelves and pieces, the global mosaic, matters a lot: because our constructions should better account for legalities having different consistency, degree of thickness, and different fabric, that cannot simply surrender to homologation without loosing their meaning. That's the risk of juridification, precisely colonization in the sense that Habermas voiced in the 80s: the fact that some technocratic efficiency-based imperatives are straightforwardly allowed to colonise the social worlds and especially those parts of the life-world, in which the most important elementary social bonds are placed, and are reflected by sensitive autochthonous labour law, education law, health law, criminal law etc. Habermas was resisting a kind of top-down Welfare juridification in the 80s: by the way, that very scheme was precisely repeated, after decades, in some passages of the German Constitutional Court decision on the Lisbon treaty, defending some areas of social embeddedness of law, some fabric of the community that had to be prevented from being legislated by external authorities. The argument was one *vis à vis* the EU law. I submit, even more so would be the case regarding threats from 'global' law.

Of course, I am not simply asserting an apology of national sovereignty, nor downplaying the progress and transformations, in international law itself. Admittedly, it has been only the law traditionally between states, it was intended to cover and legally regulate the external independence of states, and not their internal autonomy. Now international law interferes continuously into states' internal autonomy as a great amount of international norms affects directly the space of self-government, and impacts upon domestic democracy. Sovereignty now includes this account, while interference between legalities is the rule. The point is that changing some justified interference into unconditional, it turns into domination, which is unacceptable.

How can one make a distinction? First of all, in a civilised extra-state context, any player, each legal order should avail of their capacity to cooperate, argue, and confront each other: resist in case of unjustified opposition, but on the basis of legal arguments, surfacing in the frame of a case at stake. This kind of legal confrontation is something that helps re-accounting for sovereignty: not even sovereignty is unconditional, nothing is, and interlocutors should be capable of justifications: giving reasons in order to support their claims in specific circumstances. The dynamic of this relation has clearly not much in common with the monistic architectures that would make such a relation among legalities

work on a formally hierarchic basis. As much as sovereignty should not be allowed to win through the parochial use of egoistic and unjustifiable choices interfering against others, the reverse holds true as well, and neither international entities and global law would win unconditional priority basing on sheer self-referential argument: think of the many issues between say the EU and Greece, WTO and EU, WTO and India, and the like. The logic of the relation among orders and that of the viable legal arguments depends on the capacity to reason by taking into account the entire import of the issue at stake, in a multilateral, not unilateral, perspective, one that is not framed like a pyramid and cannot forfeit legitimate countervailing reasons. Those reasons of course are before the eyes of the world. This is the use of the rule of law in this context, a law limiting laws and other overbearing legalities. The relationships between different legal orders depend upon the creation of a space of legal means (instead of a wild context of power) of that kind.

It should be a place in which it is possible to conceive the possibility of justice. It is a well-known Kantian view, the one according to which the so called imperative of public law is defined as the duty to shift from the state of nature onto civil society. It is not that the birth of law creates the necessary justice, but, importantly, it creates the conditions for the coexistence and the possibility of justice.

Neil Walker:

Can I say one thing about that? I agree with everything you said, but the problem is that you cannot make it sound as if the global law is just a law of conflict resolution. There are different places and they have different types of claims and jurisdictions. Some are more or less embedded than others. Some rules are actually rules of private international law, or conflict of laws, but that is the least of it. It can be rules of constitutional pluralism etc. by which they resolve their relationships. One of the things I tried to do in my book is to say: look there is a type of global law which is what I call divergence accommodating – it is a crude term – but there is also a type of law which is convergence promoting – but this is also a crude term. But the point is that a lot of what happens in global law is precisely about finding forms of common normativity, which might come from classic top-down structures. It could be the UN law or it might come from a development of a corpus of human rights values which is seen not necessarily in these terms. Of course, there are

pedigree sources for that – regional or other international bodies – but we have a sense there is something about the circulation of human rights ideas which does not necessarily depend on that. So what you have there also is this other body of normativity whose aim is not necessary to resolve disputes between jurisdictionally specific and jurisdictionally discrete levels. It is also about advancing a common type of normativity across levels. So global law is a complex thing and sometimes about the development of a quite thick context-independent global legal morality. We have to hang on to that as well. Otherwise it just becomes about a world where we continue to preserve the different levels and sites such that global law enters the picture only in a context of an existing conflict of interest or the conflict of perspective.

Matej Avbelj:

But if I follow Gianluigi's thoughts correctly – I think he implies, what we could call, a negative conception of transnational and global law. So the kind of law that is actually threatening and undermining the rule of law and democracy inside “the cradle” of democracy and the rule of law which was the state. But on the other hand, I think we were also hinting at more positive conceptions, saying that the practices are like that, competences and power structures have migrated beyond the state. The decisions are now taken somewhere else and they significantly affect our daily lives. And in that sense the role of global law could be to take and order these things and to tie them back to the national level. So global and transnational law, they do not necessarily need to be couched in a negative language, depicting something that threatens and undermines the rule of law and democracy on the national level, but they could also be enhancing them. So, global law as an emancipatory concept?

Gianluigi Palombella:

We were answering the question raised by Dr Barreto. I attached my comment to the point, that was precisely how to resist colonisation. So my words were explaining this perspective, not denying the other, or positive side. On the other side I totally agree. I am not making conflict resolution as the key, and of course we have all worked on the positive side of law beyond the states. And even beyond massive regulatory norms in global space,

think back of how many human rights universal agreements have been signed and often also institutionalised by states, and how much they worked, for example, even recently in central and eastern Europe. Most of those external documents have been 'locked-in' in order to promote and defend internal democracy, for instance. That is another among the examples of the positive normativity influence.

Of course, the point is that we have been accustomed to think that what came from a supra-state outside, e.g. international law, was good, almost unconditionally and in principle. So resistance by state automatically amounted to a kind of a nationalism, and self-interested myopia. We have learned in last decades that it is not true. That even international law can be bad and might be resisted. But on the other side we perfectly know that human rights are something that we should respect through international law authority. And for the reasons that I recalled about universals earlier. So this positive-negative oscillation is at work. And it is the life of this setting.

Mattias Kumm:

You are right, colonialism is the negative paradigm of what global law must not become. You are also right that among international lawyers there has traditionally been a bias to associate international law with "the good", and if international law is good, more international law is always better... So there is that bias. But that bias is a professional response to a perception that international law does not matter and we don't need to know anything about it or care about it. But this is not our world anymore, I think that much is clear. You really have to be completely blind to believe that international law does not matter and is not relevant. It matters in all kinds of ways – not all of them are positive. Conversely, we have no reason to believe that international law is always good and more international law is always better. Instead we need to think hard and debate in a context sensitive way what exactly we want from law beyond the state. We need to discuss critically the role of law beyond the state, what kind of structures are appropriate and what kind of structures are dangerous.

There is something in the debate about law beyond the state I find deeply misleading. Here is the way how we should not think about the law beyond the state: There is a convention

– and this goes now to the democracy point, but also connects to our colonialism debate – there is a conventional view that says: “Look we might not know exactly what exactly the appropriate role of law and structure of law beyond the state should be, but at least we know what the paradigm of legitimate law is on the domestic level: It is the law of the liberal democratic constitutional state, with the constitution establishing a framework for self-government of free equal citizens. This allows us to know what is problematic about law beyond the state: It constrains the national demos, without being democratic itself. And that is *prima facie* a problem.”

Now, I am not saying that what goes on beyond the state is harmless, but it is important to understand what is fundamentally flawed about this way of loading the dice. When we think of the world of sovereignty and democratic self-governance, without an appropriate embeddedness in strong international institutions, the only world we have historically known is the world of Empire. When British Parliament endorses or participates in the practice of Empire consolidation through its legislation, that does not make colonialism democratic. When the democratically elected US President, supported by Congress, decides to engage in regime change in Iraq, that is not democratic. This kind of either formal or informal colonialism is just an extreme point of a more generalizable point which is that domestically made decisions often have justice-relevant consequences for outsiders. This happens not only when you fight wars or when you actually colonise a people. It happens also when a state authorizes a nuclear power plant, built right by the border, so if something goes wrong it will to a large extent affect neighbours rather than yourself. That means imposing potential externalities to others outside of your borders.

What this illustrates is that no matter how democratic the decision to put that nuclear power plant there happens to be domestically, there is still a domination problem, a serious democracy problem. Because those whose plausible justice claims are seriously affected by it are outside of the boundaries and did not participate in that decision. So even a perfect democratic decision on a national level may be deeply problematic procedurally, because it burdens outsiders in justice-sensitive ways without giving them a voice. When you look more closely across a wide range of policy areas, this problem keeps appearing. There is no easy answer to all of this, and the point here is not to discredit the idea of national democracy wholesale, but to put it in its place. It is important to create

symmetry when we think of potential pathologies and dangers. We should not think of the domestic decision making is even presumptively fine, whereas decision-making beyond the state is presumptively burdened by democratic deficiencies. If you do not have international law, if you do not have law beyond the state, that does not mean that problems of domination disappear. Of course they don't. This is the core point. On the contrary, the law beyond the state is a required structure to prevent domination by powerful nations. Sure, there are forms of international law which just present new forms of domination – I have argued that some bilateral investment treaties should be seen as a continuation of colonization with other means. But it is not the case that without international law, when there is only a world of domestic law, there is no domination between states. Domination also takes the form of national decisions that impose unjust burdens on outsiders. So this is an important point to make and to ensure there is symmetry in our discussion about global public law and to make sure that there is not a negative bias to begin with and when we start discussing the law beyond the state.

Neil Walker:

I want to say something which maybe gets to the specificity of the problem of the transnational law without saying it is better or worse than the national or the state law. Rainer Forst from Frankfurt is someone who talks about the right to justification. Basically he says, look, if you are going to think about law, power and politics historically, never start from a premise that law got off the ground before there was a problem. There is always an issue first, always an exercise, always an initiative. And there is always a counter claim. Someone claims a right to justification in response to a situation that already calls for justification. I am not saying this as a historical and philosophical rethink of how we construct a state and how do we construct legal order within and beyond the state. What we could argue is that the importance of the state was twofold – at a certain point there is a joint notion in the structure of the state and a legal order which achieves two sorts of goods. One is it creates a possibility of a democratic framework here, of a popular sovereign underpinning this, and a whole set of representational structures. And also it provides a depth and breadth and epistemic awareness of all the issues together as offers a joined up set of solutions. Politics is just a set of joined up answers to the patterned instantiations of economic, cultural and other forms of power. So it is about

putting all the rights to justification together so that the state then becomes a resource for a making a very broad claim on the part of a whole population that they have a right to justification, for all the different forms of power which have perpetrated within the particular space.

Bearing this in mind, the problem with transnational law is always double – it is a double problem. On the one hand – and everyone who thinks about this has a version of this – it is seen as having precarious legitimacy. Because it cannot do one of the things that a state can do. It cannot provide that democratic embedded platform, and so it is deracinated – in the way that Gianluigi was talking about. It is in danger, then, of being unduly authoritative. On the other hand it is not joined up – not in the same way as state law. We have to control power beyond the state. We do not constitute that power, but we still have to control it. Beyond the state we only talk about controlling power. It is reactive rather than proactive. If it is something like environmental law, then of course transnational law is always trying to develop some kind of traction and so a greater degree of control. But what it cannot do is that it cannot join up environmental law to its economic foundations in the same way as you can within a national framework. It is much harder to do the joined up thinking. Often what you do is that you are dealing with fugitive power. So on the one hand transnational law often has doubts about its legitimacy – rightly or not, because of the democracy problem. On the other hand there are massive problems of effectiveness, because transnational law does not deal with an integrated space of the political, where all these different spheres are joined up, so any kind of normative knitting together becomes a much more complex exercise within transnational law. None of this undermines the basic legitimacy of transnational law – it just means that the structure of the legal problem and the way in which the right to justification insinuates itself into the argument is different internationally than it is nationally.

Mattias Kumm:

I agree with this, I think. But just to clarify another fundamental flaw about how often the debate about the legitimacy of law beyond the state is framed, here is another often repeated but misguided argument: It is admitted that even when national institutions function well, there are a great many coordination and cooperation problems between

states that still need to be resolved. To resolve them you need to enter into all kinds of international institutional arrangements. But there is a trade-off to be made here: Although there are outcome-related benefits – we can now address these coordination and cooperation problems more effectively – we lose democratic input legitimacy. So in the end there is a trade-off to be made between input and output-legitimacy.

It is very important to understand what is wrong in this account. It is not an appropriate account, because it does not take into account that there may be outsiders that are affected by national that have a potential claim to justification as Rainer Forst would say. They could criticize for example, that a nuclear power plant was established at the border. There is nothing inherently terrible about placing a nuclear power plant at the border. But say you are in Austria, where they decided that nuclear power is too dangerous, the residual risk of a disaster is deemed by the majority not worth taking, notwithstanding the promise of economic benefits. But right next door there is the Czech Republic and they decide that notwithstanding residual risks, the benefits outweigh these considerations. Both these decisions are legitimate, but if now the Austrian citizen claims that his legitimate interests were not appropriately taken into account by the Czech decision to build the nuclear power plant near the border, that claim is correct, if damage to his health did not factor into the cost-benefit analysis and he had no right to participate in the decision-making process. So if there are justice sensitive externalities at stake, then you want to have a structure that allows those outsiders to contest the decision on plausible grounds, and to have their interests be appropriately represented in this decision making process.

There are different ways this could be done. It could be done through a bilateral treaty where you have the respective executives negotiate locational decisions, substantive standards and procedural rights. Another option is to have an international organisation which drafts certain minimum standards for nuclear power plants, for example. So there are different ways for thinking about this and different kinds of structures that might be responsible, but the core point is that this is not about striking of balance between output legitimacy and democracy. This is a tension which is inherent in what democratic accountability, appropriately understood, means.

Matej Avbelj:

At this point we are ready to take a question or two.

Question No1: How would you evaluate the capacity and/or willingness of states to enforce the multiple sources of global law?

Question No2: Dwelling on the concerns connected to the negative conception of transnational and global law, could you elaborate a little bit more on how to resolve cases in which transnational regulation results in the lowering of human rights protection on the national level? An example would be the Dublin regulation (including the amended version) determining the competent member state and their asylum policies.

Jose-Manuel Barreto:

I would like to answer the question about the enforcement of global law and transnational law. I think we are here in a very uneven field. If a national court is to resolve a dispute between a transnational company that exploits oil in Africa or South America and that court resides in Nigeria or Ecuador, there is a huge possibility that the decision will be against the community or the state that are attempting to get compensation or to restrain the projects of that company. There has been some possibility of looking for such a redress in, among others jurisdictions, a court in the US on the basis of national law and doctrine. But there has been a retreat with the Kiobel case, in which the Supreme Court decided to create a higher threshold for a case to be brought before a US court. So, there is a bias in the current judicial arrangement that favours the position or the interests of the companies. The problem is how to create and maintain a playing field, in which communities and big corporations are treated in a more fair way.

Gianluigi Palombella:

So if you were speaking about enforcement of global regulators diktat into state borders, the point is that for states there is normally no option. For most of states in the world it is impossible not to enforce, e.g. not to follow, for example, ISO. There is no exit. There is not

even a voluntary entry. Enforcement is in the air: this is a manifestation of power, and it is the asymmetry. Accordingly, in the lack of alternatives and choices, essential question is whether a legal institution is available where a claim to revision of a regulation can be justifiably raised. It is far more important than the question about who shall enforce that regulation. That is my view.

Among many concerns, the main friction takes place between global jurisgenerative powers and polities and communities that are to implement their imperatives. The grand regulators have no comprehensive view. They must stick to their own mandate, that is specialised and field related. So if the system of patents and e.g. the conditions for the trade of pharmaceuticals are violating as a matter of fact human rights and the right to health in some poorer countries, well this was barely an issue for the system of patents. But it should be. Thus, another problem, beyond that of enforcement, is how to cope with the lack of comprehensive view on the ground, and make these imperatives not as unconditional as they are. So again it is a matter of balance through contextual justifications, and cannot be a matter of hierarchy between legalities. This would be the work of a rule of law based conception of the global sphere.

And finally, I want to come back to the description of the problems by professor Barreto – companies which dominate the market and laws that are incapable to protect the weaker or the weakest in these negotiations. We deal with Legality created simply in favour of the most powerful actors and players. I suspect that Jose-Manuel was referring to that layer of global laws that we should call transnational, in my view. Transnational in the sense that has to do with horizontal and spontaneous production of *lex mercatoria*-like regulations, barely reliable as a matter of guarantees and likely to simply privilege the position of those that hold economic power. What we and I especially was thinking about, when speaking of global law, was, furthermore, a vertical legislative capacity held by standing-alone authorities, with rule making power, and often jurisdictional autonomy, creating rules curbing or guiding field related actions in a way that resembles some public function and escapes retail negotiation. There is this legislative and vertical ‘curvature’ of these entities that of course have to justify their exercise of authority in terms of coordination, and sooner or later this kind of premise leads to the question of their accountability and to a content-related test of universalizability. That is something that transnational law, when

it is only a matter of convention and bargain, is not in principle asked to do. In a sense, the test of justification, that is the link to universalizability, has to do firstly with the 'vertical' global law, with its public-law style orientation.

We perfectly know that global character of law is a matter of reach, and as I said earlier, 'globality' is a matter of fact. However universality is a normative threshold, a matter of justification. So there is no coincidence between the two. The legislative "curvature" that belongs, in my view, to global law, should be premised on the capacity to show some credentials of universalizability. When it cannot show these credentials then it is possibly resistible, eminently for lack of a multilateral, or more comprehensive, sight.

Neil Walker:

Can I say something about really important question of enforcement, but maybe I am just reinforcing what it has already been said? It is always easy in any context to pick up the lack of a particular enforcement mechanism of some norm as the key reason for its fatal failure. But, really, it just means that in that particular context it did not work, nothing necessarily more fundamental. And these things happen within states as well for all sorts of reasons. Take this example – environmental law where you have a legal regime of complex trading of different types of emissions between different states who emit different types of pollutions within a kind of trading market, and where you work out what their overall allowances are etc. What does that kind of legal framework do in terms of compliance? It is massively effective in ways it has nothing to do with enforcement.

One, it tackles a coordination problem – which you could not solve without the law. The law instructs how we should pull together. Secondly, it has an epistemic gain – there is a form of imagination there. There is one of the ways in which we use our social imagination to resolve problems. Thirdly there is a massive reputational dimension to this. So if you go ahead and sign up for this and then bluntly and transparently do not comply with it, you are not necessarily going to be thrown out of the club. But there are massive reputational damages associated with that. So no one should come to that framework and say that it lives or dies by the sharpness of its enforcement tools. Because that in the sense is almost epiphenomenal and unimportant, but people who say that that

is either the most important thing or that all these other goods that I am talking about – the epistemic, the coordination and reputational goods – only work because everyone knows that in the final instance that there is a form of enforcement, are plain wrong; that just is not a sociologically adequate way of looking at what is going on there. So I think we tend to agree – I agree here with Gianluigi – the massive problem in transnational law is one of voice, who gets the voice and who gets to contribute to the norms. Is an input problem rather than an enforcement problem.

Enforcement problem seems to me not really central.

Mattias Kumm:

About the EU law lowering the standards? It can happen. There is very little that is all that informative that it can be said about that.

Matej Avbelj:

The Melloni case was to a certain extent like that. Spain argued there for a higher standard of constitutional protection and yet the EU said, no it is primacy – for the sake of uniformity and effectiveness of EU law, the lower standard needs to prevail.

Mattias Kumm:

Yes, so that is always a possibility. But when that happens, then there are three kinds of responses. Firstly, when things happen domestically that we think are unjust, then we usually think about the political process as a way of changing that. We should think about unjust EU laws in a similar manner. So to the extent Dublin II is a disaster with regard to some of its provisions, well then let there be public outrage and a political process to change it. This might be somewhat more difficult, but in principle that is the same answer. Second, there might be a possibility to challenge the unjust aspects of Dublin II as a violation of human rights before the CJEU. If in a concrete context the conditions for mutual trust simply don't hold and the rights of individuals would be seriously threatened if refugees were sent back to another Member State, then rules requiring such actions

should probably be declared to violate the European Charter of Fundamental Rights. Third, if the EU solution is not just unjust, but meets some qualified threshold of injustice, there is always a possibility of using a pluralist structure of the relationships between the EU law and constitutional law and make the claim before the national constitutional court, perhaps seeking further support from the ECHR. If compliance with EU law would be a clear and serious infringement of domestic constitutional rights might be a reason for a national constitutional court not to enforce EU law. But that is only for extreme cases. I would not push this third solution too much.

Matej Avbelj:

On this note we have to stop and thank the audience and, of course, our distinguished guests. Obviously we have not exhausted the debate, there still are many questions left unexplored. This should be taken as an opportunity to continue this discussion at some other place and time. Thank you very much to all of you for coming. It was a great pleasure to host you in Ljubljana and I hope that you have enjoyed it as much as I have.

All discussion papers are downloadable:

<https://www.wzb.eu/en/publications/discussion-papers/trans-sectoral-research>