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Descriptive vs. prescriptive global legal pluralism: a gentle reminder of David Hume's is–ought divide

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ABSTRACT

In [almost all of the analyses of global legal pluralism], which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary ways of reasoning, and establishes [the existence of "global legal pluralism"], or makes observations concerning [the "global Bukowina" regarding international] human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is however, of the last consequence. (Hume 1738, book III, part I, ch. I)

Pointing at David Hume's powerful insight, this article aims to remind us of the necessity of sharply distinguishing between global legal pluralism as the description of recent factual developments, drawing attention for example, towards the massive increase in international actors, norms and tribunals as well as adjudicators on the one hand. And, on the other hand, as a different issue, the question of how we ought to deal with or even solve those legal conflicts (based on a (common) framework) resulting from these plural, overlapping legal claims. The "normative move" in the global legal pluralism debate asks for sufficient justification for its normative claims. This article concludes that the is – ought divide is respected at best if prescriptive proposals to solve legal conflicts are not termed "pluralistic." Instead, I shall suggest, it is more precise to refer to a necessarily common framework which addresses the question as to how those conflicts should be resolved together or at least in a way acceptable to all parties. Finally, this article holds that this common framework depends hugely on the context. Thus, solutions are more likely to be found if we focus on specific contexts instead of drawing on universal solutions for different situations.

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Introduction

This article discusses some issues of global legal pluralism. In order to grasp the idea of what is missing or underrepresented in the current debate, it is necessary to briefly

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outline the origins of the concept of global legal pluralism. This will be followed by an analysis of the consequences of defining law for normative legal pluralism, thus unmasking the far-reaching importance of this definition. I aim to show that the specific notion of official and unofficial law within the frame of global legal pluralism is highly relevant for deciding how norm conflicts should be avoided and solved; why this is the case and why one solution might be better than another.

This analysis of the definition of law in global legal pluralism will lead us to the major argument of this article, namely the importance of distinguishing between global legal pluralism as the description of recent factual developments, pointing, for example, towards the massive increase in international actors, norms and tribunals as well as adjudicators on the one hand. And, on the other hand, as a different issue, the question of how we ought to deal with or even solve those legal conflicts (based on a (common) framework) resulting from these plural, overlapping legal claims. Fully acknowledging the difference between descriptive and prescriptive global legal pluralism is important in order to unmask the consequences which follow from this differentiation, namely to clearly state how normative conceptions of solving norm conflicts are justified. I contend that the literature on global legal pluralism falls short on doing this, which is a result of taking too broad a conception of law.

Moreover, this article holds that prescriptive proposals to solve legal conflicts are better not termed "pluralistic." Instead, I shall suggest that it is more precise to refer to a necessarily common framework which addresses the question as to how those conflicts should be resolved together or at least in a way which is acceptable to all parties. As an outline of what I think is the most appropriate framework for handling norm conflicts in this pluralist world, I argue with global legal pluralists that context is of utmost importance when discussing what is the best common normative framework for how to deal with legal norm conflicts. Universalist solutions are likely to fall short of acknowledging the inevitable restrictions of context which are in place when dealing with legal norm conflicts on a global scale.

What is global legal pluralism?

The origins of global legal pluralism

It was as early as 1913 when Eugen Ehrlich published his seminal "*Grundlegung der Soziologie des Rechts*" (1913). He studied, as he put it, the "living law" of the Bukovina. His main observation was that alongside "positive law" there was also a sort of societal customary law, a distinct legal order, within the Austrian-Hungarian Empire (Ehrlich 1913, 313). Ehrlich's ideas, though controversial at that time, found quite a broad audience.[1] Because of his seminal studies Ehrlich is nowadays referred to as one, if not the founding father of legal sociology (Rehbinder 1986), a field embedded in empirical science and interested in the social reality of the legal order. Triggered by the findings of Ehrlich a common understanding of pluralism is nowadays "the presence in a social field of more than one legal order" (Griffiths 1986, 1; Engle Merry 1988; Vanderlinden 1971, 19[2]).

Yet it took a while for his thoughts to become accepted and acknowledged by the global legal (sociological) mainstream. This is the case even though some scholars track traces of legal pluralist thinking back to Alberico Gentili, one of the founding

fathers of international law in the 16th century (for more on Gentili see Scattola 2012). Gentili's thoughts are interpreted to represent a "pragmatic pluralism" when he referred to the international society of "all organized political communities" back in 1598 (Kingsbury 1998; Burke-White 2005, 978, n. 69). However, instead of taking such a constructivist reading of Gentili, it is probably more appropriate to see in him an important intellectual figure rather than an early advocate of global legal pluralism (see, e.g. Wagner 2011; 2017).

Another historical account of legal pluralism leads certain scholars to regard legal pluralism as normality[3] despite legal centralism taking over as a political and legal ideology as recently as in the 19th century (see specifically Tamanaha 2008, 377 ff; c.f. Seinecke 2012, 144 ff). It was only as late as the 1960s when pluralism was rediscovered by sociological and anthropological legal scholarship and as recent as the 90s when pluralism was (re-)discovered and embraced by (international) legal scholarship. The development and debate of the fragmentation of international law opened the floor for discussion (Koskenniemi 2006, paras 5 ff with reference to Jenks 1953, 403).

From the vantage point of two different legal authorities present in the same social field, which can also be found to exist in colonial situations, legal pluralism also became a key concept in international law (Tamanaha 2008, 390; Berman 2007, 1170). Berman describes the shift from anthropologically orientated studies towards what he coins "global *legal* pluralism" as follows: Formerly, studies were aimed at two distinct legal orders within the same territory, where usually one legal order was hierarchically superior to the other, even though this was not always the case in practice. Moving away from this hierarchical understanding, scholars, according to Berman, started to understand these different legal orders as "bidirectional, with each influencing (and helping to constitute) the other" (Berman 2007, 1171). Boaventura de Sousa Santos (1995, 117) describes three phases of pluralism: firstly the "colonial period," followed by the "post-colonial period in capitalist modern societies" and lastly the "post-modern legal plurality." With the shift from the second towards the latter phase he relates a change in the definition of law, which leads to the identification of a differentiation in a "local", "national", and "transnational" analysis. Why this is problematic will be addressed below.

Today the debate revolves around a pluralist account of international law itself and its relation to national legal orders, which might be contrasted with those scholars arguing for a constitutionalism (of international law) in a universalist sense (Kadelbach 2017). In the following I shall mostly focus on global legal pluralism as represented most commonly by Paul S. Berman (2012), Mireille Delmas-Marty (2006, 2009), Emmanuel Melissaris (2009), Nico Krisch (2010), Boaventura de Sousa Santos (1995), and Gunther Teubner (1983, 1992, 1996, 1997, 2010). Yet, this is by no means a review article, but a legal analysis, which addresses legal debates at times with support from the social sciences. Thus, I will not even try to provide an overview of the different, and very fascinating, accounts of the above-mentioned scholars, but only pick out some core arguments to illustrate the points which I think are missing in the debate and thus which I wish to make. So this article does not challenge the concept of legal pluralism as such, which has been fruitfully used to ask, for instance,

why people in social interactions in some contexts opted for one legal order, and in other contexts for another.

The definition of law

Another important part of the shift from national towards international legal pluralism as described by Berman was the readiness of legal scholars to embrace the idea of defining the "legal system" in a broader sense "to include many types of nonofficial normative ordering, and therefore argu[ing] that such legal subgroups operate not just in colonial societies, but in advanced industrialized settings as well." (Berman 2007, 1171 quoting Engle Merry 1988, 870–1; c.f. Cotterrell 2006, 37)[4] This shift in the acceptance of such a broad definition by legal scholars is a core point in the international legal pluralism debate as it illustrates on the one hand the claim of legal sociologists to overcome "the ideology of *legal centralism*" (Griffiths 1986, 3) in order to be able to analyze so-called "non-state law" as well (Berman 2007, 1171).[5] This, however, is on the other hand identified as the "core problem" of the debate by its critics (Tamanaha 2008, 391; Cotterrell 2006, 37; see also Engle Merry 1988, 878; and Falk Moore 2001, 106–7). It is also worth mentioning Gunther Teubner, who is very clear when he says:

> To avoid misunderstanding, I hasten to add that the binary code legal/illegal is not peculiar to the law of the nation state. This is in no way a view of "legal centralism" (Griffiths, 1986: 2ff.). It refutes categorically any claim that of the official law of the nation states, of the United Nations or of international institutions enjoy any hierarchically superior position. It creates instead the image of a heterarchy of diverse legal discourses. (Teubner 1997)[6]

In the same vein Nico Krisch leaves no doubt about the aim of his project entitled "beyond constitutionalism" (2010). His clear goal is to envision "post-national law" and thus he is not "afraid of radical pluralism" (Krisch 2011; Melissaris 2009, 4)[7]. Similarly Berman does not see an "intrinsic reason to privilege nation-state communities over others" (2007, 1180; 2012, 62 with reference to Anderson 2006). To the contrary, to Berman "the whole debate about law versus nonlaw is largely irrelevant in a pluralism context" (2012, 54–5; for a critique of such an account, see Giudice 2014, 600 ff). Or as Klaus Günther puts the "strikingly simple" definition of law of most global legal pluralists critically: "The debate on this question [the notorious problem of distinguishing legal orders from other kinds of normative orders] is for the most part irrelevant, for law is precisely what the agents involved each took to be law". (2016a, 2)

While the side arguing for a broad definition of *law* in terms of legal pluralism may confidently point towards recent developments in international law, including a massive increase in international actors, norms and tribunals as well as adjudicators (Burke-White 2005), this picture is contrasted by the problem of distinguishing "'law' from other forms of normative order" (Tamanaha 2008, 392)[8]. The latter view has gained force by the turn of one of the most prominent advocates of legal pluralism, John Griffiths. He now holds the view that "the expression 'legal pluralism' can and should be reconceptualized as 'normative pluralism' or 'pluralism in social control,'"

precisely because law "is not a theoretical concept in the sociology of law" (Griffiths 2006, 62–4; for a detailed analysis of this turn, see Tamanaha 2008, 392–6; c.f. for an overview Michaels 2009, 250–2).

The difficulty of defining law is acknowledged by Woodman when he states that "law covers a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control." (1998, 45).[9] Franz von Benda-Beckmann's concern in defining law is to "work with a concept that is broad enough to capture simple and complex legal configurations" and, hence, he prefers a "concept of law that is not linked to the state by definition and that is broad enough to include 'legal pluralism' [as] a useful sensitising and analytical tool" (2002, 40). Consequently, he offers a nuanced analytical conceptual understanding of law when dealing with legal pluralism which allows him to differentiate legal orders on a number of dimensions (see, e.g. Benda-Beckmann 2002, 44 with reference to Pospisil 1971, 39). Ralf Michaels suggests that "the three challenges from legal pluralism – non-state law, plurality and interaction – are related" and, thus, "[i]n order to assess any one of them, we must consider the other ones as well. We will not get an adequate concept of law beyond the state unless we address inter-relations between legal systems at the same time." (2017, 95; c.f. Cotterrell 2015, 209–311)

The present author holds that the myriad definitions, understandings and concepts of law are a strong indication pointing to the insight that there is not one single appropriate definition, understanding or concept of law. Instead, all definitions and concepts depend on the scientific background and goal, as well as the perspective of the analysis. What is important, thus, is to be as clear and transparent as possible. This includes a clear cut difference between modern State law, unofficial law and other normative forms within a normative approach. The point simply is that if law is defined very broadly, qualifying any commands or normative forces as law, many powerful developments such as the democratic legitimacy of the modern State law, guaranteed by constitutional review, and many more great legal achievements aiming at legitimizing legal normativity are lost if norm conflicts between official and unofficial law or other forms of normative authority collapse. In other words, we need to be careful to differentiate between norm conflicts between official and unofficial law or other forms of normative authority in order to do justice to their diverse modes of legitimizing authority.

Highly differentiated concepts of law might be better equipped to do justice to such legitimacy issues when broadening the concept of law. Either way it is important, as for instance Franz von Benda-Beckmann alludes, when he says that he is "perfectly aware that others dealing with law may need a different concept of law for different purposes" (2002, 40; Cotterrell 2015, 316). This means that almost any definition or concept of law will have its advantages. For instance, a broad understanding of law helps not to miss important normative forces when pursuing an empirical analysis of the role of law for social behaviour. However, it is important not to miss the prescriptive implications of such a broad concept of law when switching from a descriptive analysis to a prescriptive assessment. This does not mean that unofficial law or other forms of normative authority do enjoy weaker legitimacy per se than modern State law. Hence, of course, unofficial law or other types of normative

authority must not rest exclusively on pure force or mere habit, but might enjoy other modes of legitimacy. Separating official modern State law, unofficial law and other forms of normative authority, however, are necessary to highlight these differences. The argument simply holds that it is fruitful to acknowledge these differences when defining these various forms of normativity in order to ease the reference to the different modes of legitimacy.

Description vs. prescription and the "normative move" in the global legal pluralism debate

If the goal is a descriptive analysis of the status quo, it is, of course, very illustrative to work with a broad legal concept in order to obtain a "complete picture." This is important for social scientists as they do look at legal obligations and conflicts. What the relevant law prescribes is an issue social scientists pay much attention to. They go further than legal scholars in that they inquire how people actually use law in their interactions. So far, nobody would deny the explanatory force of pluralism. What social scientists usually do not do is to say what the law should be like and how conflicts should be avoided and solved in a legal sense. In contrast to sociological or anthropological studies, legal scholars do not stop at this analytical point. They usually go further by analyzing the link between the collected data and the connected legal obligations and conflicts, aiming constantly at thinking how the law is but also what the law prescribes and how the law could or should be and how norm conflicts should be avoided or solved. However, precisely at this point David Hume's warning still applies:

> In [almost all of the analyses of global legal pluralism], which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary ways of reasoning, and establishes [the existence of "global legal pluralism"], or makes observations concerning [the "global Bukowina" regarding international] human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is however, of the last consequence. (Hume 1738, book III, part I, ch. I)

Hume's powerful insight, which this article endeavors to remind us of, is the necessity of sharply distinguishing between the description of (recent) factual developments on the one hand and as a different issue, normative questions on the other hand. While it is heavily disputed in philosophy whether David Hume actually proposed or discovered "Hume's Law" holding that it is logically impossible to directly conclude from an *is* towards an *ought*,[10] I wish to refer to Edgar Morscher (2016) who articulated a modern version of three descriptive-normative dichotomies while leaving deliberately unanswered whether Hume actually proposed or discovered something like "Hume's Law."

According to Morscher (2016, 335–6), we commit a naturalistic fallacy, first, if we do not "appropriately demarcate normative from descriptive discourse" (grammatical descriptive-normative dichotomy). Second, we must not reduce normative to descriptive speech (in order to avoid the definitional descriptive-normative dichotomy). Third, we would commit a naturalistic fallacy if we would use arguments with

exclusively descriptive premises and purely normative conclusions (the logical descriptive-normative dichotomy).

What this means for us is that either we rest within a purely descriptive analysis of current facts and describe them as pluralistic, but of necessity end here.[11] Or, we take account of arguing now in the realm of *ought*, by introducing, for instance, the thought that we *ought* to avoid conflicts, and that if they occur that we *ought* to cooperate somehow to deal with or solve them. This is what I think is the very first prescriptive step in the global legal pluralism debate.[12] By taking this step, one has to deliver reasons *why* one thinks we *should* or *should not* cooperate in a certain way in order to solve (or not solve) legal norm conflicts, which occur in the plural legal realm. The same holds true for suggestions as to *how* and with which methods or mechanisms we *should* address these legal norm conflicts. I thus argue that we need to disclose the (normative) presuppositions underlying the claims which want to address possible legal solutions of these conflicts in the realm of *ought* (which also includes a clear differentiation between legal and normative pluralism). Claims which solely rest on the *description* of pluralistic orders do not suffice as a basis.

Once we clearly see the difference between descriptive and prescriptive global legal pluralism, it also becomes apparent that this differentiation is of utmost importance for the definition of law when speaking about global *legal* pluralism. So it makes sense when remaining in a descriptive account to define law openly as many legal sociologists and anthropologists do when speaking about pluralism in order to capture all normative obligations and rights. While this works for descriptive pluralism, it is rather problematic if still upheld in a prescriptive account of global *legal* pluralism. This is because within a prescriptive account of legal pluralism, a broad definition of law (also including unofficial law or other forms of normative authority) involves (often implicitly) a very strong claim as to how things *ought* to be. If we do not differentiate within a prescriptive account between "official," mostly modern State law, and "unofficial law," or other forms of normative authority, i.e. any authorities claiming normative force, we face the risk of blending their different modes of legitimacy. An example would be to say that in norm conflicts, for instance, between modern State law and another conflicting unofficial norm, there is no difference (in terms of their legitimacy and justification) and therefore we do not have any rules guiding this norm conflict. However, we could possibly try to settle this conflict by using various forms of conflict solutions. If advocated as such a prescriptive account, this blends those things which make official law "official," namely, its specific forms of legitimacy, resulting from democratic structures and the rule of law (elections, division of powers, parliament, constitutional courts and their control mechanisms, fundamental rights, etc.) with other modes of legitimacy of unofficial law or even in some instances brute force or mere habit. Thus, within a prescriptive account of global legal pluralism it is important to distinguish sharply between official and unofficial law and other forms of normative authority. Or, again in the words of Klaus Günther:

> When the distinction between law and other social norms disappears, when every social actor who is creating social norms and who has the power to execute them is treated as a legislator, when the validity of positive law goes side by side with other types of

> legitimate validity (for example, factual acceptance by a majority), and, finally, when negotiating processes between various social actors make valid law – then it makes no more sense to speak of "the law," and one has to give up the principles of equal adjudication and of the democratic legitimacy of legislation. (2008, 15–6)

Yet, this is not to say that official modern State law is in any sense better than unofficial law or other forms of normative authority. By highlighting this issue I simply want to emphasize that not differentiating between official and unofficial law or other forms of normative authority is a strong claim in the realm of *ought*, arguing that we *should* treat modern State law like other normative authorities, at least regarding norm conflict solution.[13] I hold that it is important to differentiate between these forms of normativity because modern State law usually enjoys a considerable degree of legitimacy as its authority is founded on elections and constrained by checks and balances. Moreover, fundamental rights are guaranteed and constitutional review is in place. In other words, power exercised by the modern State is constrained by modern State law (c.f., e.g. Raz 2017, 156–7).[14] Other normative regulatory forces might not enjoy the same level of legitimacy in this regard. Unofficial law or other forms of normative authority might not enjoy the same safeguards and limitations to power as official law and official law might not enjoy the same legitimacy.

However, in some instances, unofficial law or other forms of normative authority might even enjoy a stronger form of legitimacy than official modern State law. It might well be the case, for instance, that some unofficial norms protect democratic values better than modern State law. Yet, even in such a situation it is preferable to distinguish between modern State law and unofficial law in order to clearly demonstrate that in this case unofficial law enjoys a stronger legitimacy than modern State law. If we treated both alike under one concept of law, we could not point to this difference. At least, it would be much more difficult to characterize this difference clearly. Either way it is, thus, important to bear the legitimacy differences in mind when proposing a broad definition of law blending official modern State law with other unofficial forms of normative power. In this regard, it is not enough to bypass this legitimacy issue by holding that also unofficial norms can have an impact and, hence, can also be perceived as law (Berman 2014, 260–4). The reason is, because this is only an argument about the output, i.e. the impact of the norm, not about its origin and legitimacy.[15]

Moreover, it is important to note that, depending on the context, for instance, if we are dealing with horizontal relations (e.g. international law and international actors as such) and thus conflicts, the problem of blending official with unofficial law includes different prescriptive claims than if we are dealing with vertical relations (e.g. international and national law) and conflicts. It is the purpose of this article to emphasize that a clear line of argumentation should acknowledge this difference in any context. However, I do not wish to offer any substantial argument on a specific constellation. It should suffice to say that a sharp differentiation is always necessary in a prescriptive account of global legal pluralism. However, what this might look like specifically can vary depending on the context. I will get back to this point later.

The difference between arguing within a prescriptive or a descriptive account of global legal pluralism is also important for proposing methods or mechanisms with

which to solve norm conflicts of different legal orders. In order to mediate conflicts between legal orders, global legal pluralists argue for different mechanisms: "Sovereigntists" stand against "universalists"[16] and are then mediated by a "pluralist framework" which Berman, for instance, names "jurisgenerative constitutionalism" (Berman 2013a). "Utopian unity" is contrasted with an "illusion of autonomy" and is thus suggested to be solved or softened by "margins of appreciation" (Delmas-Marty 2009, 44). In Krisch's account (2010, 300) a "foundational constitutionalism" stands against "softer network forms of international cooperation" which are, again, mediated by pluralism.[17]

However, at the end of the day even the most radical pluralist Krisch bases the norm conflict resolution – at least in some cases – upon what he calls "the *construction* of interface *norms*" (Krisch 2010, 285 ff; my *italics*). In his opinion the "pluralist setting is concerned with orders that have established firm linkages and accepted forms of common decision-making." (Krisch 2010, 288)[18] Thus, also for him there *ought* to be certain *norms* (interface norms), which "regulate to what extent norms and decisions in one sub-order have effect in another" (Krisch 2010, 285). Yet, he immediately falls back on his radical pluralism (which is coherent in his way of "radical pluralistic" thinking) when saying that these "rules are set by each sub-order for itself, with a constant risk of conflict" (Krisch 2010, 286).[19] His main argument is that in the post-national sphere "[u]nder conditions of strong fluidity and contestation, conflict rules face serious problems of adaptation to a changing environment" and "are unlikely to be able to truly settle conflicts—they might remain ineffectual or even enflame conflicts further." (Krisch 2011, 407) Krisch is aware of the normative implications of his approach when saying that "postnational constitutionalism seeks to tap into the legitimating potential of its domestic counterpart" and therefore he is "only interested in normatively rich conceptions" (2010, 39). Yet, he holds that "[t]he pluralist setting distinguishes itself precisely by the fact that the conflict rules do *not* have an overarching legal character; they are normative, moral demands that find (potentially diverging) legal expressions only within the various sub-orders". (2010, 296, *italics* original).[20]

Along these lines other pluralists also propose concepts which "instead of trying to erase conflict, seek[] to manage it," as Berman puts it (2007, 1192; 2012, 145). However, thereby he is already engaging in the discussion how we *ought* to deal with norm conflicts. To be fair, Berman admits to making prescriptive claims to a certain extent when he proposes what he coins "jurisgenerative constitutionalism" (Berman 2013a) as a framework. As a matter of fact, he explicitly suggests that "following the descriptive insights of legal pluralism, we might draw a normative lesson and *deliberately seek to create or preserve spaces for conflict among multiple, overlapping legal systems*." (Berman 2007, 1164, *italics* original; see also 2014, 256; 2016, 154–5, 182).[21] And to "manage" norm conflicts he reviews a series of "principles" which are, in his account, instead of being substantial, only of a procedural nature; namely "procedural mechanisms, institutions, and practices" (Berman 2007, 1192, and esp. 1196 ff, 2012, 145, and esp. 152 ff.).

Likewise the French pluralist, Mireille Delmas-Marty (2009, 44), thinks that a national margin of appreciation is "key" to ordering pluralism and she goes on by

mentioning, for instance, the principle of subsidiarity in the law of the European Union (2009, 45–6). Samantha Besson (2009, 405) suggests that democracy "ought rather to be the supercriterion: when its conditions are given, it subsumes all others as it were, as it constitutes the most legitimate way of deciding on the others." Yet, she is aware "of course, [that] identifying the democratic pedigree of each norm in conflict, whether of international or national law, remains extremely complex." And, one might wish to add, democracy is not always the super-criterion of legal orders whose norms might be in conflict.

Thus, most of the global legal pluralists also think that there *should* be some kind of rules in order to assist the norm conflict resolution. Even though they are mostly rather restrictive and argue, for instance in the case of Berman, only in favour of some procedural rules (neglecting any hierarchical fundamental norms), this is a claim in the realm of *ought*. We can, thus, speak of a "normative move" in this quite recent global legal pluralism debate. This move is acknowledged sometimes explicitly and sometimes implicitly. Sometimes it is also somewhat unconsciously ignored. In any case, it is important to justify such normative claims.[22] In this regard this article wants to gently remind us of David Hume's insight referred to above. Hence, what is important when making this move is that global legal pluralists must justify why they think these rules should be valid in order to settle norm conflicts. Moving in the realm of *ought*, they are confronted with such problems as, for instance, that even reductionist procedural mechanisms might be accused of having a strong liberal flavour – and therefore are also somewhat overarching substantial value claims.[23]

Hence, almost everybody agrees that there are many diverse legal rules, stemming from different legal orders and authorities, which do conflict – at least sometimes, to a certain extent. In order to organize and minimize these uncertainties, even almost all pluralists agree that we need at least a minimum standard of *common* principles, or rules to guide the resolution of these conflicts. Despite this implicit agreement, I think it is, nevertheless, important to emphasise explicitly that we are in need of a *common* normative concept (*ought*) which enjoys the highest possible approval among the parties concerned. I do not wish to present any specific solution here. However, I wish to highlight that, firstly, it is of utmost importance to state clearly that we want to avoid norm conflicts (and say why; or why not) and, secondly, that we want to deal with them preferably, because supposedly more easily, according to a *common* framework, which is – at best – already established. Equally, for the latter claim it must be crystal clear that this is a normative endeavour for which we need reasons and some form of agreement or rather generally legitimacy. Thus, we need to distinguish merely descriptive accounts from prescriptive accounts in debates of global *legal* pluralism in order to enable a transparent discussion of the proposals made. By doing so we have to acknowledge how difficult such common frameworks are, even if we envisage for instance "only" procedural minimum requirements. This leads me to the final claim of this article: Contextualization. Instead of trying to come up with an overarching theory or model which aims at analysing pluralism worldwide, we should rather focus on the differences between all varying legal orders and thus norm conflicts at stake by taking context into account.

Contextualization

Plurality of contexts

I am convinced that the search or struggle for common *prescriptive* guidelines for norm conflict solution in the pluralistic world we live in is much easier if we do not try to come up with one solution for all kinds of very different norm conflicts.[24] Hence, I argue with global legal pluralists that context is of utmost importance when discussing what is the best common normative framework for how to deal with legal norm conflicts. Universalist solutions are likely to fall short of acknowledging the restrictions of context which are in place when dealing with legal norm conflicts on a global scale. Therefore, I am convinced that we need to take the different contexts of all norm conflicts into account in order to ease finding common solutions – beforehand or after the conflict has emerged.

Acknowledging the fact that different contexts suggest different common frameworks for norm conflict solution also applies to comparisons between historical examples of legal pluralism and current global legal plural settings. Above I referred to Berman's explanation of the shift from legal pluralism when describing the "living law" of the Bukovina or plural normative systems in some colonial settings, which were usually organized in a hierarchical way, towards "bidirectional" systems influencing each other without one constantly superior system. As already indicated, it is vital to have a closer look at this shift. The living law of the Bukovina or some other colonial settings may usually be roughly summarized by noticing that one people (colonial power) was aiming at governing one specific territory (colony) where a different people (colonized people) was living by their law, which was essentially "made" only by them. The Bukovina and colonial peoples had their own, different law(s) (living law) which was, however, at least in theoretical terms, not accepted by the dominant, colonial people and was derogated by their legal order.[25] This means there was one territory with two exclusively different "authorities" (note especially that the law of the colonial power was largely not made by the people living in the colonies and thus also not legitimized by them in any way) with law making and enforcement power, whereby one was dominant over the other.

This constellation, however, is quite different from the way in which global legal pluralism is described nowadays – at least most of "vertical" global legal pluralism. Yet, the relation between the EU and international law as well as the relation between international law and EU law and (member) State law are taken as examples by various pluralists (Krisch 2010, 109 ff; Berman 2012, 154 ff; Delmas-Marty 2009, 83).[26] We have again two different authorities with law making and (at least theoretically or rather weak) enforcement power which may possibly produce conflicting norms within the same territory. However, a decisive difference, which is not fully taken into account by the current debate, is that the people involved in the law-making procedure partly overlap. International law is – at least in theory – based on the participation in the law-making process of all those States which are bound by it afterwards. This means that when, for instance, international law conflicts with national law (two different legal orders) on the same territory (national State), there is a common element. This common element is the individuals of a modern State

who are – at least indirectly – represented on both levels: at the level of the State as well as at the level of international law. In this sense, international law is a common law of all participating States. This is quite different from the situation where the Empire's centre simply ignored the living law of the Bukovina or the law of colonies. Hence, the argument that international and national law are also to be seen as bidirectional does not hold. The context of these different examples varies too much. Vertical global legal pluralism dealing with norm conflicts between international, EU and national law is essentially different from the pluralism between the Empire and the living law of the Bukovina or the "relationship" between a colonial power and a colony. States make and thereby commit themselves to applying international law, also at the national level – the Bukovina or colonies did not do so. Therefore, the law of the Empire enjoyed much less legitimacy concerning the Bukovina– at least in this regard. This difference is important when engaging with the discussion as to how those norm conflicts should be addressed. In this regard Müller states that "the EU has always been about *pluralism within common political parameters*. After all, the accession process itself did not aim at something like maximizing difference, but was explicitly and officially intended to ensure sameness in certain regards (democracy, Rule of Law, state capacity, etc.)." (2016, 221, *italics* original)

Yet this was just one example of how, in this case, possible solutions might look somewhat different as they involve certain specific conditions. Thus, another context, so goes the main argument of contextualization, would need different solutions as different conditions are in place.[27] The point is that once we reveal that the very first prescriptive question is what we *ought* to do with norm conflicts, there are very likely very different solutions to different conflicts (and different legal orders involved) depending on the context (for a similar argument, see Melissaris 2009, ch. 3 relying on Cover 1983, 1986).[28]

An individual or institutional "battlefield" for norm conflict resolution?

Another decisive issue regarding context is facing the question as to which "battlefield" we consider more promising in the end to solve normative conflicts between competing legal orders: The "individual level" or the "institutional level?" If we were to choose the "individual level," we would leave individuals alone with resolving norm conflicts. In other words, context might inform our decision as to whether we share the skepticism of Kelsen when saying that we should try as hard as we can to avoid individuals finding themselves under different obligations at the same time: "A ought to be" and "A ought not to be" (Kelsen 1945, 374–5; 1967, 205–6).[29] Nowadays, however, the picture might be far more complex than in those times when monism and dualism portrayed two rather simple, and thus, clear pictures: either one unitary system (monism) or separated legal orders (dualism) (Kirchmair 2012, 2014). In numerous constellations it is difficult to speak of completely different legal orders. A commonality of both international and national law (as much as EU law – on both sides) is the people who are involved (at least to some degree) in each of the conflicting law-making procedures. It is the French, German, Italian, … citizens who share the law-making process of national, European and

even international law. Is this fact to be neglected when separating those legal orders because of different "sovereigns" ruling and controlling the different laws from different legal orders? Arguing in this vein it is important to note that this argumentation is not another expression of a legal unity. It suffices to see that international (and also EU) law differs from national law from Germany, Italy, France and so on quite obviously in relation to those individuals who actively (as indirect law makers) and passively (as subjects to the law) are related to the law. While Germans are subject to German national law as much as EU and international law, Italians and French are not. They share EU and international law but not their own national laws (for a theoretical examination, see Kirchmair 2016). However, going back to the initial question, which was which "battlefield" is the most promising to solve norm conflicts, for instance, between international and national legal orders, we should take this insight into account. This might lead us to conclude that the individual level is not the appropriate level for norm conflict resolution in the context of these overlapping legal orders because this article holds that international, EU and national law generally should strive to avoid addressing individuals with conflicting norms holding, for instance "A ought to be" and at the same time "A ought not to be." For another context the answer could, however, look different. Moreover, facing the question whether we think we should or should not have a prescriptive common framework to deal with norm conflicts is the very first prescriptive claim dealt with above. I hold thus, that we should deal with norm conflicts arising in the context of international, EU and national law generally speaking at an "institutional level," whereby I do mean within the realm of international, EU or national law.

Detecting the common in global plural legal orders

Independently of the question as to which battlefield, the individual or the institutional level, we consider more promising is the question whether norm conflicts between international, EU and national law "truly" arise. In order to answer this question in the affirmative, we need to operate from a common methodological point, namely a congruent (i.e. unifying both conflicting orders) definition and interpretation of law (see, Somek 2012, for the argument that already the identification of a conflict necessarily implies an overarching system). This common framework (understanding, definition) needs to be abstract enough to comprise all legal orders involved and it still needs to be concrete enough to deliver results. This is not an easy task. Independently of the concepts, methods, mechanisms or criteria which are to be used in order to decide on norm conflicts within "pluralistic" legal orders, these concepts must be enclosed by the *common* understanding of the law of all orders involved for the sake of legally solve norm conflicts arising between those different orders. These mechanisms or criteria must be reflected in the common understanding of the conflicting legal norms. For such a common understanding, definition, or concept of law, it is not enough that the identified legal concept, such as a principle of democracy, is given in only one of the conflicting legal orders. If the suggested principles are not reflected in the common understanding of law, they do not constitute a common framework. This must be taken into account if, for instance, some procedural

mechanisms (see the suggestion of Berman 2007, 1192, and esp. 1196 ff., 2012, 145, and esp. 152 ff. for which he offers normative philosophical justifications) or a super-criterion like democracy (Besson 2009, 405) is suggested to guide or deal with conflicts of norms of plural orders.

However this does not mean that there must be one single, universal understanding of the law all over the world (see, however, Melissaris 2009, 61, where he argues for a "thin but universal sense of law"). But in relation to those legal orders which are involved in norm conflicts which should be solved, a *common* understanding and definition is essential to a *legal* solution. So when we discuss norm conflicts between EU and national law, we need to start from a common understanding and definition of the law of both legal orders. When we discuss the relationship between international and national law we need a common definition of those two orders.[30] And when norm conflicts between more legal orders such as international, EU and national law are at stake, our definition needs to be guided by a legal concept in accordance with all three legal orders. This implies that the criteria guiding the norm conflict resolution might look very different depending on the legal orders which are involved.

This is connected to a trivial but nonetheless crucial insight: it is not and never will be always possible to have legal means in order to solve (normative) conflicts. However, the question is whether in a world with rapidly growing interactions between different societies, and therefore different legal orders, we must leave the norm-conflict solution between different legal orders purely to non-legal mechanisms (or new legal mechanisms as suggested by systems theory, for instance), which might be too vague and possibly not power resistant enough (Günther 2016a, 5),[31] or market dominated and so on. There are legal means to deal with norm conflicts between different legal orders and the solution lies in finding the commonalities of those different legal orders (for an interesting account focusing on authority, see Roughan 2011, 2013). Nobody would deny that the legal orders of the EU and a member State overlap and the most important commonality of the EU and its member States is the people. Nowadays, French, Germans, Greeks and so on are not only French, German, and Greek citizens, they are also EU citizens. Being one and the same person, they belong to two somewhat distinct legal orders. Norm conflicts between these legal orders should therefore be solved (for an interesting account, see von Bogdandy 2008, 2014) because those "distinct" legal orders are unified to a certain extent by the very same subjects, namely the people (Habermas 2012, 5, "systemischen Zusammenwachsen einer multikulturellen Weltgesellschaft"). Recent tendencies show that the international legal sphere also recognizes more actors than just States as was the case in earlier days. The example of international criminal law shows that individuals are also subjects on the international plane (see generally, Van Sliedregt 2012). More and more other areas of international law are developing in a similar direction. It is increasingly questioned whether only States are subjects of international law (see, for instance, Peters 2014). So even if we cannot (yet) speak of individuals as "world citizens," they are becoming more actively involved in international law and they are increasingly being addressed directly. This shows that in those norm conflicts where individuals are also addressed by international law directly, norm conflicts between

international law and national law have to be subject to legal resolution mechanisms in order to guarantee a legitimate regulation of those conflicts. If we want to avoid leaving this norm conflicts to non-legal resolution techniques and forces such as (power-) politics and market rules etc.

Conclusion

Pointing at *David Hume's* powerful insight, this article aimed to remind us of the necessity of sharply distinguishing between global legal pluralism as the *description* of recent factual developments, drawing attention for example, towards the massive increase in international actors, norms and tribunals as well as adjudicators on the one hand. And, on the other hand, as a different issue, the question of how we *ought to* deal with or even solve those legal conflicts (based on a (common) normative legal framework) resulting from these plural, overlapping legal claims. I argued that we need to disclose the presuppositions underlying the claims which address possible legal solutions of these conflicts in the realm of *ought* (which also includes a clear differentiation between legal and normative pluralism). Claims which solely rest on the *description* of pluralistic orders do not suffice as a basis. Thus, firstly, it is of utmost importance to be aware of the *is – ought* divide when defining what is law within studies of global *legal* pluralism. While a broad definition of the law might help to provide for a complete descriptive account of overlapping legal orders and legal obligations, a broad definition within a prescriptive account (often implicitly) includes a strong argument against any superiority of official modern State law against unofficial law. This, however, has to be clearly stated as well as underpinned with careful argumentation as to why, for instance, modern State law should not be enforced or is even invalid when it conflicts with some unofficial norms conflict. The point is that the varying modes of legitimacy of official modern State law and unofficial law or other forms of normative authority must not be conflated. Pertinent issues and characteristics of modern State law such as democratic principles should be carefully differentiated from non-State law, which might not enjoy the same amount of legitimacy, which thus might be diminished by a broad definition of a prescriptive account of global legal pluralism. This also pertains the other way round: a clear cut differentiation might be of help in order to show that unofficial law might enjoy an even stronger form of legitimacy than official law.

In addition, this article concludes that the *is – ought* divide is respected at best if prescriptive proposals to solve legal conflicts are to be differentiated depending on the context. In order to deal with conflicts of legal norms from different but somehow overlapping legal orders, I suggested that it is more likely to come to a solution when we accept that different contexts make different solutions necessary. As a solution of such norm conflicts in legal terms always deals with prescriptive claims, I finally argue that it is more precise referring to a necessarily *common* framework which addresses the question as to how those conflicts should be resolved *together* or at least in a way acceptable for all parties: this is no longer reflected in the term plural. Thus, global legal pluralism should rather focus on a descriptive account.

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Notes

1. Eugen Ehrlich's book "Grundlegung der Soziologie des Rechts" was translated into English in 1936 ("Fundamental principles of sociology of law.")
2. C.f. Vanderlinden 1989, 156 who excluded from his understanding of legal pluralism "the existence, within a single legal order, of different mechanisms applied to similar situations [which] amounts to a plurality of legal mechanisms, not to legal pluralism." He continues by saying that "I realize today that in order to have pluralism, one must necessarily have many legal orders meeting in the same situation and making the individual not a 'sujet de droit' but a 'sujet de droits'."
3. Sometimes this is used to make a normative argument against "legal centralism." However, if used as such an argument I consider it rather a weak argument to say that legal pluralism was normal most of the time and it was only in the period of the nation states when legal centralism gained the upper hand for a short period of time and now it is again time for global legal pluralism. I think that this highly underestimates the advantages of modern State law, organized through a more or less democratic State, giving law legitimacy, people control, and so on and so forth.
4. C.f. also Nader 1965, 4, who already discussed the implications of broad anthropological definitions of law explicitly referencing the empirically grounded reasons for such a definition (6); as well as Fuller 1994, 9 with reference, for instance, to Malinowski 1926, who equates law with social control in the widest sense.
5. Berman (2012, 4): "This book seeks to grapple with the complexities of law in a world where a single act or actor is potentially regulated by multiple legal or quasi-legal regimes."

   Cf. Delmas-Marty (2009, 17): who speaks of "a pluralist internationalisation that favours interactions between different legal systems, or ensembles (a more neutral term that takes into account currently forming ensembles that are too changing and unstable to constitute true legal systems)."
6. However, see the recent normative piece of Teubner (2012), which didn't take long to face criticism. See only Günther (2016a, 2016b, 64).
7. Melissaris also explicitly advances his discourse-theory-based account of legal pluralism in order to "explore the possibility of understanding the law in dissociation from State." In his opinion (5) "legal pluralism seems like a promising alternative to a […] monistic and necessarily hegemonic view of the law." Cf. (46) "A basic assumption in this book is that there is nothing in the meaning of law that implies, presupposes or entails its necessary connection with the State". Yet Melissaris (47) is "asking whether it is possible to acquire some objective knowledge of what counts as law without, at the same time, abandoning the project of legal pluralism." See the earlier work by Melissaris (2004, 58): "[B]ecause of its inherent diversity, legal pluralism must be approached not as another legal theory but as *a radicalization of the way we think about the law, which must permeate and inform all theorizing of the law*. This means shifting the focus from strictly defined and hermetically closed *legal systems* to *legal discourses*." [original *italics*] How problematic such alternative approaches, like in this case Melissaris' approach, are is highlighted by his suggestion (76) that "pluralistic knowledge of the legal cannot be acquired by or integrated in an institutionalized legal system", but for Melissaris the "only available topos [where the meta-theoretical and meta-jurisprudential discourse should take place], at least at this stage, is legal scholarship."

8. Regarding criticism of Teubner see, for instance, Podszun (2014, 66 f), who concedes that such an understanding makes law descriptively tangible, but a normative approach moves into the background If the normative substance of law does not have to be defined, it is easier to integrate other regulating manifestations in a complex system. ("So wird Recht zwar deskriptiv greifbar, der hier besonders interessierende normative Ansatz aber gerät darüber in den Hintergrund. Gerade deshalb allerdings ist die Systemtheorie attraktiv als Erklärungsmuster für 'informelles Recht', als Basis für einen neuen Rechtspluralismus. Denn wer den normativen Gehalt von Recht nicht definieren muss, kann umso einfacher andere regulierende Erscheinungsformen in sein komplexes System integrieren.") Yet, Teubner (2003, 21) argues that secondary constitutional norms emerge, which transcend the validity paradox of self-made digital law and decide selectively about the quality of social norms as legal norms. ("konstitutionelle Sekundärnormen entstehen, die das Geltungsparadox eines selbstgemachten Digitalrechts zu überwinden vermögen und über die Rechtsnormqualität von sozialen Normen selektiv entscheiden.") This, however, seems rather vague, as Melissaris (2009, 43) points out. Quite erroneously, this is also a criticism made against Melissaris' approach. See McKee (2010, 583).
9. See also Sandberg, 2016, who "contends that a major failing of the concept of legal pluralism has been the inability to distinguish legal norms from other forms of social control."
10. C.f. Cohon (2010). Note however, that relying on David Hume here does not necessarily imply that it is logically impossible to conclude an *ought* from an *is*. While such logical impossibility is the mainstream interpretation of David "Hume's law" attributed to the famous passage quoted in length at begin of this article Dirk Lüddecke (2014, 176–9) provides a convincing argument for a less strong interpretation: Taking into account the explicit wording of the passage and where it is situated in the third book of the "*Treaties of human nature*" Lüddecke concludes that Hume was about to clarify what will follow and the necessity – what has according to Hume not been done until then – to give a reason for concluding from an is towards an ought. C.f. for controversial discussions also Hudson (1969).
11. Yet, it is important to concede that the description is informed by normative convictions, for example concerns about inequality and oppression, and that prescription, in turn, hinges on description. However, this does not exempt us from striving to sharply differentiate between both realms,
12. For a powerful critique of the hidden "common point of reference" in pluralistic accounts, see Günther 2016a.
13. Compare, for instance, Melissaris (2009, 45) who challenges that "law is necessarily associated with the state" and moreover claims that law is the vision of those theorists who associate law with the state "as coercively addressed by a small part of the population." The present author submits that this is a very strong accusation of the State as an institution being misused by "a small part of the population" coercing the majority to conform (at least implicitly against their will). Melissaris articulates an alternative approach based on discourse theory. However, it is difficult to see how such thing as "shared normative experiences" might successfully substitute for the State. For such a criticism see also McKee (2010, 583).
14. This can be questioned, of course. In the so-called rule of law crisis in the European Union, several member States of the EU are suspected of violating fundamental EU values such as the rule of law or even democracy. Generally, States may lack the fundamental modes of legitimacy I assume here for modern State law. My argument does not aim at protecting such wanting authorities. On the contrary, I think that also for such forms of official law it is helpful to differentiate these forms of normativity from unofficial law which might clearly show a much stronger mode of legitimacy than that of the official law.

15. Berman 2016, 154 even holds that "Global legal pluralism applies the insights of socio-legal scholarship and turns the gaze away from abstract questions of legitimacy and towards empirical questions of efficacy." Yet, he adds that "Of course, questions of legitimacy and efficacy are inextricably linked […], but the point is that once we come to recognize multiple sources of transnational and non-state authority, it is difficult to maintain any single abstract conception of legal authority."
16. See the statement made by Berman (2007) holding that sovereigntists (1180) "reject the legitimacy of all communities but the territorially-defined nation-state" and have (ibid) "intrinsic reason to privilege nation-state communities over others", contrasting it with a radical universalist position stating (1189) that "[i]n contrast to a reassertion of territorial prerogative, a universalist vision tends to respond to normative conflict by seeking to erase normative difference altogether."
17. Cf. Krisch (2010, 183): "pluralism helps steer a middle course between these positions – one that does not grant ultimate authority to any collective or process, but can help bring the competing visions into an informal balance." For criticism see Schaffer 2012.
18. See furthermore ibid: "In the conflict-of-laws approach the guiding idea is to distribute jurisdictional powers among a priori unconnected orders with parallel claims to autonomy, whereas the pluralist setting is concerned with orders that have established firm linkages and accepted forms of common decision-making. This level of interconnectedness requires more careful calibrations, which should also find reflection in the terminology: the vocabulary of "collision" norms seems less appropriate than other terms–such as "interface norms"–to signal enmeshment and joint engagement in a common space."
19. Note also that Krisch states later (2010, 312) that these norms stem from the sub orders (286) and might clash.
20. C.f., also ibid, 67: "Postnational constitutionalism is an attempt to establish continuity with central political concepts and domestic traditions; it tries to avoid the normative rupture often feared in discussions of globalization and global governance."
21. Yet, Berman also holds that (2007, 1166–7) "Pluralism is thus principally a descriptive, not a normative, framework. It observes that various actors pursue norms and it studies the interplay, but it does not propose a hierarchy of substantive norms and values.

    Nevertheless, while it does not offer substantive norms, a pluralist approach may favor procedural mechanisms, institutions, and practices that provide opportunities for plural voices. […] This commitment can, of course, have strong normative implications because it asks decision makers and institutional designers to at least consider the independent value of pluralism."
22. For criticism in this regard, see also Groce & Goldoni 2015, 11 when saying that "How these [normative] demands are put forward and then channeled is a question which is left largely unexplored, except for the treatment of adjudicative processes."
23. For this critique of Berman, see Galán and Patterson 2013, 783–90, and esp. 793 ff.; for a response, see Berman 2013b; c.f. critically also Michaels 2014, 141 holding that Berman's "managerialism also presupposes some superior position from which such management is possible." See, too, Groce & Goldoni 2015, 8–9.
24. Compare F. von Benda-Beckmann (1966, 92–3) asking "What is it we want to compare and why do we want to compare it?"; See also F. von Benda-Beckmann and K. von Benda-Beckmann (2006, 13–4), as well as F. von Benda-Beckmann (2002); See also Twining (2003, 250). I am following F. von Benda-Beckmann by suggesting that "the context and purposes of the inquiry supply criteria for distinguishing 'legal' from other normative orders." However, my suggestion here to focus on the context is not so much or only related to distinguishing law from non-law, but aims at grasping, depending on

the context, different common concepts in order to address and hopefully deal with all varieties of legal normative conflicts.

25. See, for instance, the discussion by Engle Merry (1988, 869–70) of the repugnancy principle, which was used by colonial powers to "outlaw unacceptable African customs."
26. Krisch (2010, 109 ff.) elaborates on European human rights law and thereby focusing on the relationship between the European Convention on Human Rights and member States as well as the example of UN sanctions (espec. Kadi) and EU law (153 ff.).
    Berman (2012, 154 ff.) points at the relation between NAFTA panels and the U.S. state courts. Similarly to Krisch, Berman also picks the example of the relation between the European Court of Human Rights and constitutional courts of European member States (155 ff.). He also mentions "dialectical interactions […] with regard to nonstate normative standards" (160). However, to be fair, Berman at least acknowledges (153) that "[d]escribing mechanisms for managing pluralism does not tell us how best actually to manage pluralism in particular cases."
    Cf. also Delmas-Marty (2009, 83), who points at regional organisations (81 ff.) like for instance NAFTA, the Andean Community, Caricom, Mercosur, the American Convention of Human Rights, the African Union, the European Convention of Human Rights as well as at global organisations (97 ff.) where she speaks about Fragmentation and Privatization as well as about (164) a "truly pluralist order" which is "hypercomplex" and "must combine horizontal and vertical interactions and correlate this variable-geometry integration with other movements." Delmas-Marty states (17) that her "hypothesis of ordered pluralism involves renouncing the binary opposition between hierarchical relationships (by subordination of one order to another) and non-hierarchical relationships (by coordination) and considering the process of interaction in a more nuanced fashion, a bit like the reflection of diverse pluralisms." For criticism against this stance see also Hartmann (2010, 1036).
27. For such a critique of the pluralistic account of Nico Krisch see also Schaffer (2012, 579): "The positive, empirically-grounded study of transnational legal ordering, in contrast, is important for building a normative approach grounded in philosophical pragmatism which recognizes the need for institutional variation in response to different contexts."
28. However, it is important to highlight that my claim for contextualization is much simpler and thus less overladen than the claim Melissaris is making. While Melissaris's main target is a sceptical view of State law (see *supra* n. 8) – or at least the link between State and law which is unnecessary in his eyes – my argument here is simply that when facing normative conflicts there are much likely to be various different solutions to deal with the conflict depending on the context. Thus I argue against the idea of one, single – sometimes even not very clear prescriptive – claim of dealing with normative conflicts in the pluralistic world.
29. C.f. thereto Koskenniemi 2001, 240 with further reference to Kelsen 1928; See also the shift of Neil MacCormick (1998, 530): This "problem is not logically embarrassing, because strictly speaking the answers are from the point of view of different systems. But it is practically embarrassing to the extent that the same human beings or corporations are said to have and not have a certain right. How shall they act? To which system are they to give their fidelity in action? "Regarding Neil MacCormick's shift from radical pluralism towards "pluralism under international law," see, Krisch (2011).
30. For such an account exemplified by the Austrian legal order see Kirchmair (2013).
31. Günther (2016a, 5): "Historical experience teaches us that a pluralism of normative orders can rapidly become the victim of power asymmetries, or even bring forth such asymmetries."

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