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INTERLEGAL BALANCING

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Interlegal Balancing.

Gabriel Encinas[*]

ABSTRACT: In this paper, I propose a conceptualization of "interlegal balancing" as a distinctively legal-argumentative "interface", or structure for the relation between norms sourced in overlapping and diverse legal orders. My aim is to situate this concept. A concrete or formal structure for its application is left pending. This paper's argument is chiefly "architectonic" or theoretical in a structural and conceptual sense, but it certainly rests on a number of normative considerations. It proceeds in three main sections. The first section (§1) regards my working assumptions regarding the concept of legal order. I gather the continuing relevance of a "necessary and sufficient conditions" type of approach to the concept of a legal order. The next two sections embody my core considerations. They regard, respectively, two different but mutually complementary standpoints. A first standpoint (§2) could be described as a more "deductive" mapping exercise. It is a reconstruction of received views of the distinction between varieties of legal pluralism on the one hand and constitutionalization or constitutionalism beyond the state on the other hand. It aims at structuring a comparison-friendly "scale" upon two crossed variables: the presence/absence of hierarchy and the necessity of either balancing or subsumption. A second standpoint (§3) could be described as a more "inductive" or cumulative effort. Upon the results of the previous standpoint, it becomes necessary to gather more determinate criteria for the identification of legal norms and their preference. In its turn, these criteria are further sub-divided into two sorts: classifying criteria of law and qualifying criteria of law. Gathering some foremost contributions in each sense, I announce a further pending research path proposing a taxonomy in relevant guiding criteria for interlegal balancing. I conclude remarking a very brief summary of my argument's open questions (§4).

KEY WORDS: Interlegal Balancing, Balancing, Balancing Competences, Interlegality, Pluralist Jurisprudence, Global Legal Pluralism, Global Constitutionalism, Principles Theory.

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Introduction.

In this paper, I propose a conceptualization of the development of "interlegal balancing" as a distinctively legal-argumentative "interface", or structure for the *relation* between norms sourced in overlapping and diverse legal orders. This relation includes, eventually, a conditional relation of precedence. The aim is to situate this concept, still remaining far from striking any clear argumentative structure or formalization.

[To anticipate: Interlegal balancing is related but distinct from Klatt's model for *balancing competences*. Instead, it depends on an argument I present (in **§2.4.c**)[1] regarding the delicate but core considerations behind the "balance-aptness", or eventual lack thereof, regarding competence *rules*.]

This paper's argument is chiefly "architectonic" or theoretical in a structural and conceptual sense, but it certainly rests on a number of normative considerations. It proceeds in three main sections.

The first section (**§1**) regards my working assumptions regarding claims to objectivity in concepts such as legal order. This short section is preliminary and aims to place the main considerations of this paper within a broader legal-theoretical framework. Namely, I gather the continuing relevance of a "necessary and sufficient conditions" type of approach to the concept of a legal order as an alternative to restricting ourselves to an approach based on *family resemblances*. Otherwise, I believe, we would incur a greater risk of talking past each other, especially with an eye to the open-endedness orbiting the very idea of balancing norms sourced in diverse legal orders.

The next two sections embody my core considerations. They regard, respectively, two different but mutually complementary standpoints.

A first standpoint (**§2**) could be described as a more "deductive" mapping exercise.[2] It is a reconstruction of received views of the distinction between varieties of legal pluralism on the one hand and constitutionalization or constitutionalism beyond the state on the other hand. It aims at structuring a comparison-friendly "scale" upon two crossed variables: the presence/absence of hierarchy and the necessity of either balancing or subsumption. If my

[1] *Below* in this paper, pp. 16-8.
[2] §2 incorporates an updated version of the main findings of *CIR Working Paper No 02/2020*.

argument is successful, any possible type of structuring of the relations between legal orders falls someplace along this scale meaningfully. Even more important are the limitations of this standpoint, namely, its indeterminacy regarding criteria for balancing and the application of legal norms with different sources.

A second standpoint (**§3**) could be described as a more "inductive" or cumulative effort. Upon the results of the previous standpoint, it becomes necessary to gather more determinate criteria for the identification of legal norms and their preference. In its turn, these criteria are further sub-divided into two sorts: classifying criteria of law and qualifying criteria of law. Gathering some foremost contributions in each sense, I announce a further pending research path on the taxonomy of relevant guiding criteria for interlegal balancing.

I conclude with a very brief summary of my argument's open questions (**§4**).

1. Legal order and the necessary and sufficient conditions approach.

It is still a recent development in "mainstream" jurisprudence to claim that the exclusive focus of law upon the state "was, it now turns out, never justified".[3] Recent ideas carry a contrastive burden. They must individuate themselves. Along these lines, I understand the very idea of *interlegal balancing* to face important but not intractable questions.

There is a distinctive quality to be captured in interlegal balancing. After profound contributions and debates, there is a reasonable consensus that it is appropriate to look beyond the instrumental idea of politics often looming behind legal pluralism and one of its foremost fellow concepts, interlegality.[4] Interlegal balancing is a distinctively *legal* theory.

Interlegal balancing takes its point of departure to be legal practices. It regards the structure and burdens behind the arguments which serve as an interface, *i.e.* to structure a relation[5] (and, often, to *re*balance), between norms sourced in multiple and diverse legal orders.

[3] So Raz (2017: 161).

[4] On De Sousa Santos' (1987) instrumental use of *interlegality*, see Teubner (1991); Amstutz (2005); Nickel (2015); Seinecke (2015: 217 *ff*) and on the sense here adopted, which departs from the epistemic vantage point provided by the case itself, Klabbers & Palombella (2019).

[5] We may distinguish two orders of relations involved. One is the sort of relation (primacy, reception, transplant, comparison, etc) drawn from within any given legal order towards norms "sourced" in other, overlapping, legal orders. The other relation is its ground and the spring of interlegality. Take any of our personal acts. Any act may become a social matter, for we act supported by an underlying *legal relation*. On this point, see Somek (2017; 2020). The complementary step joining both is to recall that this legal relation is only artificially reducible to a single legal order, especially in our complex, interdependent social world.

As in balancing more generally, the relations thus held aim at cumulating across time. They structure conditional relations of precedence.

Such arguments are typically found in judicial reasoning, but the reasons to restrict ourselves to the judicial realm might be fewer than we often think. Officials across branches, especially in parliament, engage in interlegal balancing.

This type of structural theory might invite suspicion of explaining too much.[6] I share the core worry that generally speaking we could wish for a more solid link between theory and its standards for control or "falsifiability". By all means, empirical findings (including legal dogmatics) should be a guide of theory, but this leads us directly into a well-known hermeneutic circle. "Empirical findings" in law are the child of theory. Hence, a more straightforward strategy is immanent to theory itself. Interlegal balancing stands and falls with the coherence of an idea of autonomous legal orders. Within this general position, there is much room for internal nuance, but not everything may follow.

The rest of the brief remarks in this section are addressed mainly to explicit my guiding assumptions regarding objectivity in a concept of a legal order.

Legality is always-already multiple and diverse. One could mention the *qualitative* differences between "oracular" Ancient Greek law and the formal solemnities of Roman law,[7] the segmented and stratified, personal status-relative, validity of overlapping legalities in medieval ages,[8] and the continuing existence of autonomous social "bodies" of law (even when cast as a foil to modern state law).[9]

Key for our purposes is to recall that there are several ways to make sense of this diversity of legalities. On the one hand, at a certain end of the spectrum, we could hold a thesis along the lines of "incommensurability". Diverse legalities possess what Weber called *Eigengesetzlichkeiten*: internal, autochthonous, and self-enclosed rationalities.[10] Here, we

[6] Already in its title, Klement (2008) [„*Vom Nutzen einer Theorie, die alles erklärt: Robert Alexys Prinzipientheorie aus der Sicht der Grundrechtsdogmatik*"]. But *cf*. Sieckmann & Klement (2009).
[7] But see a nuanced take in the penetrating exchange between Gödde (2015) and Vesting (2015).
[8] See Stolleis (2008); Seinecke (2015: 51 *ff*; 2017); Duve (2017).
[9] See only Laski (1919); Dreyer (1993).
[10] See Swedberg & Agevall (2016: 368-70) with additional references; Bruun (2016). The Weberian argument sees *Eigengesetzlichkeit* in the literal autonomy of each "sphere of life" or "value sphere". Weber's famous *value polytheism* thesis left us with the dark legacy of inspiring Schmitt's own *Sachgebieten* thesis in his *Concept of the Political* or elements in the so-called "tyranny" of values (see Lebow 2017). Weber's position seems to lie

would not find different *conceptions* but entirely different *concepts* of law.[11] If anything, we could remark *family resemblances* always at the price of remaining disallowed from attempts at synthesis.[12] On the other hand, we could certainly speculate on what a "monolithic" polar opposite stance would look like. Fortunately, we don't need to. A moderate position is surely more interesting.

Our starting point must surely be the self-understanding of participants (from different social *milieus* or even "communities"). Law is what social agents regard as law.[13] This *non-essentialist* approach cannot but immediately invite two further considerations. Both remain wholly immanent to its logic. *First*, law (or legal order) implies a surplus value *vis-à-vis* the more general idea of norms (or normative order), and concepts like custom or religion.[14] This surplus value is *publicity*. This is shown as, *second*, diverse participants have an unavoidable intercourse where the result, often enough, is to recognize some of each other's practices as law.[15]

To further trim this story, we may recall that *legal order* is a term of art.[16] Its availability and familiarity tempt us to forget this fact and treat it as if it were a concept organically grown in ordinary language. Instead, it is a *legal-scientific* concept with a very determinate history. To remain in the surface, its particles show the promise of bringing *order* into the chaos of "civil society", and to do so under the right reasons for all, *i.e.* through *law*.[17] There is, therefore, a certain teleological promise in maintaining our highly artificial talk of law and legal order, and their resource-consuming practices. Certainly, we could do without them and instead we

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equidistant to Bentham on "polytheism", Nietzsche's *Umwertung* programme, and Baden Neo-Kantian *Wertphilosophie*.

[11] The distinction between concept and conceptions is usually traced to Rawls on justice (1971: 6). See further Dworkin (1986: 71; 190); and, for the use here adopted, see Forst (2013: 17 *ff*).

[12] Wittgenstein (1953: §67); *cf* the suggestive formulation in Eco (1988: 324): "[…] family resemblance is a two-faced concept, stimulating and discouraging at once: on the one hand, it may lead to inquire into what precisely justifies resemblances but, on the other hand, it leads to recognize them as an analogical illusion so that it seems more reasonable to retreat into the realm of more specialized research, disavowing totalizing syntheses."

[13] Tamanaha (2001: 166).

[14] See Günther (2003; 2008; 2014).

[15] See versions of *recognition* theories as articulated in Muñíz-Fraticelli (2014); Sandberg (2016); or Michaels (2017).

[16] This point echoes Seinecke (2015: 49 *ff*) on the concept of legal pluralism. See the helpful concise account of *legal order* in Itzcovich (2012).

[17] Already Hegel conceived of state law as the appropriate *medium* to contain the unjust tendencies in *market-based,* or *civil, society* (as received from Smith). Crucially, he entrusted this containment entirely upon the *Bildung* of bureaucrats, disavowing criteria for control. See Herzog (2013: 51-60). Likely, this very conception led Marx to his equally holistic take on the state and its "withering". Everything changes if and when law becomes a plausible *medium* for democratic-argumentative control.

maintain them under good reasons. They perform a socially necessary and useful function evident in the adoption of basic legal concepts by very diverse non-"western" societies.[18]

This cannot but require claiming objectivity. This takes place for example, through an approach along the lines of enunciating *necessary and sufficient* conditions[19] to distinguish law from non-law, legal claims from other claims, and a specific set to distinguish a legal order in *our* contemporary sense from *e.g.* "oracular" Ancient Greek *nomos*. Fortunately, we may build upon the fact that this task has been the subject of classic legal-theoretical investigations. In the following sections, I may only hint at a further specification: enunciating criteria for the classification and qualification of norms sourced in diverse legal orders.

In sum, I submit we have no conclusive reasons for skepticism regarding concepts such as law, legal order – and *interlegal balancing*.

2. A scale among pluralisms and constitutionalisms.

This section aims at drawing an analytical and conceptual standpoint regarding the interaction of legal orders within a paradigm of legal argumentation theory. This will mainly serve as a "matrix" to situate different presumptions in interlegal balancing.

In a first subsection, I present the briefest characterizations of legal pluralism and the constitutionalization of international law (or constitutionalism beyond the state) (**§2.1**). Then, I announce my distinction upon two variables (**§2.2**). These are the presence or absence of a hierarchical structure (**§2.3**), and the "interface" relations between norms structured by either subsumption or balancing (**§2.4**). This reconstruction is meant to yield a scale which enables comparison among the diversity of theories which have emerged in the relevant debates. As an analytical tool, we must distinguish four "segments": strong pluralism, moderate pluralism, moderate constitutionalism and strong constitutionalism. On the one hand, I briefly point to considerations which give content to the moderate constitutionalist and pluralist theses (**§2.5**). On the other hand, I note the limitations of this approach (**§2.6**).

[18] A wealth of evidence could be gathered from indigenous peoples' long history of claims in distinctively "western" legal terms, *e.g.* invoking an ancestral codex as proof (*justo título; título primordial*) of land property rights. See only Romero Frizzi & Oudijk (2003); Inoue (2013). The very grammar of *human rights*, first elaborated by Salamanca schoolmen, is constitutively intertwined with the (still quite imperfect) legal recognition of basic interests and needs of individuals belonging to indigenous populations. See Haratsch (2010: 33) who traces the first instance of the term "human rights" to Bartolomé de las Casas.

[19] This point is inspired in the discussion in Culver & Giudice (2010: 85 *ff*).

2.1. Pluralisms and constitutionalisms in law beyond the state.

In this short section, I restrict myself to a brief sketch of pluralism (*a*) and constitutionalism (*b*) as models for conceiving the constellations of overlapping legal orders, or law within and beyond the state.

Ad (a). **Legal pluralism.** Perhaps even more so than constitutionalism beyond the state, *legal pluralism* threatens to be an unwieldly concept. It stretches across a variety of complex and very different debates (four on my count) involving different disciplines.[20]

To be sure, theories involving legal pluralism come in a diversity only to be alluded to.[21] Notwithstanding, a composite definition was offered by Ralf Michaels. He speaks of a "relative consensus" on legal pluralism describing "a situation in which two or more laws (or legal systems) coexist in (or are obeyed by) one social field (or a population or an individual)."[22]

A first wave of legal pluralist theories emerged taking social-scientific premises into account, in legal anthropology in relation to post-colonial contexts.[23] Among them, a definition of legal pluralism which defended its "strong" against its "weak" sense was advocated by Griffiths.[24] The guiding criterion was that "strong" pluralism dispenses with the idea of state recognition which is, in turn, constitutive of "weak" approaches.[25]

These insights usually referred to *legal communities* (especially indigenous peoples and minority religious communities) within the territory of a state. Especially in the '90s,[26]

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[20] As forebears, legal pluralists adduce inspiration from a variety of sociological approaches to law. Notable examples of authors cited as forerunners include the corporatist theory of the state as elaborated by Otto von Gierke, through more sociological approaches such as those of Eugen Ehrlich's concept of 'living law', Leopold Pospíšil's legal anthropology including legal levels, and Hermann Kantorowicz on law as fact. For the reception of Gierke's *Genossenschaftslehre* in political pluralism, see Dreyer (1993); and further Runciman (1997); Dilcher (2016). On the relationship of political pluralism and early doctrines of subsidiarity, see Muñíz-Fraticelli (2014: 56-73) and Endo (1994: 632-610). On Ehrlich, a now-classic point of reference is the idea of *Global Bukowina* in Teubner (1996). For discussion, see Nelken (2008). On Pospíšil, the *locus classicus* Griffths (1986), Goodale (1998). On Kantorowicz (1958), see the critical discussion in Borowski (2011).

[21] A profound study of the concept of legal pluralism is offered in Seinecke (2015). See also Gailhofer (2016).

[22] Michaels (2009: 245).

[23] A critical and influential overview is offered in Tamanaha (1993).

[24] Griffiths (1986).

[25] Further shared premises include the opposition to state-centered law, and some version of an incommensurability thesis for the relations among legal orders, both of which have been carried over in further discussions over legal pluralism. See Seinecke (2015: 35). Muñíz-Fraticelli (2014: 26-7) traces an idea of incommensurability to Robert Cover's influential *Nomos and Narrative* (1983). In a similar sense, Habermas puts "radical versions of legal pluralism" in direct relation with the "contextualist assumption that there are legal languages which form closed, i.e. mutually untranslatable, universes of meaning', which he recognizes as 'a false philosophical premise", in Von Bogdandy & Habermas (2014).

[26] Seinecke (2015) traces this development to their treatment by De Sousa Santos and Teubner.

convergence was with interests in globalization and the changing structures of international and supranational law *vis-à-vis* the sovereign state. This led, on the one hand, to a notable transformation into theories on the European context whereby *topoi* from legal pluralism shaped up "constitutional pluralism".[27] On the other hand, it also led into theories accounting for the interaction of legal orders beyond the state, in the guise of global or transnational legal pluralism.[28] Even more recently, jurisprudence has become a site of legal pluralism.[29]

Theories of legal pluralism face important challenges. Their normative appeal is not obvious. Identifying a situation of plurality (of legal orders in a situation of potential contradiction, in this case) can seem trivial. How is such a situation stable, or (according to some versions) an ideal to be strived for, is not self-evident.[30] Legal pluralism is often accused of "externalizing" the lack of a final say to "politics". Famously, Neil MacCormick held at a point that "the solution may be a matter for political rather than legal processes".[31]

In sum, according to a received view, where most accounts of legal pluralism would stop at observing distinct but interacting legal (and normative) orders, this proves insufficient for legal participants, who would plausibly ask for the best possible solution.[32]

Ad (b). **Constitutionalism beyond the state.** On their turn, the theories which can be grasped under the concept of *constitutionalism beyond the state,*[33] are also contrasting as to

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[27] See generally Jaklic (2014). For critical discussion on the concept, see Baquero Cruz (2016).
[28] See Schiff Bermann (2016); Michaels (2009: 246-7).
[29] So Tamanaha (2019) on the program of "pluralist jurisprudence", in the essays in Roughan & Halpin (2017).
[30] See Isiksel (2013); Cohen (2017).
[31] MacCormick (1999: 75). "Political rather than legal processes" is a complex formulation. The specificity of these political processes, in my understanding, can be understood in at least two ways. *First:* as leaving the resolution of conflicts up to factual power balances or to, *second:* an "overlapping consensus" defined only through the contingent terms of each self-enclosed ethical-political community. However, the latter cannot be sustained without presupposing a moral basis: "They [a special class of human rights] set a limit to pluralism among peoples" Rawls (1999: 80). This threshold for legitimacy is higher internally in political liberalism: "The idea of public reason arises from a conception of democratic citizenship in a constitutional democracy." Rawls (2005: 445). This general topic underpins a general problematic consequence of a subjective approach in ethical-political discourse: "[...] since there is no ethical correctness criterion out of those internally settled by the members of a culture in accordance with their convergent preferences, sensibilities and attitudes, there can be no possibility of improving or correcting the outcomes of ethical-political discourse" Courteois (2004: 860).
[32] Among others who have raised a similar point, Grainne de Burca notably emphasized such shortcomings in her contrast between pluralist and constitutionalist approaches to the international legal order. See de Burca (2010: 31 *ff*).
[33] For this paper, the label will simply be used interchangeably with "constitutionalization of international law" unless otherwise noted. We should note in passing that this *constitutionalization* is not the only one emerging from the 1990s onwards. A homonym relates to the legal order of postwar states, see Folke Schuppert (1998); Guastini (1998).

yield "the danger of empty talk that is only seemingly a real discourse on an agreed topic."[34] This calls for additional criteria.

In this regard, I will follow Thomas Kleinlein, who holds that the constitutionalization of international law involves two main tenets: "the autonomization of public international law vis-à-vis the states [...] and a partial transfer of the functions of domestic constitutions to public international law and their international reinforcement."[35] This way, he regards as crucial for the constitutionalization of international law what he calls the *hierarchization* thesis.[36]

The idea of constitutionalization is characterized by identifying trends in international law (peremptory norms and *erga omnes* obligations) which drive away from state consent and certain notions of sovereignty, as well as analyzing founding documents as international constitutions.[37] Examples of the latter point toward the UN Charter,[38] the European Union[39] and the WTO.[40]

Preliminarily, this broad characterization distinguishes some senses of constitutionalism or constitutionalization of international law, leaving open for future comment those theories which use constitutionalism "as a mindset"[41], *i.e.* as a common conceptual frame to assess developments beyond the state, as well as contributions such as societal constitutionalism stemming from systems-theory.[42]

2.2. A distinction upon two crossed variables.

If anything, we have remarked the elusiveness of the borders of both "theoretical camps" alluded to immediately before.

In the following two sub-sections, I will present the grounds for a four-place "scale" between these positions. These are two crossed variables. On the one hand (**§2.3**), I will reformulate a received view on hierarchy as a criterion for their distinction. On the other hand

[34] Peters (2017: 4).
[35] Kleinlein (2012a: 82).
[36] Kleinlein (2012a: 97) For a recent take along the same elements, see Jovanović & Krstić (2020).
[37] For a concise overview, see Peters (2017). See also De Wet (2006; 2012).
[38] Fassbender (1998).
[39] For the European community, the Van Gend en Loos ruling of the ECJ affirmed the autonomy of the legal order of the European Community, Case 26/62, Van Gend en Loos [1963] ECR 1. This autonomization is characterized as a stand-in for sovereignty or a moment of constitutionalization. See Peters (2009: 208).
[40] Cass (2005), Trachtman (2006).
[41] Koskenniemi (2006).
[42] Luhmann (1997); Teubner (2012); Kjaer (2014); Thornhill (2016).

(**§2.4**), I will bring to bear on the topic the classic distinction of the theory of legal principles. We may speak of subsumption or balancing in the application of interface norms.[43]

We may also tabulate our "scale".

<table>
<tr><td>Radical pluralism</td><td>Moderate pluralism</td><td>Moderate constitutionalism</td><td>Radical constitutionalism</td></tr>
<tr><td>Subsumption</td><td colspan="2">Balancing</td><td>Subsumption</td></tr>
<tr><td colspan="2">No hierarchy</td><td colspan="2">Hierarchy</td></tr>
</table>

The two variables (hierarchy or not, balancing or subsumption), although stylized as binary, certainly present a core and a penumbra which leaves room for contestation and flexibility. The presence of a core and penumbra is ubiquitous in the concepts of legal theory which makes this by itself no conclusive objection to develop our present heuristic. More relevant are the "inherent" limitations of this mapping exercise (enunciated in **§2.6**).

2.3. Variable 1: Hierarchy.

Krisch regards hierarchy as the criterion distinguishing pluralism and constitutionalism.[44] This stylized position, however, cannot cloud the varied senses in which hierarchy has structured thought on international law.[45]

A mention of hierarchy may not dispense referring to the doctrine on the hierarchic structure (*Stufenbau*) of law, engineered by foremost Austro-Hungarian legal theorists of the early twentieth century.[46] We should note from the beginning that this doctrine may explicit primarily the levels within the state legal system, but the *inter-orders* dimension was also definitely an important part of Kelsen's take.[47]

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[43] [Revising my previous take,] I will remain detached from a "strict thesis" on the separation between rules and principles. The taxonomy of norms may well need to develop a fine-grained variety which in turn coexists with our main, binary distinction on the types of arguments: subsumption and balancing.

[44] Krisch (2010). See the exchange on this point in Stone Sweet (2013); Krisch (2013).

[45] See Weiler & Paulus (1997); Koskenniemi (1997). Further discussing the uses of the idea of hierarchy in legal reasoning, see Scarcello (2018); Riofrio (2020).

[46] As it is known, an initial version this doctrine was developed by Adolf Julius Merkl and Hans Kelsen adapted it in his *Pure Theory of Law*. For an account of the reception of the *Stufenbau* doctrine by Kelsen, see Paulson (1996).

[47] See further the comparisons of Kelsen's monism and the state primacy developed by Kelsen's disciple, Umberto Campagnolo, in Bobbio (1993); Busch, von Schmädel & Staudigl-Ciechowicz (2011: 172 *ff*).

I rely on a normative premise. A hierarchic structure is a necessary condition to sustain *our* contemporary conception of a constitution.[48] The ideas of contemporary constitutionalism are, in turn, essential to *our* background expectations of law. A quick bracketing of constitutional supremacy therefore risks selling short *our* demands regarding legitimacy and justice under the rule of law.[49]

[To anticipate a result: the hierarchy-position I take to be more stable (*moderate constitutionalism*) departs from the supremacy of state constitutions. Thus, professor Alexander Somek may be right when he kindly pointed that this position is "monist" if in a certain version. In contrast, *radical constitutionalism* requires the additional step of establishing the existence of a constitution (supra-state). Then it defends its principle of primacy.]

On the one hand, this conceptual choice does not attempt to rule out by definition the outcome of inquiring into the overlapping relationships of legal orders beyond the state. Instead, it is meant to highlight those "burdens of justification"[50] relevant in identifying normative orders as legal, and qualifying their normative pull.

On the other hand, requiring a hierarchic structure does not entail a commitment to become *full-blooded Kelsenians*.[51] Instead, we should keep in mind an "alternativity problem" identified by Stanley Paulson in the "transcendental" style of argument employed by Kelsen.[52]

At this point, there are good reasons to draw from the contributions of Martin Borowski. He has argued to reconcile the idea of a hierarchic structure with regards to two of the most relevant contemporary developments with which it would seem at odds: (*a*) contemporary

[48] It is necessary, for example, for the *dualist* notion of democracy as developed in Ackerman (1991: esp. 6-10) and adopted in Rawls (2005 [1993]: 233); and to so account for the role of fundamental principles such as constitutional rights in constraining ordinary politics under a framework. See Fioravanti (2001: 114).
[49] Grimm (2010).
[50] "As a cross-cutting issue, burdens of justification and presumptions put different international actors under pressure to justify their claims of authority in constitutional terms" Kleinlein (2012a: 121).
[51] That is, following Kelsen in his "classic" period(s) relying on Marburg Neo-Kantianism. On periodizations of Kelsen, see Paulson (2017). On the different Neo-Kantian strands animating Weber and Kelsen, see the essays in Bryan, Langford & McGarry (2015); see further on Neo-Kantianism's path-breaking treatment of normativity Beiser (2009; 2014), and more generally Hatfield (1990) on the *post-Kantian* opposition between naturalism and the normative (under metaphysical and methodological variants of each).
[52] Paulson (2012: esp. 75-8). To illustrate the point, we can take for instance the posing of a *Grundnorm* as a necessary fiction (or a "category") to make sense of our data or "experience" of effective and properly issued normativity. According to the argument's terms, the need for an explanation (for Kelsen, a *Grundnorm* as a stand-in for the *Pure Theory of Law*) is granted – but not necessarily Kelsen's. Instead, one can, with coherence, replace Kelsen's own account a different conception of law.

balancing/proportionality argumentative procedures, and (*b*) the complexity of contemporary European legal space.

Ad (a). Some scholars have worried that proportionality procedures introduce the risk of *levelling* or flattening all legal provisions. Matthias Jestaedt holds that "the doctrine of balancing destroys the different levels of the legal system."[53] Borowski shows that, on the contrary, proportionality procedures participate in what Kelsen identified as concretization in each descending step of the *Stufenbau*. Greater margins are open in the constitution than in the general laws and regulations.[54] In the same sense, the outcome of balancing is also a concrete rule from within those different margins. Elsewhere, professor Borowski has defended that "norms to be balanced have to be on the same level in the hierarchy of the legal system."[55] So, we might add, the higher the level of a norm, the higher importance must be granted to its authority (or the principle of legal certainty, etc).

Ad (b). Martin Borowski uncouples the idea of hierarchy and unconditionality during his critical assessment of Neil MacCormick's accounts of constitutional pluralism. On the one hand, he criticizes the pluralist view for not accounting for the derivative nature of European law, arguing against constitutional pluralism's upshot that "[...] the difference between voluntarily transferred powers and usurped powers is not a decisive one."[56] On the other hand, he discards an integration model in which Union law is "unconditionally supreme" for neither reflecting the limits to the Union's powers as they stand on European Treaties,[57] nor being tacitly accepted by Member States.[58] This enables him to advance the thesis of a "derived and nearly unconditional supremacy" of European law,[59] where "delegated law counts as formally superior" but exceptions are granted (only) when it can be justified that "vital interests of a Member State are seriously infringed upon and Union law provides no plausible solution."[60]

[53] Jestaedt (2012: 166). For discussion of similar critiques, see Kumm (2006).
[54] Borowski (2016: 64-5).
[55] Borowski (2011a: 206 *fn 94*).
[56] Borowski (2011a: 202).
[57] Borowski (2011a: 204).
[58] Borowski (2011a: 205).
[59] Borowski (2011a: 205-9).
[60] Borowski (2011a: 207). To similar effect, Matthias Klatt has adopted the distinction of supremacy and primacy which "allows for conditional preference relations between the colliding competences which establish a primacy without depending upon a higher rank of the competence that enjoys precedence." Klatt (2015: 209).

I take these considerations to sufficiently allow some reconciliation between the idea of a hierarchical structure on the one hand, towards both balancing as well as the complex changed structures of law beyond the state on the other hand.[61]

2.4. Variable 2: Subsumption/balancing.

Formerly, I characterized this second variable as the presence of *either rules or principles* at the interface of overlapping legal orders. After a brief characterization of the idea of interface norms (*a*), and equally brief notes on the rules and principles distinction (*b*), I will gather some of the reasons that led me to delimit this distinction around subsumption and balancing (*c*).

Ad (a). Nico Krisch's thoughts may also serve as our point of departure regarding the idea of interface norms. Krisch characterizes them as those "norms (and institutions) at the interfaces of the different sub-orders" which "regulate to what extent norms and decisions in one sub-order have effect in another; they are the main legal expression of openness and closure, friendliness or hostility among the different parts."[62]

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[61] Conceptual problems orbit the idea of adopting a *Grundnorm* bearing on the relations between national and international law. Some recent works have debated whether the *Grundnorm* belongs to the national or the international order (Gragl 2017: 15-6; at points approaching this sense, Itzcovich 2012: esp. 379). In turn, this is taken to yield a primacy for national or international law in the monist system. Gragl (2017: 21) intends to find support for a *Grundnorm* belonging in the international sphere, pointing to how it validates an international constitution, fragmented and/or unwritten as it is. My point is only to recall the *Grundnorm* presupposition need not (cannot) belong to a given legal order. It is instead a creature of legal theory where it has a "transcendental" role as a *category* for (legal) normativity as such. Along these lines, see Paulson (2012: 85-7) for seven plausible definitions of the *Grundnorm* with additional references. In any case, something different holds for a Hartian "rule of recognition" which depends upon social-institutional practices: it is licit to say we could choose among actors and sites (national, international or otherwise) to identify different rules of recognition, recognize a plurality of "rules of recognition", or even pose a meta-level of rules of recognition (see Michaels 2017 with a "rule of external recognition" defined as a "tertiary rule"). All this is peaceful, for the idea of a rule of recognition takes place from a *descriptive sociology*. The picture changes if and when conventionalism runs short of answering what one ought to do. From a *postconventional level of justification*, claiming to identify practices or beliefs as rules of recognition involves a weighty but, in last instance, *pro tanto* reason. We may invoke a formulation by Greenberg (2004: 185): "...we can ask whether facts about participants' beliefs are relevant to the content of the law, and if so, in what way. Since the content of the law is rationally determined, the answers to these questions must be provided by reasons [...] the law practices, including facts about participants' beliefs, cannot determine their own relevance.". From the (essentially, heuristic) position of a constitutional judge deciding upon a case, one must look for the best, *all things considered*, possible solution. This makes the admittedly problematic notion of the "one right answer" unavoidable as a regulative idea.

[62] Krisch (2010: 285-6).

The potential relation of *interface norms* with fellow concepts is left open.[63] Among other remarks which could be raised in this suggestive characterization,[64] what strikes me as especially relevant is to note the space for further distinctions within the broad scope of interface norms.

TJS Flynn offers a helpful proposal.[65] He finds it necessary to distinguish "interface norms *proper*" from "norms-at-the-interface". A given norm can become a "norm-at-the-interface" incurring in conflict or deontic contradiction between overlapping legal orders.[66] Paradigmatic are fundamental rights entering the so-called European "Bermuda Triangle" or multilevel structures more generally, or substantive norms beset by conflicting norms from sectorial regimes of international law. In contrast, "interface norms proper" have a "metaconstitutional" character according to Flynn.[67] They are norms dealing with other norms, namely, in jurisdictional concurrence. They are more abstract as the paradigmatic example is the conditional principle of *Solange* I & II.[68]

We may here leave open the further implications drawn by Flynn on the "metaconstitutional" character of "interface norms proper", only mentioning that his valuable theory presents a point of special relevance. Flynn appears to argue that the universality of interface norms can be falsified if the legislative (and not the judiciary) has structured these (conditional) relations.[69] This choice, however, remains wholly contingent. This is so (at least for the purposes of this paper) as a meaningful point is that *officials across branches*, especially in parliament, engage in *interlegal balancing*.

Ad (b). The theory of legal principles departs from a distinction in normative typology. Its "exclusion theorem" states *aut-aut* that every norm is either a rule or a principle[70].

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[63] To illustrate among foremost concepts we may mention *bridging mechanisms* (Walker 1998; 2005; *cf* Jaklic 2014: 52 *ff*) perhaps more on the institutional side, and *linkage rules* (von Daniels 2010; 2017) perhaps more on the norm-theoretical.

[64] We could name a couple. First, not only are norms and institutions identified with each other, but also norms and decisions, where the concept of institution is left open to interpretation. Second, there is an idea of suborders and parts which may disavow a *radical* pluralism.

[65] Flynn (2014; 2018; 2019).

[66] Flynn (2019: xxvii-xxviii).

[67] Flynn (2019: xxviii).

[68] Flynn (2019: 40 *ff*).

[69] Flynn (2014: 109-10, 215-6; 2019: 101-2, 215-6).

[70] Alexy (2000: 295); see further Bäcker (2010).

Systematic implications follow, foremost among them the one between subsumption in rules and balancing in principles.

The distinction of rules and principles predates the writings of Dworkin and Alexy.[71] Traditionally, it referred to a matter of degree.[72] Rules have a relatively determinate scope of application, principles are very general rules. In contrast, it was Dworkin who first enunciated a "logical difference" between them. Rules apply "all or nothing", principles have a weight dimension.

Alexy adapted the strict separation thesis from Dworkin, further defining principles as *optimization commands* whose application (balancing) is relative to the factual and legal possibilities, tying with a theory of proportionality. This way, for Alexy, the distinguishing criterion between rules and principles is their mode of application: subsumption (or syllogism) and balancing respectively.[73]

The nature, or the structure, of legal principles remains subject to ongoing controversies[74] if also to diffusion and further development. Among the most relevant further developments certainly counts the idea of *formal principles*.

Formal principles were developed to account for the more authoritative dimension of law,[75] especially regarding the "democratic objection" to balancing in judicial review. In a nutshell, they label an additional "weight" or burden to be taken into account when reviewing a final decision of an authority exercising its competences. This way, formal principles reconstruct margins of discretion or deference from the judiciary to legislative decisions, but also more generally between legal authorities emitting decisions and especially when reviewing

[71] For a concise account, see Portocarrero (2010); see also De Fazio (2018).
[72] This sort of distinction is widely developed. For an overview, see Portocarrero (2014). Habermas counts among foremost authors holding a difference of degree. This degree-distinction is also prevalent in international law doctrine (esp. with an eye to Art 38 of the Statute of the ICJ). See Goldmann (2014). But *cf.* Rauber (2018) wih a convincing rapprochement.
[73] Alexy (2003).
[74] See the essays in Borowski (2010), see also Poscher (2015; 2020).
[75] See the account in Portocarrero Quispe (2016). For overviews see Alexy (2014), Klatt (2015), Borowski (2017); Azevedo Palu (2019: 311-339).

others'.[76] This has made the idea of formal principles attractive to account for relations in multilevel structures and *e.g*. to reconstruct the *Solange* judgments.[77]

However, the theory of formal principles presents a significant number of open questions. Within authors working in principles theory, there is little agreement among standing models (formalizations) for their legal-argumentative application. There are at least three model-types: a combination model, a separation model, and an epistemic one.[78]

Ad (c). Such disagreement is not unusual in legal theory. However, at least three further "sites" of conceptual fragmentation lead me to recommend a detached stance for our purposes.

1. First, we have few motives (in my view) to argue for an exclusion theorem in the sense of the strict separation thesis. Convincing reconstructions of the rules-and-principles distinction propose other criteria. Besides Dworkinian models, foremost proposals include Bäcker's treatment of *defeasibility*,[79] and Sieckmann's distinction of *normative arguments* and *normative propositions*.[80]

2. Second, a fine-grained normative typology can coexist with the qualitative differences of subsumption and balancing.[81] In fact, a fine-grained normative typology is necessary especially with an eye to the next consideration.

3. Third, and most importantly, the norm-theoretic status of *competences* becomes unsettled. The exclusion theorem (rules or principles) intersects, for example, with the Rawlsian-Searlian distinction of constitutive and regulative rules, or definitions, or

[76] Formal principles would be misplaced in the relation of a jurisdictional organ (of first instance) and "ordinary" appeal instances. Beyond that, they are present transversally, in inter-branch relations and also relations between the courts of last instance in legal orders. Especially in the judiciary, this concerns an explicit review (substantive, procedural or otherwise) of a previous proportionality assessment. Whether the structure is the same in inter-branch relations depends on how we answer the question whether legislative deliberation and the concretization of rights and collective goods in administrative instances imply *balancing*.

[77] See Klatt (2014; 2015); Portocarrero Quispe (2016); Gorzoni (2019).

[78] For this classification, see Alexy (2014); Borowski (2017). In the briefest terms: the combination model (Borowski) *adds* the formal principle (e.g. respect for legislative decision) to the substantive principle favored in a precedent decision introducing an additional burden for [judicial] review, *i.e.*, the formal principle "appears" as a third principle alongside two substantive ones. The separation model (Sieckmann, Klatt) places the balancing of two opposed formal principles in "a distinct level" to then be integrated to the original proportionality assesment. The epistemic model (Alexy) transforms formal principles into a theory of certainty and discretion: the more certainty, the less margin of discretion. This issue cannot be further pursued here.

[79] Bäcker (2010). In a nutshell: to be applied, principles require balancing. This preempts defeasibility, which is characteristic of rules. His proposal includes an elegant reconstruction of the objections regarding the optimization commands formula.

[80] For a brief overview, see Sieckmann (2013).

[81] For a contribution in this sense, see Atienza & Ruiz Manero (1997); Ruiz Manero (2005).

other conceptualizations of power-conferring norms.[82] Notably, Klatt's model conceives of *competences as principles* in the sense of optimization commands.[83] Yet, not only are competences usually formulated as rules in positive legislation, most constitutions incorporate a version of the *principle of legality* setting strict limits to the acts of an authority in clearly defined legal positions.

The preceding points, especially the third, lead me to delimit our second variable in our scale to the qualitative difference between subsumption and balancing. This way, a given legal order may employ very different concepts in relevant cases: perhaps speaking of defeasibility or more or less limited *reasonableness* review-assessments, or looking at the legal dogmatics of the scope of protection and limits to fundamental rights.[84] Such different configurations, determined by "legal culture", traditions, and dogmatics are of utmost importance – yet, from the standpoint of legal reasoning, subsumption and balancing hold transversally.[85]

Still, we must note that Klatt's model for the *practical concordance*, or balancing, of competences indeed points to an important and ineludible phenomenon – as do theories of formal principles in their common core insights. The core consideration is that the authoritative dimension of law *is a value*, as the principle of legality is too.

Always on behalf of the most delicate set of controls, we must recall the following. Law itself is a value-based artifact. In the words of Radbruch, law is characterized by "the will to justice",[86] *i.e.* it is instrumental (in the sense of conditioned) to realize the idea of justice.[87]

[82] See Villa Rosas (2018) on competence *rules*, with additional references and for a helpful rapprochement with this debate. A slightly different English version, omitting its note [3] on competence norms being rules is found in Villa Rosas (2017).
[83] Klatt (2014; 2015).
[84] This latter tack is taken by the Mexican Supreme Court on article 1 of the Mexican constitution (on limitations of constitutional rights) *vis-a-vis* the Interamerican System of Human Rights especially in its case law. See *contradicción de tesis 293/2011*. See further Mateos Durán (2019) for a rapprochement with German legal dogmatics on the restriction of fundamental rights.
[85] On this point, Alexy's idea of balancing is subject to ongoing disputes, especially inviting suspicion on its claims of universality (across all legal orders) and analytic *necessity*. By no means intending to discount critique, I can only point that it is insufficient to restrict oneself into the observation that different jurisdictions speak of *e.g. reasonableness* tests instead of balancing. *Cf.* Veel (2010) on the Canadian case, Stone (2019) on the Australian case, and more generally Borowski (2013b) on proportionality and *reasonableness*. The relation of balancing and Moreso's *specificationism* as one of its conceptions also merits mention. For a helpful overview, see Sardo (2013). See further Borowski (*forthcoming*) for a helpful account of standards for *limited* proportionality review.
[86] Radbruch (2006 [1945]: 14, "Third Minute").
[87] "The concept of law, a cultural concept, *i.e.* a value-laden concept, leads us to the value of law, the idea of law: Law is defined through its sense towards serving the idea of law. We find the idea of law in justice." Radbruch (2003 [1932]: 73 [§9]). I generally disavow an invocation of Radbruch to argue for a strong connection of law and

As a result, and I take this to count as the more controversial yet central idea in this paper: no value is absolute *immanently* in the artificial realm of law.

We may draw a *structural* insight looking at discussions regarding absolute values in law from debates regarding human dignity and the prohibition of torture. One position sees the prohibition of torture as immanently and absolutely valid: it always trumps, it is always subsumed, never apt for balancing or defeasibility.[88] The other position sees the prohibition of torture as the highest or among the indisputably highest values in law by a wide margin, but precisely in virtue of its highest value for our human condition (and thus not "immanently in the artificial realm of law"). According to this latter position, it is possible (if otiose in practical cases) to reconstruct a clash of values involving the prohibition of torture.[89] The prohibition of torture will always prevail in any legitimate balancing. So, the difference between both positions is structural and *not* related to results or conclusions (namely, that torture is never admissible).[90]

What I suggest to draw from this contraposition is only the structural account of values underlying even rules which are for *all* purposes absolutely valid. *A maiore ad minus*: this structure can then be used to account for values underlying rules (competences, their delegation) which are for *nearly all* purposes absolutely valid. To insist: checks and balances must be institutionalized, made effective, available and clear to avoid a *slippery slope* from interlegal balancing into "juristocracy" or other threats to liberal democracies.

2.5. On behalf of moderate positions.

As announced (§2.2), the outcome of crossing both variables (§§2.3-4) is a "scale" with four places. These incorporate "radical" and "moderate" versions of pluralisms and constitutionalisms. The *genus proximum* of pluralism is individuated from constitutionalism by its disavowal or denial of hierarchy between overlapping legal orders. In turn, the *differentiae specificae* internal to both genuses is the role of subsumption or balancing.

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morals bearing on legal *validity*. Instead, I hold a moderate connection which must bear on legal interpretation, always within an admissible framework.

[88] See Clérico (2012) on how human rights norms may be rules or principles.

[89] See the duly careful reconstruction of this position in Borowski (2013).

[90] See Borowski (2013: esp. at 406 and *ff*).

So, we obtain: radical pluralism (no hierarchy, subsumption), moderate pluralism (no hierarchy, balancing), moderate constitutionalism (hierarchy, balancing), and radical constitutionalism (hierarchy, subsumption).

My labels are not subtle in suggesting that I take the subsumption-based "radical" positions to be less stable than the balancing-based "moderate" ones. I rely on a general normative-conceptual position which insists on two dimensions in an adequate account of law, one *immanent* to the necessity of its institutional phenomena, the other *critical* to any given instantiation.[91]

In this section, I will very briefly gather some arguments on how the "radical" positions fail to strike an adequate balance between both dimensions (*a*). Then, I will equally briefly discuss some of my initial intuitions regarding our resulting moderate positions (*b*).

Ad (a). In the "radical" versions of pluralism or constitutionalism, law is either reduced to a factual dimension which disavows its critical normativity (typical in some versions of legal pluralism) or flattened *vis-à-vis* other normative orders by rejecting its function of constituting legitimate political authority in a community (typical in some accounts of constitutionalization).

Regarding the first, law can hardly be grasped satisfactorily exclusively as social facticity. This is often the standpoint taken by *social-scientific* legal pluralism, and also a much-denounced slippery slope towards depriving law from analytical meaning.[92] Legal authority becomes indistinguishable from mere relations of power.[93] Griffiths, the starkest proponent of "strong" legal pluralism instead of "weak" varieties, eventually disavowed the term: "'legal pluralism' can and should be reconceptualized as 'normative pluralism' or 'pluralism in social control'."[94]

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[91] On the one hand, this general position fits generally with a diversity of legal theories. See especially Walker (2015: 83-4, 90), Palombella (2009), Neumann (2005); Alexy (2010); Klatt (2015b). On the other hand, this does not endorse all "dual" or "dualistic" theories of law. To gather classic examples, Jellinek's dual thesis remains wholly within the factual realm (see Klatt 2019), and some phenomenological distinctions may be understood to remain within an ideal one (in the line of Scheler and Hartmann see Kelly 2011: 114 *ff; cf.* the nuanced take in see Albert Márquez 2004; see further Kelsen's own critical take on Carlos Cossío's attempt to sublate the *Pure Theory of Law* in "egological" phenomenological terms in Kelsen 1953). For better and worse, the relevant dual type of distinction esp. in Alexy is *sui generis:* in need of further specifications as it is not coextensive with e.g. *is* and *ought*. For discussion, see Sieckmann (2015; 2019).

[92] See Michaels (2017: 93); Sandberg (2016: 145).

[93] Koskenniemi (2005: 16).

[94] Griffiths (2006: 64). Certainly, Tamanaha advances his *non-essentialist* version in relation to this development, to account to how law is a 'folk concept'. Tamanaha (2008: 375). However, this move may actually reproduce the

Regarding the second, in some theories of constitutionalization, we may run into the opposite tendency: disavowing the real dimension of law, represented by popular sovereignty as democracy and self-determination. Kelsen's monism belongs here.[95] While Habermas' proposals for the constitutionalization of international law have been characterized as a "monist approach a la Kelsen",[96] its salience for republican standards of input legitimacy as recognized in the state is a relevant qualification.[97] So, a disavowal is unwarranted insofar as popular (i.e. *depersonalized*) sovereignty still has the function of constituting legitimate political authority.[98]

Ad (b). Up to this point, the considerations alluded to conceptual reasons against both "radical" positions. The preliminary conclusion of this argument recommends moderate varieties of pluralism and constitutionalism. This may fit some characterizations of "constitutional pluralism"[99] – but I understand the moderate constitutionalist standpoint as inherently skeptical on bracketing the principle of constitutional supremacy.

What is the relation of moderate pluralism and moderate constitutionalism? Here, our meta-theoretical scale remains indeterminate. One option is we ultimately require choosing between both. The other option is that both are complementary, referring to different objects or constellations. Formerly, I saw the "choice" option as necessary. I will very briefly mention the four considerations I gathered, turning in the next subsection to the limitations of this approach – which serve also as an argument on behalf of the "complementarity" option.

My considerations take four main steps. *First*: I consider the fact of the diffusion of a culture of value-based justifications, exemplified by the central place of human rights in our moral and legal grammar. *Second*: a conventionalist moral explanation is necessary but

shortcomings of earlier concepts of law in legal pluralism. On Tamanaha's conventionalism, see Kondo (2017), and already some considerations sketched above (§1).

[95] See Kelsen (1998[1960]).

[96] Von Bogdandy & Habermas (2014).

[97] See Habermas (2014: 8-9).

[98] See Grimm (2015: 106). A constitution presupposes (but may also integrate) a community. This idea need not be understood as smuggling a contemporary (contingent) conception of constitutionalism. As an exegetical matter, Jean Bodin himself conceived of sovereignty as conditional. See Fioravanti (2001: 74); Beaulac (2003). Rawls (1999) conceptualized (a restricted list of) human rights as minimum conditions for external legitimacy, regarding recognition from other states. In this threshold, decent as well as liberal peoples are included. This can plausibly be said to follow from balancing community self-determination and human rights concerns. In favor of the very high weight of self-determination we find its salient position in important treaties, but this should not cloud its unsettled legal and normative status. Such norms fit reconstruction as *formal principles*. Their 'content-independence', insofar as it is to be reconciled with the connection to general practical discourse that Alexy's argumentation theory poses, must be understood as reflecting 'procedural rationality'. On this understanding of content-independence, see Valentini (2018).

[99] For an overview, see Jaklic (2014).

insufficient for the critical potential of human rights.[100] *Third*: an adequate account of human rights entails a theory of fundamental rights as a step towards their concretization.[101] *Fourth*: the result, I conjecture, could proceed from an account of value pluralism as a theory of practical reasoning.[102]

The idea on behalf of *moderate constitutionalism* would be that the coordinative potential which is distinctive of the state could be grasped as an institutional value (among other possible ones).

2.6. Limits in this approach.

- We have already noted the indeterminacy on the relation of varieties of constitutionalism and pluralism. In this regard, criteria incorporating institutional values need not be restricted to the state, nor to the relations between specific branches.
- Furthermore, taking paradigm cases into account, *Kadi* and *Medellin* alike fall in the parameters of hierarchy and balancing,[103] and thus *moderate constitutionalism*. As there are relevant differences at play, we need finer-grained criteria.
- This call for finer-grained criteria is general and also with an eye to serve as a practical guide, giving content to interlegal balancing.

These limitations require a complementary standpoint, with a more cumulative logic of classifying and qualifying criteria of legality. At the same time, our results in this scale, with hierarchy as a (contrastable) presumption and balancing, come in handy to shape up the relevance of those criteria according to the setting: whether multilevel (both varieties of constitutionalism) or horizontal (both varieties of pluralism), complementarily.

[100] Jones (2013), Liao & Etinson (2012); see further the essays in Etinson (2018).
[101] See Alexy (2017). A different accent in La Torre (2018). Similarly on moral objectivity and institutional pluralism, Albert Márquez (2009).
[102] The idea then, is that we could preserve what Kelsen called a *regulative ideal* of "epistemic unity" while disavowing his moral relativism. Some recent contributions take steps to recast Kelsen as a value pluralist. Besides the abundance of textual evidence for relativism instead of pluralism in Kelsen's writings (see only Spaak 2019; Albert Márquez 2009: 35 *ff*), a guiding model is found in Isaiah Berlin - who himself notoriously oscillated into relativism. See generally Reick (2016) embracing Berlin's affinities with Rorty. See Barberis (2006; 2016) who very helpfully offers a distinction between metaphysical pluralism, value pluralism, and ethical pluralism.
[103] See Harvard Law Notes (2016); De Búrca (2015).

3. Classifying and qualifying criteria of (inter-)legality.

This complementary second standpoint could be described as a more "inductive" or ongoing cumulative effort. Upon the limits of the previous standpoint, it becomes necessary to gather more determinate criteria for the identification and preference of legal norms.

In its turn, these criteria are further sub-divided into two sorts: classifying criteria of law (§3.1) and qualifying criteria of law (§3.2). After gathering some foremost examples of contributions in each sense, I (only) announce an attractive research path proposing a further taxonomy of relevant guiding criteria for interlegal balancing (§3.3).

3.1. Classifying criteria.

A strand has emphasized the implicit use of criteria for the identification of law. This would serve as an enabling condition, at the epistemic level, to tell legal norms in their relevant normative pull from other types of norms or facts. In this section I will gather two core proposals, both of which may be said to aim at a grammar of (inter-)legality. They are: (*a*) Klaus Günther's *universal code of legality;* and (*b*) Jan Klabbers' *presumptive law*.

Ad (a). Klaus Günther's universal code of legality[104] (UCL) is advanced from a discourse theoretical standpoint. It takes the form of necessary if implicit "commitments" (pragmatic, normative and/or otherwise) incurred by anyone who raises a *legal* claim, i.e. in the "various and multi-levelled networks of interlegality".[105]

In my understanding there are at least three "classes" of *universal* ingredients to be noted in the UCL thesis. First, it incorporates "basic legal concepts" such as *rights*, *sanction* and *competence*. One may say these are universally valid in the sense of being necessary to avoid

[104] "From an internal point of view actors in the various and multi-levelled networks of interlegality still communicate with one another by referring to a, at least hypothetically, uniform concept of law […] a legal meta-language which contains basic legal concepts and rules, like the concept of rights and of fair procedures, and the concepts of sanction and competence and the concepts of sanction and competence. […] deeply penetrated by historical legal experiences, like the various human rights revolutions or the struggle for democratic procedures of legitimate legislation. Many people have these basic concepts in mind when they refer to law, or when they raise a legal claim on any level from local to transnational law. […] more than a theoretical hypothesis. It already works in the daily routine of legal communication in the spheres of interlegality […] This code of legality has a certain factual validity, independent of nation state legislators, national judicial systems and national governments. The code of legality is also disengaged from political democratic legislation and still far away from a coherent interpretation of its elements." (Günther 2008: 16-7).

[105] Günther (2008: 16).

contradictory inferences.[106] Second, the concept of *fair procedures* is invoked. It justification may be deducible from Habermasian discourse theory – if also at the cost of importing the objections to both Habermas' proceduralism and the translability of discourse norms into legal norms.[107] Third, regarding human rights and democracy, these are characterized by Klaus Günther as *historical experiences*. Out of the three "classes", this is the most normative consideration as they are universally valid only insofar as human rights and democracy can be successfully justified with independence to the contingencies of their genesis.

The key point to highlight here is that the UCL thesis consciously acts as a minimum threshold beyond which there is wide space for *relative normativity*. The "radical indeterminacy" of the UCL is to be "saturated" through intersubjective agreement.

Ad (*b*). Also regarding the identification of law, an initially surprising suggestion is found in Jan Klabbers' reverse presumption: all normative utterances are legal unless rebutted.[108] So, we are recommended to invert the burden of proof in the theoretical investigation of law (or legal validity) beyond the state. This reversal may especially have strong explanatory potential in assessing legal obligations beyond the imprint of the state: regarding the more "horizontal" varieties of international law, including "sectorial" regimes, and expertise-based coordinative authorities.[109]

We could trace the argumentative steps taken by Klabbers so. First, the uniqueness of law is to be protected.[110] Law is unique among steering mechanisms being democratic (criticizable from the vantage points of morality or expertise in case of defect), and coercive. On the one hand, this embodies essential Fullerian virtues: general norms, public, non-retroactive, understandable, non-contradictory, possible to obey, stable or predictable, and applied congruously by officials.[111] On the other hand, all those Fullerian virtues must be complemented by a Razian formal criterion: state consent.[112] The latter reintroduces the idea of a *chain of legitimacy*. This nonetheless proves hard to sustain given that "international affairs

[106] See Orunesu & Rodríguez (2019) for a recent balance on the theory of fundamental legal concepts.
[107] For a foremost objection to discourse theory's proceduralism, see Höffe (2002 [1990]). See Müller-Doohm & Zucca (2019: 52*ff*) with additional references. See Villa Rosas (2015) on Alexy's (1996) consequentialist argument on the adoption in practice of discourse-theoretical norms.
[108] Klabbers (2009: 115).
[109] Klabbers (2009: 90-3). The sectorial or "self-contained" regimes of international law have been the subject matter of discussions on *fragmentation* (Simma 1985; Koskenniemi & Leino 2002; Teubner & Fischer Lescano 2006). For a recent reappraisal as "refinement" and with additional references, see Peters (2017b).
[110] Klabbers (2009: 104 ff).
[111] Klabbers (2009: 112)
[112] Klabbers (2009: 113).

are relatively isolated from democratic control."[113] These sort of empirical difficulties animate the move towards the "reverse presumption" thesis.

As any presumption is rebuttable, we are offered a series of 5 disjunctive rebuttals for the "reverse presumption" thesis of legality regarding contents,[114] context,[115] origins,[116] procedure,[117] and topic.[118] Especially relevant is that, as part of *procedural* rebuttals, a particularly thick principle is condensed: "norms made without the involvement of all those entitled to participate shall not qualify as law".[119]

Now, the formal criterion precedes all these disjunctive rebuttals.[120] While this could reduce some of the surprising potential of the reverse presumption of legality, its crucial contribution remains put in place.[121] It calls attention, and an *explanation* in legal theoretical terms, to constellations where the consent criterion is absent or recedes in principle. Especially in a "horizontal" setting of regime or jurisdictional conflicts of international law, the rest of the disjunctive rebuttals would be determining.[122]

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[113] Klabbers (2009: 115).
[114] Klabbers (2009: 118): leaving 'everything to the discretion of the addressee'
[115] Klabbers (2009: 119): 'context may suggest that legislative intents were absent ex hypothesi'
[116] Klabbers (2009: 119): 'whether the forum has 'prima facie law-making capacity'
[117] In the sense of Fuller's *procedural natural law* supplemented with the principle, "norms made without the involvement of all those entitled to participate shall not qualify as law" Klabbers (2009: 121).
[118] As a 'de minimis' rule, subject matter adequate for legal regulation Klabbers (2009: 121).
[119] A possible reading could allocate this principle the same problems that follow from 'all affected' principles in democracy, but another possibility points to particular proposals for institutionalization. Regarding the latter, a proposal is familiar from the experience of inter-authority relations in the state framework, intervening as non-parties: See Avbelj & Roth-Isigkeit (2016: 176): 'Qualifying the UN as a possible intervener would be an appropriate means to engender a reflexive and sincere cooperation between the Court of Justice and the Security'. In the EU legal space, a recent proposal regards the institutionalization of an appeal instance in the rulings of the European Court of Justice regarding jurisdictional conflicts, see Sarmiento & Weiler (2020).
[120] Klabbers (2009: 122).
[121] In a recent contribution, Mora-Carvajal points that Klabbers' proposal lacks "criteria to determine the constitutional or higher quality of norms, which makes it fail as a practical option to resolve determinate antinomies, it only moves in the realm of unity which would not allow, e.g. to resolve conflicts among normative sentences which are both reputed constitutional (it does not transcend the coherence attribute)." Mora-Carvajal (2020: 113). We could add two short comments. On the one hand, certainly from the beginning, Klabbers does not aim at a matrix to solve antinomies, but delimits his contribution to the problem of the identification of legality. The latter does not cease to imply great theoretical relevance with such diverse implications as those shown in *e.g.* the recent attention paid to the coexistence of ruling with and without rules. See Lorini & Moroni (2020). On the other hand, the need for a complementary perspective also pointed by Mora-Carvajal may be taken as a call to look, besides classifying criteria, also for qualifying criteria of legality. This paper's main aim is but a general abstract mapping exercise.
[122] On the analogous structure of 'regime conflicts' and jurisdictional conflicts, Pulkowski (2014: 329-331). See also Simma & Pulkowski (2006: 507).

3.2. Qualifying criteria.

Recent proposals include refined models for combining procedural and substantive reasons in situations of plurality of prima facie legal authorities or conflicts of jurisdiction.

Not intending to deny the relevance of other contributions, especially those which propose a rapprochement with models for balancing "interests" taken from private international law,[123] here I may recall but the most relevant features of two salient models: the argument for *relative authority* provided by Nicole Roughan (*a*), and the practical institutional concordance for balancing competences provided by Matthias Klatt (*b*).

Ad (a). Nicole Roughan draws from a variety of sources to provide a valuable argument: any given claim to legitimate authority must be constituted through the idea of interdependence and relativity towards other authorities. At the core of this proposal lies the *conjunctive justification test*:

> "Authority is justified if: (1) there is an undefeated reason to have authority rather than private decision-making; (2) a particular person or body has the standing of authority

[123] See Michaels (*forthcoming*). Dirk Pulkowski (2014) makes a case for understanding the differentiation of international law (its 'fragmentation') as calling for a more "horizontal" approach when resolving jurisdictional conflicts among the different specialized regimes. Harmonizing interpretation is advanced as an "obligation of best effort", as opposed to an obligation of result (Pulkowski 2014: 292), and following from the presumption of rationality (Pulkowski 2014: 291-2). His argument on international law regimes seems to consist in three steps. First: exhausting harmonizing interpretation. Second: conflict rules from private international law must be brought to bear. Third: finally, Pulkowski argues that the "interests" for each regime must be balanced through a "comparative impairment test" (Pulkowski 2014: 331-4). The presupposition for this is a systemic, instead of piecemeal, fashion. However, according to Pulkowski, this involves no "ordinary balancing" (Pulkowski 2014: 333), but "sacrificing" the least impeded regime. This consideration stems primarily from adopting a diagnosis of Ralf Michaels and Joost Pauwelyn that balancing among regimes would lead to different results from the perspective of the values of each system "in the absence of a common, objective standard (available essentially only within a single "system")" (Michaels & Pauwelyn 2012: 368). However, both the disavowal of balancing and the suspect of the 'sacrifice' formulation are heavily qualified during the analysis of conflicting constellations among the WTO and the Cultural Diversity Convention (under the auspices of UNESCO): 'In such situations, one of the two legal regimes would have to 'sacrifice' some of its authority, but the decision-maker's task would be to keep that sacrifice as small as possible. It is impossible to predict in the abstract, independently from any particular case, whether the WTO regime or the CDC should yield in such conflict scenarios, as much would depend on the gravity of the inconsistency of a measure with, respectively, the provisions of WTO law and the CDC.' (Pulkowski 2014: 341). Pulkowski's diagnosis is a plausible interpretation regarding the regimes of international law. It recognizes the "horizontal" specificity of the relation between different jurisdictions. Among regimes (Pulkowski analyzes the conflict of rules between the World Health Organization and the UNESCO Convention for Cultural Diversity) there is no hierarchy presumption, or at least not in the sense of the one obtaining in the legal orders of a state e.g. within a multilevel system for the protection of human rights. Thus representing possible positions beyond the institutional actors suitable for the coordinates of *moderate constitutionalism* (i.e. those characterized by the presumption of nearly unconditional primacy in the EU) and into a *moderate* or even *radical pluralist* scenario. The lack of a presumption on hierarchy allows oscillation between general, harmonizing, interpretations and more particular regime-specific ones in Simma & Pulkowski (2006: 506). Notwithstanding, this diagnosis need not commit us to accepting his prescription regarding 'comparative impairment'. Rather, I submit that the positions of Matthias Klatt and Nicole Roughan are aptly suited as responses for a pluralist scenario. To sustain these claims, I will briefly turn to their contributions.

> conferred upon it through a justified procedure; (3) that authority is supported by or is consistent with the balance of governance reasons; (4) that authority is supported by or is consistent with the balance of side-effect reasons; and (5) its exercise would better enable subjects to conform to the reasons for action that apply to them, including both primary and secondary reasons to follow or exclude the directives of other relevant authorities."[124]

To the *conjunctive justification test* above is added a "relativity condition". It incorporates the *interdependent* legitimacy of authorities and requires admitting, from the start, justified relationships between overlapping or interactive authorities:

> "(6) any overlap or interaction between the domains of prima facie authorities is managed through a relationship that: (a) improves or at least does not diminish the prospects of conformity to reason for subjects of either authority; (b) is consistent with the values protected by the justified procedures that confer standing upon either authority; (c) is consistent with the balance of governance reasons applying in the circumstances; and (d) is consistent with side-effect reasons generated by the overlap or interaction."[125]

Our core point is the following. We must point the latency of a circularity problem in conditions (3), (5) and (6). Its *circularity* regards that these require a previous identification of authorities. It is only *latent* for it need not beg the question: we are referred to identifying *prima facie* authorities.[126]

Identifying *prima facie* authorities requires a sociological type of inquiry. This method resembles a faithful report on practices *qua* social facts. It yields facts in terms of behavior or belief. While behavioral facts seem unfit to determine their own identification and systematization into a normative system, the jury is out on whether the "rule of recognition" (*qua* fact on beliefs) may thus ground its own identification and systematization.[127] In any case, Roughan's aim is assessing the justification of authorities. This requires explaining deep disagreements.

We may therefore characterize the problem from latent circularity as a "primacy of the synchronic". It emerges when fixing, in any given time, the *empirical* "standing" of plural (*prima facie*) authorities as a criterion. Then, this criterion which consists on a factual situation is used to assess, now at the *normative-conceptual* level, a claim to legitimacy.[128] We may find a leap: from describing a *prima facie* authority to assessing legitimacy. This occurs if we avoid

[124] Roughan (2013: 134).
[125] Roughan (2013: 143).
[126] Roughan (2013: 126).
[127] "[…] there must be factors, not themselves derived from the practices, that favor some models over others." Greenberg (2004: 182). *Cf.* Chilovi & Pavlakos (2019).
[128] See Roughan (2013: 158).

introducing additional normative standards on the sources of authority and its future control. In this case, we would then find ourselves introducing a bias for what has efficacy in a given moment. This may also lead to collapse the distinction of procedural and substantive standards of legitimacy. Along these lines, Roughan introduces the caveat that "legal orders whose content is, independently, contrary to reason, cannot be contenders for sharing in legitimate authority."[129] This point requires explicating a threshold on what counts as "contrary to reason".[130] However, this is left beyond the scope of the theory on relative authority.[131]

As suggested, this difficulty can be addressed sequencing two kinds of legitimacy. We may assess the standing of authorities first *diachronically* and then *synchronically*. The diachronical implies keeping a "chain of legitimation" (whether state consent, or procedures which are democratically or otherwise justified).[132] The synchronical implies arguing for a threshold of empirical and normative correctness, also in a case-by-case basis.

Thus *sequencing* is but one starting intuition regarding the research path on "what (if any) sorts of interactions, between which objects, are justified."[133]

Ad (b). Matthias Klatt's model for balancing competences (their "practical concordance") counts among the most complete contributions on the issue of jurisdictional conflicts. This complex model is based on three main steps.

As a first step, almost as a preliminary matter, a type of "classificatory balancing" is required on our (*the judge*'s) certainty on normative and empirical premises at hand. Given uncertainty or stalemates, this point already opens space for judicial "epistemic" discretion.

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[129] Roughan (2013: 165)

[130] "Occasional failures can be tolerated up to the point at which they obscure the visibility of the shared authority for the subjects and/or remove its reliability, for if subjects cannot identify or trust that authority, they cannot be guided by it, and this in turn triggers the identification problem that plagued the independent justifications of authority." Roughan (2013: 166). The consideration emerges that the relevant viewpoint for such considerations is different from the one taken up in a claim of rights of the sort leading to balancing norms from different legal orders.

[131] Roughan (2015: 220).

[132] All these are "reasons for decision" in Roughan's terms. Also characteristic of authority are "content-independent" obligations. These may only follow from consent and democracy. See Valentini (2018). Content-independent obligations do not stand outside morality but themselves hold for moral reasons. Therefore, they may ultimately be defeasible from reasons regarding moral correctness, although on an adequately high threshold. A further presupposition is that eventual conceptual links between *legal order* on the one hand and *sovereignty* on the other hand only follow after adopting a certain conception of both. On the one hand, I take sovereignty to have a dimension irreducible to state institutionalization which calls for supra-state and supra-positive checks. See Habermas (2017); Günther (2017). On the other hand, I assume we adopt sovereignty as conditioned to the protection of human rights. See Rawls (1999: 79); Raz (2010); *cf* Liao & Etinson (2012).

[133] Roughan (2020/*forthcoming*: 16).

As a second step, we have "material balancing", of the sort undertaken between two principles (rights, collective goods). This may be taken by any authority (legislative, executive, judiciary) exercising their competences. This decision remains reviewable, eventually, also by authorities from a different legal order according to the case at hand.

It is at this point, as a third step, that we find the balancing of "formal principles". This is a different sort of balancing insofar as an additional consideration enters the picture: spheres of competence. In this step, *internal justification* refers to the review of consistency and coherence in the *a quo* authority's reasoning from given premises to their conclusions. In contrast, *external justification* assesses: the premises taken as relevant, as well as the weight of the reviewed authority's competence (the "formal principle"). For the latter challenging question, a list of "weighting rules" is proposed which include *topoi* such as: democratic legitimacy, importance of material principles involved,[134] quality in the reviewed decision,[135] and considerations from subsidiarity.[136]

We noted some core challenges on conceptualizing competences as principles.[137] Another caveat is in order regarding the different models to apply formal principles, and open questions regarding the relative indeterminacy and ambivalence of a share of the "weighting rules".[138] In

[134] This bears both pro and contra invoking a margin of appreciation. In Klatt (2014), this standard was spelled out in (sub-)rules 9 to 12. Rule 9: 'the weight of interference with a formal principle of the competence of an organ correlates inversely to the intensity of the interference with a material principle in its decision' (p. 236). Rule 10: 'The more intensive the interference with material principles is in a decision, the higher must be the importance of the formal principles which sustain the decision' (p. 237). Rule 11: 'The more intensive the interference with material principles is in a decision, the more intensively will the decision be controlled' (p. 237). Rule 12: 'The greater the abstract weight of a material principle involved in a decision, the lesser the weight of the ruling competence of the deciding organ and the greater the control competence of the control organ.' (p. 239)

[135] Evaluating arguments (extensive and convincing); special expertise relevant to the issue; quality and effectiveness of the legal system

[136] Substantive closeness (time, location, facts) – applies inversely if the aim is cooperation/homogeneization

[137] *Above,* §2.4.c.

[138] This *separation model* for balancing competences (formal principles) in Klatt has been characterized as *pluralistic constitutionalism* as opposed to what we called a moderate constitutional approach. See Fila (2015: 168-174). On the one hand, the separation thesis is qualified by the close significance of material principles, specifically in (sub-)rules 9 to 11. In them, this significance regards the concrete weight, which may only be obtained comparing substantive balancing outcomes. So, formal principles are mediately combined with substantive principles. The objection remains that (sub-)rule 12 would restrict the scope of considerations for the weight of a formal principle to the abstract weight of concerned substantive principles. As, according to Klatt (2014: 244) there is no meta-criterion for the primacy of these weighting rules, concrete weight considerations are preponderant points of departure for balancing. This corresponds to them carrying the burden of justification against the presumption of nearly unconditional primacy (or the primacy of diachronic justifications alluded to above). On the other hand, a significant proportion of the values protected under the margin of appreciation and subsidiarity are subsumable in the standards of promoting democratic legitimacy and contributing to the quality of the decision if one contrasts Klatt (2014 and 2015). Apart from those, the areas of questions of national sovereignty, organization of the military or specific governmental programs count as factors in favor of a greater margin of appreciation against the ECtHR (Klatt 2014: 229). These were cited under a weighting subrule called

any case, Klatt's systematization, especially in its weighting rules, is surely a foremost contribution to be kept into account.

3.3. A systematization proposal?

In my view, interlegality brings the surplus value of emphasizing the sufficient reasons to cumulate a composite law, especially from precedent decisions and case law. These interlegal norms are Janus-faced as legally applicable standards also with the potential to bring unity into the variety of institutional actors. These are the joints which articulate the composite nature of law, *i.e.* beyond courts: parliamentary due-process of lawmaking, executive policies that concretize collective goods, and general social control of government decisions.

This way, I propose a fourfold classification of values or goals constitutive of interface norms: context (including institutional pragmatics),[139] input (democracy, polity consent, voice/exit), deliberation (interinstitutional mechanisms, eventually also criteria from private international law)[140] and output (fostering fundamental rights and collective goods).

4. Concluding Remarks.

This paper had the main aim of situating balancing within interlegal settings – still remaining very far from a constructive proposal on a structure for it. In a nutshell, my guiding intuition regards the transversality of *interlegal balancing* which accounts for multilevel settings as much as for international organizations in sectoral regimes.

A great many questions remain open around this proposed concept, among them:

A question which was only raised indirectly concerns the relation of interlegal balancing towards a "balancing of interests" inspired in private international law, perhaps also in relation to the question on alternatives to balancing.

'specific organ function' under subject-matter [*sachliche*] deciding closeness. Beyond these, such matters require a combination of substantive and formal principles.

[139] On "institutional pragmatics" as requiring a one-right-answer in *judicial* contexts: Neumann (2004); Schulz (2007); Siedenburg (2019). For a view further along the social-institutional tack, see Golanski (2019: 312 *ff*) (if at the cost of also importing open questions on "directedness at" or "collective intentionality"). See Siedenburg (2016) on how Searlian social ontology is complemented with Habermas, and Azevedo Palu (2017) pointing to the cyclical nature of deliberation.

[140] Along the lines of the intuition hinted in footnote 119 *above*, linking Klabbers' use of an *all affected* principle with particular proposals for institutional communication or reform (respectively) in Avbelj & Roth-Isigkeit (2016); Sarmiento & Weiler (2020).

Among the most general ones counts the system-relativity of validity. Does this not preclude interlegal balancing? Relying on different reasons according to each of the four places of our scale,[141] my intuition goes against this preclusion.

A related one is a question on "*Juristenrecht*". Positive legal dispositions and decisions may well enact a self-referential system. Is the proper role for interlegal balancing either critical or reconstructive (*aut-aut*)?[142]

A further aspect of validity regards its binary structure (valid/invalid). Especially the interlegal setting and epistemic authorities evidence a greater complexity in practice. In terms of institutional design, this raises the question of how democracy and judicial review find limits *e.g.* in scientific facts (to simplify).[143]

I pose that officials across branches engage in interlegal balancing. Institutional values (such as inter-authority, or even inter-branches, relations) often figure in balancing. This reanimates *Montesquieuan* questions. Is the tripartite model of separation of powers a necessary or a contingent feature of legal orders?[144] Which empirical standards or results recommend one over the other solution at the level of institutional design?

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[141] On the one hand, in multilevel systems the presumption in favor of the delegated spheres is their simultaneous concession of validity from the national jurisdiction. Balancing considerations enter through the position of evaluating potential *rebuttals* or "defeaters" for this validity. On the other hand, horizontally, *i.e.* among the regimes of international law, there is no analogous presumption in favor of such delegated spheres. However, one would be hard pressed to make a case against the rational desirability of systemic interpretation under the general norms of international law, on the one hand, and the use of criteria in the manner of conflict-rules approaches, on the other hand. This holds all the more so since, in this constellation, jurisdictional norms plausibly carry a lighter weight as compared to constellations involving democratic constitutions. One may hold that what matters most pointedly is *output* legitimacy.

[142] We can easily bring to mind especially problematic constellations where "conformity with reason" requires transnational solutions (*e.g.* obligations regarding climate change, health-related restrictions) but these are preempted by legislative or executive measures in a jurisdiction. It would be an undue idealization to rely in the judiciary to simply overturn these limits. It is not idealizing, however, to affirm that deliberating and including reasons from all affected parties (in parliament, in administrative measures) is an obligation that stems from *legal* premises in the international (UN) legal system and from the ineluctable justificatory premises of pluralist societies. Now, the *fact of reasonable pluralism* (neither in Rawls nor Habermas) cannot preclude state-"parochialism". Generally, legal decisions in a state can be purposive for the members of its (internally diverse) electorate and unfair in their "externalities". Justice beyond the state merits separate discussions. In any case, good grounds obtain to assess "opt-outs" from transnational decisions in terms of the review of the quality of deliberative processes *within* the state.

[143] See Borowski (2019: 93 *ff*; *forthcoming*: 13 *ff*) addressing this question in terms of an example of a threshold for gas emissions set in parliament, another set by experts, and its judicial review.

[144] For discussion, see O'Donoghue (2014: 32 *ff*). See also Möllers (2013) for a contribution regarding collective autonomy at the same rank as individual autonomy.

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