KFG International Law
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KFG Working Paper Series • No. 59 • January 2023

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Looking Behind the Façade of Monism, Dualism and Pluralism

Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?"

Electronic copy available at: https://ssrn.com/abstract=4326862

KFG Working Paper Series

Edited by Andrew Hurrell, Heike Krieger and Andreas Zimmermann

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Burchardt, Dana, Looking Behind the Façade of Monism, Dualism and Pluralism, KFG Working Paper Series, No. 59, Berlin Potsdam Research Group "The International Rule of Law – Rise or Decline?", Berlin, January 2023.

ISSN 2509-3770 (Internet)

ISSN 2509-3762 (Print)

This publication has been funded by the German Research Foundation (DFG)

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Electronic copy available at: https://ssrn.com/abstract=4326862

Looking Behind the Façade of Monism, Dualism and Pluralism

Dana Burchardt[*]

This paper will be published in: H.P. Aust, H. Krieger and F. Lange (eds.), Research Handbook on International Law and Domestic Legal Systems (Edward Elgar, forthcoming).

Abstract:

The relationship between domestic and international law is generally conceptualized through the lens of three notions: monism, dualism and legal pluralism. Scholars refer to these concepts as a whole, while however often only meaning one aspect of the relationship. This can somewhat distort the discussion. This chapter thus offers an alternative way of engaging with the relationship between legal spaces. It disentangles the different aspects that are relevant for theorizing how we understand this relationship. Regarding the analytical dimension of this relationship, the chapter outlines how the three concepts engage with the (apparent) dichotomies of unity or plurality of law(s), autonomy or intertwinement and hierarchy or heterarchy of legal spaces. The normative dimension is shaped, in particular, by questions pertaining to the notion of law as well as by values such as coherence and diversity and their impact on resolving conflicts between norms stemming from different legal spaces.

[*] Freie Universität Berlin, Berlin Potsdam Research Group 'International Law – Rise or Decline?'.

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1. Introduction

The relationship between domestic and international law is generally conceptualized through the lens of three roughly-shaped notions: classically, monism[1] and dualism[2]; and, especially in the past two decades, legal pluralism, which in turn comes in several variations.[3] The scholarly discussion usually refers to these concepts as a whole, arguing for or against the empirical pertinence and normative desirability of one of these concepts. However, while framing the discussion in this manner, arguments often only address one or some of the elements that are relevant for the relationship between domestic and international law. This can somewhat distort the discussion when comparing, and engaging with, diverging points of view.

This paper takes a different approach. It outlines the various analytical and normative questions that shape how we understand the relationship between domestic and international law . This approach aims to move on from schematic attributions and from over-emphasizing some aspects to the detriment of others. To this end, it proposes to theorize this relationship by disentangling the relevant aspects. This allows for a more precise engagement with the different concepts that have been suggested in the literature. It also allows to highlight that conceptualizing the relationship between domestic and international law is an exercise that is embedded in a more wide-ranging theoretical endeavour: conceptualizing the relationship between *legal spaces* more broadly understood.[4]

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[1] E.g. Hans Kelsen, *Das Problem der Souveränität und die Theorie des Völkerrechts* (2nd edn, Mohr 1928); Georges Scelle, *Précis de droit des gens: principes et systématique,* vol 1 (Receuil Sirey 1932); Léon Duguit, *Traité de droit constitutionnel*, vol 1 (E. de Boccard 1921). For more recent account of monism, see e.g. Paul Gragl, *Legal Monism - Law, Philosophy, and Politics* (OUP 2018).

[2] E.g. Heinrich Triepel, *Völkerrecht und Landesrecht* (C.L. Hirschfeld 1899); Dionisio Anzilotti, *Corso di diritto internazionale* (3rd edn, Athenaeum 1928).

[3] E.g. Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (CUP 2012); Boaventura de Sousa Santos, 'Law: a Map of Misreading. Toward a Postmodern Conception of Law' (1987) 14 Journal of Law and Society 279; Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (3rd edn, CUP 2020); Nico Krisch, *Beyond Constitutionalism - The Pluralist Structure of Postnational Law* (OUP 2010); John Griffiths, 'What Is Legal Pluralism?' (1986) 18 Journal of Legal Pluralism and Unofficial Law, 1. For overviews: Ralf Michaels, 'Global Legal Pluralism' (2009) 5 Annual Review of Law and Social Science 243; Brian Z. Tamanaha, *Legal Pluralism Explained* (OUP 2020); Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Gunther Teubner (ed), *Global Law Without a State* (Aldershot 1996) 3–28; Specifically in the EU context e.g. Neil MacCormick, 'Risking Constitutional Collision in Europe?' (1998) 18 Oxford Journal of Legal Studies 517; Neil Walker, 'Constitutional Pluralism Revisited' (2016) 22 European Law Journal 333; Miguel Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Neil Walker (ed), *Sovereignty in Transition: Essays in European Law* (Hart Publishing 2003) 501; Gareth Davies and Matej Avbelj (eds), *Research Handbook on Legal Pluralism and EU Law* (Edward Elgar 2018). For an early account akin to legal pluralism, see Santi Romano, *L'ordinamento giuridico* (1918).

[4] On the notion of legal space and a suggestion as to how to use insights from topology to conceptualize the relationship between legal spaces, Dana Burchardt, 'The Concept of Legal Space – A Topological Approach For Addressing Multiple Legalities' (2022) 11 Global Constitutionalism 518, available at <https://doi.org/10.1017/S2045381722000041> (last access 11 January 2023) .

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The relevant aspects are structured according to whether they pertain to the analytical dimension of the relationship between domestic and international law or to the normative dimension of this relationship.[5] Although both dimensions are of course closely interlinked, it is useful to distinguish between the nature of claims that are discussed under the heading of monism, dualism and pluralism. Based on this distinction, it is possible to situate the potential context-dependency of these concepts, a question raised throughout this volume.

2. Analytical Dimension

The first set of questions that shape how scholars conceptualize the relationship between legal spaces and specifically between domestic and international law is analytical in nature. This includes aspects that can be empirically determined and others that are assessed using analytical tools developed by legal theory. This analytical dimension relates to three key topics which will be addressed in turn: unity vs. plurality; autonomy vs. intertwinement; hierarchy vs. heterarchy.

a) Unity vs. Plurality of Law(s)

The first question concerns the unity or plurality of laws. Some consider law to form a cognitive and analytical unity while for others, different legal spaces can coexist as distinct entities. Which approach is taken on this issue is closely linked to a corresponding understanding of how to define law.

For monism, unity is the determining feature. Domestic and international law are understood as forming an entity. This claim is based on two assumptions. First, all legal norms are considered to form a sole cognitive entity called law. Second, this cognitive perception is translated into an analytical claim: there is only one set of legal norms and this set of norms constitutes the – sole – legal system. Both these claims result from a specific understanding of law. According to this understanding, law, in an absolute manner, either exists or it does not. Law is not seen as social construction by certain groups of actors, a perception that would allow for a relative existence of law: law being law for certain actors in certain contexts. When law is understood to exist in an absolute manner, norms cannot constitute law for some and non-law for others. Accordingly, one needs to include everything that one normatively wishes to constitute law into this entity. This is particularly important for international law, as the legal nature of international law has long been disputed. From this point of view, cognitive unity between domestic and international law is necessary if international law should be regarded as law. Further, classical monism postulates that all law has a common source of validity. Suggestions as to what this source is include for example

[5] For a similar distinction, see also Tamanaha (n 3) 159.

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the Grundnorm pacta sunt servanda[6] or "solidarity among individuals".[7] For the formalist proponents of monism, this idea of common source of validity is closely linked to the idea of a single norm-creating entity, the state. Although not a necessary precondition, considering only one (type of) entity as norm-creator facilitates to think of the resulting norms as unity. If there is only one source from which law emanates, all law is similar in nature. This homogeneous character makes it easier to conceive of law as unity, as opposed to a more diverse understanding of law (see below). In addition, a single (type of) norm-creator facilitates to think of legal norms as systematically interrelated and thus as forming a legal system. This understanding is motivated by coherence considerations which will be discussed in section 2.

In contrast, dualism and legal pluralism consider laws as plurality. This includes a (potential) distinction between a domestic and international legal space. For non-monist concepts, assessing only a certain set of norms does not mean denying the status of law to another. Different sets of norms or legal spaces can be considered individually or in groups – their (potential) nature as law is not predetermined by whether or not to include them into a specific analysis. According to this approach, law can exist in a relative manner, i.e. something can constitute law in the view of certain actors or in certain contexts but not for others. As a result, there are various ways to conceptualize the relationship of these legal spaces. The concept of legal pluralism incorporates this variety. It recognizes the coexistence of many different legal spaces, emphasizing both the *plurality* of these legal spaces and, relatedly, their *diversity*.[8] That means that not only is there more than one legal space, but these spaces can also have, and are empirically shown to have, varying characteristics. For example, legal pluralism refers to diverse legal spaces such as laws of indigenous people, customary laws and religious laws. The strand of legal pluralism that focusses on the international, transnational or global dimension also addresses diverse legal spaces such as global administrative law, lex sportiva, corporate responsibility law and platform law.[9]

Plurality and diversity are also part of the concept of dualism, however in a much more limited manner. While legal pluralism considers that many types of legal spaces coexist, dualism only recognizes two such types: international law and domestic law. Within this concept, all norms have to be characterized as either domestic or international in nature. In this regard, it shares the limited focus of classical monism which also takes only domestic and international norms into account. Yet dualism allows for the domestic and for international legal spaces to each have their own

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[6] Alfred Verdross, *Die Verfassung der Völkerrechtsgemeinschaft* (Springer 1926) 17, 29 et seq.

[7] Duguit (n 1) 96.

[8] This is also the case for international/global legal pluralism Krisch, *Beyond* (n 3) chapter 3; Paul Schiff Berman, 'Understanding Global Legal Pluralism: From Local to Global, from Descriptive to Normative' in Paul Schiff Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (OUP 2020) 1-35. In contrast, arguing that transnational legal pluralism is only about plurality, Tamanaha (n 3) 158.

[9] For an overview over the different strands of legal pluralism, Tamanaha (n 3).

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understanding of what is considered to constitute law. Conceptually, it becomes possible to acknowledge that international law regards domestic law as mere facts rather than law; and that for many domestic legal orders, international law is only law when, and in so far as, this status is attributed to it by domestic law. Moreover, dualism recognizes the diversity of the domestic and international legal spaces. However, this diversity is reduced. All domestic law is considered to have the same features and to be of one type;[10] and all international law is considered to be of the same type as well. These claims are opposed to the empirical observation by legal pluralists that there is an increasing number of legal spaces – including in the international realm – that are divers in nature. The exclusive binary of domestic and international law is perceived as “no longer tenable”.[11] In contrast to a pluralist understanding, a dualist approach thus does not allow to conceptualise a broader range of norms and whether and to which extent they form a unity or plurality of legal spaces.

A classical question that follows from whether domestic and international law are conceived as unity or plurality is the effect of international legal norms in the domestic legal order. Only if international law is applicable in the domestic legal order, state authorities can – and must – apply it as binding law.[12] Whether and to which extent international law is conceived as applicable by domestic authorities lies in the hand of state actors. State actors such as the (constitutional) legislator and domestic courts shape the unity or plurality of laws in practice. Depending on the theoretical point of view, they acknowledge, or create, a unity or plurality. Domestic legal orders that want to acknowledge, or create, a *monist* unity between domestic and international law commonly do so by a general (constitutional law) norm that recognizes, or enables, the domestic applicability of the entire body of international law. This is referred to as adoption of international law into the domestic legal order. Under such a regime, it is not necessary for the state to incorporate each international legal act or norm individually. In contrast, domestic legal orders that follow a *dualist* approach incorporate each international legal act or norm individually. Only if a specific international act has been incorporated, it is applicable in the domestic legal order. Two variations as to the effect of such incorporating acts are conceivable. For those who assume a strict dualist separation of international and domestic law, an incorporating act creates a new domestic act with the same content as the international law norm, leading to a duplication of the normative content. The international law norm is transformed into a domestic norm. According to this view, the international law norm is not applied as such in domestic law but rather as an equivalent domestic norm specifically created for this

[10] Gragl (n 1) 45.

[11] Jan Klabbers and Gianluigi Palombella, ‘Introduction - Situating Inter-Legality’ in Klabbers and Palombella (eds), *The Challenge of Inter-Legality* (CUP 2019) 1-20, at 11.

[12] Applicability as law does not necessarily mean that the norm creates rights for private actors that they can directly invoke before domestic courts. The latter is only the case for norms that are both applicable in domestic law and *self-executing* in the sense that they create justiciable rights for private actors. Other norms require further implementation by the state for private actors to obtain such rights.

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purpose. For others, the incorporating act does not duplicate the norm in the sense of the above transformation. Instead, it merely allows the application of the specific international law norm in the domestic legal order. Which of these two variations to consider has implications for the subsequent question of intertwinement addressed below.

b) Autonomy vs. Intertwinement

A second aspect that shapes the understanding of the relationship between legal spaces and specifically between domestic and international law is whether and to which extent these bodies of law are autonomous or intertwined. While the above question of unity vs. plurality can only be answered in one way or the other, autonomy and intertwinement are gradual in nature. Legal spaces can be more or less autonomous/intertwined.

On the one end of the spectrum, classical dualism conceives of domestic and international law as autonomous legal systems. It is "built on the idea that those two legal orders were clearly separate – the domestic order applied inside the state whereas the international order regulated states in their mutual interactions".[13] Both form self-sufficient or autopoietic legal spaces.[14] They are not dependent on each other with regard to their bindingness, law creation, law application etc. Every legal space decides for itself whether to give effect to norms stemming from another legal space.[15] For a radical version of dualism, the separation between domestic and international law is absolute. According to this view, there is no interaction among them: neither does domestic law intrude into the international legal order nor does international law regulate domestic law – it is limited to regulating interstate relationships.[16] As a result, domestic and international law are represented as two distinct circles that do not overlap.[17] In contrast, a moderate version of dualism considers interactions among domestic and international law. Although being autonomous legal systems in the sense that they are not interdependent, they can enter into a dialogue, for example by cross-references and the application of international norms in the domestic legal order. Moderate dualism thus allows at least for a dialogical form of intertwinement.

On the other end of the spectrum is classical monism. From a monist perspective, the domestic and international norms are so densely interconnected that they form an integrated legal system. The domestic and international legal spaces are in a dependence relationship rather than being autonomous. Based on a Kelsenian understanding of monism, norms are put into existence by other

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[13] Krisch, *Beyond* (n 3) 77.

[14] On this notion, Niklas Luhmann, *Das Recht der Gesellschaft* (Suhrkamp 1993) 38 et seq.; Gunther Teubner, *Recht als autopoietisches System* (Suhrkamp 1989).

[15] On the related notion of "recognition" of foreign legal element, H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (OUP 1983) 340–342.

[16] Anzilotti (n 2).

[17] Triepel (n 2) 111.

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norms along a Stufenbau with a Grundnorm at its apex that attributes validity.[18] According to this understanding, the dependence relationship can, in principle, come in two variations: either domestic law depends on international law or vice versa.[19] For Kelsen, it is international law that enables states to set domestic law so that the latter is dependent on the former.[20]

Like monism, legal pluralism emphasizes the intertwinement of legal spaces. One of its key analytical claims is that “laws overlap and interact in certain ways”.[21] Using multiple terminologies such as overlaps, interconnectedness, enmeshment, entanglement etc., the legal pluralist literature points to phenomena that indicate the intertwinement of legal spaces rather than their absolute autonomy in the dualist sense. However, in contrast to a monist perspective, such intertwinement does not result in legal spaces being regarded as a unitary legal system. While recognizing intertwinement, the plurality of the legal spaces is preserved. Further, and again in contrast to monism, legal pluralism allows for various degrees of intertwinement on the spectrum. Legal spaces can be intertwined to a lesser or higher degree. Such a gradual notion of intertwinement shifts the focus: from interrelations of legal spaces to interrelations of legal norms. Not all norms attributed to one legal space relate to the norms of another legal space in the same way. Instead of thinking of legal spaces as monolithic blocs that can only relate to each other in their entirety, a gradual understanding enables more nuanced approaches. Specifically for the relationship between domestic and international law, a gradual understanding of intertwinement can account for the various approaches taken by domestic law as to *which* international legal norms are regarded as applicable law in the domestic context.

Intertwinement can come in different forms. Some forms of intertwinement allow for communication between legal spaces, for example in the case of judicial dialogue. Others even lead to legal elements that are hybrid in nature. Norms are hybrid when they can be regarded as belonging to more than one legal space at once. Hybrid legal norms result for example from a cross-border implementation of norms, the generation of general principles of law and consistent interpretation of norms of one legal space in conformity with the norms of another legal space.[22] Empirically, legal pluralists observe that the various forms of intertwinement have increased considerably in many contexts and continue to do so. Pluralism points out that entire “hybrid legal spaces” have emerged “where

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[18] Hans Kelsen, ‘Der Begriff der Rechtsordnung’ in Hans R. Klecatsky et al (eds), *Die Wiener Rechtstheoretische Schule*, vol. 2 (Europa Verlag 1968) 1395; Hans Kelsen, ‘The Concept of the Legal Order’, translation by Stanley L. Paulson (1982) 27 American Journal of Jurisprudence 64.

[19] See for an overview, Gragl (n 10) 22–26.

[20] Hans Kelsen, *Reine Rechtslehre* (Verlag Franz Deuticke 1934) 147 et seq.

[21] Ralf Michaels, ‘Global Legal Pluralism and Conflict of Laws’ in Paul Schiff Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (OUP 2020) 629.

[22] On these sources of hybrid norms, Dana Burchardt, ‘Intertwinement of legal spaces in the transnational legal sphere’ (2017) 30 Leiden Journal of International Law 305.

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multiple normative regimes may govern (or at least strongly influence) our activities".[23] This describes for example functionally (rather than territorially) characterized subject matters governed by a hybrid domestic and international regime, including long-established fields such as environmental law and health law but also more recent regimes such as platform law and corporate responsibility law.

Despite the awareness of intertwinement, in many pluralist accounts, a proper conceptualization of this interconnectedness of norms has been missing with intertwinement having long been undertheorized.[24] More recently, such a conceptualisation is evolving;[25] and this is where the added benefit of future analytical research on the relationship between sets of norms will lie. This will also enhance the understanding of how domestic and international law interrelate.

c) Hierarchy vs. Heterarchy

The third aspect relevant for the relationship between domestic and international law is the question of hierarchy. Legal spaces such as the domestic and the international legal orders are considered to be in a rank relationship or, alternatively, to coexist in a heterarchical manner. As a point of departure, it is thus about whether to rank or not to rank entire legal spaces – as opposed to ranking individual legal norms. The further question of whether and, if so, how to resolve conflicts of norms is then addressed within a hierarchical or heterarchical framework.

From a monist perspective, the relationship between domestic and international law is hierarchical in nature. This hierarchy can come in two variations. Many monist authors consider international law to be hierarchically superior[26] while for others, domestic law ranks higher than international law.[27] The alternatives have been termed monism with international law primacy and monism with domestic law primacy. A prominent proponent of the former is Hans Kelsen. His monist approach bases the rank relationship on the concept of Stufenbau (see above): a norm that depends on another norm for their existence cannot trump this very norm. This creates a hierarchical ordering

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[23] Berman, *Understanding* (n 8) 6.

[24] On this issue, Nico Krisch, 'Entangled Legalities in the Postnational Space' (2022) 20 International Journal of Constitutional Law 476; also Michaels (n 21) 630.

[25] See e.g. Burchardt, *Legal Space* (n 4); Burchardt, *Intertwinement* (n 22); Dana Burchardt, 'The Relationship between the Law of the European Union and the Law of its Member States - A Norm-Based Conceptual Framework' (2019) 15 European Constitutional Law Review 73; Françoius Ost and Michel van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Publications des Facultés universitaires Saint-Louis 2002); Ioana Raducu and Nicolas Levrat, 'Le métissage des ordres juridiques européens' (2007) 43 Cahiers de droit européen 111; Margaret A. Young (ed), *Regime Interaction in International Law – Facing Fragmentation* (CUP 2012).

[26] E.g. Duguit (n 1); Kelsen (n 20); Verdross (n 6); Hugo Krabbe, *Die moderne Staatsidee* (2nd edn, Martinus Nijhoff 1919).

[27] E.g. Max Wenzel, *Der Begriff des Gesetzes* (Dümmler 1920) 385 et seq.; André Decencière-Ferrandière, 'Considérations sur le droit international dans ses rapports avec le droit de l'Etat' (1933) Revue générale de droit international public, 45, 64.

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of norms. A hierarchical understanding of the relationship between legal spaces implies that conflicts of norms are resolved according to the *lex superior* mechanism. If international law is conceived as hierarchically superior to domestic law, conflicts between a domestic and an international norm are resolved in favour of the latter. Monism thus has a clear-cut answer as to whether conflicts of norms should be resolved and how. The effect of this hierarchical way of conflict resolution does however diverge among radical and moderate strands of monism. A radical version of the monist ranking considers the hierarchically inferior norm to be invalidated by the higher-ranking norm.[28] Taking the approach of international law primacy, this means that a domestic norm that is not in line with international law is invalid. In contrast, a moderate version of this rank relationship mitigates the effect of hierarchisation. Here, a domestic norm that is not in line with international law remains valid – but the state is obliged to amend or abrogate the norm.[29]

In contrast, a heterarchical understanding of the relationship between legal spaces explicitly dismisses the idea that one legal space is hierarchically superior to the other. Both dualism and legal pluralism embrace this approach. For dualist approaches, there is no pre-determined hierarchy between international and domestic law. For the radical version of dualism that considers the domestic and international legal orders to be strictly separated, there is not even a legally relevant conflict of norms to begin with. Whether the content of domestic and international law norms is compatible with each other or not does not affect the respective norms. Norm conflicts are thus merely of a practical nature. From a more moderate dualist perspective, legally relevant norm conflicts exist. Dualism permits the legal spaces involved to govern such conflicts themselves – but only with effect for their own legal space. Domestic law can thus attribute to international law a certain rank within the domestic legal order. This approach entails a plurality of hierarchizations as there is a multitude of ways in which domestic legal orders integrate international legal norms into their internal hierarchy of norms. A typical status includes: akin to ordinary domestic legislative acts; akin to constitutional norms; an intermediate status between ordinary legislation and constitutional law; or even a supra-constitutional rank.

For legal pluralism, legal spaces, including domestic and international law, are also not considered to be in any rank relationship. Rather, their relationship is understood as heterarchical in nature. Yet this heterarchical understanding does not imply that conflicts of norms remain unresolved. Legal pluralists address norm conflicts both from a normative and an empirical perspective. Normatively, they discuss multiple approaches to the question whether and how conflicts should be resolved. The suggestions cover a broader range of conflict resolution mechanisms than is considered by a dualist understanding. This normative discussion will be addressed in section 2. Similarly, when empirically

[28] E.g. Georges Scelle, *Manuel élémentaire de droit International public* (Les éditions Domat-Montchrestien 1943) 21.

[29] E.g. Alfred Verdross and Bruno Simma, *Universelles Völkerrecht* (3rd edn, Duncker & Humblot 1984) §73.

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assessing conflict resolution, legal pluralists also take a broader perspective than dualism. They highlight various techniques that are used by legal actors to both minimize the occurrence of conflicts and solve them in case they do occur.[30] Such techniques include dialogue between legal institutions such as between domestic supreme and constitutional courts on the one hand and international and supranational courts on the other hand; courts refraining from exercising jurisdiction to not encroach upon "regulatory interests" of another legal space as for example in the case of immunities of international organisations; and extra-legal (political) means of conflict resolution such as dialogue between "multiple constituencies, authorities, levels of government, and non-state communities".[31] Legal pluralists also observe developments of conflict resolution over time. They note for example a "diffusion of the range of metaprinciples of authority" that address conflicts of norms.[32]

As compared to ranking legal spaces, a heterarchical understanding shifts the focus: instead of thinking of legal spaces as monolithic blocs with conflicts being resolved for the entire legal space at once, a heterarchical understanding allows for more flexible approaches. On a heterarchical basis, one can conceptualize the conflict resolution in a norm-specific manner. For example, this allows to conceptually make sense of diverging approaches that domestic courts take regarding whether different kinds of international legal norms trump domestic norms in case of conflict.[33] More generally, a heterarchical understanding regarding legal spaces makes it possible to conceptualize empirical observations as to how actors solve conflicts of norms in practice. Analytically, a heterarchical understanding provides more possibilities to address such observations than the predetermined hierarchical perspective.

Further, it is useful to distinguish between absolute and perspectivist hierarchy claims. Legal theoretical concepts such as monism make an absolute claim as to how legal spaces relate to each other in the sense of: "legal space 1 *is* hierarchically superior to legal space 2". In contrast, a perspectivist approach refers to how a specific legal space perceives and constructs its relationship to another legal space. Perspectivist hierarchy claims thus mean that "legal space 1 *considers itself* superior to legal space 2". Such claims can also be seen as a technique for resolving conflicts of norms. Yet, when addressing hierarchy in a perspectivist manner, competing claims can occur. The competing supremacy claims of EU law and domestic law are a prominent example. Rather than facilitating conflict resolution, such opposing understandings of hierarchy between legal spaces can hinder it. However, perspectivist hierarchy claims are no necessary feature of legal spaces. Although

[30] On some of these techniques, Michaels (n 21) 634–636.

[31] Paul Schiff Berman, 'The New Legal Pluralism' (2009) 5 Annual Review of Law and Social Sciences 225, 238; more generally Anne-Marie Slaughter, *A New World Order* (PUP 2004).

[32] Neil Walker, 'Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders' (2008) 6 International Journal of Constitutional Law 373, 386.

[33] On this differentiated approach, e.g. Basak Çali, *The Authority of International Law* (OUP 2015) chapter 4.

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some authors have argued that competing claims are inherent to the concept of a legal system which considers itself to be supreme for their community and, as per their nature, cannot tolerate a hierarchy claim from any other legal system,[34] competing claims are only observable for some legal spaces. For example, there are no conflicting claims for domestic and international law: international law does not claim hierarchy over domestic law. Binding obligations within one legal space are not equivalent to hierarchy claims vis-à-vis other legal spaces. In this context, perspectivist hierarchy claims only stem from domestic law.

3. Normative Dimension

Conceptualizing the relationship between different legal spaces also has an explicitly normative dimension. The aspects that are particularly salient in the discussion are presented here. Some concern specifically the way in which legal spaces should interact. Others raise broader questions about how to conceive of law in general.

a) Coherence, diversity and conflict resolution

When analysing the relationship between different legal spaces, scholars are often guided by the extent to which they consider coherence among legal norms to be a normatively desirable aim. In this discussion, it is emphasised that coherence provides stability and legal certainty, an element of the rule of law. This is the case because "coherence requires that the set of norms makes sense as a whole", going beyond consistency that only requires that norms do not contradict.[35]

Monist approaches are motivated by this objective.[36] When one attributes a high value to coherence of law, unity is an analytical lens through which this value can be implemented extensively. For monism, legal norms are perceived as integrated into a system in which they interrelate in a structural and consistent manner. This focus on coherence stems from the domestic context and its notion of (domestic) legal system. The coherence standard that is seen as normatively desirable and necessary for domestic law is exported to international law as well.

Yet the desire for coherence also motivates concepts beyond monism. Among legal pluralist approaches, constitutional pluralism is a prominent example in this regard. This approach aims at providing coherent interrelations between different legal spaces while at the same time recognizing

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[34] Joseph Raz, *The Authority of Law* (OUP 1979) 118. Critical regarding this argument, Nicole Roughan, *Authorities: Conflicts, Cooperation, and Transnational Legal Theory* (OUP 2013).

[35] Sanne Taekema, 'Between or Beyond Legal Orders - Questioning the Concept of Legal Order' in Klabbers and Palombella (eds), *The Challenge of Inter-Legality* (CUP 2019) 69–88, 79.

[36] E.g. Gragl (n 10).

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their plurality. Coherence is introduced through bridging elements that connect these legal spaces.[37] Authors have constructed various connectors such as certain guiding principles (e.g. democracy, principle of legality, human rights protection) or an entire legal order coordinating between multiple other legal orders (e.g. international law as bridging element between domestic and EU law – or "common legal universe").[38] Based on such common elements, conflicts can be resolved with binding effect for all legal spaces involved. More broadly, coherence-inspired suggestions within the legal pluralist debate also revolve around the notion of universalism, for example suggesting that a "universal code of legality" containing "basic legal concepts and rules, like the concept of rights and of fair procedures, and the concepts of sanction and competence" can provide shared meanings and discursive reference points.[39] Such universalist understanding reflects a cosmopolitan underpinning that constitutional pluralism translates into its coherence claims.[40]

Other legal pluralist approaches that do not focus on coherence stress diversity and its implications for power dynamics in the legal field. They argue that diversity can serve as a tool "for the articulation of subaltern politics against the mainstream forms of global governance sustained by dominant economic and military power".[41] While coherence is seen as a potential pretext and tool for the exercise of hegemonial power, pluralist diversity allows a broader set of actors to shape the legal field. In this reading, diverging legalities provide an opportunity for contestation. For the context of international law, this is one of the many normative implications related to the question which actors should be able to participate in international legal practice (see also below). Upholding diversity means acknowledging people's "differences in culture and circumstance" rather than creating the fiction of one overarching identity.[42] Such fiction would risk "silencing of less powerful voices in the global conversation".[43] Further, a coherence-inspired selection of one single regulatory actor would also affect the subjects of regulation. Approaches such as a "cosmopolitan pluralist" understanding of transnational conflict resolution thus consider it necessary to acknowledge "multiple community

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[37] For the terms "bridge" and "bridging mechanisms" in the debate, e.g. Neil Walker, 'Sovereignty and Differentiated Integration in the European Union' (1998) 4 ELJ 355, 375; Yuval Shany, 'International Courts As Inter-Legality Hubs' in Klabbers and Palombella (eds), *The Challenge of Inter-Legality* (CUP 2019) 319–338.

[38] For such approaches, e.g. Mireille Delmas-Marty, *Ordering Pluralism - A Conceptual Framework for Understanding the Transnational Legal World* (Hart 2009); Mattias Kumm, 'Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism' in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 39, 55 et seq.; Samantha Besson, 'How international is the European legal order?' (2008) 5 No Foundations 50, 65; Neil MacCormick, 'Risking Constitutional Collision in Europe?' (1998) 18 Oxford Journal of Legal Studies 517, 527.

[39] Klaus Günther, 'Legal Pluralism or Uniform Concept of Law? Globalisation as a Problem of Legal Theory' (2008) 5 No Foundations 5, 16.

[40] See for an explicit link to a cosmopolitan understanding of law, e.g. Alec Stone Sweet, 'A cosmopolitan legal order: Constitutional pluralism and rights adjudication in Europe' (2012) 1 Global Constitutionalism 53.

[41] Krisch, *Beyond* (n 3) 83. More broadly on this claim, de Sousa Santos, *New Legal Common Sense* (n 3).

[42] Berman, *Understanding* (n 8) 7.

[43] Ibid.

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affiliations" of private actors.[44] In this context, the cosmopolitan perspective on diversity aims at empowering not only regulatory actors but also subjects of regulation.

From a dualist perspective, coherence is also rejected as an argument. Rather, a dualist understanding of the relationship between domestic and international law directly addresses the power dimension of diversity. For each state to be able to shape its relationship to international law as it sees fit guarantees a diverse expression of regulatory authority. State sovereignty has thus been an important argument in the classical dualist discourse, reflecting the nationally oriented value-bases that underlies the dualist diversity approach.[45] As a result and in contrast to the above pluralist argumentation, embracing the diversity argument from a dualist perspective leads to the preservation of the regulatory power of the state rather than aiming at the diversification of regulatory actors.

Whether and to which extent conflicts of norms belonging to different legal spaces should be resolved is the predominant normative question linked to the above coherence and diversity considerations. Monist approaches answer this in the affirmative. From a monist perspective, hierarchy is designed to provide an intrinsic tool for conflict resolution. This element is constructed according to the assumption that resolving conflicts is normatively desirable. Further, monism maximizes the extent of this conflict resolution. All conflicts between domestic and international law are resolved – and they are resolved in the same way, i.e. in favour of the lex superior. This provides a "one-size-fits-all" answer to conflicts between norms belonging to these two different legal spaces. In contrast, dualism does not take a normative stance as to whether and how conflicts between domestic and international law should be resolved. Through a dualist lens, the domestic legal orders can determine this question according to their respective preferences. Based on observing what domestic legal orders decide in practice, dualists assume however that conflict resolution will occur, yet according to varying standards.

For legal pluralism, conflict resolution is a crucial normative dividing line. The discussion among the diverse strands of legal pluralism revolves around this issue – i.e. what is the best way of "managing diversity".[46] For strands at one end of the spectrum, conflicts of norms can remain unresolved. For "radical" versions of legal pluralism, the uncoordinated coexistence of legal spaces that can be observed empirically is at least not undesirable, potentially even beneficial. Nico Krisch, for example, argues that a "virtue" of such an uncoordinated coexistence is the capacity for adaptation: an "adaptation to new circumstances in a more rapid and less formalized way: by leaving the relationships between legal sub-orders undetermined, it keeps them open to political redefinition

[44] Berman, *Global* (n 3) 248.
[45] On state sovereignty as a dualist argument and the monist argumentative reaction, see Gragl (n 1) chapter 2.
[46] Berman, *Understanding* (n 8) 20.

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over time".[47] Furthermore, conflict resolution in the sense of absolute authority claims of one legal space over the other are perceived as difficult to account for. Specifically, competing authority claims seem normatively justified by legitimacy issues for example regarding democratic participation.[48] And they can be normatively desirable as a "checks and balances" tool.[49] The latter argument takes up the aspect of power relations that determines many normative pluralist arguments.

On the other end of the spectrum, constitutional legal pluralism argues that conflicts should not remain open. Giving more value to coherence, this pluralist strand uses its bridging mechanism mentioned above as techniques for conflict resolution. This approach has three key features. First, unlike monist hierarchy, such conflict resolution provides more flexibility: not in all situations of conflict, the norms of one legal space would prevail over norms of the other legal space. This is possible because conflict resolution as understood by constitutional legal pluralism is value-based rather than formalist. The guiding values can indicate certain norms to prevail in one situation but not in another. Second, as indicated by the term "constitutional", conflict resolution here means that conflicts are resolved in a way that applies to both legal spaces involved. Conflicts are thus resolved with an absolute effect. This contrasts with approaches that limit the effect of conflict resolution to one of the legal spaces involved (see below). Third, when common principles belonging to both legal spaces are used as guidelines to resolve conflicts of norms stemming from these spaces, conflict resolution has a holistic basis. That means that conflicts are resolved according to legal elements that are part of both legal spaces involved. Conflict resolution then stems from both these spaces rather than from only one of them.

In contrast, other strands of legal pluralism that are located somewhere between the two extremes of the pluralist spectrum advocate a perspectivist approach to conflict resolution. According to such approaches, conflicts should be resolved – but by each legal space itself and with an effect that is limited to this legal space. This is a unilateral way of conflict resolution, without a "general steering mechanism [that] is available to frame the relations between orders".[50] For these approaches, conflict resolution does not require an absolute effect; rather, having each legal space decide for itself is considered more flexible and practical. In particular, suggestions that use conflict of laws techniques to resolve all kinds of conflicts between norms stemming from different legal spaces argue for such a perspectivist method of conflict resolution.[51] The idea of leaving it to each legal

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[47] Krisch, *Beyond* (n 3) 79.

[48] Ibid at 86.

[49] Ibid at 85.

[50] Walker (n 32) 391.

[51] Berman, Global (n 3) 191 et seq; Berman, *Understanding* (n 8); Ralf Michaels and Joost Pauwelyn, 'Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law' (2012) 22 Duke Journal of Comparative & International Law 349; Christian Joerges, Poul F. Kjaer, and Tommi Ralli, 'A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation' (2011) 2 Transnational Legal Theory 153.

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space to deal with existing conflicts is incorporated in notions such as "responsive legal pluralism".[52] This approach emphasizes specifically that legal spaces should design their respective coordinating approaches by "taking each other into account", a suggestion that argumentatively returns to coherence as normative aim.[53] This also "emphasize[s] the advantage of a 'bottom up' evolutionary landscape of diverse legal orders over a 'top down' programmed arrangement".[54]

b) Notion of law

A second normative question that the present discussion explicitly or implicitly addresses is: what should be regarded as law? What does the "legal" in legal monism/dualism/pluralism mean? This is important when determining what can constitute, or belong to, interrelating legal spaces. Regarding domestic and international law, this question is crucial for delineating the body of law whose interrelation with domestic law is to be assessed.

Classical monism and dualism conceive of law in relation to the state. Domestic law is understood as state law created by the institutions of the nation state and to be applicable within the territory of this state. Private and other non-state law-making is not included in this concept. In a parallel manner, international law is understood as state-made law (state as norm-creator) governing the relations among states (state as main subject of international law). Non-state norms and lawmakers are not part of this notion of international law. As a result, the notion of law is formalist. As there is only one (type of) lawmaker, the law-making process can be easily discerned and regulated. That makes it possible to only acknowledge as law that which results from this process.

What is more, the classical monist and dualist understandings are based on clear distinctions between domestic and international law, as well as between binding and non-binding norms. All aspects related to unity/plurality, autonomy/intertwinement and hierarchy/heterarchy are shaped based on these clear-cut definitions and distinctions. This limits the analytical value of monist and dualist approaches. They do not conceptually integrate certain phenomena. Specifically, any accounts of hybridity between domestic and international law or state law and non-state law are excluded. Informal lawmaking such as international norms that are not formally binding also remains unaddressed. For example, the idea shared by monist and dualist approaches that international law needs to be formally incorporated into domestic law to be applicable in the domestic legal order is not suitable for informal regulatory acts. As a result, classical monism and dualism do not invite any

[52] Lars Viellechner, 'Responsive legal pluralism: The emergence of transnational conflicts law' (2015) 6 Transnational Legal Theory 312.

[53] Ibid at 323.

[54] Walker (n 32) 390.

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reflection about what is considered as law within their frameworks. The notion of law appears as a given rather than a constructed notion which needs to be able to fit a certain analytical purpose.

Legal pluralism takes a broader approach to law – without however providing an agreed-upon definition. Indeed, reconceptualizing the notion of law is one of the key pluralist endeavours. To start with, law is understood as including both state law and non-state law.[55] Legal pluralism explicitly aims at overcoming the state-centric conceptualization of law that was predominant for a considerable part of the 20th century. Such a conceptualization is portrayed as a "convenient fiction that nation-states exist in autonomous, territorially distinct spheres and that activities therefore fall under the legal jurisdiction of only one regime at a time".[56] In this regard, classical legal pluralist accounts of different laws within state-related contexts, including for example religious or indigenous law converge with more recent accounts of different laws in the international and transnational realm. Concerning such theoretical concepts of law, this legal pluralist claim is closely connected to the general debate in legal theory about "modern" and "postmodern" law.[57]

Legal pluralism thus conceptually expands the set of *actors* that potentially participate in the lawmaking to include both state and non-state actors. This has various implications. First, hybridity as to the norm-creating actors becomes possible. This is an aspect addressed by the notion of transnational law which plays a role for various strands of legal pluralism. Moving beyond the public/private and national/international divide with regard to lawmaking is what the notion of transnational law tries to accomplish.[58] Legal pluralism relates to this debate by considering hybrid regulatory regimes. Second, based on a broad notion of lawmaking actors, it seems natural to move away from a formalist understanding of law. This means that the legal nature of a norm is determined based on the practice and perception of the actors within the respective legal fields rather than (only) with regard to lawmaking procedures or coercive power.[59] Further, such a practice-based approach does not contain a clear-cut dividing line between binding and non-binding norms. For pluralist accounts of law, it is thus easier than for monist and dualist approaches to address developments such as an increasing informalisation of various fields of international law.

Yet while legal pluralists largely agree that non-state law should be part of the notion of law, it is more difficult to determine what qualifies as non-state law to be included in this notion and what

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[55] This is described as one of the key claims of "global legal pluralism" by Michaels (n 21) 629.

[56] Berman, *Understanding* (n 8) 6.

[57] Explicitly highlighting the "postmodern" understanding, e.g. de Sousa Santos, *Map of Misreading* (n 3). See also on these notions, Matej Avbelj, 'Transnational law between modernity and post-modernity' (2016) 7 Transnational Legal Theory 406.

[58] See e.g. Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism' (2012) 21 Transnational Law and Contemporary Problems 305.

[59] On practice as basis for the notion of law in the pluralist context, e.g. Sanne Taekema, 'The Many Uses of Law – Interactional Law as a Bridge between Instrumentalismand Law's Values' in Nicole Roughan and Andrew Halpin (eds), *In Pursuit of Pluralist Jurisprudence* (CUP 2017) 116–135.

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should be regarded as law at all.[60] This is where critics come in, arguing that the pluralist notion of law is becoming too broad. From *legal* pluralism, the concept is said to shift to "*regulatory* pluralism".[61] According to this critique, all kinds of norms rather than only legal norms in the narrow sense are included in the concept so that the notion of law loses its meaning. This would undermine the analytical value of the concept of legal pluralism. However, while this might be true for some questions, such categorical critique is too far-reaching. It disregards the additional analytical possibilities that a broad notion of law offers when conceptualizing the interrelations of various kinds of norms.

The notion of law used by legal pluralists has also practical consequences. Attributing the conceptual lawmaking capacity to certain actors affects established and emerging power-dynamics. On the one hand, non-state actors are empowered when their practice and perception of that which constitutes norms is given value. Accordingly, such actors are expected to normatively support the broader notion of law that legal pluralism promotes. On the other hand, the above-mentioned "mainstream forms of global governance" such as state-made international law lose their predominance to some extent. State-made international law "ends up being one voice among many".[62] This can lead to backlash by those actors who see pluralist accounts of law threatening their power position. For example, a "sovereigntist territorialism" that rejects pluralist accounts of law is seen to "represent[t] a retreat from this messy hybrid world of multiple, overlapping normative authority".[63]

4. Where to?

In light of this brief overview of some of the key issues addressed by monism, dualism and pluralism, how should one conceptualize the relationship between legal spaces and specifically between domestic and international law? Several points seem useful to consider.

First, the issues discussed under the heading of monism, dualism and pluralism are multilayered and complex. Reducing these issues to a threefold choice among these concepts does not do them justice. While this threefold representation creates the (misleading) perception that there are well-defined options able to comprehensively capture the relationship between domestic and international law, considering this relationship through these three lenses entails various risks. First, it is likely to overlook one or several of the above dimensions. The intertwinement dimension that has long been undertheorized exemplifies this issue. Second, referring to a choice between monism, dualism and pluralism without appropriately differentiating between the above issues risks to unduly blend these issues. This has been the case for the analytical and the normative dimension

[60] On this discussion, Peer Zumbansen, 'Transnational Legal Pluralism' (2010) 1 Transnational Legal Theory 141.
[61] Tamanaha (n 3) 160.
[62] Berman, *Understanding* (n 8) 12.
[63] Berman, *Understanding* (n 8) 6.

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which are often not clearly addressed as such, and also for the various analytical questions including when plurality of laws is equated with autonomy; intertwinement with unity; or heterarchy with the absence of conflict resolution. Third, focussing on the choice between monism, dualism and pluralism also risks not to consider the full range of options for each dimension. The existence of the various “sub-strands” of monism, dualism and pluralism indicates that there is a broad range of ways to conceptualize each of the aspects of the relationship between domestic and international law. A simplified threefold model does not reflect this range. Rather than perceiving the relationship between legal spaces either from a monist, a dualist or a pluralist perspective, it is thus more fruitful to *assess individually each of the issues that constitute the relationship between domestic and international law*. This also helps to avoid misunderstandings as to what these three concepts have to say on each of these issues. And it sheds light on the fact that a certain stance on one issue does not necessarily lead to a specific stance on another issue. While there are of course links between the individual issues, they are not as interdependent as they are often portrayed. What is more, focussing on the individual issues puts the apparent historic contingency and context-dependency of monist, dualist and pluralist concepts into perspective. Not all these individual issues are in the same manner and to the same extent normatively charged. Being aware of what is at stake for each issue allows to calibrate the conceptualization of interrelating legal spaces to the relevant context.

Second, a closer look at the individual issues and the alternative suggestions discussed in the monist, dualist and pluralist literature shows that one does not have to conceptualize the relationship between legal spaces in a standardized manner. Instead, it seems useful to *adopt different suggestions for different contexts*. Take the example of conflict resolution. Analytical and normative considerations suggest addressing norm conflicts differently for different sets of legal spaces. Comparing the relationship between EU law and domestic law with the relationship between international and domestic law highlights this aspect. The relationship between EU law and domestic law is characterized, inter alia, by an intense intertwinement between these legal spaces as well as a common value basis to which these spaces relate. These features support the constitutional pluralist idea of conflict resolution, solving conflicts based on bridging elements rooted in all the legal spaces involved and with an effect for all these spaces.[64] In contrast, the relationship between domestic law and international law is not characterized by a similar generalized value basis and for most domestic legal spaces, the intertwinement would be much less intense than is the case for the relationship between EU law and domestic law. There is a diverse level of intertwinement between domestic and international law. These observations provide a less strong bases for a constitutional pluralist approach and rather hint at perspectivist ways of conflict resolution. Further, when considering the relationship between other legal spaces, including various legal spaces within the

[64] On this question also Burchardt, *Relationship* (n 25).

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international realm,[65] again other considerations can be determining. The different features of the relationship between specific legal spaces thus speak for a differentiated approaches to conflict resolution depending on the context. Accordingly, the different suggestions made for each individual issue of the relationship between legal spaces should be understood as a *toolbox* rather than categorically opposed conceptual claims. This toolbox offers suitable ways to conceptualize numerous kinds of relationships between legal spaces. And it can be used by a range of actors, both for theoretically assessing the relationship between legal spaces and for practically shaping them. As to the latter, the toolbox approach offers options for (formally and informally) regulating actors as well as for judicial and quasi-judicial bodies.

Third, the variety of suggestions offered on each issue also invites us to question whether what may seem to be the best way to further a certain normative aim really provides the best outcomes. In particular, instead of focusing on the opposing suggestions that are situated at the extremes of the spectrums illustrated above, it might often be more fruitful to *consider the interjacent options*. For example, to foster the authority of international law, a hierarchical approach to the relationship between domestic and international law might seem the best solution at first glance. That would mean solving all conflicts between domestic and international law in favour of the latter. Yet such an approach would not factor in discrepancies between the normative claim and empirical observations as to how actors address the relationship between domestic and international law. Claiming a hierarchical relationship and a uniform way of conflict resolution would mean disregarding how actors shape the relationship between these legal spaces in practice. Further, normatively aiming for hierarchy can create high expectations that, when repeatedly disappointed, undermine the authority claim of international law in the long run. Being aware of other – specifically interjacent – approaches on the spectrum allows to better assess the suitability and effectiveness of the approach that might at first glance seem intuitive to achieve a certain normative aim. More generally, research should aim at a more profound understanding and conceptualization of these interjacent options, a point already alluded to in the context of the discussion on intertwinement. This will allow for the notions to keep up with ongoing legal developments. Specifically, considering interjacent options can contribute to integrating informal or hybrid forms of regulation into the relationship between legal spaces.

In sum, looking behind the façade of monism, dualism and pluralism is a valuable way forward. It allows to reassess and resituate old and current debates and develop the existing approaches further. Rather than inviting to entirely dismiss specific notions as outdated or normatively contingent, engaging with the individual issues raised by interrelating legal spaces can open up the discourse. In addition, it provides points of reference to engage with other, specifically non-western,

[65] For a pluralist account of potential conflicts between different international law “regimes”, e.g. William W. Burke-White, ‘International Legal Pluralism’ (2004) 25 Michigan Journal of International Law 963.

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debates on how domestic and international law interrelate. This includes for example the Chinese approach to the relationship between domestic and international law, which cannot be captured by the monist/dualism template to begin with. The "dialectical model" that has been predominant in Chinese scholarship regarding the relationship between domestic and international law, explicitly rejects monist and dualist approaches.[66] This model can however be linked to the outlined monist/dualist/pluralist debate when referring to the various analytical questions individually. That includes inter alia the idea of a plurality of laws, the intertwinement of domestic and international law and a discourse-based approach to conflict resolution. Reframing the debate on the relationship between domestic and international law can thus contribute to making it more inclusive.

Finally, looking behind the façade of monism, dualism and pluralism can – and should – also provide guidance for actors in legal practice. This is particularly the case for many (domestic and international) courts whose understanding of the relationship between domestic and international law is still determined by classical monism and dualism. Many domestic courts continue to categorize their respective legal order as monist or dualist, directly inferring from this categorization how to solve specific legal questions regarding the relationship between domestic and international law. This makes it likely that the above-mentioned fallacies (such as equating plurality of laws with autonomy; or heterarchy of legal spaces with the absence of conflict resolution among norms) shape their jurisprudence or that they do not duly consider context-specific and interjacent options of conflict resolution. Moreover, international courts – particularly regional courts – refer implicitly or explicitly to these notions when defining the relationship to the legal order of their respective member states regarding applicability of regional law, its potential direct effect, the enforcement of their judgements etc. This entails in particular the risk that such courts approach the relationship between domestic and international law in a way that does not sufficiently disentangle the dimensions of this relationship.[67] Further, when courts use these notions as a cognitive and argumentative point of reference for shaping this relationship, the outlined limitations of these notions can reduce the effectiveness of international law. Instead, addressing the various dimensions of this relationship individually, adopting context-specific solutions, and considering interjacent options will assist courts in facing current legal developments as well as challenges of legal policy.

[66] Björn Ahl, *Die Anwendung völkerrechtlicher Verträge in China* (Springer 2009) 29–65.

[67] This is for example the case in the early jurisprudence of certain regional courts. See e.g. East African Court of Justice, Prof. Peter Anyang' Nyong'o and Others Vs Attorney General of Kenya and Others, decision of 30 March 2007, reference no 1/2006.

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The Kolleg-Forschungsgruppe "The International Rule of Law – Rise or Decline?" examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a 'classical' type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

The Research Group brings together international lawyers and political scientists from three institutions in the Berlin-Brandenburg region: Freie Universität Berlin, Humboldt-Universität zu Berlin and Universität Potsdam. An important pillar of the Research Group consists of the fellow programme for international researchers who visit the Research Group for periods up to two years. Individual research projects pursued benefit from dense interdisciplinary exchanges among senior scholars, practitioners, postdoctoral fellows and doctoral students from diverse academic backgrounds.

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