

Global legal pluralism as fact and norm

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Abstract: This article interrogates the intellectual foundations of global legal pluralism as a descriptive and normative position, and assesses its core claims with reference to the changing status of individuals in the postnational realm. In order to uncover the normative core of the pluralist position, the article turns to the rich tradition of value pluralism in political philosophy, particularly as articulated by Isaiah Berlin. It argues that as a normative position, pluralism – whether applied to the abstract sphere of values or the concrete realm of legal regimes – is normatively underdetermined, offering too little guidance as to how the conflicts endemic to a pluralistic world ought to be resolved. Unless it is supplemented by other, more substantive principles of political legitimacy such as democracy, freedom, equality, or justice, the principle of pluralism applied to the global legal realm is poised to reproduce, even exacerbate, existing inequalities of power and resources among those whom it affects.

Keywords: constitutionalism; global legal pluralism; individual rights; international law; sovereignty

Pluralism is a ubiquitous term in contemporary debates about law, legitimacy, and public power. Like many such terms, its referents (‘pluralism of what?’) are unclear and potentially unlimited. Nonetheless, studies of pluralism (whether of values, cultures, societies, or legal orders) often note that it is a Janus-faced term: it is rooted in an empirical observation about plurality, but ends in an ‘-ism’ that is characteristic of ideological positions or normative commitments.¹ In other words, pluralism may be a descriptive thesis about the coexistence of many ‘unlikes’ within a given order, or it may be a prescriptive stance in favour of such diversity. This article will argue that the challenge of formulating a coherent

¹ In describing legal pluralism, Gunther Teubner also uses the metaphor of the Roman god Janus, although the duality emphasized by Teubner is not that between its normative and descriptive facets but legal pluralism’s reference to ‘social norms *and* legal rules, law *and* society, formal *and* informal, rule-oriented *and* spontaneous’. See G Teubner, ‘The Two Faces of Janus: Rethinking Legal Pluralism’ (1992) 13 *Cardozo Law Review* 1443–62, 1443.

pluralist philosophy is not that of discerning multiplicity in the world, but of articulating the reasons as to why it is valuable, and when it ceases to be so.

As transnational regimes and institutions addressing virtually every area of public policy acquire greater significance, a thriving epistemic community has sprung up around the topic of global legal pluralism.² In recent years, international lawyers, legal and political theorists, sociologists and others have engaged with a number of empirical, conceptual, and normative puzzles and questions having to do with the coexistence of different sorts of legal orders in the realm of global governance. The burgeoning debate on pluralism in the global legal sphere has been reshaping not just how we think about international law, but also about how political power is exercised beyond the state.

This article contributes to this effort by interrogating the intellectual foundations of global legal pluralism as a normative position. In doing so, it draws in particular on contemporary debates about value pluralism in political philosophy, to which the work of twentieth-century political philosopher Isaiah Berlin has been formative.³ The aim of the article

² See especially, P Schiff Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155–1238; J Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge University Press, New York, 2012); A von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law' (2008) 6 *International Journal of Constitutional Law* 397–413; M Delmas-Marty, *Ordering Pluralism: A Conceptual Framework for Understanding the Transnational Legal World* (Hart, Oxford, 2009); D Halberstam and E Stein, 'The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order' (2009) 46 *Common Market Law Review* 13–72; N Krisch, *Beyond Constitutionalism* (Oxford University Press, Oxford, 2010); N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *European Journal of International Law* 247–78; N MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press, Oxford, 1999); M Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in N Walker (ed), *Sovereignty in Transition* (Hart, Oxford, 2003); M Maduro, 'Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism' in JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, New York, 2009); A Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes' (2009) 16 *Indiana Journal of Global Legal Studies* 621–45; G Teubner, 'Global Bukovina: Legal Pluralism in the World Society' in G Teubner (ed), *Global Law without a State* (Dartmouth, Brookfield, VT, 1997); N Walker, 'Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders' (2008) 6 *International Journal of Constitutional Law* 373–96; N Walker, 'The Idea of Constitutional Pluralism' (2002) 65 *Modern Law Review* 317–59.

³ See especially the essays collected in I Berlin, *The Crooked Timber of Humanity* (Alfred A Knopf, New York, NY, 1991); I Berlin, 'Two Concepts of Liberty' [1958], 'Herder and the Enlightenment' [1965], 'The Apotheosis of the Romantic Will' [1975] in *The Proper Study of Mankind* (Farrar, Straus and Giroux, New York, NY, 1998).

is not so much to draw a comprehensive correspondence between the complex and long-standing debates on value pluralism on the one hand, and the relatively recent and specialized literature on global legal pluralism on the other hand, but instead to suggest that the latter, as a normative position, is vulnerable to weaknesses similar to those we find in Berlin's key articulation of value pluralism. I do not consider these weaknesses to be fatal to the pluralist position. My aim is rather to invite proponents of global legal pluralism to articulate their argument in a way that addresses them. In particular, I argue, they must differentiate more precisely between the reasons why global legal pluralism is desirable, and specify the desirable degree of pluralism in the global legal sphere. Towards the end of the article, I will explore some of the potential consequences of failing to do so.

The article proceeds as follows. I will begin by reviewing various iterations of legal pluralism as a descriptive paradigm, followed by a critical exposition of its normative claims. In the second section, I will show that the normative case in favour of global legal pluralism bears a strong family resemblance to the tradition of value pluralism in political philosophy, echoing its strengths and – crucially – its weaknesses. In the third section, I will assess some major ways in which legal pluralism transforms politically consequential forms of individual agency beyond the state. I will argue that on the one hand, the ‘subjectivation’⁴ of international law offers private actors unprecedented opportunities to shape the institutions within which they transact. On the other hand, I will critique pluralism's hands-off approach towards the postnational legal landscape as poised to reproduce, even exacerbate, existing inequalities of power and resources among individuals affected by it. I will argue that this is a consequence of the normative ambivalence at the heart of pluralism as a philosophical position, whether it is applied to the abstract realm of values or the concrete domain of transnational legal regimes.

The definitional question

My critical analysis of global legal pluralism draws on three analytically distinct notions of what pluralism in the legal sphere might entail. The first of these, which I will call the *pluralism of law*, is a hypothesis about the nature of law as a social medium, and has been the subject of a voluminous legal sociology and legal anthropology literature that long predates current

⁴ MP Maduro, *We the Court: The European Court of Justice and the European Economic Constitution* (Hart, Oxford, 1998).

debates prompted by the proliferation of transnational regimes.⁵ In its second sense, which I will call the *pluralism of regimes*, legal pluralism refers to the coexistence of diverse legal orders within a given space (whether territorial, personal, functional, or global). The pluralism of regimes can take different forms. Here, I distinguish between *Westphalian pluralism*, which comprises multiple sovereign states, each with its own constitutional order, and *postnational pluralism*, which features a diverse range of norm-producing institutions and regimes at the transnational level alongside states. In its third and final sense, legal pluralism can refer to the *pluralism of ordering principles* (or of what Neil Walker calls ‘metaprinciples of authority’⁶) that purport to govern the relationships between the existing multitude of legal orders (such as sovereign equality, global hierarchy, unipolarity, regional hegemony, etc).⁷ In what follows, I give an overview of these three analytically distinct notions of legal pluralism.

Pluralism of law

Much of the rich conceptual groundwork for the contemporary debate on global legal pluralism has been laid by antecedent research in legal sociology and anthropology. In her seminal analysis, Sally Engle Merry defines legal pluralism as ‘a situation in which two or more legal systems coexist in the same social field’.⁸ In this sense, legal pluralism is a feature of domestic legal systems (in which ‘state law’⁹ coexists with the rules of other semi-autonomous institutions such as corporations, religious orders, professional and civil associations, or academic institutions) as much as of the contemporary transnational realm. Nonetheless, the intensification of global interdependence and the emergence of bodies of rules to govern those relationships have redoubled the empirical relevance of the pluralist thesis.

Since legal pluralism emerged as an effort to free the concept of law from its strict reliance on the sovereign state and its institutions, its distinctiveness can be better understood in contrast to what Griffiths terms ‘the ideology of legal

⁵ See especially, E Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press, Cambridge, MA, 1936); J Griffiths, ‘What is Legal Pluralism?’ (1986) 24 *Journal of Legal Pluralism* 1–55; SE Merry, ‘Legal Pluralism’ (1988) 22 *Law & Society Review* 869–96, 870; SF Moore, *Law as Process: An Anthropological Approach* (Routledge, Boston, 1978); Teubner, ‘The Two Faces of Janus: Rethinking Legal Pluralism’ (n 1). For a critique, see BZ Tamanaha, ‘The Folly of the “Social Scientific” Concept of Pluralism’ (1993) 20 *Journal of Law and Society* 192–217.

⁶ Walker, ‘Beyond Boundary Disputes’ (n 2) 376.

⁷ This list draws on *ibid* 386.

⁸ Merry, ‘Legal Pluralism’ (n 5) 870.

⁹ *Ibid*, 875; Griffiths, ‘What is Legal Pluralism?’ (n 5) 5.

centralism'.¹⁰ According to legal centralism, the only norms that properly enjoy the status of law are the commands of the sovereign state, 'uniform for all persons, exclusive of all other law, and administered by a single set of institutions'.¹¹ Or, in Bodin's classic formulation, 'The word *law* signifies the right command of that person, or those persons, who have absolute authority over all the rest without exception, saving only the law-giver himself'.¹² Moreover, this means that 'no government is sovereign and subject at one: nor can be properly styled half or imperfectly supreme'.¹³ Defined in these strict terms, sovereignty is an attribute like pregnancy: one cannot be pregnant and not pregnant at the same time; and one cannot be halfway between the two.¹⁴ As a corollary, it is equally impossible for a subject to have two sovereign masters simultaneously (that is, for two or more competing legislative authorities to have authority to rule over a particular case at the same time), since for one of these to accept the concomitant authority of the other would be tantamount to admitting that the first one is not sovereign. Thus, 'it is the distinguishing mark of the sovereign that he cannot in any way be subject to the commands of another, for it is he who makes law for the subject'.¹⁵

The conceptual tidiness of the unitary account of sovereignty owes much to the messiness of its historical context. As historians have long noted, 'absolutism' as it applies to European politics in the sixteenth through the mid-eighteenth centuries is something of a misnomer.¹⁶ In fact, the age of absolutism was marked by fierce power struggles in which monarchical authority was incessantly contested by countervailing forces. Hobbes and Bodin formulated their classical accounts of sovereignty against the background of titanic political struggles not only among ecclesiastical and temporal sources of authority, but also among feudal and aristocratic modes of authority on the one hand, and centralized monarchical authority on the other; to say nothing of episodic succession disputes and confessional conflicts. During the early modern period, sovereignty, like absolutism,

¹⁰ Griffiths, 'What is Legal Pluralism?' (n 5) 3.

¹¹ Ibid 3.

¹² J Bodin, *Six Books on the Commonwealth*, trans MJ Tooley (Barnes and Noble, New York, 1967) 43.

¹³ J Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, vol I, R Campbell (ed) (James Cockcroft & Co, New York, 1875) Lecture VI, section 234, 144.

¹⁴ D Philpott, *Revolutions in Sovereignty: How Ideas Shaped Modern International Relations* (Princeton University Press, Princeton, 2001) 18.

¹⁵ Bodin, *Six Books on the Commonwealth* (n 12) 28. In this respect Austin adopts Bodin's formulation almost wholesale, describing the sovereign's 'independence ... of a determinate human superior' as the distinguishing 'negative mark of sovereignty'. *Lectures on Jurisprudence* (n 13) 117, sections 192 and 193 respectively.

¹⁶ See, for instance, P Anderson, *Lineages of the Absolutist State* (Verso, London, 1974) 49.

was a form of wishful thinking designed to allay the well-founded anxieties of the monarch, ground his claims to superlative authority, and undercut the pretensions of his challengers.¹⁷ That is to say, the idea of a sovereign with absolute and unlimited authority to issue laws without himself being subject to man-made laws fulfilled the ideological function of extinguishing competing claims to power that threatened the status of the monarch. In its origins, sovereignty is paradoxically both a product of and a response to the fact of pluralism. It is therefore hardly surprising that sovereignty has once again become an intensely contested category against the contemporary backdrop of shifting structures of public power, this time in a global context. Conversely, so long as law can reasonably be assumed to issue from a single sovereign, and the sovereign is not itself 'in a habit of obedience to a determinate human superior',¹⁸ pluralism remains a marginal concern.

Precisely because early modern accounts of sovereignty served the ideological function of discrediting rival claims to authority and consolidating the seat of power, it is difficult to reconcile sovereignty as an ordering norm with a pluralistic conception of law. In fact, according to the legal centralist conception of law as sovereign command, legal pluralism is logically incoherent: all but one of the claimed sources of authority must be subject rather than sovereign. By contrast, pluralism allows for the simultaneous authority of several lawgivers between whose commands no relationship of hierarchy can be drawn. According to legal pluralism, the idea that law is 'a single, unified and exclusive hierarchical normative ordering depending from the power of the state' is an 'illusion'.¹⁹ Here, legal pluralism's distinctive analytical move is to widen the domain of law to include societal norms that originate from sources other than the formal organs of public power. One of the forerunners of such a conception, Austrian legal scholar Eugen Ehrlich, endorsed a view of the law as reaching beyond the narrow confines of statutory or judicial norms (what he called 'Legal Provision'),²⁰ arguing that law must instead be understood 'in its

¹⁷ This anxiety is palpable not only in Hobbes's *Leviathan*, famously written against the backdrop of the English civil wars, but also in Bodin's fastidious attempt to construct a hierarchy among 'absolute sovereigns,' 'subjects of the Pope,' 'subjects of the [Holy Roman] Emperor', dukes, counts, 'highest officers of state, lieutenant-generals of the king, governors, regents, dictators', tributary princes, and assorted vassals, liege-vassals, and 'natural subjects'. See Bodin, *Six Books on the Commonwealth* (n 12) 36–9, 42.

¹⁸ Austin, *Lectures on Jurisprudence* (n 13) section 190, 117.

¹⁹ Griffiths, 'What is Legal Pluralism?' (n 5) 4–5.

²⁰ E Ehrlich, 'The Sociology of Law' (1922) 36 *Harvard Law Review* 130–45. Ehrlich defines a 'Legal Provision' as 'an instruction framed in words addressed to courts as to how to decide legal cases (*Entscheidungsnorm*) or a similar instruction addressed to administrative officials as to how to deal with particular cases (*Verwaltungsnorm*)' 132.

social relations' and as a 'function of society'.²¹ According to Ehrlich, 'the great mass of law arises immediately in society itself in the form of a spontaneous ordering of social relations, of marriage, the family associations, possession, contracts, succession, and most of this Social Order has never been embraced in Legal Provisions'.²² The theory of law as sovereign command captures a very slim range of such relations, which are historically and conceptually antecedent to state law. Memorably, Ehrlich argued that legal analysis that focuses on enacted law alone is tantamount to 'trying to catch a stream and hold it in a pond; the part that may be caught is no longer a living stream but a stagnant pool'.²³

According to the capacious conception of law endorsed by legal pluralists, 'not all the phenomena related to law and not all that are law-like have their source in government'.²⁴ In the domestic realm, 'nonlegal forms of normative ordering' can include 'institutions such as factories, corporations, and universities and include written codes, tribunals, security forces, sometimes replicating the structure and symbolic form of state law', as well as 'formal systems in which the processes of establishing rules, securing compliance to these rules, and punishing rule breakers seem natural and taken for granted'.²⁵ Merry contends that understood thus, 'virtually every society is plural'.²⁶

From this lens, legal pluralism is not only a hypothesis about competing sources of institutional authority but also one concerning the nature of the law itself. According to proponents of the pluralist approach, contemporary forms of 'law' include an increasingly hybrid range of commitments collectively generated by diverse communities.²⁷ 'legal pluralism is ... defined no longer as a set of conflicting social norms but as a multiplicity of diverse communicative processes in a given social field that observe social action under the binary code of legal/illegal'.²⁸ In other words, rather than being the privileged currency in which the state communicates power to its subjects, law is subject to appropriation by diverse social

²¹ Ibid 144.

²² Ibid 136.

²³ Ibid 133.

²⁴ SF Moore (1986), cited in Tamanaha, 'The Folly of the "Social Scientific" Concept of Pluralism' (n 5) 193.

²⁵ Merry, 'Legal Pluralism' (n 5) 870–1, references omitted.

²⁶ Ibid, 870–1, references omitted.

²⁷ Paul Schiff Berman argues that 'the whole debate about law versus non-law is largely irrelevant in a pluralism context because the key questions involve the normative commitments of a community and the interactions among normative orders that give rise to such commitments, not their formal status'. See Schiff Berman, 'Global Legal Pluralism' (n 2) 1177.

²⁸ G Teubner (ed), *Global Law without a State* (Dartmouth, Aldershot, 1997) 14.

systems that may or may not have formal links to the sovereign state but which nevertheless understand themselves in legal terms.²⁹

Pluralism of regimes: Westphalian vs postnational pluralism

While the idea of law as sovereign command is deeply at odds with the pluralistic account of law espoused by Ehrlich, Griffiths, Merry, and others, it is compatible with a different kind of legal pluralism understood as the pluralism of legal *regimes* or orders. Thus, the classical interstate system is deeply pluralistic insofar as it encompasses a plurality of sovereign states, each with its own discrete legal order, coexisting in the absence of any overarching legal authority or hierarchical ordering. I will call this variant of regime pluralism *Westphalian pluralism*. The origins of this system are conventionally dated back to the 1555 Peace of Augsburg and the 1648 Treaties of Westphalia, which together formulated the broad principles of non-interference, autonomy, and sovereignty (both internal and external) of states.³⁰ Under this system, pluralism stems from the heterarchical relationship among a multiplicity of political units, each of which claims exclusive jurisdiction over a particular territory and its inhabitants. The authority of other legal systems, such as international treaties or institutions, is borrowed from and subordinate to the states that constitute them. From this perspective, modern international institutions ventriloquize the will of states, but do not *count* as protagonists of international politics in their own right, at least on a par with sovereign states. The normative centrepiece of Westphalian pluralism is the principle of ‘sovereign equality’³¹ according to which each

²⁹ A contemporary example is *lex mercatoria*, the transnational body of private commercial law that neither issues from states nor is curated by them.

³⁰ Although the term ‘Westphalian’ serves as shorthand for the classical attributes of modern sovereignty, the historical accuracy of the standard narrative is deeply contested. See especially the essays in H Kalmo and Q Skinner (eds), *Sovereignty in Fragments. The Past, Present and Future of a Contested Concept* (Cambridge University Press, New York, 2010); S Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, Princeton, NJ, 1999); L Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (Cambridge University Press, New York, 2010); A Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’ (1999) 40 *Harvard International Law Journal* 1–81.

³¹ See Hans Kelsen’s critical attempt to articulate a sustainable notion of ‘sovereign equality’ in H Kelsen, ‘The Principle of Sovereign Equality of States as a Basis for International Organization’ (1944) 53 *Yale Law Journal* 207–20. In this article, written at the heels of the Moscow Declaration of 1943 in which the US, UK, USSR, and China stated their intention to create a ‘general international organization, based on the principle of the sovereign equality of all peace-loving States ... for the maintenance of international peace and security’, Kelsen presents a jurisprudential analysis of the idea of a world order founded on sovereign equality, along with his deep misgivings about the stability of such a system. Also see H Kelsen, ‘Sovereignty and International Law’ (1960) 48 *Georgetown Law Journal* 627–40.

sovereign state constitutes a discrete legal order coexisting with its peers under a presumption of independence and interacts with them through the medium of its own constitutional law.³²

While Westphalian pluralism has been a continuous feature of the modern international order since the emergence of the sovereign territorial state in early modern Europe, the present academic debate to which this article contributes highlights a more recent and more complex form of pluralism created by the multiplication of transnational norm-producing regimes. The legal and quasi-legal entities that are considered under the rubric of global legal pluralism defy systematic categorization: bodies such as the United Nations, the World Trade Organization, the International Criminal Court, the Inter-American Court of Human Rights, the International Chamber of Commerce, the International Organization for Standardization, as well as decentralized and/or contractual bodies of norms such as bilateral investment treaties, *lex mercatoria* and *lex sportiva* have been put forward as emblematic of the thriving new sphere of transnational law.³³ These entities vary along a number of dimensions including their substantive scope, institutional make-up, binding status, membership composition, aims, and functions. Some are geographically contiguous, while others bring together far-flung states that share common interests. Occasionally, regional institutions can become members of other international institutions; and even where they do not formally do so, legal regimes interact with one another in increasingly complex ways.³⁴

On this view, regime pluralism refers not only to the multiplication of norm-producing institutions in the global legal sphere, but also to the fact that the entities in question can no longer be comprehended by a single institutional model, least of all one based on classical interstate agreement. Thus, unlike the symmetrical multiplicity of sovereign states under Westphalian pluralism, global legal pluralism captures an array of legal forms variously taxonomized as ‘orders’, ‘systems’, ‘regimes’, ‘instruments’, or ‘institutions’. On a wider definition, it regards not only states, but also other bodies of rules such as ‘international law, and law of organized associations of states such as the EU, law of churches and other religious unions or communities, or laws of games, and laws of national and

³² See Jean Cohen’s sophisticated conceptual account and normative defence of an understanding of pluralism ‘which gives both the political values that sovereignty articulates and human rights their due without being “state-centric”’, in ‘Sovereign Equality vs. Imperial Right: The Battle over the “New World Order”’ (2006) 13 *Constellations* 485–505, 486. Also see Cohen, *Globalization and Sovereignty* (n 2).

³³ See, for instance, contributions in Teubner (ed), *Global Law without a State* (n 2).

³⁴ For instance, KJ Alter and S Meunier, ‘Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute’ (2006) 13 *Journal of European Public Policy* 362–82.

international sporting associations³⁵ as capable of producing law and therefore as contributing to a global pluralism of regimes. Once we loosen the positivist requirement that all law must issue from the sovereign state, therefore, we find ourselves in a virtually unfathomable legal pluriverse in which states are salient but by no means solitary sources of law. In Gunther Teubner's words, it is 'the implicit or explicit invocation of the legal code which constitutes phenomena of legal pluralism, ranging from the official law of the state to the unofficial laws of world markets'.³⁶

Thus, if the legal centralist conception has trouble accommodating the diversity of extant legal forms, the pluralist approach struggles to limit that diversity. As a descriptive matter, pluralism 'runs the risk of defining legal system so broadly that all social control forms are included'.³⁷ As a result, the more we loosen our notions of what counts as law (legal pluralism in the first sense defined above), the more pluralism we see in the world of legal regimes. I will shortly address the normative implications of this problem.

The novelty of the contemporary global legal landscape derives in part from the fact that certain regimes and institutions at the sub-, supra-, and transnational levels can create new obligations, rights, and duties that bind states, individuals and other actors even in the absence of hierarchically ordered means of enforcement. Consequently, '[t]he classical distinction between domestic and international spheres' becomes blurred, with 'a multitude of formal and informal connections taking the place of what once were relatively clear rules and categories' for distinguishing the domestic and extraterritorial sourcing of norms.³⁸ The expanding norm-making authority of a plurality of regimes poses a challenge to the traditional paradigm of delegated authority between sovereign states and international institutions. At the extreme, global legal pluralism 'refutes categorically any claim that the official law of the nation-states, of the United Nations or of international institutions enjoy any hierarchically superior position. It creates instead the image of a heterarchy of diverse legal discourses'.³⁹ Most importantly, such institutions challenge the state's claim to control all exercises of political power within its territory, placing a strict notion of sovereignty under serious strain. For all of these reasons, postnational pluralism, understood as either real or potential competition among multiple sources of law (whether states

³⁵ N MacCormick, 'Risking Constitutional Collision in Europe?' (1998) 18 *Oxford Journal of Legal Studies* 517–32, 525.

³⁶ Teubner, *Global Law without a State* (n 2) 14.

³⁷ Merry, 'Legal Pluralism' (n 5) 871.

³⁸ Krisch, *Beyond Constitutionalism* (n 2) 4.

³⁹ Ibid 14. Also see G-P Calliess and M Renner, 'Between Law and Social Norms: The Evolution of Global Governance' (2009) 22 *Ratio Juris* 260–80.

or non-state entities) that purport to govern the same set of phenomena, is deeply at odds with Westphalian pluralism.⁴⁰

Pluralism of ordering principles

Although the Westphalian system is a pluralistic one insofar as it comprises multiple sovereign states subject to no superior authority, the master principle of state sovereignty serves as its central ordering norm. By contrast, global legal pluralism is often taken to imply a more radical form of fragmentation. Unlike Westphalian pluralism, it lacks a ‘metaprinciple of authority’⁴¹ (such as sovereign equality) on the basis of which its constituent units may be recognized and related to one another. Instead, it is marked by a ‘disorder of orders’ ‘in which no general steering mechanism is available to frame relations between orders’.⁴² In this sense, then, pluralism depicts a world in which all ordering principles, including that of state sovereignty, have been dethroned, and where non-state institutions enjoy normative authority and partial autonomy alongside states without being subordinate either to sovereign will *or* to any plenary set of ordering norms. In the third and final sense I identify in this essay, legal pluralism refers to the *pluralism of ordering principles*.

In the absence of an ordering principle that is acknowledged to be valid by the discrete regimes that populate the global legal sphere, the relationships among these regimes are best characterized as ‘interactive rather than hierarchical’.⁴³ To be sure, in a world of plural regimes, there remains a great range of well-defined instances where the laws of one order must prevail over others. However, in such a world, we would also expect to see a greater range of instances where relationships are less clear-cut, and in which ‘not all legal problems can be solved legally’.⁴⁴ Most importantly, ‘the superfluity of legal answers’ creates cases where ‘the same human beings or corporations are said to have and not have a certain right’.⁴⁵ In other words, taken together, the *pluralism of regimes* on the one hand and the *pluralism of ordering principles* on the other make for a global legal landscape in which different sorts of regimes coexist in the absence of

⁴⁰ As Cohen explains, the layering of the traditional pluralism of sovereign states with non-traditional legal regimes beyond the state complicates traditional schemes of monist and dualist jurisprudence. See J Cohen, ‘Sovereignty in the Context of Globalization: A Constitutional Pluralist Perspective’ in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press, Oxford, 2010).

⁴¹ Walker, ‘Beyond Boundary Disputes’ (n 2) 376.

⁴² *Ibid* 391.

⁴³ MacCormick, ‘Risking Constitutional Collision in Europe?’ (n 35) 528.

⁴⁴ *Ibid* 530.

⁴⁵ *Ibid* 530.

an overarching structure for deciding competing claims to authority. The unruliness of that landscape is nicely captured by the Jackson Pollock painting that adorns the cover of Nico Krisch's book on legal pluralism.⁴⁶ *Undulating Paths* (1947) offers a striking visual symbol for this condition, depicting an irrational jumble of shapes knitted together by tangled ribbons of black and contrasting flecks of colour, in which the wandering eye of the viewer searches in vain for a convenient unifying motif.

The remainder of this discussion (and the collaborative volume of which it is a part) is broadly concerned with legal pluralism in the second sense outlined above, that is to say, the pluralism of legal regimes in the transnational realm,⁴⁷ although this notion of pluralism readily implicates the other two conceptions outlined above. With regard to the first conception, global legal pluralism appears to give the upper hand to a flexible account of law as a discursive code rather than sovereign command; and with regard to the third, it destabilizes traditional ordering principles tailored to a system of Westphalian pluralism. Regrettably, I cannot do justice to the complexity of these important conceptual links between different manifestations of legal pluralism here. In what follows, I will focus rather on the cogency of normative arguments that respond to the increasingly heterogeneous, fluid, functionally fragmented realm of global law, where a given set of actions may be governed by an assortment of legal systems or by none at all.

⁴⁶ Krisch, *Beyond Constitutionalism* (n 2).

⁴⁷ The literature that focuses on the liminal interactions (or 'plate tectonics', to borrow an apt metaphor from Bjørn Kunoy and Anthony Dawes, 'Plate Tectonics in Luxembourg: The *ménage à trois* between EC Law, International Law and the European Convention on Human Rights following the UN Sanctions Cases' (2009) 46 *Common Market Law Review* 73–104) between global legal regimes often goes under the title 'constitutional pluralism', as distinct from mere legal pluralism. In this article, I consider the latter rather than the former, first because legal pluralism is more capacious than constitutional pluralism insofar as it allows for the study of orders which, while having a fair claim to be 'law', might nevertheless be of a qualitatively distinct nature from *constitutional* law. Second, the more general term allows us to leave open highly contentious questions about whether a given regime qualifies as 'constitutional' in any conceptually rigorous sense. Last, as Christina Eckes explains in her contribution to the present volume, instances of constitutional pluralism count as 'extreme' cases of legal pluralism, whereas the reverse relation does not obtain. Therefore, the more general term allows us to make finer distinctions as necessary within the context of substantive analysis. Key contributions to the debate on constitutional pluralism include Cohen, *Globalization and Sovereignty* (n 2); M Kumm, 'The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State' in Dunoff and Trachtman, *Ruling the World?* (n 2); M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (2005) 11 *European Law Journal* 262–307; Maduro, 'Contrapunctual Law' (n 2); Maduro, 'Courts and Pluralism' (n 2); Walker, 'The Idea of Constitutional Pluralism' (n 2); M Avbelj and J Komárek, 'Four Visions of Constitutional Pluralism' (2008) 2 *European Journal of Legal Studies* 325–70.

Pluralism's normative core

Advocates of global legal pluralism often view it as a legitimate mode of organizing the global legal realm; that is, as more than simply a prescient descriptive account.⁴⁸ Still, the reasons most frequently cited in favour of a pluralist world order tend to emphasize the purported desirable consequences of pluralism *or* its merits relative to more centralized forms of global ordering. To illustrate: if we ask why legal pluralism might be deemed valuable, the answer may be that it opens up the international system to a wider range of actors and affords greater opportunities for participation and contestation. That defence, however, makes pluralism's value contingent on its democratic effects; that is, the controlling normative principle is one of democratic participation or non-domination rather than pluralism *per se*. Is pluralism desirable because it shields states and their citizens from the hegemony of a few great powers and enables the exercise of national sovereignty or popular self-government? That argument makes pluralism's value contingent on its promotion of collective or individual autonomy; that is, it makes us nationalists or civic republicans. Should we favour pluralism because it affords a greater chance for protecting basic individual rights at various regimes and levels of governance? Then the principle that informs our conclusion is a universalism of human rights rather than pluralism as such. Conversely, if the pluralism of legal orders were shown to be empirically unrelated to or disruptive of any of these ends (for example, if it turned out to promote subjection rather than autonomy, relativism and wanton chaos rather than diversity and human flourishing, oppression and violence rather than basic rights and liberties, or global hegemony rather than collective self-rule), then we would look elsewhere for more desirable principles of legal and political order. Set apart from other, conceptually independent principles such as democracy or human rights, what reasons do we have for defending pluralism in the transnational sphere as a *value* that all legitimate projects of world order must respect? Or does legal pluralism, like a philosophical chameleon, take its normative valence from whatever outcomes it appears to produce?

These cursory points illustrate the difficulty of pinning down global legal pluralism's normative value independently of the 'superordinate goods'⁴⁹ with which it is contingently aligned. This is not to say that one cannot effectively make a case for global legal pluralism on contingent grounds. To the contrary, we are right to care deeply about how even the

⁴⁸ In Schiff Berman's words: 'pluralism offers both a more accurate descriptive account of the world we live in and a potentially useful alternative approach to the design of procedural mechanisms and institutions'. Schiff Berman, 'Global Legal Pluralism' (n 2) 1165.

⁴⁹ I Shapiro, *Democratic Justice* (Yale University Press, New Haven, 2001) 23.

most elegantly devised political ideas work themselves out in the world. Nonetheless, if the only arguments that support global legal pluralism are contingent ones, that makes the pluralist position a less interesting one from the point of view of political theory.

To further the search for a non-contingent justification for global legal pluralism, I would like to turn to a different debate, namely that concerning *value* pluralism.⁵⁰ Value pluralism in the broadest sense is a philosophical position that maintains the impossibility of reconciling competing human values such as justice, benevolence, equality, or liberty. To be sure, neither the kind of pluralism that pertains to the abstract realm of values (what George Crowder terms ‘meta-ethical pluralism’),⁵¹ nor the kind which denotes the diversity of cultural, religious and ethical viewpoints in contemporary societies is strictly analogous to global legal pluralism. Notwithstanding the distinctiveness of the latter, however, the fact that most defences of legal pluralism come to rest on its purported effects implies that the normative argument in favour of legal pluralism may have something to learn from well-established accounts of pluralism as a philosophical doctrine. In parsing the normative case for legal pluralism, therefore, I will begin by revisiting the reasons why political thinkers (particularly but not exclusively in the liberal tradition) have defended pluralism over attempts at enforced uniformity in the realm of values. I will then pose the challenge of translating pluralism from a factual statement about the normative universe to a normative position about how the conflicts within that universe ought to be resolved or mitigated.

Value pluralism is rooted in the observation, in Bernard Williams’s words, that ‘there are many and various forms of human excellence which will not all fit together into a one harmonious whole’.⁵² It is not merely

⁵⁰ It would be impossible to map all of the tributaries to this abundant and fast-moving current in contemporary political theory, but notable interventions include G Crowder, *Liberalism and Value Pluralism* (Continuum, New York, 2002); WA Galston, *Liberal Pluralism* (Cambridge University Press, New York, 2002); WA Galston, *The Practice of Liberal Pluralism* (Cambridge University Press, New York, 2005); J Gray, *Two Faces of Liberalism* (Polity Press, Cambridge, 2000) 34–68; J Kekes, *The Morality of Pluralism* (Princeton University Press, Princeton, NJ, 1993); J Kekes, *Against Liberalism* (Cornell University Press, Ithaca, NY, 1997) 159–79; C Larmore, ‘Pluralism and Reasonable Disagreement’ (1994) 11 *Social Philosophy and Policy* 61–79; S Lukes, ‘Making Sense of Moral Conflict’ in *Moral Conflict and Politics* (Oxford, Clarendon Press, 1991); T Nagel, *Mortal Questions* (Cambridge University Press, Cambridge, 1979) 128–41; J Raz, *The Morality of Freedom* (Clarendon Press, Oxford, 1986); C Taylor, ‘The Diversity of Goods’ in A Sen and B Williams (eds), *Utilitarianism and beyond* (Cambridge University Press, Cambridge, 1982); B Williams, *Moral Luck* (Cambridge University Press, Cambridge, 1981) 71–82.

⁵¹ G Crowder, ‘Pluralism and Liberalism’ (1994) 42 *Political Studies* 293–305, 294.

⁵² B Williams, *Ethics and the Limits of Philosophy* (Harvard University Press, Cambridge, MA, 1985) 153.

that we cannot hope to achieve all of the ends we seek; it is that the ends themselves may be fundamentally incompatible with one another. As Berlin puts it, ‘one cannot have everything, in principle as well as in practice’.⁵³ Pluralism is an immanent property of the moral universe, which, far from allowing for a reconciliation between all sources of value, is irremediably fraught and fragmented. As such, contemporary proponents of value pluralism ‘are committed both to affirming the heterogeneity of values and to denying the existence of comprehensive rank-orders among them’.⁵⁴ They argue that ‘the deep structure of moral experience’⁵⁵ is such that ‘no single value or limited range of values is capable of representing or commensurating all others’.⁵⁶ That is to say, pluralists reject the notion that the ends human beings pursue can be consolidated into a seamless whole, summed up in a universal maxim, or subordinated to a master value. From the pluralist perspective, ‘no basic value is inherently more important or authoritative or weightier than any other, and none embraces or summarizes all other values’.⁵⁷ This means that ‘values are not only plural but may be radically so: they may be *incommensurable* with one another’.⁵⁸ According to one observer, incommensurability means above all that the values in the human pantheon are ‘unrankable’;⁵⁹ that is to say, they ‘share no common denominator in terms of which they can be measured along the same dimension’.⁶⁰ Instead of looking forward to an ultimate reconciliation between these ends, the pluralist admits that in certain cases, ‘to choose one good is necessarily to forgo another genuine good, and the loss of the latter can not wholly be compensated by the gain of the former’.⁶¹ As Berlin memorably put it, the essence of the human condition is that ‘[w]e are doomed to choose’ among ends that are incompatible but often equally meritorious of being pursued, ‘and every choice may entail an irreparable loss’.⁶²

Thus far, value pluralism offers ‘an account of the actual structure of the normative universe’.⁶³ To value pluralists, ‘the diversity of values is a fact of

⁵³ Berlin, ‘The Pursuit of the Ideal’ (n 3) 17.

⁵⁴ Galston, *Liberal Pluralism* (n 50) 31.

⁵⁵ Crowder, *Liberalism and Value Pluralism* (n 50) 6.

⁵⁶ *Ibid* 7.

⁵⁷ *Ibid* 3.

⁵⁸ *Ibid* 2.

⁵⁹ *Ibid* 49.

⁶⁰ *Ibid* 2.

John Kekes gives a more expansive definition of incommensurability as ‘the denial of (1) a summum bonum, (2) the fungibility of values, and (3) a canonical principle for ranking values’. Kekes, *The Morality of Pluralism* (n 50) 56. For other accounts of incommensurability, see Williams, *Moral Luck* (n 50) 77; Raz, *The Morality of Freedom* (n 50) ch 13.

⁶¹ Crowder, *Liberalism and Value Pluralism* (n 50) 7.

⁶² Berlin, ‘The Pursuit of the Ideal’ (n 3) 13.

⁶³ Galston, *Liberal Pluralism* (n 50) 30.

life that reasonable moral theories must take into account'.⁶⁴ Even if we accept that the pluralist account is descriptively accurate, however, we must still ask how its descriptive claims might translate into normative ones. In other words, to observe, as a purported fact of the ethical universe, that human values are plural is not to say that such plurality is *desirable in itself* or even that it is a *good*. Is pluralism espoused merely as 'a truth claim' 'about the metaphysical structure of value',⁶⁵ or can it be an ethical principle in itself (e.g. that pluralism is valuable and must be protected)? Is value pluralism merely a meta-ethical axiom, a clever philosophical observation about the irreducible diversity of human goods, or does it contain a prescriptive standard capable of functioning as our guide in resolving those ethical dilemmas? Is it possible to transform pluralism into an *ordering* philosophy rather than a diagnosis of *disorder*; in other words, transform it from a *fact* into a *norm*? That question is essential for assessing the claim that pluralism in the global legal sphere is not merely an empirical diagnosis but also a normative principle for ordering or reforming the relationships among norm-creating institutions in a fragmented transnational realm.

The strongest argument for viewing value pluralism not merely as a fact of the moral universe but as a value in its own right grows out of the compelling contrast Berlin draws with what he calls philosophical 'monism'. According to Berlin, monism is the dominant disposition in Western political philosophy and rests on the (in his view) fallacious idea 'that there is only one overriding human purpose'.⁶⁶ It assures us that there is a unitary solution to all human ills, that this solution is discoverable through reflection and achievable in practice, and that all human goods can be consolidated into a harmonious, hierarchically ordered whole.⁶⁷

⁶⁴ Kekes, *The Morality of Pluralism* (n 50) 160.

⁶⁵ Newey, cited in Galston, *Liberal Pluralism* (n 50) 30.

⁶⁶ I Berlin, 'Does Political Theory Still Exist?', in Berlin, *The Proper Study of Mankind* (n 3) 66. Berlin's definition of 'monism' is not to be confused with the traditional legal theory sense of that term, which views 'international and domestic law as together constituting a single legal system,' as opposed to 'dualism,' which views 'international law as a discrete legal system' whose domestic effects are conditioned by domestic constitutional law or statute. See L Henkin, 'The Constitution and United States Sovereignty: A Century of *Chinese Exclusion* and Its Progeny' (1987) 100 *Harvard Law Review* 853–86, 864.

⁶⁷ In Berlin's words, monism, as 'the central core of the intellectual tradition in the West has, since Plato (or it may be Pythagoras), rested upon three unquestioned dogmas: (a) that to all genuine questions there is one true answer and one only, all others being deviations from the truth and therefore false ...; (b) that the true answers to such questions are in principle knowable; (c) that these true answers cannot clash with one another, for one true proposition cannot be incompatible with another; that together these answers must form a harmonious whole'. See Berlin, 'The Apotheosis of the Romantic Will' (n 3) 555. Also see Berlin, 'The Decline of Utopian Ideas in the West' in *The Crooked Timber of Humanity* (n 3) 24.

According to Berlin, this ‘faith in a single criterion’ ‘has always proved a deep source of satisfaction both to the intellect and to the emotions’.⁶⁸ By contrast, Berlin argues, an honest acknowledgment of the pluralistic alternative is a relatively less worn intellectual path. To excavate a philosophy of pluralism, Berlin turns to Niccolò Machiavelli, Giambattista Vico, Johann Gottfried Herder.⁶⁹ Although Berlin readily concedes problematic (perhaps ultimately authoritarian) interpretations of the romantic worldview in particular, he argues that each of these thinkers exposes the fundamentally irreducible diversity of the values and normative systems to which human beings and communities subscribe.

For Berlin, this realization is a key first step on the way to an ontology of social and political ordering that is conducive to human freedom. Thus, the normative thrust of Berlin’s value pluralism derives from what he argues is the unavoidable destructiveness of the monist outlook. Because human beings and societies are irreducibly diverse, Berlin argues, the Platonic aspiration to impose unity on moral goods would not eliminate but would instead exacerbate the collisions and conflicts between them. Accordingly, any monistic vision is bound to ‘encounter some unforeseen and unforeseeable human development, which it will not fit; and will then be used to justify the a priori barbarities of Procrustes – the vivisection of actual human societies into some fixed pattern dictated by our fallible understanding of a largely imaginary past or a wholly imaginary future’.⁷⁰ In fact, conflicts among incommensurable monist projects are likely to be much more violent and much less amenable to conciliatory solutions than an all-around acknowledgment of even the most radical forms of pluralism. Thus, Berlin’s refusal of the monist pretension is partly informed by wariness of grand political projects and the destruction they tend to stir up in their wake.

Just as Berlin’s argument for pluralism rests partly on his critique of the monist ambition to impose a hierarchical ordering on human ends, the argument for global legal pluralism often cites the dangerous potential of hierarchical projects of global order. The subordination of autonomous legal orders (whether states, regional institutions, or public and private international regimes) to an overarching set of global institutions, pluralists argue, would require severely coercive political engineering at the expense of diversity and democratic control. By contrast, a pluralist legal sphere is said to be more permissive of difference, more flexible, and more ‘open to

⁶⁸ Berlin, ‘Two Concepts of Liberty’ (n 3) 241.

⁶⁹ See, among others, Berlin, ‘The Decline of Utopian Ideas in the West’ (n 3); ‘The Pursuit of the Ideal’ (n 3); ‘Alleged Relativism in Eighteenth-Century European Thought’ (n 3); ‘Herder and the Enlightenment’ (n 3).

⁷⁰ Berlin, ‘Two Concepts of Liberty’ (n 3) 241.

political redefinition over time'.⁷¹ It can defuse the tensions that arise from law's finality, and make the injustices that result from law's inertia easier to contest and correct. Indeed, the disordered postnational realm may offer an even more promising site for peaceful political contestation than democratic constitutionalism does within the nation-state context. Antje Wiener has argued that the internationalization of norms greatly expands the range of meanings attached to those norms, creating room for debate, redefinition, and discursive engagement.⁷² Such contestatory practices, Wiener argues, are precisely how binding norms acquire legitimacy.⁷³ International legal norms are not simply 'downloaded' by democratic societies; they draw their value and validity not merely from their content, but also from being invoked and redefined by those who live under their terms.⁷⁴

This perspective has notable implications for global legal pluralism. It implies, first, that a global constitutionalism designed in the dry dock of intellectual contemplation cannot be democratically legitimate no matter how laudable its substantive commitments. This is because legitimate principles for ordering the interaction of legal regimes cannot precede conflicts but must emerge as a product of settlements and usages negotiated over the long term. In contrast to a consolidated and entrenched system at the global level, a pluralistic world order is open to improvement over time and ensures that any power imbalances and hegemonic structures will be only temporary.⁷⁵ In this sense, pluralism can serve as a postnational surrogate for well-formed democratic and constitutional mechanisms that institutionalize contestatory politics in the domestic context. As long as individuals can find meaningful channels through which to participate in the making and remaking of the rules that govern them, the proponents of global legal pluralism argue, a plural and unsettled global legal landscape is fertile ground for democratic interactions. This is perhaps the most relevant hypothesis for empirical investigations of global legal pluralism. I will return to it in the third section.

By contrast, legal pluralists argue, a grand project of global constitutionalism would lack the 'legitimacy resources'⁷⁶ such as those

⁷¹ Krisch, *Beyond Constitutionalism* (n 2) 79.

⁷² A Wiener, 'Contested Meanings of Norms: A Research Framework' (2007) 5 *Comparative European Politics* 1–17, 12.

⁷³ Wiener writes that 'If democratic processes require contestation as a necessary element in order to generate and maintain legitimacy of legal norms', then 'contestation needs to be integrated in supranational institutional settings as a common procedure' *ibid.*, 6.

⁷⁴ S Benhabib, *Another Cosmopolitanism* (Oxford University Press, New York, 2006).

⁷⁵ Krisch, *Beyond Constitutionalism* (n 2) esp 81–5.

⁷⁶ PL Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State* (Oxford University Press, Oxford, 2010) 11.

that have sustained robust democratic institutions in the domestic context. This is a particularly strong objection to entrenched and obligatory or 'constitutionalized' supranational norms. Whereas domestic constitutional systems justify entrenchment with reference to 'democratic iterations' of the basic principles on which citizens understand their union to rest,⁷⁷ discursive convergence on constitutional values in the global context is highly unlikely. Hence, any steering principles we might propose for adjudicating conflicts among legal orders beyond the state, any institutional framework to bridle competing claims to authority, any substantive standard by which to order the fragmented priorities of global governance is guaranteed to be perceived as oppressive by some. Coercively enforced constitutional discipline on a global scale would risk becoming an 'imperial yoke' that hegemonizes rather than liberates.⁷⁸

Still, one hardly needs to be a radical pluralist to acknowledge the oppressive potential of any project for a rigid, hierarchical project of global order. No less a cosmopolitan than Immanuel Kant acknowledged that a world state would produce a 'soulless despotism' and ride roughshod over the republican principles that the law is meant to protect, arguing instead for a 'limited' measure of cosmopolitan right to protect domestic constitutional rule.⁷⁹ Indeed, the kind of centralized world state or 'global constitutionalism' that has come to provide the foil to pluralism is more of a caricature than a serious project. Even the most steadfast advocates of global constitutionalism would willingly concede that it should not be conceived of as an inflexible, hierarchical system. For instance, Richard Falk writes that '[t]he successful realization of democratic global constitutionalism, in contradistinction to traditional world federalism, does not necessarily entail any further centralization of world authority, and may indeed work in the opposite direction by affirming tendencies toward the emergence of a global civil society from below'.⁸⁰

Partly for this reason, proponents of global legal pluralism insist that their position is not limited to a critique of a hypothetical unitary global order. In other words, they present pluralism not merely as a second-best option in the face of the impracticability and undesirability of a world state, but as the most legitimate way to compose the legal framework of

⁷⁷ S Benhabib, 'Twilight of Sovereignty or the Emergence of Cosmopolitan Norms? Rethinking Citizenship in Volatile Times' (2007) 11 *Citizenship Studies* 19–36, 32.

⁷⁸ J Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, New York, 1995) 5.

⁷⁹ I Kant, *Political Writings*, 2nd edn with an introduction by H Reiss, trans HB Nisbet (Cambridge University Press, Cambridge, 1997) 105.

⁸⁰ RA Falk, RC Johansen and SS Kim, *The Constitutional Foundations of World Peace* (SUNY Press, New York, 1993) 9.

political power on a global scale, particularly in view of the kaleidoscopic variety of constituencies governed by diverse and overlapping legal orders.⁸¹ In what follows, I will assess whether a normative principle of pluralism is the best response to the conflict, uncertainty, and potential for hegemony engendered by the empirical fact of pluralism, and I will once again turn to the theory of value pluralism for some clues.

Beyond anti-monism: shared vulnerabilities

The most persuasive aspect of value pluralist philosophy is its critique of monism. What is less clear is whether value pluralism is equally well prepared to face down the anarchical aftermath of that critical move, namely, an ethical realm divested of all of its sovereign values. In other words, having knocked down the possibility of ordering and prioritizing human values, pluralists must reconstruct an alternative way to adjudicate the relentless conflicts of values they cite as evidence in the case against monism. Were it to fail at that task, value pluralism would collapse into relativism, the total repudiation of the possibility of objectively evaluating values.

Indeed, of all elements of Berlin's political philosophy, few have attracted more critical attention than his attempt to distinguish pluralism from mere relativism – what I will unimaginatively call the slippery slope problem.⁸² In rejecting the monist's search for a final answer to enduring moral problems, Berlin tries to resist the opposite extreme of denying altogether our ability to distinguish between good and bad ideas, values, practices, and norms. In other words, if pluralism is to be considered an ethical project, its proponents must show not only that it does not altogether eliminate the possibility of reasoned moral judgment but also that it can offer guidance to human beings who daily confront thorny moral dilemmas. If it is indeed the case that we have 'no escape from choices governed by no overriding principle',⁸³ as Berlin is the first to point out, we are especially in need of rational ways to resolve ethical conflicts that attend the condition of pluralism. Similarly, while it is reasonable to argue that '[t]he difficulty

⁸¹ For a systematic account of overlapping but distinct levels of constituencies, see N Krisch, 'The Pluralism of Global Administrative Law' (n 2).

⁸² George Kateb argues that 'Whatever he says, Berlin is a relativist.' G Kateb, 'Can Cultures Be Judged? Two Defenses of Cultural Pluralism in Isaiah Berlin's Work' (1999) 66 *Social Research* 1009–38, 1029. Others are more sanguine about the possibility of steering Berlin's pluralism away from the relativist precipice. See A Gutmann, 'Liberty and Pluralism in Pursuit of the Non-Ideal' (1999) 66 *Social Research* 1039–62; J Riley, 'Interpreting Berlin's Liberalism' (2001) 95 *American Political Science Review* 283–95.

⁸³ Berlin, 'The Apotheosis of the Romantic Will' (n 3) 578.

of many of our moral choices seems to stem from the deeply fragmented nature of the ends we pursue',⁸⁴ observing that moral choices are difficult makes alleviating conflict an all the more pressing task. Can value pluralism give us the kind of guidance that would keep it from sliding into wholesale relativism?

The problem of distinguishing value pluralism from complacent relativism has a parallel in global legal pluralism's struggle to specify the limits of acceptable pluralism in the transnational realm. In the global context, pluralism, by itself, tells us hardly anything about where a peaceably multi-vocal world of institutions shades into abject anarchy. Thus, while global legal pluralists rightly warn us against the dangers of uniformity and hierarchy in the international realm, their position is vulnerable to concerns about the centrifugal tendency of a 'disorder of orders'.⁸⁵ In an unregulated global system, what is to keep the fragmented and relatively autonomous systems from zooming off into the outer reaches of autarky? Once again, the parallel with value pluralism is instructive in terms of answering this question: if value pluralists have managed to extract from pluralism itself a principle by which to resist the slide into meta-ethical anarchy, then this might also provide the normative standard needed to distinguish global legal pluralism from unrefined chaos. Is *all* pluralism valuable, or are there extreme forms of pluralism that should be considered undesirable under a logic internal to pluralism itself?

In order to reinforce the barrier between relativism and pluralism, value pluralists have emphasized that they are concerned in particular with values that are conducive to 'human flourishing'.⁸⁶ Unlike relativists, pluralists believe 'that there are at least some universal values, generic goods that contribute to any good life', regardless of one's 'particular cultural or epistemological perspective'.⁸⁷ On the basis of these 'universal', 'generic', or 'objective' goods, pluralists argue, 'the distinction between good and bad, and between good and evil, is objective and rationally defensible'; in other words, moral distinctions are neither arbitrary nor purely subjective.⁸⁸ Put differently, pluralists, in contrast to relativists, do recognize that '[t]here are obvious limits set by common human needs to the conditions under which human beings flourish and human societies flourish', and that what falls within those limits has a stronger moral claim

⁸⁴ Crowder, *Liberalism and Value Pluralism* (n 50) 5.

⁸⁵ Walker, 'Beyond Boundary Disputes and Basic Grids' (n 2).

⁸⁶ Crowder, *Liberalism and Value Pluralism* (n 50) 2.

⁸⁷ *Ibid* 4.

⁸⁸ Galston, *Liberal Pluralism* (n 50) 5. According to Galston, pluralism, unlike relativism, admits of a 'nonarbitrary distinction between good and bad or good and evil' 30.

on us than what falls beyond them.⁸⁹ By contrast, value pluralists regard relativism as ‘too permissive’ with regard to ‘what possibilities are acceptable and how they may be pursued’,⁹⁰ whereas pluralism entails a ‘moral vision’ ‘of *reasonable* people whose lives are given meaning and purpose by a conception of a good life’.⁹¹ Value pluralism strives to enable not *all imaginable* conceptions of the good life but only ‘reasonable’ ones.⁹²

None of these answers is entirely satisfactory, however. Moral standards are needed precisely where the conditions for flourishing are not as ‘obvious’, where needs are not held to be ‘common’, or where the ‘reasonableness’ of a conception of the good life is not self-evident. That is to say, even if we grant that ‘value pluralism does not rule out the possibility of compelling (if nonalgorithmic) arguments for right answers in specific situations’,⁹³ this does not address the question of what kind of tools value pluralism gives us for *making* such arguments rather than merely *allowing* them to be made on other, non-pluralist grounds. The question is not so much whether pluralism ‘does not *exclude* reasoned value judgment’,⁹⁴ but whether pluralism *itself* gives us any guidance as to how we can distinguish right from wrong. Or is pluralism parasitic on other sorts of principles (with no intrinsic link to pluralism) in order to resolve such moral disputes? Can pluralism draw *its own* outer limits?

Happily, the question of whether a useful analytical distinction exists between relativism and value pluralism is one we can leave to political philosophy proper. That said, since our goal is to find out whether global legal pluralism furnishes free-standing normative principles by which we may evaluate existing forms of global legal ordering, we *are* interested in whether the cognate idea of value pluralism provides a compelling way to adjudicate between conflicting values, or whether it relies on the assistance

⁸⁹ S Hampshire, *Morality and Conflict* (Harvard University Press, Cambridge, MA, 1983) 155.

⁹⁰ Kekes, *Morality of Pluralism* (n 50) 170.

⁹¹ *Ibid.*

⁹² The most well-known account of ‘reasonable pluralism’ is that given by John Rawls, who writes:

A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines... Political liberalism assumes that, for political purposes, a plurality of reasonable yet incompatible comprehensive doctrines is the normal result of the exercise of human reason within the framework of the free institutions of a constitutional democratic regime.

J Rawls, *Political Liberalism* (Columbia University Press, New York, 1993) xviii.

⁹³ Galston, *Liberal Pluralism* (n 50) 35.

⁹⁴ Crowder, *Liberalism and Value Pluralism* (n 50) 57.

of other, non-pluralistic principles to resolve such conflicts. What kind of centripetal or integrative resources might pluralism offer a disordered world?

For his part, Berlin answers this question by highlighting pluralism's mutually supportive relationship with what he terms 'negative liberty'.⁹⁵ He reasons that a liberal philosophy that is cognizant of value pluralism must allow individuals to craft their own ends, and treat human beings as autonomous moral agents capable of assigning moral value, adjudicating ethical conflicts, and deciding between competing conceptions of the good life. Other thinkers of pluralism have also highlighted the apparent reciprocity between value pluralism and individual autonomy.⁹⁶ In contrast to the monist quest for an ultimate transcendence of value conflict, the pluralist tradition values dissensus as the handmaiden of liberty. As James Madison argues in *Federalist* Number 10, 'As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed.'⁹⁷ By contrast, the idea of 'removing the causes of faction ... by giving to every citizen the same opinions, the same passions, and the same interests' is a 'cure worse than the disease'.⁹⁸ To Madison, this tendency to embrace rather than eradicate pluralism is a hallmark of the republican tradition, which views the divergence of individual wills not as a social pathology to be cured, but as a condition of human freedom. On this view, political institutions that as far as possible allow each individual to pursue her own notion of a fulfilling life help to forestall authoritarian excess.

In a similar way, Berlin's defence of negative liberty is intimately linked to his defence of value pluralism: specifically, he favours negative liberty because it enables individuals to choose their own ends from within the universe of competing values.⁹⁹ As long as liberalism rests on negative liberty, Berlin argues, it can avoid the monist trap; that is to say, it can accommodate competing values without establishing itself as superior to them. However, critics have been unwilling to let Berlin off the hook so easily. In privileging liberty as a master value of sorts, they argue, Berlin betrays his own value pluralism, which requires that we remain equidistant

⁹⁵ Berlin, 'Two Concepts of Liberty' (n 3).

⁹⁶ Ibid, 198–211; S Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Clarendon Press, Oxford, 1990) 234–8.

⁹⁷ J Madison, 'No.10: The Utility of the Union as a Safeguard against Domestic Faction and Insurrection', *The Federalist Papers*, Ian Shapiro (ed) (Yale University Press, New Haven, 2009) 48.

⁹⁸ Ibid, 48.

⁹⁹ For a critique of this 'simple argument from indeterminacy' see Crowder, *Liberalism and Value Pluralism* (n 50) 8.

towards all objective values.¹⁰⁰ John Gray states the charge starkly: ‘If there are irreducibly many values which cannot be ranked or weighed on any single scale, negative liberty – which Berlin sees as the core liberal value – can only be one good among many... The impossibility of deriving the priority of negative liberty over other values from value-pluralism can be seen as a defeat for liberalism.’¹⁰¹ Whether or not we accept Gray’s drastic conclusion, Berlin’s position implies that value pluralism is desirable because and to the extent that it supports individual liberty, which does suggest that it is liberty, rather than pluralism as such, that gives Berlin’s philosophy its normative ballast.

The conclusion Gray draws from his critique of Berlin is that instead of elevating negative liberty above the fray of other values (an illegitimate philosophical move under value pluralism), the most that liberals can endorse without violating the pluralist proviso is a *modus vivendi* that protects the conditions of peaceful coexistence in increasingly pluralistic societies. Still, as Galston points out, that argument in turn appears to situate peaceful coexistence as an overriding value, repeating Berlin’s purported error.¹⁰² That peace is one contingent value among many seems clear: for instance, it is far from obvious that we ought to put up with injustice or inequality (i.e. compromise on other values) for the sake of peaceful coexistence. Such a prescription (which seems to be implied by the valorization of *modus vivendi* over, say, refusing to live with certain infractions) itself seems to violate pluralist neutrality.

A third attempt to extract normative principles out of the meta-ethical axiom of pluralism is the theory of liberal and pluralist ‘virtues’ put forward by Crowder. Crowder argues that a series of ‘pluralist virtues’, including generosity, realism, attentiveness, and flexibility, are in a ‘mutually reinforcing’¹⁰³ relationship with liberal virtues that include ‘broad-mindedness’, ‘moderation’, ‘attentiveness’, and most importantly,

¹⁰⁰ Berlin’s fraught attempt to reconcile his defence of negative liberty with pluralism has been a topic of heated debate. See WA Galston, ‘Value Pluralism and Liberal Political Theory’ (1999) 93 *American Political Science Review* 769–78; J Gray, ‘Where Pluralists and Liberals Part Company’ (1998) 6 *International Journal of Philosophical Studies* 17–36; A Honneth, ‘Negative Freedom and Cultural Belonging: An Unhealthy Tension in the Political Philosophy of Isaiah Berlin’ (1999) 66 *Social Research* 1063–77; S Lukes, ‘The Singular and the Plural: On the Distinctive Liberalism of Isaiah Berlin’ (1994) 61 *Social Research* 687–717; Riley, ‘Interpreting Berlin’s Liberalism’ (n 82). See also, Crowder, ‘Pluralism and Liberalism’ (n 51).

¹⁰¹ Gray goes on to argue that a consistent value pluralist must espouse a quite different, chastened sort of liberalism, namely that rooted in the search of a ‘*modus vivendi*’ rather than ‘a quest for some kind of super-value’. See J Gray, *Two Faces of Liberalism* (Polity Press, Cambridge, 2000) 32, 25 respectively.

¹⁰² Galston, *The Practice of Liberal Pluralism* 188–9 (n 50).

¹⁰³ Crowder, *Liberalism and Value Pluralism* (n 50) 201.

‘personal autonomy’, understood as the idea of ‘making one’s own life’ free of coercion or manipulation and in accordance with one’s own standards.¹⁰⁴ Crowder makes the all-important logical transition from value pluralism to the liberal ideal of autonomy by arguing that ‘in order to choose rationally among contending plural values one needs to be autonomous’.¹⁰⁵ To face those ‘hard choices’, pluralism demands a ‘self-directing agent’ who can reflexively evaluate her own inclinations and the standards of conduct expected of her.¹⁰⁶ Still, the virtues Crowder elaborates seem to be sensible and laudable *responses to* pluralism rather than principles intrinsic to or implied by pluralism itself. In other words, they neither follow automatically from the fact of value pluralism, nor are they the only available responses to it. Once again, pluralism-as-fact seems to pose a pressing question to which pluralism-as-norm is unable to supply the answer.

Hasty and incomplete though it may be, this discussion illustrates the difficulty of transforming the value pluralist thesis into a normative principle capable of addressing, rather than merely chronicling, inevitable conflicts between values. In responding to problems that are themselves the consequence of pluralism, including those of conflict and uncertainty, pluralism cannot be our sole guiding principle. The distinction between values that are worthy of protection and those that are not, between legitimate and illegitimate manifestations of pluralism, cannot be drawn without the aid of some external principle. That principle may be liberty or equality or justice or community,¹⁰⁷ but it cannot be pluralism *simpliciter*. Those who espouse value pluralism as a normative position rather than a merely descriptive one seem inevitably to elevate some good, some principle, some norm, above the hubbub of a pluralistic moral universe as that by which we must order Pandora’s box.

These qualms underline a deeper philosophical difficulty with the pluralist position. Whether we speak of ethical, cultural, social, or legal pluralism, pluralism is a given. As Berlin eloquently shows, pluralism frames the human condition. Normatively, however, pluralism, as such, is virtually inert: it must be respected as a product of human intellectual freedom, but it does not itself imply a particular normative commitment. In Crowder’s words, ‘The mere fact that values are “plural”, in the relevant

¹⁰⁴ Ibid 199.

¹⁰⁵ Ibid 207.

¹⁰⁶ Ibid 209.

¹⁰⁷ Kekes argues that value conflicts must be alleviated against the background norms and practices of a cohesive community and its traditions: given the pluralist’s rejection of any standard criteria by which to commensurate values, Kekes writes, ‘reasonable conflict-resolution is made possible by the traditions and conceptions of a good life to which people who face the conflicts adhere’. Kekes, *Morality of Pluralism* (n 50) 76.

sense, tells us nothing about which of the vast range of values known to us from human experience are the values we ought to choose for ourselves and our social institutions. Pluralism tells us that we must choose but not what to choose.¹⁰⁸ If value pluralism is to be a prescriptive position rather than a diagnostic one, the observation that values are incommensurable cannot be the last word on value conflict. Pluralism should not be an abdication of the philosophical responsibility to adjudicate conflicts among values.

In the global legal realm, too, the extent to which pluralism can be a solution rather than a problem remains a puzzle. After all, the pressing task of social organization is not to amplify pluralism (the way, say, liberalism seeks to broaden liberty or feminism seeks to mainstream the female sex), but to find non-oppressive ways to channel and contain its centrifugal effects. As political philosophers who extol pluralism as an expression of our intellectual faculties nevertheless recognize, the key challenge is to calibrate and justify the outer limits of pluralism. For instance, Rawls speaks of the problem of finding principles to govern the basic structure of society under conditions of ‘reasonable pluralism’, that is to say, where citizens disagree about ultimate questions of the good life but recognize their need to live together under conditions equally acceptable to (though not necessarily accepted by) all.¹⁰⁹ Social and political institutions must be open, but they must also be stable, sustainable, and able to supply legitimate responses to conflict, however provisional those responses may be.¹¹⁰ To focus on pluralism as a *desideratum* is to

¹⁰⁸ Crowder, ‘Pluralism and Liberalism’ (n 51) 303. Crowder later retracted his strong claims that ‘value pluralism does not support liberalism’ and that ‘pluralism positively undermines any rational case for liberalism.’ However, he nevertheless remains unpersuaded by Berlin’s argument that pluralism generates support for liberalism, and seeks to bolster it with his virtue-based account of pluralism and liberalism. See Crowder, *Liberalism and Value Pluralism* (n 50) vii–viii, 185–213.

¹⁰⁹ Rawls, *Political Liberalism* (n 92) 63–4.

¹¹⁰ In his essay ‘What is Enlightenment?’, Kant states this problem in dialectical form, characterizing it as ‘a strange and unexpected pattern in human affairs’ whereby

A high degree of civil freedom seems advantageous to a people’s *intellectual* freedom, yet it also sets up insuperable barriers to it. Conversely, a lesser degree of civil freedom gives intellectual freedom enough room to expand to its fullest extent. Thus once the germ on which nature has lavished most care—man’s inclination and vocation to *think freely*—has developed within this hard shell, it gradually reacts upon the mentality of the people, who thus gradually become increasingly able to *act freely*.

Kant, *Political Writings* (n 79) 59. Discounting Kant’s eighteenth-century reservations about a permissive regime of ‘intellectual freedom,’ we can nevertheless find the same concern in contemporary debates about limits of liberal toleration. Many commentators argue that liberal institutions require some form of self-defence against the corrosive effects of illiberal doctrines, whether in the form of hate speech legislation (Waldron), ‘gag rules’ (Holmes) or ‘constitutional patriotism’ (Habermas). To be sure, few liberals would advocate a ‘shell’ quite as ‘hard’ as the one Kant endorsed in the context of Frederick the Great’s Prussia!

focus on the wrong side of the equation: the more pressing question is that of finding a predictable, habitable and (one hopes) just normative framework in which to accommodate the pluralism – whether of values, identities, norms, legal systems – that we find in the world.

In the realm of public institutions, value pluralism's normative indeterminacy (whereby it struggles to supply a criterion by which to resolve dilemmas arising from the fact of pluralism) may 'unleash centrifugal forces that make a decently ordered public life impossible'.¹¹¹ As a normative blueprint, global legal pluralism runs a similar risk: unless it is supplemented by independent principles of transnational political legitimacy, it gives us too little guidance in distinguishing legitimate exercises of normative authority from unjust, oppressive, or *ultra vires* instantiations of power. Thus, we might imagine a pluralistic world in which every legal regime pursues its own ends obliviously to the others, unencumbered by any shared commitments to guide its respective functions. What would be the pluralist critique of that world? Would pluralism alone be an adequate principle for distinguishing teleological fragmentation and hermetic isolation from systemic integration, miscommunication from dialogue, entrenched conflict from jurisgenerative engagement, or opportunistic interactions from coexistence guided by shared principles?

Furthermore, under a pluralistic system that lacks some common understanding about how public ends ought to be ordered, pre-existing power asymmetries and disparities in institutional resources could well be the sole determinants of each specialized regime's ability to successfully pursue its own ends in the face of competing claims to authority. Thus, as long as its distinguishing mark is resistance to a uniform global order, pluralism may have few resources with which to dismantle existing relations of domination. Like the philosophical analogue of relativism, global legal pluralism might merely reflect rather than remake the *status quo*, whether just or unjust. At best, legal pluralism may end up as 'a part of the problem and not of its solution';¹¹² in Martti Koskenniemi's apt formulation, it might 'cease to pose demands on the world'.¹¹³ In the absence of a substantively just constitutional ordering, or, at the very least, a loose set of customary norms, usages, and understandings to govern the coexistence of legal orders, the horizontal compartmentalization

¹¹¹ Galston, *Liberal Pluralism* (n 50) 65.

¹¹² M Koskenniemi, 'Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought,' Keynote Speech, delivered at Harvard University 5 March 2005, 15. On file with the author.

¹¹³ M Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1–30, 23.

and vertical dispersal of public power may even threaten to undo the achievements of otherwise well-institutionalized legal systems (not least among them constitutional democracies).

In the domestic realm, pluralism can throw the basis of political obligation into doubt if it refuses to grant the state a conditional measure of decisional primacy over other forms of human association. Even rightful demands by the state might occasionally interfere with the manifold allegiances of its citizens, and radical pluralism gives us no reason for prioritizing our civic duties. Where each value or institution seeks to retain its own autonomy in the absence of a modulating force, pluralism is vulnerable to hegemonic conquest. In order to resist this ‘anarchical’ or radically dissociative tendency,¹¹⁴ pluralism must concede that ‘social peace and stability’ can help ‘create the framework within which the attainment of other goods becomes possible’.¹¹⁵ Some recognition of the primacy of public power (however conditional) is necessary to resolve what I will call pluralism’s autophagy problem: in the total absence of a coordinating authority, pluralism is likely to consume itself.¹¹⁶ Like democracy, pluralism requires mechanisms to defend itself against projects of domination that arise from within its ranks.

In liberal democracies, constitutional rule safeguards pluralism against its own excesses by ‘select[ing] a subset of worthy values, bring[ing] them to the foreground, and subordinat[ing] others to them’.¹¹⁷ Constitutionalism combats this anarchical tendency by highlighting some values as more central to the public weal than others. However, in the absence of such an authoritative ordering of principles, ends, and prerogatives, pluralism in the global legal realm runs a more immediate risk. Relatively more powerful regimes and the values they pursue (such as international institutions of trade and finance) threaten to subjugate other important objectives (such as labour rights, public health, sustainability, or development) and stunt the development of regimes capable of pursuing them. To take one example, in recent years, the adjudicative organs of international economic regimes have forayed into other areas of public policy, appraising domestic laws on environmental and consumer protection, public order, and human rights in view of their conduciveness to free trade. Just as value pluralism within

¹¹⁴ That anarchical tendency is often associated with the English pluralists Harold Laski and GDH Cole. See the works compiled by PQ Hirst, *The Pluralist Theory of the State* (Routledge, New York, 1989).

¹¹⁵ Galston, *Liberal Pluralism* (n 50) 65.

¹¹⁶ The term is adapted from Melissa Schwartzberg, who develops the ‘logic of democratic autophagy’ as the idea that ‘unfettered democracy will “consume itself”’. See M Schwartzberg, *Democracy and Legal Change* (Cambridge University Press, Cambridge, 2007) 7.

¹¹⁷ Galston, *Liberal Pluralism* (n 50) 66.

the domestic public realm is guaranteed by ‘an authoritative partial ordering of public values’ found in the constitution,¹¹⁸ global legal pluralism requires ordering principles to protect healthy pluralism from either being reduced to anarchy or obliterated by a hegemonic force from within.

Furthermore, global legal pluralism raises the perennial risk of unregulated and open-ended conflict among fragmentary nodes of authority. Although the functional delimitation of governance tasks in the transnational realm may give the impression of a neat division of labour among regimes with complementary tasks, in reality, there is no guarantee that the need for transnational regulation of any given area will be met by appropriate and effective institutions. As Helfer writes, ‘pure functionalism no longer accurately describes most forms of international lawmaking and adjudication’.¹¹⁹ Rather, ‘[a] more accurate assessment recognizes that the proliferation of institutions and the blurring of issue area boundaries have enabled different decision makers to address similar issues in distinct international fora’.¹²⁰ In the absence a commonly recognized allocation of competences among regimes (a function served by constitutions in the domestic realm) such overlap can produce salutary forms of regime competition and sharing of best practices, or it can lead to redundancy, conflict, and ‘multiple legalities’.¹²¹ In the long run, an overabundance of competing ordering principles might scramble jurisdictions, disrupt expectations of comity and mutual recognition, and undermine the predictability of the law. Insofar as global legal pluralism unsettles the sense of certainty on which law as a social system rests, it introduces a sort of ‘existential anxiety’ into international law.¹²² Although philosophers may safely abdicate the task of ranking and ordering values in the abstract,

¹¹⁸ Ibid 66.

¹¹⁹ LR Helfer, ‘Constitutional Analogies in the International Legal System’ (2003) 37 *Loyola of Los Angeles Law Review* 193–238, 211.

¹²⁰ Ibid 211.

¹²¹ The term ‘multiple legalities’ is coined by Christopher Tomlins in the context of early Anglo-European colonial law. Tomlins defines ‘legalities’ as ‘the symbols, signs, and instantiations of formal law’s classificatory impulse, the outcomes of its specialized practices, the products of its institutions. They are the means of effecting law’s discourses, the mechanisms through which law names, blames, and claims.’ Legalities, moreover, ‘are social products, generated in the course of virtually any repetitive practice of wide acceptance within a specific locale’. Compared to the austere, self-validating term ‘law,’ the term ‘legalities’ exposes the contextuality, contingency, and indeterminacy of norms that claim the status of *law*. See C Tomlins, ‘The Many Legalities of Colonization: A Manifesto of Destiny for Early American Legal History’ in C Tomlins and BH Mann (eds), *The Many Legalities of Early America* (University of North Carolina Press, Chapel Hill, NC, 2001) 2–3, 11.

¹²² J Klabbbers, ‘Constitutionalism Lite’ (2004) 1 *International Organizations Law Review* 31–58, 49.

unregulated pluralism in the concrete realm of transnational law might undermine the law's function of stabilizing expectations,¹²³ encourage unaccountable, even hegemonic exercises of power, and undermine the ability of democratic political communities to govern themselves.

Paradoxically, then, the key element of any pluralist philosophy must be the norms and practices by which it proposes to regulate multiplicity without smothering the variety and dynamism essential to human freedom. The challenge of global governance (for legal pluralists and monists alike) is whether the postnational realm ought to be more or less regulated through shared principles, remedies, procedures, standards of deference and prevalence, and norms of reason-giving. That is to say, the choice is between more or less regulated forms of pluralism, rather than between the totalizing monism of a world state and the *status quo* of a haphazard constellation of regimes and institutions. This puts the onus on advocates of global legal pluralism to flesh out a philosophically and empirically compelling account of the substantive principles and procedural safeguards needed to transform the wanton, centrifugal plurality of law into a legal pluriverse that is conducive to individual freedom and other equally basic standards of political legitimacy.¹²⁴

A final methodological note is in order. Value pluralism and global legal pluralism are alike insofar as they both address the fragmentation of ends: in the former case, these are ends sought by human beings, and in the latter case, they are goods sought by formal institutions in the transnational realm. Thus, both value pluralism and global legal pluralism highlight the potential for conflict among valuable ends in the absence of an overarching, authoritative system for adjudicating between them. That said, in the global context, the kind of pluralism I address in this article results from the multiplicity of norm-producing institutions rather than a conflict among values *per se*. Put differently, the potential for conflict under global legal pluralism is not necessarily due to incommensurability among the goods sought by different regimes (those goods may or may not, in fact, be incommensurable in the sense used by value pluralists),

¹²³ Niklas Luhmann writes that 'positive law and ideology acquire the function of reducing the complexity of the system and its environment,' and as such, address the 'permanent problem' of stability. See N Luhmann, *The Differentiation of Society*, trans S Holmes and C Larmore (Columbia University Press, New York, 1982) 93, 96 respectively. Also, Callies and Renner, 'Between Law and Social Norms' (n 39) 267.

¹²⁴ For one such response, see Cohen, *Globalization and Sovereignty* (n 2), Cohen argues in favour of a global system of constitutional pluralism based on the dual principles of sovereign equality and fundamental human rights. She recognizes that in the absence of such an ordering principle, a radically pluralistic world of sovereign states is vulnerable to abuse, not least the abuse of sovereign prerogative for imperialist ends or gross violations of human rights.

but stems from competing claims to authority made by these regimes, irrespective of the compatibility or otherwise of their respective *teloi*. While human rights, free trade, environmental protection, and economic development may or may not represent incommensurable policy ends, the crucial conflicts are not likely to be among such values considered in the abstract, but among the organized power structures that claim to stand for them. There is a silver lining to this: even if the respective values represented by the WTO, the ILO, the EU, or international environmental regimes are seen as incommensurable, the relationships among the institutions themselves can be more or less harmoniously ordered. Furthermore, although it may be the case that human beings value a great variety of incommensurable goods, it does not necessarily follow that these goods would be best instantiated by a pluralist framework in the global legal realm. In other words, that there are many incommensurable goods does not imply that each good should be pursued by an autonomous regime. It may well turn out that a relatively consolidated form of global constitutionalism, rather than unregulated global legal pluralism, is the best way to ensure a healthy pluralism of values. Value fragmentation does not dictate institutional fragmentation: after all, in the domestic context, constitutional democratic mechanisms can help to sustain, encourage (and occasionally constrain) pluralism.¹²⁵

Individuals under global legal pluralism

So far, I have laid out some of the basic normative issues at the core of the now-sprawling debate on legal pluralism. If a comprehensive account of these issues is even possible, it is certainly not attempted in this article. Rather, I have sought to show that as a prescriptive model, global legal pluralism is characterized by a troubling ambivalence, namely its inability to distinguish healthy manifestations of pluralism from anarchical ones, without the help of external principles such as autonomy, democracy, or justice. In what follows, I will show how this normative ambivalence manifests itself in the ways in which global legal pluralism affects individuals. Most notably, I will argue that left to its own devices, pluralism can alternately enhance or diminish democratic participation and accountability in the context of global governance. Perhaps more than any other principle of political ordering, therefore, pluralism must be complemented by external standards of legitimate rule.

¹²⁵ For a constitutional theory that takes pluralism seriously as a central constitutional value, see Tully, *Strange Multiplicity* (n 78).

Proponents of global legal pluralism maintain that the coexistence of a diverse range of transnational legal regimes creates the conditions for a wider range of actors (rather than just states) to participate in transnational decision-making. This means that individuals, transnational movements, civil society groups, as well as systemic actors such as government agencies or private firms, have greater opportunities to challenge the exercise of public power where it affects them. Echoing Berlin's defence of value pluralism, it is argued that global legal pluralism is an institutionalized form of contestation by default: the competition of the systems of value embedded in functionally fragmented legal regimes results in a porous system that permits 'multiple ports of entry'¹²⁶ for a wide spectrum of interests and viewpoints. Competition among regimes opens up resistance spaces and makes room for 'counter-hegemonic action' by those who are left out of traditional bargaining mechanisms among sovereign states (and only a small subset of states, at that).¹²⁷ To take one example, in the absence of a consolidated and well-institutionalized international framework for protecting labour rights, 'the struggle for worker rights takes place in a context of legal pluralism in which national labour laws, ILO conventions, corporate codes of conduct, social clauses in bilateral and regional trade agreements, and unilateral sanctions overlap and clash'.¹²⁸ The abundance of normative sources provides more opportunities for stakeholders to make their voices heard.

Furthermore, these possibilities are enhanced by the 'subjectivation' of international law,¹²⁹ by which some international regimes extend special forms of recognition (whether legal status, rights, or participatory opportunities) to private actors, whether legal or natural persons.¹³⁰ To be sure, subjectivation is an uneven and still-unfolding process. However, with the multiplication of non-state legal orders, individuals are often recognized as subjects under several canopies of law and may have access to a variety of rights and remedies beyond the domestic.

¹²⁶ The phrase is borrowed from J Resnik, 'Law's Migration' (2006) 115 *Yale Law Journal* and cited in P Schiff Berman, 'Global Legal Pluralism' (n 2) 1210.

¹²⁷ BDS Santos and CA Rodríguez-Garavito, 'Law, Politics, and the Subaltern in Counter-Hegemonic Globalization' in Santos and Rodríguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press, New York, 2005) 20.

¹²⁸ CA Rodríguez-Garavito, 'Nike's Law: The anti-sweatshop movement, transnational corporations, and the struggle over international labor rights in the Americas,' in Santos and Rodríguez-Garavito (eds), *Law and Globalization from Below* (n 127) 65.

¹²⁹ Maduro, *We the Court* (n 4) 9.

¹³⁰ Hersch Lauterpacht is one of the earliest and most strident advocates of the idea that international law is coming to recognize 'the individual as a subject of the law of nations'. See, especially, H Lauterpacht, *International Law and Human Rights* (Archon Books, Hamden, CT, 1968 [1950]) 4; also, ch 2.

In underlining the development of international institutions which ‘grant domestic actors direct access to international tribunals’, Goldstein *et al.* write that such institutions provide ‘a unique form of representation for many social actors – one that reduces the cost of political action, thereby increasing the flow of internationally directed legal action and hence the likelihood of further development of legal rules’.¹³¹ While this argument is empirically persuasive, however, it says little about the asymmetries of access to these mechanisms. Specifically, direct links between individuals and international regimes are most advanced in the realm of institutions of economic governance ranging from the EU, WTO, and NAFTA to bilateral investment treaties. Each of these regimes has in various ways fostered the involvement of firms, multinational corporations and industry groups in its political and legal development by bestowing on them rights, entitlements and advantages.¹³² Many of them feature adjudicative mechanisms that allow for the direct or indirect participation of these actors, opening up a window within public international law through which they can register their preferences. To take a few examples, rights of cross-border commerce can be invoked before the Court of Justice of the European Union as ‘fundamental freedoms’ and are treated with the kind of urgency normally reserved for conventional constitutional rights. Firms’ claims of market access can be raised before the World Trade Organization’s dispute resolution panels indirectly, with the aid of business-friendly domestic agencies responsible for foreign trade. Bilateral and multilateral investment treaties signed by states create opportunities for private investors to challenge domestic economic policies before investor-state arbitration bodies commissioned by the treaties. Cumulatively, these legal channels vest supranational dispute settlement mechanisms with greater power over rule making.¹³³ The legal recognition which private economic actors enjoy before these bodies not only gives

¹³¹ J Goldstein, M Kahler, RO Keohane and A-M Slaughter, ‘Introduction: Legalization and World Politics’ (2000) 54 *International Organization* 385, 392.

¹³² For a more detailed treatment of the argument raised in this passage, see T Isiksel, ‘Citizens of a New Agora: Postnational Citizenship and International Economic Institutions’ in W Maas (ed), *Multilevel Citizenship* (University of Pennsylvania Press, Philadelphia, PA, 2013)

¹³³ For different analyses sharing this basic diagnosis, see NC Tate, and T Vallinder (eds), *Global Expansion of Judicial Power* (NYU Press, New York, 1995); W Sandholtz, ‘Globalization and the Evolution of Rules’ in A Prakash and JA Hart (eds), *Globalization and Governance* (Routledge, New York, 1999); N Fligstein and A Stone Sweet, ‘Constructing Politics and Markets: An Institutional Account of European Integration’ (2002) 107 *American Journal of Sociology* 1206–43; R Howse and K Nicolaidis, ‘Legitimacy through ‘Higher Law’? Why Constitutionalizing the WTO Is a Step Too Far’ in T Cottier and PC Mavroidis (eds), *The Role of the Judge in International Trade Regulation* (University of Michigan Press, Ann Arbor, 2003)

them privileged access to economic and other forms of politically consequential decision-making, but also lends them a voice in shaping the very institutions within which they transact.

Furthermore, such asymmetries of access might lead to an *increase* in the cost of political action for groups who are already under-represented due to organizational, informational, or material constraints. In the absence of formal procedures of equal representation such as those enshrined in modern constitutional democracies, legal pluralism can amplify and further entrench the existing privileges of those whose resources allow them to exploit jurisdictional overlap and norm conflict. Transnational economic adjudication can favour the rights of traders, investors, and corporations at the expense of other, equally valid policy objectives that states might wish to pursue.¹³⁴ Over time, domestic decision-making becomes subject to the ‘shadow’ of rules that protect the rights of privileged actors such as corporations or large investors.¹³⁵

As such, far from opening up global governance to an ever-wider array of constituencies, subjectivation in a disordered world raises the danger of commercial interests colonizing other, equally legitimate public goods. ‘Specialized judicial bodies’ such as the WTO Appellate Body or investment tribunals can hardly be expected to strike an impartial balance, as they themselves tend to bring ‘a biased approach to questions of clashes between different values and issue areas’.¹³⁶ With each regime or institution pursuing its own discrete *telos* at the expense of other values, pluralism can easily become a ‘struggle for institutional hegemony’¹³⁷ in which more strongly institutionalized regimes gain the upper hand over looser ones, particularly those that pursue non-economic forms of international cooperation.¹³⁸ The development of some bodies of law can occur at the expense of others, and pluralism, as a stand-alone principle, is insufficient to guarantee

¹³⁴ For instance, multiple arbitral awards by the International Centre for the Settlement of Investment Disputes have elevated the rights of private investors over the policy decisions of the Argentine government in the face of a massive economic crisis and social unrest. See WW Burke-White, ‘The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System’, Research Paper No 08-01 (University of Pennsylvania Institute for Law and Economics, 24 January 2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1088837> accessed 31 March 2013.

¹³⁵ G Shaffer, ‘Developing Country Use of the WTO Dispute Settlement System: Why It Matters, the Barriers Posed’, Legal Studies Research Paper Series No 08-50 (University of Minnesota Law School, 2009) 171–5.

¹³⁶ AL Paulus, ‘From Territoriality to Functionality? Towards a Legal Methodology of Globalization’ in IF Dekker and WG Werner (eds), *Governance and International Legal Theory* (Martinus Nijhoff Publishers, Leiden/Boston, 2004) 75.

¹³⁷ Koskenniemi, ‘The Fate of Public International Law’ (n 113) 8.

¹³⁸ Goldstein, Kahler, Keohane and Slaughter, ‘Introduction: Legalization and World Politics’ (n 131) 387.

that such trade-offs will be fair. Consequently, untutored pluralism can reproduce and may exacerbate power imbalances among the many stakeholders in global governance, whether between private citizens and multinational corporations, workers and employers, producers and consumers, or industrial and environmental interests, to name just a few. In the worst-case scenario, unequal access to legal regimes and weak institutionalization of public goods other than free trade can erode the possibilities for solidarity, inclusive political participation, and equitable distribution of the benefits and burdens of social cooperation among those subject to the same institutions.

Conclusion

As a research agenda, global legal pluralism is an effort to understand and critically evaluate evolving structures of postnational law that a strict Westphalian paradigm can no longer fully comprehend.¹³⁹ To make this point, global legal pluralists need not contest the status of states as the principal actors on the international stage, nor should they discount (or undervalue) the role of sovereignty as a significant normative principle. Rather, the simple descriptive claim of global legal pluralism – that a narrow focus on states occludes many consequential forms of political power in the transnational realm – prompts us to shift to a more capacious understanding of norm-producing institutions lest we fail to appreciate (not to mention, control) their impact on individuals and communities.

Normatively, however, our assessment of global legal pluralism must be more nuanced. In contesting the rise of a pluralistic view of law within the disciplines of legal sociology and anthropology (the first sense of legal pluralism I have identified in this article), Brian Tamanaha argues that as an analytical concept, legal pluralism is incapable of delimiting the outer bounds of what is to count as ‘law’: it is either so inclusive as to capture all forms of social control, and therefore fails to distinguish between table manners and criminal law; or else it is parasitic on the state-centred idea of law it sets out to reject. Legal pluralism, Tamanaha writes, is ‘unable to provide a certain standard by which we are to identify the distinctively legal (now in the broader legal pluralist sense) from the truly non-legal (those normative orders even legal pluralists would not want to call

¹³⁹ A far more contentious question concerns assessing the significance of regime pluralism. Sceptics continue to insist that the formal regimes and more diffuse bodies of ‘law-like’ norms highlighted by pluralists hardly amount to a qualitative shift in the nature of the international order, which in their view remains firmly subject to the authority of states and the principle of sovereignty that defines their interactions.

law)'.¹⁴⁰ In other words, a theory that emphasizes pluralism as the law's distinguishing characteristic proves too much by leaving us unable to constrain the scope of what ought to count as *law*.

Whether or not we accept Tamanaha's critique of legal pluralism as a *descriptive* paradigm, I have argued in this article that an analogous problem of indeterminacy afflicts global legal pluralism as a *normative* position. To be sure, global legal pluralism is useful as a critical perspective that rejects both a Hobbesian framework of international anarchy *and* the far-fetched idea of coercively enforced constitutional discipline at the global level. As a normative stance in its own right, however, global legal pluralism remains incomplete. Although the tradition of value pluralism in political philosophy provides a helpful intellectual resource on which global legal pluralism can and should draw, the key shortfall of these cognate accounts of pluralism is that they are normatively under-determined, meaning that they offer us little principled guidance when it comes to *constraining* pluralism. In other words, pluralism is a fact that must be counterbalanced by some norm other than itself: the conflictual and centrifugal forces that act upon the ethical, social, and legal universes that we inhabit call for principles besides pluralism with which to order them (whether democracy, individual freedom, equality or justice). In the absence of such principles, value pluralism too easily collapses into relativism and the abdication of the possibility of rational agreement, while global legal pluralism might end up consecrating a ruthless world governed – to quote the arch-monist – by 'nothing other than the advantage of the stronger'.¹⁴¹

¹⁴⁰ Tamanaha, 'The Folly of the 'Social Scientific' Concept of Legal Pluralism' (n 5) 194.

¹⁴¹ Plato, *Republic*, trans GMA Grube (Hackett, Indianapolis, 1992) 338c.