Introduction

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This volume presents a collection of contributions originally prepared for events convened by the Centre of Excellence in the Foundations of European Law and Polity, funded by the Academy of Finland and directed by Kaarlo Tuori. One important aspect of the Centre's work is to rethink or reassess traditional legal-theoretical, conceptual and doctrinal starting points – 'traditionally' bound to the nation-state perspective – that are considered insufficient for discussing transnationalisation. As for lack of a viable option, nation-state bound vocabulary forms the starting point for examining transnational frameworks: it cannot simply be abandoned but must be reframed or reassessed. To take up this challenge, the Centre's work has brought together researchers from different substantive areas of law to address the challenge faced by both public and private law. The contributors to the present volume have joined forces with the Centre in this quest.

The book opens with Kaarlo Tuori's 'Transnational law: on legal hybrids and perspectivism' (Chapter 1), setting the scene for the chapters to come by seeking an interpretative and normative framework to make sense of transnational legal hybrids that escape the confines of the inherited conceptual frameworks of contemporary lawyers. The point of view is presented as criticism of the radical pluralist position, in order to draw attention to the challenge that legal hybridisation poses on the level of individual legal phenomena and concepts, of traditional systematisation of branches of law, and of legal orders and legal systems. Especially as to relations between legal orders, one should focus on interlegality instead of conflict, unlike radical pluralists. Moreover, approaching transnational law – 'the true El Dorado of legal hybrids' – from the perspective of global interlegality can serve as an exercise in sharpening one's view of the significance of inherent perspectivism and discursiveness in all law.

The rest of the volume is organised in three parts. Part I is devoted to fundamental questions related to transnational law and the legal-theoretical means to address these questions. European law is the most

advanced example of transnational law, so it inevitably occupies a central place even in a discussion on the need to rethink legal thinking in the face of the law's increasing transnationalisation. In Part II, the focus is on two concepts, – 'pluralism' and 'justice' – the rethinking of which is central for a legal-theoretical analysis of how European law has changed our legal landscape. Illuminatingly enough, the authors are not unanimous in their definition of these concepts, nor do they necessarily agree with the conceptual proposals presented in the introductory chapter. Once again this testifies to the ongoing cooperative process of renewing our conceptual tools. The law's transnationalisation entails shaking its divisions and the emergence of new branches that, in the framework of traditional systematisation, epitomise legal hybridisation. Part III addresses the impact of transnationalisation on the established fields of municipal law and the need to rethink the law's divisions.

Each chapter in its own way pursues the task of rethinking legal thinking in order to address the consequences of the law's transnationalisation. But each chapter also manifests the state of fermentation in which legal theory finds itself. Proposals for rethinking are not uniform, indeed may even contradict one another, even at the level of basic concepts. Most, but not all, of the authors, use the term 'transnational law' in the sense defined by Tuori in the opening chapter. But in addition to or in lieu of 'transnational' some authors employ the term 'supranational'. No effort has been made to unify terms or concepts; any attempt to do this would have entailed injustice to at least some authors' substantive argument.

Part I on transnational law's fundamental questions and the legal-theoretical means to address them begins with H. Patrick Glenn's probe into the foundations of legal thinking. He claims that law has been in the grip of binary thinking, making an underlying assumption that the laws of identity, non-contradiction and the excluded middle are self-evident and have universal validity. He draws attention to the 'multi-valued turn' in contemporary logic and explores both existing examples – such as the margin-of-appreciation doctrine of the ECtHR and the *Solange* decisions of the German Constitutional Court – and future possibilities for multivalent logic in legal thinking. But more importantly, so Glenn argues, multivalent logic opens up a space for transnational law, an included middle, no longer shut out by the binary logic of national and international law.

In Chapter 3, Enzo Cannizzaro and Beatrice Bonafè start from the paradox that although monism and dualism never applied in practice, these archetypes based on the principle of legal solipsism are still used to

conceptualise relations between legal orders – for lack of an alternative scheme. They propose that a way forward could be sought by focusing more on relations between legal rules contextualised in their original systems than on relations between legal orders as such. The assumption is that this approach could ultimately reveal more of how legal orders actually interact.

Cannizzaro and Bonafè demonstrate their approach by analysing examples of what they call 'techniques that judges tend to apply in order to avoid what they perceive as an improper implication of the doctrines of legal solipsism': the margin of appreciation, consistent interpretation and equivalent protection. This extensive analysis draws on material collected from national constitutional courts within and outside Europe and from the CJEU, the ECtHR and other international courts. Based on their analysis, Cannizzaro and Bonafè conclude that an emerging practice already seems to exist in which relations between legal orders are based on mutual recognition, tolerance and cooperation rather than on supremacy and subordination. However, they suggest that, at most, finding emerging patterns merely relativises the principles of legal solipsism or exclusivity. What has emerged is not ready to replace the classic archetypes of monism and dualism. In order to rethink these (normative) archetypes of modern legal thinking, Cannizzaro and Bonafè suggest that closer focus on the practice of consistent legal interaction between legal orders is especially promising from the point of view of legal theory and might even give rise, eventually, to a scheme to overcome the paradoxical archetypes.

Next, Alexander Somek proposes that the concept 'constitution' should be rethought. He introduces the notion of the cosmopolitan constitution. This, he supposes, might provide the solution to the dilemmas created by previous constitutionalism, which Somek reconstructs as three ideal types, taken from history. Constitutionalism 1.0 amounts to creating and sustaining limited government through jurisdictional constraints and negative rights. Under it, a constitution is conceived of as a document, written by 'the people' or the 'nation' and authoritatively interpreted by either the judiciary or a representative body. In constitutionalism 2.0, the constitution is supposed not only to limit but also to guide optimal government. What matters more than the authorship of the constitution is an understanding of it as an expression of practical reason. The Constitution of the United States is the epitome of constitutionalism 1.0, while the constitution of Germany, as applied by the Constitutional Court, provides the paradigm for constitutionalism 2.0. Constitutionalism 3.0 belongs to

an era in which even constitutional authority is denationalised; it sees the national constitution entangled with transnational regulatory processes, as in the European Union, or observance of shared constitutional standards being monitored by a peer group. Typical of constitutionalism 3.0 is the growing importance of the executive branch, and the collapse of the distinction between norms and their application in risk management and crisis intervention.

Somek presents the cosmopolitan constitution as the type of constitutional law that emerges from the situation marked by constitutionalism 3.0, in particular from three currents of comparison and peer review that it contains: mobility and belonging; proportionality and pluralism; and issues of fundamental rights. He argues that the cosmopolitan constitution comes in two forms, one defensible and the other defective. Somek points to a revolution in 'belonging' that is most strongly epitomised by European citizenship. Together the rise of peer review and the revolution in belonging are unravelling the special tie between a constitution and national history. In turn, through proportionality the constitution is transformed from limits established by legal rules into standards for assessing the rationality and reasonableness of government action. This tends to result in a pluralism of constitutional authority and the allocation of jurisdiction becoming an issue of second-order rationality. The changes brought about by constitutionalism 3.0 necessitate a reconsidering of constitutional authority.

Somek argues for the cosmopolitan constitution as 'an attempt to rescue the universalistic ambition of modern constitutionalism from being suffocated by its particularistic mode of realisation'. The defensible form of cosmopolitan constitution combines political self-determination, which involves a deep commitment to a bounded form of life, with what Somek calls a mixed form of cosmopolitan self-determination.

In Chapter 5, Ralf Michaels discusses the compatibility of legal pluralism with liberalism. He argues that liberalism, in the sense of the order of a liberal state, presupposes political, cultural and religious pluralism. However, recognising such pluralism does not entail legal pluralism in the sense of giving autonomous law-making power to cultural or religious groups, i.e. recognition of separate legal orders. This would be strong legal pluralism, denoting a situation in which non-state law is not subordinated to state law. The argument seems to be that a liberal state must have the power to monitor the respect that non-state law accords the liberal order. By contrast, Michaels claims that liberalism is compatible with what he

calls weak legal pluralism, while at the same time doubting whether this weak form is pluralism at all. In weak legal pluralism, non-state orders remain normatively inferior to state legal order. In addition, the validity of non-state law depends on its recognition by state law. At the end of his chapter, Michaels transfers his discussion beyond state boundaries. He argues that strong legal pluralism may well be compatible with liberalism beyond the state; neo-liberalism, as he calls it. Strong legal pluralism contends that no automatic superiority of state law to non-state law exists. Correspondingly, neo-liberalism, in the sense Michaels uses the term, sees the state merely as one among diverse legitimate orders.

Part II of the book, where the focus is on rethinking the concepts of 'pluralism' and 'justice', begins with Joxerramon Bengoetxea discussing the conceptual pairs legal and cultural plurality, and legal and cultural pluralism, with a specific focus on the European Union context. He proposes to use 'legal *plurality*' and 'cultural *plurality*' as empirical concepts; as ideas linked to sociological, cognitive or descriptive interest. By contrast, to his mind 'legal *pluralism*' and 'constitutional *pluralism*', or '*multiculturalism*', are better understood as normative concepts. Bengoetxea perceives pluralism as a solution to the tensions created by plurality. The chapter builds on Neil MacCormick's conception of law as an institutional normative order and locates law in a wider context of practical reasoning. With regard to legal and constitutional plurality in Europe, Bengoetxea calls for accommodation rather than confrontation as a response to cultural normative diversity and contested constitutional claims. Accommodation is facilitated by liberal cosmopolitan values, related to human rights and shared across the EU, which should be included as essential elements in the concept of (EU) law. Bengoetxea emphasises 'subsidiarity', 'primacy' – instead of 'supremacy' – and 'reasonable accommodation' as concepts contributing to the new lexicon and the new logic needed to rethink EU law and legal thinking.

In Chapter 7, Samantha Besson examines legal pluralism in Europe from the perspective of human rights law and human rights legal theory. She identifies a human rights plurality in the sense of a coexistence of multilevel human rights norms and judicial interpretations of these norms within international, European and domestic legal orders and institutions. But this plurality does not necessarily amount to human rights pluralism. This claim is linked to Besson's understanding of 'legal pluralism' as the idea that not all legal norms applicable in a given legal order ought to be regarded as validated by the same criteria and situated

within a hierarchy, and that, hence, some normative conflicts may receive no legal answer. She criticises the literature on human rights pluralism for being mainly empirical and descriptive, and lacking the necessary normative arguments for pluralism. She points to the specific character of human rights norms as legitimating norms, which entails that their pluralism is bound to be very different from that of other legal norms. She concludes by contending that if there is a form of human rights pluralism at work in Europe, it is about mutual validation and legitimation, located at the very core of the democratic legitimation of European legal orders.

Sionaidh Douglas-Scott and Christian Joerges discuss the concept of justice in the context of the European Union but their approaches are very different. In Chapter 8, Douglas-Scott starts from, not justice, but absence of justice, that is, injustice. She analyses what she considers to be instances of injustice in the EU. She argues that perhaps more crucial than an elusive or utopian concept of justice is the diagnosis of *injustice*: it is in its absence that justice moves people. Her examples consist of measures taken in handling the Eurozone crisis that contradict the EU's avowal of social justice and infringe human rights; the incoherence and undue focus on security in establishing the EU area of freedom, security and justice; the subordination of social justice to free movement concerns; and the consequences of the specific legal pluralism of the EU in terms of, e.g., lack of accountability. Douglas-Scott also introduces what she names critical legal justice, in which adherence to the rule of law plays a central role. She maintains the importance of critical legal justice, invoking the centrality of legal integration for the development of the EU. But she also reminds us that justice is not confined to legal justice and concludes by suggesting that 'perhaps justice is best envisaged as a discourse of absence'.

In Chapter 9, Christian Joerges bases his search for a concept of justice for the EU on a reconstruction of Friedrich Carl von Savigny's conceptualisation of 'justice under private international law' (*internationalprivatrechtliche Gerechtigkeit*), and Hermann Heller's theory of the 'social state' (*Sozialstaat*). However Joerges contends, first, that justice as defined under private international law cannot serve as a model for governing the relations between the Member States of the EU and, second, that the social state as envisaged by Heller has eroded in the integration process. Joerges calls for a new synthesis related to the recent debate on justice and democracy in the EU between the political scientist Jürgen Neyer and the philosopher Rainer Forst. Joerges brings into the debate his own proposal for conflicts-law constitutionalism and Rudolf Wiethölter's concept

of *Rechtfertigungsrecht* (law of justification). His conclusion is a turn to proceduralisation and an understanding of European law primarily as a *Recht-Fertigungs-Recht*; as a law of law production.

Part III of the book addresses how transnationalisation affects established fields of municipal law. In Chapter 10, Hans-W. Micklitz discusses the alleged vanishing of the public/private divide using the conceptual tools of legal hybrids and perspectivism. He looks at legal hybrids on the four levels identified above – individual legal cases, branches of law, legal orders or legal systems and legal spaces – and from the perspective of three fields of law – constitutional law, (private) administrative law and private law. Furthermore, within each of these fields he distinguishes between an inward- and an outward-looking perspective. His conclusion is that, in spite of a variety of legal hybrids at all four levels, the public/private distinction is still very much alive. In particular, it is cherished in the inward-looking perspective typical of constitutional law and traditional private law, which both try to shield the autonomy of their respective disciplines. However, the introduction of the notion of economic law and, later, regulatory private law signified the breakthrough of an outward-looking perspective, even in private law. A similar role in constitutional law has been played by, e.g., debates on many constitutions and constitutional pluralism.

At the end of his chapter, Micklitz briefly comments on the emergence of the private/public divide and subsequent hybridisation as a process and addresses the question whether what is at issue is a linear development or whether it should be understood as a loop. He proposes a link between the emergence of the public/private divide and the rise of the state nation in the seventeenth and eighteenth centuries, and between the beginning of hybridisation in its diverse variations and the nation state of the nineteenth and twentieth centuries. In turn, the twenty-first century will witness the full development of the market state, under which the fate of the public/private divide is uncertain, as it requires redefinition of the role of the state and the function of the private.

In Chapter 11, Jan M. Smits focuses on transformations within the field of private law. He claims that in actuality the main changes caused by transnationalisation and simultaneous technological progress do not concern the substance of private law but rather its role and function. State law is losing its power to govern relationships among private parties, who increasingly turn to other types of ordering. Smits characterises this as a development from *ex post* to *ex ante* governance of private relationships.

Thus, in rulemaking there is a turn towards private regulation and choice of law. If state law, because of its territorial limitations, can no longer meet the demand for legal certainty, then privately created orders take its place. In addition to large functional systems, such as *lex mercatoria* and *lex sportiva*, these include the use of general conditions in business-to-consumer transactions and private rulemaking in certain types of trade. Private regimes offer what a national legal system is not able to provide: a set of rules that is not territorially limited. If parties still make use of state law, they do not necessarily choose the law of their own jurisdiction but might submit some specific aspect of their activities to a foreign law.

A parallel development from state enforcement to self-enforcement exists. If state law cannot guarantee effective enforcement, parties will turn to other types of enforcement or to devices that allow them to avoid enforcement completely. One of the major mechanisms is *ex ante* reliance on reputation instead of *ex post* recourse to law. *Ex post* dispute resolution is increasingly replaced by *ex ante* avoidance of disputes through, e.g., reputational networks. Where dispute resolution still plays a role, private justice – in the shape of arbitration, mediation and other types of alternative dispute resolution – is pushing state courts aside. In online dispute resolution, the legal needs of globalising commerce and technological progress come together. In conclusion, Smits claims that the increasing delivery of 'legality' without law is much more important for understanding the denationalisation of law than the concrete efforts of European and supranational organisations to create rules fit for the European or global market.

In Chapter 12, Giacinto della Cananea discusses the impact of transnationalisation on the other side of the public/private divide, namely in administrative law. He uses as the vehicle for his analysis a particular institution of administrative law: *jus poenitendi* or the power to modify or cancel the effects of a previous administrative act. According to the traditional paradigm, administrative law is a national enclave, closely bound to the nation state. Cananea examines the transnationalisation of administrative law in two dimensions: in the vertical dimension leading from national administrative law(s) to European administrative law and in the horizontal relations between national administrative laws. In both dimensions, administrative-law principles common to different nation states (Member States) have had a major impact. He carries out his analysis through two legal cases involving *jus poenitendi*. *Algera*, decided by the ECJ in 1957, illustrates how European administrative-law principles were

elaborated on the basis of principles common to Member States. In turn, the other case, decided by the Tribunale di giustizia amministrativa di Trento in 2009, illuminates the interpretation of the legislation of one Member State (Italy) in the light of the judicial doctrine of another (Germany). At issue is the use of the law of another municipal jurisdiction. However, the relevant normative model is not conflict of laws but *lex alius loci*.

In their contribution, Oreste Pollicino and Marco Bassini take up a new branch of law that is often regarded as a typical product of the hybridisation caused by transnationalisation and simultaneous technological progress: namely, Internet law. They address the question to what extent and especially at what level of governance a regulatory approach could play its role in cyberspace. The hypothesis they explore is that, although Internet law has been treated as an epitome of national law's limitations in an era of globalisation, it could turn out to be one of the few fields of law that are still encapsulated in national law.

Pollicino and Bassini analyse two phases in the scholarly and judicial treatment of Internet law. The first was dominated by what the authors call the cyber-anarchic approach, claiming the disintegration of state sovereignty over cyberspace, in which territorially defined jurisdictions were impotent. The authors argue that this approach overlooked three important arguments. First, it relied on a static notion of sovereignty, which was already outdated when the Internet acquired a commercial dimension. Second, its advocates mistook the direction of technological development in assuming, e.g., that a content provider or Internet service provider with a multijurisdictional presence cannot monitor or control the geographical flow of information on the Internet. Third, the cyber-anarchic approach ignored the distinction between prospective jurisdiction and enforcement jurisdiction. The authors contend that national law continues to play a crucial role, even where the content source is beyond the reach of a territorial government. They do not consider top-down harmonisation a feasible option in Internet law because of the nature of the state interests involved in transnational regulatory issues. These often touch upon hard-core values at the heart of national identity, as the authors show through their analysis of Internet-related case law in the fields of hate speech, gambling and privacy. The solution that the authors advocate, which they think takes into account both transnational and national aspects, is a case-by-case approach that takes place in the no-man's-land between municipal law and international

law, on the common ground of shared values and in accordance with the discursive principles of a pluralistic vision of transnational law. Pollicino and Bassini conclude by making a call for what they term a new fundamental right in the new season of transnational law: the right of access to the Internet.