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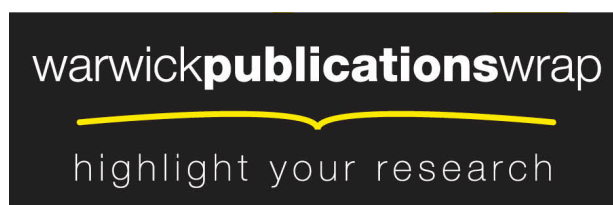
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# On the constitutional question in global governance: Global administrative law and the conflicts-law approach in comparison

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**Abstract:** The question of constitutionalization cuts through the heart of theoretical debate on the fragmentation of global governance. This paper aims to contribute to this debate through a comparison of global administrative law (GAL) and the conflicts-law approach. While the conflicts-law approach espouses the move towards global constitutionalism, GAL disavows constitutional ambition. I make a twofold argument. First, the differing diagnoses these two approaches make of global governance lead to their distinct proposed solutions. GAL identifies the lack of accountability as the underlying concern of global governance and responds to fragmented global governance through balancing-centred legal management. The conflicts-law approach instead attributes the challenges facing global governance to the ill-designed democratic institutions in nation states and turns to ‘democratic juridification’ as the solution. Second, GAL and the conflicts-law approach reflect two distinct images of constitutionalism. GAL’s ‘constitutional deficit’ suggests its implicit embrace of a version of constitutionalism rooted in the tradition of populist democracy. The conflicts-law approach situates transnational democracy in the conflicts-law process in which inter-regime conflicts are resolved, suggesting a prototype of constitutionalized global governance underpinned by an epistemic understanding of democracy.

**Keywords:** global administrative law; global constitutionalism; global governance; populist and epistemic constitutionalism; the conflicts-law approach

## Introduction

As transnational legal orders multiply in the emerging postnational space, the unity or fragmentation debate features the contemporary

world order.<sup>1</sup> Nation states are blamed for erecting barriers that hamper the emergence of a transnational legal system. Thus, a postnational legal order in which jurisdictional boundaries of national legal orders are opened up seems to suggest a move towards the direction of unity in the regulation of transboundary issues. Yet, the development of global governance points to the opposite. As transboundary issues are dealt with in functionally differentiated regulatory regimes, what emerges from the postnational legal order is not legal unity. Rather, the legal landscape of global governance is populated with regulatory sectors, each of which responds to particular subject matters in transboundary regulation.<sup>2</sup> Put bluntly, fragmentation characterizes global governance and its corresponding legal universe.<sup>3</sup>

It is against the backdrop of fragmentation that various proposals have been made to map out the postnational legal universe of global governance.<sup>4</sup> Notably, a dividing line cuts through the heart of these proposals: constitutionalization.<sup>5</sup> One side tends to associate the response to the fragmentation of the legal landscape of global governance with the projection of constitutionalism beyond nation states.<sup>6</sup> Not only is international law to be reconceptualized in constitutional terms to alleviate the anxiety over the fragmentation of global governance, but values and principles of

<sup>1</sup> See e.g. N Krisch, 'Who Is Afraid of Radical Pluralism? Legal Order and Political Stability in the Postnational Space' (2001) 24 *Ratio Juris* 386.

<sup>2</sup> See generally P-M Dupuy, 'International Law: Torn between Coexistence, Cooperation, and Globalization: General Conclusions' (1998) 9 *European Journal of International Law* 278.

<sup>3</sup> See M Koskeniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *Modern Law Review* 1, 4–9. See also G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (trans G Norbury, Oxford University Press, Oxford, 2012).

<sup>4</sup> See generally JL Dunoff and JP Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, Cambridge, 2009).

<sup>5</sup> Constitutionalization here is understood as the phenomenon of examining global governance-related issues in constitutional terms or in light of values associated with constitutionalism. See M-S Kuo, 'Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-c Global Constitutionalism' (2011) 44 *New York University Journal of International Law and Politics* 55. Cf JHH Weiler, *The Constitution of Europe: 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration* (Cambridge University Press, Cambridge, 1999) 19–25. For different conceptions of constitutionalization, see DZ Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford University Press, Oxford, 2005) 15–18. For a sceptical view of the notion of constitutionalization, see M Loughlin, 'What Is Constitutionalisation?' in P Dobner and M Loughlin (eds), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010) 47.

<sup>6</sup> See JL Dunoff and JP Trachtman, 'A Functional Approach to Global Constitutionalism' in Dunoff and Trachtman (n 4) 3, 6–9; AL Paulus, 'The International Legal System as a Constitution' in Dunoff and Trachtman (n 4) 69, 69–70.

constitutionalism are also regarded as governing the relationship between individual regulatory regimes.<sup>7</sup> On the other side are those who are sceptical of the compatibility of constitutionalism with the new legal order that is seen to transcend nation states. Fragmentation should be tackled by legal means that falls short of constitutionalization.<sup>8</sup> Seen in this light, the question of fragmentation in global governance provides a unique access point to look into different proposals aimed at mapping out the postnational legal universe of global governance, shedding light on the debate surrounding global constitutionalism.<sup>9</sup>

In the face of numerous proposals on the developing legal configuration of global governance,<sup>10</sup> this paper aims to contribute to the debate on the constitutionalization of global governance through a close-up examination of two distinct approaches, i.e., global administrative law (GAL)<sup>11</sup> and the conflicts-law approach.<sup>12</sup> Although GAL and the conflicts-law approach differ in orientation and substance, both are aimed to respond to the legal challenges arising from global governance. Among the common themes shared by GAL and the conflicts-law approach is how to tackle the question

<sup>7</sup> See M-S Kuo, 'Between Law and Language: When Constitutionalism Goes Plural in a Globalising World' (2010) 73 *Modern Law Review* 858, 865–9.

<sup>8</sup> See N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, Oxford, 2010).

<sup>9</sup> See Kuo (n 7) 872–8. Cf CEJ Schwöbel, 'Situating the Debate on Global Constitutionalism' (2010) 8 *International Journal of Constitutional Law* 611.

<sup>10</sup> Jeffrey Dunoff and Joel Trachtman identify three main strains of academic literature on this topic: international constitutionalization, global administrative law, and legal pluralism. See Dunoff and Trachtman (n 6) 33–5. In addition, some scholars, led by Armin von Bogdandy, a co-director of the Max Planck Institute for Comparative Public Law and International Law at Heidelberg in Germany, centre the legal response to global governance on the issue of international public authority. See A von Bogdandy, 'General Principles of International Public Authority: Sketching a Research Field' (2008) 9 *German Law Journal* 1909, 1918–21.

<sup>11</sup> The idea of global administrative law originates in a project based in New York University School of Law, which has brought together scholars from both sides of the North Atlantic and beyond. See B Kingsbury *et al.*, 'Foreword: Global Governance as Administration: National and Transnational Approaches to Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 1. A terminological clarification is due in order. I use GAL to refer to the aforementioned theoretical stance towards global governance. With respect to the actual regulations and other normative underpinnings of global governance that inspire GAL's theorizing effort, I call them *GAL norms*.

<sup>12</sup> The conflicts-law approach can be regarded as the brainchild of Christian Joerges at the University of Bremen in Germany, who has published numerous articles, research papers, and books on this topic over the past two decades. See e.g. C Joerges, 'A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation' in C Joerges and J Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart, Oxford, 2011) 465; C Joerges, PF Kjaer and T Ralli, 'A New Type of Conflicts Law as Constitutional Form in the Postnational Constellation' (2011) 2 *Transnational Legal Theory* 153.

of fragmentation in global governance.<sup>13</sup> Notably, with respect to the issue of global constitutionalism, they stand in opposition: the conflicts-law approach espouses the move towards global constitutionalism; the GAL camp expressly disavows ‘constitutional ambition’. A juxtaposition of GAL with the conflicts-law approach against the backdrop of fragmented global governance will help to cast light on how the idea of constitutionalization parallels the perceived fragmentation of global governance. Moreover, as will be dissected in my discussion, the contrast between both approaches’ visions for the future of democracy in the politics of global governance gets at the heart of the matter in the debate surrounding global constitutionalism: Is it possible to imagine a constitutional order on a democratic basis untied from a political community like the nation state?<sup>14</sup>

In this article, I argue that the contrast between GAL and the conflicts-law approach as to whether to conceive of global governance in constitutional terms pivots on the different judgments they harbour on the nature of global governance politics. My argument will proceed as follows. Situating GAL and the conflicts-law approach in the context of fragmented global governance, I first provide a summary account of the attitudes of GAL and the conflicts-law approach towards global governance: GAL responds to fragmented global governance through legal management with a focus on the accountability of transnational regulatory bodies; ‘democratic juridification’ is the defining characteristic of the conflicts-law approach to tackling the inter-regime conflicts in global governance.

I then take a closer look at the images of constitutionalism reflected in both approaches. I shall argue that despite its ‘agnostic’ stance on the future of global constitutionalism as it disavows any constitutional ambition, GAL implicitly ties global constitutionalism to the development of a global political community, which is conceived in the strong democratic tradition of popular sovereignty in national constitutions.

<sup>13</sup> See B Kingsbury, N Krisch, and RB Stewart, ‘The Emergence of Global Administrative Law’ (2005) 68 *Law and Contemporary Problems* 15, 37; N Krisch, ‘The Pluralism of Global Administrative Law’ (2006) 17 *European Journal of International Law* 247; B Kingsbury, ‘International Law as Inter-Public Law’ in HS Richardson and MS Williams (eds), *Moral Universalism and Pluralism* (NOMOS XLIX) (New York University Press, New York, 2008) 167, 171; C Joerges, ‘The Idea of a Three-dimensional Conflicts Law as Constitutional Form’ in C Joerges and E-U Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart, Oxford, 2011) 413. See also M-S Kuo, ‘The Concept of “Law” in Global Administrative Law: A Reply to Benedict Kingsbury’ (2009) 20 *European Journal of International Law* 997, 998.

<sup>14</sup> See e.g. H Brunkhorst, ‘Constitutionalism and Democracy in the World Society’ in Dobner and Loughlin (eds) (n 5) 179.

In contrast, the conflicts-law approach explicitly departs from this populist view of constitutionalism, reconstructing democracy in terms of its epistemic function. On this view, the core of democracy consists of the processes in which complex and conflicting regulatory and other societal needs can be adequately addressed and accommodated with the input of epistemic communities, comprising stakeholders with the necessary knowledge and information acquired from their experiences and epistemic backgrounds.<sup>15</sup> Thus, the legal mechanism that governs the inter-regime relations not only functions as a transnational choice of law, or, rather, ‘conflicts law’ through which the applicable law is decided, suggesting the distinction between law and non-law among global governance practices. It also provides the platform in which transnational democracy takes shape. As this ‘conflicts law’ is seen as an emerging prototype of constitutionalized global governance, it indicates what I call epistemic constitutionalism in the name of transnational democracy without *demos*. Notably, the conflicts-law approach’s epistemic understanding of democratic constitutionalism evokes the central role of the community of academic lawyers in the nineteenth-century liberal reform of international law as was then espoused by Friedrich Carl von Savigny. In conclusion, as the juxtaposition of GAL and the conflicts-law approach indicates, underlying the debate over global constitutionalism is the contested character of democracy and its uneasy relationship with constitutionalism.

I should make it clear that my aim is neither to justify the constitutional deficit of GAL nor to dampen the democratic aspiration of the conflicts-law approach. Nor do I intend to provide a comprehensive appraisal of existing different proposals for the future of global governance. Rather, my point is limited to casting light on the fact that as GAL and the conflicts-law approach suggest, the constitutional (un)ambition in different visions on the legal configuration of global governance reflects the judgment of their supporters on the state of global governance. There is nothing wrong with this. As the scholarly debate surrounding global constitutionalism is not detached from the politics of global governance,<sup>16</sup> however, we should keep aware of and tease out the political components of different theoretical positions before choosing between them.

<sup>15</sup> Cf FI Michelman, *Brennan and Democracy* (Princeton University Press, Princeton, 1999) 54–60.

<sup>16</sup> See e.g. JL Dunoff, ‘The Politics of International Constitutions: The Curious Case of the World Trade Organization’ in Dunoff and Trachtman (eds) (n 4) 178–205.

### Diagnosing global governance: views from GAL and the conflicts-law approach

This section provides a summary account of the attitudes of GAL and the conflicts-law approach towards global governance, especially in terms of their distinct diagnosis of the challenges from global governance. While GAL focuses on the lack of accountability in the exercise of transnational regulatory power, the conflicts-law approach attributes the issues surrounding global governance to the problematic character of existing democratic institutions in the modern state. After summarizing GAL's and the conflicts-law approach's diagnoses of global governance in order, a juxtaposition of their responses is provided. It is indicated that GAL responds to fragmented global governance through legal management whereas democratic juridification characterizes the conflicts-law approach to the inter-regime conflicts in global governance.

#### *Holding transnational regulation to account: the view from GAL*

GAL is a normative response to the fact that with the increasing needs of global governance, regulatory decisions and their effects have extended beyond the control of national administrations.<sup>17</sup> In an essay that lays the foundations for GAL, Benedict Kingsbury, Nico Krisch, and Richard Stewart situate GAL's emergence in 'the vast increase in the reach and forms of transgovernmental regulation and administration designed to address the consequences of globalized interdependence' in diverse regulatory fields.<sup>18</sup> Emerging from this context of global governance are the 'transnational systems of regulation or regulatory cooperation' established in various forms.<sup>19</sup> Consequently, transnational administrative bodies, governmental as well as nongovernmental, are in charge of the implementation of transnational regulation without being subject to direct control by national governments or state parties to treaty-based regulatory regimes. Thus arises the question of accountability deficit.<sup>20</sup> In addition, the externality of domestic regulatory decisions is another concern at the core of global governance.<sup>21</sup> It is true that the spillover effect of domestic regulatory

<sup>17</sup> Although originating in New York, GAL has attracted scholarly attention from around the globe. See e.g. N Krisch and B Kingsbury, 'Introduction: Global Governance and Global Administrative Law in the International Legal Order' (2006) 17 *European Journal of International Law* 1; G Anthony *et al.* (eds), *Values in Global Administrative Law* (Hart, Oxford, 2011).

<sup>18</sup> See Kingsbury *et al.* (n 11) 16.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*



decisions on other states, international organizations, or other stakeholders in transnational regulation, has been a lingering issue.<sup>22</sup> Nevertheless, as governance issues become globalized, adverse effects from regulatory decisions made by national administrations raise more eyebrows.

To respond to the dual challenges of accountability deficit and regulatory externality, advocates for GAL observe that traditional administrative law tools adopted in domestic legal systems have been deployed in the transnational regulatory environment. On the one hand, concerns over accountability deficit are seen to be mitigated with the development of administrative law mechanisms on the global level and the extension of national administrative law to the domestic effects of decisions made by transnational regulatory bodies.<sup>23</sup> On the other hand, as transnational regulatory regimes, under which national governments are subsumed, evolve, administrative law mechanisms are utilized to address the issue of regulatory externality when domestic regulatory decisions affect other state parties to transnational regimes. National administrative decisions with external effects to other states need to be scrutinized and justified in light of administrative law standards.<sup>24</sup> In view of these developments, GAL defines itself as a normative theoretical approach that focuses on

the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decisions, and legality, and by providing effective review of the rules and decisions they make.<sup>25</sup>

Under this view, traditional international organizations and new forms of administrative bodies, governmental and nongovernmental, which jointly constitute ‘global administration’,<sup>26</sup> take part in the decision making of transnational regulation. Taking account of the development of national administrative law in response to the rise of modern bureaucracies of nation states, GAL aims to bring these new clusters of regulatory power underpinning global governance under control. This is where the normative idea of publicness comes in. Inspired by the experiences of domestic administrative law, which is regarded as resting on the idea of publicness

<sup>22</sup> See e.g. A Breton and P Salmon, ‘External Effects of Domestic Regulations: Comparing Internal and International Barriers to Trade’ (2001) 21 *International Review of Law and Economics* 135.

<sup>23</sup> See Kingsbury, Krisch and Stewart (n 13) 16. See also DC Esty, ‘Good Governance at the Supranational Scale: Globalizing Administrative Law’ (2006) 115 *Yale Law Journal* 1490.

<sup>24</sup> See Kingsbury, Krisch and Stewart (n 13) 16–17.

<sup>25</sup> *Ibid* 17.

<sup>26</sup> *Ibid* 20–7.

and its associated principles,<sup>27</sup> the crucial distinction is made between law and non-law with respect to the regulatory decisions and administrative practices of global governance in light of the normative criteria associated with the idea of publicness.<sup>28</sup>

Regardless of its effect of constitutional significance,<sup>29</sup> GAL disavows constitutional ambition but instead is focused on how to enhance the legitimacy and rationality of decentred transnational regulatory powers in the variegated global administrative space by means of administrative law mechanisms and standards.<sup>30</sup> Underlying this understanding of global governance is a landscape of legal pluralism.<sup>31</sup> Against this backdrop, the steering of relationships between regulatory regimes in the variegated global administrative space is central to the functioning of global governance, raising the issue of ‘conflicts of laws arrangements’ in the face of the fragmented global governance.<sup>32</sup> Specifically, as governance issues become complex and diverse, new arrangements as to the exercise of regulatory power are made in global governance. To the extent that governance issues are intertwined, it is not clear which regulatory body constitutive of global administration holds sway in individual cases. Leaving this inter-regulatory regime relationship unaddressed, however, global governance would be plunged into regime collisions as literature on the fragmentation of international legal order suggests.<sup>33</sup> Thus, beyond its original focus on the legitimacy and rationality of transnational regulatory powers, GAL takes up the steering role in the relations between regulatory jurisdictions arising from the multiplicity of networks of sectoral governance regimes.<sup>34</sup>

Bearing this landscape of legal pluralism and the need for ‘conflicts of laws arrangements’ in mind, Benedict Kingsbury appeals again to the idea of publicness in his attempted comprehensive jurisprudential account of GAL. In addition to the enhancement of the legitimacy and rationality

<sup>27</sup> The underlying values of the notion of publicness include the principles of ‘legality’ in its power-limiting sense, rationality, proportionality, rule of law, and human rights. See B Kingsbury, ‘The Concept of “Law” in Global Administrative Law’ (2009) 20 *European Journal of International Law* 23, 31–3.

<sup>28</sup> See *ibid* 30–2.

<sup>29</sup> See Kuo (n 5) 71–80.

<sup>30</sup> See N Krisch, ‘Global Administrative Law and the Constitutional Ambition’ in Dobner and Loughlin (eds) (n 5) 245.

<sup>31</sup> See Krisch (n 13).

<sup>32</sup> See Kingsbury (n 27) 56.

<sup>33</sup> See e.g. Koskenniemi (n 3); A Fisher-Lescano and G Teubner, ‘Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 999. See also Teubner (n 3).

<sup>34</sup> See also Kuo (n 13) 1000–1.

of decisions of individual regulatory regimes, GAL pivots its ‘conflicts of laws arrangements’ on the balance in the inter-regulatory regime relationship in light of the idea of publicness and its associated principles.<sup>35</sup> To avert the possible regime collisions, the intricate interrelationships between regulatory regimes is steered with consideration of the underlying principles of the idea of publicness, including principles such as the limitation of power, the requirement of justification and proportionality, the procedural mechanism for deliberate decision-making, and the protection of human rights in each governance sector. Notably, the steering of the inter-regime relations is carried out on a case-by-case basis. In each instance of conflicts of laws arrangements, the laws of two regulatory regimes in conflict are balanced against each other to decide which one to apply in each case.<sup>36</sup> Thus, when it comes to conflicts of laws arrangement, GAL relies on the exercise of balancing.<sup>37</sup>

*Taking democracy deficit seriously: the thrust of the conflicts-law approach*

While the issue of ‘conflicts of laws arrangements’ takes a back seat in the GAL project, concerns over regime conflicts lie at the heart of the conflicts-law approach to global governance.<sup>38</sup> Tracing the turn to governance in transnational regulation to early regulatory reforms in response to the dysfunctional regulation of the interventionist administrative state, the conflicts-law approach situates global governance in the multiplicity of regulatory regimes that have evolved from the problem-solving efforts of variegated regulatory bodies alongside nation states.<sup>39</sup> Instead of substituting transnational regulatory regimes for national administrative bodies, the ‘conflicts-law school’, headed by Christian Joerges at the University

<sup>35</sup> See Kingsbury (n 13) 197; Kingsbury (n 27) 56.

<sup>36</sup> Cf Krisch (n 8) 277–8.

<sup>37</sup> See Krisch (n 13) 269–74. Cf S Cassese, ‘Administrative Law without the State? The Challenge of Global Regulation’ (2005) 37 *New York University Journal of International Law and Politics* 663, 680.

<sup>38</sup> See Joerges (n 13). See also C Joerges, ‘Reconceptualizing the Supremacy of European Law: A Plea for a Supranational Conflict of Laws’ in B Kohler-Koch and B Rittberger (eds), *Debating the Democratic Legitimacy of the European Union* (Rowman & Littlefield, Lanham, 2007) 311, 316.

<sup>39</sup> Joerges argues that the characteristics of global governance such as the inclination towards informal administrative measures and the rise of private regulation are the extension of administrative reforms in response to the regulatory state. See C Joerges, ‘Constitutionalism and Transnational Governance: Exploring a Magic Triangle’ in C Joerges, I-J Sand and G Teubner (eds), *Transnational Governance and Constitutionalism* (Hart, Oxford, 2004) 339, 340–50.

of Bremen,<sup>40</sup> argues that global governance concerns how to choose the best solution to the regulatory issue at hand in the face of various regulatory regimes.<sup>41</sup>

To fully appreciate the uniqueness of the conflicts-law approach, it is necessary to see how it diagnoses the issues of global governance. Compared to other approaches, the conflicts-law approach identifies a more serious problem than regulatory failure in global governance. According to Joerges and his followers, global governance not only brings to the fore the issue of accountability deficit of transnational administrative bodies as diagnosed by GAL scholars. The issue of regulatory externality further exposes the problematic nature of democracy in modern states.<sup>42</sup> The spillover effects of decisions made by national administrations are not merely a result of lacking regulatory co-ordination between them, which can be addressed through the component mechanisms of GAL as are developed under transnational regulatory regimes concerned.<sup>43</sup> Rather, the Joerges School argues that the very fact that the effects of domestic regulatory decisions spill over to those who do not belong to the political community where the aforesaid decisions are made is symptomatic of the problematic

<sup>40</sup> It should be noted that there are two strains under the rubric of the conflicts-law (*Kollisionenrecht*) approach. In addition to the Joerges School discussed here, another strain of the conflicts-law approach is attributed to Gunther Teubner, whose theoretical underpinning is systems theory. While both strains of the conflicts-law approach concern the issue of conflict in global governance, the Teubner School is focused on the functional differentiation of (sub) social systems in what he terms 'world society' and the resulting decoupling of the legal system from other social systems. Under Teubner's view, how to restore the status of the legal system, especially in terms of its mediating role among (sub)social systems, constitutes the main theme. My discussion here centres on Joerges's variety of the conflicts-law approach as his theory puts the choice over conflicting regulatory regimes front and centre in the discussion on global constitutionalism. See Joerges (n 39) 370. Outside the Bremen nucleus, the Joerges School also attracts Joost Pauwelyn (Geneva) and Ralf Michaels (Duke) among others. See R Michaels and J Pauwelyn, 'Conflict of Norms or Conflict of Laws? Different Techniques in the Fragmentation of International Law' in T Broude and Y Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Hart, Oxford, 2011) 19. For a representative publication centring on the Joerges School, see generally R Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification* (Intersentia, Antwerp, 2011). For further discussion on the Teubner School of the conflicts-law approach, see Teubner (n 3) 150–73; Fisher-Lescano and Teubner (n 33).

<sup>41</sup> See Joerges (n 39) 370–2.

<sup>42</sup> See Joerges (n 12) 467–9. See also Joerges, Kjaer and Ralli (n 12) 154. Cf R Howse and K Nicolaidis, 'Democracy without Sovereignty: The Global Vocation of Political Ethics' in T Broude and Y Shany (eds), *The Shifting Allocation of Authority in International Law: Considering Sovereignty, Supremacy and Subsidiarity: Essays in Honour of Professor Ruth Lapidoth* (Hart, Oxford, 2008) 163, 167.

<sup>43</sup> See text at notes 21–24 above.

decision-making processes in modern democratic states.<sup>44</sup> To the extent that those who are affected by national policies and live outside the political community are kept from participating in the decision-making processes, those policy decisions made by national administrations cannot be considered democratic. In this way, Joerges turns the discourse on the democracy deficit of transnational regulatory regimes upside down.<sup>45</sup> The root of democracy deficit in global governance lies in the problematic nature of democracy that has taken the form of the modern nation state.<sup>46</sup>

Thus understood, the question of democracy deficit finds itself alongside the classical issue of how to stabilize individual expectations in international transaction in the face of variegated foreign legislation and policies, a central concern to the field of private international law and conflict of laws.<sup>47</sup> While private international law and conflict of laws were traditionally regarded as part of the domestic legal order, that individuals are the protagonists in the functioning of this distinct division of international law has inspired liberal theorists of international relations in the post-World War II era.<sup>48</sup> To counter the emphatic role of state interest in international relations as advocated by the realist school, some liberal theorists have drawn upon the practices of private international law and conflict of laws with an aim to introducing ‘transnational law’ in the place of public international law.<sup>49</sup>

It is in these liberal lines of reversing the relations between individuals and the state in the international legal order that the Joerges School takes its conflict of laws predecessor further, characterizing democracy deficit as conflicts of laws between different regulatory regimes. With the spillover effects to other states, domestic administrative regulations penetrate through jurisdictional boundaries. Notably, the penetration of domestic administrative regulations through jurisdictional boundaries is not a one-way phenomenon. The interpenetration of domestic regulations in global governance results

<sup>44</sup> See Joerges, Kjaer and Ralli (n 12) 154; C Joerges and J Neyer, ‘From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology’ (1998) 3 *European Law Journal* 273, 293–5.

<sup>45</sup> Joerges imputes the gap between ‘political decision-making powers’ and ‘affectedness by political decisions’ to the “‘democracy failure’ of constitutional nation states’. See Joerges (n 12) 468.

<sup>46</sup> See *ibid* 481.

<sup>47</sup> See A-M Slaughter Burley, ‘International Law and International Relations Theory: A Dual Agenda’ (1993) 87 *American Journal of International Law* 205, 230–1. Despite the analytical distinction between private international law and conflicts of law, I use them interchangeably.

<sup>48</sup> See *ibid* 214–15.

<sup>49</sup> See *ibid* 230–2.

in conflicts of laws between national jurisdictions.<sup>50</sup> Furthermore, with the development of new forms of administration, jurisdictional conflicts extend beyond the interpenetration of domestic regulations to the intertwining of decisions made by different regulatory regimes.<sup>51</sup> Against this backdrop, the conflicts-law approach praises transnational administrative arrangements as opening regulatory decisions to the influence from all those affected, thus making up for democracy deficit incurred from the domestic decision-making processes of modern democratic states. In this way, transnational regulatory decisions are acquitted of the charges of democracy deficit. Transnational regulatory bodies are regarded as a solution, not a problem, to the democratic mechanisms of the nation state; the functioning of transnational regulatory bodies amounts to a new conflict of laws in that individual expectations are stabilized thereunder in the face of criss-crossing national regulations.<sup>52</sup>

Taking the experiences of the European Union (EU) as the prototype of transnational governance, Joerges identifies three types of conflict resulting from the intermesh of regulatory competences in the EU and its member states: 'vertical', 'horizontal', and 'diagonal'.<sup>53</sup> In a recent article, Joerges and his collaborators state:

horizontal conflicts occur when different state laws claim application in the same case; vertical conflicts pit a state law against a supreme ... law; while diagonal conflicts refer to a situation where a national regulation belongs to one field, where the European Union lacks true legislative competence in that field, but where nevertheless the regulation may conflict with [other fields of] European law.<sup>54</sup>

Based on this diagnosis, Joerges purports that inter-jurisdictional conflicts or regime collisions pose the fundamental challenge to global governance.<sup>55</sup>

It should be noted that treaty-based formal transnational regulatory bodies are not the only response to the question of democracy deficit resulting from national regulations. Rather, new regulatory arrangements such as public-private partnership and the outsourcing of regulatory functions to private bodies have become significant players in global governance, making the issue of inter-jurisdictional conflicts or regime collisions more complicated.<sup>56</sup>

<sup>50</sup> Cf Joerges (n 12) 455–6.

<sup>51</sup> See *ibid.* See also Joerges, Kjaer and Ralli (n 12) 154–5.

<sup>52</sup> See Joerges and Neyer (n 44).

<sup>53</sup> See Joerges (n 38) 318.

<sup>54</sup> Joerges, Kjaer and Ralli (n 12) 155 (quoting R Mayntz, 'The Architecture of Multi-Level Governance of Economic Sectors', MPIfG Discussion Paper 13/2007, 23–4).

<sup>55</sup> See Joerges (n 38) 315–16.

<sup>56</sup> See Teubner (n 3).

Bearing the centrality of individuals to inter-jurisdictional conflicts in global governance in mind, Joerges draws inspiration from private international law and conflict of laws scholars in Germany and the United States (US) to resolve these three types of conflicts.<sup>57</sup> In particular, based on Brainerd Currie's realist view of 'new choice of law' that choice of law decisions centre on policy choices, Joerges translates the question of global governance into one of conflict of laws among multiple regulatory regimes in the globalizing legal landscape.<sup>58</sup> Thus, under the rubric of the conflicts-law approach, the Joerges School puts forward a 'three-dimensional conflicts law' as the key to global governance overshadowed by potential regime collisions.<sup>59</sup> In articulating this three-dimensional conflicts law, Joerges shifts emphasis from the relationship between regulatory regimes to the types of regulatory bodies involved in transnational regulation.<sup>60</sup>

Under this analytic framework, conflicts law of the first dimension deals with the relationship between two formally autonomous regulatory bodies in global governance, including inter-state, inter-treaty regime, and state-treaty regime relations.<sup>61</sup> Joerges emphasizes that the conflicts-law approach does not subscribe to the view that democratic legitimacy has been fully transposed to transnational regulatory arrangements, although the democratic form of the modern state is problematic.<sup>62</sup> Transnational regulatory regimes, which work in co-operation with states concerned, are regarded as a mechanism of enhancing the democratic legitimacy of the modern state. For this reason, in the EU example, the relationship between EU and member states with respect to regulatory competence should not be regarded as hierarchical. Rather, underlying the seemingly supremacy of the EU law with respect to its enumerated competences of regulation is a special 'conflicts law' that is aimed to resolve the jurisdictional

<sup>57</sup> See Joerges (n 38) 312–15. See also Joerges (n 12).

<sup>58</sup> See Joerges (n 39) 347–8.

<sup>59</sup> See Joerges (n 12); Joerges, Kjaer and Ralli (n 12); Joerges (n 13). See also J Pauwelyn, 'Public International Law and the Conflicts-Law Approach' (13 October, 2011), available at <SSRN: <http://ssrn.com/abstract=2017542>> accessed 27 January, 2013.

<sup>60</sup> Notably, the correspondence between the three types of conflicts and the three-dimensional conflicts law is not clear. Cf Joerges (n 12); Joerges, Kjaer and Ralli (n 12).

<sup>61</sup> See Joerges (n 12) 477–80, 488–95; Joerges, Kjaer and Ralli (n 12) 158–9. Joost Pauwelyn, another important contributor to the Joerges School of the three-dimensional conflicts-law approach, recently labels this first dimension of conflicts law as 'law as system', which concerns 'how to open up a specific treaty regime to other legal orders'. See Pauwelyn (n 59). Even so, when a treaty regime is opened to an international organization, which must be treaty-based, the core issue is how to tackle the conflicts between two treaty regimes.

<sup>62</sup> See Joerges and Neyer (n 44) 293–4.

conflicts between member states.<sup>63</sup> In other words, to make sense of the relationship between the EU and the member states, we need to understand the rationale behind choosing the EU law over national laws. What decides the supremacy, or, rather, primacy of the EU law is not the hierarchical structure in which the EU is seen as sitting above member states but rather the better accommodation of individual expectations provided by the EU law, thereby alleviating the democracy deficit of national laws.<sup>64</sup> In this train of thought, Joerges notes the relationship between the WTO and the EU as another example of the conflicts law of the first dimension.<sup>65</sup>

Compared to this conflicts law of the first dimension, the second and third dimensions of conflicts law respond to the rise of unorthodox legal measures and regulatory arrangements in global governance. In its second dimension, conflicts law concerns new transnational arrangements in which transnational bureaucrats and representatives of national administrative agencies hammer out regulatory policies with the participation of nongovernmental experts.<sup>66</sup> These hybrid regulatory bodies function as better accommodating arrangements as to individual expectations in the face of regulatory issues that require the cooperation between private individuals and public officials. Comitology of the EU is regarded as the best example in the second dimension of conflicts law.<sup>67</sup>

In addition, as the function of accommodating individual expectations exceeds the capacity of traditional administrative bodies and other regulatory arrangements in the contemporary complex regulatory environment, nongovernmental entities are formed taking on the regulatory role. Thus, the conflicts law of the third dimension is conceived as a normative response to the ramifications of the 'self-justifying ruling power' of 'non-statal institutions and para-legal regimes'.<sup>68</sup> '[H]ow to open up law to informal or para-legal regimes' constitutes the central concern in the third dimension of conflicts law.<sup>69</sup> The standardization

<sup>63</sup> See Joerges, Kjaer and Ralli (n 12) 158–9; Joerges (n 38) 316–18. Understood in this way, Pauwelyn's first dimension of conflicts law, law as system, is not so much about opening up a treaty regime to the legal orders of its member states as about tackling the conflicts of laws between its member states.

<sup>64</sup> Joerges (n 38).

<sup>65</sup> See Joerges, Kjaer and Ralli (n 12) 159.

<sup>66</sup> See Joerges (n 12) 480–2, 495–8; Joerges, Kjaer and Ralli (n 12) 159–60. Pauwelyn terms this second dimension of conflicts law 'law as regulation', which concerns 'how to open up law to non-legal expertise'. See Pauwelyn (n 59).

<sup>67</sup> Joerges, Kjaer and Ralli (n 12) 159.

<sup>68</sup> *Ibid.* 160. See also Joerges (n 12) 483–5, 498–500.

<sup>69</sup> This is what Pauwelyn calls 'law as governance'. See Pauwelyn (n 59).



bodies involved in the concretization of various safety standards in the EU regulatory regime illustrate the third dimension of conflicts law.<sup>70</sup>

Taken as a whole, Joerges's three-dimensional conflicts law comes down to the legal processes within the innovative institutional arrangements through which criss-crossing transboundary regulations are to be negotiated and managed so as to avoid legal conflicts in global governance. As the conflicts-law approach attributes the problem of global governance to the problematic nature of national democratic institutions, the three-dimensional conflicts law seems to suggest a solution to the democracy deficit facing nation states as it functions to dissolve regulatory and policy conflicts through legal mechanisms. How the Joerges School takes this further and turns the three-dimensional conflicts law into the incubator of transnational democracy is among the themes I address next.

*Governing fragmentation in global governance: legal management or democratic juridification?*

Both GAL and the conflicts-law approach concern the de facto self-justifying governance authorities independent of nation states. Also, both aim to resolve the inter-regime conflicts resulting from fragmented global governance within a legal framework.<sup>71</sup> In response, GAL analogizes the issue of global governance to that resulting from the rise of the modern administrative state.<sup>72</sup> From this perspective, the underlying concern of the administrative state is the lack of political accountability of administrative agencies. Modelled after the development of the US administrative law,<sup>73</sup> GAL is focused on how to enhance the legitimacy and rationality of the exercise of regulatory power by procedural safeguards of administrative decisions. The issue of how to steer interrelationship between regulatory regimes is thus secondary to the establishment of procedural safeguards of

<sup>70</sup> See Joerges (n 12) 483–4.

<sup>71</sup> Joerges suggests that GAL falls within the second dimension of conflicts law. See *ibid* 495–8. Yet, taking account of the types of global administration identified in GAL, i.e., ‘international administration’, ‘distributed administration’, ‘transnational networks and coordination arrangements’, ‘hybrid intergovernmental-private administration’ and ‘private bodies’, GAL’s concern extends to all the three dimensions of conflicts law. See Kingsbury, Krisch and Stewart (n 13) 19–23. See also S Cassese, ‘Global Standards for National Administrative Procedure’ (2005) 68 *Law and Contemporary Problems* 109, 113–15.

<sup>72</sup> Compare RB Stewart, ‘The Reformation of American Administrative Law’ (1988) 88 *Harvard Law Review* 1667, with Kingsbury, Krisch and Stewart (n 13).

<sup>73</sup> See A Somek, ‘The Concept of “Law” in Global Administrative Law: A Reply to Benedict Kingsbury’ (2009) 20 *European Journal of International Law* 985, 985. See also C Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17 *European Journal of International Law* 187. Cf RB Stewart, ‘U.S. Administrative Law: A Model for Global Administrative Law?’ (2005) 68 *Law and Contemporary Problems* 63.

decision making in individual regulatory regimes. It should be resolved by some ‘conflicts of laws arrangements’ that operate in accordance with the principle of proportionality and balancing on a case-by-case basis. To sum up, legal management through balancing characterizes the way that GAL responds to fragmented global governance.<sup>74</sup>

In contrast, the conflicts-law approach attributes the fundamental challenge from global governance to the democratic institutions in the modern state. Accordingly, it rests its proposed solution on the legal processes in which conflict of laws issues regarding global governance are resolved and the democracy deficit of nation states are compensated for, which the Joerges School provocatively characterizes as ‘democratic juridification’.<sup>75</sup> In the eyes of the conflicts-law approach, conflict lies at the core of global governance. Moreover, the underlying cause of inter-regime conflicts is the insufficiency of the democratic institutions in the modern state to accommodate individual expectations in the face of complex regulatory issues. In other words, traditional democratic mechanisms fail to live up to high hopes for its epistemic function of recognizing and responding to regulatory and other societal needs satisfactorily.<sup>76</sup>

Against this backdrop, recast in its three-dimensional response to new organizational configuration of global governance, the new conflicts law as preached by the Joerges School in effect makes a strong claim on democracy in its attempt to resolve various types of conflicts between regulatory regimes.<sup>77</sup> While the conflicts-law approach appears to ‘juridify’ global governance by translating inter-regime conflicts into conflict of laws issues, what lies beneath this attempt of juridification is the aspiration to accommodate the diverse needs of different individuals or stakeholders through innovative organizational arrangements under which the epistemic failure of traditional democratic institutions can be addressed. Characterized as ‘democratic juridification’,<sup>78</sup> the three-dimensional conflicts-law arrangement is not only a law proper but also an instance of institutionalized democracy, corresponding to the epistemic function of

<sup>74</sup> See M-S Kuo, ‘Inter-Public Legality or Post-Public Legitimacy? Global Governance and the Curious Case of Global Administrative Law as a New Paradigm of Law’ (2012) 10 *International Journal of Constitutional Law* 1050. See also A Somek, ‘Administration without Sovereignty’ in Dobner and Loughlin (eds) (n 5) 266. Cf Krisch (n 30) 263.

<sup>75</sup> Joerges, Kjaer and Ralli (n 12) 158.

<sup>76</sup> For the epistemic function of democratic institutions, see Michelman (n 15) 54–60. For a philosophical justification of the epistemic value of democracy, see DM Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press, Princeton, 2009).

<sup>77</sup> See D Chalmers, ‘A Comment on Joerges’ in Kohler-Koch and Rittberger (eds) (n 38) 329.

<sup>78</sup> Joerges, Kjaer and Ralli (n 12) 158.

the democratic processes and thus paving the way for its further constitutional claims on global governance.<sup>79</sup>

### **Of democracy: excavating the contrasting conceptions of constitutionalism in GAL and the conflicts-law approach**

Both GAL and the conflicts-law approach aim to resolve the inter-regime relations in the fragmented global governance within a legal framework. The former indicates the strategy of legal management underpinned by balancing; the core of the latter is democratic juridification. Yet, they stand in contrast as to whether such a legal framework should be understood in constitutional terms as recasting their respective responses to global governance issues accordingly would have to confront the important questions of fundamental principles such as who should have ultimate authority and how.<sup>80</sup> Cautioning against taking stance on these touchy issues, the GAL camp harbours general scepticism about the move towards the constitutionalization of global governance, including the steering of inter-regime relations. In contrast, the conflicts-law approach proclaims that it is in the legal resolution of regime collisions that transnational or global constitutionalism materializes. Does the debate as to whether to constitutionalize or not between these two camps simply suggest GAL's timidity and the conflicts-law approach's conceit with respect to global constitutionalism? This section aims to put this debate in perspective, showing that the opposite attitudes of GAL and the conflicts-law approach towards global constitutionalism reflect two contrasting images of democracy embedded in the tradition of constitutionalism: the former disavows constitutional ambition in the shadow of the tradition of populist democracy; the latter's constitutional vision echoes an epistemic understanding of democracy. It is further suggested that the divergence between GAL and the conflicts-law approach as to the constitutional question rests on their differing judgments on the relationship between constitutionalization and reform in global governance.

#### *Against the background of populist democracy: discovering GAL's elusive constitutional vision*

Nico Krisch, one of the founding theorists of the GAL project, challenges the 'constitutional ambition' held by scholars of different stripes who have

<sup>79</sup> See Joerges (n 38) 318–22.

<sup>80</sup> Krisch and Kingsbury (n 12) 10. See also M Shapiro, 'Administrative Law Unbounded: Reflections on Government and Governance' (2001) 8 *Indiana Journal of Global Legal Studies* 369, 377.

attempted to frame global governance in legal terms. In contrast to those constitutionalist approaches, he rests the legal vision of GAL on non-constitutional terms, asserting that GAL's constitutional unambition makes it a more desirable legal solution to the issues of global governance.<sup>81</sup> Nevertheless, it does not mean that the idea of constitutionalism or constitution does not exist in GAL at all.<sup>82</sup> To see how it relates to constitutionalism, we need to take a short detour for the evolution of law-making processes in global governance.

At the core of the phenomenon of global law-making in relation to global governance is what Jean Cohen calls 'the juridification of the new world order'.<sup>83</sup> In traditional international law, state consent is the legal basis for the authority of international legal regimes and national constitutions provide the framework within which controversies regarding state consent are resolved. In contrast to the Westphalian world composed of national jurisdictions, the world order envisaged by legal globalists does not rest entirely on state consent. Rather, it emerges mainly from a global process of juridification whose linkage to an individual state's will and its constitutional framework has been loosened.<sup>84</sup>

More importantly, the global process of juridification is set apart from the development of 'juridification' in municipal law by the way that the law is conceived. In contrast to the court-centred concept of domestic juridification,<sup>85</sup> the global process of juridification extends to the operation of non-judicial actors in global governance. Through the lens of global juridification, the *modus operandi* of each subject field that emerges from the practice of everyday governance is institutionalized through myriad self-regulatory networks, developing into a networked global legal regime.<sup>86</sup> Moreover, the global legal regime generalizes and stabilizes normative expectations in each sector of subject matter and thus enhances global governance. Taken together, the networked norm-making regime is

<sup>81</sup> See Krisch (n 30).

<sup>82</sup> See Kuo (n 5) 71–7.

<sup>83</sup> See JL Cohen, 'Whose Sovereignty? Empire versus International Law' (2004) 18 *Ethics and International Affairs* 1, 2.

<sup>84</sup> See Kuo (n 5) 72.

<sup>85</sup> See UK Preuss, 'The Concept of Rights and the Welfare State' in G Teubner (ed), *Dilemmas of Law in the Welfare State* (Walter de Gruyter, Berlin, 1986) 151; L Trägårdh and MX Delli Carpini, 'The Juridification of Politics in the United States and Europe: Historical Roots, Contemporary Debates and Future Prospects' in L Trägårdh (ed), *After National Democracy: Rights, Law and Power in America and the New Europe* (Hart, Oxford, 2004) 41.

<sup>86</sup> See Kuo (n 5) 72–3.

embedded in the norms that autonomously materialize in the processes in which governance becomes globalized.<sup>87</sup>

Furthermore, this new model of norm-making is regarded as constituting a kind of ‘ultimate rule of recognition’ on a global scale, according to which the distinction between law and *non-law* is made. On this view, the question of what is law and *non-law* in the traditional municipal legal system can no longer be decided solely by reference to national constitutions.<sup>88</sup> Rather, it has to be determined in light of the global rule of recognition in that municipal legal systems are re-conceptualized as components of the globalized legal system, suggesting the emergence of a ‘constitutional’ order for the world.<sup>89</sup> In this way, those *GAL norms*, i.e., the regulatory norms that underlie global administration and draw the attention of the GAL camp, not only play the pivotal role in the juridification of global governance but also seem to assume the constitutional function for a globalizing legal order as they develop the criteria of distinguishing law from non-law in global governance.<sup>90</sup>

Layered with normative implications, *GAL norms* spill further into global constitutionalism.<sup>91</sup> As pointed out above, *GAL norms* echo their domestic counterpart, comprising the normative values of due process, transparency, and accountability at the core of constitutionalism. Some of GAL’s main proponents have argued that *GAL norms* fall short of a ‘framework of a more constitutionalist character’ because they leave out

<sup>87</sup> See *ibid* 73. See also M-S Kuo, ‘The End of Constitutionalism as We Know It? Boundaries and the State of Global Constitutional (Dis)Ordering’ (2010) 1 *Transnational Legal Theory* 329, 358–64.

<sup>88</sup> As Joseph Raz emphasizes, the rule of recognition in HLA Hart’s legal theory exists as ‘a practice of the legal officials’ and stands apart from constitutions. See J Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in L Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, Cambridge, 1998) 152, 160–2. My usage of the notion of rule of recognition is in a broader sense. Cf M Adler and KE Himma (eds), *The Rule of Recognition and the U.S. Constitution* (Oxford University Press, New York, 2009). When it comes to international law, traditionally state consent is the legal basis for the authority of international legal regimes. The national constitution provides the framework within which controversies regarding state consent are resolved. In this sense, the constitution also functions as the ultimate rule of recognition in deciding whether international law is binding on a particular constitutional system.

<sup>89</sup> See ‘Introduction’ in RStJ MacDonald and DM Johnston (eds), *Towards World Constitutionalism: Issues in the Legal Ordering of the World Community* (Martinus Nijhoff, Leiden, 2005) xiii, xv. Cf Christian Walter, ‘Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law’ (2001) 44 *German Yearbook of International Law* 170. This ‘conceptual shift’ is related to the globalist epistemological shift to an external sociological perspective of the law. See Cohen (n 83) 7.

<sup>90</sup> See Kuo (n 5) 74.

<sup>91</sup> See *ibid* 71–7.

the decisions concerning ‘important questions of principle (who should have ultimate authority?)’.<sup>92</sup> On the other hand, however, *GAL norms* have notably been equated with ‘all the rules and procedures that help ensure the accountability of global administration’.<sup>93</sup> In light of the increasing self-constitutionalization of the emerging legal regimes beyond the nation state,<sup>94</sup> the normative values underpinning the *GAL norms* appear to pave the way for the constitutionalization of global governance.<sup>95</sup>

It is noteworthy that our experiences with constitutionalism are formed in the legacies of state constitutionalism,<sup>96</sup> which further frame our imagination of the new global constitutional ordering. Accordingly, the trend to extend constitutional ordering beyond the state needs to be analysed in light of our inherited constitutional experiences.<sup>97</sup> Among the legacies of state constitutionalism, citizens’ inclination to turn to the guardian of the constitution, mostly the (constitutional) courts, to hold the government to account for fully implementing constitutionalism is the underlying cause of the contemporary expansion of constitutionalism, driving the constitutionalization of politics.<sup>98</sup> Moreover, the inclination to turn to the court and its equivalent for the full implementation of constitutionalism by interpreting the constitution in light of the idea of justice is rooted in a modernist state of mind, in which the centrality of constitution to the rule of law idea is conceived. On this view, the state power ordained by the constitution is conceived of as part of ‘a project of theory, as well as of practice’.<sup>99</sup> The state or the polity cannot be disassociated from the idea of justice but is rather considered the means to achieve justice. Correspondingly, a constitution that underlies the state or a polity is to be read and interpreted through theories of justice. As the multiplication of the functions of fundamental rights and the expansion of

<sup>92</sup> See Krisch and Kingsbury (n 12) 10.

<sup>93</sup> See Kingsbury, Krisch and Stewart (n 13) 28.

<sup>94</sup> See e.g. Cass (n 5); S Gardbaum, ‘Human Rights and International Constitutionalism’ in Dunoff and Trachtman (eds) (n 4) 233; M Everson and J Eisner, *The Making of the European Constitution: Judges and Lawyers beyond Constitutive Power* (Routledge-Cavendish, Abingdon, 2007).

<sup>95</sup> See Kuo (n 5) 74–5.

<sup>96</sup> See Krisch (n 8) 35–8; MP Maduro, ‘From Constitutions to Constitutionalism: A Constitutional Approach for Global Governance’ in D Lewis (ed), *Global Governance and the Quest for Justice*, vol I: *International and Regional Organizations* (Hart, Oxford, 2006) 227, 238–41.

<sup>97</sup> See Kuo (n 7) 874–8.

<sup>98</sup> See M-S Kuo, ‘Reconciling Constitutionalism with Power: Towards a Constitutional Nomos of Political Ordering’ (2010) 23 *Ratio Juris* 390, 394.

<sup>99</sup> See PW Kahn, *Putting Liberalism in Its Place* (Princeton University Press, Princeton, 2004) 270. See also Kuo (n 5) 392–3.

the catalogue of constitutional rights suggest,<sup>100</sup> the full implementation of constitutionalism is carried out by reading theories of justice into a constitution. For this reason, constitutionalism tends to be tied to the idea of justice, standing as the ideal model of a sophisticated legal system.<sup>101</sup> Viewed this way, it is conceivable that *GAL norms* are taking on constitutional character as it continues to perfect its normative values.<sup>102</sup>

Thus, the development of *GAL norms* extends beyond the pragmatism of functional administration to global constitutionalism with the increase of its constitutional spillover effects. In other words, from a functionalist point of view, *GAL norms* have evolved close to a so-called small-c constitution.<sup>103</sup> Even so, advocates for GAL stand firm against attempts to conceptualize *GAL norms* in constitutional terms. GAL disputes the constitutional character of the law that emerges from the global law-making processes as noted above.<sup>104</sup>

The insistence on the non-constitutional character of the global law-making process suggests that GAL makes two assumptions on constitutional ordering. First, GAL makes an empirical assumption of the functioning of existing national constitutional orders. As its diagnosis of the issues resulting from the exercise of transnational regulatory power suggests, what needs to be addressed is how to enhance the political accountability of administrative bodies without questioning the institutional designs enshrined in national constitutions.<sup>105</sup> This attitude corresponds to the US response to the rise of the modern administrative state. As this period of US history indicated, the political system resting on the US Constitution was not regarded as problematic. The democratic legitimacy of the US constitutional regime was not called into question. Instead, administrative law reform, which resulted in the enactment of the US 1947 Administrative Procedure Act, was the legal remedy for the lack of political accountability as a consequence of the rise of the administrative state.<sup>106</sup> Paralleling the US experience that focused on the enhancement of the political accountability of administrative bodies, GAL assumes that the core of existing national constitutions is still well-functioning without questioning their legitimacy.

<sup>100</sup> See K Möller, *The Global Model of Constitutional Rights* (Oxford University Press, Oxford, 2012) 3–15.

<sup>101</sup> See Kuo (n 98) 393–4.

<sup>102</sup> See Kuo (n 5) 75–7.

<sup>103</sup> See *ibid* 77–80.

<sup>104</sup> See Krisch (n 30).

<sup>105</sup> See *ibid* 256–8.

<sup>106</sup> See generally M Shapiro, 'APA: Past, Present, Future' (1986) 72 *Virginia Law Review* 447. See also Stewart (n 73) 73.

Enhancing the political accountability of transnational and domestic administrative bodies constitutes GAL's underlying concern.

Second, relating to this empirical assumption, GAL assumes a particular conception of the process in which a constitution, or, rather, a *national* constitution, is created. Questioning the constitutionalist approaches to the legal issues of global governance, GAL points to the traditional association of a constitution with a political community and a *demos*. Constitutions only materialize in political communities. Only when a *demos* resorts to its constituent power can it give a constitution to the political community in which it resides.<sup>107</sup>

Thus, assuming a conception of constitutionalism that is rooted in the idea of popular sovereignty, GAL rejects the call for global constitutionalism. This conception of constitutionalism echoes the French-American revolutionary tradition of constitution-making.<sup>108</sup> A constitution owes its legitimacy to the exercise of the constituent power by the people, i.e., the *demos*. The process that results in the making of a constitution is not only political in nature but is also to be separated from normal law-making processes.<sup>109</sup> For this reason, the GAL project denies itself any constitutional implications because there exists no separate process of global constitution-making from the global law-making processes in which *GAL norms* takes shape. Instead, it subscribes to the *prima facie* legitimacy of national constitutions in that they are perceived to have been conceived in the *demos*-centred political processes.<sup>110</sup>

To sum up, as a global political community remains elusive, if not lacking at all, GAL insists, there is no bestowing constitutional character upon the law resulting from the global law-making processes, even if *GAL norms* have functioned as a small-c constitution of global governance. In resisting the move towards global constitutionalism, GAL empirically assumes the effectiveness and legitimacy of existing national constitutions. Moreover, despite its self-consciously disavowing any constitutional claim, it implicitly accedes to a populist conception of constitutionalism, which associates the democratic process of constitution-making with the idea of popular sovereignty.

<sup>107</sup> See Krisch (n 8) 55–7.

<sup>108</sup> See *ibid* 41–4. See also Krisch (n 30) 252.

<sup>109</sup> See Krisch (n 8) 41–2.

<sup>110</sup> It is empirically questionable that most national constitutions can be attributed to a historical process of revolutionary constitution-making. Nevertheless, the conceptual dualism of constitution-making and normal law-making underlies constitutional theories. See Krisch (n 30) 252. See also Kuo (n 87) 345.



*Beyond the constitutional ambition of the conflicts-law approach: an emerging epistemic constitutionalism?*

In its attempt to resolve regime collisions resulting from the emergence of unconventional regulatory bodies and fragmented global governance, the conflicts-law approach sets itself apart from traditional conflict of laws by resting its own legitimacy on its claimed democratic character. As many commentators have already indicated, the conflicts-law approach re-orientates the apolitical, universalistic character of its nineteenth-century private international law predecessors by linking the conflicts of laws to the mediation of the conflicts between legal regimes.<sup>111</sup> On the one hand, Joerges traces the intellectual roots of the current conflicts-law approach to the nineteenth-century private international law theories of von Savigny as well as Joseph Story.<sup>112</sup> He subscribes to the view that private international law is oriented towards interstate co-operation and universalism with an eye to stabilizing individual expectations in international transaction.<sup>113</sup> Yet, he parts company with his nineteenth-century predecessors over the nature of private international law. Instead of resting private international law on ‘an apolitical *Gesellschaft*’, Joerges turns to Currie’s conflict of laws theory.<sup>114</sup> Through this realist lens, the choice between conflicting legal regimes is concerned with policy decision.<sup>115</sup> Thus, the conflicts-law approach deviates from the apolitical Savignian legacy. Rather, it regards the choice of legal systems governing the issue at hand as a matter of policy making in the tradition of legal realism, which is political in nature, rather than an articulation of universal norms.<sup>116</sup>

As a whole, Joerges re-characterizes the legacy of private international law by shifting focus from its universal claim to the steering of inter-regime relations to its functional role in providing a platform on which conflicts between legal regimes can be resolved.<sup>117</sup> Yet, departing from Currie’s seemingly nationalist position in favour of the law of the forum, the conflicts-law approach points to the factor of institutional design in the decisions regarding the choice of law.<sup>118</sup> Defying the legalist, even doctrinalist, view of conflict of laws, the conflicts-law approach claims to be rooted in

<sup>111</sup> See e.g. Joerges (n 12); Fisher-Lescano and Teubner (n 33).

<sup>112</sup> See Joerges (n 38) 312–13; Joerges (n 39) 346.

<sup>113</sup> See Joerges (n 39) 346.

<sup>114</sup> See *ibid* 346–7.

<sup>115</sup> See *ibid* 347–8.

<sup>116</sup> See Joerges (n 38) 312–15.

<sup>117</sup> See Joerges (n 13) 474–6.

<sup>118</sup> See Joerges (n 38) 314, 322.

democracy as it regards itself as providing a solution to the question of democracy deficit haunting the democratic form of nation states.<sup>119</sup> To drive this point home, Currie's nationalist position is reinterpreted in light of institutionalized democracy in nation states. The conflicts-law approach argues that Currie's preference for the law of the forum is not a reflection of nationalism. Rather, it suggests that in the world order underpinned by nation states, each state is assumed to be an equal democracy with the legislature/parliament as the principal political mechanism through which public opinions are channelled into policy making. Thus, in terms of democratic legitimacy, the forum court should choose the law of the forum, which is enacted by the domestic legislature, over foreign law.<sup>120</sup> In this way, Currie's seemingly nationalist strand of conflict of laws theory is treated as a legal response to the state of democracy at his time.

As noted above, however, the conflicts-law approach points out that the self-contained nation state has been eroded as a result of economic globalization. The decision-making mechanism as epitomized in the nation state does not control the effect of its policy choices, spilling over beyond its boundaries. This spillover effect of policy choices in the age of globalization defines contemporary legal conflicts.<sup>121</sup> For this reason, when private international law fulfils its traditional function in the mediation of legal conflicts, it also plays a role in the resolution of the democracy deficit rooted in the state-centred world order. To the extent that the three-dimensional conflicts law functions as the platform on which the democracy deficits of traditional national legal systems and their resulting conflicting external effects can be compensated, the conflicts-law approach takes on democratic character.<sup>122</sup>

Further along this line of thought, the central role of traditional national parliaments and their function in policy making are regarded as being eroded too.<sup>123</sup> As a consequence, parliaments are no longer superior to courts in terms of democratic legitimacy and thus there is no reason to assume that parliaments are better placed to resolve policy issues. Instead, Joerges suggests that through what he calls 'a discovery procedure of practice' underpinning the legal processes in resolving the conflicts of regulatory regimes in global governance, the conflicts-law approach is capable of lending legitimacy to the entities that exercise governance

<sup>119</sup> See *ibid* 318–22; Joerges, Kjaer and Ralli (n 12) 158.

<sup>120</sup> See Joerges (n 38) 314, 322.

<sup>121</sup> See Joerges (n 12) 467–76.

<sup>122</sup> See Joerges, Kjaer and Ralli (n 12) 158.

<sup>123</sup> See Joerges (n 12) 482.

authorities.<sup>124</sup> Under the conflicts-law approach, the institutional innovations in response to global governance as indicated in the three-dimensional conflicts law as well as courts will be chosen over other political channels as the desirable institution in addressing contemporary legal conflicts and the fundamental concerns of cross-border democracy deficit because of their superior democratic credentials.<sup>125</sup> Thus, in resolving the conflicts of regulatory regimes, conflicts law transmits legitimacy to those who exercise powers in global governance. Moreover, as the applicable law emerging from the confrontation, negotiation, and compromise between conflicting regulatory regimes in global governance is decided in accordance with conflicts law, the three-dimensional conflicts law further functions as the ‘law of law production’.<sup>126</sup>

It is here where the conflicts-law approach reveals its constitutional ambition. On the one hand, the law that steers global governance turns out to be the applicable law chosen in each exercise of conflict of laws decision. In this way, the three-dimensional conflicts law assumes the traditional constitutional function in governing law production. Moreover, committed to the normative principles of constitutionalism, conflicts law distinguishes itself from its intellectual predecessors by undergoing a deep process of constitutionalization as it rests more on normative values than on functional concerns.<sup>127</sup> Taken together, to the extent that conflicts law rests its mediating role in regime collisions on democratic concerns, the conflicts-law approach seems to realign the law with democracy. It is through this alignment of law and democracy that the three-dimensional conflicts law legitimately and normatively decides the law steering global governance and thus emerges as the prototype of transnational/global constitutionalism.<sup>128</sup>

However, a closer look at the conflicts-law approach reveals that its image of law more resembles that held dear by its nineteenth-century private international law predecessors, especially von Savigny, than embodies a democracy-rooted archetype of constitutional ordering. Based in the reality of the postnational world order, the conflicts-law approach does not rest its claim of democratic character on a transnational political community.<sup>129</sup> Rather, the conflicts-law approach acknowledges the emergence of different legal orders alongside national legal systems and

<sup>124</sup> See Joerges (n 39) 374.

<sup>125</sup> See Joerges (n 38) 320–1.

<sup>126</sup> See Joerges (n 12) 467–76; Joerges (n 39) 373.

<sup>127</sup> See Joerges (n 12) 481–2; Joerges (n 39) 372–3.

<sup>128</sup> See Joerges (n 12) 481–2.

<sup>129</sup> See *ibid* 486–8; Joerges, Kjaer and Ralli (n 12).

regards each legal system as resulting from the interaction of stakeholders involved.<sup>130</sup> In the eyes of the conflicts-law approach, the democracy deficit of traditional democratic mechanisms lies in failing its epistemic function of recognizing and responding to regulatory and other societal needs satisfactorily. Thus, the different institutional configurations of global governance as conceived by the conflicts-law approach are expected to compensate for the democracy deficit by providing the institutional platform in which regulatory needs can be adequately addressed with the input of required knowledge and information from epistemic communities concerned.<sup>131</sup> In each instance of conflicts law decision, within and without the court, it is a democratic imperative for the conflicts of law arrangements to take account of the interests of the stakeholders by maintaining the integrity of each legal regime in conflict. To this end, judges in the judicial proceedings and other players in extrajudicial conflict of laws settings have to weigh and balance interests and different factors in resolving legal conflicts without the integrity of each legal regime being prejudiced.<sup>132</sup> Moreover, weighing and balancing in each instance of legal conflict management is conducted with an eye to achieving justice ‘in the concrete operations in place’.<sup>133</sup> In this way, law finds democratic legitimacy within, not without, the legal system.

Looked at this way, the multiple epistemic communities (including the legal profession), which consist of stakeholders with different epistemic backgrounds and are in charge of steering the inter-regime relations in each instance of legal conflict management, judicial or not, are expected to act as the ‘organ’ of transnational democracy in the form of the mediation of legal conflicts.<sup>134</sup> Interestingly, this echoes the liberal reform of modern international law in the nineteenth century when it was proposed that a legal scientific institute be established as the “organ” of legal conscience-consciousness of the civilized world’.<sup>135</sup> According to Martti Koskenniemi, the centrality of legal academics as epitomized in the nineteenth-century

<sup>130</sup> Cf PF Kjaer, ‘The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law, and the Political in the Transnational Space’ (2010) *Wisconsin Law Review* 489, 527–8.

<sup>131</sup> See C Joerges, ‘Unity in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form’ in A Greppi and R Nickel (eds), *The Changing Role of Law in the Age of Supra- and Transnational Governance* (Nomos, Baden-Baden, forthcoming), available at SSRN <<http://ssrn.com/abstract=1723249>> accessed 27 January, 2013.

<sup>132</sup> Joerges implicitly acknowledges the roles of weighing and balancing in the conflicts-law approach. See Joerges (n 39) 370.

<sup>133</sup> See Joerges (n 12) 481, 496.

<sup>134</sup> See M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, Cambridge, 2001) 12–67.

<sup>135</sup> *Ibid* 43.

liberal reform of modern international law can be traced to the German historical school of law, particularly von Savigny.<sup>136</sup> As a reaction against the abstract rationalism of Enlightenment thought and as a critique against the legislating of comprehensive codes, von Savigny stressed, ‘Positive law lives in the common consciousness of the people’.<sup>137</sup> Moreover, Koskenniemi notes, ‘[t]he word “positive” here had nothing to do with recognition by each and every member of the *Volk*, nor with majority decision’. Rather, ‘it denoted a real, supra-individual historical process’.<sup>138</sup> What is important here is that this ‘organic theory’ was directed at ‘a renewal of legal scholarship’.<sup>139</sup> In other words, to von Savigny’s mind, the ‘*Volk*’ was ‘a cultural concept, an intellectual tradition and not an actual people’.<sup>140</sup> Thus, ‘a community was neither a raw notion nor a bundle of free-floating individuals but an institution and a history’.<sup>141</sup> It is here where the role of legal profession, academic lawyers in particular, comes into play. Under von Savigny’s view of the *volkish* law, the academic lawyers ‘stand in a reflexive relationship to the *Volk*; taking the law as they find it in a nation’s history and customs and exposing it in the codes they prepare for the nation’.<sup>142</sup>

In other words, as the principal holder of knowledge necessary to make sense of the *volkish* law, the Savignian community of academic lawyers serves as the prototype of the epistemic communities at the heart of the conflicts-law approach. Both acquire the epistemic sensitivity to the dynamics in which their object of knowledge evolves.<sup>143</sup> While the Savignian community of academic lawyers embodies the apolitical character of this universalistic *volkish* law, the epistemic communities underpinning the conflicts-law approach depart from the universalistic orientation of von Savigny’s private international law and instead brace themselves for the role of politics in the operation of transnational constitutionalism. Nevertheless, the image of law as revealed in the conflicts-law approach in conceiving of global constitutionalism heightens the positing of groups of stakeholders with the special epistemic discernment of their respective fields of knowledge, echoing von Savigny and his followers in the nineteenth-century liberal reform of modern international law.<sup>144</sup>

<sup>136</sup> See *ibid* 43–5

<sup>137</sup> *Ibid* 43.

<sup>138</sup> *Ibid*.

<sup>139</sup> *Ibid* 44.

<sup>140</sup> *Ibid*.

<sup>141</sup> *Ibid*.

<sup>142</sup> *Ibid* 45.

<sup>143</sup> See *ibid* 77, 183.

<sup>144</sup> Cf Joerges (n 12) 496.

If so, democratic aspirations of the conflicts-law approach seem to stand in stark contrast to populist constitutionalism in the French-American revolutionary tradition of constitution-making. Rather, its 'democratic' claim of constitutionalism evokes the epistemic conception of constitutionalism. In contrast to populist constitutionalism, the constitutional form of the conflicts-law approach takes the existence of non-state legal systems as its starting point instead of identifying an ultimate source of political authority.<sup>145</sup> Moreover, it ascribes democratic character to these already existing legal regimes in terms of their epistemic function. Instead of choosing between these legal orders with variances on their democratic character, the conflicts-law approach accepts the maintenance of the integrity of each legal regime in conflict as the baseline concept of postnational democracy and transnational constitutionalism. To substantiate these premises, the conflicts-law approach appeals to the mediating role of the law as the proxy of democracy.<sup>146</sup> In this way, the conception of constitutionalism conceived in the conflicts-law approach resolves the constituent power and its democratic implications into the application of the law, suggesting a version of constitutionalism based on an epistemic understanding of democracy.

*Political judgment and constitutional (un)ambition*

With respect to the constitutionalization of global governance, GAL and the conflicts-law approach stand in stark contrast: the former shows a kind of constitutional timidity, refusing to view global governance in constitutional terms; the latter's self-designated champion of transnational constitutionalism reeks of constitutional conceit. Moving beyond the surface of two opposite constitutional mentalities, the contrast between GAL and the conflicts-law approach reflects two distinct versions of constitutionalism: the former emerges against a background concept of constitution rooted in the tradition of populist democracy; the latter is based on an epistemic understanding of democracy. Neither version of constitutionalism gives full account of the constitutional condition of global governance.<sup>147</sup> Of course, neither GAL nor the conflicts-law approach

<sup>145</sup> This position seems to echo the legalistic conception of constitutionalism that regards a constitution as serving 'towards the legalization or juridification of the already existing [political order]' as the cases of England and Germany suggest. See C Möllers, 'Pouvoir Constituant—Constitution—Constitutionalisation' in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd rev. edn, Hart, Oxford, 2010) 169, 173.

<sup>146</sup> See Joerges, Kjaer and Ralli (n 12) 158.

<sup>147</sup> Cf C Möllers, 'Transnational Governance without a Public Law' in Joerges, Sand and Teubner (eds) (n 39) 329.

should be taken as aiming to provide a definitive answer to the issues surrounding global governance. Nevertheless, each stance suggests a particular political judgment on the state of global governance.

In the eyes of GAL, the perceived constitutional politics of global governance would be closely intertwined with the founding and re-founding of a political order, which is supposed to stand apart from politics of legal interpretation within the complex of legal systems in transnational regulation.<sup>148</sup> As a result, GAL disavows any constitutional ambition, while it is focused on the issue of accountability deficit overshadowing regulatory bodies in global governance. Moreover, GAL's distancing itself from the effort of constitutionalizing current global governance suggests its sceptical attitude towards the capacity of global politics to re-found the global political ordering on a constitutional basis. In other words, compared to its national counterparts, a global civil society that would underpin a global political community is judged as rudimentary, falling far shy of generating an order-founding political process.<sup>149</sup> On this view, 'constitution talks' about global governance is rhetoric at best. Even worse, it would distract attention from the reform effort to rein in global governance by the rule of law.<sup>150</sup> As a whole, from the vantage point of GAL, nation states remain the main arenas where political actions take place; a version of politics that is capable of transforming global governance into constitutional ordering remains elusive on the global scale.

If GAL's constitutional unambition implies the suspension of constitutionalizing the juridification of global governance, the conflicts-law approach displays the opposite. Calling for the constitutionalization of global governance, the conflicts-law approach entertains the judgment that the juridification of global governance without constitutional underpinnings would be vulnerable to the whims of world politics and global economy.<sup>151</sup> Accordingly, as part of the effort to reform the practice of global governance, the conflicts-law approach sets out to claim the mantle of leadership in global constitutionalism through its theoretical stance. With theoretical innovation, the conflicts-law approach believes that constitutionalism would thrive in the global legal landscape, resting

<sup>148</sup> In the nation state context, statutory law-making can also be regarded as the legislative interpretation of the constitution. See also WN Eskridge, Jr and J Ferejohn, 'Super-Statutes' (2001) 50 *Duke Law Journal* 1215. Cf L Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton University Press, Princeton, 1988).

<sup>149</sup> See Krisch (n 8) 58–61.

<sup>150</sup> See *ibid* 57–66.

<sup>151</sup> Cf M Amstutz, 'In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning' (2005) 11 *European Law Journal* 766.

global governance on solid normative foundations. In this way, the conflicts-law approach acts as the herald of a looming global constitutional moment.<sup>152</sup>

In sum, the contrast between GAL and the conflicts-law approach in regard to the constitutional question indicates their differing judgments on whether constitutionalization would play a positive role in the continuing reform of global governance. GAL's scepticism about the move towards global constitutionalism suggests its unease about how those state-embedded constitutional ideas can possibly be transposed to the pluralistic transnational settings; the conflicts-law approach's optimism about the constitutionalization of global governance results from its critical stance on the political institutions in national democracy.

## Conclusion

In the face of the fragmentation of the international legal order, various theoretical attempts have been made on the legal framework for global governance, aiming to provide legal unity in the emerging postnational space. As unity has been conventionally tied to a legal system resting on a constitutional foundation, the constitutionalization of the international legal system seems to suggest a quick solution to the fragmented global governance.<sup>153</sup> Yet, this constitutional solution raises questions too. At the heart of the constitutional question in global governance is whether we can imagine democracy beyond the nation state and thus project constitutionalism onto a globalizing political space. This is the context in which various theoretical positions on the future of global governance are situated.

With the state of global governance scholarship in mind, I have focused on GAL and the conflicts-law approach among the scholarly efforts to rest global governance on legal underpinnings. Characterizing the problem of global governance as the lack of accountability in regulatory bodies, GAL responds to fragmented global governance through legal management. In contrast, the conflicts-law approach attributes the issues surrounding global governance to the problematic design of democratic institutions in the nation state and thus turns to what it terms 'democratic juridification' as the solution to the inter-regime conflicts in global governance. As a result,

<sup>152</sup> Cf G Teubner, 'A Constitutional Moment? The Logics of "Hitting the Bottom"' in PF Kjaer, G Teubner and Al Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart, Oxford, 2011) 3.

<sup>153</sup> Cf S Picciotto, 'Constitutionalizing Multilevel Governance?' (2008) 6 *International Journal of Constitutional Law* 457, 461.



it seems natural that GAL disavows constitutional ambition with respect to global governance, whereas the conflicts-law approach expands on the feature of democratic juridification, envisaging the incubation of global constitutionalism in the form of a three-dimensional conflicts law.

While GAL and the conflicts-law approach seem to sit on the two sides along the divide of constitutionalization, I have indicated that in the event they reflect two distinct conceptions of constitutional thought. GAL's 'constitutional deficit' suggests its 'agnostic' attitude towards global constitutionalism but at the same time reeks of a constitutional vision rooted in the strong democratic tradition of populist constitutionalism. With no global *demos* in sight, GAL holds deep scepticism about the attempts to re-conceive global governance in constitutional terms. In contrast, the conflicts-law approach reflects a version of constitutionalism in which democracy is equated with the process in which conflicts between regulatory regimes can be resolved with the input of different epistemic communities, leading to the equal treatment of the regimes involved without stakeholders being prejudiced. As the question of fragmentation comes to the foreground in global governance, the three-dimensional conflicts law provides the platform on which transnational democracy takes shape, suggesting a prototype of constitutionalized global governance.

Despite their differing diagnoses of the issues concerning global governance and their opposing attitudes towards global constitutionalism, GAL and the conflicts-law approach agree that the legal theorizing of global governance plays a pivotal role in shaping up the global legal landscape. Also, both regard the future of global constitutionalism as pivoting on sound judgment of global governance politics. Yet, they differ in the relationship between legal theorizing and the broader political process beyond the political judgment of legal academics. GAL suggests that 'constitution talks' about global governance would distract attention from the reform effort to rein in global governance by the rule of law. As nation states remain the main arenas where political actions take place, a version of politics that is capable of transforming global governance into constitutional ordering remains elusive on the global scale. In contrast, the conflicts-law approach entertains the judgment that global governance cannot withstand the whims of world politics and global economy without resting on constitutional pillars. As part of the effort to reform the practice of global governance, the conflicts-law approach believes that constitutionalism will thrive in the global legal landscape with its theoretical innovation. Both attitudes reflect differing political judgments on the state of global governance and the future of democracy. Without

taking sides on the contention between GAL and the conflicts-law approach, my point is to shed light on what has been assumed and what has been rejected in these two approaches to the constitutional question in global governance. Only time will tell which view of democracy will prevail in the future global governance.

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