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BOOKS AND CLASSICS

Legalising inter-legality

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Abstract

This is a review of the edited collection of Jan Klabbers and Gianluigi Palombella, 'The Challenge of Inter-Legality' (Cambridge, 2019). It considers how the volume revisits the influential concept of 'inter-legally', introduced by the Portuguese sociologist Boaventura de Sousa Santos 35 years ago. The main focus of the review is an evaluation of the editors' innovative and extended attempt, supported by many of the contributions, to account for inter-legality not simply as a sociological phenomenon - an effect of the interpenetration of legal orders - but as an idea with its own specifically legal content. In so doing, the editors provide a new normative dimension to our understanding of contemporary legal pluralism on the global stage. It is important, however, to continue to recognise the limitations of any single juridical idea in contributing to our understanding of global (in)justice.

Keywords: law; inter legality; pluralism; global; European

1. Introduction: a crowded field

While some would argue that the gradual transformation of the largely state-centred legal world since the WWII to embrace a far greater range of orders – state and non-state, territorial and functional, public and private – and a more intense and complex set of overlaps and intersections between these orders, remains 'under theorized',[1] it certainly cannot be for the want of effort. There have been many monographs and collections in recent years that have sought to grapple with questions of 'law beyond the state', postnational law, global legal pluralism and transnational law, to name only a few of the flags under which this genre of research has flown.[2] If undertheorisation, nevertheless, remains an issue, it seems to be so on two counts, which are in some measure merely opposite manifestations of the same underlying puzzle. First, and most obviously, such is the bewildering variety of the phenomena confronted by the scholar of law beyond the state that theory has often either taken second place to rich description, or it is so concerned in doing justice to its subject matter that it becomes little more than rich description itself – unable or reluctant to abstract from the detail of the parts it seeks to illuminate.[3] In this regard, Jorge Luis Borges's famous story of the map of the empire that, in the court cartographers'

[1]G Swenson, 'Legal Pluralism in Theory and Practice' 20 (2018) International Studies Review 438–62.

[2]To pick just a few examples from the past year, we have seen two 1,000-page-plus handbooks on global legal pluralism and transnational law respectively, and another substantial collection similar in scale and ambition to the volume under review; see G Berman, *The Oxford Handbook of Global Legal Pluralism* (Oxford University Press 2020); P Zumbansen, *The Oxford Handbook on Transnational Law* (Oxford University Press 2021); N Krisch, *Entangled Legalities Beyond the State* (Cambridge University Press 2021).

[3]For a similar discussion of historical tendencies within EU legal theory, see N Walker, 'Legal and Constitutional Theory of the EU', in P Craig and G De Burca (eds), *The Evolution of EU Law* (3rd ed) (Oxford University Press 2021) chapter 4.

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quest to please the emperor with the precision of their craft, ends up being exactly the same size as the empire, comes all too readily to mind.[4]

Second, the fact that so many of the new postnational developments are still very much in train, and so many aspects of the new globalising law retain an 'intimated' quality – suggested, anticipated, incipient, fluid, their settled form not yet guaranteed, and so open to the influence of the more persuasive narrator or the more committed prophet – conditions theory-building.[5] It means that the act of theorisation, especially where the theory in question seeks an economy of insight that can somehow contain the kaleidoscopic variety of the new forms, often tends to be abstract and speculative, and so prone to neologism, and also quite heavily normatively engaged. The shifting and uncertain horizons of the new legal landscape, therefore, provide both constraint and opportunity – a limitation on what can be pinned down and presented as a stably verifiable and broadly persuasive account *and* a chance to stake a claim for the theorist's favoured way ahead – sometimes with its own bespoke brand and label. It is a combination that produces some interesting results but is not necessarily conducive to the steady accumulation of broadly endorsed theoretical knowledge.

It is against this background that Jan Klabbers, Gianluigi Palombella and their various collaborators have made their own ambitious and substantial contribution to the debate. They do so by returning to and reworking one of the older capsule ideas in the domain of postnational legal theory – albeit one that through relative neglect still carries the scent of neologism, namely 'inter-legality'. In approaching their task they certainly show a sensitivity to the difficulties of marrying high-level theoretical reflection to detailed empirical work, and so reconciling our two key problems of 'undertheorisation' in a single solution. The editors themselves are an interesting combination. While both have pedigree in this field of enquiry, they come from very different academic places; Palombella from legal theory *sensu lato* and Klabbers from international institutional law.[6] The other contributors, too, are well spread across the theory-doctrine spectrum, though the overall emphasis is on the latter. After a joint editorial introduction, Palombella is joined in a highly theoretical but relatively short opening section by Friedrich Kratochwil and Sanne Taekema. In a characteristically penetrating analysis, Kratochwil addresses the idea of 'responsibility', and shows how the highly particularising forms and forums of modern law struggle to assign responsibility in a manner that pays attention to 'inter' contextual as well as 'intra' contextual considerations. Taekema compares and contrasts 'closed' systemic and 'open' interactional – or 'product' and 'practice' – models of the legal system, and argues that it is only through combining these two aspects of law's ordering, and by prioritising the latter, that we can develop a dynamic account of the role played by considerations of inter-legality.

The middle section, 'Realities and Inter-Legality Questions', is, unsurprisingly, the most empirically grounded part of the collection. Samantha Besson, Dimitry Kochenov and Alberto di Martino consider how the perspective of inter-legality affects how we view three of the most prominent building blocks of a traditional state-centred legal configuration: jurisdiction; citizenship; and criminal law, respectively. In the economic field, Antonello Tancredi looks at trade and Panos Koutrakos looks at international investment law through the prism of inter-legality. In the environmental field, Laura Pineschi does likewise in respect of marine ecosystems, while Andras Sajo and Sergio Giuliano conduct a similar examination of European human rights law. A final section, 'Shaping Inter-Legality', while also located in particular contexts of action, possesses more

[4]In fact, it is discussed by Boaventura de Sousa Santos in the very essay where he introduced the 'interlegality' concept. See his 'Law: A Map of Misreading. Toward a Postmodern Conception of Law' 14 (1987) Journal of Law and Society 279–302, at 282.

[5]See N Walker, *Intimations of Global Law* (Cambridge University Press 2015).

[6]See, for example, J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009). G Palombella, *E Possibile una Legalità Globale? Il Rule of Law e la Governance del Mondo* (Il Mulino 2012).

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of the speculative theoretical qualities that we associate with wholesale attempts to evaluate and even influence a still emergent global tendency. Edoardo Chiti looks at the diverse range of inter-legal connections between different administrative systems, while Poul Kjaer develops a more general conception of global governance as producing a form of global law characterised by the prominence of 'connectivity norms'. Yuval Shanay examines the structural position and role of international courts and tribunals as 'inter-legality hubs', while Jan Klabbers addresses the potential of a virtue-based approach as an appropriate ethical starting point for the judges of these courts. Palombella concludes proceeding by setting out a 'general manifesto' for a revised project of inter-legality.

Each chapter repays close reading; all make serious efforts to relate their concerns to the general themes of the book. It is clear, however, that the best measure of the book, as an attempt at a general theoretical project that appreciates and seeks to address the pitfalls we identified earlier in this article, is the treatment it accords to its core concept. We will focus on three key parts of that treatment. First, what is inter-legality in the editors' revised understanding, and how does it differ from, relate to, and (perhaps) improve on other ways of thinking about the global legal landscape? Second, where does inter-legality come from and how does it acquire the properties that make it distinctively inter-legal? What, if any, plausible understanding of the pathway of late modern law substantiates and sustains the view put forward of inter-legality as a key developing theme? Third, what, if any, is the pay-off of our key concept in terms of our appreciation of the emergent properties of the global legal configuration as a whole? Does inter-legality provide much by way of distinctive explanatory or evaluative insight, or even prescriptive suggestion, as we go forward? Is it a sufficiently robust concept to justify the ambitions of the editors? To return to the underlying difficulty of gaining common theoretical purchase on such a vast and diverse range of materials, to what extent do the contributions of a diverse range of authors find and follow a common thread under the sign of inter-legality? Do their efforts to do justice to the various rich particularities of their fields dilute or vitiate the value of inter-legality as a master concept? And to the extent that this may be so, is it merely indicative of the limitation of any single candidate concept of this type?

2. What is inter-legality?

As is well known, the concept of inter-legality was coined by the Portuguese sociologist Boaventura de Sousa Santos in the late 1980s.[7] He argued that in order to locate 'interlegality' (unhyphenated) in our framework of understanding, and grasp its centrality, we must first get a handle on the changing meaning of legal pluralism.[8] In his estimation 'the key concept of a postmodern view of law',[9] legal pluralism, has evolved from the traditional anthropological perspective that focused on the co-existence of different legal orders, each conceived of as quite separate entities. In the later and more developed vision that de Sousa Santos favours, we have instead begun to think of legal pluralism as referring to the way in which 'different legal spaces (are) superimposed, interpenetrated, and mixed in our minds as much as in our actions'.[10] Our age is one of 'legal porosity, of multiple networks of legal orders forcing us to constant transitions and trespassings'.[11] Inter-legality, presented by de Sousa Santos as a second key concept of postmodern law, fits into this picture as the subjective dimension or 'phenomenological counterpart' of the new legal pluralism, referring to the agent's lived experience of the intersection of legal orders.[12]

[7]de Sousa Santos, "Law: A Map of Misreading".

[8]de Sousa Santos, "Law: A Map of Misreading", 298. I will not speculate as to the significance or otherwise of Klabbers and Palombella's insertion of a hyphen.

[9]de Sousa Santos, "Law: A Map of Misreading", 297.

[10]de Sousa Santos, "Law: A Map of Misreading", 297–8.

[11]de Sousa Santos, "Law: A Map of Misreading", 298.

[12]de Sousa Santos, "Law: A Map of Misreading", 298.

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For de Sousa Santos, as Klabbers and Palombella point out, the main significance of inter-legality so defined, and indeed its major pay-off, lies in its emphasising the scope for the legally implicated actor to choose otherwise; for 'the porosity of legal orders would allow people to pick and choose which legal order to employ, and typically, they would employ the one most attuned to their claims or grievances' (9). This might of course favour the well-resourced individual forum shopper with access to specialist advice. Yet, as Palombella reminds us, awareness of the porosity of legal orders can also allow space for the development of strategies 'of popular control from below; a kind of counter-instrumentalization' (374) through which collective movements can resist the comprehensive imposition of 'winner's authority' that we associate with closed legal systems.

Our editors have some sympathy with this general approach, but it is limited. On the one hand, they agree with de Sousa Santos's promotion of pluralism to the centre of the conceptual picture of global law, a move they see as involving the rightful marginalisation of dualism and monism. As the traditional rival approaches to the relationship between legal orders under the modern post-Westphalian configuration, dualism and monism – their rivalry notwithstanding – both presuppose hierarchy, separation and binary division as key underlying coordinates. Where dualism makes the states the masters in their relationship with international law, with the latter considered as quite a separate register of legality whose standing depends upon recognition by domestic state law, monism, according to the classic Kelsenian design, places international law at the apex of a single world order, albeit one in which there remains two, and *only* two, 'relevant legal spaces to consider; the international and the national' (11). According to pluralism, there are instead many different types of legal order, whether territorially in-between the national and the international, as in European or other regional economic or human rights law, or in specialist regimes in everything from internet regulation to the governance of climate change. As we have already noted, rather than separate and mutually indifferent orders, in the more mature pluralist picture sponsored by de Sousa Santos these orders are overlapping and interpenetrating. What is more, there is no pre-ordained hierarchy between the different orders, and no governing meta-rule to resolve any conflict. Rather, the framing and resolution of the issue will vary situationally, depending on the site or sites at which the issue arises and the perspective of the dominant actors operating there.

On the other hand, Klabbers and Palombella depart from de Sousa Santos's perspective in two related ways. The first is normative: the editors insist from the outset that the idea of inter-legality is to be taken seriously, pursued and nurtured because it '*recommends* something' that they are in favour of; namely, that we:

> approach the legal reality through a larger path, embracing the law as comprehensive and composite, understanding the normative complex as it surfaces through the circumstances and issues under consideration and awaiting (legal) justice. (2)

The key notion here is the idea of a 'composite' legality, and the editors are at pains to point out that we should make neither too much nor too little of this. On the one side, a composite legality does not imply some kind of general fusion or golden mean of the different normative considerations as they intersect from their different jurisdictional starting points. The idea of inter-legality as a composite structure does not involve 'a kind of appeal to natural law or to some grand theory of justice' (3), or even an invitation to defer to the version of such a theory subscribed to by the judge *in situ*. Equally, it is no friend of the kind of 'thick, monolithic version of constitutionalization, implicitly (and sometimes explicitly) based on global unity, on a worldwide convergence of values' (5), which in recent decades has gained considerable traction in certain quarters of the international law community. On the other side, however, a composite understanding of law's plurality promises something more than a mere disaggregated choice of approaches within an instrumental power game, so it should not offer the range of stark alternatives that encourage and reward forum-shopping, as tends to be envisaged within de Sousa

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Santos's approach. The relevant law covering a material situation poised between different legal systems should be more than a choice between positions taken by each of these different legal systems and understandable only in the terms of that system. Rather, it should be a *composition*, one that shows 'the relevance of – and the caring for – all the relevant normativities actually controlling the case' (3). Law can never entirely disregard the 'home' jurisdictional point of view, and we should not expect different jurisdictions, with their eyes on the same question, to come to the same perfectly blended result. However, we should expect particular forums and the systems that underwrite them to be aware of the perspectives of others and to develop measures or make decisions that are available to and capable of withstanding the 'critical scrutiny' (3) of others. Law suitably composed, may not be 'just' in any final and fundamental sense, but, in the words of the editors, it should at least be capable of offering 'a "more just" solution' (3).

This brings us to the second way in which the new position on inter-legality distances itself from that of de Sousa Santos. The difference is not just over what inter-legality *ought* to be and to provide, but also, and more fundamentally, over what inter-legality *is*. De Sousa Santos is interested in inter-legality only as a sociological phenomenon – as a belief or disposition of social actors. He makes no claims as to the legal standing of such beliefs and dispositions, and in this he works very much within the pluralist tradition. For even though pluralists reach beyond the binary and hierarchical assumptions, and – at least in some measure in the 'postmodern' version favoured by de Sousa Santos – also the separatist assumptions, of the dualists and the monists, they tend to retain the same underlying systemic mindset of these more traditional perspectives. That is to say, 'legality lives as a discrete segmental property' (378) of a particular order or system, and so what happens at the interface of different systems, cannot, or at least cannot clearly, be granted the character of law. If we take, for example, the debate over constitutional pluralism in the European Union (EU), we can see how something called 'law' proves stubbornly elusive at the margins between legal systems. We have either radical pluralism,[13] in which the substantive content of relations between the supranational and national systems is reduced to the realm of pure politics, the conclusions then formally validated independently (and inevitably non-identically) within each of the systems; or we struggle to find stable ground between the Scylla of general overarching, trans-systemic norms that threaten to form their own pluralism-eclipsing monistic legal 'system',[14] or the Charybdis of suggestions that actors at the interface behave in a manner that is law-*like*, but not actually legal, or in accordance with norms that are law-*like*, but not actually legal.[15]

Klabbers and Palombella want to make a stronger ontological claim – one that overcomes the silences and hesitations of the pluralists. This is that legality overflows the requirements of validity of the various discrete systems and attaches to the space of inter-legality itself. As Palombella trenchantly insists in his concluding chapter, 'from the perspective of inter-legality, *interconnectedness* is itself a *legal* situation' (378). In other words, when people think in ways that range *beyond* the normative boundaries of the legal system in which, for the purposes of the issue in question, they are enrolled as legal actors (whether as judges, lawyers or just as legally interested citizens), their doing so in order to take into account the 'legal' point of view of extra-systemic actors (who may either be other persons situated in another system, or even themselves recast as role players in another system) who are also affected by the material facts of the issue in question as identified within the 'home' legal system, such persons need not necessarily be considered to be *thinking and*

[13]For discussion, see, for example, N Walker, 'Reconciling MacCormick: Constitutional Pluralism and the Unity of Practical Reason' 24 (2011) Ratio Juris 369–85.

[14]As may be argued of the work of Mattias Kumm on general law-based values, see, for example, his 'The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law' 20 (2013) Indiana Journal of Global Legal Studies 605–28.

[15]As may be argued of Miguel Maduro's notion of 'contrapunctual law', see, for example, his 'Europe and the Constitution: What If This is as Good as it Gets?' in M Wind and J Weiler (eds) *European Constitutionalism Beyond the State* (Cambridge University Press 2003) 74.

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acting outside the law itself. Thinking outside the jurisdictional box, in other words, can still be *legal* thinking.

3. The legal properties of inter-legality

It is one thing to announce that interconnectedness is itself a legal situation, and so inter-legality is a form of legality. It is quite another thing to supply a persuasive defence of that proposition. One approach might be simply to hold that it becomes easier to make the argument for the capacity of inter-legality to embrace the more ecumenical and broadly responsive conception of legal practice that the editors believe to be a good thing if that capacity itself can be taken to be legally grounded and supported. But it cannot be a satisfactory argument – and certainly not a sufficient one – in favour of something actually being the case, that taking it to be the case would have (arguably) good consequences. We need an answer that reaches beyond this kind of wishful functionalism. Equally, given the editors' aversion to natural law or any other brand of legally consequential universalism as any kind of ruling paradigm, we must also seek an answer to the legality of inter-legality that looks beyond the idea of an overarching global law. Such an answer, avoiding both of these rabbit holes, is attempted by Palombella in his opening chapter, where he introduces the idea of 'legal formats'.

According to Palombella, legal formats refer to 'diverse structures, patterns . . . of legality whose birth is originally placed in different historical times' (23). The examples that he provides, which are not intended to be exhaustive, are 'law as Esprit', *ius gentium*, medieval law and global administrative law. Each format has a deep and complex history. None is the property of any particular writer, school or movement, though they may become closely associated with certain figures and labels. Instead, each format speaks to a resilient way of imagining the world of law and legal authority, more often implicitly assumed than explicitly articulated. Law as Esprit draws on the Montesquieuian idea of law as intrinsically relational, baked in with the very stuff, including local culture and the dynamics of political rule, that it is supposed to regulate. *Ius gentium* speaks to a sense of what our laws hold in common globally, whether as a matter of reason or consensus. Medieval law supplies the template for 'a complex legal universe in which the multiplicity of legal orders is managed through a series of peculiar paths ranging from case-centred interpretation of law to *aequitas* and a concrete focus upon justice' (30). Global administrative law refers to the recent development of a de-territorialised regulatory law, a 'flat body' of regulatory principles 'depending on a variety of horizontally ordered sources' (35). Theses sources should be thought of as a set of structurally similar administrative spaces made up of a proliferating range and combination of administrative bodies of various origins – domestic as well as international, private as well as public.

Crucially, for Palombella, these formats in their combination and interaction provide a deeper coding of law than can be supplied by any one of them individually. The different formats may have originated at different times, but they come to co-exist as distinct and sometimes rival ways of framing the law, with no one being dominant. So, today we find mixed together deep traces of the quasi-universalism of *ius gentium*, the enduring legacy of the holistic polity-particularism of the Esprit tradition as it became adapted to the sovereigntist claims of the modern state, hints of the loose multi-site coupling of medievalism in today's fragmented regional arrangements, and the newly deracinated and widely disseminated regulatory culture of 'glocal' administration. As Palombella puts it:

> The repeated and relentless interaction among these complex factors can better be understood as the simultaneous recirculation of formats of law that bear different ideal-type logics and natures, and resurface to contaminate each other, regardless of their date of origin, at a time when it is vain to try and impose one single paradigm. (24)

In all of this, the very idea of a legal system as a discrete and self-contained jurisdictional entity recedes somewhat. Rather than the only way of recognising and validating law, it becomes but one

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element present or absent in different ways and to differing degrees within each of the formats. It remains the governing idea in the state sovereigntist inheritance of the Esprit tradition, but is much less prominent in the other formats. And with this dilution of the significance of system-recognition as a measure of legality the most basic objection to considering that which takes place between or across and so *outside of* systems – the 'inter' dimension – as a form of legality disappears. More positively, the format approach, according to the editors, can actually help identify and explain the ways in which, and frequency with which, considerations of inter-legality arise. For just as our sense of legality is a product of the deeper code supplied by our interacting multiple formats, so too our sense of inter-legality speaks not only to our experience at the interface of systems, but also, and more profoundly, to how we comprehend and confront the recurring confrontation of different formats. Indeed, we can really only begin to think and act in inter-legal terms if we are aware that there *are* different ways of 'formatting' law and that no format enjoys automatic supremacy. If, for example, we thought that Esprit-inspired state sovereignty always prevailed, or alternatively, that an endorsement of *ius gentium* was indicative of the in-principle superiority of the global over the local norm, then we would invariably have a default answer to the question of which law takes priority in those places where laws intersect, and would not see the matter as one that required the cross-perspective sensibility and compositional skills of the inter-legally aware. Inter-legality, as Palombella pithily puts it, 'makes sense as inter-formats as well' (24).

4. The dividend of inter-legality

For anyone seeking to make sense of how we might think of law in a manner that does not reduce it to a system-dependent positivism or a universal moralism, and which can account both for continuities and discontinuities over the *longue durée*, the discussion of legal formats is genuinely interesting and provocative. The provocation lies not just in the overall downgrading of the contemporary significance of the idea of a legal system, but also, more generally, in the somewhat speculative specification of all the various formats as discussed, even if they are intended only to be exemplary rather than exhaustive. While the broad-brush and highly abstracted intellectual and cultural history required to engage in this exercise makes a measure of speculation inevitable, readers might still wonder why, for example, these particular categories rather than others are foregrounded, why the key formats are rooted quite so deeply in history, why the idea of medievalism, well-worn as a description of the 'complex geography'(30) of pre-modern plurality, is pressed further and endorsed as a relevant *legal* precursor of the postmodern, or why global administrative law is singled out for such special mention as today's outstanding new global format. Yet the analysis remains very suggestive, and its appeal is not confined to how it informs the question of inter-legality. But since the matter at hand concerns inter-legality, in this concluding section let us ask how we might cash the conceptual cheque of Klabbers and Palombella's new version, informed as it is by the deep cultural geology that the notion of formatting supplies.

In particular, let us ask two questions of the approach taken, both of which recall and address elements of the background puzzle of matching economy of theoretical insight to the considerable weight, diversity and open-endedness of evidence. In posing these questions, I assume a critical perspective, but this should not be read as a dismissal of the originality of the editors' approach or the informative value of the collection in general. Far from it, for in both respects the achievement is considerable. Rather, these comments should be read as speaking to the difficulty confronted by *any* approach that displays the kind of ambition shown by Klabbers and Palombella.

The second of these two questions, and challenges, concerns the relationship between foreground and background, between the punctuation of particular decisions, which provide the focal

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reference of the capsule concept of inter-legality, and the underlying general structure of law. We shall turn to that second concern after we have considered the punctuation points themselves. To what extent - and this is our first question - is the editors' understanding of how inter-legality should operate as a disposition of legal actors in particular cases actually borne out by the practice? Put more fully, to what extent do we find evidence on the ground of inter-legality, conceived of as a two-layered approach; as a system-situated response to the inter-connectedness of an issue under consideration that should take due cognisance of the perspectives associated with all other systems (and system actors) affected by the issue under consideration, and also, at a deeper level, as a way of overcoming 'some preconceptions attuned to [just one of] the formats [considered] separately' and instead able 'to make sense of, and cope with, their enmeshing and interplay' (25)?

At least since Dworkin, we have become accustomed to a style of constructivist theorising that treats the answer to the question of what is right or appropriate as a matter of law in any particular case as only in part based on the evidence of actual community practice, and in its other part based upon a regulative ideal.[16] It is an approach that trades precision and close empirical corroboration for dynamism and an aspirational trajectory. For Dworkin, the search for the right answer, the 'best fit' in terms of the legally coded morality of a community, is one that pays attention to past legal decisions and practices, but is never reducible to these. Instead, it treats these past efforts as, at best, provisional attempts to articulate and apply the moral principles of the community in an optimal way – an effort that must be continually renewed, refined and reconstructed as new factual situations emerge to challenge the received legal understandings of the day. This is an approach, therefore, whose plausibility, at least in its own terms, can survive evidence that practice often falls short of – sometimes even disregards – the ideal that supposedly is and continues to be considered the 'true' measure and ultimate point of that very practice. Yet it is also an approach that, just because of its relative freedom from empirical constraint, can attract the criticism that it becomes untethered from any independently verifiable standard of assessment.

Something similar may be at work in the approach of Klabbers and Palombella to inter-legality, and similar reservations may be voiced. The kind of composite treatment of issues at the interface of legal systems that they advocate for adoption in their efforts to legalise inter-legality is at best a work in progress. Indeed, in one sense the moral-epistemological challenge associated with inter-legality and its interlocutors is even greater than that associated with Dworkin's project and its key *dramatis personae*, the potential gap between practice and ideal even more profound. As Klabbers candidly concedes in his discussion of the virtues required of the judge of inter-legality, 'Dworkin's Hercules had it relatively easy: he was never asked to engage with more than one jurisdiction at the time' (362). It may have required all his superhuman understanding and patience for the domestic Hercules to deliver the right answer, but at least that right answer was integral to a single legal order. Would it not be so much harder for him to deliver from a position required to take account of multiple legal orders? One reasonable answer to that question, and to the charge that underwrites it, however, is that, as is clear from their introductory discussion, Klabbers and Palombella – and their more cosmopolitan Hercules – are not attempting anything as ambitious as searching for the right answer. The composite approach that they advocate is more about process than outcome, concerned with how decisions are reached rather than what decisions are reached. The goods that this approach champions are more the pragmatic virtues of reaching some measure of agreement among difference and finding a way of getting on and moving on together, than the high-bar epistemic virtue of finding the compellingly correct solution to a singular moral and practical problem.

Yet that answer might in turn invite two retorts. One is that in allowing such latitude, it becomes difficult to tell whether or to what extent the composite approach that the editors' advocate is being followed, and whether and to what extent the evidence adduced that it is being followed is in fact the sign of the gradual evolution of a common inter-legal sensibility. Much

[16]See, for example, R Dworkin, *Law's Empire* (Belknap Press 1988).

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case law at the margins between legal order is complex, notoriously so, and it is possible to read it in quite different ways. The multi-stage *Kadi* jurisprudence, considered by the editors and several of the contributors, offers one example. Concerned with the politically sensitive question of the freezing of financial assets in the fight against terrorism, in some of its forums and in some readings of the relevant decision-making this case reads as an instance of the failure to appreciate the interpenetration of EU law, human rights law, general international law and the regulatory output of the United Nations Security Council. But the story of the litigation is nuanced and open-ended enough to also offer succour to the inter-legality advocate set on finding green shoots. To take another example, the equally famous *Tadic* case before the Yugoslav Tribunal is often read as an example of the narrow self-referentiality of an international court somewhat complacent of its own authority. Yet there is an alternative reading, plausibly pursued by Palombella, (386–7), which instead sees the decision as example of a court simply assuming sufficient powers to make the kind of comprehensive judgement favoured by an inter-legal approach.

And if we move from individual decisions to broader jurisprudential tendencies, we see similar examples of the kind of diversity that might be read either as a healthy trend of inter-legality in action or as a failure to take inter-legal questions sufficiently seriously. Take, for instance, the chapters by Besson on state jurisdiction, di Martino on criminal law, and Sajo and Giuliano on the European Convention on Human Rights and human rights. Each provides penetrating analysis and supplies cogent conclusions about the overall tendency of the law. But, whereas Besson and di Martino warn against theories and practices that give too much credence to a unitary global conception of what is at stake and that accord too much weight to ways of organising the legal field against the particular perspectives and legitimate clams of different national sovereigns, Sajo and Giuliano's concerns are very much in the opposite direction, aimed at the corrosion of general human-rights values in the face of overdue deference to states' margin of appreciation. There is no doubt that each of these authors is alert to inter-legality's claim for a more composite approach to the difficult cross-systemic issues that arise in their fields, even if they might differ somewhat over how the optimal balance between the various orders, and the various order-framing formats, should be struck. But whether and to what extent the legal developments and judicial decisions that they report on and evaluate reflect a similar depth and nuance of understanding, and themselves display evidence of the spirit of inter-legality, is quite another matter.

A second retort to the claim that inter-legality is more about developing an awareness and respect for multivocality than reaching any particular outcome is more obvious, and can be made very briefly. For it is clearly the case that some of the key decision-makers who operate at the contested margins of different legal orders are not simply oblivious to concerns of inter-legality, or, perhaps, only indirectly opposed on account of a substantive commitment to an unduly one-sided view of matters. More than that, they are actually actively resistant to the kinds of other-regarding considerations that the perspective of inter-legality would champion. I write this in the very week that the Polish Constitutional Tribunal, its membership increasingly stacked in favour of a national government ideologically resistant to the supranational authority claims of the EU, has disavowed the juridical basis of these authority claims as they inhere in a conception of conditional supremacy that has been crafted and finessed over 60 years to take account of the interests both of the supranational whole and the national parts.[17] The aim of the Polish court is not to reboot inter-legality, or to adjust the balance within a composite approach, but flatly to reject it, or at least reject the kind of sensibility that would favour its more expansive sense of the horizon of debate. Just as there has long been a kind of myopic system-dependent positivism that would not merely disagree with the interpretive licence afforded to Dworkin's domestic

[17]See, for example, *Verfassungsblog*, 15 October 2021, 'Resolution No 04/2021 of the Committee of Legal Sciences of the Polish Academy of Sciences of October 12, 2021 in regard to the ruling of the Constitutional Tribunal of October 7, 2021', https://verfassungsblog.de/resolution-no-04-2021/.

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Hercules, but, provoked by the championing of his prominent role within the state constitutional order, would dismiss him as quite illegitimate, so too there is an attitude, ever more sharply drawn in these times of populist nationalism, that would and does react in similarly negative fashion to the sponsorship of Hercules's cosmopolitan cousin in the arenas of law beyond the state.

If we turn, finally, to the relationship of particular decisions to the background, general structure of the law, the inter-legality approach faces another set of questions. In some respects this is again an epistemic challenge, concerning what is known and what is knowable in particular contexts of decision. But it is also a capacity challenge, one that concerns the relationship between different levels of action and of analysis, and the ways in which moments of surface inter-legality reflect, and the extent to which – if at all – they can affect, the deep structure of legal and political relations from which they emerge. Otherwise put, whereas the first challenge we considered concerns the breadth of vision of the legal decision-maker, and whether a monistic perspective on the various surface legalities in play can be overcome, the second challenge concerns depth of vision, and whether the decision-making instance, even where an inter-legal sensibility might have been adopted, is capable of illuminating and bringing into play the deeper structure of law.

We have already noted that Kratochwil's chapter indicates how a partiality of perspective and disaggregation of responsibility function to limit the power of legal actors to hold power to account, never more so than today in a world of increasingly fragmented power structures and proliferating inter-legal margins. We are faced with a constant problem and an unending 'process of overcoming one-side angles'.(17) The further we look out and away from the angle of the immediate dispute – the focal point of the particular case – and towards the background structure of the whole, the less we see, the less direct our responsibility, the less we can affect things. But is this inevitable? Can we not, with the right theoretical tools, posit some kind of more robust relationship between the structural background and the immediate inter-legal presence, such that we can hold both in our grasp simultaneously? Might inter-legality provide or point us towards the right tools? There are three related difficulties facing any ambition of that sort, each of which I will briefly address with reference to one of the chapters in the collection. These are problems of complexity, of false analogy, and, finally, of abstraction.

First, the problem of complex particularity. This begins by our acknowledging the detailed diversity of the underlying structure of law, and noting that the way in which this background feeds and becomes written into live intersectional legal issues at the surface of legal debate and disputation follows no simple pattern of correspondence. Take the case of transnational administration. Considered as a summary representation of how law should deal with this burgeoning phenomenon – one that operates at the (inter-legality sensitive) margins of state or other international systems, global administrative law, as we have already mentioned, tends to flatten our understanding of the question of administrative power. It treats a range of different institutional arrangements as subject to similar sorts of issues and requiring similar forms of regulatory attention. If, however, we look to Edoardo Chiti's insightful analysis of the actual underlying transnational structures of administrative authority and the ways in which they operate in combination, we can see that such an approach might not fully capture the complexity of the challenge. He demonstrates how, depending on the sectors involved, the pattern of these relations of combination may be alternatively one of joint responsibility, or mere coordination of responsibilities, or even a conflict of responsibilities. These different relational contexts need quite different forms of inter-legal treatment as the various hard cases that they raise come to the surface.

The same point could be expanded across many sectors. As Nico Krisch has argued in his taxonomically insightful introduction to a recent volume on 'entangled legalities' (which can profitably

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be read as a companion to Klabbers and Palombella),[18] the ways in which different legal regimes come to be interlinked or enmeshed, often on an ongoing basis, involve a variety of actors, a variety of pathways (consensus, rational choice, resonance, coercion, etc), a variety of dynamics (gradual or disruptive), as well as of variety of legal forms (reception norms, overarching norms, straddling practices). The relationship between the structural background and the foreground legal forms is highly context specific. There would seem to be no general rules of translation that allow the latter to be read off from the former, or that show there to be an identifiable set of problems at the structural level to which the approach taken within certain surface legal forms offers any kind of general solution or response.

Is this conclusion without exceptions? The development of a certain type of analogical language to imply that inter-legality can sound not only at the intersecting surfaces of law but also at the general structural background level might suggest otherwise, but this is typically overstretched. Dimitry Kuchenov's idea of inter-citizenship as a general or background form of inter-legality is a case in point. The extension of particular citizenship rights, such as work and residence, outside the country granting the citizenship status, is an important development, and one of various aspects of post-Westphalian membership of political communities upon which Kuchenov has written in an interesting fashion.[19] But only in the loosest sense can this movement towards inter-citizenship be conceived of as a case of inter-legality *a la* Klabbers and Palombella. Inter-legality refers to the point of confluence of different legal orders, its focal interest – to repeat a point – being the representative norms of these different orders as they bear upon a particular legal situation. It speaks, therefore, to a form of legal overdetermination, in which a single composite effect is produced by multiple causes. Inter-citizenship, in stark contrast, is about multiple effects, a proliferation of citizenship rights, coming from a single citizenship status. Where the one refers to the meeting of different legal ideas at a border, the other addresses the mobility of the one legal idea across borders.[20]

A final and rather more promising approach to linking the inter-legal situation to background structural considerations would start neither by focusing on the detailed particularity of the structural background nor by seeking to reduce structure to some catch-all legal container such as citizenship. Rather, and more modestly, it would look for certain very general characteristics that may be common both to the background structure and the immediate case, and with regard to which we might imagine a relationship of mutual corroboration and reinforcement. This is the approach most closely associated with certain brands of transnational legal pluralism. These seek to find aspects of general value in the very idea of inter-systemic accommodation that also mark the disposition sought in every particular situation of inter-legality. Such accommodation is seen to be beneficial in respect of factors such as the overall balance of transnational power and the checking of unilateral jurisdictional excess, the encouragement of tie-breaking solutions or productive dialogue, and the equal recognition of different and diverse constituencies and their corresponding regimes.[21]

This way of fashioning a virtuous circle between the interactional and the structural is certainly hinted at by the editors in their introduction. Yet that such an approach, while valuable, also has its limitations, is most clearly conveyed in Poul Kjaer's chapter. In particular, his distinction between asymmetrical and symmetrical relations between different constituencies is instructive. It is a distinction that depends on their relative background power and the quality of the

[18]Krisch, *Entangled Legalities Beyond the State*.

[19]See, for example, D Kuchenov, *Citizenship* (MIT press 2019).

[20]A similar example of false analogy would be to treat the mobility of a certain framework of constitutional ideas across legal orders as an instance of inter-legality. On patterns of constitutional mobility, see, for example, M Neves, *Transconstitutionalism* (Hart 2013); R Dixon and D Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021).

[21]See, for example, N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press 2010) 285–96.

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connectivity norms through which legal ideas move between them. In the classical imperial and later colonial models such relations were characterised by sharp asymmetry in favour of empire. The connectivity implied by legal transplants went in only one direction. The sponsorship of many contemporary connectivity norms, focusing on the increased background prominence of human rights and other common constitutional values, instead aspires to a more symmetrical structure, and in principle offers supports to the various goods of equal mutual respect indicated by the pluralists. We should not, however, overstate the potential of this, for any wholesale endorsement of the benefits of a switch from asymmetry to symmetry in the general structure of legal relations abstracts too much from the real underlying terms of exchange and neglects continuing material inequalities. In Kjaer's own words:

> such perspectives cover up the paradox that the quest for symmetric global norms to date has been based on a profoundly asymmetric relationship, with the advocates of symmetry largely being located in a part of the world enjoying an asymmetrical structural position vis-à-vis the rest of the world. (318)

In other words, law, even the most egalitarian law, remains incapable of correcting underlying inequalities. For law's deep structure, its assemblage of formats, is in the final analysis not only legal in quality. Rather, the shifting background legal patterns remain tied to and coloured by other underlying material power relations in which profound reserves of economic, political and cultural capital remain in play. In its latest iteration provided by Klabbers and Palombella, inter-legality certainly gives us real insight into how we should identify and better treat the fault lines that emerge from that deep structure, but on its own it can do little to disturb the deep structure itself.

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