



Scientific

## CONSTITUTIONALISM DURING THE CLIMATE EMERGENCY: TOWARDS A LEGAL REALIST ACCOUNT OF TRANSNATIONAL LAW

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### ABSTRACT

While the regulation of sustainable growth and CO<sub>2</sub> emissions has become a transnational legal affair, the legal-theoretical implications of the climate emergency remain relatively under-researched. On the one hand, recent jurisprudence in human rights law has seen an increased sensibility for identifying environmental aspects of human rights, constitutional rights to environmental goods enshrined in half the world's states as well as a new trend towards identifying an autonomous environmental human right. On the other hand, constitutional scholars have articulated detailed accounts of how transnational legal pluralism is to be properly understood and managed as globalization and trade-liberalization create collective action spaces, observably regulated by constitutional principles, such as the rule of law, democracy and human rights. In this paper, I first survey the shortcomings of the principles of environmental law (Section 1) and discuss the nature and possibility of autonomous environmental rights (Section 2). Then, I disentangle competing conceptions of constitutional pluralism (Section 3), and argue for a legal realist conception of transnational law that can better deal with the climate emergency (Section 4).

Keywords: Constitutional pluralism, transnational law, environmental law, human rights, Legal Realism

### Introduction

In recent years, two trends have become increasingly apparent to legal scholars: the 'transnationalisation' of law and politics and the environmental degradation and harm caused by climate change. The lines between domestic and international law have become more blurred, challenging the state-centred, Westphalian model of sovereignty.<sup>1</sup> Indeed, as the distinction between private and public law becomes opaquer, 'legal hybrids' emerge, making law less coherent overall albeit leading scholars to think more deeply about the coherence of a particular body of law.<sup>2</sup> The challenge here for legal scholars is to make sense of transnational legal pluralism, i.e. the existence of overlapping and competing systems of law that push against unity

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<sup>1</sup> See Neil Walker, "The Idea of Constitutional Pluralism," *The Modern Law Review* 65 (2002): 317–59.

<sup>2</sup> Miguel Maduro, Kaarlo Tuori, and Suvi Sankari, *Transnational Law. Rethinking European Law and Legal Thinking* (Oxford: Oxford University Press, 2014), 11–58.

and hierarchy,<sup>3</sup> whilst safeguarding fundamental human rights on the one hand and claims of justice on the other hand. Three models of constitutional theory have emerged to tackle this first trend: an ‘institutional’ approach, stressing the self-referential nature of constitutional orders that interact against the backdrop of international customary law,<sup>4</sup> a ‘discursive’ approach, emphasizing heterarchy, conflict and discourse between systems,<sup>5</sup> and a global approach that envisions a disjointed but hierarchical system of constitutionalized norms under international law.<sup>6</sup>

Climate change has become a considerable issue for legal scholars, involving a reassessment of how to regulate negative externalities, human rights violations, food sovereignty and health security in an age increasingly devastated by human induced rises in water levels, temperature and natural catastrophes. Because of the dire need to tackle governance gaps, and due to the pressing transnational and global nature of the problem of global heating and the degradation of the planet, oftentimes at the expense of those worst off, it is better to refer to our current situation as a state of *climate emergency*.

Moreover, while the regulation of sustainable growth and CO<sub>2</sub> emissions has become a transnational legal affair, the legal-theoretical implications of climate justice remain relatively under-researched. Some synergies have been located between climate activism and constitutional discourse,<sup>7</sup> but the limits to tackling problems of law and problems of political theory seem to permeate the debate in both environmental law and constitutional theory. On the one hand, there is an emerging list of international treaties and relations that seek to regulate the climate emergency, influencing principles of international customary law albeit in a piecemeal fashion. Additionally, recent jurisprudence in human rights law has seen an increased sensibility for identifying environmental aspects of human rights, constitutional rights to environmental goods enshrined in half the world’s states<sup>8</sup> as well as a new trend towards identifying a distinctly environmental human right for humans and even for the environment itself. On the other hand,

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<sup>3</sup> Peer Zumbansen, *Transnational Legal Pluralism, Transnational Legal Theory*, vol. 1, 2010.

<sup>4</sup> See Neil MacCormick, *Questioning Sovereignty* (Oxford: Oxford University Press, 1999).

<sup>5</sup> Miguel Poiares Maduro, “Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism Miguel,” in *Ruling the World? Constitutionalism, International Law, and Global Governance*, ed. Jeffrey L. Dunoff and Joel P. Trachtman (Cambridge: Cambridge University Press, 2009); Miguel Poiares Maduro, “Three Claims of Constitutional Pluralism,” in *Constitutional Pluralism in the European Union and Beyond*, ed. Matej Avbelj and Jan Komárek (Oxford: Hart Publishing, 2012), 67–84; Miguel Poiares Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action,” in *Sovereignty in Transition*, ed. Neil Walker (Oxford: Hart Publishing, 2003).

<sup>6</sup> Antje Wiener et al., “Global Constitutionalism: Human Rights, Democracy and the Rule of Law,” *Global Constitutionalism* 1, no. 1 (2012): 1–15; Mattias Kumm, “Constituent Power, Cosmopolitan Constitutionalism and Post-Positivist Law,” *International Journal of Constitutional Law* 14, no. 3 (2016): 697–711; Mattias Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State,” in *Ruling the World?: Constitutionalism, International Law, and Global Governance*, ed. J. L. Dunoff and J. P. Trachtman (Cambridge: Cambridge University Press, 2009), 258–325; Mattias Kumm, “The Best of Times and the Worst of Times,” in *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010), 201–19.

<sup>7</sup> See, e.g., Aled Dilwyn Fisher, “Legal Pluralism and Human Rights in the Idea of Climate Justice,” *Oslo Law Review* 3, no. 03 (2016): 200–224.

<sup>8</sup> See Bridget Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects*, *Environmental Human Rights and Climate Change: Current Status and Future Prospects*, 2018, 41–43, 51–54.

constitutional scholars have articulated detailed accounts of how transnational legal pluralism is to be properly understood and managed as globalization and trade-liberalization create collective action spaces, observably regulated by constitutional principles, such as the rule of law, democracy and human rights. The interplay of combatting the climate emergency through law and the theoretical underpinnings of recent debates in constitutional pluralism will be the subject of this paper, specifically drawing on MacCormick, Maduro and Kumm's approaches to conceptualizing the transnational legal space.

In what follows, I address these questions by exploring the nexus between environmental law and constitutional pluralism. First, I survey the shortcomings of the principles and norms of environmental law (Section 1) and discuss the nature and possibility of autonomous environmental rights (Section 2). Then, I disentangle competing conceptions of constitutional pluralism (Section 3) and argue for a legal realist conception of transnational law that can better deal with the climate emergency (Section 4). My main argument is that a legal realist approach to constitutional pluralism can appropriately deal with environmental issues because it offers a theory of adjudication that can tap into the normative bias that judges are confronted with. I conclude with a summary and an outlook into future research.

## I. Principles of International Environmental Law

Turning to the shape of environmental law, it consists of norms and principles that are reflected in international law in general, i.e. either customary international law, treaty law, national law or scholarly commentary. Without embarking into a lengthy discussion of the sources of international law, it suffices to make the distinction between norms and principles that have been formally codified within a document and norms and principles that can be derived from "international custom, as evidence of a general practice accepted as law" as stated in Article 38b, *Statute of the International Court of Justice* (1945). While the latter is a written document, binding a state party to the treaty to the norms and principles coded in the document, the former reflects unwritten rules that bind states based on custom. This distinction is important here because the legal instruments available to the environmental lawyer are very limited. Kravchenko et al. discuss five major norms and principles that guide international environmental law: sustainable development, the precautionary principle, the polluter pays principle, intergenerational equity and access to information/participation.<sup>9</sup> Indeed, they are partially contested but serve nonetheless as the foundation for progressing environmental regulation.

### I.1. The principle of sustainable development

During the negotiations for international environmental coordination in the 1980s, as sketched above, a growing discourse emerged surrounding the concept of 'sustainable development'. The concept was first given legitimacy through the *Brundtland Report* (1987), which was adopted by the *World Commission on Environment and Development*, defining sustainable development as "development that meets the needs of the present without compromising the ability of future

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<sup>9</sup> Svitlana Kravchenko, Tareq M.R. Chowdhury, and Md Jahid Hossain Bhuiyan, "Principles of International Environmental Law," in *Routledge Handbook of International Environmental Law*, ed. Shawkat Alam et al. (New York: Routledge, 2013), 43-60.

generations to meet their own needs”.<sup>10</sup> Two features are important to note here, as regarding international norms and principles of environmental law: the focus on future generations and on human needs. This focus on a future as shared by the global community as well the primary importance of current human needs made it both accessible and generalizable. While the terminology was also part of the discourse in the *Rio Declaration* and the Sustainable Development Goals (SDGs) in the 1990s, its legal status is contested, precisely because it entered law by means of custom. Kravchenko et al. argue that, on the one hand, it may have achieved (or be in the process of achieving) the status of customary international law because sustainable development is now considered a normative principle that concerns all states.<sup>11</sup> The principle that is being recognized consists in furthering development strategies that are commensurate with sustainability principles, i.e. SDGs. However, on the other hand, there is still a very loose consensus on whether sustainable development is indeed established customary law, although this may change as it becomes increasingly important for states to respect the environment considering scrutiny by the international community.<sup>12</sup>

Moreover, *Gabčíkovo-Nagymaros*<sup>13</sup> at the International Court of Justice (ICJ) in 1997 is a quite illuminating case at hand. This case concerned a dispute between Hungary and Slovakia over the construction of a cross-border dam system on the Danube that aimed to protect the region from dangerous flooding. However, as Hungary became aware of the economic and ecological effects of building the dam, which included pollution and the possible destruction of an important water reservoir, it suspended construction and pulled out of their agreement with Slovakia. The Court held that Hungary could not pull out of the project, but it asserted that the parties “should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant”.<sup>14</sup> The reasoning here was that although Hungary was not legally entitled to pull out of their agreement, there were significant environmental concerns that needed to be balanced to find a “satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river”.<sup>15</sup> Strikingly (as regards the status of the principle of sustainable development), Judge Weeramantry argues in his separate opinion that the major legal issue at stake concerned the principle that enabled the Court to hold the “balance even between the environmental considerations and the developmental considerations raised by the respective Parties”.<sup>16</sup> As he went on to argue, this principle was the ‘principle of sustainable development’ that “is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community”.<sup>17</sup>

## I.2. The precautionary principle

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<sup>10</sup> Gro Harlem Brundtland, “‘Our Common Future’: Report of the World Commission on Environment and Development” (United Nations, A/RES/42/187, 1987).

<sup>11</sup> Kravchenko, Chowdhury, and Bhuiyan, “Principles of International Environmental Law,” 44.

<sup>12</sup> *Ibid.*, 45.

<sup>13</sup> *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment of 25 September 1997, I.C.J. Reports (1997).

<sup>14</sup> *Ibid.*, 78.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Advisory Opinion of 25 September 1997, I.C.J. Reports, Separate Opinion of Vice-President Weeramantry (1997), p. 85.

<sup>17</sup> *Ibid.*, 95.

A perhaps more established principle in international environmental law is the precautionary principle. This principle was first advocated as a political concept in West Germany in the 1970s, i.e. the *Vorsorgeprinzip*, but has since become established in both ‘soft law’ instruments, e.g. the *Rio Declaration*, as well as in ‘hard law’, e.g. the United Nations Framework Convention on Climate Change (UNFCCC) and European Union law.<sup>18</sup> The principle states that while the lack of scientific research may not give states clear solutions to environmental problems, positive action must be taken to ensure environmental protection in anticipation of harm. The idea here is that the lack of scientific consensus on the extent of ecological harm or human health should not be used to prevent the protection of life in the face of danger. It is similar to a positive obligation in so far as it requires states to take precautionary measures to minimize environmental harm even if the scientific consensus is scant. Cameron locates the emergence of this principle in the language and discourse used to highlight the importance of precautionary measures, the application of the principle in practice, and the implementation of the principle into national law.<sup>19</sup> At the *Second International Conference on the Protection of the North Sea* (1987), the parties, consisting of all Northern European countries with access to the North Sea, agreed to accept this principle. The notion here was that if there was reason to believe that substances or technologies employed in the region were suspect of “harmful effects on the living resources of the sea” the states should implement protective measures “even where there is no scientific evidence to prove a causal link between emissions and effects”.<sup>20</sup> Hence, the principle underpinned the Conference’s aspirations and can thus be understood as customary international law.

Reference to the European Union context is helpful here to understand how this emergence, from discourse to international practice to implementation in formal law, played out. As we saw, the principle became part of various international legal documents that were considered soft law (most specifically the *Rio Declaration* and the *Agenda 21* define it), and it is now slowly emerging as international customary law. Many national legal orders have implemented the principle in formal law. Article 191 Treaty on the Functioning of the European Union (TFEU) explicitly states the precautionary principle, directing policy “at a high level of protection taking into account the diversity of situations in the various regions of the Union” but more elaborately defines it in a later Commission Communication (COM/2000/0001). Here, the precautionary principle falls within a structured approach to risk management: “when there are reasonable grounds for concern that potential hazards may affect the environment or human, animal or plant health, and when at the same time the available data preclude a detailed risk evaluation, the precautionary principle has been politically accepted as a risk management strategy in several fields”.<sup>21</sup>

In the *Alpharma v. Council* case,<sup>22</sup> the Court of Justice of the European Union (CJEU) included explicit reference to the precautionary principle as grounds for protecting public health concerns over economic considerations. This case concerned an American manufacturer of antibiotics

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<sup>18</sup> Kravchenko, Chowdhury, and Bhuiyan, “Principles of International Environmental Law,” 46.

<sup>19</sup> See T. O’Riordan and J. Cameron, *Interpreting the Precautionary Principle* (London: Earthscan Publications Ltd., 1994), 263.

<sup>20</sup> See “Second International Conference on the Protection of the North Sea” (London, 24-25 November, 1987).

<sup>21</sup> Communication from the Commission on the precautionary principle, (COM/2000/0001), 2 February (2002).

<sup>22</sup> CJEU, T-70/99, *Alpharma v Council*, 11 September (2002).

that challenged a Directive that prohibited using their antibiotics in treating animals. While Alpharma complained that the measures taken were disproportionate in the face of lacking scientific evidence regarding that specific antibiotic, the Court argued that there was a well-established link between the use of antibiotics and the emergence of antibiotic resistant bacteria, which pose a significant public health risk. Although there was indeed an ongoing scientific discussion about the actual effect of antibiotics used in feeding animals, the Court dismissed the company's claims by arguing for the precautionary principle. It defended the measures taken by stating that "such an approach, which sought to ensure that the risk of a transfer of resistance would not become a reality, was consistent with the precautionary principle, under which a public authority may be required to take action even before adverse effects have become apparent."<sup>23</sup> This judgement is a noteworthy development of environmental law because it puts priority on human needs and health rather than economic interests in the face of lacking scientific evidence.

### I.3. The polluter pays principle

Under EU law as well as in other legal orders, the precautionary principle is often described in conjunction with the polluter pays principle. This principle consists in making those responsible for the pollution pay for the damages incurred. This requires distinguishing between 'polluter' and 'user', who both may be considered responsible for the pollution.<sup>24</sup> Oftentimes, a company that is identified to pollute the environment in the course of producing a product will be held primary accountable while the fluctuations in prices after the event fall on the user of the product. Thus, consumers indirectly pay for the pollution as well as the costs become internalized in the prices of the product. In international law, the principle can be considered a customary law as well. Mentioned in soft law instruments, such as the *Rio Declaration*, and also in hard law instruments, such as the *Convention on the Transboundary Effects of Industrial Accidents* (1992). In the latter Convention, the principle is explicitly mentioned as a principle of international customary law alongside other recognized customs, e.g. "good-neighbourliness, reciprocity, non-discrimination and good faith".<sup>25</sup>

One example from the vast case law making use of this principle is the 'Erika oil spill', which involves an oil tanker that sank off the coast of France in 1999. In the *Commune de Mesquer v. Total France SA* case,<sup>26</sup> the Court considered three questions in a preliminary ruling: It considered the correct interpretation of "waste" under Directive 75/442, whether the damage to the ecosystem was born out of the waste and whether national courts can consider the company liable for the waste that was created. First, the Court asserted that the oil could not be considered waste before the oil spill occurred. This is important because it upheld that oil cannot be considered waste before an accident occurs, contaminating the region. This reasoning allowed the Court to interpret waste restrictively as "a substance or object has been discarded or of an intention or requirement to discard it".<sup>27</sup> But in the treatment of the second question, the Court held that the oil can be considered waste after the accident, and therefore the oil that

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<sup>23</sup> *Alpharma v Council*, §355.

<sup>24</sup> Kravchenko, Chowdhury, and Bhuiyan, "Principles of International Environmental Law," 50.

<sup>25</sup> "Convention on the Transboundary Effects of Industrial Accidents Is a United Nations Economic Commission for Europe" (Helsinki, 17 March, 1992), 461.

<sup>26</sup> CJEU, C-188/07, *Commune de Mesquer v Total France SA and Total International Ltd.* [GC], 24 June (2008).

<sup>27</sup> *Commune de Mesquer v Total France SA and Total International Ltd.*, §41.

contaminated the water are “to be regarded as substances which the holder did not intend to produce and which he ‘discards’, albeit involuntarily”.<sup>28</sup> While this may seem inconsequential, it allows for the polluter pays principle to kick in. Thus, the third question was answered by upholding the polluter pays principle, allowing for the costs for disposing of waste to be borne by the holder of the waste as well as previous holders from which the waste came.<sup>29</sup> This meant that the company was liable for the waste because the “seller-charterer contributed to the risk that the pollution caused by the shipwreck would occur, in particular if he failed to take measures to prevent such an incident, such as measures concerning the choice of ship”.<sup>30</sup> This allowed the national court, in this case a French one, to hold the company criminally liable for the waste and they were fined for almost 400.000 euros and had to pay damages to the extent of 2 million euros.<sup>31</sup> The lesson that can be learned from this episode is that the Court references the polluter pays principle not only as enshrined in Union law (i.e. the implementation of international environmental law), but also with reference to international customary law, from which the principle receives its legitimacy.

#### I.4. Intergenerational equity

A fourth principle of international environmental law is established as far back in time as the *International Convention on the Regulation of Whaling* (1946). Along with other legal instruments, as varied as the *Brundtland Report* and the UNFCCC, reference is widely made to “protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities”.<sup>32</sup> This falls under Article 3 of the convention, i.e. ‘principles’. This latter aspect is of some importance here because the UNFCCC explicitly insists that developing countries should ‘take the lead’ in combatting climate change as justified by the protection of future generations.<sup>33</sup> Within this context, it may also be considered an important aspect of state’s individual legitimacy to protect future generations in the face of climate change. In practice, however, this may be a difficult principle to invoke in a substantive way, but it expresses a duty of care for future generations that can complement the other principles when establishing that an injustice has occurred.

An interesting case to be mentioned very briefly regards another highly relevant area of environmental law, namely the effects of nuclear weapons and nuclear power plants on the environment. In an advisory opinion at the ICJ on the “Legality of the Threat of Use of Nuclear Weapons”, the Court sought to answer the question ‘Is the threat or use of nuclear weapons in any circumstance permitted under international law?’. While I cannot go into the facts of this case here, or the depth of the judgment, it suffices to discuss the intergenerational aspects of the opinion. The Court acknowledges that nuclear weapons are a threat to the environment. But they go further in their reasoning, drawing on the principle of intergenerational equity: “The

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<sup>28</sup> *Commune de Mesquer v Total France SA and Total International Ltd.*, §59.

<sup>29</sup> *Commune de Mesquer v Total France SA and Total International Ltd.*, §12.

<sup>30</sup> *Commune de Mesquer v Total France SA and Total International Ltd.*, §78.

<sup>31</sup> See “‘Erika’: La Cour de Cassation Confirme La Condamnation de Total,” *Le Monde*, 2012, (accessed on: 1 July 2019), [https://www.lemonde.fr/societe/article/2012/09/25/la-cour-de-cassation-confirme-la-condamnation-de-total-dans-le-nauffrage-de-l-erika\\_1765467\\_3224.html](https://www.lemonde.fr/societe/article/2012/09/25/la-cour-de-cassation-confirme-la-condamnation-de-total-dans-le-nauffrage-de-l-erika_1765467_3224.html).

<sup>32</sup> “United Nations Framework Convention on Climate Change” (Rio de Janeiro, 3-14 June, 1992), §3.1.

<sup>33</sup> *Ibid.*

Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”<sup>34</sup> They conclude that there exists a general obligation for states to make sure that activities in their respective jurisdiction “is now part of the corpus of international law relating to the environment”.<sup>35</sup> This is a crucial judgement because it further entrenches the status of international environmental law as custom, making intergenerational equity a viable principle in protecting the environment.

### **I.5. Access to information/participation**

Finally, I turn to a less accepted principle of environmental law that only has recently received legitimacy as part of international law. In the *Rio Declaration*, the principle of public participation and deliberation in environmental decision-making processes is expressed.<sup>36</sup> While this principle is more procedural in nature, i.e. requiring legal systems to ensure “access to information, public participation and access to justice”,<sup>37</sup> it still forms a very important part of environmental law. Indeed, this principle is entrenched in *International Covenant on Civil and Political Rights* (1966), requiring that states ensure that citizens participate in public deliberation, to vote in elections and have access to public service in the country.<sup>38</sup> The connection to environmental law becomes clear when we consider the kind of information that is needed by a public to deliberate properly on the extent or risk involved in measures taken that could harm the environment. While this principle is less clear than, say, the polluter pays principle, it is nonetheless consequential: by connecting procedural rights with a general requirement for states to prepare assessments of the impact that policy measures will have on the environment and make them accessible to the public.

A noteworthy case at the ICJ is the 2010 *Pulp Mills* case,<sup>39</sup> which may seem to have had a suboptimal outcome, but notwithstanding may be considered a landmark case in terms of the Court’s reasoning. Leaving the importance of diplomatic and political struggles aside for now, the case involved a dispute between Uruguay and Argentina concerning the extent to which a pulp mill in Uruguay was polluting the transboundary river, which is shared with Argentina. Argentina charged Uruguay with breaching a 1975 Statute that sought to regulate this shared body of water. Argentina claimed that the mills would lead to transboundary pollution that violated the Statute. Ultimately, the Court concluded that Uruguay had not breached the Statute because evidence was lacking to support the claim that the country had polluted the river or not acted in a manner that would have prevented the pollution of the river. I leave the political dimension of the dispute and the aspect of factual evidence aside because the reasoning of the Court as regards environmental law and its principles is far more illuminating. The Court held that the two countries had legal obligations under Article 41 of the 1975 Statute to protect and preserve the

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<sup>34</sup> *Legality of the Threat or Use of Nuclear Weapon*, Advisory Opinion of 8 July 1996, I.C.J. Reports (1996), §29.

<sup>35</sup> *Ibid.*

<sup>36</sup> Kravchenko, Chowdhury, and Bhuiyan, “Principles of International Environmental Law,” 58.

<sup>37</sup> *Ibid.*

<sup>38</sup> UN General Assembly, “International Covenant on Civil and Political Rights” (16 December, 1966), Art. 25.

<sup>39</sup> *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment of 20 April 2010, I.C.J. Reports (2010).

environment “with respect to activities which may be liable to cause transboundary harm” and “carry out an environmental impact assessment”.<sup>40</sup> This latter aspect is crucial because the Court subsequently justified the practice as a part of international customary law that “may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource”.<sup>41</sup> If we now connect this general principle of international law to produce risk assessments and impact evaluations with the principle of participation, access to information and access to justice, we have a highly influential international environmental norm on our hands: the general requirement of states to make impact assessments available to the public and include them in the deliberation and decision-making process surrounding the environment.

## II. On the Possibility of Environmental Rights

In this section, I map out the nexus of environmental rights, which come in three variants: a) human rights with an environmental aspect, b) constitutional rights, and c) a human right to ‘the environment’. As we will see, the research on these kinds of rights is relatively recent. As regards the second type of rights (constitutional rights), less than half of the world’s countries exhibit these sorts of rights. However, before turning to the exploration of the scope and implications of this kind of environmental law, I wish to preclude my analysis with a word on ‘human’ rights versus ‘constitutional’ rights because “despite the tremendous appeal of the idea of human rights, it is also seen by many as lacking in foundation and perhaps even in reason and cogency”.<sup>42</sup>

Human rights are considered special interests that are protected under international law with a variety of important, legally binding documents. At the most basic level, rights are the manifestation of certain social norms<sup>43</sup>, principles of personal desert<sup>44</sup>, or so-called ‘incidents’<sup>45</sup> that involve the institutionalization of claims, powers, immunities and privileges.<sup>46</sup> On the one hand, many legal scholars are optimistic about human rights, deriving the existence of these rights from a universal morality of human rights law,<sup>47</sup> which is a commitment that may be found in the *Universal Declaration of Human Rights* where the states party to the United Nations (UN) recognize the “inherent dignity and of the equal and inalienable rights of all members of the

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<sup>40</sup> *Pulp Mills on the River Uruguay*, §204.

<sup>41</sup> *Ibid.*

<sup>42</sup> Amartya Sen, “The Global Reach of Human Rights,” *Journal of Applied Philosophy* 29, no. 2 (2012): 91.

<sup>43</sup> Raymond Geuss, *Philosophy and Real Politics* (Princeton: Princeton University Press, 2008), 60.

<sup>44</sup> Joel Feinberg and Jan Narveson, “The Nature and Value of Rights,” *The Journal of Value Inquiry* 4, no. 4 (1970): 245.

<sup>45</sup> Wesley Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” *The Yale Law Journal* 23, no. 1 (1913): 30.

<sup>46</sup> It is not my intention to engage with different theories of rights, such as interest-based or will-based theories. However, for a more detailed discussion of the nature of rights and the relation between claims, powers, immunities and privileges, please see: Leif Wenar, “The Nature of Rights,” *Philosophy & Public Affairs* 33, no. 3 (2005): 223–52.

<sup>47</sup> See, for a moral account, John Tasioulas, “Towards a Philosophy of Human Rights,” *Current Legal Problems* 65, no. January (2012): 1–30, <https://doi.org/10.2139/ssrn.2556016>.

human family is the foundation of freedom, justice and peace in the world”.<sup>48</sup> The notion here for many scholars is that human rights are “universal, egalitarian, categorical and individual rights”<sup>49</sup> that are mobilized transnationally and can be claimed by any human in the world.

On the other hand, there are sceptics who do not believe in a universal human rights morality but favour a ‘political’ or ‘practical’ approach that attends “to the actual practice of human rights and not assume that it must have philosophical foundations”.<sup>50</sup> Here, Raz prominently argues that human rights are just constitutional rights that demarcate the limits of state sovereignty, giving states a “defeasibly sufficient ground for taking action against violators in the international arena”.<sup>51</sup> In this sense, what differentiates ‘human’ rights from constitutional rights is a political motif that structures international relations and interference in other states’ jurisdictions. Constitutional rights are individual rights guaranteed within a framework of the rule of law. Taken in this light, constitutional pluralism allows us to view human rights as special individual rights that are protected in an increasingly transnationalised and fragmented legal system that spans the globe, while requiring a political determination to normalize the human rights discourse.<sup>52</sup>

Finally, it is important to mention that it is widely held that there are three generations of human rights: 1) political and civil, 2) social and economic, and 3) cultural rights. The most important legal documents include the *International Covenant on Civil and Political Rights* (first generation), the *International Covenant on Economic, Social and Cultural Rights* (second generation) and, e.g. the African Commission on Human and Peoples Rights (ACHPR) or UNFCCC (third generation). While political and civil rights, which include rights like the right to life and the prohibition of torture, are forcefully protected *legally*, social and economic rights, such as the right to work or the right to education are more important in *social policy*. Finally, third generation rights that belong to the community are the most recent addition, and they find articulation especially in environmental or developmental issues. In face of legal pluralism, many different regional human rights instruments have emerged, including the European Convention on Human Rights (ECHR), which supplements first generation and second generation human rights, the Inter-American Commission on Human Rights (IACHR), which (as we shall see) has recently developed third generation rights in a novel way, and ACHPR that most explicitly aims to safeguards all three generations of rights. I will look at three types of human rights that are relevant under environmental law.

## II.1. Human rights with an environmental aspect

On a first front, we are concerned with human rights, such as the right to life or the right to family life, that have been interpreted to have an environmental aspect. Here, I shall focus on the jurisprudence of the regional constitutional setting of the ECHR, drawing attention to the scope of Article 8, the right to respect for private and family life.

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<sup>48</sup> UN General Assembly, “Universal Declaration of Human Rights Preamble,” *United Nations Declaration of Human Rights*, 1948, 1-8.

<sup>49</sup> Georg Lohmann, “Different Conceptions and a General Concept of Human Rights,” *Fudan Journal of the Humanities and Social Sciences* 8, no. 3 (2015): 370.

<sup>50</sup> Allen Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013), 51.

<sup>51</sup> Joseph Raz, “Human Rights without Foundations,” in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford: Oxford University Press, 2010), 328.

<sup>52</sup> Raz, 337.

In the *López Ostra v. Spain* case,<sup>53</sup> the applicant complained that the state failed to protect her Art. 3 right to the prohibition of torture and her Art. 8 right to family life. The applicant alleged that the Spanish government neglected to take action against dangerous gas fumes that were being emitted by a local leather plant, even though the local authorities had been made aware of the danger on multiple occasions. While the Court rejected any violation of Art. 3, it reasoned that the “hydrogen sulphide emissions from the plant exceeded the permitted limit and could endanger the health of those living nearby and that there could be a causal link between those emissions and the applicant’s daughter’s ailments.”<sup>54</sup> Although the reasoning strongly resembles other case law, such as in the *Oneryildiz v. Turkey* case<sup>55</sup>, concerning a gas explosion that killed multiple individuals in Istanbul, the Court included in their reasoning an environmental aspect to this human right: “severe environmental pollution may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.”<sup>56</sup>

Similarly, in the *Guerra and Others v. Italy* case,<sup>57</sup> a violation of Art. 8 was found by the Court. This case concerned toxic emissions from a plant as well as a dangerous fertilizer that was being released near the Italian town of Manfredonia. On the one hand, the Court reasoned in a similar way: “there may be positive obligations inherent in effective respect for private or family life” that the Italian government did not respect albeit not directly ‘interfering’ with their private life.<sup>58</sup> Thus, the case refines the *López Ostra v. Spain* case, referring to the passage cited above (*López Ostra v. Spain*, §51) directly in the judgement. But there is a further point raised by the Court: the authorities had failed to publicize “essential information that would have enabled them to assess the risks they and their families might run if they continued to live at Manfredonia.”<sup>59</sup> While they did not find that the applicants had sustained any particular damage due to the lack of information, it is still notable that failing to make information about environmental risks plays an integral part in the scope of Art. 8.

Finally, in the *Hatton and Others v. the United Kingdom* case,<sup>60</sup> the Court modified its previous jurisprudence surrounding the interpretation of the scope of Art. 8 as having an environmental aspect. The applicant, who lived near the Heathrow airport, complained that the sustained noise from the night-time flights violated her Art. 8 right. She alleged that the level of noise had increased over time (after 1993) and that the authorities had failed to make the applicants aware of this, relying on the independent noise pollution studies from before 1993. While the Court ‘had no doubt’ that the new scheme for flight patterns were “adversely affecting the quality of the applicants’ private life”,<sup>61</sup> the legal issue was whether the British government had overstepped its margin of appreciation, i.e. to balance individual and national interests in limiting rights. Additionally, they distanced the case from both *López Ostra v. Spain* and *Guerra and Others v. Italy* because these cases concerned illegal toxic waste and the lack of information publicity,

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<sup>53</sup> ECtHR, *López Ostra v. Spain*, Application no. 16798/90, 9 December (1994).

<sup>54</sup> *López Ostra v. Spain*, §49.

<sup>55</sup> ECtHR, *Oneryildiz v. Turkey*, Application no. 48939/99 (2004).

<sup>56</sup> *López Ostra v. Spain*, §51.

<sup>57</sup> ECtHR, *Guerra and Others v. Italy*, Application no. 116/1996/735/932, 19 February (1998).

<sup>58</sup> *Guerra and Others v. Italy*, §58.

<sup>59</sup> *Guerra and Others v. Italy*, §60.

<sup>60</sup> ECtHR, *Hatton and Others v. the United Kingdom*, Application no. 36022/97, 8 July (2003).

<sup>61</sup> *Hatton and Others v. the United Kingdom*, §118.

respectively.<sup>62</sup> Instead, the Court found that the defendant enjoyed a wide margin of appreciation and had thus not illegitimately limited the applicant's Art. 8 right. While the Court reasoned that "[e]nvironmental protection should be taken into consideration by States in acting within their margin of appreciation", it also confirmed that "it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental human rights."<sup>63</sup> On the one hand, the Court made it explicit that there are not environmental human rights under European human rights law. But, on the other hand, the Court has taken a step back from a line of jurisprudence that could have ended in environmental human rights protection.

## II.2. Constitutional rights

On the front of constitutional rights, we delve into the interesting nexus between national and regionally codified constitutional rights to environmental goods, such as the right to a clean environment or the right to a general satisfactory environment. These rights differ from the previous exploration of rights with an environmental dimension because the norms that are being directly codified and translated into an individual constitutional language locate protected interests in environmental goods.

Drawing on empirical research, Lewis offers a detailed analysis of half of the world's jurisdictions that have constitutional rights to an environment that is 'safe for life and health', e.g. as enshrined in constitutions such as Ukraine (responding to the nuclear meltdown in Chernobyl).<sup>64</sup> And while I do not have the space to discuss every provision in the 150 countries around the world that has included rights with environmental aspects in their constitutions or the 85 countries that protect an explicit 'right to the environment',<sup>65</sup> I wish to draw attention to one special case at the ACHPR. This case is special because I understand the ACHPR to be a setting, in line with constitutional pluralist theory, where explicit rights to a clean environment are enshrined in the constitution. In the *Morka and The Social and Economic Action Rights Centre v. Nigeria* case,<sup>66</sup> the Court refines its case law and prerogative for states to "respect, protect, promote, and fulfil"<sup>67</sup> the rights enshrined in the charter, many of which have environmental aspects. This case concerned the Nigerian government that had been involved in oil production, which after an oil spill had contaminated the area inhabited by the Ogoni people. Most pertinent here, the Court found, in addition to violations of multiple other rights, that there had been a violation of Art. 24, the right to a clean environment, which requires "the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources."<sup>68</sup> While we saw that the jurisprudence of the European Court of Human Rights (ECtHR) does not allow the space for distinctly environmental human rights, this case, which involved an oil spill (something that we saw happens in Europe as well, e.g. *Commune de Mesquer v Total France SA and Total International Ltd*) shows how the regional constitutional setting at the ACHPR allows for remedy

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<sup>62</sup> *Hatton and Others v. the United Kingdom*, §120.

<sup>63</sup> *Hatton and Others v. the United Kingdom*, §122.

<sup>64</sup> Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects*, 45.

<sup>65</sup> See Lewis, 43, 59.

<sup>66</sup> African Commission on Human & Peoples' Rights, *Morka and The Social and Economic Action Rights Centre v. Nigeria*, 155/96, May 27 (2002).

<sup>67</sup> *Morka and The Social and Economic Action Rights Centre v. Nigeria*, §44.

<sup>68</sup> *Morka and The Social and Economic Action Rights Centre v. Nigeria*, §52.

for environmental human rights. However, the African Court did read this right in conjunction with other rights violations, such as the right to health and clean air, so the extent to which it played a distinct role in their reasoning may be questioned.

### II.3. A Human right to the ‘environment’

Finally, I address the very recent and controversial project of identifying a human right to a good environment-- both as regards humans and the environment itself. What is at stake here differs from rights that may be interpreted with an environmental aspect, i.e. the right to family life, as well as from constitutional rights to certain environmental goods, such as the right to clean air. Rather, a human right to a good environment seeks to “construct the environment as something which is instrumental to the fulfilment of other human rights.”<sup>69</sup> This claim may come in two variants. In the 2017 *Advisory Opinion* at the IACHR,<sup>70</sup> the Court considered the extent to which a right to a healthy environment existed and what the scope of such a right may be. The Opinion was initiated upon request from Columbia as to whether a recent construction project, which would possibly harm the marine environment in the Wider Caribbean Region, would be in violation of the American Convention on Human Rights (hereinafter: ACHR). To answer this question, the Court first considers various human rights documents and international treaties, trying to reconstruct answers in international customary law.<sup>71</sup>

As enshrined in Art. 11 of the ACHR, there exists a human right to a healthy environment, but the Court reiterates the “interdependence and indivisibility between civil and political rights, and economic, social and cultural rights” that should be read together, “without hierarchy among themselves and enforceable in all cases before those authorities that are competent for it.”<sup>72</sup> They argue that in addition to a collective dimension, i.e. as a group right (e.g. as regards indigenous peoples), “its [Art. 11] violation can have direct or indirect repercussions on people due to its connection with other rights”, still sticking to a conglomerate reading of the provision. Furthermore, they reference the case law at the ACHPR described above, where the scope of the right to a healthy environment imposes “the obligation to take reasonable measures to prevent pollution and ecological degradation, promote conservation and ensure development and use of ecologically sustainable natural resources, as well as supervise projects that could affect the environment.”<sup>73</sup> But the right also has an individual dimension because the environmental degradation causes harm to humans, making Art. 11 a “fundamental right for the existence of humanity.”<sup>74</sup>

Considering this reasoning, the Court moves to state that the right to a healthy environment is an “autonomous right, unlike other rights” because it

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<sup>69</sup> Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects*, 59.

<sup>70</sup> Inter-American Court of Human Rights. *Advisory Opinion*, OC-23/18, 15 November (2017). Translations are my own.

<sup>71</sup> *Advisory Opinion*, §47-55.

<sup>72</sup> *Advisory Opinion*, §57.

<sup>73</sup> *Advisory Opinion*, §61.

<sup>74</sup> *Advisory Opinion*, §59.

“protects the components of the environment, such as forests, rivers, seas and others, as legal interests in themselves, even in the absence of certainty or evidence about the risk to individual persons. It is about protecting nature and the environment not only because of its connection with a utility for the human being or for the effects that its degradation could cause on other people's rights, such as health, life or personal integrity, but because of its importance for the other living organisms with whom the planet is shared, also deserving of protection in themselves. In this sense, the Court notes a tendency to recognize legal status and, therefore, rights to nature not only in judicial sentences but even in constitutional systems.”

This is a very impressive line of reasoning from the Court because it derives an individual right to the environment and it also implies that the environment itself may have rights, and thus perhaps be deserving of legal status, because of its importance in sustaining other organisms that cohabit the planet.

While this is a relatively recent Opinion, I still think that it is striking how far the human rights concept is being stretched. Considering the climate emergency, it seems that there is sustained support for this kind of combatting of the climate emergency through law. Lewis argues that “even as merely an aspirational statement it has potential to foster a greater understanding of the interconnectedness of the environment and human rights”, which I think that a conception of transnational human rights must fulfil. In conclusion, both the five principles of customary law sketched above and the varied jurisprudence on different ‘green’ human rights, increase protection against the climate emergency. However, how do different schools of legal pluralism fit in this practice within their own accounts? And do we have a sufficiently rich account that puts environmental protection in the centre of the normative vision? I turn to these questions in the subsequent sections.

### III. Reconciling Three Approaches to Constitutional Pluralism with the Climate Emergency

In this section, I reconstruct three theories of constitutional pluralism: MacCormick’s ‘institutional’, Maduro’s ‘discursive’ and Kumm’s ‘globalist’ accounts. I subject these accounts to sustained criticism both internally, based on legal-theoretical arguments, as well as from the perspective of environmental principles and rights. I will also pose the question as to whether these accounts could adequately deal with the climate emergency, carving out space to combat the dire issue through law.

#### III.1. MacCormick’s Institutional Account

The first perspective to consider is MacCormick’s ‘institutional’ account of constitutional pluralism. It is important to note that his seminal work, *Questioning Sovereignty*,<sup>75</sup> is often considered as the point of origin for thinking about constitutional pluralism. A good start for understanding MacCormick’s ontological commitments is to begin with his definition of law as a

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<sup>75</sup> See MacCormick, *Questioning Sovereignty*.

normative order. This order is an ideal view of the world that seeks to guide our norms and judgements, where these “normative commitments come out of our responses to the world as it is, our satisfaction of dissatisfaction with it as it is and as it goes on, and our sense of practicable alternatives to what does or might happen”.<sup>76</sup> Additionally, law as a normative order becomes institutionalized, receiving a self-referential character and also requiring “final authority of what counts as a binding norm”.<sup>77</sup> Here, self-referential means that in light of many constitutional orders, there will be many different views on the sources of law, but individual orders will remain focused on referencing the rules within their own normative order (because they make sense). Politics also plays an important role for law, as does morality, where political power is ‘power-in-fact’, directing society and individuals towards common ends and a common good, determining how someone has acted (fact) and may act in the future. However, law has a different normative power as it doesn’t determine power-in-fact but what could be called power-in-ought.<sup>78</sup> Law establishes a system of rights and duties that determines how individuals ought to act within a given context, backed by political power, i.e. the force of politics to determine fact. As regards morality, MacCormick follows Habermas in asserting that morality is a third sphere of normativity that stands above both law (as institutionalized power-in-ought) and politics (as discursive power-in-fact).<sup>79</sup> Morality is procedural in reasoning and universal in scope, i.e. serving to determine how what is right can be deliberated on prior to what is good, acting independently of both law and politics.<sup>80</sup> It serves to guide these two other spheres, but law as institutionalized practice remains constrained to a jurisdiction in virtue of the foundational character of the rule of law value, i.e. law acts within a *Rechtsstaat* (German: law-state).<sup>81</sup>

This understanding of what grounds law, e.g. with the rule of recognition, may have some similarity to a way of envisioning law as rooted in a single overarching norm, such as a *Grundnorm*<sup>82</sup> that validates law in a top-down fashion. As Green tells us, “[t]he original constitution needs to have genuine authority or nothing below it does, so if we are to regard materials created under its ground rules as law, we need to presuppose that the original constitution is binding”.<sup>83</sup> The notion here is that “social facts determine the content of the law, but a special norm is required to animate those inert facts with obligation”.<sup>84</sup> A constitution creates a framework of supremacy precisely to the end of creating legal validity that can be traced back to a norm that structures the legal system. This position may also be considered Kantian because it locates the *Grundnorm* by way of transcendental reasoning, i.e. positing that legal norms are only possible if there exists the ‘ought’ of a higher norm.<sup>85</sup> This is also a stipulation shared by

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<sup>76</sup> MacCormick, 5.

<sup>77</sup> MacCormick, 8.

<sup>78</sup> MacCormick, 12–14.

<sup>79</sup> MacCormick, 13.

<sup>80</sup> See Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Cambridge: MIT Press, 1996); John Rawls, “The Priority of Right and Ideas of the Good,” *Philosophy & Public Affairs* 17, no. 4 (1988): 251–76; John Rawls, *Political Liberalism: Expanded Edition* (New York: Columbia University Press, 2005).

<sup>81</sup> MacCormick, *Questioning Sovereignty*, 16–18.

<sup>82</sup> See Hans Kelsen, *Pure Theory of Law*, trans. M. Knight (Berkeley: University of California Press, 1960).

<sup>83</sup> See Preface by Leslie Green: Hart, *The Concept of Law*, xix.

<sup>84</sup> Murphy, *What Makes Law*, 111.

<sup>85</sup> See Kelsen, *Pure Theory of Law*; Andrei Marmor, “The Pure Theory of Law,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N Zalta, Spring 2016 (Metaphysics Research Lab, Stanford University, 2016) Marmor discusses how Kelsen is Kantian in virtue of the argumentative structure of

MacCormick who also begins by stating that you cannot get an ‘ought’ from an ‘is’ statement alone.<sup>86</sup> But his treatment of this issue is at best agnostic, i.e. following the notion that there is some kind of ‘ought’ even in a weaker sense of the Hartian ‘rule of recognition’, or at worst MacCormick sidesteps a key feature of constitutional pluralism that will undermine his account entirely (as we will see later on). While Kelsen, who fathered this justification of legality, still remained a positivist in the sense that law is a construction that reflects a certain cultural and social understanding of rules, his approach is less sociological than Hart, requiring a hierarchical orientation towards some ultimate source of legal validity. Although Van den Meerssche argues that MacCormick is a committed Hartian, with the implication that what matters is how judges within a self-referential legal order are motivated by institutional practice and ‘emerging custom’, i.e. the rule of recognition,<sup>87</sup> Tuori argues that MacCormick should rather be seen as a Kelsenian.<sup>88</sup> Nevertheless, MacCormick’s position may be more Hartian or more Kelsenian, he remains a positivist.

The contradistinctive position to either positivistic reading of MacCormick’s enterprise is the position of the natural law tradition (also called non-positivism), where scholars argue that morality is what is central to understanding law, by “playing a role as a guide to interpretation, resolving indeterminacy and perhaps also correcting particular mistakes in the law to show the law as a whole in its morally best light”.<sup>89</sup> The notion here is that the ultimate source of legal validity is not a Hartian ‘rule of recognition’ or even a Kelsenian ‘*Grundnorm*’. On a weaker version of the natural law tradition, the rule of law value, which should ground every constitutional setting, is based on what has been called an ‘inner morality’ of law.<sup>90</sup> Fuller’s account of the morality in the rule of law contains eight principles of legality: laws must be 1) general, 2) promulgated, i.e. accessible to the public, 3) prospective, i.e. telling individuals how to act, 4) understandable, 5) non-contradictory, 6) within the powers of the affected party, i.e. realistic, 7) relatively static, and 8) congruent between written and official action.<sup>91</sup> This calculus makes up the rule of law value. But other non-positivists may also go a step further: not only does law have a morality internal to its institutionalized practice, we interpret law precisely because of what morality requires. This is one major distinction in the so-called ‘Hart-Dworkin debate’<sup>92</sup>. While Hartian positivists do not deny that morality will play some role in legal reasoning for the judge (as a sociological-descriptive claim), it acts to supplement the institutionalized character of legal norms. But non-positivists make the claim that all legal reasoning about rights and duties is moral because all rights and duties are moral. In hard-liner cases, judges are solely guided by moral considerations, giving law an explicit moral character. In sum, this latter approach is not the route taken by MacCormick. His reading of the transnational nature of constitutional pluralism is Hartian, and as different legal orders become more enmeshed, “institutional praxis has the potential to generate a new rule of recognition, which determines distinct criteria of validity that

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transcendental logic, however, as relativist he did not follow Kant in stipulating an objective grounding of morality.

<sup>86</sup> MacCormick, *Questioning Sovereignty*, 2.

<sup>87</sup> Van Den Meerssche, “European Perspectives on Constitutional Pluralism(s): An Ontological Roadmap,” 6.

<sup>88</sup> Maduro, Tuori, and Sankari, *Transnational Law. Rethinking European Law and Legal Thinking*, 35 (supra note 43).

<sup>89</sup> *Ibid.*, 42.

<sup>90</sup> See Lon Fuller, *The Morality of Law*, 1964.

<sup>91</sup> *Ibid.*, 38.

<sup>92</sup> See Shapiro, “The ‘Hart-Dworkin’ Debate: A Short Guide for the Perplexed.”

shape an autonomous legal system”.<sup>93</sup> His argument is that in face of the plurality of constitutional normative orders, customary law or informally accepted rules at the level of contestation between legal orders will triumph.<sup>94</sup> In short, the major statement made by MacCormick is that on top of the Hartian description of the way that constitutional law functions in a world made up of many legal orders, the end of national sovereignty is upon us. Today, the plurality of constitutional settings is geared towards heterarchy, and the determination of a source of law becomes a political question of power-in-fact. Thus, it is better to stick to international custom as a solid basis for legal validity.

Without rehearsing Van den Meerssche’s charges against MacCormick that this move to constitutional pluralism is self-defeating,<sup>95</sup> it suffices to draw attention to two implications of MacCormick’s account of transnational legal pluralism: First, he remains inconsistent in making normative claims because the line becomes blurred between a Hartian analysis of the way that constitutional pluralism works in the world descriptively, i.e. based on political-conflict, and a normative argument for how this kind of pluralization should play out in practice. He argues that constitutional orders will still need some set of higher norms to nullify the problem of infinite regress,<sup>96</sup> and international custom should play this role. What is self-defeating about this argument, is that it loses a normative bite because it describes the way the world already works, refraining from some kind of normative ideal to guide courts or judges in the face of the need for change, as is the case with the climate emergency or with technological automation. Additionally, this view is somewhat inconsistent because his commitment to heterarchy in the plurality of constitutional orders also relies tacitly on a set of hierarchical norms that stand above these orders. MacCormick’s account of legal pluralism will not be able to adequately deal with the climate emergency but the accounts of other scholars complement his theory, as we will see in the following.

### III.2. Maduro’s Discursive Account

Now, I turn to the question of how this ‘institutional pluralist’ legal ontology relates to the climate emergency, but I believe that the implications of this account are already quite clear. On the first front of principles, MacCormick would welcome the development towards environmental issues being increasingly regulated by international customary law. He may argue that the principle of sustainable development is a solid basis for constitutionalizing development strategies that are more sustainable in nature. Moreover, the recourse to custom can aid in legal disputes, as explored in the case law from Section 1. It may also be argued that the precautionary and polluter pays principles are also solid bases for adjudicating between conflicting legal claims, and the political forces that underpin the various courts’ reasoning reflect power-in-fact. On the front of human rights, MacCormick’s account is more hesitant. If individual legal orders can only rely on the interpretative practices internal to that order, then developments from outside will not be

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<sup>93</sup> Hart, *The Concept of Law*, 44., cited in Van Den Meerssche, “European Perspectives on Constitutional Pluralism(s): An Ontological Roadmap,” 7.

<sup>94</sup> MacCormick, *Questioning Sovereignty*, 102-3.

<sup>95</sup> Van Den Meerssche, “European Perspectives on Constitutional Pluralism(s): An Ontological Roadmap,” 14.

<sup>96</sup> See Waldron’s discussion of infinite regress, which was already a prominent feature in Hobbes’ political theory of the Leviathan: Jeremy Waldron, “Are Sovereigns Entitled to the Benefit of the International Rule of Law?,” *European Journal of International Law* 22, no. 2 (2011): 315-43.

taken into account. It is no coincidence that fora, such as the Inter-American Commission on Human Rights or the African Court on Human and Peoples' Rights have acknowledged a human right to the environment. In these regions, the effects of the climate emergency are hitting the hardest and the practices of the constitutional courts reflect a logic that cannot so easily be accepted by jurisdictions that do not have to deal with deforestation, oil spills and pollution. In fact, developing countries have been able to induce the majority of these environmental ills whilst being backed by the law of their own jurisdictions.

However, as relates to the dire need to combat the climate emergency through law, the self-referential nature of institutionalized orders as defined by MacCormick creates considerable difficulties. This closed conception of how constitutional pluralism ought to function to combat transnational problems will not mobilize actors to change laws in their own legal orders. Instead, MacCormick's framework reinforces the status quo. One objection to this charge may be that the 'institutional' model of constitutional pluralism seeks to describe the way that the world is currently functioning, i.e. MacCormick is not making a normative argument. But this becomes untenable in light of the political and economic interests that prevent systemic change of environmental governance. Because of the clear distinction that is made between law as power-in-ought and politics and power-in-fact, his model will continue to subject legal interpretation and change to politics. Shouldn't law also play an active role in combatting such a dire transnational problem? Within MacCormick's model, the limits of changing the way that environmental issues are regulated are set at international custom. In this sense, this model is not an adequate contender for a theory of constitutional pluralism that can play an active role in constraining the politics of climate change. The separation between law and politics remains artificial as judges and legislators continue to be influenced by their social surroundings. If you are a judge or a legislator in the global North, you will be shaped by the strange social self-understanding that environmental issues do not directly affect you at home. This prevents any sort of viable systemic change that could be brought about by law.

Turning to the second perspective, Maduro shares MacCormick's sensibility towards welcoming the multiplicity of constitutional orders. But while MacCormick argues that the ensuing conflict that emerges between legal orders is better dealt with in the realm of politics, Maduro prefers a theory of constitutional pluralism that focuses more directly on "interpretative and adjudication competition among courts".<sup>97</sup> This is meant to problematize MacCormick's notion that legal orders remain self-referential and stuck within their own institutionalized space. On this reading, judges will not look beyond the confines of their own legal order. Although MacCormick supports the multiplicity of legal orders, the problem here is that his view does not leave open conceptual space for courts to engage in a dialogue whilst interpreting their own legal texts.

At an empirical level, Maduro thinks that under the present conditions (especially as regards the European constitutional arena), courts are not fixated primarily on their own legal orders, and he rejects MacCormick's conviction that an institutionalized legal order is for the most part autonomous. Maduro tells us that "pluralism changes both the nature and scope of the legal issues to be addressed by courts and their communities of discourse" because under the constraints of transnational legal pluralism, constitutional courts are engaging in a dialogue with each other, drawing on different interpretative practices and creating a shared discourse.<sup>98</sup> The

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<sup>97</sup> Maduro, "Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism Miguel," 358.

<sup>98</sup> Maduro, 358.

major problem that emerges under pluralism is that the ultimate legal authority of courts' decisions are questioned, raising issues as to how the discourse, contestation and dialogue is to be structured.

To solve this problem, Maduro argues that courts “have to adapt the nature of their judicial reasoning, the normative preferences that determine their judicial outcomes, and the self-perception of their institutional role” because actors should seek to become part of a discourse. But before I turn to the implications of the normative claim on this discursive account of constitutional pluralism, I wish to round up the empirical observation that stands at the heart of Maduro's reasoning. For him, the “validity of a legal norm [...] is not determined by hierarchical lineage to a jurisprudential vanishing point, but by the relational market logic of discursive practice”.<sup>99</sup> This means that we should stop searching for explanations of how officials come to change their rules of recognition (via the political power-in-fact/morality) confined within the constraints of a self-referential legal order, or by means of a *Grundnorm* that finds some source of ultimate authority, on MacCormick's reasoning, in international custom. Instead, we should recognize that the validity of law is determined by the interaction of many different legal actors that shape our meaning of ‘law’ together, and the authority of a court will necessarily depend on this ‘multipolar discursive dynamic’.<sup>100</sup>

The other half of this account of constitutional pluralism is the normative story that we tell about the discourse that different legal actors become part of. On the one hand, we should “emphasize methods of interpretation that require courts to articulate the systemic impact of their decisions and that are more apt to engage them in a dialogue with the other institutions that compete in giving meaning to the law”.<sup>101</sup> The idea here is that as judicial decisions increasingly tap into highly sensitive political and social issues—especially as regards transnational issues—, courts will need to more actively cooperate with each other. On the other hand, increased judicial engagement with complex transnational processes is necessary precisely in virtue of how difficult it is for cross boundary problems to be solved using the interpretative resources from a single jurisdiction. Therefore, a discursive understanding of how law is validated is more dynamic and can more readily adapt to globalized processes and accelerated social change. But what are the terms of this discourse? And how do courts gain access to the dialogue? Maduro argues for so-called “meta-principles of contrapunctual law”,<sup>102</sup> which aim to manage the dialogue. The notion here is that as legal orders engage in dialogue there will be conflict and contestation, which is an inherent feature of a discourse, driving the legal process. But these principles are not imposed on the discourse, i.e. externally/hierarchically. Rather, he describes this kind of discourse as a game, where different participant courts enter into the game (discursive context, e.g. the EU), learn to speak the language by becoming familiar with past rules, and come to even propose new rules

“by acting or narrating the law in a certain way and that becomes a rule of the discourse to the extent that it becomes part of the discourse itself. Each judicial decision is an illocutionary act but, in this respect, their performative value is

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<sup>99</sup> Van Den Meerssche, “European Perspectives on Constitutional Pluralism(s): An Ontological Roadmap,” 16.

<sup>100</sup> Van Den Meerssche, 17.

<sup>101</sup> Maduro, “Courts and Pluralism: Essay on a Theory of Judicial Adjudication in the Context of Legal and Constitutional Pluralism Miguel,” 365.

<sup>102</sup> See Maduro, “Three Claims of Constitutional Pluralism.”

dependent on their discursive value. What I argue is that once courts are in a context of constitutional pluralism they ought to manage the risk of constitutional conflicts, in the context of the European Union, by embracing those principles.”<sup>103</sup>

This is a novel approach to conceptualizing constitutional pluralism because it accepts that there is an underlying structure to the transnational order, but it is a structure that is maintained and managed by the participants. An upshot of this discursive approach is that it opens the logical space for recognizing how all discourses are undercut by dynamics of power and hegemony, which is an approach that has already been applied to the climate emergency (drawing on Gramsci).<sup>104</sup>

As regards the conceptual resources available to us to combat the climate emergency with this account of legal pluralism, we have reason to be more optimistic. On the level of principles, Maduro has created an innovative approach to the way that customary law and the principles used by judges at the international level deal with the climate emergency. First, the emphasis is on discourse, meaning that as actors continue to participate in dialogue and contestation within a legal system of overlapping constitutional settings, there are accepted principles that shape the terms of the discourse. Environmental principles of customary international law may find their way into the discourse and crystalize as accepted ways of dealing with cross boundary claims. For example, the sustainable development principle may come to be more widely accepted within a discourse of constitutional orders in the global North, giving judges resources to interpret the law in favor of those least well off. At the level of environmental human rights, Maduro’s conception is surely a step up from MacCormick’s institutional approach. Because different legal orders that are part of an institutionalized discourse can draw on the arguments and interpretations from other jurisdictions, e.g. in the EU, there may be more willingness within this model for a transition towards environmental human rights protection.

However, there are a few shortcomings that should be addressed. First, the ‘discursive’ model may turn out to relativize environmental issues based on the regional understandings of a shared constitutional discourse. While Maduro seeks to clarify how multiple sources of legal validity can be used to an advantage, strengthening legal discourse, there are difficulties that arise at the level of scale and scope. For example, the discourse may come to reflect regional interests alone, preventing the entrance of players from other areas of the world most harmed by environmental degradation. Or, perhaps environmental issues may play an active role in the discourse of a regional constitutional pluralist setting but do so in a way that comes to safeguard the health of the environment in a particularly privileged region, creating a shared logic of provincialization. This may lead to considerable challenges when it comes to the long-term development of such a model, and we should be acutely aware of the problems that may come about. Surely, it is not incomprehensible that Maduro’s model envisions a world divided up in many, probably regionally organized discursive institutional settings. A global discursive forum seems both unrealistic and impractical. Would this casting of transnational law capture the global extent of the climate emergency? It seems that the fragmentation of international law that Maduro thinks can strengthen regional protection may in fact be diametrically opposed to solving issues that are

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<sup>103</sup> Ibid., 69.

<sup>104</sup> Fisher, “Legal Pluralism and Human Rights in the Idea of Climate Justice.”

of a global scale. Accordingly, I suspect that such a constellation will inevitably favour more developed regions of the world.

Second, and closely related, the ‘discursive’ model may fail at the normative level to mitigate for big players that have stronger political and economic interests contra environmental protection within a shared constitutional setting. Perhaps, Maduro’s account lends itself to more awareness of the hegemonic tendencies that come along with any form of discourse, but because of his approach to judicial politics, rather than politics proper, more work would need to be done to synthesize Gramscian, Foucaultian or subaltern perspectives on the terms of the constitutional discourse he is advocating for.<sup>105</sup> However, it suffices to make reference to an innovative study by Fisher, who explores the perspective of Norwegian legislation and discourse. The legal argument here is that “Norway promotes itself within international climate discourses, while maintaining its position among leading petroleum exporters”, capitalizing on strategies such as the “promotion of inter-state emissions trading; financing of high-profile climate initiatives in Southern states, and pursuit of technologies, like carbon capture and storage (CCS), that prolong carbon-intensive industries and avoid ‘carbon leakage’”.<sup>106</sup> All discourses run the risk of empowering regional hegemonies in virtue of the political and economic structures that undergird constitutional practices. I admit that involving more actors in a discourse is beneficial for finding variant and dynamic sources of law, but it neglects this dimension of hegemonic power that will stand in the way of using the crucial resources that law supplies to combat pressing issues that run against the hegemonies within the discourse.

Finally, issue may be taken with the treatment of the relationship between politics and law. On the one hand, Maduro’s model seeks to overcome a shortcoming in MacCormick’s theory that artificially separates political power-in-fact from legal power-in-ought. Instead, courts are empowered to engage in judicial politics by communicating with other constitutional orders. But on the other hand, Maduro keenly points our attention to how judicial politics also plays a role in making political decision-making at the national level less concrete surrounding transnational problems. Because the international level continues to be constitutionalized, this means that political movements calling for radical political change, such as the climate justice movement, face increased barriers in bringing about changes to the legal system. While Maduro hopes that the discursive model can capture transnational politics, engaging judges and lawyers to reflect these developments, the model still lacks a sensibility for the way that oftentimes international cooperation will continue to be driven by larger political and economic forces.

### III.3. Kumm’s Globalist Account

The final perspective on constitutional pluralism is Kumm’s cosmopolitan conception of law. One way of making the comparison more illustrative would be to position the previous views on a spectrum of constitutional pluralism. On the one side, we have MacCormick’s account that

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<sup>105</sup> This is a complex issue that is not the subject of this paper. But it may be an interesting avenue of future research—especially for legal scholars. See Antonio Gramsci, *Selections from Prison Notebooks*, trans. Quintin Hoare and Geoffrey Nowell Smith (London: Lawrence & Wishart, 2005); Michel Foucault, *The Foucault Reader*, ed. Paul Rabinow (Pantheon Books, 1984); Gayatri Chakravorty Spivak, “Can the Subaltern Speak?,” in *Marxism and the Interpretation of Culture*, ed. C. Nelson and L. Grossberg (Basingstoke: Macmillan Education, 1988), 271–313.

<sup>106</sup> Fisher, “Legal Pluralism and Human Rights in the Idea of Climate Justice,” 211.

admits heterarchy but requires overarching constitutional principles. Individual legal orders are left to their own self-referential logic. While this account gives us a descriptive account that retains the exclusivity and context-dependence of each legal order, it creates space to think about the kinds of norms, i.e. international customary law, that will structure the interaction between these orders. On the other side of the spectrum, we have Maduro's discursive account of pluralism where transnational law requires no hierarchical ultimate authority. Legal validity is established in a process of inter-court dialogue, where participating actors gain access to a discourse and create a legal system (rather than individual legal orders) that reference each other. Beyond the confines of self-reference, courts are aided in interpreting difficult transnational and border crossing issues by communicating and expressing conflicting interpretations. Meta-principles are thus borne out of this discourse as the communication comes to be managed by rules of the game that are socially constructed by the interaction of the courts.

However, I would argue that Kumm's conception of cosmopolitan law falls in the middle of this spectrum. Pace Maduro, he rejects a purely descriptive account of transnational legal pluralism, maintaining that we do have viable conceptual resources to articulate normative ideals for shaping transnational law. However, unlike Maduro, Kumm locates legal validity in hierarchical principles that can be deduced from moral theory. Kumm stands in the middle of this spectrum because he offers rules and principles beyond MacCormick's description of customary law (which are cosmopolitan moral principles of justice), but objects to the discursive approach. On his reading, legal pluralism is meant to be integrated into a conception of natural law that structures the post-national space in different constitutional areas that may not have written documents but function via a cosmopolitan logic of moral rights and justice-seeking principles.

In brief, Kumm's position follows this school of thought and may be summed up as a 'practice conception of constitutionalism' that seeks to "liberate constitutionalism from the statist paradigm and the biases to which it is connected".<sup>107</sup> The notion here is that while some legal scholars remain skeptical of constitutionalism beyond the nation state, we can viably disentangle problems of ultimate authority, legal validity and cross border claims of justice. His conceptual energy is directed at the 'sceptics', who defend a statist conception of constitutionalism, such as the prominent German constitutional judge Grimm, arguing that a global vision of constitutionalism "nourish the hope that the loss national constitutions suffer from internationalisation and globalisation could be compensated for on the supranational level".<sup>108</sup> His criticism is that the history of constitutionalism is deeply connected to legal certainty via the ultimate authority of a constitution, where the legitimate exercise of public power is deeply rooted in national democratic participation.<sup>109</sup> Once we start conceiving of a constitutional framework beyond the nation state, we require something that resembles a supranational form of governance, i.e. a world state.

Kumm's account begins with the empirical claim that there exist many constitutional orders that cannot be separated from each other. National constitutions that are connected to a 'people' thrive in virtue of a system on many 'we the peoples'.<sup>110</sup> His argument is that national and international law are 'co-constitutive' where "[n]ational constitutional legitimacy depends in part

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<sup>107</sup> Kumm, "The Best of Times and the Worst of Times," 203.

<sup>108</sup> Dieter Grimm, "The Achievement of Constitutionalism and Its Prospects in a Changed World," *The Twilight of Constitutionalism?*, 2010, 22.

<sup>109</sup> Grimm, 16-17.

<sup>110</sup> See Kumm, "Constituent Power, Cosmopolitan Constitutionalism and Post-Positivist Law."

on how the national constitution is integrated into, and relates to, the wider legal and political world”.<sup>111</sup> The basic units of his world view are individual national constitutional orders that are justified in virtue of belonging to the greater international community. One upshot of this ontology has to do with constituent power because he argues that there can be “no self-standing national constitutional legitimacy, because the practice of constitutional self-government within the framework of the sovereign state raises the problem of justice-relevant negative externalities”.<sup>112</sup> In turn, this is also what Kumm identifies as the purpose of international law to “authoritatively resolve these concerns [justice-relevant negative externalities]”.<sup>113</sup> He defines justice-relevant externalities as cross boundary flows of persons and goods as well as environmental damage. While I do not have the space to scrutinize his views on the legitimacy of international law, his envisioned process of resolving transnational conflict aims at the ‘fair participation of relevantly affected stakeholders’ as well as a duty ‘to support and sustain the development of an international law’.<sup>114</sup> From the perspective of legal pluralism, he problematizes conflict within the scope of questions of justice, which can be dealt with by deducing moral principles.

Furthermore, Kumm’s argument is that the process of deducing moral principles, which reflects natural law or the non-positivism (briefly touched upon above), can aid judges in disputes and conflict over justice-relevant externalities that arise between constitutional orders. As his conception of cosmopolitan law is rooted in the conviction that there exists a “universal moral requirement that public authorities treat those who are subject to their authority as free and equal persons endowed with human dignity”,<sup>115</sup> the dispute can be resolved by judges who can make moral arguments for what is required of justice. The notion here is that there will be a ‘right answer’ to a legal question that will necessarily involve a moral claim about universal rights, freedom, equality or the dignity of global subjects. Pace Dworkin, Kumm argues that “the identification and interpretation of the relevant conventions to some extent require engagement with moral arguments, that is arguments about what is efficient, fair, legitimate or just”.<sup>116</sup> To realize this aspiration, judges should more actively connect the discourse on human rights to public reason, i.e. by formulating justifications that can be endorsed by a wide range of ethical views, and continue to communicate with other international institutions in their case law.

The attractiveness of this position is three-fold: First, if we accept the premise that there exist universal human rights and constitutions are necessarily composed of free and equal persons, then all constitutional orders rely on each other for their co-dependent legitimacy. Thinking about constitutionalism solely at the national level loses sight of the fact that national subjects only are given their status of free and equal in virtue of the global community having this cosmopolitan right. Second, if we identify the power of deducing principles to remedy justice-relevant negative externalities from a universal human rights morality, then judges just have to locate the correct abstract right that must be interpreted for the context-specific situation. Unlike MacCormick,

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<sup>111</sup> Kumm, 703.

<sup>112</sup> Kumm, 704.

<sup>113</sup> Mattias Kumm, “The Legitimacy of International Law: A Constitutionalist Framework of Analysis,” *European Journal of International Law* 15, no. 5 (2004): 18.

<sup>114</sup> Kumm, 18.

<sup>115</sup> Mattias Kumm, “The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law,” *Indiana Journal of Global Legal Studies* 20, no. 2 (2013): 303.

<sup>116</sup> Kumm, “The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State,” 262 (supra note 10).

international customary law needn't guide judges over transnational conflicts. All judges are armed with moral arguments that are borne from the stipulation of transcendental universal rights. These rights just need to be articulated and then 'iterated' in different cultural contexts.<sup>117</sup> And finally, due to the cosmopolitan structure of international law that generates legitimate authority for the exercise of power in co-dependent constitutional settings, actors have a duty to obey the law.<sup>118</sup> So the argument goes, if an authority is morally justified in wielding power, then we have a duty to obey that authority.<sup>119</sup> The post-national constellation of constitutional pluralism that is guided by Kumm's conception of cosmopolitan law does have that moral authority and thus obliges states and other transnational actors to abide by the framework. Whether or not this tells us much about a specific issue, i.e. the climate emergency, is still up in the air. But it suffices to sketch the contours of Kumm's innovative account that strives to dissolve classical tensions between national and international law.

How would Kumm's 'cosmopolitan conception of law' react to the climate emergency? On the one hand, it should be stated from the start that this approach most directly addresses environmental issues by placing justice-negative externalities so prominently in the forefront. Not only are these kinds of externalities, which include cross boundary issues such as oil spills or pollution, the 'purpose and point' of international law,<sup>120</sup> but the dealing with these claims seems to be of utmost importance to his conception of law. However, there are two points of criticism that can be levelled against the account in failing to deal adequately with specifically climate related issues. First, the instability of the underlying moral ontology of this theory may prove problematic when dealing with custom or progressive environmental human rights. The notion here is that for Kumm to integrate principles of international customary law into his framework unless they can also be rooted in some abstract moral consideration. The same applies to progressive human rights, as we saw in the IACHR Advisory Opinion. To do this would be to locate environmental rights within human rights morality, which may prove quite difficult.

Second, Kumm's account does not include a varied theory of adjudication that can explain how judges act and decide cases (beyond applying moral principles). On the one hand, judges are supposedly deducing the 'right' fit or best possible answer to a legal question using moral arguments. But in light of the indefensible environmental degradation that the global North produces, how does this kind of redress fit into his account? I suspect that South American, African or South-East Asian judges would be more willing to support progressive environmental human rights law if you put them in the positions of European judges. The notion here is that Kumm's account does not carve out conceptual space to think about how judges choose principles based on their own ethical or political convictions. And this matters, both as a theoretical argument because we ought to try to understand what is really behind a certain choice of rule or principle (rather than blindly accepting that it flows from transcendental logic) but also as a practical argument: lawyers should be able to assess which judges are more likely to rule in their favour. This would be of great importance to environmental human rights lawyers, seeking to combat environmental degradation through law.

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<sup>117</sup> See Seyla Benhabib, "Democratic Interaction and the Dialectic of Rights and Identities," in *Another Cosmopolitanism*, 2006, 67-74.

<sup>118</sup> Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis," 908.

<sup>119</sup> Kumm follows Raz's conception of moral authority: Joseph Raz, *Authority of Law*, 1979; Kumm, "The Legitimacy of International Law: A Constitutionalist Framework of Analysis," 908 (supra note 7).

<sup>120</sup> Kumm, "Constituent Power, Cosmopolitan Constitutionalism and Post-Positivist Law," 704.

However, if we take stock of the holes in each of the three accounts of constitutional pluralism I explored, there seems to be a lacuna in the research: What would a theory of transnational legal pluralism look like that sufficiently acknowledges the centrality of the climate emergency as a political issue that affects the way law is mobilized? An account of this sort would need to better expand on notions like ultimate authority, legal validity, meta-principles and adjudication to properly combat the climate emergency within a legal-theoretical model. Such a theory will also have to carve out more conceptual space for the principles and rights of environmental law.

#### IV. Towards a Legal Realist Account of Transnational Law

To begin talking about Legal Realism is to ask the reader to take a leap of faith. ‘Political Realism’ in International Relations theory is often caricatured as the power-politics view of *Realpolitik* (German: realistic politics) that ‘fetishizes state and military power’, defending international anarchy beyond the nation-state.<sup>121</sup> It would seem that an application of this position to international law would make it inherently opposed to any kind of constitutional pluralism in the post-national space. But in recent debates, legal scholars have started to reassess a largely neglected group of American and Scandinavian scholars working in the 1930s that were concerned with theorizing adjudication, i.e. the way that judges and legal officials make their decisions.<sup>122</sup>

As Leiter tells us, all realists are committed to the idea that “in deciding cases, judges react primarily to the underlying facts of the case, rather than to applicable legal rules and reasons”.<sup>123</sup> The notion is that when adjudicating upon cases, judges are not just applying legal reasons or deducing how to solve a case from rules alone (legal formalism), rather they are “fact-responsive”.<sup>124</sup> For example, if we recall the Hartian model of primary and secondary rules, in a case where a judge must decide on conflicting primary rules, he will look towards secondary rules. Let’s say that there is a conflict between the freedom of speech and the freedom of privacy. The positivist tells us that we can find a legal argument, that will be sufficiently based on some rule of recognition, to apply to the case at hand. On the other hand, the non-positivist says that we also have moral rules that we can apply to the situation at hand, too.

Moreover, realists direct their criticism against what is called the ‘determinacy of law’, which is another way of saying that there can be only one single rule that can be applied to a case. On the one hand, Hart argues that indeterminacy is “linguistically a result of the inherent ‘open texture’ of legal rules” but that the legal formalist approach contained enough content to create definitive answers to legal problems.<sup>125</sup> The non-positivist approach goes even further, where Dworkin argues that by focusing too much on the centrality of rules, other “principles and policies

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<sup>121</sup> Duncan Bell, “Under an Empty Sky Realism and Political,” in *Political Thought and International Relations. Variations on a Realist Theme*, ed. Duncan Bell (Oxford: Oxford University Press, 2008), 3.

<sup>122</sup> See Brian Leiter, *Naturalizing Jurisprudence. Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007); Gregory Shaffer, “Legal Realism and International Law,” 2018; Oliver Jütersonke, “Realist Perspectives on Global Constitutionalism,” in *Handbook on Global Constitutionalism*, ed. Anthony Lang and Antje Wiener (Cheltenham, UK: Edward Elgar Publishing, 2017).

<sup>123</sup> Leiter, “Legal Realism and Legal Positivism Reconsidered,” 281.

<sup>124</sup> Leiter, “American Legal Realism,” 249.

<sup>125</sup> Oliver Jütersonke, “Realist Approaches to International Law,” in *The Oxford Handbook of the Theory of International Law*, 2016, 335.

(including moral and political appraisals)” will help judges produce the ‘right’ answer.<sup>126</sup> The response from legal realists is that Hart’s answer does not appropriately account for how the judges are shaped as individuals; and Dworkin’s answer is deceiving because the moral principles and political appraisals that judges are using to find the ‘right’ answer are an expression of their own socialization. Perhaps, it may seem as though there is only one right answer and maybe the judge gets the job done with some master, moral principle. However, so the claim goes by realists, if we were to empirically test this, we may find that judges from other jurisdictions have diametrically opposed moral interpretations, or we may find that the judges are guided by some kind of political or economic agenda.

But realists also argue that there are various “psychosocial factors, ranging from the political ideology to the institutional role to the personality of the judge” that will be what leads them to choose one rule over another.<sup>127</sup> The point that realists are making is not that judges decide cases without using rules, which is a position Hart calls ‘rule-skepticism’,<sup>128</sup> but rather, that the social context judges find themselves in will motivate them to choose one rule over another—even though a different rule could also have decided the case. The obvious objection to this view will come from the non-positivist, like Dworkin, who believes that in every case there will be a ‘best fit’ or ‘right’ rule to be applied.<sup>129</sup> Realists (and also Critical Legal Studies scholars<sup>130</sup>) do not think there is any observable evidence to support this claim and there may be multiple ‘right’ answers in a case. However, what will matter is the social context of the forum, the position of power that the specific official finds himself in, or how a judge is willing to evaluate the facts based on his own personal, moral or political convictions. For this reason, Legal Realism may be a contender for a new account of constitutional pluralism exactly in virtue of speaking to such highly political issues, like the climate emergency.

Before moving on to clarifying what an account of transnational legal realism may look like, and what the empirical and normative implications of such a view might be, I wish to return to a point about political realism. As we saw above, each of our three theories of constitutional pluralism were also undercut by some sort of political theory. In essence, we saw that a legal must also carve out space to address what role political power, social forces and economic interests play in mobilizing the law. For example, MacCormick’s ‘institutional’ account made a clear distinction between power-in-fact (politics) and power-in-ought (law). The underlying political theory here becomes rather irrelevant for determining how different legal orders interact at the international level. On the Hartian reading of MacCormick, judges will be self-referential and adhere to the logic inherent to their own legal order. The rules that they use to solve cases may come to be influenced by other legal orders but only through politics: not through law. The same applies to the Kelsenian reading, where legal validity is derived from some overarching principle that the judge will recall and then deduce legal arguments when deciding a case. In sum, politics may play

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<sup>126</sup> Ibid. Jütersonke is quoting Dworkin: Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).

<sup>127</sup> Leiter, “American Legal Realism,” 249.

<sup>128</sup> See Hart, *The Concept of Law* especially at 136-141.

<sup>129</sup> See Murphy, *What Makes Law*, 53.

<sup>130</sup> Critical Legal Studies (CLS) is a theory of law that developed out of Legal Realism. Much of what I will argue for could be argued for within their paradigm. However, I believe that CLS scholars will be much more pessimistic of constitutional pluralism than realists. Thus, I will only approach the issues at hand from the perspective of Legal Realism.

a role for legal officials in determining fact, but formalism still prevails as judges apply the law until enough social force is mobilized to affect the secondary rules.

Furthermore, part of Maduro's criticism of MacCormick is that he insufficiently takes note of how different constitutional orders communicate with each other. As a descriptive claim, he rejects the view that judges remain self-referential: they will become influenced by other legal orders. As a normative argument, Maduro thinks that judges should also look to other jurisdictions for inspiration, making the discursive legal system (many legal orders in discourse) the point of reference. To structure the discourse, meta-principles will emerge, from which judges will draw to deduce legal arguments. When we evaluate Maduro's conception from the perspective of Legal Realism, we may have some doubt that his vision makes sufficient room for the social and political bias that influence legal officers. The meta-principles still act as a kind of overarching form of legal formalism albeit being constructed by the discourse. Maduro's hope is that these rules will then be useful for judges to make better legal arguments. However, the dimension of how every kind of discourse may be hegemonically structured, and thus the meta-principles, is not sufficiently treated. This means that there is no conceptual space left to allow for the empirical and normative assessment of judgments, which at best may be construed because of hegemonic bias, and at worst a form of relativism (legitimizing a hegemonic discourse). And while the underlying political theory that supports his conception advocates for a politicization of judicial dialogue, it neglects the ways in which politics affect the judges 'from the outside', i.e. via shaping their own political world-view outside of the constitutional discourse (e.g. views about trade-liberalization, capitalism, etc.).

On the final front, Kumm may be understood as more straightforwardly dealing with the problems that arise from allowing the rules of the discourse to dictate whether the meta-principles themselves are justified. In place of the meta-principles, we put a cosmopolitan conception of justice, relying on a universal argument for the moral acceptance of persons as free and equal. While I take no offense to trying to deal with the lacking normative edge that Maduro's relativism offers, the same methodological mistake is replicated in Kumm's account from the perspective of Legal Realism. Additionally, because Kumm is committed to a non-positivist conception of law that follows Dworkin, we are confronted with an even stronger version of legal formalism than on Maduro's account. There will be only one 'right' answer in adjudication that we can deduct from Kantian moral theory. Kumm's answer circumvents the issue of the indeterminacy of law because we already assume, on his conception, that the transnational law mobilized in constitutional settings is an expression of a higher moral code. This seems quite problematic, and the realist would argue that Kumm's view does not "take account of changed social context, such as the industrial revolution and the rise of large corporations and unions" that have exceedingly influenced society and politics.<sup>131</sup>

To round up this criticism, I only wish to reproduce James Kent's words, an American judge who practiced in the 19<sup>th</sup> century: "I saw where justice lay, and the moral sense decided the court half the time; I then sat down to search the authorities ... but I almost always found principles suited to my view of the case."<sup>132</sup> Choosing which rule to apply is a highly political affair, and even when it is not explicitly of a political nature, judges are more likely to choose to apply rules, provisions or principles that fit in with their own world-views. For Kumm, the underlying political

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<sup>131</sup> Shaffer, "Legal Realism and International Law," 3.

<sup>132</sup> Cited in Leiter, "Legal Realism and Legal Positivism Reconsidered," 298.

theory seems rather absent, but it may be construed as a vacuous form of ‘applied ethics’.<sup>133</sup> My contention here is that the political views of judges become reduced to Kantian ethics, e.g. the categorical imperative, which seems misplaced in a world where officials in positions of power all have their own struggles for success, power and influence-- or vice-versa, are affected by others who have these aspirations.<sup>134</sup> In the subsequent section, I will expand on this point a bit further, but I have already given away my interpretation of a better contender for an underlying political theory for constitutional pluralism. It is a form of political realism, but it is not the *Realpolitik* of International Relations theory. Rather, it is what has been called the ‘new’ realism in political theory, as defended by Williams<sup>135</sup> or Geuss<sup>136</sup>, that defends the view that the sphere of politics has its own distinct form of normativity. Political theories should not be a kind of ‘applied ethics’, where we clarify our moral convictions and apply them to the sphere of politics. Rather, politics is a space of fundamental disagreement, shaped by ideology and struggles for power. In this sense, I follow other political and legal theorists, such as Schmitt<sup>137</sup> and Arendt<sup>138</sup>. Additionally, this view may complement Legal Realism to add a new normative bite to the underlying normative political theory.

But how does this realist conception look like? First, an account of realist constitutional pluralism will be undercut by a political realist theory of politics. As discussed above, politics is about disagreement and power, where actors compete for ideological positions. As regards the pressing issue of the climate emergency, this means that the account should acknowledge that judges will be affected by their own socialization, choosing principles that best fit in with their own position towards the climate. This closely ties in with the legal realist theory of adjudication. Judges will be compelled to choose rules and principles that reinforce their own moral or political bias. More research should therefore be done to empirically understand which judges use certain rules and for what reasons.

On the matter of ultimate authority, a legal realist account will fall closely in line with Maduro’s conception, allowing for multiple sources of legal validity within a constitutional setting. However, instead of allowing for the discourse to develop relativistic meta-principles, legal realists should strive to construct principles of international law that are rooted in political practice. These needn’t be moral principles, but they will be evaluative standards that are confirmed by empirical scientists, which as regards the climate, will be ecologists and Earth scientists.

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<sup>133</sup> Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Princeton: Princeton University Press, 2005), 3–5.

<sup>134</sup> For a more detailed discussion of “political realism”, see Geuss, *Philosophy and Real Politics*; Enzo Rossi and Matt Sleat, “Realism in Normative Political Theory,” *Philosophy Compass* 9, no. 10 (2014).

<sup>135</sup> Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument*.

<sup>136</sup> Geuss, *Philosophy and Real Politics*.

<sup>137</sup> Carl Schmitt, “The Concept of the Political,” 1929; Mouffe further develops this Nazi thinker’s notion of antagonistic politics to a conception of “agonistic” politics that is premised on struggle and competition: Chantal Mouffe, “2. Carl Schmitt and the Paradox of Liberal Democracy,” in *The Democratic Paradox* (New York: Verso, 2000), 36–57.

<sup>138</sup> For more on Arendt’s constitutionalism: Christian Volk, “Hannah Arendt and the Constitutional Theorem of De-Hierarchization. Origins, Consequences, Meaning,” *Constellations* 22, no. 2 (2015): 175–87 I suspect that there is much to be done in future research in connecting Arendt with Legal Realism.

If we follow Tuori,<sup>139</sup> a distinction can be made between three types of transnational legal pluralism: First, there exists a plurality of legal sources that create conflict in theory, i.e. to ground law, and in practice to determine who is allowed to participate in a discourse “specifying the contents of the legal order and what weight the respective contributions carry”.<sup>140</sup> This leads to ‘polycentricity’, i.e. when many actors participate in a legal discourse and the sources of law multiply, challenging a more hierarchical view of legal superiority. Second, there exists a plurality of legal orders, leading to more communication, conflict and cooperation as “more than one legal order claims authority within the same geographically delineated social space”.<sup>141</sup> Finally, the plurality of legal systems displace the exclusivity of national jurisdictions, challenging traditional concepts like sovereignty as well as democratic participation.<sup>142</sup>

A legal realist account of transnational law will support the expansion of legal sources because the position is not committed to a determinacy view of the law. In fact, realists argue that the law is inherently indeterminate. By creating discursive contexts where the legal sources are multiple, it will be easier to push for radical change, especially if we think about the environment. As jurisdictions slowly have to adapt to the increasingly pressing situation regarding the climate in the global North, it will be helpful to have varying legal sources. This may also aid in exposing ideological discursive contexts, which, once exposed, may also change the meta-principles of their game. However, if the idea of ultimate authority is abandoned, democratic participation will become increasingly important. The notion here is that as the transnational space becomes more constitutionalized, this may come at the cost of participatory potentials. This may especially be the case within MacCormick’s vision, as the conflict becomes entirely structured by customary law, or on Kumm’s account where moral theory will determine political issues. The realist account of transnational law will advocate for radically democratic visions of regional governance, e.g. as is the case (albeit not entirely) in the EU. Perhaps discursive legal systems could be supplemented with democratic decision-making bodies from within the nation states, so as to create more transparency and accountability. By doing so, the political nature of law-- the extreme realist position is that of law as social policy-- can be more adequately captured in practice.

Although the major innovation of this paper has been normative-theoretical, i.e. in disentangling the various claims made by constitutional theorists and exposing the flaws in theories that fail to create the logical space to deal with political issues, this approach can be of value for environmental lawyers and social scientists in future research. The hope is that it can serve as a theoretical backbone for more sustained research into the various logics, behaviour and histories of environmentally progressive lawyers and judges, linking adjudication more directly with the political contexts they were embedded in. Realist transnational law would offer a lens to problematize both the *political* legal conflict within a discursive legal system as well as in the *political* political conflict that undercuts the judges’ own standpoints and perspectives. To map this out would mean to take stock, possibly in the form of a database, of how judges reason in cases to allow lawyers to find the best ‘path of the law’ to fit their needs. This will be especially pertinent to environmental lawyers, as a choice for a forum, like the ECHR may be less conducive to legal activism than in another forum. In this sense, the legal realist does not fear what Koskenniemi calls ‘forum shopping’<sup>143</sup>. Instead, realists would support lawyers carefully

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<sup>139</sup> Maduro, Tuori, and Sankari, *Transnational Law. Rethinking European Law and Legal Thinking*.

<sup>140</sup> Maduro, Tuori, and Sankari, 24.

<sup>141</sup> Maduro, Tuori, and Sankari, 25.

<sup>142</sup> Maduro, Tuori, and Sankari, 26.

<sup>143</sup> See Koskenniemi and Leino, “Fragmentation of International Law? Postmodern Anxieties.”

choosing where to bring their case so as to maximize the effect on the discourse and possibly push for radical change with the law. In environmental issues, this will become increasingly important as degradation and living conditions worsen in the future. However, this has only been an exploratory sketch of some of the positions that may be included in a realist account of constitutional pluralism.

## Conclusion

In this paper, I explored the dire issue of the climate emergency through the lens of constitutional pluralism. I posed the question of whether we have an account of transnational legal pluralism that can sufficiently deal with the climate emergency and combat environmental issues through law. To unpack this question, I explored principles and rights of environmental law, and I related these issues to the legal theory of constitutional pluralism. Additionally, I aimed to fill a lacuna with a new account of constitutional pluralism from the perspective of Legal Realism. I argued that this approach is a worthy contender for approaching constitutional pluralism because of the centrality it puts on political dynamics. I addressed the underlying political theories in the three previous accounts, and I sketched the counters of a realist account of constitutional pluralism, hopefully opening up a new avenue of research. I argued that this approach could better address the climate emergency and can aid both scholars, legislators and lawyers in choosing fora that suit their needs because the account supplies a previously missing theory of adjudication.

However, this paper was broadly exploratory, and there is lots of future research to be done in clarifying the legal realist account of transnational legal pluralism. There has been some work that explores this subject, but more research is needed to support the project. More empirical research will be especially helpful here. The field of Empirical Legal Studies (ELS) could supply ample methods and models for engaging in future research. But more theoretical research can also be helpful to clarify disputes in methodology, which are immensely important. As methodological distortions enter into academic legal discourse they reproduce and create a normalizing effect. Future generations of scholars will surely benefit if we continue to clarify the ontological commitments of legal pluralists so as to screen out ideological distortions that, to the dismay of many scholars, may come with a moral face.

In addition, the political theory that undercuts the realist approach to transnational law could be examined in more depth. There is much synergy to be found between political realists and legal realists, that is mostly under-researched. 'New' political realists working in normative political theory share many commitments with legal realists, and the nexus between these paradigms should be investigated. Moreover, political realism in International Relations theory could greatly benefit from insights from either of these paradigms, perhaps in the form of a realist version of social constructivism. Critical theories of international relations may also help clarify how both legal and political realist positions share sensibilities with Marxism or Post-structuralism as well as methods such as ideology critique or discourse analysis.

Finally, as regards the climate emergency and legal realist transnational law, there is much future research to be done on decolonisation, political reconciliation, transitional justice and other themes reflecting on global hegemony in the 21<sup>st</sup> century. These areas all have the potential to deal with the climate emergency in interesting and novel ways. Transnational law is an especially fruitful framework to approach these research areas with knowledge of how to create legislation that can support a more sustainable future both for the least well-off living in precarious

environments today, as well as for future generations that will inherit environmental disasters tomorrow.