

TABLE OF CONTENTS

<i>Publication Series Preface</i>	i
<i>The Law of the Future Joint Action Programme</i>	iii
<i>Summary Table of Contents</i>	v
<i>Introduction</i>	1
1. Part I: The Law of the Future	6
1.1. Globalisation, the International System, International Law and a Global Constitutional Framework: Towards a New Global New Deal?.....	6
1.2. Changing State Institutions	14
1.3. Private Actors, International Commerce and Private Legal Regimes.....	18
2. Part II: The Future of Law	22
2.1. Law and Its Evolution – Theoretical Perspectives.....	22
2.2. Divergence and Convergence of Legal Systems.....	26
2.3. New Legal Challenges Posed by Technological Development	29
2.4. The Emerging International Criminal Justice System	34
3. Future of the <i>The Law of the Future and the Future of Law</i>	38

PART I: THE LAW OF THE FUTURE

1. Globalisation, the International System, International Law and a Global Constitutional Framework: Towards a New Global New Deal?	41
1.1 Randall Peerenboom: <i>The Future of Law in a Multi-Polar World:</i> <i>Toward a Global New Deal</i>	43
1. Introduction.....	43
2. The Substructure: The New Economic Order.....	44
3. The Superstructure: Geopolitical Consequences of the New Economic Order in a Multi-Polar World Marked by Diversity	46
4. War and Peace.....	49

5.	Toward a Global New Deal.....	50
6.	Law and Development for the 21 st Century: New Development Agendas.....	52
7.	Neither the Washington Consensus nor the Beijing Consensus: From the Futile Quest for a Universal Model of Development to a More Diversified Context-Specific Approach.....	53
8.	Multiple Modernities and Post-Modernities	55
1.2	Thomas Pogge: <i>A Future to Avert: Law as Contributor to Instability and Polarisation</i>	57
1.3	Jan Klabbers: <i>The Idea(s) of International Law</i>	69
1.	Introduction.....	69
2.	Classic or Outdated?	71
3.	The Global Economy	71
4.	All Things Soft and Mushy	73
5.	Controlling Public Power.....	76
6.	Some Prescriptive Conclusions.....	78
1.4	André Nollkaemper: <i>The Bifurcation of International Law: Two Futures for the International Rule of Law</i>	81
1.5	Stavros Zouridis: <i>The Rule of Law in the twenty-first century: Bridging the Compliance Deficit</i>	89
1.	The Rule of Law as a Socio-Political Institution	89
2.	The Rule of Law?.....	90
2.1.	The Rule of What?	91
2.2.	What Does Law Rule?	92
3.	The Current State of the Rule of Law: A Rough Sketch.....	93
3.1.	Measuring the Rule of Law	93
4.	The Need for a Public Administration and Public Governance Perspective	96
5.	The Spread of Law-Bounded Government	99
5.1.	The Current Situation	101
5.2.	Rule of Law on the Books and Rule of Law in Action ...	102
5.3.	Eroding Public and Political Support for the Rule of Law?	102

5.4. The Dark Sides of Globalisation	103
6. Future Challenges	104
 1.6 Michel Rosenfeld: <i>The Challenges of Constitutional Ordering in a Multilevel Legally Pluralistic and Ideologically Divided Globalised Polity</i>	109
1. Introduction.....	109
2. Legal Pluralism in Context: A Dynamic of Convergences and Divergences.....	111
3. De-Centred and Pluralistic Constitutional Ordering as the Means to Future Harmony and Legitimacy	116
4. Concluding Remarks: A Non-Hierarchical Convergence between Ideological and Legal Pluralism?	122
 1.7 Joost Pauwelyn: <i>The Rise and Challenges of 'Informal' International Law-Making</i>	125
1. Introduction.....	125
2. The Rise and Possible Explanations for 'Informal' International Law-Making	126
3. The Challenges and Accountability of 'Informal' International Law-Making	130
3.1. Internal Versus External Accountability	134
3.2. International Versus Domestic Accountability	135
3.3. Not More But Better Accountability	137
4. Outlook	137
 2. Changing State Institutions	141
2.1 Tom Ginsburg: <i>The Future of National Constitutions in a Global World</i>	143
1. Introduction.....	143
2. Constitutions in the Global Era.....	146
3. Continuation of Specific Trends	147
4. The Future.....	148
5. Conclusion	151
 2.2 Philipp Kiiver: <i>The Future of Parliamentary Accountability in Europe</i>	153
1. Introduction.....	154
2. The European Parliament.....	155

2.1. The Electoral System.....	155
2.2. Co-Legislation and Oversight	156
2.3. Connecting with the Citizens	156
3. The National Parliaments.....	157
3.1. Subsidiarity Review	158
3.2. Agents for Change: Courts	159
3.3. The Rise of the Senates	161
4. The Known Unknowns	162
5. Outlook.....	163
 2.3 Ralf Michaels:	
<i>Global Problems in Domestic Courts</i>	165
1. Introduction.....	165
2. Global Problems.....	166
3. A Global Problem by Nature: Global Markets.....	168
4. A Global Problem by Design: The Review of UN Security Council Resolutions	169
5. A Global Problem by Definition: Human Rights Violations ..	170
6. The Role of Domestic Courts.....	172
7. Challenges.....	173
 2.4 Hans Corell:	
<i>The Increased Interconnection between International and National Law and the Need to Coordinate the Legislative Process in the Future</i>	177
1. Introduction.....	178
2. The Challenge	180
3. Requirements in the Legislative Process at the National Level.....	184
3.1. The Constitutional Aspect	184
3.2. The Consistency Aspect	186
4. Requirements in the Legislative Process at the International Level	187
4.1. The Constitutional Aspect	187
4.2. The Consistency Aspect	190
5. How Can One Achieve Better Coordination?	191
6. Conclusions.....	193
 2.5 John Bell:	
<i>The Internationalisation of Public Services and the Character of National Public Law</i>	195
1. The Basic Issue	195

2.	The Traditional Conception of Public Law.....	196
3.	Decisions Are Not Simply National.....	197
4.	Public and Private Sectors Are Overlapping.....	198
5.	The Changing Character of the State	199
6.	The Place of Transnational Providers	199
7.	Implications.....	200
2.6	Jean-Bernard Auby:	
	<i>Mega-Cities, Glocalisation and the Law of the Future</i>	203
1.	Introduction.....	203
2.	Cities and Local Realities in the Process of Globalisation	203
2.1.	Urban Growth Around the World: The Rise of the Mega-Cities.....	204
2.2.	Global-Local Dialectics: ‘Glocalisation’.....	205
3.	Some Already Perceptible Consequences in the Law.....	206
3.1.	International Legal Emergence of Local Institutions	206
3.2.	International Legal Support for Local Institutions	207
4.	Hypotheses on the Future.....	208
4.1.	Institutional Logics.....	208
4.2.	Normative Issues	210
2.7	Janne Nijman:	
	<i>The Future of the City and the International Law of the Future</i> ..	213
1.	Introduction: The Challenges of Global Urbanisation	213
2.	The Global Private City and the Global Public City	217
3.	Propositions on the Global Public City and the International Law of the Future	218
3.1.	Direct, Institutionalised Relations between the City and Global Institutions will Intensify	219
3.2.	In the Future, International Law is Increasingly Implemented and Enforced by the City on its Own Accord	221
3.3.	The International Law of the Future is Less Formal	223
3.4.	The City will be an (Informal) Actor in the International Law-Making of the Future	224
3.5.	The International Law of the Future Addresses the City Directly	226
3.6.	The City: An International Legal Person of the Future? .	227
4.	The Urbanisation of International Law: Caveat and Concluding Remarks	228

3. Private Actors, International Commerce and Private Legal Regimes	231
3.1 Gralf-Peter Calliess: <i>The Future of Commercial Law:</i> <i>Governing Cross-Border Commerce</i>	233
1. Introduction	233
2. Key Development: Transnationalisation of Commercial Law	233
3. Key Dilemmas: Privatisation and the Rule of Law	235
4. Access to Justice	236
5. Equity	237
6. Legal Certainty	238
7. Public Good	240
7.1. Preservation of the Public Order	240
7.2. Vertical Integration and Competition Policy	241
8. Resume and Outlook	242
3.2 Jan Smits: <i>Private Law in a Postnational Society</i>	245
1. Introduction	245
2. Substantive Developments	246
3. Changes in Our Inherited Ways of Thinking	247
3.3 Deborah Hensler: <i>How Economic Globalisation is Helping to Construct a Private Transnational Legal Order</i>	249
1. Introduction	249
2. Economic, Cultural, Political and Technological Factors Promoting Mass Private Litigation	250
3. The Response of National Legal Systems to Mass Harm	253
4. The Rise of a Transnational Private Legal Order for Mass Claims	256
5. Bibliography	260
3.4 Thosten Beck: <i>Matching Global Banks with Global Regulation</i>	263
1. Introduction	263
2. The <i>Status Quo</i> of National Regulation	264
3. Cross-Border Banking – Opportunities and Risks	265
4. Cross-Border Bank Regulation and Resolution – Misaligned Incentives	267

5. Conclusions.....	270
3.5 Tineke Lambooy:	
<i>Corporate Law and CSR: Will There Be a Constitution for Multinational Companies in 2030?</i>	273
1. The Ideal CSR Scenario.....	273
2. The Role of Law in Supporting the Ideal CSR Scenario	276
3. Examples of Current Debate About Multinational Conduct...	277
4. Discussion on the Emergence and Present Functioning of CSR.....	280
5. International Law and MNCs.....	283
6. MNCs and CSR.....	285
7. Future Scenario's Regarding MNCs and International Legal Framework(s).....	286
8. A Possible Future Scenario: An 'MNC Constitution'	289
3.6 Jan Eijsbouts:	
<i>International Market Regulation, Corporate Governance, CSR and Multinationals</i>	295
1. Introduction.....	296
2. The Substance	297
3. The Form.....	300
4. Conclusion	302
3.7 Levinus Timmerman, Matthijs de Jongh and Alexander Schild:	
<i>The Rise of the Social Enterprise: How Social Enterprises Are Changing Company Law Worldwide</i>	305
1. Introduction.....	306
2. Where the Public and the Private Sectors Meet	306
2.1. The Public Need for the Private Sector	306
2.2. The Drawbacks of the Private Sector	307
2.3. Limiting External Costs vs. Creating External Benefits .	308
2.4. <i>Homo Economicus</i> vs. the Social Entrepreneur	309
3. Two Key Challenges.....	310
3.1. Finance	310
3.2. Dual Purpose	312
4. Special Legal Entities for Social Enterprises	313
4.1. Why and How?.....	313
4.2. A Global Trend.....	315
4.3. All Roads Lead to Rome	318
5. Conclusion	319

PART II:
THE FUTURE OF LAW

4.	Law and Its Evolution – Theoretical Perspectives.....	323
4.1	Peer Zumbansen: <i>The Future of Legal Theory</i>	325
1.	Introduction.....	325
2.	Definitions.....	326
2.1.	Institutionalised Lawmaking Authorities	328
2.2.	Stabilising Expectations	329
2.3.	Law as Oppression/Law as Hope and Emancipatory Tool.....	330
3.	Futures.....	331
3.1.	The Conundrum of Functionality	331
3.2.	Law as Empty Shell/Law as Parasite	333
4.	Context.....	336
5.	Prospects	338
6.	Interdisciplinarity	339
4.2	Jo Ritzen and A.W. Heringa: <i>An Imminent Implosion of Legal Systems?</i>	341
1.	An Imminent Implosion?	341
2.	When Too Much Legislation Decreases Trust and Predictability	343
3.	Trust is a Repeated Game	345
4.	Social Risk Aversion Enforces Legislation: The Spiral Downwards	346
5.	(How) Does the Implosion Occur?	347
6.	Trust in Legislation, Politics and Institutions.....	348
7.	Conclusion	349
8.	Annex.....	350
4.3	Hans Lindahl: <i>The Boundaries of Legal Orders in a Postnational Setting: Conceptual, Normative and Institutional Issues</i>	355
1.	Legal Boundaries in the Postnational Era	355
2.	A Thought Experiment.....	358
3.	Beyond Cosmopolitanism and Communitarianism.....	363

4.4 James Gordley:	
<i>The Future of Private Law</i>	367
4.5 David Koepsell:	
<i>International Law and Legal Positivism</i>	375
1. The Emergence of Positivism	375
2. Legal Positivism and International Law	378
3. A Vacuum of Justice	380
4. Progress and Justice: Embracing a Natural Basis for the Good	382
4.6 H. Patrick Glenn:	
<i>The Future of the Future</i>	385
1. Introduction.....	385
2. The Concept of the Future and Its Possible Decline	385
3. Law in a World with No Future	386
4. Private International Law.....	387
5. Civil Procedure	389
6. The Legal Professions.....	391
7. Corruption	392
8. Conclusion	393
4.7 Marc Amstutz:	
<i>Mechanisms of Evolution for a Law of the Future</i>	395
1. Introduction.....	395
2. The Genesis of the Law	398
3. The Mechanisms of the Evolution of Law.....	400
4. The Evolution of the Concept of Law (as a Function of the Globalisation of Law)	402
5. The Implications of Legal Evolution for the Application of Law (Evolutive Legal Reasoning)	403
4.8 Pierre Larouche:	
<i>Law, Society and Normativity</i>	407
1. Introduction.....	407
2. Positive Law and Normativity	408
3. Law and Legal Science <i>Vis-à-Vis</i> Other Social Sciences	412
4. Conclusion	416
4.9 Ewoud Hondius:	
<i>A Private Law Perspective, Focusing on Procedural Aspects</i>	417
1. Delimitation of the Subject	417

2. Material	419
3. Importance of the Subject	421
4. Conclusion: A Procedural Approach	422
5. Divergence and Convergence of Legal Systems.....	425
5.1 Larry Catá Backer: <i>Inter-Systemic Harmonisation and Its Challenges for the Legal State</i>	427
1. Introduction.....	427
2. The Future: Divergence, Coordination, and Contradiction in Ideologies of Convergence.....	428
3. The Challenge for the Development of Law: Avoiding Containment and Irrelevance	431
4. Toward a Mechanics of Relevance for National Legal Systems in the International Legal Order as a Whole.....	434
5.2 David Nelken: <i>Globalisation, Comparative Criminal Justice, and Diversity</i>	439
1. Introduction.....	439
2. Globalisation and Criminal Justice	440
3. Studying the Spread of Criminal Justice Blueprints	443
4. Towards a Common Criminal Justice?	445
5. Respecting and Learning from Difference	448
5.3 Hugh Collins: <i>The Impossible Necessity of European Labour Law</i>	453
1. Introduction.....	453
2. Regulatory Competition	454
3. Pluralist Settlements.....	456
4. The Inevitable Accident of EU Labour Law.....	459
5. Private International Law?	461
6. De-Paradoxification	463
6.1. Negative Integration and Deregulation	463
6.2. Soft Law	464
6.3. Constitutionalisation of Labour Law.....	465
7. Broader Lessons for the Future	466
5.4 Stefan Grundmann: <i>The Future of Contract Law</i>	467
1. Introduction	467

2. Institutional Questions and Questions Concerning the Overall Framework	468
3. Starting Point:	
New Levels of Legislation and New Legislatures	469
3.1. Supranational Level.....	469
3.2. Private Ordering and Rule Setters?	472
4. Optimising Freedom via Tightening Protective Standards	473
4.1. Core Examples Today	473
4.2. Characterising the Two Poles and Their Interplay	476
5. Summary and Conclusions.....	479
 5.5 Ruth Sefton-Green: <i>Transformations of European Contract Law Over the Next Two Decades</i>	481
1. Introduction.....	481
2. The Need for Further Integration to Facilitate Cross-Border Transactions	483
2.1. The Objective: The Quest for Coherence of European Contract Law or Convergence of National Private Law Rules.....	484
2.2. The Means: How to Achieve Convergence.....	484
2.3. Uncertainty and Decision-Making	486
3. Evaluating the Options.....	486
3.1. Harmonisation and Fragmentation: The Risk of Backfire	487
3.2. An Optional Instrument: Choosing Between Domestic Law and the European ('28 th ') Regime	488
3.2.1. The Legal Form of an Optional Instrument	489
3.2.2. An Optional Instrument for Whom?	489
3.2.3. The Field of Application: General Contract Law or Specific Contracts Only?	491
3.3. A Combination: Not One or the Other but Both?	491
4. Greater Transparency in European Law-Making: Who Are the Law-Makers?.....	492
5. Hopes for a European Legal Culture: Wishful Thinking?	493
 5.6 Benedict Kingsbury: <i>Indicators and Governance by Information in the Law of the Future</i>	495
1. Introduction.....	495
2. What Are Indicators?	496
3. Producers, Users, and Subjects of Indicators	497

3.1. Producers.....	497
3.2. Users.....	499
3.3. Subjects	499
4. Indicators in Governance: Historical Antecedents.....	500
5. Roles and Problems of Indicators in Contemporary Global Governance	504
6. Indicators and Law.....	507
 6. New Legal Challenges Posed by Technological Development	509
6.1 Nicole Vincent: <i>The Challenges Posed to Private Law by Emerging Cognitive Enhancement Technologies</i>	511
1. Introduction	511
2. Background Assumption – Responsibility Tracks Capacity... <td>513</td>	513
3. Neurolaw – The Assessment and Restoration of Responsibility Through Neuroscientific Techniques	514
4. Cognitive Enhancers – Does Responsibility Track Hypercapacity?.....	514
5. Theoretical Background and Historical Precedents	515
6. Current Lack of Legal Policy on Important Questions	518
7. Conclusion	519
6.2 Efthimios Parasidis: <i>The Essence of Being Human</i>	523
1. Introduction	523
2. Distinguishing Humans from Other Organisms	527
2.1. The Anthropological Record	528
2.2. Comparative Genomics	531
3. Identifying the Life and Death of an Individual Human	534
3.1. Interpreting Embryological Development.....	536
3.2. Cessation of the Organism-as-a-Whole.....	539
4. Conclusion	542
6.3 Yan Ling: <i>The Future of Space Law</i>	545
1. Introduction.....	545
2. Weaponisation of Outer Space.....	546
3. Safety of Space Objects	548
4. Private Participation in Outer Space Activities.....	551

5. Space Law Relating to Exploration and Exploitation of the Natural Resources of the Moon	555
6.4 Peter Hustinx:	
<i>Privacy and Data Protection – Legal Lessons?</i>	557
1. Introduction.....	557
2. Complexity.....	558
2.1. Allocating Responsibility	559
2.2. Accountability	561
3. Globalisation	562
3.1. Territoriality Under Pressure.....	562
3.2. Developing Global Standards.....	563
4. International Cooperation	564
5. Concluding Remarks.....	565
6.5 Norberto Nuno Gomes de Andrade:	
<i>Future Trends in the Regulation of Personal Identity and Legal Personality in the Context of Ambient Intelligence Environments: The Right to Multiple Identities and the Rise of the ‘Alvatars’</i>	567
1. Introduction.....	568
2. The Vision of Ambient Intelligence.....	568
3. The Challenges of AmI to Personal Identity and the Right to Multiple Identities.....	571
3.1. The Right to Multiple Identities	576
4. The ‘Alvatars’ and the Attribution of Legal Personality	577
4.1. The Rise of a New Breed of Intelligent Agents: The ‘Alvatar’.....	577
4.2. Main Characteristics and Features of the ‘Alvatar’	578
4.2.1. The Extreme Level of Personalisation That Can Be Achieved by the ‘Alvatar’	578
4.2.2. The Scope and Sphere of Action of the ‘Alvatars’	581
4.2.3. The Range of Proactive Decisions and Actions Available to the ‘Alvatar’	582
4.2.4. The Versatility, Continuity and Longevity of the ‘Alvatars’	582
4.2.5. The ‘Invisibility’ and Unobtrusiveness of the ‘Alvatars’	583
4.3. Legal Personification.....	583

7.	The Emerging International Criminal Justice System	587
7.1	Mark Osiel: <i>After International Law:</i>	
	<i>Non-Juridical Responses to Mass Atrocity</i>	589
1.	Introduction	589
2.	The Central Argument	594
3.	Reasons for Non-Juridification	595
4.	Democratic Opinion: The Continuing Place of Politics.....	602
5.	False Leads: An Inventory of Tantalising Missteps.....	605
7.2	Richard Goldstone: <i>The Future of International Criminal Justice and Its Impact on Domestic Law</i>	609
1.	Introduction	609
2.	The Most Significant Challenges for the Development of the Law.....	610
2.1.	Application of Complementarity	610
2.2.	The Resolve of the United Nations Security Council	611
2.3.	Asymmetric Wars and Other Realities of Modern Warfare.....	613
3.	Developments Likely in the Coming Two to Three Decades.....	614
3.1.	Development and Increased Use of the Principle of Complementarity	614
3.2.	Development and Increased Use of Customary International Humanitarian Law	616
3.3.	Diminished Distinction Between IHL for International and Non-International Armed Conflicts.....	616
3.4.	Development of the Legal Framework Regarding Civilians Who Directly Participate in Hostilities	617
4.	Consequences for National Systems in the International Legal Order as a Whole	618
4.1.	Greater Consideration by States of Their International Legal Obligations	618
4.2.	Possible Increased International Intervention in Cases Where States do not Implement Their International Legal Obligations	619
4.3.	Use of International Treaty and Customary International Law by National Courts	619
5.	Conclusion	620

7.3 Göran Sluiter:	
<i>The Future of International Criminal Justice</i>	621
1. Introduction.....	621
2. The Occurrence of Mass Atrocities and Issues of Criminalisation.....	622
3. Response of the International Community.....	624
4. Future Functioning of the ICC	628
5. Key Dilemma: Build or Consolidate?	631
7.4 Sébastien Jodoin:	
<i>Crimes Against Present and Future Generations: Ending Corporate Impunity for All Serious Violations of International Law.....</i>	633
1. Governance Gaps and Permissive Environments Conducive to Serious Violations of International Law	633
2. The Potential of International Criminal Justice for Addressing Corporate Impunity for Serious Violations of International Law	635
3. Crimes Against Present and Future Generations	639
4. New International Norms and Crimes.....	645
7.5 Filippo Spiezia:	
<i>The Coordination of Investigations at International Level: Towards a World Public Prosecutor?.....</i>	651
1. Introduction.....	651
2. The Inadequacy of the Answers Provided by National States: The Tension between the Principle of State Sovereignty and the Internationalisation of Crime	653
3. The Possible Solutions: The Necessity of Shared Values on International Level	658
4. The Building of Harmonised National Legal Criminal Systems at a Global Level.....	661
5. An International Coordination System for Prosecutions: The Necessity for new Global Players?	663
5.1. The Coordinating Function: The Example of Eurojust for the EU.....	663
6. The Creation of a European Public Prosecutor Office from Eurojust.....	667
7. One World Public Prosecutor or Several International Public Prosecutors for Different Homogeneous Areas?	669

7.6 André Klip:	<i>The Future of International and European Criminal Law</i>	673
1. Introduction	673	
2. A Glimpse into a Possible European Future: General Outlook of the Further Integration of the European Union.....	674	
3. Particular New Features and Institutions of Continued Integration of the European Union.....	676	
3.1. The European Public Prosecutor's Office	676	
3.2. The European Criminal Court	676	
3.3. The Character of European Criminal Law	677	
3.4. The Language of EU Law	677	
4. The ICC's Bias Regarding International Crimes Related to World Powers.....	678	
4.1. The Failure of Complementarity	679	
5. Conclusion – The Decline of the Primacy of National Criminal Law	681	
7.7 Maíra Rocha Machado:	<i>Modern Penal Rationality Left Behind: A Call for Innovative Thinking and Practice in Criminal Law</i>	683
1. Introduction	683	
2. Modern Penal Rationality as One of the Main Challenges to the Development of Law.....	684	
3. First Problematic Manifestation: Minimum Punishment	688	
4. Second Problematic Manifestation: The Marginal Role of Restorative Justice Mechanisms	691	
5. To Conclude	692	
7.8 Sohail Inayatullah:	<i>Alternative Futures of Crime and Prisons</i>	695
1. Popular Culture and the Futures of Crime and Prisons	695	
2. Futures of Crime	697	
3. Rehabilitation	698	
4. Punishment.....	701	
5. Genomics – A New Variable?.....	701	
6. Digitalisation	703	
7. Soft Technologies	704	
8. Alternative Futures.....	705	
8.1. Prisons Forever.....	705	
8.2. Prisons Transformed.....	705	
8.3. Community Alternatives	706	
8.4. Prevention.....	706	

8.5. Punishment Plus	707
8.6. Prisons and the Justice System as a Learning Organisation.....	707
9. Crime and Its Futures Based on Our Views of Justice.....	708
 List of Contributors.....	709
 Index.....	735
 FICHL Publication Series	741
 Other Volumes in the FICHL Publication Series.....	743