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► **To cite this version:**

Horatia Muir Watt. Conflicts of laws unbounded: the case for a legal-pluralist revival. *Transnational Legal Theory*, 2016, 7 (3), pp.313 - 353. 10.1080/20414005.2016.1212585 . hal-03275659

**HAL Id: hal-03275659**

**<https://sciencespo.hal.science/hal-03275659>**

Submitted on 1 Jul 2021

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To cite this article: Horatia Muir Watt (2016) Conflicts of laws unbounded: the case for a legal-pluralist revival, *Transnational Legal Theory*, 7:3, 313-353, DOI: [10.1080/20414005.2016.1212585](https://doi.org/10.1080/20414005.2016.1212585)

To link to this article: <http://dx.doi.org/10.1080/20414005.2016.1212585>



Published online: 05 Aug 2016.



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## Conflicts of laws unbounded: the case for a legal-pluralist revival\*

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### ABSTRACT

This paper attempts to bring the specific insights of conflict of laws to issues challenging contemporary legal theory in its efforts to integrate the changes wrought by globalisation in the normative landscape beyond the nation-state. Indeed, conflicting norms and social systems are now at the centre-stage of jurisprudence. Conversely however, private international legal thinking can benefit from attention to the other legal disciplines that have preceded it in 'going global'. It needs to undergo a conceptual overhauling in order to capture law's novel foundations and features and adjust its epistemological and methodological tools to its transformed environment. It must reconsider the debate about legitimacy of political authority and the values that constitute its normative horizon. From this perspective, societal constitutionalism, as mooted by Teubner, provides a particularly promising avenue for unbounding the conflict of laws, which might then emerge as a form of de-centred, reflexive coordination of global legal interactions.

**KEYWORDS** Legal pluralism; conflict of laws; private international law; revival; globalisation; rights; legitimacy; conflicting rationalities

### I. Introduction

In a world society with neither apex nor centre, there is just one way remaining to handle inter-constitutional conflicts – a strictly heterarchical conflict resolution. This is not just because of the absence of centralized power, which could be countered by intensified political efforts, but is rather connected with deep structures in society which Max Weber called the 'polytheism' of modernity. Even committed proponents of the 'unity of the constitution' are forced to agree that the unity of the nation-state constitution is now moving toward a 'clash of civil constitutions', toward mutually conflicting rationalities to be defused by a new conflict of laws.<sup>1</sup>

Teubner's striking statement elevates the conflict of laws to a meta-constitutional level. This paper seizes upon this opportunity to ask whether

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\* Paper first delivered at the Conference for the *Journal of Private International Law* at University of Cambridge, September 2015. All websites accessed 21 March 2016.

<sup>1</sup> Gunther Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (Oxford University Press, 2012) 152.

the discipline has specific insights to bring some of the most significant issues that challenge contemporary legal theory,<sup>2</sup> in its attempts to integrate the radical changes wrought by globalisation in the normative landscape beyond the nation-state.<sup>3</sup> A global legal paradigm,<sup>4</sup> that is, a legal consciousness<sup>5</sup> comprising modes of reasoning and a conceptual structure adapted to the new normative landscape, requires an overhauling of the concepts with which to understand law's foundations and features. It also mandates a reconsideration of the values that constitute its normative horizon; calls for an adjustment of methodological and epistemological tools with which to understand social complexity; justifies a renewal of the terms of the debate about legitimacy of political authority. Such an enterprise also reinforces the conviction that, conversely, private international legal thinking has all to gain from attention to the various other legal disciplines that have preceded it in the effort to 'go global'. From this double perspective, its ambition is to further the efforts already undertaken by various (and sometimes conflicting) strands of legal pluralism, as an alternative form of 'lateral-coordinate approaches'<sup>6</sup> towards the crafting of a 'jurisprudence across borders'.<sup>7</sup>

<sup>2</sup> Seeing international law (public and private) as a privileged standpoint from which to view legal theoretical issues is not new. See, for example, of each: H Batiffol, *Aspects philosophiques du droit international privé* (Librairie Dalloz, 1956); R Quadri, 'Le fondement du caractère obligatoire du droit international public' (1952) 80 RCADI 579. But has the modern international lawyer 'rejected theory' as Martti Koskeniemi surmises? See Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2nd edn 2006) 187. Today, the *Transnational Legal Theory* journal publishes conflicts of laws contributions to legal theory (see Martin Herberg, 'Global Governance and Conflict of Laws from a Foucauldian Perspective: The Power/Knowledge Nexus Revisited' (2011) 2(2) *Transnational Legal Theory* 243; Horatia Muir Watt, 'Private International Law Beyond the Schism' (2011) 2(3) *Transnational Legal Theory* 347). Comp. my attempt in 'La globalisation et le droit international privé' in V Heuzé, R Libchaber and P de Vareilles-Sommières (eds) *Mélanges en l'honneur de Pierre Mayer* (LGDJ, 2015). For a vision of pluralism through the lens of private international law, see Didier Boden, 'Le pluralisme juridique en droit international privé' (2005) 49 *Archives de Philosophie du Droit* 275.

<sup>3</sup> Globalisation is understood here as the specific compression of time and space which coincides with late modernity (Anthony Giddens, *The Consequences of Modernity* (Polity Press, 1991) 64; the coming of risk society (Ulrich Beck, *La société du risque: sur la voie d'une autre modernité* (L Bernardi tr, Flammarion, 2008), global neo-liberal economics (of which it will be question below); the paradoxical 'return of science' (Philip Pomper and David Gary Shaw (eds), *The Return of Science: Evolution, History, and Theory* (Rowman & Littlefield, 2002)) in a period of increasing disbelief in the values of modernity; and, with particular relevance to international law (public and private), the 'liquidification' of sovereignty: Zygmunt Bauman, *Identité* (L'Herne, 2010).

<sup>4</sup> Ralf Michaels, 'Globalisation and Law: Law Beyond the State' in Reza Banakar and Max Travers (eds), *Law and Social Theory* (Hart Publishing, 2nd edn 2013) 287–304; Benoît Frydman, 'Comment penser le droit global?' (2012) Centre Perelman de Philosophie du Droit Working Paper n°2012/01, online: <[www.philodroit.be/IMG/pdf/comment\\_penser\\_le\\_droit\\_global\\_2011.pdf?lang=en](http://www.philodroit.be/IMG/pdf/comment_penser_le_droit_global_2011.pdf?lang=en)>.

<sup>5</sup> Duncan Kennedy observes that what has been globalised (in successive waves, see (n 3)) are modes of legal consciousness (see Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in David Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006) 19–73).

<sup>6</sup> Neil Walker, *Intimations of Global Law* (Cambridge University Press, 2014) 106.

<sup>7</sup> Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012).

### A. Pluralism is in; conflicts are out

Indisputably, globalisation, or its contemporary (fourth?<sup>8</sup>) avatar, is inflicting an identity crisis upon the conflict of laws.<sup>9</sup> One of the reasons for this is that it illustrates the link between legal methods elaborated in view of dealing with conflicting norms and the framing of law's origins, functions and objects within a particular legal paradigm. In other words, modes of legal reasoning in the face of conflicting norms and claims to authority reflect various conceptions and expectations as to what law is and does, where it comes from and the types of issues it deals with. Change affecting these assumptions and representations about the world affects established forms of legal knowledge; probing them is a distinctly 'dangerous method'.<sup>10</sup>

Traditionally – that is, in the course of the last century and under the influence of classical legal thought in international law<sup>11</sup> – the ordering of competing normative claims outside any particular domestic system was sought in (public or private) international law. It was understood both to provide an overall scheme of intelligibility through which to understand other social spheres and to make available operational tools with which to define authority, allocate responsibilities, and guide the conduct of public and private actors. However, the emergence of competing, diffuse (post-Westphalian) forms of authority challenges the law in these ordering functions.<sup>12</sup> In the wake of displacements of power from

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<sup>8</sup> Contemporary globalisation is not the 'first' phenomenon of its kind in the history of intellectual thought: see Samuel Moyn and Andrew Sartori, 'Approaches to Global Intellectual History' in Samuel Moyn and Andrew Sartori (eds), *Global Intellectual History* (Columbia University Press, 2013) 3–32, 5; for previous globalisations affecting the law, see Kennedy (n 5).

<sup>9</sup> Understood as a crisis of modernity, it extends to the institution of law in general. However, at the same time, law, particularly international (public and private) law is far from irrelevant or absent from the global scene. On the one hand, the processes which drive the global economy, from commodity and financial markets to global supply chains, are all either embedded in domestic legal orders or public international economic law. This explains why novel claims (which will be questioned below) to private transnational authority are all made in specifically legal terms, even if they occur outside the bounds of any supporting institutional system. The contestation of global inequalities and injustices, whether in the form of human rights violations, environmental concerns, gender inequity or precarity in the workplace, all use legal syntax. Beyond judicial or quasi-judicial fora (national and international, public or private), the emancipatory potential of the language of the law is used in institutions (such as ILO, OECD) and by activists, in the name of civil society, so that law appears as crucial within the many political projects undertaken with a view to reconstruct a fairer global society. Human rights as the 'last utopia' will be further discussed below towards the end of section II, B ('Impersonal rights'): Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010).

<sup>10</sup> 'Dangerous method' is the topic of the current PILAGG (Private International Law as Global Governance) research project: PILAGG, online: <<http://blogs.sciences-po.fr/pilagg>>.

<sup>11</sup> 'Classical legal thought' is a paradigm identified in (US) domestic law: see Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books, 1975); but its influence stretched across the board (covering all Western systems and into international law).

<sup>12</sup> See Roger Cotterrell and Maksymilian del Mar (eds), *Authority in Transnational Legal Theory* (Edward Elgar, forthcoming).

public to non-state actors,<sup>13</sup> struggles for legitimacy occur between state-bound or endorsed legal systems and other unidentified sources. Moreover, sovereignty, the foundational concept of the international and domestic legal order, appears inverted or subverted, investing in private actors, or indeed signifying obligations towards the international community rather than supremacy.<sup>14</sup> It is difficult to understand what ‘law’ signifies in this environment, since its existing structure and syntax assume, implicitly, a horizon confined to the nation-state (either within the nation-state, or the interactions between nation-states). From a theoretical perspective, therefore, a new conceptual scheme is required in order to seriously consider whether to legitimise, challenge, or govern new, diffuse and disorderly expressions of power and normativity – those of the ‘unauthorised’ actors of late modernity<sup>15</sup> – which do not necessarily fit traditional forms of legal knowledge. However, the crisis that affects the conflict of laws seems to be more acute than the minor earthquakes suffered by neighbouring legal disciplines. Public international law has adapted to the massive arrival of non-state right-holders by transforming itself into an overarching welfarist system and exploring its own relationship to global justice.<sup>16</sup> Comparative law has left behind its static classifications of family traditions to join forces with the anthropology of legal transfers<sup>17</sup> or contribute to the aesthetics of global spaces.<sup>18</sup> Moreover, while analytical jurisprudence arguably loses its relevance outside the legal order of the nation-state, various schools of legal pluralism have undertaken to ‘disorder’ jurisprudence<sup>19</sup> so as to grapple with the possible foundations of legal authority beyond state boundaries.<sup>20</sup> Global,

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<sup>13</sup> *Ibid.* For an exhaustive study of multinational corporations as regulators, see Anna Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-regulation and National Private Law* (Hart Publishing, 2015). See more generally on the rise of non-state actors, indicators and rankings as emblematic of global law, Kevin Davis, Angelina Fischer, Benedict Kingsbury and Sally Engle Merry (eds), *Governance by Indicators: Global Power Through Classification and Rankings* (Oxford University Press, 2012); Benoît Frydman and Arnaud Van Waeyenberge (eds), *Gouverner par les standards et les indicateurs: De Hume aux rankings* (Bruylant, 2014).

<sup>14</sup> On the inversion of sovereignty, see Jens Bartelson, *Sovereignty as Symbolic Form: Critical Issues in Global Politics* (Routledge, 2014); and Part III, B of this paper.

<sup>15</sup> Beck (n 3).

<sup>16</sup> Emmanuelle Jouannet and Christopher Sutcliffe (trs), *The Liberal-Welfarist Law of Nations: A History of International Law* (Cambridge University Press, 2014). Moreover public international law, on the tide of managerialism and fragmentation, is now increasingly confronted with conflicts articulated as collisions of jurisdiction and applicable law, among which private or hybrid authorities and regimes now occupy a significant place. It is progressively taking on the traditional problematics of private international law (see Muir Watt (n 2)).

<sup>17</sup> Günter Frankenberg (ed), *Order from Transfer: Comparative Constitutional Design and Legal Culture* (Edward Elgar, 2013).

<sup>18</sup> Pier Giuseppe Monateri, *Geopolitica del diritto: Genesi, governo e dissoluzione dei corpi politici* (Editori Laterza, 2013).

<sup>19</sup> Berman (n 7).

<sup>20</sup> See Cotterell and del Mar (n 12) with various pluralist contributions from Paul Berman, Nico Krisch, Nicole Roughan. The debate focuses on the very nature of law (if it has one), the foundations of law’s legitimacy (mythological or otherwise), and the relationship between legal and political authority.

cosmopolitan or societal constitutionalism<sup>21</sup> and more improbably, global administrative law,<sup>22</sup> are the result of a similar turn involving a radical overhaul of central disciplinary assumptions. Thus, the complex normative conflicts of our global age have arguably become an exciting new theoretical and empirical discipline, drawing on an array of highly diverse ideas from which private international law (time-worn and bounded) is paradoxically excluded.

This new legal theoretical literature is now self-consciously global; it is also, in its most plausible avatars,<sup>23</sup> largely pluralist. As Paul Berman points out:

It has now been approximately 20 years since scholars first began pushing the insights of legal pluralism into the transnational and international arena. During those two decades, a rich body of work has established pluralism as a useful descriptive and normative framework for understanding a world of relative overlapping authorities, both state and non-state. Indeed, there has been a veritable explosion of scholarly work on legal pluralism, soft law, global constitutionalism, the relationships among relative authorities, and the fragmentation and reinforcement of territorial boundaries.<sup>24</sup>

Competing plural and transnational assertions of authority are singled out as the emblematic feature of our complex world, while the defining problem in contemporary legal thought lies in the interactions of legal traditions, social spheres, cultural values, rights and identities, epistemologies or world-visions. Rather than a search for consensus (around substantive constitutional values) or the promotion of new utopias (the quest for global justice), pluralism variously celebrates diversity as competition (law and economics), devises methodologies designed to mediate or coordinate (systems theory), and renews definitions of authority and legitimacy (socio-legal studies). Although pluralism comes in many guises and its very tenets are contested,<sup>25</sup> the features which set it apart from other modes of dealing with diversity (liberalism, or, in international law, monism) are, arguably, the location of authority within each of the conflicting systems,<sup>26</sup> the acceptance of compromise, hybridity or

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<sup>21</sup> Mattias Kumm, 'Constitutionalism and the Cosmopolitan State' (2013) 20(2) *Indiana Journal of Global Legal Studies* 605; for 'societal constitutionalism' inspired from Luhmann's systems theory, Teubner (n 1), discussed in detail below.

<sup>22</sup> Benedict Kingsbury, Nico Krisch and Richard Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3) *Law and Contemporary Problems* 15.

<sup>23</sup> These do not include forms of global constitutionalism or global governance which see the world as subject to one overarching legal order, either on the basis of an expanded version of public international law, or by projection of democratic institutions familiar to (some models of) the nation-state.

<sup>24</sup> Paul Schiff Berman, 'The Evolution of Global Legal Pluralism' Cotterrell and del Mar (n 12) forthcoming; Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012).

<sup>25</sup> Brian Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local To Global' (2007) 30 *Sydney Law Review* 375.

<sup>26</sup> Boden (n 2).

‘constructive distortion’<sup>27</sup> as an end result,<sup>28</sup> and reflexivity as an intellectual style.<sup>29</sup>

At first sight, the conflict of laws would appear to fit quite well among these pluralist strands of thought. Indeed, in his impressive panorama or theories of global law, Neil Walker classifies together, as models of a ‘lateral-coordinate approach’, both the conflict of laws and legal pluralism.<sup>30</sup> From within the discipline of the conflict of laws, this is hardly surprising. The links between pluralism and conflicts<sup>31</sup> are surely ancient: an influential definition of private international law sees its function as management of horizontal pluralism,<sup>32</sup> while the work Santi Romano has become a reference for so-called ‘unilateralist’ doctrines.<sup>33</sup> Of these two related disciplines, however, the latter – with its contemporary constitutional overtones, its comparativist pedigree and its connection to transnational societal concerns – is in. Conflict of laws – long a thriving intellectual field<sup>34</sup> – is out. Why then has its status so declined as to be reduced ‘parochial boundary-maintenance’,<sup>35</sup> while the various brands of legal pluralism flourish? As a descriptive enterprise, ‘global legal pluralism is now recognised as an entrenched reality of the international and transnational legal order’.<sup>36</sup> Normatively, or as a theoretical project, it is perhaps the most promising avenue with which to approach contemporary jurisprudential questions dissociated from the domestic legal order.

One explanation might be that the conflict of laws has lost out within in its own orbit. This is not to deny that there is a flourishing industry of traditional private international rule-craft around the world; indeed, codification seems never been to have been so popular.<sup>37</sup> But this does not help dispel the impression that the jurisprudential vein is elsewhere. There may no longer be any reason, possibly other than the strength of the professional lobby,<sup>38</sup> to support the survival of the conflict of laws at all costs. At most, it might

<sup>27</sup> Gunter Teubner, ‘Two Faces of Janus: Rethinking Legal Pluralism’ (1991–1992) 13 *Cardozo Law Review* 1443.

<sup>28</sup> The compatibility of hybridity and pluralism is contested, however, by Alexis Galán and Dennis Patterson, ‘The Limits of Normative Legal Pluralism: Review of Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*’ (2013) 11(3) *International Journal of Constitutional Law* 783.

<sup>29</sup> See the fascinating contribution by Karen Knop, Ralf Michaels and Annelise Riles, ‘From Multiculturalism to Technique: Feminism, Culture and the Conflict of Laws Style’ (2012) 64(3) *Stanford Law Review* 589, suggesting that the conflict of laws could provide an ‘intellectual style’ for dealing with conflicts of cultural norms; (eds), *Transdisciplinary Conflict of Laws* (2008) 71(3) *Law and Contemporary Problems*.

<sup>30</sup> *Ibid.*

<sup>31</sup> On which, see the remarkable ‘dypthic’ presented by Didier Boden (n 3), which relates the tenets of pluralism with those of monism, and then translates them into the terms used by the conflict of laws.

<sup>32</sup> Ph Francescakis, *La théorie du Renvoi et les conflits de systèmes en droit international privé* (Sirey, 1958).

<sup>33</sup> Santi Romano, L François and P Gothot (trs), *L’ordre juridique* (Daloz, 2nd edn 2002).

<sup>34</sup> Ralf Michaels, ‘After the Revolution – Decline and Return of US Conflicts of Laws’ (2009) 11 *Yearbook of Private International Law* 11.

<sup>35</sup> Walker (n 6) 109.

<sup>36</sup> Berman (n 24) forthcoming.

<sup>37</sup> See the panorama of codification in Symeon Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford University Press, 2014).

<sup>38</sup> Anthony Ogus, ‘The Economic Basis of Legal Culture: Networks and Monopolization’ (2002) 22(3) *Oxford Journal of Legal Studies* 419.



be argued, it is now a sub-department of internationalised contract law, a technical adjunct for intra-European Union (EU) market issues, an auxiliary to international commercial arbitration or a largely strategic tool for cross-border forum-shoppers. Legal issues arising in connection with cross-border collisions of rights and norms seem to fall within the remit of other, more recent, more overbearing or more political principles such as federalism (or free movement in the EU) and human rights, which both sweep away private international techniques and methods into the great sea of proportionality.<sup>39</sup> Moreover, much high-profile cross-border economic litigation is composed of questions of domestic contract law under party autonomy. In other fields, notably of personal status and family relationships, either the idea of recognition<sup>40</sup> suffices or conflict rules break down under the pressure of public policy. Perhaps then the sleeping discipline (dog or beauty?) should be left to lie as a vestige of the pre-global age.

A further consideration is that it has missed the very turning which it was eminently well placed to take,<sup>41</sup> and which might have invested it both as queen of the great new issues of jurisprudence in a world of colliding norms and as provider of the methodological toolbox which compose the new legal paradigm beyond state borders.<sup>42</sup> It might have inspired an authoritative perspective, born of a multi-secular experience, which to approach unfamiliar expressions of sovereignty or novel assertions of jurisdiction. It might thereby have provided a better understanding of our pluralistic world in which competing non-state norms must find their place among more venerable law-like forms. It might have led the critical stance on informal empire,<sup>43</sup> peopled by multinational corporate actors, contractual cross-border value chains and markets without borders, which are the very stuff of private (international) law. The problem, then, is arguably deeper than mere irrelevance. Its shortcomings, or worse, its darker sides for which it has already come under fire for their role in the modern imperial enterprise, may be the very cause of the great imbroglio beyond the state in which the law itself is losing out in favour of alternative more credible world-visions.

### **B. Conflicts are back ... well, sort of**

On each of these points, alternative disciplinary vocabularies have arrived on the scene and displaced the conflict of laws with more exciting 'intimations'<sup>44</sup>

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<sup>39</sup> This is not to suggest, however, that proportionality itself has a uniform content in these contexts: see Antonio Marzal Yetano, *La Dynamique du Principe de Proportionnalité. Essai dans le contexte des libertés de circulation du droit de l'Union européenne* (Institut Universitaire Varenne, 2014).

<sup>40</sup> Muir Watt (n 2) 22.

<sup>41</sup> This point has been developed more extensively: *ibid.*

<sup>42</sup> Michaels (n 4).

<sup>43</sup> See Martti Koskeniemi, 'Empire and International Law: The Real Spanish Contribution' (2011) 61 *University of Toronto Law Journal* 1.

<sup>44</sup> Walker (n 6).

as to contemporary ‘changes of state’.<sup>45</sup> Without theoretical renewal, the conflict of laws no longer delivers on a world-vision with which to make sense of global chaos – a point on which the promise of legal pluralism is far more ambitious, to the extent that it takes on board all sorts of normative diversity visible outside or beyond the state. Whatever the reasons that have led to its current eclipse, however justified its dismissal by current research, and notwithstanding the wealth of its history and potential, the discipline is probably not, or no longer, asking the right questions, proposing the appropriate methods or using an adequate epistemology. Yet, paradoxically, at the very moment where it might seem to be displaced by competing vocabularies, a closer look shows it (on the contrary) to be invested with a new relevance. Pluralist thinking has ‘caught on’ to conflicts. In many respects, the insights of the new global thinking have overtones of the reinvention of the wheel – if in a richer, interdisciplinary mode.

Global constitutionalism is framed as providing for the *modes of interaction* between overlapping normative systems. Political science calls for interface norms.<sup>46</sup> The central problem singled out by contemporary legal pluralism is framed in terms of competing norms and claims to authority, while proposed solutions for their mutual accommodation take the form of deference, coordination or synthesis, and competition. The diversity thus described, the terms defined, the methods used, the values involved, are all largely familiar to the history of the conflict of laws, in one era or another. The discipline grew out of the concurrence of different claims to authority (religious and secular; political independence); had to confront heterogeneous traditions of law-making (written and oral customs; formal and informal systems); pitted ‘conflicts justice’ against alternative aspirations such as economic efficiency; dealt variously in individual rights or legal systems; included unrecognised states and indigenous peoples; wheeled between public law and private law; experimented with substantive rules, principles of deference or subsidiarity; became torn between attachment to neutrality and the pursuit of values; oscillated between community-building and the dictates of sovereignty; provided the emblematic space to explore the virtues of rules and standards, security and flexibility; explored the limits of toleration and still swings constantly from faith in universalism to resignation before irreducible cultural interpretations.

It is hardly surprising, therefore, that private international legal methodology – albeit substantially revisited – has attracted new attention<sup>47</sup> to the point of being posited by Gunter Teubner as the only plausible content of

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<sup>45</sup> Annabel S Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (Princeton University Press, 2011).

<sup>46</sup> Nico Krisch, ‘The Structure of Postnational Authority’ in Cotterrell and del Mar (n 12) forthcoming.

<sup>47</sup> See Knop, Michaels and Riles (n 29); see too, Lars Vellechner, ‘Responsive Legal Pluralism: The Emergence of Transnational Conflicts Law’ (2015) 6(2) *Transnational Legal Theory* 312.

‘global societal constitutionalism’.<sup>48</sup> As flagged by the citation at the beginning of this text, such a claim will be taken very seriously throughout the developments that follow. A similar statement is made by Paul Berman, who recognises in the context of global legal pluralism that ‘these [private international law] doctrines become a core way of navigating the interactions, using principles that navigate between legal formalism and political practicality’.<sup>49</sup> In this respect, the conflict of laws contains a sophisticated arsenal of methodological principles which fit the pluralist idea of coordination. Choice of law rules and standards, diverse ‘approaches’, theories of incidental application, renvoi and (with a pinch of imagination) subsidiarity, deference and deliberative polyarchy are all but a few of the techniques at its disposal with which it can offer the navigation map that legal pluralism arguably lacks. Arguably, the conflict of laws would have been able to ‘set the ground-rules for interaction among relative authorities’,<sup>50</sup> with a little nudging. Nor need it be disdained as a clever toolbox. It has a rich jurisprudence of rights (transitory or not), law (including the status of foreign law), comity, sovereignty, coordination and tolerance. Recently, it has appeared as a sophisticated repository for interdisciplinarity,<sup>51</sup> providing a discursive framework that structures thought<sup>52</sup> as an epistemology of complex systems<sup>53</sup> or a new launch-pad for global governance.<sup>54</sup>

Like the return of science,<sup>55</sup> the revival of the conflict of laws is on the cards! The discipline appears as a serious candidate for occupying a significant governance function in ‘global legal space’ defined as beyond the reach and out of bounds of state sovereignty or state-endorsed institutions. After all, its line of business has long been making sense of interactions that cross state boundaries and fall between the gaps between domestic sovereignty and public international law. At the same time, however, complacency would be largely misplaced. The conflict of law’s contemporary intellectual abeyance certainly warrants a humble detour by the various thriving strands of global legal theory.<sup>56</sup> Indeed, it may have much to learn from

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<sup>48</sup> Teubner (n 1).

<sup>49</sup> On the flip side of this move is the new prominence of constitutionalism. ‘If ... we see constitutionalism as setting the ground-rules for interaction among relative authorities, constitutionalism becomes more important than ever’ (Berman (n 24) forthcoming).

<sup>50</sup> *Ibid.*

<sup>51</sup> Once again, Karen Knop, Ralf Michaels and Annelise Riles (eds), ‘Transdisciplinary Conflict of Laws’ (2008) 71(3) *Law and Contemporary Problems*.

<sup>52</sup> As Knop, Michaels and Riles claim, it provides a template for lateral and reflexive thinking, useful for navigating cultural conflicts, including clashes of feminism and tradition: *ibid.*

<sup>53</sup> See Horatia Muir Watt, ‘New Challenges in Public and Private International Legal Theory: Can Comparative Scholarship Help?’ in Mark Van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) 271.

<sup>54</sup> See Horatia Muir Watt and Diego Fernandez Arroyo (eds), *Private International Law and Global Governance* (Oxford University Press, 2015).

<sup>55</sup> Pomper and Shaw (n 3).

<sup>56</sup> For an overview and tentative classification of these strands, see Walker (n 6).

other disciplinary vocabularies, either about the definition of conflicts or their modes of resolution, and this could lead in turn to a radical reformulation of its own core issues. Indeed, if encounters between heterogeneous norms or expressions of diverse types of informal authority are central to the understanding of the normative landscape beyond the confines of state sovereignty,<sup>57</sup> the traditional schemes of intelligibility which underlie the conflict of laws need to take on board various additional dimensions of global complexity. If it does so and succeeds in living up to this challenge, it may emerge considerably enlightened by global legal theory. However, the reverse is true too.

What follows then is something in the way of a co-productive,<sup>58</sup> interdisciplinary effort. Several thorny issues or choices confront both the conflict of laws and legal pluralism when they claim relevance outside international or infra-state contexts, respectively. This paper proposes to explore the ways in which the former can gain from (and contribute to) the newer insights of the latter. It will first revisit the anatomy of 'conflict' under these two approaches. In comparing their respective perceptions of normative interaction, it appears then that the conflict of laws approach focuses more tellingly on the underlying stakes, but needs in turn to take on board the complexity and centrality of normative overlap as emphasised by legal pluralism (I). It will be shown how this could potentially lead to a radically new reading of the very 'matrix' of the private international law discipline. Indeed, its traditional spotlight is on antagonistic individual claims invoked by different right-holders, so that rights have tended to become the focus of conflict of laws analysis. But an alternative approach (inspired by Gunter Teubner's societal constitutionalism) understands such individual rights-claims to be the visible expression of conflicts on a deeper level as involving 'anonymous' social systems. The implications of this idea for the conflict of laws will be explored (II). A further transformation resulting from this encounter between the conflict of laws and legal pluralism concerns the perspective from which questions of theoretical import are asked. When pluralism advocates a heterarchical and reflexive approach to any form of legal overlap, private international law is able to make available a supportive methodological framework that can respond to the usual critiques levelled at pluralism's inability to solve conflicts or to its lack of normative horizon (III).

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<sup>57</sup> For a critique, in turn, of Walker's own conceptions as being tainted by a state-focused paradigm, see Ruth Buchanan, 'Reconceptualizing Law and Politics in the Transnational Constitutional and Legal Pluralist Approaches' *Comparative Research in Law & Political Economy Research Paper No. 19/2008* (Osgoode Hall Law School, Toronto, 2008).

<sup>58</sup> On interdisciplinary co-production of knowledge, see Sheila Jasanoff and Olivier Leclerc, *Le droit et la science en action* (Daloz, 2013).

As will be seen in the conclusion to this article, practice has unfortunately not waited for these insights. Are we on the way, then, to a legal-pluralist revival of the conflict of laws?

## II. The anatomy of conflict

What's in a conflict?<sup>59</sup> 'Conflicts' within the meaning of the conflict of laws are notoriously more complex than they might seem at first sight. They are not necessarily understood as confrontational. Sometimes indeed, they are 'false'.<sup>60</sup> In other instances, they imply that a law deliberately 'offers' its competence but will defer to a refusal.<sup>61</sup> More frequently, they signify that several laws are simultaneously available for possible use, to the extent that they all include the issue at hand in their scope or all accept to serve as default rules for international contracts. Only occasionally do they really involve mutually exclusive claims to regulate.<sup>62</sup> And yet again, some such claims may be merely 'incidental'.<sup>63</sup> In turn, legal pluralism suggests that norms meet, clash or combine independently of state borders according to multiple patterns of instable and recursive interaction in global context. Comparing these perceptions of normative interaction shows the conflict of laws approach to focus more tellingly on the underlying stakes, on the condition, however, that its templates integrate the greater complexity (A) and the very centrality of hybrid normative encounters (B).

### A. Close encounters: a third kind?

Private international law understands 'conflict' in terms of three distinct ideal types: simultaneous assertions of jurisdiction in respect of a single situation or the issues to which it gives rise are theorised as giving rise to either confrontation, cooperation or competition between the contending laws or legal systems. Correlatively, three main methodologies – unilateralism,

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<sup>59</sup> The alternative to the unsatisfactory vocabulary of conflicts is to talk about 'private international law', but again everyone knows that the private is problematic, that the international is too state-centred, and that non-state norms can only gingerly be included in the concept of 'law'. Do the semantics really matter if despite the hiatus between the terms and their meaning, the convention is sufficiently clear? It is likely that they do, at least when the context has changes so much that the words convey an entirely contrary meaning. The time-worn vocabulary may explain at least in part why conflicts seems so parochial to global legal theory, as Walker (n 6) observes. Perhaps it would be better to spell out conflicts as 'de-centered, reflexive coordination of global legal interactions'.

<sup>60</sup> As in Brainerd Currie's 'governmental interest analysis': B Currie, *Selected Essays on the Conflict of Laws* (WS Hein, 1963), where a conflict is 'false' when only one state has an interest in pursuing its policy in a given case (for a comprehensive overview, see Lea Brilmayer, 'Governmental Interest Analysis: A House Without Foundations' (1985) 46 *Ohio State Law Journal* 459, online: <[http://digitalcommons.law.yale.edu/fss\\_papers/2512](http://digitalcommons.law.yale.edu/fss_papers/2512)>.

<sup>61</sup> As in renvoi.

<sup>62</sup> As in 'lois de police' or overriding mandatory norms.

<sup>63</sup> Incidental application, or 'giving effect' (see Regulation (EC) No 593/2008, Article 9 (Rome I)) or *prise en consideration*.

multilateralism and party choice – each provide, in ideal form, a response to the particular problems thus defined. Theorised in the course of the past century – largely in the wake of various political projects involving the establishment of liberalism, the story of state sovereignty, the modern international public legal order – the discipline’s approach to the interactions between plural, conflicting norms naturally bears the marks of the great simplifications<sup>64</sup> of modern law’s ‘mythodology’.<sup>65</sup> This approach’s main challenge was to grapple with territorial monopoly, in order to craft the ways in which the ‘relevance’<sup>66</sup> of foreign systems might find expression despite the constraints of the legal framework imposed by public international law. With varying degrees of (im)plausibility, doctrines such as vested rights, transitory torts, the perception of foreign law as fact, were all attempts to by-pass the legal impregnability of the nation-state boundaries which global pluralism dismisses as increasingly irrelevant today. However, globalisation weakens the claim of these fictions to any plausible description of the postnational world, or the forms which law takes ‘beyond the state’. As Berman again points out: ‘[W]hat we might be done with is the (perhaps always fictitious) idealized vision of the nation-state as a single authority operating autonomously within bounded territory.’<sup>67</sup>

In stark contrast to the traditional, simplified view of conflicts stands the post-modernist viewpoint of global legal pluralism. As Neil Walker muses, the intimated features of ‘global law’ take on the dynamic, unstable and recursive characteristics of the complex processes that it claims to capture.<sup>68</sup> One of the comparative attractions of global legal pluralism is to reflect in its methodology the intense circulation of ideas and the constant mutual irritation, the ‘in-between worlds’ which ‘interlegality’ produces.<sup>69</sup> Embracing instability, contingency, dynamics, disorder, polyarchy in its definition of interactions between normative orders, global-pluralist legal theory sees ‘the state and the interstate system as complex social fields in which state and non-state, local and global social relations interact, merge and conflict in dynamic and

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<sup>64</sup> The Peace of Westphalia had produced order out of normative chaos by creating sovereign territorial monopolies and correlative assumptions, ideals, beliefs and dogma about the reach, nature and foundations of the law. These also shaped the conceptualisation of the ‘overflow’ – the remaining conflicts beyond the boundaries of each sovereign state, to which private international methodology applies. If law, including international law, functions according in systematic and hierarchical mode and tends towards stability, unity, coherence and certainty; the space beyond the state must in turn be subject to such order.

<sup>65</sup> This term is a wordplay upon the authentic version of Peter Fitzpatrick’s *The Mythology of Modern Law* (Routledge, 1992).

<sup>66</sup> This was the term used by Santi Romano to describe the relationships between social systems. At a time when the conflict of laws was dominated by a sovereignty paradigm, it was used to break through an overly formalist conception of the relationship between the legal systems, notably that of the forum and foreign law (see Romano (n 33)).

<sup>67</sup> Berman (n 24) forthcoming.

<sup>68</sup> See Walker (n 6) 148.

<sup>69</sup> Marc Amstutz, ‘In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning’ (2005) 11(6) *European Law Journal* 766.

even volatile combinations'.<sup>70</sup> Indeed, the vocabulary and the metaphors are highly revealing: collisions, interaction, merging, recursivity, interwoven diversity, mutual provocation, in-between worlds, irritations, interferences (understood in an electrical mode), disruptions or distortions are all used by pluralists to express multiple new patterns of encounters between legal systems.<sup>71</sup>

This pluralist vision certainly suggests a richer understanding of the 'interminglings' between social systems than the three horizontal schemes of coordination, competition and confrontation to be found within the paradigm of the conflict of laws. Beyond its obvious focus on confrontation, the term 'conflict' – curiously understood to cover complementarity – does not adequately express mutual 'irritations' that set off a series of unpredictable and potentially far-reaching consequences when the internal make-up of each system differs.<sup>72</sup> Nor does an overly static vision do justice to the dynamics of these interactions with which, in practice, the conflict of laws itself has to cope in the form of strategic navigation by private actors of multiple regimes (from fiscal and investment regimes to familiar forum shopping for procedural tools).<sup>73</sup> Indeed, strategic u-turns and the resort to clawbacks and counter-measures are so much part of the global picture that the concept of 'fraud on the law' – a pillar of continental general theory designed to neutralise attempts to circumvent the 'natural' forum – has been rendered impotent.<sup>74</sup> In turn, EU law draws attention to the diagonal dimensions of conflicts in multi-layered systems.<sup>75</sup> Furthermore, using the pluralist framework of societal constitutionalism, Teubner attempts a classification of regime collisions which signals the increased new intricacy of 'problem areas'. These are '(1) the collision of a particular sub-rationality with other

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<sup>70</sup> Berman (n 24) forthcoming, quoting Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Cambridge University Press, 2002) 94.

<sup>71</sup> They fit the post-modern paradigm of the tentacular rhizome (Deleuze), and the accelerated intensity of hyper-reality (Baudrillard).

<sup>72</sup> Gunter Teubner has famously drawn attention to the 'irritations' that occur when systems enter into contact with each other through 'legal transfers', setting off a series of unpredictable and potentially far-reaching consequences when the internal balance (the social couplings) within the two systems differs: Gunter Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61(1) *Modern Law Review* 11.

<sup>73</sup> The notorious *Chevron* litigation provides the supreme example, promising a legal battle made of measures and countermeasures throughout the world, 'until the oceans run dry'. For convenience, see the multiple references in Horatia Muir Watt, 'Chevron, l'enchevêtrement des fors. Un combat sans issue?' (2011) 100(2) *Revue critique de droit international privé* 339.

<sup>74</sup> Despite free movement, the concept lingers, however: see in the case of the French prohibition on surrogacy arrangements, and the refusal to recognize the civil status of children born of such agreements abroad on grounds of *fraude à la loi*: *Mennesson v France* [2014] ECtHR n°65192/11 and *Labassee v France* [2014 ECtHR] n°65941/11 (regarding violation of the European Convention on Human Rights (ECHR) art 8).

<sup>75</sup> Christian Joerges, 'The Idea of a Three-Dimensional Conflicts Law as Constitutional Form' in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation* (Hart, 2006) 491–528; Jeremy Heymann, *Le droit international privé à l'épreuve du fédéralisme européen* (Economica, 2010).



sub-rationalities; (2) collision with a comprehensive rationality of world society; and (3) the collision of the function-maximization with its own self-reproduction.<sup>76</sup> Among the ‘intimations’ of global law, Walker points out the ‘double deformatisation’ which transforms ‘the paradigm conflicts case... between state legal orders which are symmetrical and largely mutually exclusive’ so as to include ‘trade and mix of first-order authority between regimes with quite different but often significantly overlapping substantive jurisdictions’.<sup>77</sup>

Significantly, awareness of the pervasive complexity of normative interaction<sup>78</sup> is also a feature of all the other disciplines that have positioned themselves to survey or regulate (from various standpoints) the global legal landscape. Outside the conflict of laws, then, the new global problematic is that of ‘conflicts’. Legal sociology explores the ‘no-man’s-land in which different normative orders collide because different spheres of meaning (*Sinnwelten*) are colliding’.<sup>79</sup> Comparative law, renewing its alliance with anthropology and global history, explores the dynamics of legal transfer and the contested internal make-up of each legal culture, full of ‘unofficial portraits’ and informal sub-cultures.<sup>80</sup> Human rights theory, now indissociable from its own set of critical strands, has taken on board the inter-sectionality of identities<sup>81</sup> and moreover shows up the contestations which takes place within the discourse of human rights itself. The spate of recent cases that have come up in Western societies in relation to the diverse cultural practices of immigrant populations illustrates the multiple standpoints which can emerge in a conflict otherwise framed in apparently univocal terms. Wearing a full-veil or burqa in a secular (or mono-religious) society which prohibits ostensible (or non-orthodox) religious wear in public<sup>82</sup> can be viewed

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<sup>76</sup> Teubner (n 1) 81. He adds, ominously: ‘The evolutionary dynamics of these three collisions certainly have the potential to result in a societal catastrophe.’ He references Niklas Luhmann: ‘the occurrence of catastrophe is contingent. It depends on whether countervailing structures will emerge which prevent the positive feedback catastrophe’. On the methodology which is suitable to take up this challenge, see Section II of this article.

<sup>77</sup> Walker (n 6) 114.

<sup>78</sup> de Sousa Santos (n 70) 437: ‘different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions, either on occasions of qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life’.

<sup>79</sup> Poul F Kjaer, ‘The Concept of the Political in the Concept of Transnational Constitutionalism’ in Christian Joerges and Tommi Ralli (eds), *After Globalization: New Patterns of Conflict and Their Sociological and Legal Re-construction* (ARENA Report No 4/11, RECON Report No 15) 285–321, 315, online: <[http://pure.au.dk/portal/files/70590248/After\\_Globalization.pdf](http://pure.au.dk/portal/files/70590248/After_Globalization.pdf)>.

<sup>80</sup> See Frankenberg (n 17); Mitchel de S-O-l’E Lasser, ‘Judicial (Self-) portraits: Judicial Discourse in the French Legal System’ (1995) 104(6) *Yale Law Journal* 1325. The internal complexity of legal cultures explains why forced legal transplants act as ‘irritants’ (Teubner (n 1)) producing unpredictable consequences in their adoptive environment: importing an isolated institution cannot be the end of the story, since the internal complexity of a legal tradition will produce new patterns, fuelling disruption and new combinations.

<sup>81</sup> The term was coined by Kimberle Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’ in David Kairys (ed), *The Politics of Law: A Progressive Critique* (Pantheon, 2nd edn 1990) 195–217.

<sup>82</sup> See the position of French law as analysed in ECtHR, *SAS v France* [2014] n° 43835/11.



diversely as an identitarian assertion in the name of self-expression, a feminist stance, a form of resistance against the perceived repressive nature of state secularism, a practice mandated, encouraged or condoned by a foreign law governing personal status, a submissive gesture within a sexist subculture or the sign of deep social unrest in a class-based system. In legal terms, it could take the form of a human rights claim,<sup>83</sup> a traditional issue of applicable law (personal status), an instance that requires a political acceptance of foreign or religious cultures in a multicultural society,<sup>84</sup> or a national security event.<sup>85</sup> A proportionality analysis has to weigh in all these viewpoints and is certainly better equipped methodologically to embrace this multi-faceted situation than any single perspective.<sup>86</sup>

From the standpoint of legal pluralism, bringing to bear the lens of a conflict of laws analysis will facilitate the analysis of sensitive cases of mutual irritation between hybrid regimes – whether or not in a transnational context. Once the ‘conflict’ is identified, its multiple dimensions are better grasped and ultimately, the needs of each system more appropriately accommodated. As Berman says:

[C]onceiving of these clashes between religious and state law in conflicts terms reorients the inquiry in a way that takes more seriously the non-state community assertion. As a result, courts must wrestle both with the nature of the multiple community affiliations potentially at issue and with the need to articulate truly strong normative justifications for not deferring to the non-state norm.<sup>87</sup>

If it is willing to take on the greater complexity, the conflicts approach, then, is right.<sup>88</sup> Thus, on the one hand, pluralism could gain by ‘conceiving of a battle between state and non-state law in terms of conflicts doctrine [*which*] will tend to change the framework of decision’.<sup>89</sup> Putting conflicts in the limelight allows multiple complex stakes to surface. Conversely, the potential contribution of pluralism to the conflict of laws would be to make ‘the choice-of-law decision a constructive terrain of engagement among multiple normative

<sup>83</sup> *Ibid.*

<sup>84</sup> On recognition in such a context, which is both an element of societal dialogue and a conflict of laws problematic, see Horatia Muir Watt, ‘Fundamental Rights and Recognition in Private International Law’ (2013) 3 *European Journal of Human Rights* 409. The recognition concept in Hegel’s early social philosophical works (on ‘struggle for recognition’: *kampf um anerkennung*) is re-read by Axel Honneth in *The Struggle for Recognition: Moral Grammar of Social Conflicts* (Polity Press, 1996). Similarly, Charles Taylor’s Hegelian scholarship inspires his own work on recognition within a multicultural society: *Hegel and Modern Society* (Cambridge University Press, 1979); *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, 1994).

<sup>85</sup> See the reasons (as invoked by the French government) for the French prohibition of (full) veil in public spaces, in *SAS v France* (n 82).

<sup>86</sup> On the complexity of proportionality itself as simultaneously mode of reasoning, technique and conflict rule (institutional competence): see Yetano (n 39).

<sup>87</sup> Berman (n 24) forthcoming.

<sup>88</sup> The passage goes on: ‘Because non-state law-making is not usually conceived of as law, we do not usually think of clashes between state and non-state law through the prism of conflict-of-laws jurisprudence. *But we could*’: *ibid.*

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

systems, rather than an arm of state government automatically and without reflection imposing its normative vision on all within its coercive power'.<sup>90</sup> The latter description might of course appear to conflicts lawyers to be a reductive view of what conflicts law actually does. Nevertheless, following this path would undeniably enlarge the jurisdiction of the conflict of laws to encompass social conflicts of all types, whether or not the crossing of state borders is concerned. The 'irritant' that this might represent, however, now needs to be addressed in turn.

## **B. Mainstreaming conflicts**

For the conflict of laws, framing these interactions in the alternative vocabulary of global legal pluralism emphasises their omnipresence and expresses the idea that they are no longer (as they were in a pre-global setting) simply marginal encounters between territorially bounded legal systems. 'Wherever one looks, there is conflict among multiple legal regimes.'<sup>91</sup> An awareness of the pervasiveness of normative interaction is what sets apart new global versions of legal pluralism from its more classical antecedents. Thus, as Berman observes,

Pluralism had always sought to identify hybrid legal spaces, where multiple normative systems occupied the same social field. And though pluralists had often focused on clashes within one geographical area, where formal bureaucracies encountered indigenous ethnic, tribal, institutional or religious norms, the pluralist framework proved highly adaptive to analysis of the hybrid legal spaces created by a different set of overlapping jurisdictional assertions (state v. state; state v. international body; state v. non-state entity) in the global arena.<sup>92</sup>

However, in the case of the conflict of laws, the potential change of course which would result from an acknowledgement of the ubiquity of conflicts is not merely quantitative, nor is it limited to a reversal of the respective scope of principle (domestic cases) and exception (international cases). The pervasiveness of conflicts means, much more radically, that conflicts are no longer merely a problem of overflow to be dealt with at the confines of law's usual business, but a permanent, all-pervasive feature of the normative landscape, reflecting the intensity of global processes. If conflicts are now 'mainstreamed', as Neil Walker puts it, conventional wisdom stands on its head,<sup>93</sup> and the perception of conflict changes. From simple and marginal situations of horizontal antagonism or antinomy in international cases, to situations of pervasive mutual irritation, the phenomena involved are more

<sup>90</sup> *Ibid*, forthcoming.

<sup>91</sup> de Sousa Santos (n 78) 94.

<sup>92</sup> Berman, *ibid*, forthcoming.

<sup>93</sup> Walker (n 6) 131–47.

numerous, complex and heterogeneous than are the formal legal systems of the world of sovereign nation-states.

Putting conflicts at the very core of global law means, first of all, that the issue of threshold that arises in the conflict of laws – the notoriously difficult determination of what is ‘international’, as opposed to the purely domestic – becomes irrelevant. If global encounters between different systems are not limited to law that is state-endorsed and territorially bound, then there is no reason to balance out the interests expressed in various normative systems (laws, standards, principles, indicators) differently, according to whether they arise within the confines of one state territory or are framed as involving a problem of conflict of laws. The burqa case discussed above provides ample illustration of this. The normative conflict arises whether or not there is a traditional international conflict of laws opposing the personal status of the veil-wearer and the prohibitive position of the forum. The required international element does not change the terms of the interactions involving religion, culture or gender, since even in the absence of a permissive foreign law, there is a right which trumps the subordinate forum law or an overriding value (republican neutrality, security considerations, etc.) which trumps the right. This example also shows up the links between the question of threshold (when is there a conflict of laws?) and the tricky issue of equal treatment or non-discrimination. Formulating a right in terms of non-discrimination (on grounds of religion, cultural practice or gender) is a demand for justification of differential treatment; identifying such grounds is precisely the problematic which lies at the heart of the conflict of laws.<sup>94</sup> Using an alternative vocabulary does not change its terms. The issue of when justice allows differential treatment persists whether or not there is an international conflict of laws.

Secondly, putting conflicts in the limelight may contribute a key to the ‘legitimacy conundrum’ which stalls attempts by contemporary pluralists to respond to the question of the foundations of transnational authority<sup>95</sup> and the nature of law in a world of overlapping claims by ‘unauthorised’ actors of the ‘second’ modernity.<sup>96</sup> Since most analytical jurisprudential explanations are still bound either to sovereignty or the domestic polity,<sup>97</sup> they lose purchase correlatively to nation-states’ ‘loss of control’.<sup>98</sup> Various strands of socio-legal theories and societal constitutionalism turn away,

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<sup>94</sup> The conflict of laws has long entertained a symbiotic but contradictory relationship with principles of non-discrimination and equal treatment. See, for example, Douglas Laycock, ‘Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law’ (1992) 92(2) *Columbia Law Review* 249; and our analysis: Horatia Muir Watt, ‘Aspects économiques du droit international privé’ (2005) 307 *RCADI* 29.

<sup>95</sup> Cotterrell and Del Mar (n 13).

<sup>96</sup> Beck (n 3).

<sup>97</sup> On the requirements of sovereignty, see below, Part III, B.

<sup>98</sup> Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (Columbia University Press, 1996).

therefore, from governance or constitutionalist projects which tend to project familiar state-bound structures onto the global scene. In this respect, a first significant insight from these global-pluralist conceptions is that it is implausible, for the moment, to envisage authority beyond the nation-state in any form other than concurrent *claims*.<sup>99</sup> This is in keeping with the idea that global law is aspirational – intimation rather than law made flesh.<sup>100</sup> A further, connected, contribution is that sociological explanations of authority which were marginal within the doctrinal context of nation-state – such as Weber’s fourth category of ‘charismatic’ authority – have risen to overriding importance beyond the state, where expert knowledge, the power of image, rating agencies and other spin doctors all flourish.<sup>101</sup> But however novel, tentative and anti-essentialist, it is striking that this renewed theoretical reflection does not seem to change the terms of the questions being asked. The jurisprudential quest is to grasp the features of law-likeness without the support of the formal theory of sources of law. When confronted with unaccountable mafia-like private authority, repressive religious practices or indicators sponsored by the very entities being assessed, the question is usually whether such phenomena are sufficiently law-like to be considered as law – albeit beyond the state. Even global law’s eerie ‘intimations’ are seen to present familiar characteristics in this respect.<sup>102</sup> In other terms, the renewed description of intermingling, hybrid jurisdictional assertions as a new state of global affairs does not appear to modify the legal consciousness<sup>103</sup> into which such claims will have to fit.

What can a conflict of laws approach bring to this debate? It is true that when the conflict of laws reached maturity within the framework of the modern state, it implicitly took statehood as a criterion for assessing the

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<sup>99</sup> Roger Cotterrell, ‘Transnational Legal Authority: A Socio-legal Perspective’ in Cotterrell and Del Mar (n 12) forthcoming, proposing as a starting point ‘to treat authority generally as a *practice* and *experience* to be identified and interpreted sociologically’. Moreover, ‘given the complex conditions of existence of transnational legal authority, this authority will be shifting, variable and constantly re-negotiated’.

<sup>100</sup> Walker (n 6) 151: global law is ‘an incipient development ... a legal form that is still coming to fruition and so largely future-orientated’.

<sup>101</sup> Cotterrell (n 99). This does not mean of course that there is anything more rational about modern law than about the ‘intimations’ of the global – ‘Were we ever Modern?’, asks Bruno Latour (*Nous n’avons jamais été modernes. Essai d’anthropologie symétrique* (La Découverte, 1981)) – but that rationality is part of the ‘mythodology’ of modern law with which we are now willing to part.

<sup>102</sup> Walker sees a common denominator of *ratio* and *voluntas* in the various conceptualisations of global law: Walker (n 6) 196–7.

<sup>103</sup> Defined in *New Oxford Companion to Law* as a concept

used to name analytically the understandings and meanings of law circulating in social relations. Legal consciousness refers to what people do as well as say about law. It is understood to be part of a reciprocal process in which the meanings given by individuals to their world become patterned, stabilized, and objectified. These meanings, once institutionalized, become part of the material and discursive systems that limit and constrain future meaning-making. Consciousness is not an individual trait nor solely ideational; legal consciousness is a type of social practice reflecting and forming social structures. (*New Oxford Companion to Law* (Oxford University Press, 2008))

legitimacy of the norms it would accept within its ‘community of laws’.<sup>104</sup> However, detached from state sovereignty, the additional contribution of the conflict of laws would be to point to these interactions themselves as the starting point from which to approach issues of legitimacy. This would mean dodging the legitimacy question – by avoiding having to sift through concurrent claims *ex ante*, since these are all dealt with *ex post* and in relative terms. This idea seems perfectly in line with global law’s instable reflexivity. It suggests that the legitimacy question arises in different terms according to the type of claim – collaborative, confrontational, concurrent – that is being made in respect to other legal systems.

For example, is a private corporate code law or not law – legitimate or illegitimate, binding or softly decorative? This might not be the right question to ask, or the right way to ask it. It may be, for instance, that when a corporate actor undertakes, in a private code made available to investors, to work towards a more ethical or egalitarian workplace,<sup>105</sup> those commitments should be binding – and apt to be invoked against it – to the extent that it is supported by values present in its environment. The same code might not, however, in other circumstances, serve as governing law.<sup>106</sup> Accepting that legitimacy issues arise *ex post* and can receive variable, relative answers according to the type of conflict in which they are involved comes closer to capturing the complexity of the normative landscape beyond the state. As Teubner on pluralism reminds us, ‘the primacy of a function system can, however, only be claimed within a particular local and situational context. It changes from place to place and from situation to situation’.<sup>107</sup> It is time now to explore the insights to be garnered, in turn, from other elements of this pluralist approach.

### III. Beyond rights: the anonymous matrix?<sup>108</sup>

The complexity inherent in patterns of ‘conflict’ as enhanced by a pluralist vision can also be observed in respect of the normative phenomena involved in these encounters. Under various, traditional, conflict of laws doctrines, the concept of ‘laws’ has admittedly come to include multiple phenomena (rules of various types, whole legal systems, judgments or rights). These categories

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<sup>104</sup> This expression is famously von Savigny’s: Friedrich Carl von Savigny, *System des heutigen Römischen Rechts* (Veit, 1849). In von Savigny’s initial formulation of ‘multilateralist’ methodology, only the communities (at the time, German princedoms) belonging to a closed ‘community of laws’ cemented by shared cultural (religious, linguistic and legal) tradition, were considered as participants in the common allocation of prescriptive authority.

<sup>105</sup> See, for thoroughly documented examples, Beckers (n 13).

<sup>106</sup> As in the case of a global value chain, when competing state norms guarantee improved hygiene, security or environment for the stakeholders involved, or when fundamental rights are threatened.

<sup>107</sup> Teubner (n 1) 64.

<sup>108</sup> Or to adopt the May 68 slogan, ‘sous les pavés, la plage’. The ‘anonymous matrix’ is borrowed from Teubner (n 1), and its meaning will be discussed in detail below.

are also understood to be the tangible expression of antagonistic sovereign wills, contradictory policy-driven rules, colliding values, different legal traditions or mutually exclusive legal orders. But legal pluralism suggests that the traditional matrix of the conflict of laws may not adequately capture the complexity of colliding transnational regimes, of which formal law is only one among many. It moves the focus from traditional state-bound law to self-referential social systems, inviting a radically new reading of the normative and social landscape beyond the state (A). While incomplete, the traditional matrix may also be misleading. The centrality of litigation and the rise of fundamental rights have put the spotlight on antagonistic individual claims invoked by different right-holders, so that rights have tended to become the focus of conflict of laws analysis. An alternative approach understands such individual rights-claims to be the visible expression of conflicts on a deeper level, involving ‘anonymous’ social systems (B).

### **A. Autonomous rationalities**

‘Societal constitutionalism’, the specific brand of pluralism advocated by Gunter Teubner,<sup>109</sup> makes a direct connection between its own vision of ‘colliding function-systems’ and the conflict of laws.<sup>110</sup> It is also deliberately attuned to the features of the global, and is not therefore merely an extension of infra-state pluralism to the transnational sphere. As such, it is certainly one of the most original and productive strands of contemporary global legal thought. In short, its sociological perspective sees as the central evolution of late modernity (that is, emerging within the modern state and accentuated by globalisation), the multiplication of areas of autonomous action in society, each developing its own formal rationality, in mutual indifference to each other. It claims a post-structuralist pedigree to the extent that it was Foucault who first identified ‘radically de-personalizing power phenomena and identifying today’s micro-power relations in society’s capillaries in the discourses/practices of “disciplines”’.<sup>111</sup> This results in ‘escalated differentiation, pluralization, and reciprocal compartmentalization of separate spheres’.<sup>112</sup> Such spheres concern culture, science, the economy, or law, but

<sup>109</sup> This theory is developed by Gunter Teubner (n 1) on the basis of insights Niklas Luhman’s theory of functional differentiation of social spheres. It is emphatically not a theory of global constitutionalism involving the search for an all-encompassing set of shared principles of world governance, but a pluralist perspective. As will be seen, it advocated only one possible common constitutional approach, that of ‘collision law’, which each node (or forum, in more traditional vocabulary) would define for itself.

<sup>110</sup> Christian Joerges has also mooted a version of (three-dimensional) ‘Conflicts Law as Constitutional Form’: Joerges (n 75). According to this project, meta-conflict rules would allocate competence as between the different multi-levels of governance (national, supra-national/regional). In this respect, it seems to assume an overriding conflicts law rather than the reflexive, decentred approach advocated below.

<sup>111</sup> See Teubner (n 1) 74, observing, however, that an inflated perspective of power ‘does not discern the more subtle effects of other communication media’.

<sup>112</sup> *Ibid.*, 39.

also more specialised sub-spheres such as finance, ecology, human rights or the *lex mercatoria*, which will be questioned below. These processes describe and explain the crisis of politics in the modern state. It is no longer possible for any authority to represent the whole of society. The political constitution of the state can no longer channel ‘the collective energies of the whole society, founding the nation’s unity. In modernity, the collective potential is no longer available as a whole, but has been dispersed into numerous social potentials, energies, powers’. This is due to the ‘narrow specialization of the communicative media – power, money, knowledge, law’.<sup>113</sup>

Like the nation-state emerging in early modernity, these social sub-systems are self-referential, establishing themselves through processes by which, *ex nihilo*, they constitute their own autonomy. The specific contribution of societal constitutionalism is to analyse this move towards autonomy as the development by each sphere of its own ‘constitution’.<sup>114</sup> Obviously, the concept of constitution advocated here must be dissociated from the nation-state.<sup>115</sup>

Firstly, the constitution should be disconnected from statehood, so that transnational issue-specific regulatory regimes may be considered candidates for constitutionalization. Secondly, the constitution should be decoupled from institutionalized politics, thus allowing other areas of global civil society to be identified as possible constitutional subjects. Thirdly, the constitution should be decoupled from the medium of power, thus making other media of communication possible constitutional targets.<sup>116</sup>

The idea advocated by Teubner is then to borrow insights from the discipline of constitutional sociology, relating both to the conditions surrounding the

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<sup>113</sup> *Ibid.*, 63. This process is not necessarily negative. It has made possible great achievements of civilization in the arts, science, medicine, economics, politics and the law even if it has dark sides. More specialization is to come: ‘Research, education, healthcare, the media, the arts – globalization offers the opportunity to strengthen their autonomy’ (*Ibid.*, 82).

<sup>114</sup> In terms of systems theory, ‘the political constitutions of nation states have the constitutive function of securing the autonomy of politics which has been acquired in the modern era in relation to “other” religious, familial, economic, and military sources of power’: *Ibid.*, 75. In contrast to the former, however, ‘their self-foundation does not take place through a formally organized collective, but rather as a communicative self-foundation with no formal organization of the whole system’: *Ibid.*, 67.

<sup>115</sup> This is a move constitutional scholars often have trouble making. It is preferred, however, to alternative terms, such as ‘meta-regulation’, ‘indispensable norms’ or ‘higher legal principles’ which are inadequate to comprehend the complexity of issues that the concept ‘constitution’ covers.

<sup>116</sup> Teubner (n 1) 60. There is serious disagreement here under the wide umbrella of pluralism. Noting that ‘we should abandon, then, the false premise that constitutionalization inevitably means the transformation of a group of individuals into a collective actor’, Teubner warns that ‘concepts which some find helpful, such as “epistemic community”, “economic community”, or “nomic community” should be used with extreme caution, since, once again, none of the sociological characteristics of a community are present’. In this respect, he argues,

Berman’s ideas are therefore problematic, since his anthropological approach always assumes the presence of culturally defined communities that function as constitutional subjects. In reality, however, the communities referred to in social constitutions are just imagined identities, just self-descriptions of their operational unity. (*Ibid.*, 68)

constitution of social systems, and the contributions made by legal norms to this process, and then to generalise these insights to non-state systems. Thus, a constitution dissociated from state requires ‘a legal imagination which can call upon the founding myth of a collective ... a constitution does not necessarily require a demos, a primordial ethnic group or intermediary structures, but it does need a legal imagination of revolution and memory’.

In support of this point, it can indeed be observed that even private regimes have their founding myths, which are at the heart of their constitutions and legitimise their ‘jurisgenerative power’. Global law itself, in Neil Walker’s account, has to confront self-referentiality<sup>117</sup> and, to do so, creates its own pedigree by appealing to the past in its own ongoing process of self-constitution.<sup>118</sup> This is where, for instance, human rights or the *lex mecatoria*, each with particularly powerful mythical imaginaries, appear as possible constitutionalised regimes. Gunter Frankenburg provides a highly plausible account of human rights narrative as a drama of redemption or occasional reconciliation, which ‘draws its liberating appeal from the widespread view that these rights are inventions of reason and justice and therefore very much incarnate the good in an evil world’.<sup>119</sup> In turn, Samuel Moyn points out the ‘myths of deep origins’ of human rights despite their very recent emergence in global political consciousness.<sup>120</sup> Similarly, in respect of the *lex mercatoria*, Teubner shows how the constitutional self-validation of the *lex mercatoria* also appeals to the history of ancient trade customs.<sup>121</sup> The

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<sup>117</sup> Walker (n 6) 151: global law is

uncharted law, not yet fully registered in any of our established maps of legal authority. Its projection, then, involves a gambit, a calculated risk that its explicit self-sponsorship as a form of law should not be undermined by a prior lack of autorisation.

<sup>118</sup> *Ibid.*, 85:

Rather than discontinue older lines of legal thought, the new approaches purport to develop them ... as in Kumm’s insistence on the continuity of cosmopolitan thought across the long epoch of modernity. Or it may claim even more venerable roots, as in Günther’s claim for the classical pedigree of law’s universal code, or Tuori’s assertion that ‘deep structure’ is part of the *longue durée* of law, supplying a common geological core for successive surface cultures.

<sup>119</sup> Gunter Frankenburg, ‘Human Rights and the Belief in a Just World’ (2014) 12(1) *International Journal of Constitutional Law* 35.

<sup>120</sup> Moyn (n 9) 212.

<sup>121</sup>

In the *lex mercatoria*, the agreements concluded cannot refer back to a national legal constitution. Nevertheless, a constitutional basis has been developed in support of the idea that the expectations generated by these agreements are legally binding. Instead of referring to a national constitution, the *lex mercatoria* calls upon a rich fund of relevant non-legal material – international trade and transport customs and commercial practices – that developed in the chaotic environment of the world market. When disputes have to be settled, political and legislative institutions are by-passed and it is claimed, with little basis in fact, that these social practices have ‘always’ had legal effect and have had constitutional authority since time immemorial. Similarly, reference is made to earlier arbitration awards, made not according to existing national law, but rather according to standards of ‘equity’. These decisions, although they



‘culture of the past’ of the common law<sup>122</sup> or the natural rights pedigree of the civil law tradition are other examples in more traditional spheres. The conflict of laws itself is no exception; its own ‘saga’ comprises a dramatic narrative of its foundational moment, as Pierre Gothot has brilliantly shown.<sup>123</sup>

The requirement of a foundational myth is linked in Teubner’s account to the constitution’s first essential function, which is to supply a way of dealing with the ‘paradox of self-reference’<sup>124</sup> or how a political system emerges out of nothing. As he explains in the context of *Societal Constitutionalism*, self-foundation or ‘mystical self-recursivity’<sup>125</sup> is described as a feature of the political constitutions of nation-states. ‘The self-constituting social system refers to the law which in turn supports self-foundation.’<sup>126</sup> This means that the problem of self-reference is dealt with as it were by externalising the paradox to the law. The same phenomenon can be observed in other social systems: their respective paradoxes of self-foundation are externalised to the law. ‘When a social system gives itself a legal constitution, it finds an escape from the deficiencies of self-foundation and its paradoxes.’<sup>127</sup> This is well illustrated by the example of the *lex mercatoria*, developed below. A second function of constitutions – at least, of successful constitutions – is to ‘induce limits within each social system through “self-steering” mechanisms’.<sup>128</sup> On the one hand, sub-systemic rationality can develop pathological, self-destructive tendencies (‘turbo-autopoiesis’). This compulsive growth dynamic can be seen in the politicisation, economisation, juridification, medialisation and medicalisation of the world.<sup>129</sup> External political interventions as limits or breaks on these compulsive dynamics are therefore necessary to avoid chaos. The example of the

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were expressly meant as non-legal (*ex aequo et bono*), are later referred to as if they were legally binding precedents, to which the techniques of distinguishing and overruling are then applied. (Teubner (n 1) 70)

<sup>122</sup> Louis Asser-Andrieu, *L’ autorité du passé: essai anthropologique sur la common law* (Daloz, 2011).

<sup>123</sup> P Gothot, ‘Simples réflexions à propos de la saga du conflit des lois’ in *Mélanges en l’honneur de Paul Lagarde* (Daloz, 2005) 343–54.

<sup>124</sup> Teubner (n 1) 108. And,

Systems theory opts for a phenomenon of social communication. Here it is suggested to understand the ‘*pouvoir constituant*’ as a *communicative potential*, a type of social energy, literally as a ‘power’ which, via constitutional norms, is transformed into a ‘*pouvoir constitué*’, but which remains as a permanent irritant to the constituted power. (*ibid*, 62)

‘The “constitutional subject” is then not simply a semantic artefact of communication, but rather a pulsating process at the interface of consciousness and communication, resulting in the emergence of the *pouvoir constituant*: *ibid*, 63.

<sup>125</sup> *Ibid*, 104:

We should only speak of constitutions in the strict sense when the medial reflexivity of a social system – be it politics, the economy, or some other sector – is supported by the law or, to be more precise, by the reflexivity of the law.

<sup>126</sup> *Ibid*, 144.

<sup>127</sup> *Ibid*, 107.

<sup>128</sup> Teubner, *ibid*, 85.

<sup>129</sup> The analysis is applicable to law itself:

financial system provides excellent evidence here. On the other hand, such interventions need to be ‘transformed into a self-domestication of the systemic growth dynamic’. This means that they require a form of translation so as to be integrated within the system in ways the latter can understand, as it were in its own grammar. ‘Fight fire by fire; fight power by power; fight law by law; fight money by money’.<sup>130</sup>

Although societal constitutionalism developed in order to understand changes which take place within the late-modern state, these ideas apply equally well to global regimes which cross the boundaries of nation-states. ‘In transnational contexts, it is the issue-specific regimes that form new kernels around which collective identities crystallize.’<sup>131</sup> However, these regimes are distinctive because their

primary constitutional aim is to dismantle nation-state barriers: to break down the close structural couplings between the function systems and nation-state politics and law, and to enable function-specific communications to become globally interconnected ... . Constitutive rules thus serve to unleash the intrinsic dynamics of the function systems at the global level. Unburdened by nation-state restrictions, the systems are now placed to follow, globally, a programme of maximizing their partial rationality ...

This is quite clear in the context of the global economy, where ‘[t]he dismantling of national production regimes releases destructive dynamics in the global systems; destructive dynamics in which the one-sided rationality-maximization of one social sector collides with other social dynamics’.<sup>132</sup>

The most familiar illustration, for private international lawyers, of an autonomous self-constitutionalising system with ‘destructive growth tendencies’ can be found in the transnational market regime (the global version of the *lex mercatoria*<sup>133</sup>) which has sprung in the past few decades from the idea of party autonomy. Such a regime of unaccountable private authority, complete with its own inner logic, structuring principles and private jurisdictions, prospers notably through extreme liberalisation of arbitration.<sup>134</sup> It shows furthermore a marked propensity to expand into

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In the case of law, we can clearly see that law not only resolves conflicts and returns to a position of rest. Rather, its own regulations actually generate conflicts, which then call for further regulation. Through its regulatory intervention in daily life, law itself produces the situations which then give rise to conflicts. And, at the same time, each norm generates problems of interpretation, which themselves generate further conflicts. Finally, the sheer mass of legal rules produces rule-conflicts which call for the production of yet more rules. It appears that the high autonomy of law enhances the number of conflicts. (*Ibid*)

<sup>130</sup> *Ibid*, 88.

<sup>131</sup> *Ibid*, 66

<sup>132</sup> *Ibid*, 76–9.

<sup>133</sup> Andreas Fischer-Lescano and Gunther Teubner, ‘Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law’ (2004) 25 *Michigan Journal of International Law* 999.

<sup>134</sup> See Horatia Muir Watt, ‘Party Autonomy in Global Context: The Political Economy of a Self-constituting Regime’ (2015) *Japanese Yearbook of Private International Law* (forthcoming).

neighbouring areas such as investment law, where it clashes with other regimes.<sup>135</sup> It has come complete with a philosophical doctrine designed to legitimate the 'regulatory lift-off' it has achieved, in respect of limits contained either in the laws of nation-states or indeed, as the context of investment arbitration shows, fundamental rights.<sup>136</sup> This is largely 'how private corporate actors govern'.<sup>137</sup> In Teubner's words, 'corporate constitutional politics have successfully dismantled nation-state production regimes whenever they impede the global expansion of corporate activities'.<sup>138</sup> But why has the market regime's own environment not secreted limits which the system might internalise?

One answer is that the conflict of laws has played a considerable role in the career of this particular functional regime by its eager espousal of unlimited 'party autonomy', or contractual freedom of choice of the governing law, which fulfils a key function within the global political economy of private ordering. In this respect, while the principle emerged as part and parcel of the 'mythodology' of modern law, it has also worked, less visibly, to destabilise modernity's assumptions about the relationship between law and sovereignty, which are now at the heart of the theoretical turmoil within the traditional legal paradigm. Since sovereignty itself is no longer the privilege of the nation-state, clashes occur between the market regime and the very national legal orders which are responsible for freeing the genie of the lamp. The market regime also clashes with alternative rationalities, such as culture or ecology, or indeed with human rights, which as we shall now see may also be expressing, *sub rosa*, the rationalities of the latter. It is on this last point that the societal constitutionalist analysis takes these legal-pluralist insights further in a way that is equally stimulating for conflicts lawyers.

## **B. Impersonal rights**

Periodically, the conceptual starting point of the conflict of laws analysis moves from systems, abstract rules, policy orientations or values, to rights. The rights model was initially adopted within the common law tradition (in the form of Dicey's vested rights), and, after a period of dominance of the civilian conception of concurrent legal orders,<sup>139</sup> it is now dominant once again in the very different context of international and regional

<sup>135</sup> See Horatia Muir Watt, 'The Contested Legitimacy of Investment Arbitration and the Human Rights Ordeal: The Missing Link' in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford University Press, 2014) 214–40.

<sup>136</sup> Emmanuel Gaillard, 'Aspects philosophiques du droit de l'arbitrage international' (2007) 329 *RCADI* 158.

<sup>137</sup> Dan Danielson, 'How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance' (2005) 46(2) *Harvard International Law Journal* 411.

<sup>138</sup> Teubner (n 1) 77.

<sup>139</sup> See, for instance, Roberto Ago, 'Règles générales des conflits de lois' (1936) 58 *RCADI* 243; P Mayer, *La distinction entre règles et décisions et le droit international privé* (Daloz, 1973).

constitutionalism (in the form of human or fundamental rights). In a political context in which territorial sovereignty supplied a means to resist the borderless realm of the Catholic Church,<sup>140</sup> this model was imagined as a means of circumventing the monopoly of the law of the forum in order to let in (as it were through the window) foreign law, suitably tamed and deprived of its sovereign edge, in the form of previously acquired rights. Its contemporary expression is the now familiar avenue through which transcending values of a higher legal order are given primacy over norms that are not conformist, displacing if necessary the horizontal choice of law rule if it is not attuned to recognition. In the European context, the *Wagner* case handed down by the European Court of Human Rights is the most striking illustration to date of the impact of fundamental rights on conflict of laws reasoning.<sup>141</sup> Here, the right to a normal family life (article 8 ECHR<sup>142</sup>) overrides the prohibitive outcome obtained by applying the choice of law rule of the recognising forum.

While the priority of vested rights was linked to chronology, the primacy of fundamental rights is a question of content. In both cases, however, the methodological significance of the turn to a rights paradigm is that it points towards recognition (of existing rights) rather than allocation (of laws poised for future application). Recognition pre-empts the conflicts of laws by trumping the application of more restrictive laws. There is much food for thought here for private international lawyers, who have not yet fully embraced the suggestion, mooted by Teubner, that human rights might themselves 'take effect as "conflict of law rules" between partial rationalities in society'.<sup>143</sup>

Similarly to international law (from which they are deemed to stem), human rights possess a high profile in contemporary moral consciousness.<sup>144</sup> They are indubitably powerful insofar as they are currently the most disruptive language in which ostensibly non-political contestation of existing social structures can take place.<sup>145</sup> As Samuel Moyn points out in *The Last Utopia*, their relevance in the past three decades owes much to 'the desertion of the

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<sup>140</sup> Joel Paul, 'Comity in International Law' (1991) 32 *Harvard International Law Journal* 1.

<sup>141</sup> *Wagner et JMWL v Luxembourg* [2007] ECtHR n° 76240/01.

<sup>142</sup> ECHR art 8:

Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>143</sup> Teubner (n 1) 145.

<sup>144</sup> Moyn (n 9) 213.

<sup>145</sup> For an illustration, see Colin Scott and Robert Wai, 'Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation' in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart Publishing, 2004) 287.

stage by alternative promises to transcend the nation-state'. But it is counter-productive and even suicidal to compel them to take on all the 'burden of morality' which brought other ideologies low – including the embrace of utopian politics or global governance, which they were not designed to do. Emerging from 'a yearning to transcend politics, human rights have become the core language of a new politics of humanity that has sapped the energy from old ideological contests ...'<sup>146</sup> and 'born in the assertion of the power of the powerless they have become bound up with power of the powerful'. By extending its purview from the mission of catastrophe prevention and incorporating aspirations that are emphatically visionary but necessary divisive, human rights discourse becomes 'a recipe for the displacement of politics, forcing aspirations for change to present themselves as less controversial than they really are'.<sup>147</sup> The point of Moyn's intervention is that human rights should leave room for other political utopias to come. 'Put another way, the last utopia cannot be a moral one.'<sup>148</sup>

Integrating the insights of pluralism within the conflict of laws – now newly placed to solve all manners of global legal interaction – points to a way, if not of relieving human rights of this tremendous 'moral burden', at least of questioning their epistemological dominance within the law and thereby clarifying their role within a renewed vision of globalised conflicts. Pluralist authors such as Ladeur and Teubner insist that it is misplaced to see the conflicts of laws as colliding rights.<sup>149</sup> According to societal constitutionalism, the correct matrix for framing the contemporary conflict of social systems is 'anonymous' or impersonal: 'on one side of the new equation is no longer a private actor as the violator of fundamental rights, but the anonymous matrix of an autonomized communicative medium'.<sup>150</sup> 'Both the "old" state-centred and the "new" poly-contextural human rights question should be understood as people being threatened not by their fellows, but by anonymous communicative processes.'<sup>151</sup> This means that vertical conflicts are not to be understood as involving an individual right-holder against a state authority, but as pitting the impersonal exigencies of two differentiated regimes. Indeed, in this context, 'fundamental rights are not defined by the fundamentality of the affected legal interest or of its privileged status in the constitutional texts, but rather as social and legal counter-institutions to the expansionist tendencies of social systems'.<sup>152</sup> This is necessarily

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<sup>146</sup> Moyn (n 9) 213.

<sup>147</sup> *Ibid.*

<sup>148</sup> *Ibid.*

<sup>149</sup> Karl-Heinz Ladeur, 'Methodology and European Law – Can Methodology Change so as to Cope with the Multiplicity of the Law?' in Mark van Hoecke (ed), *Epistemology and Methodology of Comparative Law* (Hart Publishing, 2004) 91–122. As will be shown below, however, rights claims may be perceived, on the contrary, as conflict of laws: Teubner (n 1) 143.

<sup>150</sup> Teubner, *ibid.*

<sup>151</sup> *Ibid.*

<sup>152</sup> *Ibid.*

valid, too, for the horizontal effects of human rights (that is, in the relationships between private actors). Thus, if violations of fundamental rights stem from the totalising tendencies of sectorial rationalities, there is clearly no longer any point in seeing their horizontal effect as if rights of private actors have to be balanced against each other. The ‘imagery of “horizontality”’ unacceptably takes the sting out of the whole human rights issue, as if the sole point of the protection of human rights was that certain individuals in society threaten the rights of other individuals’.<sup>153</sup> ‘Fundamental rights’, as understood here, differ from ‘subjective rights’ in private law as they are not about mutual endangerment of individuals by individuals, i.e., intersubjective relations, but rather ‘about the dangers to the integrity of institutions, persons and individuals that are created by anonymous communicative matrices (institutions, discourses, systems)’.<sup>154</sup>

However, although human rights should thus be reinterpreted as expressing underlying rationalities of social systems rather than purely individual claims, they remain an indispensable heuristic both under current argumentative conventions<sup>155</sup> and given the constraints of litigation.<sup>156</sup> Interestingly, though, through their use in this respect, they actually take on the function of conflict of law rules. ‘By protecting, for instance, the integrity of art, family, or religion against totalitarian tendencies of science, media, or economy, fundamental rights take effect as “conflict of law rules” between partial rationalities in society.’<sup>157</sup> The fact that human rights are *not* to be taken at surface value makes them appear all the more indispensable within the project of societal constitutionalism. The normative agenda of the latter is to ‘construct constitutionally guaranteed counter-institutions in different social areas’. In other words, to put a break on the growth proclivity of autonomous systems. Usefully in such a context, ‘fundamental rights act not only as spaces of individual autonomy, but also as guarantees to include the entire

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<sup>153</sup> *Ibid*, 142.

<sup>154</sup> *Ibid*, 143–4.

<sup>155</sup> For our attempt to explore a semiotic of legal argument as set out by Duncan Kennedy, in private international law, see Andrea Bonomi and Gian Paolo Romano (eds), *Yearbook of Private International Law* (2012–2013) XIV.

<sup>156</sup> The condundrum is that conflicts of social systems still occur through litigation of individual rights:

How can the law describe the boundary conflict, when after all it has only the language of ‘rights’ of ‘persons’ available? Can it, in this impoverished rights talk, in any way reconstruct the difference between conflicts of fundamental rights that are internal to society (person-related) and external to society (human-related)? Here we reach the limits not only of what is conceivable in legal doctrine, but also the limits of court proceedings. In litigation there must always be a claimant suing a defendant for infringing his rights. In this framework of mandatory binarization as person/person-conflicts, can human rights ever be asserted against the structural violence of anonymous communicative processes? (Teubner (n 1) 146)

<sup>157</sup> *Ibid*, 145.

population into the function systems'.<sup>158</sup> Obviously, this new function does not solve the problem of overload as described by Moyn. But it helps see behind the monolith and invites acknowledgement of their (here, epistemological) contingency. Beyond rights, the question, now, is to frame an adequate methodology to deal with conflicts framed as collisions between two function-systems each obeying its own inner logic. This is where perspective comes, as it were, into the (renewed) picture.

#### IV. Questions of perspective

A significant epistemological feature of global legal pluralism lies in the necessarily de-centred perspective it advocates for envisaging modes of communication of social systems beyond the state.<sup>159</sup> A similar displacement of perspective is an equally important part of contemporary thinking in other related fields engaged in critical reflection on law under globalisation. It can be seen, for example, in comparative law and anthropology, which reverse the relationship between centre and periphery and explore the spread of ideas and institutions (legal transfers) from the point of view of the receiving (colonised or neo-colonised) legal order.<sup>160</sup> A similar stance is adopted by critical strands of public international law, which seek to bring third-world perspectives into a field which is largely dominated by a Western, capitalist centre (TWAAIL studies).<sup>161</sup> Further instances can be found within human rights doctrine, which has incorporated standpoint analysis first advocated by gender and subaltern studies.<sup>162</sup> In all these cases, the epistemology has normative underpinnings in pluralist values of mutual tolerance. It is trite but nevertheless striking in the light of these recent developments elsewhere, that de-centring also has a long intellectual history within the conflict of laws.<sup>163</sup> Therefore, when legal pluralism advocates a heterarchical, reflexive approach to manage polycentric interactions among social systems, the conflict of laws is able to make available a supportive methodological framework (A). Moreover, in response to the usual critiques of pluralism, it shows that pursuing open-ended mutual accommodation does not exclude drawing the line at the threshold of tolerance nor does it contradict the requirements of sovereignty, wherever vested (B).

<sup>158</sup> *Ibid.*, 137.

<sup>159</sup> Walker (n 9) 151 and onward, on the importance of the epistemic dimensions of global law.

<sup>160</sup> Frankenberg (n 17).

<sup>161</sup> *Third World Approaches to International Law*. See Richard Falk, Balakrishnan Rajagopal and Jacqueline Stevens (eds), *International Law and the Third World: Reshaping Justice* (Routledge, 2008).

<sup>162</sup> See Muir Watt (n 84).

<sup>163</sup> Recognizing that a right only vests as long as there is a legal system to support it was a breakthrough both in the Continental European tradition, which thereupon renounced the universalist ideal, and in strands of neo-statism influenced by US legal realism, which thereupon denounced a certain rights fetishism which had pervaded overly formal doctrines of the conflict of laws.

### **A. Recursive reflexivity: conflicts unilateralism in network mode**

The de-centring enterprise natural to ‘the pluralist structure of postnational law’<sup>164</sup> excludes any overriding perspective from which to view autonomous social regimes and order them in any reassuring semblance of hierarchy. The appropriate methodology must necessarily take the form of mutual accommodation. What, then, should be done about true or irremediable conflicts? A similar difficulty seems poised to be carried over into global space: however descriptively adequate and normatively attractive, pluralist theories are surely of little use once the autonomy of normative regimes and the ensuing competition for supremacy are established.

The conflict of law reached a similar conclusion long before contemporary globalisation, in respect of unilateralist doctrines. While normatively attractive, unilateralism suffered from its radical inability to solve problems of overlaps and gaps, since it could offer no overarching perspective from which to choose between conflicting laws equally applicable or non-applicable. The problem was a stock of ‘orphaned’ relationships,<sup>165</sup> or in the more recent vocabulary of functionalist methodologies, ‘unprovided-for cases’ before which even policy analysis was seen to stall.<sup>166</sup> Renvoi, which is basically a unilateralist stance within multilateralism,<sup>167</sup> is similarly and notoriously vulnerable to an ‘unending tennis match’ unless chance comes up with two identical connecting factors in succession. How helpful is it, then, for the conflict of laws to succumb to the pluralist siren of a more fluid or ‘liquid’ frame<sup>168</sup> in which the degree of authority of colliding norms remains undefined. In short, how do you actually solve the conflicts? When pushed on this point, however, legal pluralists agree on the fact that there comes a time where some sort of limit has to be drawn.<sup>169</sup> The threshold of toleration is conceived as something similar to the exception of public policy in the conflict of laws; correctly analysed, this exception actually belongs to a unilateralist–pluralist scheme in the conflict of laws.<sup>170</sup>

<sup>164</sup> Krisch (n 46) forthcoming.

<sup>165</sup> In the words of JP Niboyet, who switched to unilateralism after being convinced of the virtues of renvoi: JP Niboyet, *Traité de droit international privé français*, 7 vols (Sirey, 1938–1950).

<sup>166</sup> Larry Kramer, ‘The Myth of the “Unprovided-For” Case’ (1989) 75 *Virginia Law Review* 1045.

<sup>167</sup> As are other components of the ‘general theory’ of the conflict of laws, such as preliminary questions and characterization *lege causae*. See (n 156).

<sup>168</sup> Krisch (n 46) forthcoming.

<sup>169</sup> See the debate on this point between Patterson and Galán, with Berman: Galán and Patterson (n 28); and Berman’s response: Paul Schiff Berman, ‘How Legal Pluralism Is and Is Not Distinct from Liberalism: A Response to Alexis Galán and Dennis Patterson’ (2013) 11(3) *International Journal of Constitutional Law* 801.

<sup>170</sup> For a diptych of the two methodological types and the specific implications of each, see Didier Boden, ‘L’ordre public: limite et condition de la tolérance. Recherches sur le pluralisme juridique’ (PhD International Law thesis, Université Paris 1 Panthéon-Sorbonne 2002). According to this author, the two templates were progressively mixed up, for the lack of a clear theoretical conception of the inner logic of each. Multilateralism then uses such techniques as renvoi or characterisation *lege causae*, or the public policy exception, which are logically part of unilateralism.



This is where it becomes interesting to follow the lead of societal constitutionalism in order to understand what the de-centred standpoint implies in terms of methodology. According to this strand, at the start, a de-centred standpoint means reasoning in terms of networks and nodes, rather than hierarchy or monism. This is a familiar move in legal theory. Networks, in the place of hierarchy, have already become the new mode of conceptualising relationships between more traditional legal systems, and provide an alternative model for the international legal order challenged by fragmentation.<sup>171</sup> Its avatars are the judicial dialogue at regional level and various recent developments in the case law of the European regional courts in respect of their mutual relationships, and those with other international authorities.<sup>172</sup> Furthermore, the influence of economic theories of regulation inspired by systems theory have carried networks into the very heart of private law: the 'organisational contract' is a networked structure, which transcends more traditional categories of contract, tort and corporation.<sup>173</sup>

On the one hand, as a matter of structure, 'networks are an institutional answer to rationality conflicts that result from the differentiation and autonomization of systems, in our context of transnational function regimes'.<sup>174</sup> They are 'a peculiar combination of bilateral individual relations and multi-lateral overall co-ordination' which responds to 'the fragile co-existence of different, mutually contradictory normative orders of the network nodes'.<sup>175</sup> On the other hand, as a matter of method, reasoning in terms of networks in respect of conflicting social systems implies a specific form of reactivity of each node to its environment, and vice versa, which Krisch has named 'recursive reflexivity'.<sup>176</sup> This phenomenon is explained by Gunter Teuber in the following way: 'networks offer an institutional answer to conflicts of norms by transforming... external contradictions into internal imperatives of the network nodes, which can be made situatively compatible with one another'. Networks 'translate the external contradictions manifested

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<sup>171</sup> François Ost and Michel van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Presses des Facultés Universitaires Saint Louis, 2002). For a social theory extending networks from human or fictional legal actors to non-human actors or things. See Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford University Press, 2005).

<sup>172</sup> See, for example, ECJ, *Kadi and Al Barakat International Foundation v Council and Commission* [2008] Joined Cases C-402/05 P and C-415/05 P insisting that the international organisations, such as the Security Council of the United Nations, respect rights constitutive of the EU; applying in turn its own version of Solange in respect of the European Court of Justice (ECJ), ECtHR, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* [2005] Application No 45036/98, 42 EHRR 1. Compare too, for a dialogical reading of these relationships, Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford University Press, 2011).

<sup>173</sup> Fabrizio Cafaggi, Giuseppe Vettori and Stefan Grundmann (eds), *The Organisational Contract: From Exchange to Long-Term Network Cooperation in European Contract Law* (Ashgate Publishing, 2013); compare Horatia Muir Watt, 'Governing Networks: A Global Challenge for Private International Law' (2015) 3 *Maastricht Journal of European and Comparative Law* 352.

<sup>174</sup> Teubner (n 1) 159.

<sup>175</sup> *Ibid.*, 159.

<sup>176</sup> Krisch (n 173).

in conflicts of norms into the internal perspective of the individual nodes, which internally reflects the relations between various levels, subsystems, network nodes, and the overall network'.<sup>177</sup> This produces 'a "paradoxical structure" of inter-institutional interweaving' triggered by (pervasive) situations of conflicting (and by definition, unstable) norms. Here, the

rationality premises of one system are to be exposed to those of the others. Because modern society has no central authority, all efforts at conflict resolution should be decentralized, they should put pressure on 'the function systems to develop a stronger regard for the overall social environment. Because nobody else can do this'.<sup>178</sup>

In this respect, an explicit connection between this new reflexive pluralist approach and the conflict of laws has been made by Gunter Teubner.<sup>179</sup> Naturally, and once again, the perception of conflict (here as the mutual interference of dynamic global processes) mandates the methodology. De-centralised interweaving appears as the most appropriate response to the complex global processes described above. The picture which emerges is that of self-contained, self-referential regimes related by networks, that are exposed, not just to 'horizontal' conflicts but also to 'vertical' and 'diagonal' conflicts specific to multi-layered governance.<sup>180</sup> In response, network nodes 'internally develop their own conflict of laws from which perspective they can decide conflicts of norms'.<sup>181</sup> There is no network centre to decide norm conflicts between nodes; rather, the nodes decide the issues for themselves in a decentralised manner.

Of course, this is far from unheard of in the conflict of laws, albeit in respect of national legal orders. It looks much like a description of intra-federal conflict of laws in the American system, where each state manages conflicts on its own account, within a wider, loose, framework of coordination provided by the network system (such as full faith and credit or mutual recognition). Beyond regional structures, Alex Mills has proposed a similar conceptualisation of the conflict of laws in terms of polyarchy, federalism and peer review.<sup>182</sup> Even from a traditional conflict of laws perspective, the insight according to which each node reacts on its own account to conflicting signals from its environment, all the while aspiring to some sort of global coordination, is perfectly comprehensible.<sup>183</sup> Indeed, it has long been

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<sup>177</sup> Teubner (n 1) 159.

<sup>178</sup> *Ibid*, 159

<sup>179</sup> Once again, social differentiation mandates a polycentrism which is very far from the contemporary unifying projects of mega-constitutionalism.

<sup>180</sup> See Joerges (n 75). Network theory is seen to fit the heterarchical relations between the various semi-autonomous levels of multi-level governance within the EU.

<sup>181</sup> Teubner (n 1) 159.

<sup>182</sup> Alex Mills, 'Variable Geometry, Peer Governance and the Public International Perspective on Private International Law' in Muir Watt and Arroyo (n 54) 245–61.

<sup>183</sup> This was no doubt, in another vocabulary, the dominant philosophical theory in continental doctrine in the twentieth century, which invested the conflict of laws with a function of coordination of particularist viewpoints.

accepted in this context that (unless there is an international treaty) each legal system can only decide conflicts for itself – even when it integrates elaborate devices such as renvoi that purport to integrate the viewpoint of various legal systems outside itself. This also led to the discovery that there is no such thing as a subjective right ‘out there’.<sup>184</sup> As Wengler showed back in 1933, a right can only exist from the extremely relative perspective of a particular forum.<sup>185</sup>

But this cursory glance at the history of the conflict of laws also shows that, conceivably, each node might function in a closed mode, as under particularist multilateralism during the twentieth century.<sup>186</sup> The difference then is in the requirement of reflexivity, which leads each node to evolve by integrating the information its receives from its environment. Thus, reflexivity takes the idea a step further and requires that ‘each node then has the responsibility to incorporate into its internal perspective the norms of the other nodes as well as those of the overall order’.<sup>187</sup> Once again, however, this clearly rings a bell. Under the intellectual influence of Rolando Quadri,<sup>188</sup> the unilateralist revolt against mainstream multilateralism explicitly rejects the closure of the latter and embraces a more complete attention to the other which is certainly more in line with the methodological dictates of reflexive pluralism. The traditional reflexive devices of the ‘general theory’ of the conflict of laws – renvoi, preliminary questions and characterisation *lege causae* – are each, after all, borrowed from unilateralist methodology.<sup>189</sup>

Moreover, reflexive responses to the conflict of laws have regularly surfaced in ‘cosmopolitan substantive’<sup>190</sup> or synthetic forms. Indeed, the proposal formulated by Teubner in cases of conflicts involving transnational specialised regimes (such as a conflict between party autonomy and the requirements of health, culture, finance or the environment), is for a ‘substantive law approach’, which

takes up elements from the conflicting constitutional norms in each case and reflects these in the shape of a new substantive norm oriented at the same time towards the ‘ordre public transnational’. This leads to a form of hybrid law as, from the viewpoint of the deciding authority, the substantive norm

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<sup>184</sup> As opposed to a fundamental right, which does not need to be created by one of the national laws in conflict.

<sup>185</sup> Wilhelm Wengler, ‘The General Principles of Private International Law’ (1961) 104 *RCADI* 273; Francois Rigaux, ‘Les situations juridiques individuelles dans un système de relativité générale’ (1989) 213 *RCADI* 9, 84 onward.

<sup>186</sup> When equipped with a mechanism such as renvoi which operates ‘as if’ the system were open, it demonstrates the intrusion of unilateralist–pluralist elements.

<sup>187</sup> Teubner (n 1) 160. This sophisticated account of societal constitutionalism yields the idea of a differentiated collision-law or conflict of laws analysis, as applicable to normative orders beyond the state. It is similar in many respects to the framework proposed by Talia Fisher, ‘A Nuanced Approach to the Privatization Debate’ (2011) 5(1) *Law and Ethics of Human Rights* 72; and discussed in Muir Watt (n 2) 418.

<sup>188</sup> R Quadri, *Lezioni di diritto internazionale privato* (Liguori, 3rd edn 1961).

<sup>189</sup> Boden (n 170).

<sup>190</sup> Hannah L Buxbaum, ‘Conflict of Economic Laws: From Sovereignty to Substance’ (2002) 42(4) *Virginia Journal of International Law* 931.

internalizes alien constitutional norms into its own law, but at the same time leaves their autonomy undisturbed.<sup>191</sup>

The idea here is that different methods are available to deal with issues of conflict according to the type of ‘social couplings’ involved for different types of societal spheres. It may well be possible here to detect a similarity to the differentiated modes of treatment in traditional conflicts doctrine according to the type of legal area involved (persons, contracts, etc.). Thus, in societal constitutionalism, different regimes (or nodes) each entertain particular relationships with the social. The parameter is the constitution of the nation-state, which is embedded within an encompassing legal order. In this respect, it disposes of an ‘internal balance’ constituted by mechanisms of self-limitation, notably a set of fundamental rights. By contrast, specialised transnational regimes may present a far lesser degree of social embeddedness, lacking similar internal resources. These are

tailored solely to a functionally differentiated sector of world society and as a consequence represent a ‘self-contained regime’ that develops specialized norms reflecting the independent rationality of the societal sector coupled to them. Regime constitutions are partial constitutions that are not based on overall social processes, i.e. those directed at the broader public interest.

At the other extreme, ‘indigenous’ normative orders are more strongly embedded at the overall social level than nation-state law. The reason is that ‘they appear in social areas in which no functionally differentiated legal system has been formed: their norms are inseparably interwoven with religious, political, and economic aspects’.<sup>192</sup>

These differing degrees of social embeddedness, Teubner suggests, impact directly upon the appropriate mode of conflict resolution. In instances involving only transnational specialised regimes (such as a conflict between party autonomy and the requirements of health, culture, finance or the environment), the appropriate methodology would be the ‘substantive law approach’, which ‘takes up elements from the conflicting constitutional norms in each case and reflects these in the shape of a new substantive norm oriented at the same time towards the ‘ordre public transnational’’. This leads to a form of hybrid law as, from the viewpoint of the deciding authority, the substantive norm internalizes alien constitutional norms into its own law, but at the same time leaves their autonomy undisturbed.

On the other hand, more socially embedded regimes appear as generating ‘intercultural conflicts’. An example, developed elsewhere, would be claims grounded on indigenous property rights against the land-grab by private investors in the context of investment arbitration. In many cases, the issue

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<sup>191</sup> Teubner (n 1) 169.

<sup>192</sup> *Ibid* 172.

will be brought before the courts and framed as involving a fundamental right (for instance, the right to land as property, but also as environment and furthermore as a sacred resource, which enters into collision with freedom of contract).

Interestingly, some years ago, Von Mehren and Trautman had suggested a similar methodology for the needs of interstate conflict of laws, according to which each legal order reinvents the foreign norm in the light of a synthesis of different values.<sup>193</sup> This comes very close to saying that outcome of the confrontation between two different rules is the judicial creation of a third, which (tailored to the case in the light of the various policies and interests involved) takes on board elements from both. A similar move may sound much more familiar if it is compared with proportionality as a mode of legal reasoning: in the balancing process involving an individual human right and a restrictive regulation, neither trumps the other automatically, but a step-by-step negotiation of antagonistic aims and values may result in a hybrid norm.<sup>194</sup> But is there any limit, consistent with the premises of pluralism, to this reflexive open-endedness to be brought into the conflict of laws?

### **B. Tolerance and the inversion of sovereignty**

Conceptualising modes of interaction is not enough to respond to the conundrum that has plagued legal pluralism constantly, within or without the state. Is there a limit to the tolerance of alterity, when the values of the receiving system are perceived to be threatened? Must a liberal Western culture turn a blind eye to practices that it perceives as antagonistic to its political morality, such as hate-speech, or excision?<sup>195</sup> This is the point at which theories of legal pluralism usually fall short of providing an answer. Deferent to the other, respectful of alterity, they also appear as apologetic, devoid of politics, making no demands on the world.<sup>196</sup> A recent debate on the place of religious justice (sharia courts) in a secular state illustrates the apparent dilemma.

<sup>193</sup> Arthur von Mehren and Donald Trautman, *The Law of Multistate Problems* (Little, Brown, 1965) under the label of 'functional analysis'.

<sup>194</sup> An excellent example is provided by the decision of the Upper Tribunal Immigration and Asylum Chamber: R (on the application of ZAT and Others) v Secretary of State for the Home Department (Article 8 ECHR – Dublin Regulation – interface – proportionality) IJR, [2016] UKUT 00061 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber) (22 January 2016), which solved the conflict between the 'Dublin III' Regulation and Article 8 of the European Convention on Human Rights in the case of unaccompanied child asylum seekers in Calais by reframing it as a case of converging objectives within a proportionality analysis. On similar instruments of accommodation such as margins of appreciation and subsidiarity regimes as pluralist legal tools and discursive practices for managing hybridity, see Paul Schiff Berman, 'Global Legal Pluralism' (2007) 80 *Southern California Law Review* 1155, 1196 onward.

<sup>195</sup> Pierre Legrand, 'Sur l'analyse différentielle des juriscultures' (1999) 4 *Revue internationale de droit comparé* 1053. A comparative analysis of cultural practice, say of female genital mutilation, can tend towards an understanding within that culture. Private international law is concerned with the place that practice can have within the culture of the receiving or forum state.

<sup>196</sup> Martti Koskeniemi, *The Politics of International Law* (Hart Publishing, 2011) 35.

Pluralists see no reason to prohibit the peaceful exercise of religious jurisdiction within a predominantly secular community. Of course, this politically liberal position is critiqued for the excess of tolerance across the political spectrum, ‘from rights advocates worried about illiberal practices to nation-state sovereigntists worried about giving any authority at all to non-state communities’.<sup>197</sup> But the familiar internal – as it were, methodological – critique is formulated in the other direction, by Pattersen and Galán, who argue that pluralism is not really pluralism unless ‘liberal communities allow sharia courts to operate *regardless* of whether or not they violate fundamental values of the liberal community’.<sup>198</sup>

However recurrent, the objection is not insuperable, however (whether addressed to legal pluralism or to liberal theories of justice more generally). An answer can be found, for instance, in terms of the Rawlsian doctrine of overlapping consensus, now also used to conceptualise heterarchical relationships between overlapping legal orders in the international arena.<sup>199</sup> In turn, global legal pluralism advocates acceptance (here, in the case of sharia courts), ‘so long as those courts do not entrench upon fundamental values of the liberal community’.<sup>200</sup> This is where the conflict of laws provides additional insights. It is the point on which the conflict of laws diverges from legal comparatism; specifically, whereas both are geared to understanding otherness, the problem of private international law is ultimately to fit difference into the legal universe of the forum. Here, too, the methodological contest within the conflict of laws becomes highly significant.<sup>201</sup> While multilateralism is assimilationist in that reduces the acceptance of alterity to models it can immediately comprehend, unilateralism, built on mutual accommodation, responds to this challenge by pushing back the limits of acceptance of difference until it threatens the substantive values of the forum. The limit is defined by substance, not form. In continental theory, the variable intensity of the exception of public policy, according to whether a situation has been created abroad or within the forum, is part of the unilateralist scheme.<sup>202</sup>

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<sup>197</sup> Berman (n 24) forthcoming.

<sup>198</sup> Galán and Patterson (n 28); Berman (n 155).

<sup>199</sup> Joshua Cohen and Charles Sabel, ‘Directly-Deliberative Polyarchy’ (1997) 3(4) *European Law Journal* 313.

<sup>200</sup> Berman (n 24) forthcoming: ‘so long as’ evokes the *Solange* doctrine of the German Constitutional Court (Bundesverfassungsgericht, or BVerfG): See *Internationale Handelsgesellschaft v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, BVerfGE 37, 271 2 BvL 52/71 (29 May 1974) [*Solange I*]; *Re Wünsche Handelsgesellschaft* BVerfGE (1984) Case 345/82, [1987] 3 CMLR 225 [*Solange II*].

<sup>201</sup> As emphasised above, various perceptions of ‘conflict’ as including competition, or the aspiration towards international coordination, alongside outright sovereign antagonism, have been bound up historically with diverse methodologies and different conceptions of what it is (abstract rule, individualised right, legal system as a whole, policy) that is actually involved in the interaction. The allocatory function is exercised on the basis of private or public law values, domestic policy considerations or deliberately cosmopolitan vision.

<sup>202</sup> Boden (n 170).

According to this doctrine, which has taken on a more contemporary form in the ‘principle of proximity’, situations which would normally be intolerable if they were to be created with the direct implication of the forum through close connection to local society, can nevertheless be recognised *ex post*.<sup>203</sup> This device therefore serves to push back the point at which the forum will refuse to recognise a foreign institution. This is why the pluralist response makes sense:

Just because one embraces insights from legal pluralism, after all, does not mean that the values of pluralism must necessarily and always trump any other values a community might hold. It simply cannot be that legal pluralism is only a true normative position if it is pursued to the exclusion of all other values, interests, and commitments.<sup>204</sup>

That such a limit must be set in respect of transnational regime conflicts beyond the state is also a conclusion reached in a different way by Teubner’s societal constitutionalism. The problem is set in structural terms, as the need for ‘countervailing tendencies’ in respect of the ‘compulsive growth compulsion’ of autonomous regimes.<sup>205</sup> The disquieting conclusion which comes of the observation of specialised systems such as finance in the global arena is that ‘the self-reproduction of function systems and formal organizations follow an inexorable growth imperative’.<sup>206</sup> This idea can equally be expressed, in Polanyi’s terms, as a consequence of the ‘disembedding’ of such regimes from their social roots.<sup>207</sup> In terms equally familiar to the conflict of laws, they generate externalities within their environment, thereby threatening the global commons.<sup>208</sup> The explanation is to be found in the specific structure of these specialised systems, which are ‘oriented towards one and only one binary code’.<sup>209</sup> As such, and differently from the social systems of nation-states, they destroy ‘the inherent self-limitations which worked effectively in the multifunctional institutions in traditional societies’. This, then, is the particular problem of globalisation: ‘when the function systems become global, thus freeing themselves from the dominance of nation-state politics, there is no longer an agency to set them limits, stem their centrifugal tendencies, or regulate their conflicts’.<sup>210</sup> Whatever methodology is used to decide the conflicts which arise from such externalities, it

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<sup>203</sup> The contemporary version, proximity, introduces a distance element (linked to the liberalisation of jurisdictional criteria).

<sup>204</sup> Berman (n 24) forthcoming.

<sup>205</sup> Teubner (n 1) 71.

<sup>206</sup> *Ibid.*, 79.

<sup>207</sup> Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Press, 2001), qualifying the idea of self-regulating market as a dangerous utopian myth. On Polanyi’s concept of ‘disembeddedness’ and its possible use for the conflict of laws, see Muir Watt (n 2).

<sup>208</sup> On the possible use of conflict of laws as limiting negative externalities of legislation in respect of the global commons, see Muir Watt (n 94).

<sup>209</sup> Teubner (n 1) 79.

<sup>210</sup> *Ibid.*, 42.

needs to set from the outside the very limits which such systems have eaten up from the inside.<sup>211</sup> Teubner proposes the concept of ‘sustainability’ with which to capture the idea. Originally, this principle was designed to restrict economic expansion at the expense of the natural environment with a view to the protection of future generations. It is proposed here, however, that it should not be limited to the relationship of the economy to nature, nor to the relationship of a social system to just one of its environments.

Sustainability must be reconsidered in application to all function regimes; it must at the same time include not just the natural environment, but all relevant environments. Environment is to be understood here in the broadest sense, as the natural, social, and human environment of transnational regimes.<sup>212</sup>

Dealing with externalities through widespread adhesion to the idea of sustainability is certainly both coherent and desirable as a system of coexistence of overlapping social systems, in the same way as it makes sense in dealing with other tragedies of the global commons such as climate change. But however reasonable it may seem, this pluralist stance still leaves open a fundamental question, which falls traditionally within the remit of political and legal philosophy. It is basically the same issue of sovereignty that has always been the core dilemma of private international law. How can adhesion to what is basically a duty to cooperate (for instance, in protecting the global commons) be conciliated with sovereignty (be it that of a nation-state or an autonomous network node)? Global legal pluralism responds that a deliberative approach is constitutionally necessary. An approach which might seek to achieve a form of overlapping consensus between different axiological outlooks, can be said in this respect to be a feature of a ‘new constitutionalism’, indeed the only possible content of global constitutionalism. As Berman notes,

[Scholars of constitutional pluralism] seek structures to guide constitutive systemic interactions beyond the nation-state, and pluralism can offer a helpful rubric for building such structures. Significantly, as Walker’s work makes clear, legal pluralism provides a way to reinvigorate constitutional discourse by reorienting it away from the structure of a single state and towards a discussion of how to manage constitutive interactions among multiple normative systems.<sup>213</sup>

In this respect, Nicole Roughan argues that what pluralists need to develop in order to combat monist conceptions of the law (notably with Raz in mind) is an ‘account of law that explains how different supremacy claims can be

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<sup>211</sup> *Ibid.*, 166: ‘If the goal is to limit the expansion of modern-day institutions, there is no way around reconstructing extrinsic factors using intrinsic concepts, in order to erect internal barriers in the appropriate positions.’

<sup>212</sup> *Ibid.*, 173.

<sup>213</sup> Berman (n 24) forthcoming.



integrated and mutually recognized while upholding the authority of law'.<sup>214</sup> Her idea of 'relative authority' aims to provide such an account: relative authorities that must 'cooperate, coordinate, or tolerate one another *if they are to have legitimacy* [emphasis mine]'.<sup>215</sup> In this model, the claim to legitimate authority actually occurs *through* interdependence and interaction. Mireille Delmas-Mary develops a similar idea, the passage from 'solitary sovereignty' to 'solidary-sovereignty' (de la souveraineté solitaire à la souveraineté solidaire).<sup>216</sup> Both these positions evoke the conclusions reached within international relations theory on 'sovereignty as symbolic form'. This takes us back to the question of perspective. Indeed, Jens Bartelson shows how the concept of sovereignty has become inverted in international politics.<sup>217</sup> Initially designed to protect the political community of the nation-state from outside intervention, it is now used to justify external interference. Full sovereignty is the attribute of good states (benchmarked as such) that have conformed to the requirements of international law. Sovereignty, in other words, has come to do work that is the very reverse of its initial function. The concept has been turned inside out. The perspective is reversed.

## V. Conclusion: conflicting rationalities in practice

Bartelson's analysis, which perfectly captures the theoretical move by which contemporary pluralist legal theory establishes the conflict of laws as its new axis, is conducted in the sophisticated terms of aesthetics.<sup>218</sup> However, as is often the case, practice has not waited for theory to catch up before making an equally adventurous move. It has already had to confront conflicting claims, values, interests, ideals and norms which appear beyond the remit of state law in varied spheres and with diverse stakes and complex dynamics. It is naturally less free than legal theory to break out of conventional vocabularies in order to react appropriately.<sup>219</sup> Nevertheless, many examples comes to mind in which various established jurisdictions have adopted various forms of lateral or reflexive thinking, produced hybrids in the course of accommodating colliding sets of rules or have sought to acknowledge the compliance pull of informal practices. Among these, in addition to the instance involving proportionality cited above,<sup>220</sup> one might cite the case of *Jivraj*, in which a

<sup>214</sup> Nicole Roughan, 'From Authority to Authorities: Bridging the Social/Normative Divide' in Cotterrell and Del Mar (n 13).

<sup>215</sup> *Ibid.*

<sup>216</sup> Mireille Delmas-Marty, *Résister, responsabiliser, anticiper* (Seuil, 2013).

<sup>217</sup> Bartelson (n 14).

<sup>218</sup> For a return of aesthetics, too, in comparative legal theory, see Monateri (n 18).

<sup>219</sup> On the constraints of conventional argument bites, see Duncan Kennedy, 'A Semiotics of Legal Argument' III(2) *Academy of European Law* 309; and for an attempt to apply this to the conflict of laws, Horatia Muir Watt, 'A Semiotics of Private International Legal Reasoning' in Bonomi and Romano (n 155) 51–70.

<sup>220</sup> Mehren and Trautman (n 193).

religious arbitration clause was contested as discriminatory under EU employment legislation;<sup>221</sup> or *James Elliott Construction*,<sup>222</sup> in which the ECJ is called upon for the first time to interpret technical standards;<sup>223</sup> or again, the recent Claudia Pechstein case, in which compulsory arbitration in sports disputes is pitted against competition law in the German courts.<sup>224</sup>

However, the last word will be for a particularly remarkable example, which acknowledges the conflicts between expanding autonomous regimes, and proposes an equally pluralist response. It can be found in a recent child slavery case in US federal court, involving cocoa farms in the Ivory Coast. Appropriately illustrative of a problem that is emblematically global, it concerns the functioning of worldwide value chains and commodities markets, which are arguably the most potent recipes for destructive externalities in the global social and ecological environment today.<sup>225</sup> It serves first to suggest the importance and relevance of pluralist understandings of the complex normative landscape beyond the state in which regulatory power (here, over the world cocoa market) is asserted by a multinational market actor. At the same time, the analysis is carried out within a conflict of laws framework, which structures the court's jurisdictional enquiry under the Alien Tort Statute. However, remarkably, neither territory, sovereignty, nor the requirements of foreign policy are part of the legal reasoning used by the court, although they have been the focus of (private international) law's more familiar approach to the governance of corporate conduct abroad. On the other hand, what the Court is clearly attempting to do within the formal confines of a determination of jurisdiction is to bring the pressure of the legal system on a point (in various vocabularies, a 'hub', weakest link or 'pressure point', or a point of 'jurisdictional touchdown') in a global production chain.<sup>226</sup>

The court (US Court of Appeals for the 9th Circuit) refers to the economic leverage exercised by a particular brand in the world commodity market, from

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<sup>221</sup> *Jivraj v. Hashwani*, [2011] UKSC 40, allowing an appeal against a decision of the Court of Appeal ([2010] EWCA Civ 712), according to which an arbitration clause stipulating that the arbitrators should be prominent members of the Ismaili community, was void under regulations giving effect to anti-discrimination provisions of EU employment legislation.

<sup>222</sup> The original case is *James Elliott Construction Ltd v Irish Asphalt* [2014] 1 ESC 74 (Supreme Court of Ireland); on the request for preliminary ruling, see Advocate General Campos Sánchez-Bordona, C-613/14 (28 January 2016).

<sup>223</sup> On this type of conflict involving private regulatory standards, see Harm Schepel, 'Rules of Recognition: A Legal Constructivist Approach to Transnational Private Regulation' in Paulus Jurcys, Poul F Kjaer and Ren Yatsunami (eds), *Regulatory Hybridization in the Transnational Sphere* (Martinus Nijhoff, 2013) 189–202.

<sup>224</sup> Antoine Duval, *The Pechstein Case: Transnational Constitutionalism in Action at the Bundesgerichtshof* (10 March 2016), VerfassungsBlog online: <<http://verfassungsblog.de/the-pechstein-case-transnational-constitutionalism-in-action-at-the-bundesgerichtshof>>.

<sup>225</sup> On the implications of global value chains for hunger, see Olivier De Schutter and Kaitlin Y Cordes, *Accounting for Hunger: The Right to Food in the Era of Globalisation* (Hart Publishing, 2011).

<sup>226</sup> On the hub analysis, Tomaso Ferrando, 'Land and Territory in Global Production: A Critical Legal Chain Analysis' (PhD Law thesis, Sciences Po 2015).

which it then draws legal inferences. In *DOE V NESTLE USA, INC.*,<sup>227</sup> the Court asserts:

[T]he defendants had enough control over the Ivorian cocoa market that they could have stopped or limited the use of child slave labor by their suppliers. The defendants did not use their control to stop the use of child slavery, however, but instead offered support that facilitated it. Viewed alongside the allegation that the defendants benefitted from the use of child slavery, the defendants' failure to stop or limit child slavery supports the inference that they intended to keep that system in place ... the defendants participated in lobbying efforts designed to defeat federal legislation that would have required chocolate importers and manufacturers to certify and label their chocolate as 'slave free'. As an alternative to the proposed legislation, the defendants, along with others from the chocolate industry, supported a voluntary mechanism through which the chocolate industry would police itself.

This passage draws attention, in a pluralist mode, to other normative phenomena involving private power, self-regulation, reputational pressure and certification of compliance to moral standards. The leverage of private actors within the market through their brands is acknowledged, as is their power of regulatory capture through lobbying and the triumph of self-regulation. The legal response can be understood in terms of social responsibility, 'juridical touchdown'<sup>228</sup> (in Robert Wai's vocabulary), victim access to justice (rather than territorial jurisdiction, contract, corporate form, market) and a political horizon in which the pursuit of profit or market efficiency is balanced against other values.

The evolving landscape of judicial practice shows that the time is ripe – indeed, it may be a question of survival of the discipline – for the conflict of laws to absorb these pluralist understandings which it can enhance, in turn, with the body of knowledge that first emerged in a pre-modern context of plural authorities, unchartered territories and indeterminate boundaries between the public and the private spheres. Indeed, enriched conflict of laws theory has the potential to serve at the problematic heart of global law and its relationship to global justice, by contributing principles with which to govern non-state authority; infuse hybrid normative interactions with ideas of tolerance and mutual accommodation; and ensure accountability in the global decision-making processes through deliberation,<sup>229</sup> contestation,<sup>230</sup> and recognition.<sup>231</sup>

## Disclosure statement

No potential conflict of interest was reported by the author.

<sup>227</sup> *Doe v Nestle USA, Inc.*, No 10-56739 DC No 2:05-CV-05133-SVW-JTL (US Court of Appeal, 9th Cir, 2014).

<sup>228</sup> Robert Wai, 'Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization' (2002) 40 *Columbia Journal of Transnational Law* 209.

<sup>229</sup> Jacco Bomhoff, 'The Constitution of the Conflict of Laws' in Muir Watt and Arroyo (n 54), 270.

<sup>230</sup> Wai (n 228).

<sup>231</sup> Muir Watt (n 2).