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# Alterity in the Conflict of Laws: An Ontology of the In-Between

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## 18th Rabel Lecture, 2022

## Alterity in the Conflict of Laws

## An Ontology of the In-Between

By HORATIA MUIR WATT, Paris

The conflict of laws can serve heuristically to underscore two established but radically opposing models of modernist legal ordering: multilateralism and statism. Such a prism is helpful if we want to rethink (as we must!) our late-modern legality's deep epistemological settings in the shadow of the "catastrophic times" to come, whether in terms of environmental devastation or political dislocation. Both phenomena are profoundly linked and indeed constitute two faces of alterity, natural and cultural, from which modernity has progressively taught us to distance ourselves. Importantly, law encodes the conditions that produce these dual somatic symptoms in our contemporary societies. This chasm between nature and culture has produced humanity's "ontological privilege" over our natural surroundings and a similar claim of superiority of modern (Western) worldviews over "the rest". In this respect, the main achievement of the moderns, as Bruno Latour wryly observed, has been to universalise the collective blindness and amnesia that allow our "anthropocentric machine" to hurtle on, devastating life in its path and devouring the very resources it needs to survive.

*Alterität im Kollisionsrecht: Eine Ontologie des Dazwischen.* – Das Kollisionsrecht kann heuristisch dazu beitragen, zwei etablierte, aber gegensätzliche Modelle rechtlicher Ordnung herauszuarbeiten, Multilateralismus und Statutismus. Ein solches Prisma hilft uns dabei, im Schatten der bevorstehenden „katastrophischen Zeiten“ mit Umweltzerstörung und politischen Verwerfungen die tiefgreifenden erkenntnistheoretischen Voraussetzungen unserer spätmodernen Legalität notwendig zu überdenken. Beide Phänomene hängen eng zusammen: sie bilden zwei Seiten von Alterität, Natur und Kultur, von denen wir – so jedenfalls die fortschreitende Lehre der Moderne – uns distanzieren sollen. Das Recht kodiert, das ist wichtig, die Bedingungen, die diese dualen somatischen Symptome in unseren heutigen Gesellschaften hervorbringen. Diese Kluft zwischen Natur und Kultur hat das „ontologische Privileg“ der Menschheit in Bezug auf unsere natürliche Umgebung hervorgebracht und in ähnlicher Weise auch einen Anspruch auf Überlegenheit der modernen (westlichen) Weltanschauungen gegenüber „dem Rest“ begründet. Wie Bruno Latour scharfsinnig bemerkte, besteht die wichtigste Errungenschaft der Moderne darin, die kollektive Blindheit und Amnesie zu verallgemeinern, die es unserer „anthropozentrischen Maschine“ ermöglichen, weiter zu rollen, alles auf ihrem Weg zu verwüsten und eben die Ressourcen zu verschlingen, die sie eigentlich zum Überleben benötigt.

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*Humanity’s ontological privilege.* – The main achievement of modernity, as Bruno Latour wryly observed, has been to universalise the collective blindness and amnesia that enable (Western) humanity’s “anthropocentric machine”<sup>1</sup> to hurtle on regardless, devastating life in its path and devouring the very resources it needs to survive.<sup>2</sup> What are the implications, in legal terms, of this observation of the world we have created, our societies and our environment? The shadow of the “catastrophic times”<sup>3</sup> to come, whether in terms of ecological devastation or political dislocation, should work as a call to rethink our late-modern legality’s deep epistemological settings. Ecological devastation and political dislocation are profoundly linked and indeed constitute the two faces of alterity, one natural and one cultural, from which modernity has taught us, progressively, to distance ourselves.<sup>4</sup> Such a chasm, unshared by nonmodern traditions, grounds humanity’s “ontological privilege” over its natural surroundings<sup>5</sup> and a similar claim of superiority of modern (Western) worldviews over the “rest”.

*Encoding the nature/culture divide.* – Importantly, law *encodes* the conditions<sup>6</sup> that produce these dual somatic symptoms in our contemporary societies.<sup>7</sup>

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\* Part of a lecture series first begun in 1988 that honours and acknowledges the memory of Ernst Rabel, founder and first Director of the Institute. Lectures take up current and foundational topics in areas comprising the work of Rabel and the Max Planck Institute in Hamburg. This paper was initially presented as the eighteenth Rabel Lecture on 7 November 2022. The current modified version is based on parts of the book, *Horatia Muir Watt, The Law’s Ultimate Frontier: Towards an Ecological Jurisprudence – A Global Horizon in Private International Law* (2023).

<sup>1</sup> Here the reference is to *Giorgio Agamben, The Open: Man and Animal* (2002), in turn taking up Descartes’ concept of the “animal machine”.

<sup>2</sup> *Bruno Latour, Enquête sur les modes d’existence: Une anthropologie des modernes* (2012).

<sup>3</sup> *Isabelle Stengers, In Catastrophic Times: Resisting the Coming Barbarism* (2015).

<sup>4</sup> *Norbert Elias, Über den Prozeß der Zivilisation: Soziogenetische und psychogenetische Untersuchungen, vol. I: Wandlungen des Verhaltens in den weltlichen Oberschichten des Abendlandes, vol. II: Wandlungen der Gesellschaft: Entwurf zu einer Theorie der Zivilisation* (1939). In French: *La Civilisation des mœurs* (1973), *La Dynamique de l’Occident* (1975). In English: *The Civilizing Process – Sociogenetic and Psychogenetic Investigations* revised edition (2000).

<sup>5</sup> *Philippe Descola, Par-delà nature et culture* (2005).

<sup>6</sup> On the way in which law “encodes” see *Katharina Pistor, The Code of Capital: How the Law Creates Wealth and Inequality* (2019).

<sup>7</sup> *Eric L. Santner, The Weight of All Flesh: On the Subject-Matter of Political Economy* (2016); *Pierre Schlag, Twilight of the American State* (2023).

The foundational divide between nature and culture generates various specifically juridical artefacts,<sup>8</sup> such as the distinction between persons and things, self and other, public and private. And it explains moreover why chains of legal reasoning take the shape they do.<sup>9</sup> Thus, to enable our exit from the “old settlement”<sup>10</sup> we need to understand law’s (often imperceptible) role in entrenching the schemes by which we apprehend our empirical reality. Thereafter, we must take the measure of law’s transformative potential. It is important to emphasise that this means a profound overhaul, in that it is not enough to call for more regulation (of global warming) or more rights (in response to social wrongs), however important such actions may be. We need to dig deeper, to unearth the embedded paradigms through which we view our (human and non-human) surroundings and escape from law’s “model land”,<sup>11</sup> that is, from its present epistemological “fishbowl”.<sup>12</sup>

*Conflict of laws as heuristic.* – The thread running through this paper is that the conflict of laws can serve, heuristically, to provide such a prism. It underscores the coexistence of two opposing models of legal ordering inside the empire of modern law. As all students of the discipline know, two approaches to the conflict of laws have waltzed together through the ages. But until the early twentieth century, when belief in an overarching “natural” rational world order (whether divine, Roman or common law) dissolved, there was no perception of the potential, radical opposition between these two approaches. One, derived from and sometimes entirely assimilated to the great opus of Friedrich Carl von Savigny<sup>13</sup>, is usually known today as “multilateralism”. The other is the older, statist model, with multiple avatars and variations, such as North American functionalism or in Europe the contemporary rise of overriding mandatory rules. Importantly, both meth-

<sup>8</sup> Law, Anthropology and the Constitution of the Social: Making Persons and Things, ed. by Alain Pottage / Martha Mundy (2004).

<sup>9</sup> These are the terms of Kyle McGee, On Devices and Logics of Legal Sense: Toward Socio-technical Legal Analysis, in: Latour and the Passage of Law, ed. by idem (2015) 61–92. They must be understood with reference to Wesley Newcomb Hohfeld’s canonical “Fundamental Legal Conceptions as Applied in Judicial Reasoning”, 26 Yale Law Journal (Yale L.J.) 710–770 (1917). According to McGee (this note), Hohfeld proposes an immanent modalization of each transformation composing a chain of legal reasoning. McGee goes on to evoke the role of such modalization within the hidden universe of the infra-juridical or the invisible locus of beings of law.

<sup>10</sup> Latour, Enquête (n. 2).

<sup>11</sup> See Erica Thompson, Escape from Model Land: How Mathematical Models Can Lead Us Astray and What We Can Do About It (2022).

<sup>12</sup> Ratna Kapur, Gender, Alterity and Human Rights: Freedom in a Fishbowl (2020).

<sup>13</sup> Friedrich Carl von Savigny, System des heutigen römischen Rechts, 8 vols. (1840–1849); French translation: Traité de droit romain, 8 vols., translated by Charles Guenoux (1855–1859); English translation of vol. 8 by William Guthrie: Private International Law – A Treatise on the Conflict of Laws (1869). This opus can be seen further as the re-actualised (“heutiges”) project of a complete formalisation of life, following a cosmological system of “invisible proportions” and displaying the aptitude of legal knowledge to detach itself from its object (Aldo Schiavone, Ius: L’invenzione del diritto in Occidente (2005) 60).

ods can be seen as repositories of ideas about the foreign, or about the other, in legal terms.<sup>14</sup>

*Multilateralism and its centrism.* – On the one hand, through the singular, meta-normative lens of the conflict of laws, we find particularly strong evidence of modern legality’s role in constructing the various “centrism” (ego-, ethno-, anthropo-) that separate us (as self, culture, or humanity) from our outside world. At least since the nineteenth century, when the thrust of Savigny’s methodological discovery (or indeed, revolution) was extended beyond the epistemological community of like-minded legal traditions (and thereby deformed), its various devices<sup>15</sup> have contributed to shaping and reinforcing modernity’s separatist vision of an intensely hierarchised world. On the other hand, however, the law of the conflict of laws also comprises a second, alternative version, now (at least formally<sup>16</sup>) on the margins on the European scene, that suggests myriad ways of re-crossing modernity’s great divides.

*A nested dialectic.* – Understanding each of these two methods as a singular lens through which to view the dominant shape and content of Western legality,<sup>17</sup> it could thus be said that the (largely endo-European) history of the

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<sup>14</sup> On this point, see further, *Horatia Muir Watt*, *Discours sur les méthodes du droit international privé: pour un droit de l’inter-altérité* (2019).

<sup>15</sup> Meaning all the corrective techniques that were gradually conceptualised as a “general theory” of the conflict of laws, as if they were part of a rational “system” rather than a series of devices invented in response to the various distortions generated by the use of Savignian methods in heterogeneous cultural contexts. *Renvoi*, conflicts of characterisation or preliminary questions (as well as the normalisation of “exceptional” defences against “odious” institutions or *ordre public*) are all reminders that the Savignian multilateralist “revolution” could only work smoothly as a coordinating mechanism within a framework of epistemologically homogenous legal structures. All such devices are vestiges of statutism that reappear whenever there is insufficient structural “fit” between the legal systems involved in a specific conflict of laws. On the multiple technical or methodological paradoxes that spring from the progressive repression of pluralist statutism, see *Didier Boden*, *L’ordre public: limite et condition de la tolérance – Recherches sur le pluralisme juridique*, Doctoral dissertation, Univ. Paris I (2002), dir. H. Muir Watt.

<sup>16</sup> Readers do not need to be reminded of the formal predominance of a multilateralist scheme, whether in legal codification of private international law around the world (on which, see *Symeon C. Symeonides*, *Codifying Choice of Law Around the World* (2014)) or in current EU instruments in the field of economic obligations (the Rome I and II regulations). However, the latter operate, arguably, in an increasingly unified (or “approximated”) legal environment and are able, at least to a certain extent, to eliminate some risks of distortion, hence the disappearance of *renvoi*, for instance, or the creation of “autonomous” legal categories by the European Court of Justice in order to smooth out potential conflicts of characterisation in the laws of different Member states. Nevertheless, given that there is still room for significant differences in national substantive legislation, it is precisely in this context that the most powerful contemporary expression of statutism – overriding mandatory rules or “*lois de police*” – has been given a precise legal definition and user’s guide (as in art. 9 of the Rome I regulation).

<sup>17</sup> Our contemporary condition is described in various terms in as many disciplinary vocabularies: late-modern, anthropocentric, capitalo-centric, neo-liberal or naturalist. “Our” here refers to a perspective either of individual liberal and supposedly free subjects; of the

discipline of the conflict of laws reveals a nested dialectic<sup>18</sup> between two conceptual models. The difference between them can be read in political as well as epistemological terms. The prevailing scheme, monism, constitutes a rationalist project of legal ordering pursued from an overarching external standpoint. The other is an alternative model that represents a pattern of pluralistic entanglement<sup>19</sup> between multiple normative worlds. It is easy to see that the former evolved in cadence with statehood, secularism and capitalism (with its intrinsic colonial dimension and successive transformations).<sup>20</sup> However, it is less often noted that monism is haunted by its very own shadow-opposite,<sup>21</sup> an alternative “minor jurisprudence” which resurfaces faintly and unexpectedly from time to time.

*Towards an alternative vision.* – It is this second, alternative vision which unfolds below, as an “ontology of the in-between”. This is emphatically *not* a classical academic study as is conventionally understood in law’s somewhat

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Western tradition as superior, more rational or more “civilised” than all others; or again, of humanity as naturally endowed with specific intelligence and virtues in respect of other species. The common factor linking these various labels is a worldview that separates human society from nature, empties places of all other belief systems and neglects other forms of life. Legality has participated in the shaping of this perception, but this paper is *not* an indictment of modernity as such, nor of enlightenment per se, nor indeed of technology. Nor does it signify that our *nomos* cannot change, as we shall see.

<sup>18</sup> Nested, in the sense that further iterations of each opposite term turn up at a further stage of argument *within* the other; see *Jack M. Balkin, Nested Oppositions*, 99 *Yale L.J.* 1669–1704 (1990).

<sup>19</sup> “Entanglement” is a metaphor to be found very frequently in ecological thought of all kinds, often used (as here) in opposition to linear or grid-like division between humanity and nature induced by modern “jurisdictional thinking”. Some of the important points made below follow the path drawn by socio-technical legal studies (or science and technology studies as applied to law). The latter emphasise, importantly, that in humanity’s entanglement with nature, technology cannot be left out of the picture, since it is inextricably linked with both; see *Sheila Jasanoff, States of Knowledge: The Co-Production of Science and Social Order* (2004); *Bruno Latour, Love Your Monsters: Why We Must Care for Our Technologies As We Do Our Children*, in: *Love Your Monsters: Postenvironmentalism and the Anthropocene*, ed. by Michael Shellenberger (2011); *Donna J. Haraway, Simians, Cyborgs, and Women: The Reinvention of Nature* (1991), presenting the cyborg as a material/semiotic figure that implodes the dichotomies of nature/technology, human/nonhuman, male/female.

<sup>20</sup> *Neoliberal Legality: Understanding the Role of Law in the Neoliberal Project*, ed. by Honor Brabazon (2016).

<sup>21</sup> The idea that a norm secretes its own opposite, a central part of the deconstructive critique of law (as seen above), can also be related to the structure of our *nomos*. Normalisation, writes Nancy, “dessine les contours de la marge et de l’anormalité, monde sublunaire et dégradé. Car si les normes, explicites ou tacites, forment et conforment les êtres, les choses et les mots, c’est toujours accompagnée de son contraire que la norme constitue ses objets. La plupart du temps en effet, les normes s’ordonnent à la logique des oppositions binaires qui déclinent leurs valeurs antagonistes, à commencer par celles du normal et de l’anormal. Nous sommes ainsi constitués par des normes qui, infiltrant tout, commandent notre être au monde, c’est-à-dire comment vivre, travailler, penser ou aimer pour participer à la normalisation générale, être normé, normatif et normal”; *Jean-Luc Nancy, Preface*, in: *Camille Fallen, L’anomalie créatrice* (2012).

inward-looking modes of research.<sup>22</sup> Such forays outside the beaten track are usually met with derision or suspicion,<sup>23</sup> as if a somewhat obsessional revisiting of legal technique were intellectually superior to the search for an external perspective on law's mode of existence. But where exactly have academic exercises in crossword puzzles in the conflict of laws led us, in terms of making sense of our "catastrophic times"<sup>24</sup>? This is not a study (the umpteenth) of the law applicable, say, to the consequences of environmental pollution through industrial extraction or to the operation of the financial markets that enable it. Nor indeed is it a study of the implications of the devices of the conflict of laws for global governance or for the cross-border structuring of corporate capital. These have been done, and indeed overdone, elsewhere.<sup>25</sup>

*Taking metaphor seriously.* – What follows, far from either of those, is a deeper and certainly unorthodox reflection on the famously "dismal swamp" of the conflict of laws.<sup>26</sup> Unlike its conventional (and again, overlaboured) use, this metaphor points to the entangled root causes of legal modernity's "twilight",<sup>27</sup> currently so manifest in both nature and society. As such, an initial explanation is required as to why the conflict of laws might be an apt guide through the mysterious subterranean pathways that connect law to both our natural and cultural environments (I.). Thereafter, we must follow the gaze of the jaguar (II.) and trust in the artfulness of the shaman (III.).

### I. A guide through the "dismal swamp"

*Initially intended as a disparagement of the state of the law of the conflict of laws as archaic, abstruse and unscientific (at least in that its methods did not live up to the new empirical expectations of the emerging social sciences), the metaphor of the dismal swamp will be taken seriously here. It draws attention to the existence of a shrouded (non-Cartesian, non-linear,*

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<sup>22</sup> See *Geoffrey H. Samuel*, *Rethinking Historical Jurisprudence* (2022); *Mark Van Hoecke*, *Epistemology and Methodology of Comparative Law* (2004).

<sup>23</sup> Or, of course, with downright rejection, as do deviations from dogmatic and syllogistic legal forms in modes of energy or dissociation; see *Pierre Schlag*, *The Aesthetics of American Law*, 115 *Harvard Law Review* (Harv.L.Rev.) 1047–1118, 1055 (2002).

<sup>24</sup> *Stengers*, In *Catastrophic Times* (n. 3).

<sup>25</sup> For a wide sample of the global governance implications of the *Bhopal/Shell/Chevron/Vedanta* case-law and the use of private law therein in the construction of what Robé calls the "entreprise-monde" (*Jean-Philippe Robé*, *Le temps du monde de l'entreprise: Globalisation et mutation du système juridique* (2015)) and its structuring of corporate capital, see the various analyses of neoliberalism in the conflict of laws in: *Le tournant global en droit international privé*, ed. by *Horatia Muir Watt/Lucia Biziková/Agatha Brandão de Oliveira/Diego P. Fernández Arroyo/Megan Ma* (2020).

<sup>26</sup> *Lea Brilmayer/Daniel B. Listwa*, *Continuity and Change in the Draft Restatement (Third) of Conflict of Laws: One Step Forward and Two Steps Back?*, 128 *Yale L.J. Forum* 266–292 (2018).

<sup>27</sup> *Schlag*, *Twilight* (n. 7).

*non-rationalist, non-modern) penumbra lurking underneath the assertedly scientific project of rationalist global governance. As a visual representation of a new legal ontology of the “in-between”, it reveals our enmeshed interdependence with alterity.*

*The in-between and an ontology of the frontier.* – Borrowed from literary criticism,<sup>28</sup> the in-between as a significant conceptual category has now emerged in multiple fields of knowledge as diverse as linguistics, political theory, history, anthropology, sociology, psychology, art, gender studies and philosophy. For instance, it serves to underline that the forms through which we understand the empirical world and confer meaning upon it – artforms; landscape design; narratives as to chains of events; linguistic styles; configurations of time and space – are not necessarily linear, stable and unidimensional but rather are multi-sided, moving and ephemeral.<sup>29</sup> In particular, taking its cue from various strands of feminist-ecological<sup>30</sup> and eco-phenomenological thinking<sup>31</sup> in the West,<sup>32</sup> and from indigenous cosmologies

<sup>28</sup> *Silviano Santiago*, *The Space In-Between: Essays on Latin American Culture* (2001).

<sup>29</sup> On an eco-feminist account of multi-sidedness, see *Venu Mehta*, *Anekāntavāda: The Jaina Epistemology*, in: *Constructing the Pluriverse: The Geopolitics of Knowledge*, ed. by Bernd Reiter (2018) 259–278.

<sup>30</sup> See *Evelyn Fox Keller*, *The Mirage of a Space Between Nature and Nurture* (2010); see too, re-phrasing Bruno Latour’s famous dictum “we have never been modern”, Donna Haraway (*Nicholas Gane*, *When We Have Never Been Human, What Is to Be Done? – An Interview with Donna Haraway*, 23:7–8 *Theory, Culture & Society* 135–158 (2006)); by the same author, the famous *Cyborg Manifesto* and its progeny: *Donna J. Haraway / Cary Wolfe*, *Manifestly Haraway: The Cyborg Manifesto and the Companion Species Manifesto* (2016).

<sup>31</sup> See *Corine Pelluchon*, *Les Lumières à l’âge du vivant* (2021).

<sup>32</sup> “Indigenous ontologies” appear here as a block of common resistance to (late or colonial) modernity (notably in respect of relationships to land, natural resources and non-humans). In anticipation of the objection that the position unfolding in this paper “exoticises” such cosmologies (within the meaning of “legal orientalism”, see *Teemu Ruskola*, *Legal Orientalism: China, the United States, and Modern Law* (2013)), it may well be that – with some serious excavation – a not dissimilar epistemological stance can be found within the Western tradition itself. On this point it is interesting to recall (with *Allen Carlson*, *Environmental Aesthetics*, in: *Stanford Encyclopedia of Philosophy* (Winter 2020 Edition), <<https://plato.stanford.edu/archives/win2020/entries/environmental-aesthetics/>> (19 July 2023)) that a Western “forerunner of contemporary ecological non-cognitive aesthetics” (known as the “engagement approach”), was John Dewey, whose work is seen as close to Merleau-Ponty’s phenomenology but also in certain regards to Marxist and feminist aesthetics. The “engagement approach” rejects “disinterested appreciation, with its isolating, distancing, and objectifying gaze, is out of place in the aesthetic experience of nature, for it wrongly abstracts both natural objects and appreciators from the environments in which they properly belong and in which appropriate appreciation is achieved. Thus, the aesthetics of engagement stresses the contextual dimensions of nature and our multi-sensory experiences of it. Viewing the environment as a seamless unity of places, organisms, and perceptions, it challenges the importance of traditional dichotomies, such as that between subject and object. It beckons appreciators to immerse themselves in the natural environment and to reduce to as small a degree as possible the distance between themselves and the natural world. In short, appropriate aesthetic experience is held to involve the total immersion of the appreciator in the object of appreciation” (*Carlson* (this note) sub 3.2).



in the global South<sup>33</sup> recently brought to our (modern) attention by the “ontological turn” in anthropology, the in-between can be seen as a mode of existence that weaves through different life-worlds and cultural forms, crossing borders, changing shape, creating hybridity. Significantly for the conflict of laws, it has been argued that such complex interweaving (*cum plessis*) constitutes an *ontology of the frontier itself*.<sup>34</sup>

*Multifarious universes.* – This in-between ontology acknowledges the co-existence among the forms of life on our planet of multifarious universes<sup>35</sup> that are not separate or exclusive, but overlapping and interacting.<sup>36</sup> It resonates in aesthetic terms with a radical break with modernity’s Archimedean, linear perspective, in favour of a reflexive, multi-sided standpoint.<sup>37</sup> A “dwelling”<sup>38</sup> at the threshold or frontier of multiple worlds involves an ability to de-centre and adopt the lateral standpoint of the other – that is, the standpoint of each of these interlocking cultural and natural ecosystems. In a “pluritopical” vein,<sup>39</sup> indigenous ecological epistemologies thus invite us to adopt the cognitive standpoint of the other – to follow the gaze of the

<sup>33</sup> For one instance of interdisciplinary explorations at the frontiers of art forms, museology, history and law, see the work of Zalamea (for example, *Patricia Zalamea*, *En diálogo con un mundo antiguo: las pinturas de las casas coloniales de Tunja en el marco de un Renacimiento global*, *Revista Historia y Sociedad* 36 (2019) 161–194). Such work is emblematic of the contemporary retrieval of the “Humanity(s)” as an intellectual stance. Along these lines, see too *Caitlin Gordon-Walker*, *Beyond Inclusion: Canadian and Indigenous Sovereignty in Mainstream Museums*, 199 *British Columbian Quarterly* 129–149 (2018).

<sup>34</sup> *Walter D. Mignolo*, *Foreword: On Pluriversity and Multipolarity*, in: Reiter (n. 29) ix–xvi.

<sup>35</sup> See *Kathrin Eitel / Michaela Meurer*, *Exploring Multifarious Worlds and the Political Within the Ontological Turn(s)*, *Berliner Blätter* 84 (2021) 3–19; for the use of pluriversity in private international law, see the Max Planck Institute research project “Decolonial Comparative Law”, led by Ralf Michaels and Lena Salaymeh, <<https://www.mpipriv.de/decolonial>> (20 June 2023).

<sup>36</sup> Escobar defines this concept as “a world where many worlds fit”; *Arturo Escobar*, *Pluriversal Politics: The Real and the Possible* (2020) 9.

<sup>37</sup> The contemporary turn to eco-aesthetics as part of political ecology is to be contrasted with the modern aesthetics of nature (eighteenth century), of which the classic formulation can be found in Immanuel Kant’s “*Kritik der Urteilskraft*” (*Critique of Judgement*), taking nature as an exemplary object of aesthetic experience. The intimate connection with law appears here insofar as all judgement (including legal judgement) is aesthetic.

<sup>38</sup> The idea of “dwelling”, central in Mignolo’s pluriverse, is also a focus of (Western) anthropology in its ontological turn; see *Tim Ingold*, *The Temporality of the Landscape*, *World Archaeology* 25:2 (1993) 152–174. Ingold’s “dwelling perspective” has spread to other disciplines such as landscape architecture, as an attempt “to reconcile the separation between man and landscape by imagining the landscape as a continually unfolding story. The landscape bears witness to the passing of time; it contains a living memory of all who have lived in it. To perceive the landscape is to carry out an act of remembrance – one is immersed in this unfolding, gathering details and impressions that can be related again”; *Jacques Abelman*, *Response to Tim Ingold*, <<http://www.groundcondition.com/essays/the-dwelling-perspective/>> (1 June 2023). See, too, on a profound but very different (musical) register, *Francis Monkman*, *Dweller on the Threshold* (CD release 2004).

<sup>39</sup> That is, from multiple, moving perspectives all at once. On pluritopicality, see *Mignolo*,

jaguar,<sup>40</sup> think like a mountain,<sup>41</sup> enjoy life like a fish<sup>42</sup> or imagine ourselves as mushroom spores<sup>43</sup> – instead of viewing and dividing up the world, flattening and emptying it – from a unitary, external, stable and overarching viewpoint.<sup>44</sup>

*Inhabiting the in-between.* – The clear *political* message of these alternative ontological modes and their accompanying aesthetic is that the only adequate response to our late-modern obsession for division, closure, classifications and hierarchies is to inhabit the in-between.<sup>45</sup> By the same token, it also signifies a radical reversal of coloniality as an attitude towards alterity.<sup>46</sup> Moreover, these alternative strands of in-between thinking all seek to make visible, beneath all the (modern) binaries and categories that construct our vision of the world or affect our sense of belonging, the fuzziness of confines (metaphorical or geographical) and the plethora of traces, residues, practices

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Foreword (n.34) xi: “To think pluritopically means [...] to dwell in the border”. Border-dwelling must be understood as both an ontology and an aesthetic.

<sup>40</sup> *Eduardo Viveiros de Castro*, *Le regard du jaguar: Introduction au perspectivisme amérindien*, translated by Pierre Delgado (2021): “En lieu et place d’une théorie évolutionniste (lato sensu) qui prétend que ‘les humains sont des animaux qui ont gagné quelque chose’, les amérindiens disent: ‘les animaux sont des humains qui ont perdu quelque chose’” (taken from the blurb). On the gaze of the jaguar, see II. below.

<sup>41</sup> *Aldo Leopold*, *Think Like a Mountain* (1944, republished 2021). Or indeed, like a forest: *Eduardo Kohn*, *How Forests Think: Toward an Anthropology Beyond the Human* (2013). Or again, like a river: *Camille de Toledo*, *Le fleuve qui voulait écrire – Les auditions du parlement de Loire* (2021).

<sup>42</sup> On Chinese eco-aesthetics, see *Carlson*, *Environmental Aesthetics* (n. 32) sub 5.2.

<sup>43</sup> *Anna Lowenhaupt Tsing*, *The Mushroom at the End of the World: On the Possibility of Life in Capitalist Ruins* (2015).

<sup>44</sup> This point is made forcefully by *Philippe Descola*, *Les Formes du visible* (2021), in his exploration of the aesthetics of indigenous cosmologies.

<sup>45</sup> In addition to the works of Mignolo, de Sousa Santos, Viveiros de Castro, Ingold (cited in various parts of this article), see *Matthew Wildcat / Justin de Leon*, *Creative Sovereignty: The In-Between Space: Indigenous Sovereignties in Creative and Comparative Perspective*, *Borderlands Journal* 19:2 (2021) 1–28, arguing that Indigenous sovereignties exist in the space between what is and what is possible.

<sup>46</sup> As *Silviano Santiago* writes, “Colonization through the spread of Faith and the Empire is the negation of the values of the Other [...]. To be more precise, it is a triple negation of the Other: first, from a social standpoint, because the Indian loses his freedom as he becomes the subject of a European crown. Second, the Indian is forced to abandon his religious system (and everything implied by it in economic, social, and political terms) and is transformed – by the power of catechism – into a mere copy of the European. Third, he loses his linguistic identity, gradually expressing himself through a language that does not belong to him. [...] Therefore, colonization through the expansion of Faith and of the Empire is above all the lack of respect (and not mere intellectual curiosity) in relation to the Other; it is intolerance with the values of the Other. It is the main effect of the narcissistic European gesture that aimed at seeing its own image repeated throughout the universe. In full glory, the so-called universal history begins with European expansionism. The New World is only the occasion for another mirror, and the native is the clay to mould a double, similar figure – and add more violence and destruction”; *Silviano Santiago*, *Why and For What Purpose Does the European Travel?*, in: *idem*, *The Space In-Between* (n. 28) 9–24, 13.

and concurrent imaginaries that shape our subjectivities. The in-between, then, is an “abyssal” model,<sup>47</sup> made of (ontological) hybridity or interstitiality and (aesthetic) entwinement and oscillation.

*Legal schemes of intelligibility.* – At first sight, however, such ideas would seem particularly difficult to translate into a credible (modern) legal form.<sup>48</sup> Modernity has so accustomed us to the existence of a monist (or grid-like<sup>49</sup>) aesthetic in law – a unitary viewpoint embodied in a rule of decision that effects a final “closure” of legal conflicts – that plurality in law would seem to be a contradiction in terms.<sup>50</sup> However, from a legal standpoint, the primary lesson from such readiness to “dwell in the border” is that our normative universe is not simple (in the sense of unique, monist or exclusive) but multiple (in that a plurality of modes of access to reality coexist in time and space). By contrast, modern law’s project of global order cannot contain (nor restrain) the underlying entwinement of “life-forms” (most readily, species diversity) and “mental categories” (obviously a facet of culture).

*Ecological resonance.* – Importantly, the concepts of interlegality,<sup>51</sup> threshold, hybridity, interstitiality, border-crossing, connections, plurality and of course alterity all evoke the idiom of private international law, as does the concept of the spatialised frontier. Echoing all these diverse instances of the

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<sup>47</sup> *Boaventura de Sousa Santos*, *Toward A New Legal Common Sense*<sup>2</sup> (2002) 437; *idem*, *Epistemologies of the Global South* (2023).

<sup>48</sup> Difficult insofar as they echo indigenous ecological cosmologies; see, from the perspective of literary critic, *Fred Coelho*, *Improvisations of a Tropical Cartesianism*, *Critical Studies in Improvisation* 7:1 (2011), *Brazilian Improvisations / Improvisações Brasileiras*: “[F]or some thinkers improvisation and its corollaries are proof that these countries and their people would live forever on the margins or in negative dialectics within the heritage of Enlightenment reason, [but] for others it is precisely there – in the possibility of reinventing reason from hybridisms, strategic appropriations, and re-readings – that the creative and autonomous potentials in the post-colonial world lie” (taken from the abstract).

<sup>49</sup> *Schlag*, *Aesthetics* (n. 23).

<sup>50</sup> This is the point made by Roughan and Halpin in their quest for a pluralist jurisprudence: *In Pursuit of Pluralist Jurisprudence*, ed. by Nicole Roughan / Andrew Halpin (2019). Conversely, see too the observation by Viveiros de Castro as to the necessary circularity of (metaphysical) monism that presupposes distinctions that are impossible to draw: “Humanity and world are literally on the same side; the distinction between the two terms is arbitrary and impalpable: if one starts from humanity (thought, culture, language, the ‘inside’) one necessarily arrives at the world (being, matter, nature, the ‘Great Outdoors’) without crossing any border and conversely. ‘Pluralism = monism’, the magical formula sought by Deleuze and Guattari can also be written, when read by a Tardean sorcerer or an Amerindian shaman, as ‘Pan-psychism = Materialism’”; *Déborah Danowski / Eduardo Viveiros de Castro*, *The Ends of the World*, transl. by Rodrigo Guimarães Nunes (2017) 113.

<sup>51</sup> *De Sousa Santos*, *New Legal Common Sense* (n. 47) 437, describes interlegality as the phenomenological counterpart of legal pluralism; see too *Robert Wai*, *The Interlegality of Transnational Private Law*, (2008) 71 *Law and Contemporary Problems* 107–128; *Mariana Valverde*, *Chronotopes of Law: Jurisdiction, Scale and Governance* (2015) 50. *De Sousa Santos* also uses the concept of “transconflictuality” (which might also be the phenomenological equivalent of intersectionality).

in-between, the metaphor of the “dismal swamp” then comes into its own.<sup>52</sup> The point is that these alternative modes of dwelling can be productively unearthed (or perhaps more appropriately, re-earthed), so as to allow legality to resonate with deep-ecological descriptions of the world as biodiversity and entwinement. In this respect, the shadow-avatar of the conflict of laws identified above, as it navigates in-between spaces and embraces thresholds of uncertainty, proposes an alternative scheme of legality. To recall: the distinctive feature of statism is that it allows foreign law (or its institutions) to determine how and when it will apply on its own terms, rather than in terms defined in the mirror-image of the law of the forum, itself projected as if it were an Archimedean, neutral standpoint. Thus, the dismal swamp contains an invitation to look back at ourselves, not from law’s traditional unitary or monist standpoint, but from the lateral and necessarily plural *perspective of the other*.

*Pluritopicality and relationality.* – This perspective promises renewal in the conventional terms in which legal plurality is envisaged in conventional Western scholarship in private international law. It opens onto an alternative ontology that could be described as “relational”, in that it reaches across the great divides of modernity and their legal avatars as described above.<sup>53</sup> In this way, the shadow-version of the conflict of laws can serve to make visible faint, unfamiliar shapes of legality, suggesting that we can move from a grid-like, linear vision towards a multi-sided or pluritopical understanding of our relationship to alterity (whether other life-worlds, our surroundings, or nonhuman species) – if only we accept dwelling metaphorically in the in-between.<sup>54</sup> Clearly, this transformation of our modern, monist universe will meet with resistance and requires the aid of an avatar.<sup>55</sup> It will take two

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<sup>52</sup> On the aesthetic of the swamp, the work of Brazilian literary critic Silviano Santiago (cited above, n. 28) is particularly interesting, having developed (in the 1970s) the idea of the swamp as the in-between space (“o entre-lugar”, in Portuguese).

<sup>53</sup> There are various other ideas in contemporary legal thought that use the concept of the “relational”; see *Hanoah Dagan*, *A Liberal Theory of Property* (2021); and in private international law, *Roxana Banu*, *Nineteenth Century Perspectives on Private International Law* (2018); *Ralf Michaels*, *Law and Recognition: Towards a Relational Concept of Law*, in: *Roughan/Halpin* (n. 50) 90–115. Here, however, the same term does not refer to intersubjective reciprocity in private law (although this of course is important) nor indeed to the element of relationality in the definition of legality (on which *Michaels*, this note, and more below, text at n. 106), but to the epistemologies of “relations” evoked by *Descola*, *Par-delà nature et culture* (n. 5).

<sup>54</sup> *Mignolo*, *Foreword: On Pluriversality and Multipolarity* (n. 34), emphasises the dimension of “dwelling” pluritopically or of “inhabiting” the border as the reverse of Hegel’s philosophy of history (as grounded in territory). The idea of “dwelling” in our environment is also central to *Ingold’s* work (see *Tim Ingold*, *The Perception of the Environment: Essays on Livelihood, Dwelling and Skill* (2000)), in which the “dwelling perspective” is about perception, a view of the relational self in which awareness and activity in and of the world are rooted in an organism’s active engagement with the world).

<sup>55</sup> On the definitions of avatars and totems in indigenous traditions, see *Descola*, *Formes* (n. 44). The avatar is a much-used figure in political ecology, including as an art form (see for

non-anthropomorphic figures, the jaguar and the shaman,<sup>56</sup> to help further this reversal.

## II. The gaze of the jaguar

*To follow the “gaze of the jaguar”<sup>57</sup> means to enter a reflexive web of mutual sensitivity contrary to imposing our own standpoint on others. Thus, in a radical form of decentring, the gaze of the jaguar turns back on the self, the observer.<sup>58</sup> As a mode of external criticism, it brings us to scrutinise our own life-world. However, this is a far more complex intellectual device than the usual “outsider’s insights” that we have come to identify with endo-European comparative legal studies.*

*Decentering perspective.* – For the Amerindians, when a jaguar sees itself in the mirror, it sees a human being.<sup>59</sup> The ecological implications behind this striking representation by Eduardo Viveiros de Castro of the object of the

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example, *Cynthia Erb*, *A Spiritual Blockbuster: Avatar, Environmentalism, and the New Religions*, 66:3 *Journal of Film and Video* 3–17 (2014)). For the law, see *John Borrows (Kegeedonce)*, *Drawing Out Law: A Spirit’s Guide* (2010).

<sup>56</sup> The jaguar and the shaman are twin figures of indigenous mythologies. Each represents a specific, decentred mode of encounter with the strange. While both inhabit the “space of the in-between”, the jaguar (whose gaze represents a reversal of perspective, an “anti-narcissus”) and the shaman (who takes on the shape of the other, including an animal, jaguar-like form) should not be conflated (on their distinctiveness, see *Eduardo Viveiros de Castro*, *Métaphysiques Cannibales* (2009); on their signification, see *Pierre Clastres*, *Échange et pouvoir: philosophie de la chefferie indienne*, *L’Homme* 2:1 (1962) 51–65; *idem*, *La Société contre l’État: Recherches d’anthropologie politique* (1974); *idem*, *Mythologie des Indiens Chulupi* (1992); for further analysis of the derisive laughter with which the two figures, presented as burlesque, are greeted by the Chulupi Indians, see *Anne-Christine Taylor*, *Pierre Clastres et la dérision du pouvoir chez les Indiens: un commentaire*, *Terrain: anthropologie et sciences humaines* 61 (2013) 114–121). These two burlesque figures are invested with a cathartic and highly constitutional function, inducing laughter in order to exorcise power. In the context of this book, to follow the gaze of the jaguar is to see ourselves as seen by the other, while the shaman leads us into the underworld (or otherworld, the hinterland) by taking on the attributes of the other. Moreover, in enacting a specific relationship to alterity, the jaguar may devour the other (by eating the relation), while the shaman becomes the other by changing identities.

<sup>57</sup> Perspectivism is a concept associated with Eduardo Viveiros de Castro’s immersive exploration of the modes of thought of Amazonian Indian communities. “Pour les Amérindiens, l’homme n’est pas le seul à être une personne au sens fort. Tous les habitants du cosmos sont des humains, sous le vêtement des espèces, des corps, des formes distinctes. Si l’on prend au sérieux cette proposition et qu’on essaie de réfléchir dans cette perspective, c’est un autre monde qui s’ouvre à nous, multiple, ondoyant, vertigineux”; *Eduardo Viveiros de Castro*, *Pour les Indiens, quand un jaguar se voit dans le miroir, il voit un homme*, *Philosophie Magazine*, No 140 – July 2020. The philosopher makes the point that this is also an essential resource for confronting the ecological crisis, which is all at once metaphysical, political and economic.

<sup>58</sup> *Renvoi* in the conflict of laws (or “foreign court theory”, its other, common law version) is emblematically, or perhaps anecdotally, the legal device that performs exactly this reflexive move. See again, *Eduardo Viveiros de Castro*, *Exchanging Perspectives: The Transformation of Objects into Subjects in Amerindian Ontologies*, 10:3 *Common Knowledge* 463–484 (2004).

<sup>59</sup> *Viveiros de Castro*, *Le regard du jaguar* (n. 40).

jaguar's gaze are far-reaching.<sup>60</sup> They eradicate humanity's distance from other species and modify perspective. For the Western metaphysical and legal traditions, of which we have already seen that their relation to human (cultural) alterity is inseparable from their approach to the (nonhuman) natural world, the reversal is radical. The deflected mirror effect of the jaguar's gaze suggests a world of confusing reflexivity, disturbing our modes of access to reality.<sup>61</sup> The mirror of the other sends back our own image, decentering our being. It is *as if* the jaguar, the avatar, the incarnation of radical alterity, was part of our split self. The gaze of the jaguar serves to remind us, within the Western, eminently "centred" tradition, that the divide between us and them, subject and object, runs through ourselves, and that however rational, civilised or in control we think we are, we are produced and driven by our shadow-lives and -histories. In terms that ring true to deconstructive, post-structuralist ears (and as such will also meet with entrenched rejection by the "moderns"), the gaze of the jaguar teaches that the perspective creates the subject, not the other way round. This is singularly relevant in respect of the law, whose modern guise as order and closure will certainly offer tenacious resistance to this reflexive, decentered aesthetic.

*Methodological choices: monism.* – In order to understand the *legal* insights to be drawn from following the gaze of the jaguar, it is certainly useful to recall, briefly, various key elements concerning the impact of our methodological choices, and of their corresponding epistemological assumptions

<sup>60</sup> At this point, it is useful to refer to the author's own explanation of anthropological perspectivism (*Eduardo Viveiros de Castro*, *The Relative Native* (2015) 16–20), which sums up beautifully the point we are trying to make here in respect of legal perspectivism (if indeed it is dissociable from the anthropological): "When it comes to the question of whether the object of anthropology ought to be the native's point of view, the response must be both 'yes' and 'no.' 'Yes' (certainly!), because my problem [...] [is] to discover what a 'point of view' is for the native. In other words, what concept of a point of view do Amazonian cultures enunciate – what is the native point of view on the point of view? The answer is 'no,' on the other hand, because the native concept of a point of view does not coincide with the concept of 'the native's of point of view.' After all, my point of view cannot be the native's own, but only that of my relation with it. This involves an essentially fictional dimension, since it implies making two entirely heterogeneous points of view resonate with each other [...]. As stated above, the experiment I am proposing posits an equivalence *de jure* between the anthropologist's and the native's discourses, taking them as mutually constitutive of each other, since they emerge as such when they enter into a knowledge relation with one another. [...] They reflect [...] a certain relation of intelligibility between two cultures; a relation that produces the two cultures in question by back projection, so to speak, as the 'motivation' of the anthropological concepts. As such, anthropological concepts perform a double dislocation: they are vectors that always point in the other direction, trans-contextual interfaces that function to represent, in the diplomatic sense of the term, the other in one's own terms (that is, in the other's other's own terms) – both ways. In short, anthropological concepts are relative because they are relational, and they are relational because their role is to relate."

<sup>61</sup> On the mirror of self as a (modern) ruse of naturalisation, see Donna Haraway's "cyborg" critique (*Haraway*, *Simians, Cyborgs, and Women* (n. 19) 178) when she challenges the naturalising stories that still haunt the bodies of everyone marked as other, whose task is to mirror the self.

within the conflict of laws, upon the aesthetics of modern legality. Thus, from a conventional, monist perspective, law is an (exclusive or totalising) ontological order (for instance, a code, a nation-state constitution, or an imagined world legal system) that is all-encompassing, external and prior to social reality<sup>62</sup> – a denial, as it were, of “life before the law”.<sup>63</sup> In the conflict of laws, this vision is instantiated by multilateralist methodology: choice of law is an exercise in fitting diverse national rules back into an overall frame administered by means of a set of complete, coherent and exclusive categories. In such a context, conflicts of norms are anomalous: they look somewhat like a disassembled jigsaw puzzle, of which the pieces must be returned to their proper place within a pre-existing (and of course, internally consistent) order. Difference, in the form of alternative rationalities or other world-visions, is as if flattened out or “squared” through a requirement of conformity with the forum’s legal categories.

*Statutism and cosmopolitics.* – Conversely, statutism thinks of law in terms of prospective, negotiable assertions advanced outside any pre-fixed, overarching structure. Law involves a distribution of agencies,<sup>64</sup> a constant changing and exchanging of perspectives, in a recognizably methodological incarnation of legal pluralism. Like outer space traversed by chaotic trajectories of various objects today, the normative world beyond the state, rather than being self-regulated within an order undergirded by coherent principles, is cluttered with disorderly, heterogeneous claims.<sup>65</sup> Conflicts of laws are generated by the unruly encounter of concurrent, virtual aspirations in the absence of any overarching Archimedean point. In a Latourian idiom, they blur jurisdiction and involve the sharing of juridical space.<sup>66</sup> Thus, law passes,<sup>67</sup> and indeed a pluralist account of private international law provides an emblematic illustration of legality’s specific mode of existence in this respect. Far from being anomalous, the constant overlapping and negotiation of the claimed spatial thrust of different normative projects is an integral part

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<sup>62</sup> In the conflict of laws, this vision is well illustrated by the idea of a “legal relation” central to Savigny’s doctrine, deployed within a real or imagined community of laws. The legal relation was, as it were, pre-configured before it became the object of normative conflict, in such a way that whatever the starting point (the applicable law or the social relationship), the result was the same.

<sup>63</sup> See *Cornelius Castoriadis, L’institution imaginaire de la société* (1999).

<sup>64</sup> See *McGee, On Devices and Logics of Legal Sense* (n. 9).

<sup>65</sup> On the conceptualisation of transnational legal authority outside or beyond the state as a claim, in the language of legal sociology, see: *Authority in Transnational Legal Theory: Theorising Across Disciplines*, ed. by Roger Cotterrell / Maksymilian Del Mar (2016). Examples of a pluralistic approach in positive private international law today are, on the one hand, the recognition of foreign judgments (and its contemporary avatar, the recognition of legal situations on human rights grounds); on the other, “governmental interests analysis” and “lois de police”. All these examples start from and centre around the claim itself, which may require renegotiation or redefinition when it conflicts with another.

<sup>66</sup> *McGee, On Devices and Logics of Legal Sense* (n. 9).

<sup>67</sup> *McGee, On Devices and Logics of Legal Sense* (n. 9).



of legality's mode of existence; to borrow from Isabelle Stengers' account of the "body politic", it is a sort of legal "cosmopolitics".<sup>68</sup>

*Hospitality in legal terms.* – Law's morphological plurality is underscored, therefore, when its multiple (local, positive) bodies meet and interact. Such encounters may highlight the multiplicity of broad institutions or concepts, singular rules or policies, or even deeper normative or belief systems.<sup>69</sup> Against the backdrop of the historical rivalry between monist and pluralist methodologies in private international law, there is a significant normative choice to be made: either a claim based on foreign law is heard *hospitably* in its own language,<sup>70</sup> on its own terms, and along with its conceptual vocabulary and representation of spatiality (with the ensuing risk of irreducible mutual misunderstandings); or, the claim based on foreign law is forced to fit within the structure of the legal categories of the forum (at the risk of deforming all of its conceptual architecture and ideology).<sup>71</sup> The former, "perspectivist" vision is inherent in legal pluralism and embodied in statist doctrines within the conflict of laws. The idea of a "claim" is taken very seriously in this context. Above all, such claims are accepted in their existing shape or garb. In other words, statism, like legal pluralism, refuses to smooth over differences.<sup>72</sup> For example, the Muslim *kafalah* needs to be taken as it is understood in its own context and not made to fit in the (unfamiliar) categories of the forum. And so indeed should indigenous peoples'

<sup>68</sup> Isabelle Stengers, *Cosmopolitiques I* (2003); *idem*, *The Cultivation of Ways of Overlapping: a Matter of Reclaiming*, in: *A Book of the Body Politic – Connecting Biology, Politics and Social Theory*, ed. by Bruno Latour / Simon Schaffer / Pasquale Gagliardi (2020) 159–174.

<sup>69</sup> For a theorisation of such encounters between secular and non-secular legal cosmologies or epistemologies, see *Sandrine Brachotte*, *The Conflict of Laws and Non-Secular Worldviews: A Proposal for Inclusion*, Doctoral Dissertation, Sciences Po, Law School (2022), dir. H. Muir Watt. For examples, this author uses indigenous relationships to land, religious arbitration and ideological activism on moral or sexual issues with extraterritorial effects.

<sup>70</sup> Jacques Derrida, *De l'hospitalité: Anne Dufourmantelle invite Jacques Derrida à répondre* (1997).

<sup>71</sup> This is the "problem of characterisation" in the conflict of laws. If made to fit in an inappropriate category, difficulties or irritants may emerge downstream (*renvoi* or indeed conflicts of characterisation, *stricto sensu*, where the governing law thus designated in the light of an initial analysis of the "nature" of a legal institution then responds in completely different terms). As seen above, endless examples in which monism's devices are deployed – notably, characterisation *lege fori* – show how foreign law is ironed out when its shape or content appear as alien or deviant. Indeed, the various conundrums produced by multilateralist methodology – typically, *renvoi* generated by conflicting characterisation within the foreign legal system – are a direct result of this initial elimination of whatever does not, by and large, fit or conform.

<sup>72</sup> Ensuing cases of irreducible conflicts between claims that will not concede or negotiate are admittedly more problematic, but in such cases a pluralist view consists in giving effect to the strongest (in terms of legitimacy or effectiveness). Statism (as will be seen below) does not deny that this may entail a comparative, value-laden assessment of the strength and value of linkages in particular cases. It says, however, that conversely to its monist counterpart the initial opening to the other must be framed in the other's terms. This is a complete reversal of bias, but not a miraculous solution to all conflicts.



non-proprietary ideas of land use and occupation be understood, or their ideas of how alien *personae* (sacred statues, masks or rivers) are endowed with agency by a nonsecular or nonmodern foreign law.<sup>73</sup>

*What counts as law.* – Judicial practice in such cases reveals underlying and historically variable assumptions as to *what counts as law* (as opposed to religious institutions, “primitive” practices, cosmologies – or indeed fictions different from modern law’s own!). The point, however, is that under a monist approach in the conflict of laws, where law is synonymous with formal legality produced by the state, the question of what counts as “law” is pushed to the background (there is little point in asking the law of a state whether it thinks of itself as law), and the focus is displaced towards a second issue: the spatial thrust and coordination of different systems of state legality. From the point of view of the court of a secular legal system, the *kafalah* as a religious institution will command attention only if it is embodied in the foreign state law governing the personal status of the child. The same can be said of the indigenous usage of sacred land, which will be recognized as title only if formalised as such under the *lex rei sitae*.<sup>74</sup> The reach of (foreign) state law, as we know, has been the exclusive preoccupation of private international law since the early twentieth century. Comparative law and its legal “families”, born from colonial anthropology, did much to reinforce this view.<sup>75</sup>

*The problem of the state form.* – The irony is that the (Roman law-based) categories of the conflict of laws originated in circumstances where statehood was certainly not the parameter used to identify legality. If there was no perceptible rupture in this with the coming of the new entwinement of law and statehood in the nineteenth century, it was because the “concert” of European nation-states was still homogeneous. The displacement, into a wider international setting, of the methodologies initially designed to ensure the coordination of the laws of Germanic-Roman, Christian city states

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<sup>73</sup> These are all well-known examples of “unfamiliar” categories that raise issues of characterisation in the conflict of laws. The example of unknown legal *personae* was usually illustrated by the problem of the appearance of the trust at the threshold of civilian legal systems, but it has lost much of its punch by reason of a certain convergence around fiduciary institutions. However, the question of the legal standing of rivers and natural entities is obviously more topical; for the famous example of the River Atrato in Colombia, see *Sandrine Revet*, *Les droits du fleuve – Polyphonie autour du fleuve Atrato en Colombie et de ses gardiens*, *Revue européenne d’analyse des sociétés politiques: Sociétés politiques comparées* 52 (2020) online. On the *Hopi mask* case, see below, n. 117.

<sup>74</sup> But even then, categories of title to property can be instrumentalized; on the infamous *Song Mao* case (involving Tate and Lyle and Cambodian “blood sugar”), with commentaries by Alex Mills, Hisashi Harata and Oona Le Meur, see *Global Private International Law*, ed. by Horatia Muir Watt/Lucia Bíziková/Agatha Brandão de Oliveira/Diego P. Fernández Arroyo (2019) 118–150.

<sup>75</sup> *Veronica Corcodel*, *Modern Law and Otherness: The Dynamics of Inclusion and Exclusion in Comparative Legal Thought* (2019); *Daniel Bonilla Maldonado*, *Legal Barbarians: Identity, Modern Comparative Law and the Global South* (2021).

and princedoms seemed “natural” or only to involve a very slight move. In reality, the change was considerable. The state form that eliminated all the other actors from the international order (or all other subjects from international law) by the early twentieth century in no way guaranteed any similarity as to law’s formal and apparently homogenous framework. There was no common substantive content (hence indeed the rise of the conflict of laws as a discipline, along with its comparative counterpart<sup>76</sup>), no shared conceptual architecture (thereafter appeared the problem of characterisation), and indeed no analogous vision of what counts as legality (now assimilated to state-based private law).

But as Robert Cover’s definition of *nomos* reminds us, there is considerably more to law than rules.<sup>77</sup> And as unitary as law’s superficial frame is purported to be, so variable is this invisible part of law. Legal pluralism, then, can be seen as an attempt to see beyond the unitary legal form of statehood. It also changes the terms of the interaction between different conceptions of legality within the conflict of laws. As seen above, monism assumes a comfortable fit between (state) legal systems; since it does not dwell on definition, it can orchestrate encounters between systems from an Archimedean standpoint. But no such comfort is available under radical pluralism.<sup>78</sup> Of course, it is difficult to leave behind the comfort of modern law’s linearity and its obsession with closure, “legal security” and decisiveness. As Pierre Schlag observes, the power of self-definition (in respect of what counts as law) always risks degenerating into dissociation.<sup>79</sup> The conflict of laws illustrates this riddle perfectly: is this not the very reason for which its shadow-avatar has been relegated to the margins? The latter represented the dominant methodological form as long as Roman law (or reason)<sup>80</sup> offered an overarching background from which local laws diverged.<sup>81</sup> But towards

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<sup>76</sup> In the vein of the previous note, these two legal disciplines differ in their objects but produce similar effects in terms of the voiding or hierarchisation of space.

<sup>77</sup> Robert M. Cover, Foreword: Nomos and Narrative, 97 Harv.L.Rev. 4–69 (1983).

<sup>78</sup> Twining describes the instability of such interaction, which “is often more like that between waves or clouds or rivulets than between hard, stable entities like rocks or billiard balls” (William Twining, Diffusion and Globalization Discourse, 47 Harvard International Law Journal 507–516, 513 (2006).

<sup>79</sup> Schlag, Aesthetics (n.23). The idea of dissociation has obvious psychoanalytical resonance.

<sup>80</sup> This is equally valid for the overarching or common background of the common law in American neo-statutism, or the belief in the strict territoriality of law as in vested rights.

<sup>81</sup> See Peter Stein, Roman Law in European History (1999) 71 ff. Initially, for Bartolus de Sassoferrato and the Commentators of the late middle ages, the *ius commune* provided the methods with which to interpret local statutes, and in such a way as to restrict the opportunity for derogation. Later attitudes varied considerably from place to place towards the *Corpus Iuris* and Roman law more generally, but the conviction remained that conflicts between local, secular laws took place in the shadow of an overarching normative scheme (whether *corpus*, Institutes, Roman classical culture, or natural reason) that commanded a uniform method of delimitation of local statutes or customs. Because local customs were still under-

the turn of the nineteenth century, it was rejected as archaic when statehood became the exclusive, universal source of legality and public international law no longer posed the frame of reference for the conflict of private laws.

*The dilemma of true conflicts.* – Ever since, attempts to reinstate a neo-statutist, pluralist methodology beyond a “community of laws”<sup>82</sup> have largely failed by reason of their apparent impotence in the face of “true conflicts”<sup>83</sup> or their inability to achieve closure or decisiveness. The semantics of the conflict of laws and legal pluralism are different, but the dilemma is identical.<sup>84</sup> Both espouse “perspectivism” (or self-definition) in the absence of any overarching or monist stance from which to harness multiple viewpoints, so their very plurality is likely to fall into chaos or dislocation.<sup>85</sup> The seemingly inextricable difficulty in both cases is that “anything goes”.<sup>86</sup> In other words, if we allow each legal entity to deploy its own singularity, chaos ensues: overlapping claims in the language of the conflict of laws, legal insecurity in debates over pluralism. How then, in the absence of a stable frame or centre, can we prevent the potentially positive dynamic of constant exchange between multiple viewpoints from breaking down into a disarticulated shambles or state of dislocation? How can law reconnect, re-place, re-order or reinsert disrupted sequences of things and beings, persons and events when it cannot rely on the guidance of an overarching scheme of things? How can it enact fluid and contestable interlegality<sup>87</sup> rather than dislocation?<sup>88</sup> In this respect, most justifications of legal pluralism fail to

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stood as interpretative variations on Roman law as the sole depositary of a legal essence or authority, the focus of the intense juridical labour of the post-glossators was the spatial (personal or territorial) projection of forms that were recognized as unquestionably juridical.

<sup>82</sup> As already seen above, in Savigny’s opus this normative community was that of the Germanic city-states and princedoms. But the same concept could refer to the common law tradition as a whole, or indeed to a common regional legal area such as that of the European Union.

<sup>83</sup> The reader will recognize the classical critique addressed to Currie’s “governmental interests analysis” in the conflict of laws (*Brainerd Currie, The Constitution and the Choice of Law – Governmental Interests and the Judicial Function*, in: *idem, Selected Essays on the Conflict of Laws* (1963) 188–282).

<sup>84</sup> As Roughan/Halpin (n. 50) formulate the conundrum: how to achieve pluralism without sacrificing closure?

<sup>85</sup> Or “dissociation” in Pierre Schlag’s words; *Schlag, Aesthetics* (n. 23). These terms all have psychic implications, pointing to a risk of social self-destruction.

<sup>86</sup> On this theme, see *Martijn W. Hesselink, Anything Goes in Private Law Theory? – On the Epistemic and Ontological Commitments of Private Law Multi-pluralism*, 23 *German Law Journal* 891–899 (2022) online.

<sup>87</sup> On the concept of interlegality, see *de Sousa Santos, New Legal Common Sense* (n. 47) 437; on the analogy between interlegality and private international law, see *Wai, Interlegality* (n. 51).

<sup>88</sup> A coordinating method, we are told repeatedly, cannot work if it is decentred. As we know, it is this very conundrum – the demise of statist methodology when confronted with insoluble “true conflicts” – that explains the enduring success of monist ideas within the conflict of laws.

overcome the objection of the risk of chaos or dissociation. The same objection is equally familiar in the conflict of laws in respect of statist method-ology, the internationalist avatar of legal pluralism: a method of conflict resolution that is impotent to solve conflicts is by definition unqualified for the job.<sup>89</sup>

*Interdependence and ecosystems.* – The underlying assumption of the usual approaches to legal pluralism, still paradoxically bearing the traces of the monist model, is that one norm has to be identified as legal (however loosely) *before* envisaging its coordination with others. As several strands of scholarship have pointed out, this particular sequence or order of questions may well need rethinking or resequencing.<sup>90</sup> In other words, the key to this familiar methodological riddle may lie in the way in which the problem itself is framed. Moreover, the problem itself – the disorder – may be part of the solution! Taking our cues from indigenous-ecological lateral thinking<sup>91</sup> or frontier-dwelling, we could say that decentring and mutual sensitivity, or readiness to interact mutually to the point of substitution or identification with the point of view of the other, is constitutive of the very existence of an ecological system (whether law or holobiont). Multi-sidedness and hybridity then appear as promises to be pursued, rather than as obstacles to be overcome, encouraging a reversal in our methodological assumptions. An individual (psychic) ability to decentre the self and a collective (cultural) capacity to step outside community imaginaries are already important parts of critical “post-Freudian” thinking in the West, bringing (historical) context back into understanding of the collective psyche and its denials.<sup>92</sup>

*Constitutive alterity, mutual sensitivity.* – This, then, is the insight to be drawn from indigenous epistemologies: the gaze of the radical, animal other, directed towards oneself, is, in the words of Philippe Descola, a form of “constitutive alterity”.<sup>93</sup> Moreover, seeing ourselves through the gaze of the jaguar goes as far as the complete identification of the other’s point of view

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<sup>89</sup> For a synthesis of the debate over Brainerd Currie’s “governmental interest analysis”, see *Kermit Roosevelt III, The Myth of Choice of Law: Rethinking Conflicts*, 97 Michigan Law Review 2448 (1999).

<sup>90</sup> *Michaels, Law and Recognition* (n. 53).

<sup>91</sup> There are strong links between laterality (on an aesthetic register), relationality (as ethics) and the in-between (ontology) in contemporary pluralistic theories of all kinds; see (as a significant sample) *Pelluchon, Les Lumières* (n. 31) 72; *Soulemane Bachir Dgiane*, as reviewed by *Nadia Yala Kisukidi, Décoloniser l’universel – À propos de: Souleymane Bachir Diagne & Jean-Loup Amselle, En quête d’Afrique(s), La vie des idées* (2 May 2019), <<https://laviedesidees.fr/Decoloniser-l-universel.html>> (21 June 2023); *Baptiste Morizot, Wild Diplomacy – Cohabiting with Wolves on a New Ontological Map* (2022); *Marilyn Strathern, Partial Connections* (updated edition 2004) on laterality as an intellectual mode of comparison; *Bruno Latour, Où suis-je? – Leçons du confinement à l’usage des terrestres* (2021), on lateral mobility as an emancipated mode of existence in conditions of confinement.

<sup>92</sup> *Hervé Mazurel, L’inconscient ou l’oubli de l’histoire – Profondeurs, métamorphoses et révolutions de la vie affective* (2021).

<sup>93</sup> *Descola, Par-delà nature et culture* (n. 5) 438–439: The Other is the guarantor of the

as directed towards ourselves. This does not mean a renouncement of critique, nor an invitation to blind submission or unconditional deference to the others (*autrui*). It is an invitation however, to come out of oneself to view the self as a singularity from the standpoint of alterity.<sup>94</sup> It is a project to become other, to carry in oneself the gaze of the other. Similarly, on a collective register, a foundational or constitutive requirement of community is not to renounce one's own identity or the singularity of one's own collective values but instead to interiorise and acknowledge the existence of alterity within ourselves.<sup>95</sup>

The important point at this stage is that an approach that sees mutual sensitivity as constitutive of legal community effectively fields the double objection conventionally addressed to legal pluralism and the underlying assumption of the inevitability of statehood. The very constitution or definition of legality would depend upon such an opening towards alterity and on a willingness to enter into contact with foreign legal forms on their own terms. Several different sets of powerful scholarship can be cited in such a vein. Gunther Teubner proposes resorting to a pluralist scheme borrowed directly and explicitly from the conflict of laws in order to ground a global societal constitutionalism.<sup>96</sup> In this account, absent any other possible universal substantive principle, the conflict of laws would supply a “meta-dogmatic” norm to which all systems claiming some sort of prescriptivity would adhere. This norm would be without substantive content in that it could only enjoin a form of reciprocal deference, an “ecological” necessity (an intimate reflexive linkage with a surrounding environment) deriving from the reality of the interconnection of such systems. Identified as a form of pluralist jurisprudence, it points tentatively towards a pattern of open interaction in which

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constitutive virtues of the community and flags the gaze of the other that I carry within myself.

<sup>94</sup> *Descola*, *Par-delà nature et culture* (n. 5) 438.

<sup>95</sup> *Descola*, *Par-delà nature et culture* (n. 5) 439. In order to move into this new register of “inter-alterity”, that is, of communication and identity between radical others in legal terms, law – through the conflict of laws – has to effect a deep change in its epistemological settings.

<sup>96</sup> *Gunther Teubner*, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012) 152. His insight is as follows: “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.” Teubner’s system of networked reciprocity reconstitutes an ideal, constitutionalized system of conflict of laws rules in which significant place is given to non-state communities, their value systems and sense of belonging. Moreover, this overarching framework is designed to impose a break, or a certain discipline, on the autonomous, self-expanding rationalities of privatised legal regimes or “codes of capital”. However, it remains somewhat unclear how a constitutional metanorm in the form of a (monist or multilateralist) set of universal conflict of laws rules can be reconciled with the essentially perspectivist stance that pluralism requires. Any given system or node may create its own coordination devices, and these will of course reflect axiological priorities and preferences that will prevail before its own courts or decision-makers. But this does not avert the risk of collapse or disjunction largely associated with pluralism. The discussion in the main text attempts to respond to this difficulty.

authority is settled neither by one system accepting or deferring to another nor by each system claiming authority for itself. Instead, each system's claim can be understood as a claim to some kind of interdependence, which entails the existence of the other's authority without amounting to deference to that other system.<sup>97</sup>

*The need for a go-between.* – Under this reading of legality, every normative order (or claim) is authenticated on its own terms, but such authentication is conditional on its containing some sort of integrated mechanism that makes interaction possible. As Nicole Roughan and Andrew Halpin so forcefully point out, there has to be an intermediate stage of legal reasoning between the initial pluralist recognition of multiple claims to normativity or authority and the subsequent interaction between recognised members of that plurality.<sup>98</sup> This would be a third order or principle – a metanorm – designed to foster interaction between the various units. It implies that all systems that make a normative claim (a claim to *be* legal) must possess a sort of a constitutive, non-hierarchical coordination device based on a form of minimal mutual recognition: a “tertiary rule of recognition” (Ralf Michaels);<sup>99</sup> a strictly heterarchical conflict resolution technology (Gunther Teubner’s “dogmatic metanorm”);<sup>100</sup> or indeed, as we shall see below, a shamanic go-between, a *persona* whose very existence is designed to ensure the mutual communication between heterogeneous worlds.

*Inbuilt mediating device.* – However, before we return to the art of the shaman, the relationship between such an inbuilt mutual recognition device and the very definition of legality needs to be more heavily highlighted. Indeed, a paradigmatic change in respect of classical analytical-legal approaches is underway here, since, as Ralf Michaels points out, the usual directionality of this relationship is reversed.<sup>101</sup> The very qualification of a normative system as *legal* would then be conditional on what philosopher Isabelle Stengers beautifully calls its “cultivation of ways of overlapping”<sup>102</sup>, an acknowledgement of its own interdependence in respect of other such systems, the other systems being identifiable in turn by their own reciprocal acknowledgement of their readiness to connect – through the *lingua franca*, as it were, of interlegality.<sup>103</sup> Thus, reflecting on the constitution of a “new

<sup>97</sup> See similarly, Michaels, *Law and Recognition* (n. 53).

<sup>98</sup> Roughan/Halpin (n. 50).

<sup>99</sup> Michaels, *Law and Recognition* (n. 53) 107.

<sup>100</sup> Teubner, *Constitutional Fragments* (n. 96). Seeing multiple colliding rationalities as co-existing within a network justifies an obligation upon each to ensure the mutual accommodation of the others; the performance of that obligation is constitutive of their very existence as network nodes.

<sup>101</sup> Michaels, *Law and Recognition* (n. 53) 94.

<sup>102</sup> Stengers, *Cultivation of Ways of Overlapping* (n. 68).

<sup>103</sup> For interesting elements in support of an analogy between the Mediterranean *lingua franca* and the conflict of laws see Jocelyne Dakhlia, *Lingua franca: Histoire d'une langue métisse en Méditerranée* (2008).

ecological body politic”, Stengers advises us to start from the mutual sensitivity of collectives or individuals (rather than from an atomistic perspective that begins with the former and ends with the latter). Her approach is deliberately reflective of the symbiotic, co-productive constitution of the ecosystem: none of its components can exist without the others. If what we perceive as our outside “environment” is actually part of our inner existence (or part of our microcosm, of the holobiont), then we need to reverse the order of our rational chains of reasoning, which always start from the centre of any object of study to consider its relationship with its own surroundings or periphery.

*Resequencing.* – The suggestion, then, is to “flip” the order of questions, so as to start from the ecological or macrocosmic “outside” of any being or form of life, on the reverse assumption that this outside is integral to this being’s very core.<sup>104</sup> The implications of this new ecological paradigm for law become clear if we compare it to another recent jurisprudential exploration of legal pluralism.<sup>105</sup> Here, Ralf Michaels proposes a re-ordering of the conventional presentation of the issues of legality (its definition) and modes of interaction (between legal systems). Instead of attempting first to define a normative system and then asking about its relationship to its own others (or in more traditional conflict-of-laws terms, its spatial scope), the relationship question will come first.<sup>106</sup> Thus, no system can make a (legitimate) normative claim if it does not include a mutual recognition device. Not only that, but mutual recognition is also constitutive of the system itself, commanding its very existence qua system. Rather than being an “afterthought” in a monist vision that starts from the essence of law before addressing interlegality, a pluralist conception, Michaels argues, must work interlegality into the very fabric of law.<sup>107</sup> In more radical, eco-anthropological terms, one might

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<sup>104</sup> *Stengers*, *Cultivation of Ways of Overlapping* (n. 68) 159. This also seems to correspond to Gunther Teubner’s “ecological” understanding of law in society, in which the conflict of laws acts as go-between between legality and its environment. It also ties in perfectly with the idea that sovereignty may not be sovereignty if it does not accommodate interdependency; such interdependency is once again part of what it means to be sovereign.

<sup>105</sup> Michaels is writing as a pluralist here, and not, he says, as a private international lawyer.

<sup>106</sup> *Nicole Roughan / Andrew Halpin*, *The Promises and Pursuits of Pluralist Jurisprudence*, in: *idem* (n. 50) 326–366, 362 elaborate on this point: “in circumstances in which more than one system of norms is implicated in a legal dispute [...] as a matter of legitimate authority, there may be no justification for one system/set for ignoring or excluding the other under the rubric of jurisdiction.”

<sup>107</sup> For an analogous “dialogical” idea of sovereignty, see *Craig N. Scott*, *Dialogical Sovereignty: Preliminary Metaphorical Musings* (1992), <[https://digitalcommons.osgoode.yorku.ca/all\\_papers/191](https://digitalcommons.osgoode.yorku.ca/all_papers/191)> (7 June 2023); and in respect of indigenous law and sovereignty, see *idem*, *Indigenous Self-Determination and Decolonization of the International Imagination*, 18 *Human Rights Quarterly* 814–820 (1996); and leading from there, *Iris Marion Young*, *Two Concepts of Self-Determination*, in: *Ethnicity, Nationalism, and Minority Rights*, ed. by Stephen May / Tariq Modood / Judith Squires (2004) 176–196; compare the plea for a dialogical mode of solidarity as opposed to a form of sovereignty as “solitude”: *Mireille Delmas-Marty*, *Profits*

ask whether the ontology of the relation itself were to prevail over that of the entities it purports to connect.<sup>108</sup>

*Lateral coordination.* – This is the cue to loop back to private international law. The shadow-avatar of this discipline provides a model of lateral coordination and accommodation according to which singular systems or units interact in a mutually supportive mode. A significant example of such lateral interlegality could be taken from the field of recognition and enforcement of foreign judgments, which in many ways is the crux of coordination between systems. Numerous cases of interminable struggle at the ultimate, enforcement stage of legal disputes demonstrate this.<sup>109</sup> On a monist register, each legal system usually determines jurisdiction unilaterally and exercises it independently of the effects it might have elsewhere.<sup>110</sup> However, by contrast, in the mode of lateral, mutual coordination, any judgement made in the home jurisdiction should imply both an anticipation of its effects elsewhere as well as a commitment to mutually accommodate the reactions of other legal systems.<sup>111</sup> Far from undermining the value of decisiveness, a pluralist approach suggests that a mutually supportive model of interlegality enhances the legitimacy and predictability of any normative claim.<sup>112</sup> Both would depend upon the degree to which other concurrent normative projects are accommodated on their own terms.

Isabelle Stengers' account of the symbiotic body politic has already provided significant evidence of the ecological resonance of this mutually sensitive jurisprudential paradigm. Such resonance is stronger still if we move to the question of hybridity. From the gaze of the jaguar, we must loop back to the shadowy figure of the shaman.

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de la pandémie pour faire la paix avec la Terre (17 March 2020), <[https://www.lemonde.fr/idees/article/2020/03/17/mireille-delmas-marty-profitons-de-la-pandemie-pour-faire-la-paix-avec-la-terre\\_6033344\\_3232.html](https://www.lemonde.fr/idees/article/2020/03/17/mireille-delmas-marty-profitons-de-la-pandemie-pour-faire-la-paix-avec-la-terre_6033344_3232.html)> (7 June 2023).

<sup>108</sup> Morizot, *Wild Diplomacy* (n. 91).

<sup>109</sup> An example of a struggle of this kind can be found in the notorious *Chevron* saga, in which the litigants threatened to fight “until the oceans run dry” (see *Global Private International Law* (n. 74) 55ff., with commentaries by Diego P. Fernandez Arroyo and Laura Carballo Piñeiro).

<sup>110</sup> See *Michaels*, *Law and Recognition* (n. 53). It can be argued that the requirement of a “close connection” in one form or another as a condition for the exercise of jurisdiction ensures the acceptability of any resulting judgement.

<sup>111</sup> In this respect, one clear example is what could be called a “method of anticipation” put into place by the Hague Convention on intercountry adoption of 29 May 1993 (to be found in various forms in further judicial practice; on such a method, see *Dominique Bureau / Muir Watt*, *Droit international privé*<sup>5</sup> (2021) no. 581). The simple idea is that the adoption will not be granted if it is shown that it would not be recognized in the country to which the child has or might have close connections and a desire to return. In an older vocabulary, this is an attempt to avoid “limping” relationships (recognized in one country but not in the other). It has also been theorised by Picone as “ordinamento competente” (see *Paolo Picone*, *Il rinvio all’ordinamento competente nel diritto internazionale privato*, *Rivista di diritto internazionale privato e processuale* 1981, 309–376).

<sup>112</sup> Roughan/Halpin (n. 50).



### III. The art of the shaman

*The shaman*<sup>113</sup> (of which the jaguar can be an embodiment<sup>114</sup>) in animist traditions is a symbolic mediator between humans and the spirits of nature or the other-world. An emblematic “passeur” between multiple places and spaces,<sup>115</sup> the shaman bears witness to the plurality and permeability of other, different forms of life (both spiritual and material). In its mediating role, the shaman can take on multiple shapes, both human and animal, thereby emphasising the value and centrality of hybridity. Dwelling in the border, the shaman conducts a form of inter-world diplomacy<sup>116</sup> between the physical or biological world and the universe of spirits. Shamanic otherness in-between two worlds evokes the shadowy otherworldliness of unseen (off-scene) and uncanny (the Freudian “unheimlich”) encounters with alterity. Moreover, it involves a form of ontological transmutation. Rather than mere disguise, this is a means of becoming other.<sup>117</sup>

*Translation and hybridity.* – Two particularly important aspects of the ontology of the in-between are present here: translation and hybridity. As the reader will no doubt expect, if we move to a legal register, these two dimensions of the in-between, as embodied in the shaman, resonate once again within the shadow-version of the conflict of laws.

Firstly, in order to fulfil its important social functions,<sup>118</sup> the shaman can take on different forms or avatars, undergoing a sort of double or two-way translation.<sup>119</sup> Thus, the spirit of the shaman sometimes goes out of itself into the other world, where it can inhabit an entity that can communicate with the inhabitants of another life. Other times, it invokes into its (our) world a being from another, controlling its spirit or borrowing its shape. It is both hybrid, protean and multiform, inside and outside, past and present, here and there, charged with plural identities.

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<sup>113</sup> On the varieties of shamanism, see *Descola*, *Par-delà nature et culture* (n. 5) 428: In a strict sense (see *Donald Pollock*, *Shamanism*, Oxford Bibliographies, <<https://www.oxfordbibliographies.com/display/document/obo-9780199766567/obo-9780199766567-0132.xml>> (7 June 2023)), shamanism is a specific form of religious practice found in Siberia, where the Tungus religious practitioner called *šamán* provided the model. However, anthropology tends to use this concept to describe a set of religious phenomena of historical depth and wide ethnographic extent, across very diverse indigenous traditions (sub-Saharan Africa, East Asia, Latin America), that fulfil a variety of social roles (healing as well as harming) by intervention with spirits or through knowledge gained by communication with spirits.

<sup>114</sup> See *Viveiros de Castro*, *Le regard du jaguar* (n. 40).

<sup>115</sup> *Descola*, *Par-delà nature et culture* (n. 5).

<sup>116</sup> On the importance of diplomacy in the imaginaries of the world in the shadow of extinction, see *Latour*, *Enquête* (n. 2) 478 (“the supreme art of compromise”).

<sup>117</sup> Hence the sacred character of certain masks that ensure this transmutation from one world to another (on the *Hopi mask* case, involving modes of relations with alterity that are incommensurable with Western legal categories, see *Marie Cornu*, *About Sacred Cultural Property: The Hopi Masks Case*, (2013) 20 *International Journal of Cultural Property* 451–466).

<sup>118</sup> These are known to be variable: the shaman may heal or harm social relations.

<sup>119</sup> *Mignolo*, *Foreword: On Pluriversality and Multipolarity* (n. 34).

Secondly, the shaman is witness to the interpenetration of different registers of being. As Walter Mignolo writes of “pluriversality”, the shaman evidences cosmological entanglement, a plurality of worlds that are neither separate, nor organised on a hierarchical mode, but that overlap, overflow and interact.<sup>120</sup> Against monist, jurisdictional jurisprudence,<sup>121</sup> the shaman weaves reflexively in and out, mixing past and present, reversing far and near. Moreover, it produces hybrids as forms of communication or mutual sensitivity (as seen above). These must be carefully distinguished from “cultural relativism” – a frequent charge against legal pluralism.<sup>122</sup> Hybridity in this context is not a non-choice or a failure of communication. On the contrary, it is a highly sophisticated form of “cosmopolitics”, or in more familiar terms, an exercise in the “sublime art” of compromise.<sup>123</sup>

How are these two features of the ontology of the in-between that the shaman embodies relevant for private international law?

*Again, two schemes and a dual vision.* – As we know, the central labour of this discipline can be seen as the reconnecting of persons and communities in different ways when geographical dispersion threatens to disrupt or sever moral, cultural, material or emotional ties.<sup>124</sup> The first feature concerns the highly sensitive question of identity or belonging, which may concern multiple worlds or one. The politics of identity<sup>125</sup> have become a central concern of private international law (and of course of international politics more generally). The two possible schemes available for this purpose offer contrasting visions of the (our) world and diverging methodological approaches

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<sup>120</sup> Mignolo, Foreword: On Pluriversality and Multipolarity (n. 34).

<sup>121</sup> Jurisprudence of Jurisdiction, ed. by Shaun McVeigh (2007).

<sup>122</sup> The point here is that hybridity or the supreme art of compromise is communication between two worlds. This means that the adoption of the other’s viewpoint may change one’s gaze. Understanding for instance that cannibalism is a way of integrating alterity (see *Descola, Par-delà nature et culture* (n. 5) 544: “un moyen paradoxal d’incorporer l’altérité la plus profonde tout en restant fidèle à soi-même”) is already very important. However, it is difficult to stop there and to accept what appears in the vocabulary of the enlightenment, human rights and psychoanalysis, to be murder, child molestation, inhuman treatment etc. The exception of public order in private international law shows these conflicts to be intractable, notably when they involve shame (punishment) and morals (religion, sexuality). There may be a need at some point to put up a screen or a limit when foreign practices or belief systems intrude upon the host community, but such a defence must avoid negating the seriousness of the other’s access to reality.

<sup>123</sup> These are respectively the expressions of Isabelle Stengers and Bruno Latour, cited above n. 68.

<sup>124</sup> All these components are present to different degrees in the composition of domicile and nationality, the two standard legal expressions of attachment or belonging. They tend to be spelled out in cases of conflict and uncertainty. Thus, in identifying the law applicable to personal status, the rules of the conflict of laws aim to ensure that family and interpersonal relationships are governed by the law that best represents the lifestyle and sense of belonging of those involved.

<sup>125</sup> Iris Marion Young, *Justice and the Politics of Difference* (2011).

for the determination of the most significant relationship in terms of belonging and emplacement.<sup>126</sup>

*Monism and exclusivism.* – The conventional assumption, present in (state-based) monism, is that identity and community are totalizing concepts: community membership is exclusive, while identity is stable and unidirectional. The implications of this assumption have been deployed on a similar register since the heyday of the nation-state.<sup>127</sup> By and large,<sup>128</sup> an individual's personal relationships must always be governed by the same law, defined moreover by means of a connecting factor (domicile or nationality) that remains the same for all purposes. This univocal connection does much to reinforce the “imagined community” of the nation-state.<sup>129</sup> Unsurprisingly, given the nexus between modern legality and statehood, there is a close analogy between the premises underlying the idea of national or territorial community and those that shape the definition of modern legality: the latter excludes by definition, as Hans Lindahl points out, since it is a narrative written in the first person plural and in the name of a bounded society.<sup>130</sup> Thus, barring exceptional cases, statehood offers mutually exclusive alternatives: you are either in or out, in the same way that an act is either legal or illegal. In short, on any register – moral, epistemological, geopolitical or legal – there is no in-between place to be (no divided loyalties).

*Pluralism and overlapping attachments.* – By contrast, under a pluralist approach, an individual may be a member of several communities simultane-

<sup>126</sup> Law's boundaries in this context are those of the post-Westphalian division of the world's entire surface into states. As the current trajectories of migrant populations show (at the Mexican border, at lines drawn across the African continent and again at the confines of the European Union), such exclusion comes with a series of destructive consequences in terms of dispossession of “the right to have rights”, and more generally the unequal distribution of economic and social value, power and privilege. The expropriations (or expulsions) described by Saskia Sassen (see below n. 155) as the new global “golden rule” apply to whole swathes of the world's population.

<sup>127</sup> A recent and brief moment, as Brunkhorst points out; *Hauke Brunkhorst, Critical Theory of Legal Revolutions: Evolutionary Perspectives* (2014).

<sup>128</sup> Of course, as always there have been trends to the contrary and counter-moves that show up alternative modes. Dual citizenship calls for further choices (such as the choice of the most effective law or the preference for the law of the forum); clashes may occur between nationality and domicile in the deployment of the connecting factor (*renvoi*); interesting forays take place from time to time in the modulation of one or the other (for instance, in the case of adoption of a foreign child; see *Daniel Gutmann, Le sentiment d'identité: Étude de droit des personnes et de la famille* (2000).

<sup>129</sup> The term is from: *Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1991, reprint 2006). This is illustrated by heated contemporary political-doctrinal debates on the legitimacy and effects of dual nationality, or, in the European setting, the contested idea of and case law on European Union citizenship, for instance – see the Report of the EU Parliament, *European Parliament, Acquisition and Loss of Citizenship in EU Member States* (2018), <[www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS\\_BRI\(2018\)625116\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625116/EPRS_BRI(2018)625116_EN.pdf)> (7 June 2023).

<sup>130</sup> *Hans Lindahl, Authority and the Globalisation of Inclusion and Exclusion* (2018), in which Lindahl himself develops the post-modern ideal of in-between place.

ously.<sup>131</sup> A pluralist perspective can make available an in-between space in which multiple identities overlap.<sup>132</sup> If communities are imagined<sup>133</sup> and their boundaries are unstable, the community members' sense of place or belonging is not necessarily exclusive. This view is also resurfacing in contemporary private international law<sup>134</sup> in the form of frequent allowances for ever more complex individual and collective attachments, including in their temporal variations.<sup>135</sup> In a similar vein, the everyday lives of a collectivity may be governed by norms that are effectively followed, even when not formally recognized as "law", that is, as part of the legal system in force in a state.<sup>136</sup>

*Metizo law.* – The second feature of the shamanic in-between evoked above is hybridity. At the core of yet another controversy over methodological legitimacy, the question of *métissage*<sup>137</sup> or "creolization" of law<sup>138</sup> pits the virtues of legal pluralism against a liberal (monist) vision of the law.<sup>139</sup> This is a variation on a familiar charge made in the name of decisiveness and purity against legal pluralism's supposedly muddy conflict-solving methods.<sup>140</sup>

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<sup>131</sup> Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (2012).

<sup>132</sup> In this respect, it borrows psychoanalytical insights relating to the invisible realm of the subconscious onto the equally subliminal operation of the social norm.

<sup>133</sup> See Anderson, *Imagined Communities* (n. 129).

<sup>134</sup> A view advocated by Berman, *Global Legal Pluralism* (n. 131).

<sup>135</sup> In this respect, Daniel Gutmann identifies a progressive "recognitive" function in the conflict of laws, allowing it to follow the progressive integration of a foreign individual into a host community; Gutmann, *Sentiment d'identité* (n. 128).

<sup>136</sup> On the ways in which private international law can sidestep public international law's requirement of state recognition, see Karen Knop, *Citizenship, Public and Private*, 71:3 *Law and Contemporary Problems* 309–341 (2008).

<sup>137</sup> In public international law, the notion of *mestizo* has been elevated to a genre: Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (2014). Such a move is missing on the private side.

<sup>138</sup> The concept of "créolisation" emerged at the end of the nineteenth century to signify processes of linguistic appropriation and adjustment in the encounter between the language of the coloniser ("langue lexificatrice") and the local language ("substrat"), from which a hybrid merged ("le créole"), borrowing structural elements from each (see Georges Daniel Véronique, *Créole, créoles français et théories de la créolisation*, *L'information grammaticale* 85 (2000) 33–38). The idea of *lingua franca* evoked above is distinct as it is a third language, not a "corrupted" form, and does not involve the dissymmetry that underlies creolization; François Laplantine / Alexis Nouss, *Etudes des métissages, des hybrides et des circulations* (2007) 257.

<sup>139</sup> See the political-philosophical objections to Berman's theory of global legal pluralism by Alexis Galán / Dennis Patterson, *The Limits of Normative Legal Pluralism: Review of Paul Schiff Berman, Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*, (2013) 11 *International Journal of Constitutional Law* 783–800. This debate extends to the question of the adequacy of liberalism (or mere value pluralism as opposed to legal pluralism) to accommodate alterity.

<sup>140</sup> The charge is now more than familiar: these methods fail precisely in cases of real antinomy or of "true" normative conflicts between the host legal order and the incoming norm. The worst defect for a legal method, we learn, is not being able to choose between two alternatives; a choice of law rule that cannot solve "true conflicts" cannot serve as a method.

As the argument goes, pluralism is unable to choose when different laws can equally claim to govern, and yet it is prohibited from falling back on a pre-defined parameter of choice (the very allocation it sought initially to avoid), and so it collapses into a hotchpotch in which “anything goes”.<sup>141</sup> From this perspective, the failure of pluralism’s collateral mode of mutual accommodation lies in its inability to commit to the exclusive application of a unitary substantive rule.<sup>142</sup> Implicitly, this once again refers to law’s purported need for *a priori* decisiveness and furthermore to the illegitimacy of any form of syncretism.

*Hybridity as a cosmopolitical value.* – However, hybridity does not have to be viewed as a defect, any more than purity a virtue. A linguistic analogy on this very point can be found in Monateri’s comparative legal study of the (shadowy) figure of “Black Gaius” – a legal avatar of “Black Athena”. It points to the (evident) dangers of pursuing an unadulterated pedigree as a value in either language or law.<sup>143</sup> Both social phenomena are composed of countless residues and traces from all parts. This points once again to hybridity as a specifically cosmopolitical value of the in-between. As such, it is inscribed in the idea of pluriversality (encountered above), in that different coexisting worlds interact, combine and blend in various ways. The conflict of laws illustrates this by means of its most ancient and foundational idea: it is harnessed to construct a *lex franca* from multiple and mutually reinforcing legal components. As a matter of political philosophy, we could say that this composite, mosaic-like model of law benefits from enhanced acceptability, to the extent that it reflects the very plurality and interdependence of all the contributing legal systems.<sup>144</sup> In this respect, the hybridity of the final normative outcome reinforces its legitimacy, as contrasted with a decision obtained by reference to one (monist) legal system exclusively applied and imposed on all the other affected communities. Since the disputes involving conflicts of laws arise out of situations that are spatially dismembered between different jurisdictions, none of which has an exclusive claim to govern

<sup>141</sup> Roughan/Halpin (n. 50).

<sup>142</sup> Galán/Patterson, Limits (n. 139).

<sup>143</sup> Pier Giuseppe Monateri, Black Gaius: A Quest for the Multicultural Origins of the “Western Legal Tradition”, 51 Hastings Law Journal 479–555 (2000).

<sup>144</sup> On a striking illustration, in a “close-call” (5–4) Canadian Supreme Court decision, of the “mutual translation” metaphor that suggests juxtapositional/combinational *métissage* – a judicial entering in-between space in a new-norm-forging decisional mode –, see *Newsun Resources Ltd. v. Araya*, 2020 SCC 5 (CanLII), [2020] 1 SCR 166, in which Abella J’s majority judgment cites: Torture as Tort – Comparative Perspectives on the Development of Transnational Human Rights Litigation, ed. by Craig Scott (2001), in which, in a final section of the article by the same author, “Translating Torture as Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms” (45–64), the mutual translation metaphor appears.

the whole, but each of which contributes a part, the final composition carries an enriched, and not a diluted, form of social legitimacy.<sup>145</sup>

*Entwinement of time/space.* – Interestingly, what is true of this form of hybrid spatiality is also valid in respect of its inscription in time. In “taking place”, concomitantly with the emergence of the modern linear perspective in space,<sup>146</sup> modern law secreted its own (eminently juridical) invention of continuous chronological temporality.<sup>147</sup> By contrast, other (notably, indigenous) epistemologies subscribe to the idea of the nonlinearity or “pluritopicality” of time and its variability according to place.<sup>148</sup> However, an alternative temporal mode of the in-between, mixing the past, present and future, is sometimes visible behind modern legality’s chronological time. Law has the power to conjure up history into the courtroom, to fictionally suspend or cut off the passing of time, or to give voice to future generations.<sup>149</sup>

*Chronotopes.* – The shadow-avatar of private international law in particular illustrates this entwinement of time and space, history and geography. Indeed, Mariana Valverde uses jurisdiction as a conceptual category through which she proposes to explore the plural scaling of time and its own complex relationship to spatiality.<sup>150</sup> Her concept of “chronotope” sees each legal or-

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<sup>145</sup> That it rarely (if ever) corresponds to the law of any given system or to a foreign court’s idea of its own law is of no import; an inaccurate interpretation of foreign law is not an error of law. Moreover, it will be recalled that even in highly monist settings, the enforcement of foreign judgments or arbitral awards, an error of interpretation of the forum court’s own law is not, per se, a reason to refuse recognition. A good example can be found in the controversial *Dallah v. Pakistan* case involving the alleged misinterpretation of French law by English courts. It illustrates, very forcibly, that there are other interests and objectives at stake in private international law than the integrity of a given substantive legal rule (*Dallah Real Estate & Tourism Holding Co v. Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46, 3 November 2010; Cour d’appel de Paris 17 February 2011, *Gouvernement du Pakistan – Ministère des Affaires religieuses c. Société Dallah Real Estate and Tourism Holding Company* – n° R/G 09/28533; comp. the analysis by *Sylvain Bollée*, in: *Global Private International Law* (n. 74) 342–349 and *Le tournant global en droit international privé* (n. 25) n°4.2).

<sup>146</sup> *Jens Bartelson*, *Sovereignty as Symbolic Form – Critical Issues in Global Politics* (2014).

<sup>147</sup> The invention of the latter was linked to the specific need for a fictional continuity of the mediaeval king’s sublime body: as explained by *Ernst Kantorowicz*, *The King’s Two Bodies: A Study in Mediaeval Political Theology* (1957), medieval lawyers created a specific legal temporality when struggling with the political consequences of the physical death of the king’s metaphysical corporeity. The king is dead; long live the king!

<sup>148</sup> On the ability of the *griot* to manipulate, re-sequence and reassemble different forms of symbolic organisation in the world passing through different temporalities, see *Issiaka Ouattara*, *The Griots of West Africa: Oral Tradition and Ancestral Knowledge*, in: *Reiter* (n. 29) 151–167.

<sup>149</sup> Our collective subconscious has no sense of time; our forgotten history prepares a return of the repressed; see *Mazurel*, *L’inconscient* (n. 92). This is well illustrated by the category of “future generations”, an imagined collective that is in the process of acquiring legal standing.

<sup>150</sup> *Valverde*, *Chronotopes* (n. 51).

der as occupying its own specific temporal-spatial nexus.<sup>151</sup> In the conflict of laws, the device of *ordre public* is an emblematic embodiment of such a nexus. One of the most ancient debates within the discipline concerns the imbrication of distance, past, and their combined impact on the legal force of the moral or political concerns covered by the elusive notion of “public policy”. Under this in-between legal regime, in cases in which rights vested abroad and long ago, there is less reason to disturb individual or social expectations by refusing to enforce them. Conversely, greater “proximity” of the context in which the legal entity (relation, status, situation, right) took shape (notionally, or by means of a legal judgement) creates a corresponding need for the host legal system to assert certain core legal values.<sup>152</sup>

*Feminist approach.* – Moreover, this temporal-spatial in-between in (private international) legal terms echoes the feminist critique of linearity and its place within the (monist, largely masculine) aesthetic of modern law.<sup>153</sup> To illustrate how such linearity is an artificial projection of the modern state, authors Annelise Riles and Karen Knop use the example of the saga of Asian “comfort women” enslaved by the Japanese army as prostitutes during the Second World War. The saga is composed of diplomatic skirmishes, judicial disputes and individual quests for moral or psychological reparation. It has given rise to myriad cases, rulings, and negotiations. Here, rather than conforming to an orderly chronological and spatial pattern, linearity is disrupted, the past constantly intruding into the present and changing the shape of the conflict, while the object of the conflict pops up endlessly, here and there. Interestingly, the initial dispute was sparked by the haunting presence of a sheer symbol – a bronze statue, implanted extraterritorially, so to speak, outside a Japanese embassy in Korea and elsewhere – with political and legal repercussions worldwide.<sup>154</sup> Such an example chimes well with the exploration by social theorist Saskia Sassen of the spatialities and temporalities of the global, in which she reminds us that the era of the global is that of a-temporal time and of space in flux.<sup>155</sup>

*Modus operandi of the conflict of laws.* – Here is the cue to turn to further in-between properties of hybridity within the conflict of laws. They are all

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<sup>151</sup> One striking example Valverde provides – that of the courtroom, where the use of procedural rituals or forms marks ends and beginnings in time and space – recalls the archaic pedigree of law, still so visible in contemporary judicial procedures and protocols.

<sup>152</sup> On proximity as an axial principle in the conflict of laws, see *Paul Lagarde, Le principe de proximité dans le droit international privé contemporain* (Cours général de droit international privé), *Recueil des cours* 196 (1986) 1–237.

<sup>153</sup> On sovereign time, see *Valverde, Chronotopes* (n. 51); *Rachel Sieder, To Speak the Law: Contested Jurisdictions, Legal Legibility, and Sovereignty in Guatemala*, 43 *PoLAR – Political and Legal Anthropology Review* 334–351 (2020).

<sup>154</sup> *Karen Knop / Annelise Riles, Space, Time, and Historical Injustice: A Feminist Conflict-of-Laws Approach to the Comfort Women Agreement*, 102 *Cornell Law Review* 853–927 (2017).

<sup>155</sup> *Saskia Sassen, Losing Control? – Sovereignty in An Age of Globalization* (1996).

very well-known elements of the conventional “general theory”, although they are rarely presented as signs of an ontological entanglement in which modern law, despite its monist, linear self, is embroiled. Thus, we find multiple examples of the “adaptations” to which a given rule or institution is subjected when applied by an alien forum. Indeed, the whole enterprise of the conflict of laws by definition produces hybridity, insofar as it implies at the very least the mixing of foreign substance and domestic procedure. The result is often a complex composition of normative bits and pieces collected from here and there and assembled to form a coherent and acceptable picture.<sup>156</sup> There are countless instances of such hybridisation. The combination of rules or institutions borrowed from different legal systems delivers a result that does not correspond to any existing form in any one of them.<sup>157</sup> When the procedural rules of the forum have to combine with extraneous substantive law, statutes of limitation can shorten or lengthen, rules of evidence can weigh upon outcomes, and remedies can be provided where none were available.<sup>158</sup> This is the most familiar – and venerable – manifestation of the in-between in private international law, which accepts hybridity as a legitimate legal form.

*Indigenous legalities.* – Less well advertised is the way in which this in-between *modus operandi* resonates with the mosaic-like quality of indigenous legality.<sup>159</sup> Indeed, insofar as it acknowledges the plurality of legal worlds, it echoes Mignolo’s description of the properties of “pluriversality”, each world to be understood from its own perspective. But this in-between mode also reinforces the pluralist response to the charge of cultural relativism traditionally levelled against non-monist projects of legality, as seen above. As Mignolo stresses, cosmological entanglement is (emphatically) not cultural relativism.<sup>160</sup> Each world “universalises”. But importantly, none devours the others. This is very exactly the claim made by anthropologist Philippe De-

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<sup>156</sup> The etymological origin of the term “complex” (*com plessis*) suggests a weaving together of disparate or heterogeneous elements.

<sup>157</sup> On “adaptation” as a technique of the conflict of laws, see *Giorgio Cansacchi, Le choix et l’adaptation de la règle étrangère dans le conflit de lois, Recueil des cours* 83 (1953) 79–162. A notable example is the famous *Patino* saga and conundrum that continued for decades before the French courts, in which (through the effect of a *renvoi* from Bolivian (personal) law of the husband to Spanish law of the place of the celebration of their marriage) a couple could neither divorce nor be legally separated, although both potentially applicable laws allowed one or the other. The “adaptation” consisted (on the grounds of *ordre public*) in allowing the resolution to benefit from the minimal mode of legal separation under French law (Cass.civ. 15 May 1963, Bull. n° 258).

<sup>158</sup> More striking examples can be found in the area of family law, including for example the succession of polygamist husbands in Western courts, where various assets are divided between several spouses and their children.

<sup>159</sup> *Christine F. Black, A Mosaic of Indigenous Legal Thought: Legendary Tales and Other Writings* (2018); *Borrow, Drawing Out Law* (n. 55).

<sup>160</sup> *Mignolo, Foreword: On Pluriversality and Multipolarity* (n. 34).



scola, under the provocative label of “relative universalism”.<sup>161</sup> Here, “relative” is not to be understood as a clever play upon words (as in cultural relativism), but as pertaining to a relation. What it takes, he writes, are subjects who do not according to their own consciousness prejudge the lived experience of others, subjects who accept the equal value of other diverse modes of access to reality.<sup>162</sup> Similarly, a pluriverse of meaning is built for Mignolo in turn upon the recognition of multiple worlds, none of which claims superiority for itself. All traditions are universal in their foundational values. But this does not mean that each has correlatively to deny the existence of the others or the value of other modes of access to reality.

*Conclusion: Hospitality beyond the nature/culture divide.* – This is of course a very simple message. Was it worth disturbing the avatars of the shadowy swamp of the conflict of laws to remind us of the rich presence of alterity in nature and culture and its ethical call to save ourselves?<sup>163</sup> Arguably not. Yet it can hardly be said at present that law has been effectively mobilised so as to produce a global sense of responsibility towards our planet, nor indeed to express hospitality to all the multifarious forms of life our planet contains and that give it meaning. Unless or until modern legality delivers on its promise of nondestructive coexistence in our world of difference, the heuristic use of the conflict of laws shows us the ways we might retrieve some of that responsibility, hospitality and meaning in the very terms of the law.

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<sup>161</sup> *Descola*, *Par-delà nature et culture* (n. 5) 522.

<sup>162</sup> *Descola*, *Par-delà nature et culture* (n. 5). The author explains that this is a form of universalism that does not assume any fixed essence to categories of nature and cultures, substances and spirits, first and second properties. Instead (on a structuralist mode), it assumes relations of continuity and discontinuity, identity and difference, resemblance and dissimilarity that humans establish everywhere with tools that come from their own phylogenesis: body, intentionality, aptitude to distinguish, aptitude to link to others through attachments or antagonisms, domination or dependence, exchange or appropriation, subjectivisation of objectivisation. It does not need a transcendental spirit or mind to confer immanence or meaning.

<sup>163</sup> The last words are Bruno Latour’s (*Latour*, *Enquête* (n. 2)), who sees ethics as inscribed in our very surroundings, echoing with the call to save what we depend upon for our very survival. This of course is another way of emphasising the paradox of extractive capitalism, that eats up its own resources. On the question of ethics (rather than solely political economy) as a critique of capitalism seen as a form of life, see *Nancy Fraser / Rahel Jaeggi*, *Capitalism: A Conversation in Critical Theory* (2018).