

## CONFLICTS OF LAWS UNBOUNDED: THE CASE FOR A LEGAL-PLURALIST REVIVAL.

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**ABSTRACT:** *This paper attempts to bring the specific insights of the discipline of the conflict of laws to some of the most significant issues which challenge contemporary legal theory, in its attempts to integrate the radical changes wrought by globalisation in the normative landscape beyond (framed outside, or reaching over) the nation-state. Indeed, remarkably, these changes have brought complex interactions of conflicting norms and social systems to the center-stage of jurisprudence. This means that the conflict of laws has a plausible vocation to contribute significantly to a “global legal paradigm” (Michaels 2014), that is, a conceptual structure adapted to unfamiliar practices, forms and “modes of legal consciousness” (Kennedy 2006). Conversely, however, private international legal thinking has all to gain from attention to the other legal disciplines that have preceded it in the effort to “go global”. Thus, it needs to undergo a general conceptual overhauling in order to capture law’s novel foundations and features. In this respect, it calls for an adjustment of its epistemological and methodological tools to its transformed environment. It must revisit the terms of the debate about legitimacy of political authority and reconsider the values that constitute its normative horizon. From this perspective, the ambition of this paper is to further the efforts already undertaken by various strands of legal pluralism, as an alternative form of “lateral coordination” in global law (Walker 2015), towards the crafting of a “jurisprudence across borders” (Berman 2012). Societal constitutionalism (Teubner 2011), which has explicitly made the connection between transnational regime-collision and the conflict of laws, provides a particularly promising avenue for unbounding the latter, which might then emerge as a form of de-centered, reflexive coordination of global legal interactions.*

## INTRODUCTION.

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

Teubner’s striking statement elevates the conflict of laws to a meta-constitutional level. This paper seizes upon this opportunity to ask whether the discipline has specific insights to bring to some of the most significant issues that challenge contemporary legal theory<sup>2</sup>, in its attempts to integrate the radical changes wrought by globalisation in the normative landscape beyond the nation-state<sup>3</sup>. A global legal paradigm<sup>4</sup>, that is, a legal consciousness<sup>5</sup> comprising modes of reasoning and a conceptual structure adapted to the new normative landscape, requires an overhauling of the concepts with which to understand law’s foundations and features. It also mandates a reconsideration of the values that constitute its normative

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<sup>1</sup> G. Teubner, *Constitutional Fragments: Societal Constitutionalism in Globalization*, OUP 2011, p. 152.

<sup>2</sup> Seeing international law (public and private) as a privileged standpoint from which to view legal theoretical issues is not new. See, for example of each: Batiffol, *Aspects philosophiques du droit international privé*, Dalloz 1956; R. Quadri, *Le fondement du caractère obligatoire du droit international public*, RCADI(1952), vol. 80. But has the modern international lawyer « rejected theory » as M. Koskiennemi, surmises? See *From Apology to Utopia: The Structure of International Legal Argument*, CUP 2006, p. 187. Today the *Transnational Legal Theory* journal publishes conflicts of laws contributions to legal theory (see Martin Herberg, « Global Governance and Conflict of Laws from a Foucauldian Perspective : The Power/Knowledge Nexus Revisited », (2011) 2(2) *Transnational Legal Theory* 243-269 ; and H. Muir Watt, « Private International Law Beyond the Schism » (2011) 2(3) *Transnational Legal Theory* 347-427). See too our attempt in « La globalisation et le droit international privé », *Mélanges Pierre Mayer*, Dalloz, forthcoming 2015.

<sup>3</sup> Globalisation is understood here as the specific compression of time and space which coincides with late modernity (A. Giddens, *The Consequences of Modernity*, Polity Press: Blackwell, Cambridge, 1991, spéc. pp. 64) ; the coming of risk society (U. Beck, *La société du risque. Sur la voie d’une autre modernité*, Flammarion, Champs, Préface de Bruno Latour, 2008), global neo-liberal economics (of which it will be question below) ; the paradoxical « return of science » (Philip Pomper & David Gary Shaw (ed), *The Return of Science, Evolution, History, and Theory*, Rowman & Littlefield, Oxford 2002) in a period of increasing disbelief in the values of modernity ; and, with particular relevance to international law (public and private), the « liquidification » of sovereignty (Zygmunt Bauman, *L’identité*, éd. de l’Herne, coll. Carnets, 2010).

<sup>4</sup> R. Michaels, « Globalisation and Law : Law Beyond the State », in R. Banakar & M. Travers, R. Banakar & M. Travers (dir.), *Law and Social Theory*, Hart Publishing, 2<sup>e</sup> éd (2013), p. 287 s. ; B. Frydman, « Comment penser le droit global? » Working Papers du Centre Perelman de Philosophie du Droit, 2012/01, <http://www.philodroit.be>.

<sup>5</sup> Duncan Kennedy observes that what has been globalised (in successive waves, see FN 8 below) are modes of legal consciousness (see « Three Globalizations of Law and Legal Thought

horizon; calls for an adjustment of methodological and epistemological tools with which to understand social complexity; justifies a renewal of the terms of the debate about legitimacy of political authority. Such an enterprise also reinforces the conviction that, conversely, private international legal thinking has all to gain from attention to the various other legal disciplines that have preceded it in the effort to “go global”. From this double perspective, its ambition is to further the efforts already undertaken by various strands of legal pluralism, as an alternative form of “lateral coordinate approaches”<sup>6</sup> towards the crafting of a “jurisprudence across borders”<sup>7</sup>.

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

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(1850-2000) » in *The New Law and Economic Development. A Critical Appraisal*, David Trubek and Alvaro Santos (eds.), Cambridge 2006.

<sup>6</sup> Neil Walker, *Intimations of Global law*, OUP 2015, 3.4.1, p.106.

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

<sup>8</sup> Contemporary globalisation is not the « first » phenomenon of its kind in the history of intellectual thought: see S. Moyn & A. Sartori, « Approaches to global intellectual history », in S. Moyn & A. Sartori, *Global Intellectual History*, Columbia Univ. Press, 2010, p.5 et s. ; for previous globalisations affecting the law, Duncan Kennedy, 2006.

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

<sup>10</sup> « Dangerous method » is the topic of the current « pilagg » (private international law and global governance) research project. See pilagg/blog/sciences po, 2015.

Traditionally – that is, in the course of the last century and under the influence of classical legal thought in international law<sup>11</sup>, the ordering of competing normative claims outside any particular domestic system was sought in (public or private) international law. It was understood both to provide an overall scheme of intelligibility through which to understand other social spheres and to make available operational tools with which to define authority, allocate responsibilities, and guide the conduct of public and private actors. However, the emergence of competing, diffuse (post-Westphalian) forms of authority challenges the law in these ordering functions<sup>12</sup>. In the wake of displacements of power from public to non-state actors<sup>13</sup>, struggles for legitimacy occur between state-bound or endorsed legal systems and other unidentified sources. Moreover, sovereignty, the foundational concept of the international and domestic legal order, appears inverted or subverted, investing in private actors, or indeed signifying obligations towards the international community rather than supremacy<sup>14</sup>. It is difficult to understand what « law » signifies in this environment, since its existing structure and syntax assume, implicitly, a horizon confined to the nation-state (either within the nation-state, or the interactions between nation-states). From a theoretical perspective, therefore, a new conceptual scheme is required in order to take seriously – whether to legitimize, challenge, or govern – new, diffuse and disorderly expressions of power and normativity – those of the “unauthorised” actors of late modernity<sup>15</sup> – which do not necessarily fit traditional forms of legal knowledge.

However, the crisis that affects the conflict of laws seems to be more acute than the minor earthquakes suffered by neighbouring legal disciplines. Public international law has adapted to the massive arrival of non-state right-holders by transforming itself into an overarching welfarist system and exploring its own relationship to global justice<sup>16</sup>. Comparative law has left behind its static

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

<sup>12</sup> See Roger Cotterrell & Maks del Mar (eds), *Transnational Authority*, Elgar, 2015 (forthcoming).

<sup>13</sup> *Ibid.* For an exhaustive study of multinational corporations as regulators, see Anna Becker *Taking Corporate Codes Seriously, Towards Private Law Enforcement of Voluntary Corporate Social Responsibility Codes*, forthcoming Hart, Oxford, 2015. See more generally on the rise of non-state actors, indicators and rankings as emblematic of global law, Kevin E. Davis, Angelina Fischer, Benedict Kingsbury, Sally Engle Merry (ed), *Governance by indicators : Global Power through Quantifications and Rankings*, Oxford University Press, 2012; Benoît Frydman (Benoît) et Arnaud Van Waeyenberge, *Gouverner par les standards et les indicateurs. De Hume aux rankings*, (Bruylant, 2014).

<sup>14</sup> On the inversion of sovereignty, see Jens Barteleon, *Sovereignty as Symbolic Form. Critical Issues in Global Politics*, Routledge, 2014, and below, Part III, B.

<sup>15</sup> Ulrich Beck, *Risk Society : Towards a New Modernity*, Sage, London 1992.

<sup>16</sup> E. Jouannet, *The Liberal-Welfarist Law of Nations. A History of International Law*, CUP 2014. Moreover public international law, on the tide of managerialism and fragmentation, is now increasingly confronted with conflicts articulated as collisions of jurisdiction and applicable law, among which private or hybrid authorities and regimes now occupy a significant place. It is progressively taking on the traditional problematics of private international law (see H. Muir Watt, 2011, « Beyond the schism »).

classifications of family traditions to join forces with the anthropology of legal transfers<sup>17</sup> or contribute to the aesthetics of global spaces<sup>18</sup>. Moreover, while analytical jurisprudence arguably loses its relevance outside the legal order of the nation-state, various schools of legal pluralism have undertaken to “disborder” jurisprudence<sup>19</sup> so as to grapple with the possible foundations of legal authority beyond state boundaries<sup>20</sup>. Global, cosmopolitan or societal constitutionalism<sup>21</sup> and more improbably, global administrative law<sup>22</sup>, are the result of a similar turn involving a radical overhaul of central disciplinary assumptions. Thus, the complex normative conflicts of our global age have become, arguably, an exciting new discipline, theoretical and empirical, drawing on an array of highly diverse ideas from which private international law, time-worn and bounded, is paradoxically excluded.

This new legal theoretical literature is now self-consciously global; it is also, in its most plausible avatars<sup>23</sup>, largely pluralist. As Paul Berman points out: “It has now been approximately 20 years since scholars first began pushing the insights of legal pluralism into the transnational and international arena. During those two decades, a rich body of work has established pluralism as a useful descriptive and normative framework for understanding a world of relative overlapping authorities, both state and non-state. Indeed, there has been a veritable explosion of scholarly work on legal pluralism, soft law, global constitutionalism, the relationships among relative authorities, and the fragmentation and reinforcement of territorial boundaries »<sup>24</sup>. Competing plural and transnational assertions of authority are singled out as the emblematic feature of our complex world, while the defining problem in contemporary legal thought lies in the interactions of legal traditions, social spheres, cultural values, rights and identities, epistemologies or world-visions. Various responses come in the form of a search for consensus (around constitutional values), the promotion of new utopias (the quest for global justice), the celebration of

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<sup>17</sup> G. Frankenburg, *Order from Transfer, Comparative Constitutional Design and Legal Culture*, Edward Elgar, 2013.

<sup>18</sup> PG Monateri, *Geopolitica del diritto*, Laterza 2013.

<sup>19</sup> Berman, 2012.

<sup>20</sup> See Roger Cotterell & Maks del Mar, 2015, with various pluralist contributions from Paul Berman, Nico Krisch, Nicole Roughan. The debate focuses on the very nature of law (if it has one), the foundations of law’s legitimacy (mythological or otherwise), and the relationship between legal and political authority.

<sup>21</sup> Mattias Kumm, « Constitutionalism and the Cosmopolitan State », *Indiana Journal of Global Legal Studies*, Vol. 20, No. 2, 2013 ; for « societal constitutionalism » inspired from Luhmann’s systems theory, Teubner, 2011 (discussed in detail below).

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

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

<sup>24</sup> Paul Schiff Berman, « The Evolution of Global Legal Pluralism », *Transnational Authority*, Cotterrell & Del Mar, 2015, p. XXX (forthcoming).

diversity as competition (law and economics), the devising of methodologies designed to mediate or coordinate (systems theory), or renewed definitions of authority and legitimacy (socio-legal studies).

At first sight, the conflict of laws would appear to fit quite well among these pluralist strands of thought. Indeed, in his impressive panorama or theories of global law, Neil Walker classifies together, as models of a “lateral-coordinate approach”, both the conflict of laws and legal pluralism<sup>25</sup>. From within the discipline of the conflict of laws, this is hardly surprising. The links between pluralism and conflicts are surely ancient; an influential definition of private international law sees its function as management of horizontal pluralism<sup>26</sup>, while the work Santi Romano has become a reference for unilateralist doctrines<sup>27</sup>. Of these two related disciplines, however, the latter, with its contemporary constitutional overtones, its comparativist pedigree and its connection to transnational societal concerns, is in. Conflict of laws, long a thriving intellectual field<sup>28</sup>, is out. Why, then, has its status so declined as to be reduced « parochial boundary-maintenance »<sup>29</sup>, while the various brands of legal pluralism flourish? As a descriptive enterprise, “global legal pluralism is now recognized as an entrenched reality of the international and transnational legal order »<sup>30</sup>. Normatively, or as a theoretical project, it is perhaps the most promising avenue with which to approach contemporary jurisprudential questions dissociated from the domestic legal order.

One explanation might be that the conflict of laws has lost out within in its own orbit. This is not to deny that there is a flourishing industry of traditional private international rule-craft around the world; indeed, codification seems never been to have been so popular<sup>31</sup>. But this does not help dispel the impression that the jurisprudential vein is elsewhere and that there may no longer be any reason, possibly other than the strength of the professional lobby<sup>32</sup>, to support the survival of the conflict of laws at all costs, unless as a sub-department of internationalised contract law, a technical adjunct for intra-EU market issues, an auxiliary to international commercial arbitration, or a largely strategic tool for cross-border forum-shoppers? Legal issues arising in connection with cross-border collisions of

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<sup>25</sup> See above.

<sup>26</sup> Ph. Francescakis, *La théorie du Renvoi et les conflits de systèmes en droit international privé* (1958).

<sup>27</sup> S. Romano, *L'ordre juridique*, 2nd ed., French translation by L. François and P. Gothot, Dalloz 1975.

<sup>28</sup> Ralf Michaels, *After the Revolution – Decline and Return of U.S. Conflicts of Laws*, 11 *Yearbook of Private International Law* 11-30 (2009).

<sup>29</sup> Walker, 2015, p. 109.

<sup>30</sup> Berman, 2015, p. XXX (forthcoming).

<sup>31</sup> See the panorama of codification in S. Symeonides, *Codifying choice of law around the world. An international comparative analysis*, OUP, 2014.

<sup>32</sup> A. Ogus, « The economic basis of legal culture: networks and monopolization », 22 *Oxford J. Legal Stud.* 419 (2002).

rights and norms seem to fall within the remit of other, more recent, more overbearing or more political principles such as federalism (or free movement in the European Union) or human rights, which both sweep away private international techniques and methods into the great sea of proportionality<sup>33</sup>. Moreover much high profile cross-border economic litigation is composed of questions of domestic contract law under party autonomy. In other fields, notably of personal status and family relationships, either the idea of recognition<sup>34</sup> suffices, or conflict rules break down under the pressure of public policy. Perhaps, then, the sleeping discipline (dog or beauty?) should be left to lie, as a vestige of the pre-global age.

A further consideration is that it has have missed the very turning which it was eminently well placed to take<sup>35</sup>, and which might have invested it both as queen of the great new issues of jurisprudence in a world of colliding norms and as provider of the methodological toolbox which compose the new legal paradigm beyond state borders<sup>36</sup>. It might have inspired an authoritative perspective, born of a multi-secular experience, which to approach unfamiliar expressions of sovereignty or novel assertions of jurisdiction. It might thereby have provided a better understanding of our pluralistic world in which competing non-state norms must find their place among more venerable law-like forms. It might have led the critical stance on informal empire<sup>37</sup>, peopled by multinational corporate actors, contractual cross-border value chains and markets without borders, which are the very stuff of private (international) law. The problem, then, is arguably deeper than mere irrelevance. Its shortcomings, or worse, its darker sides for which it has already come under fire for their role in the modern imperial enterprise, may be the very cause of the great imbroglio beyond the state in which the law itself is losing out in favour of alternative more credible world-visions.

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

On each of these points, alternative disciplinary vocabularies have arrived on the scene and displaced the conflict of laws with more exciting “intimations”<sup>38</sup> as to contemporary “changes of state”<sup>39</sup>. Without theoretical renewal, the once revered

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<sup>33</sup> This is not to suggest, however, that proportionality itself has a uniform content in these contexts: see A. Marzal Yetano, *La Dynamique du Principe de Proportionnalité. Essai dans le contexte des libertés de circulation du droit de l'Union européenne*, ed Fondation Varenne, 2014.

<sup>34</sup> See below, p. 22.

<sup>35</sup> This point has been developed more extensively elsewhere (see Muir Watt, 2011 « Beyond the Schism »).

<sup>36</sup> Michaels, 2013.

<sup>37</sup> See M. Koskenniemi, « Empire and International Law: The Real Spanish Contribution » 61 *U. Toronto L.J.* 1 (2011).

<sup>38</sup> Walker, 2015.

<sup>39</sup> A. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law*, Princeton Univ. Press, 2011.

conceptual discipline no longer delivers on a world-vision with which to make sense of global chaos – a point on which the promise of legal pluralism is far more ambitious. Whatever the reasons that have led to its current eclipse, however justified its dismissal by current research, and notwithstanding the wealth of its history and potential, the discipline is probably not, or no longer, asking the right questions, proposing the appropriate methods, or using an adequate epistemology. Yet, paradoxically, at the very moment where it might seem to be displaced by competing vocabularies, a closer look shows it, on the contrary, to be invested with a new relevance. Pluralist thinking has “caught on” to conflicts. In many respects, the insights of the new global thinking have overtones of the reinvention of the wheel – if in a richer, inter-disciplinary mode.

Global constitutionalism is framed as providing for the *modes of interaction* between overlapping normative systems. Political science calls for “interface norms”<sup>40</sup>. The central problem singled out by contemporary legal pluralism is framed in terms of competing norms and claims to authority, while proposed solutions for their mutual accommodation take the form deference, coordination or synthesis, and competition. The diversity thus described, the terms defined, the methods used, the values involved, are all largely familiar to the history of the conflict of laws, in one era or another. The discipline grew out of the concurrence of different claims to authority (religious and secular; political independence); had to confront heterogeneous traditions of law-making (written and oral customs; formal and informal systems); pitted “conflicts justice” against alternative aspirations such as economic efficiency; dealt variously in individual rights or legal systems; included unrecognized states and indigenous peoples; wheeled between public law and private law; experimented with substantive rules, principles of deference or subsidiarity; became torn between attachment to neutrality and the pursuit of values; oscillated between community-building and the dictates of sovereignty; provided the emblematic space to explore the virtues of rules and standards, security and flexibility; explored the limits of toleration and still swings constantly from faith in universalism to resignation before irreducible cultural interpretations.

It is hardly surprising, therefore, that private international legal methodology – albeit substantially revisited –, has attracted new attention, to the point of being mooted as the only plausible content of “global societal constitutionalism”<sup>41</sup>. As Paul Berman recognizes, “these (private international law) doctrines become a core way of navigating the interactions, using principles that navigate between legal formalism and political practicality »<sup>42</sup>. In this respect, the conflict of laws contains a sophisticated arsenal of methodological principles which certain fit the pluralist idea

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<sup>40</sup> Nico Krisch, “The Structure of Postnational Authority”, in Cotterrell & Del Mar, 2015, p. XXX (forthcoming).

<sup>41</sup> Teubner, 2011.

<sup>42</sup> On the flip side of this move is the new prominence of constitutionalism. « If ...we see constitutionalism as setting the ground-rules for interaction among relative authorities, constitutionalism becomes more important than ever » (Berman, 2015, p. XXX forthcoming)

of coordination and which it is unnecessary to develop in detail here. Choice of law rules and standards of all sorts, diverse « approaches », theories of incidental application, renvoi and, with a pinch of imagination, subsidiarity, deference, deliberative polyarchy are but a few of the techniques at its disposal with which it can offer the navigation map which legal pluralism arguably lacks. Arguably, the conflict of laws would have been able to « set the ground-rules for interaction among relative authorities »<sup>43</sup>, with a little nudging. Nor need it be disdained as a clever tool-box, moreover. It has a rich jurisprudence of rights (transitory or not), law (including the status of foreign law), comity, sovereignty, coordination or tolerance. Recently, it has appeared as a sophisticated repository for interdisciplinarity<sup>44</sup>, providing a discursive framework that structures thought<sup>45</sup>, an epistemology of complex systems<sup>46</sup> or a new launch-pad for global governance<sup>47</sup>.

Like science<sup>48</sup>, then, the return of the conflict of laws is on the cards. It appears as a serious candidate for occupying a significant governance function in “global legal space” defined as beyond the reach and out of bounds of state sovereignty or state-endorsed institutions. After all, its line of business has long been making sense of interactions that cross state boundaries and fall between the gaps between domestic sovereignty and public international law. At the same time, however, complacency would be largely misplaced. The conflict of law’s contemporary intellectual abeyance certainly warrants a humble detour by the various thriving strands of global legal theory<sup>49</sup>. Indeed, it may have much to learn from other disciplinary vocabularies, either about the definition of conflicts or their modes of resolution, and this could lead in turn to a radical reformulation of its own core issues. Indeed, if encounters between heterogeneous norms or expressions of diverse types of informal authority are central to the understanding of the normative landscape beyond the confines of state sovereignty<sup>50</sup>, the traditional schemes of intelligibility which underlie the conflict of laws need to take on board various additional dimensions of global complexity. If it does so and succeeds in living up to this challenge, it may emerge considerably enlightened by global legal theory. The reverse is true, too, however.

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<sup>43</sup> *Ibid.*

<sup>44</sup> K. Knop, R. Michaels, Ralf and A. Riles, (ed), *Transdisciplinary Conflict of Laws*. Law and Contemporary Problems, Vol. 71, No. 3, 2008.

<sup>45</sup> As Knop, Michaels and Riles claim (*ibid.*, « Foreword »), it provides a template for « lateral thinking ».

<sup>46</sup> See H. Muir Watt, « New Challenges in Public and Private International Legal Theory: Can Comparative Scholarship Help? », in M. Van Hoeke (ed), *Epistemology and Methodology of Comparative Law*, Hart Publishing, 2004, p.271.

<sup>47</sup> See H. Muir Watt & D. Fernandez Arroyo, *Private International Law and Global Governance*, OUP 2014.

<sup>48</sup> Pomper & Shaw, 2002.

<sup>49</sup> For an overview and tentative classification of these strands, see Walker, 2015.

<sup>50</sup> For a critique, in turn, of Walker’s own conceptions as being tainted by a state-focussed paradigm, see Ruth Buchanan, « Reconceptualizing Law and Politics in the Transnational Constitutional and Legal Pluralist Approaches » *Comparative Research in Law & Political Economy*. Research Paper No. 19/2008 (Osgoode Hall Law School, York University, Toronto).

What follows, then, is something in the way of a collaborative, interdisciplinary effort. Several thorny issues or choices confront both the conflict of laws and legal pluralism when they claim relevance outside inter-national or infra-state contexts, respectively. This paper proposes to explore the ways in which the former can gain from and contribute to the newer insights of the latter. It will revisit the anatomy of “conflict” (I), in order to reformulate the matrix of the discipline correlatively (II), and change the perspective from which questions of legal theoretical import are asked (III). It will perhaps come as no surprise that practice has not waited for these insights, as will be seen in conclusion. Are we on the way, then, to a legal pluralist revival of the conflict of laws?

## I. THE ANATOMY OF CONFLICT

What’s in a conflict?<sup>51</sup> “Conflicts” within the meaning of the conflict of laws are notoriously more complex than they might seem at first sight. They are not necessarily understood as confrontational. Sometimes indeed, they are “false”<sup>52</sup>. In other instances, they imply that a law deliberately “offers” its competence but will defer to a refusal<sup>53</sup>. More frequently, they signify that several laws are simultaneously available for possible use, to the extent that they all include the issue at hand in their scope or all cept to be default rules for international contracts. Only occasionally do they really involve exclusive and incompatible claims to regulate<sup>54</sup>. And yet again, some such claims may be merely “incidental”<sup>55</sup>. In turn, legal pluralism suggests that norms meet, clash or combine, independently of state borders, according to multiple patterns of instable and recursive interaction in global context. Comparing these perceptions of normative interaction shows the conflict of laws approach to focus more tellingly on the underlying stakes, on the condition however that its templates integrate the greater complexity (A) and the very centrality of hybrid normative encounters (B).

### A. CLOSE ENCOUNTERS: A THIRD KIND?

Private international law understands “conflict” in terms of three distinct ideal types: thus, simultaneous assertions of jurisdiction in respect of a single situation or

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<sup>51</sup> The alternative to the unsatisfactory vocabulary of conflicts is to talk about “private international law”, but again everyone knows that the private is problematic, that the international is too state-centered, and that non-state norms can only gingerly be included in the concept of “law”. Do the semantics really matter if despite the hiatus between the terms and their meaning, the convention is sufficiently clear? It is likely that they do, at least when the context has changes so much that the words convey an entirely contrary meaning. The time-worn vocabulary may explain at least in part why conflicts seems so parochial to global legal theory, as Walker observes. Perhaps it would be better to spell out conflicts as “*de-centered, reflexive coordination of global legal interactions*”...

<sup>52</sup> As in Currie’s « governmental interest analysis ».

<sup>53</sup> As in *renvoi*.

<sup>54</sup> As in « lois de police » or overriding mandatory norms.

<sup>55</sup> Incidental application, or « giving effect » (as in article 9 EC Regulation Rome I) or « prise en consideration ».

the issues to which it gives rise are theorized as giving rise to either confrontation, cooperation or competition between the contending laws or legal systems. Correlatively, three main methodologies - unilateralism, multilateralism, and party choice - provide respectively, also in ideal form, a response to the particular problems thus defined. Theorised in the course of the past century - largely in the wake of various political projects involving the establishment of liberalism, the story of state sovereignty, the modern international public legal order - the discipline's approach to the interactions between plural, conflicting norms naturally bears the marks of the great simplifications<sup>56</sup> of modern law's "mythology"<sup>57</sup>. Its main challenge was to grapple with territorial monopoly, in order to craft the ways in which the "relevance"<sup>58</sup> of foreign systems might find expression despite the constraints of the legal framework imposed by public international law. With varying degrees of (im)plausibility, doctrines such as vested rights, transitory torts, the perception of foreign law as fact, were all attempts to by-pass the legal impregnability of the nation-state boundaries which global pluralism dismisses as increasingly irrelevant today. However, globalisation weakens the claim of these fictions to any plausible description of the post-national world, or the forms which law takes "beyond the state". As Berman again points out: "...what we might be done with is the (perhaps always fictitious) idealized vision of the nation-state as a single authority operating autonomously within bounded territory »<sup>59</sup>.

In stark contrast, therefore to the traditional, simplified view of conflicts, stands the post-modernist viewpoint of global legal pluralism. As Neil Walker muses, the intimated features of "global law" take on the dynamic, unstable and recursive characteristics of the complex processes that it claims to capture<sup>60</sup>. One of the comparative attractions of global legal pluralism is to reflect in its methodology the intense circulation of ideas and the constant mutual irritation, the 'in-between worlds' which 'interlegality' produces<sup>61</sup>. Embracing instability, contingency, dynamics, disorder, polyarchy in its definition of interactions between normative orders, global-pluralist legal theory sees "the state and the interstate system as complex social fields in which state and non-state, local and global social relations

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<sup>56</sup> The Peace of Westphalia had produced order out of normative chaos by creating sovereign territorial monopolies and correlative assumptions, ideals, beliefs and dogma about the reach, nature and foundations of the law. These also shaped the conceptualisation of the "overflow" - the remaining conflicts beyond the boundaries of each sovereign state, to which private international methodology applies. If law, including international law, functions according in systematic and hierarchical mode and tends towards stability, unity, coherence and certainty; the space beyond the state must in turn be subject to such order.

<sup>57</sup> This term is a wordplay upon the authentic version of P. Fitzpatrick's *The Mythology of Modern Law*, London, Routledge, Chapman & Hall, 1992.

<sup>58</sup> This was the term used by Santi Romano to describe the relationships between social systems. At a time when the conflict of laws was dominated by a sovereignty paradigm, it was used to break through an overly formalist conception of the relationship between the legal systems, notably that of the forum and foreign law (see Francis and Gothot, 1975).

<sup>59</sup> Berman, 2015, p. XXX (forthcoming).

<sup>60</sup> See Walker, 2015, chapter 5, p. 148 et s.

<sup>61</sup> M. Amstutz (2005), « In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning ». *European Law Journal*, Volume 11, Issue 6, pages 766-784, November 2005.

interact, merge and conflict in dynamic and even volatile combinations »<sup>62</sup>. Indeed, the vocabulary and the metaphors are highly revealing. Collisions, interaction, merging, recursivity, interwoven diversity, mutual provocation, in-between worlds, irritations, interferences (understood in an electrical mode), disruptions, or distortions are all used by pluralists to express multiple new patterns of encounters between legal systems. They fit the post-modern paradigm of the tentacular rhizome (Deleuze), the accelerated intensity of hyper-reality (Baudrillard).

This vision certainly suggests a richer understanding of the 'interminglings' between social systems than the three horizontal schemes of coordination, competition and confrontation to be found within the paradigm of the conflict of laws. Beyond its obvious focus on confrontation, the term "conflict" – curiously understood to cover complementarity, does not adequately express mutual "irritations" that set off a series of unpredictable and potentially far-reaching consequences when the internal make-up of each system differs<sup>63</sup>. Nor does an overly static vision do justice to the dynamics of these interactions with which, in practice, the conflict of laws itself has to cope in the form of strategic navigation by private actors of multiple regimes (from fiscal and investment regimes to familiar forum shopping for procedural tools)<sup>64</sup>. Indeed, strategic u-turns and the resort to claw-backs and counter-measures are so much part of the global picture that the concept of "fraud on the law", a pillar of continental general theory designed to neutralise attempts to circumvent the "natural" forum, has been rendered impotent<sup>65</sup>. In turn, European Union law draws attention to the diagonal dimensions of conflicts in multi-layered systems<sup>66</sup>. Furthermore, using the pluralist framework of

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<sup>62</sup> Berman, 2015, p.XXX (forthcoming).

<sup>63</sup> Gunter Teubner has famously drawn attention to the "irritations" that occur when systems enter into contact with each other through "legal transfers", setting off a series of unpredictable and potentially far-reaching consequences when the internal balance (the social couplings) within the two systems differs. « Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences » (1998). *Modern Law Review*, Vol. 61, pp. 11-32, 1998.

<sup>64</sup> The notorious *Chevron* litigation provides the supreme example, promising a legal battle made of measures and countermeasures throughout the world, "until the oceans run dry". For convenience, see the multiple refernces in H. Muir Watt, « Chevron, l'enchevêtrement des fors : un combat sans issue? » *Revue critique de droit international privé* (2011) Volume 100, p. 339-351.

<sup>65</sup> Despite free movement, the concept lingers, however : see in the case of the French prohibition on surrogacy arrangements, and the refusal to recognize the civil status of children born of such agreements abroad on grounds of « fraude à la loi » : ECtHR, *Menesson c. France* (n°65192/11) and *Labassee c. France* (n° 65941/11) (violation of article 8 ECHR).

<sup>66</sup> Christian Joerges, (2011) 'The Idea of a Three-Dimensional Conflicts Law as Constitutional Form', in Christian Joerges and Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, Oxford: Hart, 491-528 ; J Heymann, *Le droit international privé à l'épreuve du fédéralisme européen* (Economica, 2010).

societal constitutionalism, Teubner attempts a classification of regime collisions which signals the increased new intricacy of “problem areas». These are « (1) the collision of a particular sub-rationality with other sub-rationalities; (2) collision with a comprehensive rationality of world society; and (3) the collision of the function-maximization with its own self-reproduction»<sup>67</sup>. Among the « intimations » of global law, Walker points out the « double deformatisation » which transforms « the paradigm conflicts case ...between state legal orders which are symmetrical and largely mutually exclusive » so as to include « trade and mix of first-order authority between regimes with quite different but often significantly overlapping substantive jurisdictions »<sup>68</sup>.

Significantly, awareness of the pervasive complexity of normative interaction<sup>69</sup> is also a feature of all the other disciplines which have positioned themselves to survey or regulate, from various standpoints, the global legal landscape. Outside the conflict of laws, then, the new global problematic is that of “conflicts”. Legal sociology explores the “no-man’s land of colliding spheres of meaning” (*Sinnwelten*)<sup>70</sup>. Comparative law, renewing its alliance with anthropology and global history, explores the dynamics of legal transfer the contested internal make-up of each legal culture, full moreover of “unofficial portraits” and informal sub-cultures<sup>71</sup>. Human rights theory, now indissociable from its own set of critical strands, has taken on board the inter-sectionality of identities<sup>72</sup> and moreover shows up the contestations which takes place within the discourse of human rights itself. The spate of recent cases which have come up in Western societies, in relation to the diverse cultural practices of immigrant populations, illustrates the multiple standpoints which can emerge in a conflict otherwise framed in apparently univocal terms.

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<sup>67</sup> Teubner 2011, p 81. He adds, ominously: « The evolutionary dynamics of these three collisions certainly have the potential to result in a societal catastrophe. (According to) Niklas Luhmann: the occurrence of catastrophe is contingent. It depends on whether countervailing structures will emerge which prevent the positive feed- back catastrophe ». On the methodology which is suitable to take up this challenge see below (section II).

<sup>68</sup> Walker, 2015, p.107.

<sup>69</sup> Alvarez Santos (2003) *Toward a New Legal Common Sense*, 437: ‘different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions, either on occasions of qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life’.

<sup>70</sup> P.F. Kjaer, « The Concept of the Political in the Concept of Transnational Constitutionalism », in Joerges & Tommi (eds), *After Globalization – New Patterns of Conflict and their Sociological and Legal reconstruction*, Oslo, Arena, 2011.285-321, p.315.

<sup>71</sup> See Frankenburg, 2013 ; Mitchel de S.-O.-I’E. Lasser, « Judicial (Self-)Portraits: Judicial Discourse in the French Legal System », 104 Yale L.J. 1325 1994-1995. The internal complexity of legal cultures explains why forced legal transplants act as “irritants” (Teubner, above) producing unpredictable consequences in their adoptive environment: importing an isolated institution cannot be the end of the story, since the internal complexity of a legal tradition will produce new patterns, fuelling disruption and new combinations.

<sup>72</sup> The term was coined by Kimberley Crenshaw, « Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics », in David Kairys (ed), *The Politics of Law: A Progressive Critique* p. 195-217 (2e ed., Pantheon, 1990).

Wearing a full-veil or burqa in a secular (or mono-religious) society which prohibits ostensible (or non-orthodox) religious wear in public<sup>73</sup>, can be viewed, diversely, as an identitarian assertion in the name of self-expression, a feminist stance, a form of resistance against the perceived repressive nature of state secularism, a practice mandated, encouraged or condoned by a foreign law governing personal status, a submissive gesture within a sexist sub-culture, or the sign of deep social unrest in a class-based system. In legal terms, it could take the form of a human rights claim<sup>74</sup>, a traditional issue of applicable law (personal status), an instance which requires a political acceptance of foreign or religious cultures in a multicultural society<sup>75</sup>, or a national security event<sup>76</sup>. A proportionality analysis has to weigh in all these viewpoints and is certainly better equipped methodologically to embrace this multi-faceted situation than any single perspective<sup>77</sup>.

From the standpoint of legal pluralism, bringing to bear the lens of a conflict-of-laws analysis will facilitate the analysis of sensitive cases of mutual irritation between hybrid regimes - whether or not in a transnational context. Once the “conflict” is identified, its multiple dimensions are better grasped and ultimately, the needs of each system more appropriately accommodated. As Berman says, «conceiving of these clashes (between religious and state law) in conflicts terms reorients the inquiry in a way that takes more seriously the non-state community assertion. As a result, courts must wrestle both with the nature of the multiple community affiliations potentially at issue and with the need to articulate truly strong normative justifications for not deferring to the non-state norm»<sup>78</sup>. If it is willing to take on the greater complexity, the conflicts approach, then, is right<sup>79</sup>. Thus, on the one hand, pluralism could gain by “conceiving of a battle between state and non-state law in terms of conflicts doctrine (which) will tend to change the framework of decision»<sup>80</sup>. Putting conflicts in the limelight allows multiple complex stakes to surface. Conversely, the potential contribution of pluralism to the conflict of laws would be to make «the choice-of-law decision a constructive terrain of

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<sup>73</sup> See the position of French law as analyzed in *SAS v France*, ECtHR no ([43835/11](#)) 2014.

<sup>74</sup> See again, *SAS v France*, 2014.

<sup>75</sup> On recognition in such a context, which is both an element of societal dialogue and a conflict of laws problematic, see «Fundamental rights and recognition in private international law», (2013) 3 *European Journal of Human Rights* 409. The recognition concept in Hegel’s early social philosophical works (on ‘struggle for recognition’: *kampf um anerkennung*) is re-read by Axelle Honneth in *The Struggle for Recognition: Moral Grammar of Social Conflicts* (Polity Press 1996). Similarly, Charles Taylor’s Hegelian scholarship inspires his own work on recognition within a multicultural society (*Hegel and Modern Society*, 1979; *Multiculturalism. Examining the Politics of Recognition*, Princeton University Press, 1994).

<sup>76</sup> See the reasons (as invoked by the French government) for the French prohibition of (full) veil in public spaces, in *SAS v. France* (ECtHR 2014).

<sup>77</sup> On the complexity of proportionality itself as simultaneously mode of reasoning, technique and conflict rule (institutional competence): see Marzal Yetano, 2014.

<sup>78</sup> Berman 2015, p. XXX (forthcoming).

<sup>79</sup> The passage goes on: “Because non-state law-making is not usually conceived of as law, we do not usually think of clashes between state and non-state law through the prism of conflict-of-laws jurisprudence. *But we could*”.

<sup>80</sup> *Ibid*, p. XXX (forthcoming)..

engagement among multiple normative systems, rather than an arm of state government automatically and without reflection imposing its normative vision on all within its coercive power »<sup>81</sup>. The latter description might of course appear to conflicts lawyers to be a reductive view of what conflicts law actually does. Nevertheless, following this path would undeniably enlarge (universalize?) the jurisdiction of the conflict of laws to encompass social conflicts of all types, whether or not the crossing of state borders is concerned. The « irritant » that this might represent, however, now needs to be addressed, in turn.

## B. MAINSTREAMING CONFLICTS

For the conflict of laws, framing these interactions in the alternative vocabulary of global legal pluralism emphasizes their omnipresence and expresses the idea that they are no longer (as they were in a pre-global setting) simply marginal encounters between territorially bounded legal systems. “Wherever one looks, there is conflict among multiple legal regimes »<sup>82</sup>. An awareness of the pervasiveness of normative interaction is what sets apart new global versions of legal pluralism from its more classical antecedents. Berman observes that “pluralism had always sought to identify hybrid legal spaces, where multiple normative systems occupied the same social field. And though pluralists had often focused on clashes within one geographical area, where formal bureaucracies encountered indigenous ethnic, tribal, institutional or religious norms, the pluralist framework proved highly adaptive to analysis of the hybrid legal spaces created by a different set of overlapping jurisdictional assertions (state v. state; state v. international body; state v. non-state entity) in the global arena ».

However, in the case of the conflict of laws, the potential change of course which would result from an acknowledgement of the ubiquity of conflicts is not merely quantitative, nor is it limited to a reversal of the respective scope of principle (domestic cases) and exception (international cases). The pervasiveness of conflicts means, much more radically, that conflicts are no longer merely a problem of overflow to be dealt with at the confines of law’s usual business, but a permanent, all-pervasive feature of the normative landscape, reflecting the intensity of global processes. If conflicts are now “mainstreamed”, as Neil Walker puts it, conventional wisdom stands on its head<sup>83</sup>, and the perception of conflict changes. From simple and marginal situations of horizontal antagonism or antinomy in international cases, to situations of pervasive mutual irritation, the phenomena involved are more numerous, complex and heterogeneous than are the formal legal systems of the world of sovereign nation-states.

Putting conflicts at the very core of global law means, first of all, that the issue of threshold that arises in the conflict of laws – the notoriously difficult determination of what is “international”, as opposed to the purely domestic – becomes irrelevant. If global encounters between different systems are not limited to

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<sup>81</sup> *Ibid*, p. XXX(forthcoming).

<sup>82</sup> Santos, 2002, p. 94.

<sup>83</sup> Walker, 2015, Chapter 4.

law that is state-endorsed and territorially-bound, then there is no reason to balance out the interests expressed in various normative systems (laws, standards, principles, indicators) differently, according to whether they arise within the confines of one state territory or are framed as involving a problem of conflict of laws. The burqa case discussed above provides ample illustration of this. The normative conflict arises whether or not there is a traditional international conflict of laws opposing the personal status of the veil-wearer and the prohibitive position of the forum. The required international element does not change the terms of the interactions involving religion, culture, or gender, since even in the absence of a permissive foreign law, either there is a right which trumps the subordinate forum law, or there is an overriding value (republican neutrality, security considerations, etc) which trumps the right. This example also shows up the links between the question of threshold (when is there a conflict of laws?) and the tricky issue of equal treatment or non-discrimination. Formulating a right in terms of non-discrimination (on grounds of religion, cultural practice or gender) is a demand for justification of differential treatment; identifying such grounds is precisely the problematic which lies at the heart of the conflict of laws<sup>84</sup>. Using an alternative vocabulary does not change its terms. The issue of when justice allows differential treatment persists whether or not there is an international conflict of laws.

Secondly, putting conflicts in the limelight may contribute a key to the “legitimacy conundrum” which stalls attempts by contemporary pluralists to respond to the question of the foundations of transnational authority<sup>85</sup> and the nature of law in a world of overlapping claims by ‘unauthorised’ actors of the ‘second’ modernity<sup>86</sup>. Since most analytical jurisprudential explanations are still bound either to sovereignty or the domestic polity<sup>87</sup>, they lose purchase correlatively to nation-states’ “loss of control”<sup>88</sup>. Various strands of socio-legal theories and societal constitutionalism turn away, therefore, from governance or constitutionalist projects which tend to project familiar state-bound structures onto the global scene. In this respect, a first significant insight from these global pluralist conceptions is that it is implausible, for the moment, to envisage authority beyond the nation-state in any form other than concurrent *claims*<sup>89</sup>. This is in keeping with the idea that global

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<sup>84</sup> The conflict of laws has long entertained a symbiotic but contradictory relationship with principles of non-discrimination and equal treatment. See for example, Douglas Laycock, “Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law”, 92 *Colum. L. Rev.* 249 (1992) and our analysis in “Aspects économiques du droit international privé”, *Recueil Cours Académie Droit International*, t307, 2005, §192 s.)

<sup>85</sup> Cotterrell & Del Mar, 2015.

<sup>86</sup> Ulrich Beck, 1992.

<sup>87</sup> On the requirements of sovereignty, see below, Part III, B.

<sup>88</sup> Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (Columbia University Press, 1996).

<sup>89</sup> Roger Cotterrell, « Transnational Legal Authority: A Socio-Legal Perspective », in Cotterrell & Del Mar, 2015, p. XXX (forthcoming), proposing as a starting point « to treat authority generally as a *practice* and *experience* to be identified and interpreted sociologically »... Moreover, « given the

law is aspirational - intimation rather than law made flesh<sup>90</sup>. A further, connected, contribution is that sociological explanations of authority which were marginal within the doctrinal context of nation-state – such as Weber’s fourth category of “charismatic” authority – have risen to overriding importance beyond the state, where expert knowledge, the power of image, rating agencies and other spin doctors all flourish<sup>91</sup>. But however novel, tentative and anti-essentialist, it is striking that this renewed theoretical reflexion does not seem to change the terms of the questions being asked. The jurisprudential quest is to grasp the features of law-likeness without the support of the formal theory of sources of law. When confronted with unaccountable mafia-like private authority, or repressive religious practices, or indicators sponsored by the very entities being assessed, the question is usually whether such phenomena are sufficiently law-like to be considered as law, albeit beyond the state. Even global law’s eery “intimations” are seen to present familiar characteristics in this respect<sup>92</sup>. In other terms, the renewed description of intermingling, hybrid jurisdictional assertions as a new state of global affairs, does not appear to modify the legal consciousness<sup>93</sup> into which such claims will have to fit.

What can a conflict of laws approach bring to this debate? It is true that when the conflict of laws reached maturity within the framework of the modern state, it implicitly took statehood as a criterion for assessing the legitimacy of the norms it would accept within its ‘community of laws’<sup>94</sup>. However, detached from state sovereignty, the additional contribution of the conflict of laws would be to point to these interactions themselves as the starting point from which to approach issues of legitimacy. This would mean renouncing to decide the legitimacy question – in other words to sift through concurrent claims *ex ante*, and dealing with it *ex post* and in

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complex conditions of existence of transnational legal authority, this authority will be shifting, variable and constantly re-negotiated ».

<sup>90</sup> Walker, 2015, p.151 : global law is « an incipient development, ...a legal form that is still coming to fruition and so largely future-orientated ».

<sup>91</sup> Cotterrell 2015. This does not mean of course that there is anything more rational about modern law than about the “intimations” of the global – “Were we ever Modern?”, asks Bruno Latour (*Nous n'avons jamais été modernes. Essai d'anthropologie symétrique*, éd. La Découverte, 1981) – but that rationality is part of the “mythodology” of modern law with which we are now willing to part.

<sup>92</sup> Walker, 2015 p.196, sees a common denominator of *ratio* and *voluntas* in the various conceptualisations of global law.

<sup>93</sup> Defined in *New Oxford Companion to Law*, Oxford University Press, 2008, as a concept « used to name analytically the understandings and meanings of law circulating in social relations. Legal consciousness refers to what people do as well as say about law. It is understood to be part of a reciprocal process in which the meanings given by individuals to their world become patterned, stabilized, and objectified. These meanings, once institutionalized, become part of the material and discursive systems that limit and constrain future meaningmaking. Consciousness is not an individual trait nor solely ideational; legal consciousness is a type of social practice reflecting and forming social structures ».

<sup>94</sup> This expression is famously von Savigny’s (*System des heutigen Römischen Rechts*, 1849). In von Savigny’s initial formulation of ‘multilateralist’ methodology, only the communities (at the time, German princedoms) belonging to a closed ‘community of laws’ cemented by shared cultural (religious, linguistic and legal) tradition, were considered as participants in the common allocation of prescriptive authority.

relative terms. This idea seems perfectly in line with global law's instable reflexivity. It suggests that the legitimacy question arises in different terms according to the type of claim - collaborative, confrontational, concurrent - that is being made in respect to other legal systems.

For example, is a private corporate code law or not law (legitimate or illegitimate? binding or softly decorative?). This might not be the right question to ask, or the right way to ask it. It may be, for instance, that when a corporate actor undertakes, in a private code made available to investors, to work towards a more ethical or egalitarian workplace<sup>95</sup>, those commitments should be binding - and apt to be invoked against it - to the extent that it is supported by values present in its environment. The same code might not, however, in other circumstances, serve as governing law (as in the case of a global value chain, when competing state norms guarantee improved hygiene, security or environment for the stakeholders involved, or when fundamental rights are threatened). Accepting that legitimacy issues arise ex post and can receive variable, relative answers according to the type of conflict in which they are involved comes closer to capturing the complexity of the normative landscape beyond the state. As pluralism itself reminds us, "the primacy of a function system can, however, only be claimed within a particular local and situational context. It changes from place to place and from situation to situation" <sup>96</sup>. It is time now to explore the insights to be garnered, in turn, from other elements of this pluralist approach.

## II. BEYOND RIGHTS: THE ANONYMOUS MATRIX?<sup>97</sup>

The complexity inherent in patterns of "conflict" as enhanced by a pluralist vision, can also be observed in respect of the normative phenomena involved in these encounters. Under various, traditional, conflict of laws doctrines, the concept of "laws" has admittedly come to include multiple phenomena (rules of various types, whole legal systems, judgments, or rights). These categories are also understood to be the tangible expression of antagonistic sovereign wills, contradictory policy-driven rules, colliding values, different legal traditions, or mutually exclusive legal orders. But legal pluralism suggests that the traditional matrix of the conflict of laws may not adequately capture the complexity of colliding transnational regimes, of which formal law is only one among many. It moves the focus from traditional state-bound law to self-referential social systems, inviting a radically new reading of the normative and social landscape beyond the state (A). Incomplete, the traditional matrix may also be misleading. The centrality of litigation and the rise of fundamental rights have put the spotlight on antagonistic individual claims invoked by different right-holders, so that rights have tended to become the focus of conflict of laws analysis. An alternative approach understands such individual rights-claims to be the visible expression of conflicts on a deeper level, involving "anonymous" social systems (B).

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<sup>95</sup> See, for thoroughly documented examples, Anna Beckers, 2015.

<sup>96</sup> Teubner 2011, p. 64.

<sup>97</sup> Or to adopt the May 68 slogan, « sous les pavés, la mer (mère) ». The « anonymous matrix » is borrowed from Teubner 2011, and its meaning will be discussed in detail below.

## A. AUTONOMOUS RATIONALITIES

“Societal constitutionalism”, the specific brand of pluralism advocated by Gunter Teubner<sup>98</sup>, makes a direct connection between its own vision of “colliding function-systems” and the conflict of laws<sup>99</sup>. It is also deliberately attuned to the features of the global, and is not therefore merely an extension of infra-state pluralism to the transnational sphere. As such, it is certainly one of the most original and productive strands of contemporary global legal thought. In short, its sociological perspective sees as the central evolution of late modernity (that is, emerging within the modern state and accentuated by globalisation), the multiplication of areas of autonomous action in society, each developing its own formal rationality, in mutual indifference to each other. It claims a post-structuralist pedigree<sup>100</sup> to the extent that it was Foucault who first identified « radically de-personalizing power phenomena and identifying today’s micro-power relations in society’s capillaries in the discourses/practices of ‘disciplines’ ». This results in « escalated differentiation, pluralization and reciprocal compartmentalization of separate spheres »<sup>101</sup>. Such spheres concern culture, science, the economy, or law, but also more specialized sub-spheres such as finance, ecology, human rights or the *lex mercatoria*, of which it will be question below. These processes describe and explain the crisis of politics in the modern state. It is no longer possible for any authority to represent the whole of society. The political constitution of the state can no longer channel « the collective energies of the whole society, founding the nation’s unity. In modernity, the collective potential is no longer available as a whole, but has been dispersed into numerous social potentials, energies, powers ». This is due to the narrow specialization of the « communicative media » of each social sphere – power, money, knowledge, law ». <sup>102</sup>

Like the nation-state emerging in early modernity, these social sub-systems are self-referential, establishing themselves through processes by which, *ex nihilo*, they constitute their own autonomy. The specific contribution of societal constitutionalism is to analyse this move towards autonomy as the development by each sphere of its

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<sup>98</sup> This theory is developed by Gunter Teubner (*Constitutional Fragments*, 2011) on the basis of insights Niklas Luhman’s theory of functional differentiation of social spheres. It is emphatically not a theory of global constitutionalism involving the search for an all-encompassing set of shared principles of world governance, but a pluralist perspective. As will be seen, it advocated only one possible common constitutional approach, that of « collision law », which each node (or forum, in more traditional vocabulary) would define for itself.

<sup>99</sup> Christian Joerges has also mooted a version of (three-dimensional) « Conflicts Law as Constitutional Form » (Joerges, 2011). According to this project, meta-conflict rules would allocate competence as between the different multi-levels of governance (national, supra-national/regional). In this respect, it seems to assume an overriding conflicts law rather than the reflexive, decentered approach advocated below.

<sup>100</sup> See Teubner 2011 p. 74, observing however that an inflated perspective of power « does not discern the more subtle effects of other communication media ».

<sup>101</sup> *Ibid* p. 39.

<sup>102</sup> *Ibid*, p.63. This process is not necessarily negative. It has made possible great achievements of civilization in the arts, science, medicine, economics, politics, and the law even if it has dark sides. More specialization is to come : « research, education, healthcare, the media, the arts – globalization offers the opportunity to strengthen their autonomy » (p. 82).

own “constitution”<sup>103</sup>. Obviously, the concept of constitution advocated here must be dissociated from the nation-state<sup>104</sup>. “Firstly, the constitution should be disconnected from statehood, so that transnational issue-specific regulatory regimes may be considered candidates for constitutionalization. Secondly, the constitution should be decoupled from institutionalized politics, thus allowing other areas of global civil society to be identified as possible constitutional subjects. Thirdly, the constitution should be decoupled from the medium of power, thus making other media of communication possible constitutional targets »<sup>105</sup>. The idea advocated by Teubner is then to borrow insights from the discipline of constitutional sociology, relating both to the conditions surrounding the constitution of social systems, and the contributions made by legal norms to this process, and then to generalize these insights to non-state systems. Thus, a constitution dissociated from state requires « a legal imagination which can call upon the founding myth of a collective... a constitution does not necessarily require a demos, a primordial ethnic group or intermediary structures, but it does need a legal imagination of revolution and memory ».

In support of this point, it can indeed be observed that even private regimes have their founding myths, which are at the heart of their constitutions and legitimize their ‘jurisgenerative power’. Global law itself, in Neil Walker’s account, has to confront self-referentiality<sup>106</sup> and, to do so, creates its own pedigree by appealing to the past in its own ongoing process of self-constitution<sup>107</sup>. This is where, for instance, human rights or the *lex mecatoria*, each with particularly powerful mythical imaginaries, appear as possible constitutionalized regimes. Gunter Frankenburg provides a highly plausible account of human rights narrative as a drama of

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<sup>103</sup> In terms of systems theory, « the political constitutions of nation states have the constitutive function of securing the autonomy of politics which has been acquired in the modern era in relation to ‘other’ religious, familial, economic, and military sources of power » (p. 75). In contrast to the former, however, « their self-foundation does not take place through a formally organized collective, but rather as a communicative self-foundation with no formal organization of the whole system ».

<sup>104</sup> This is a move constitutional scholars often have trouble making. It is preferred however to alternative terms, such as ‘meta-regulation’, ‘indispensable norms’ or ‘higher legal principles’ which are inadequate to comprehend the complexity of issues that the concept ‘constitution’ covers.

<sup>105</sup> *Ibid*, p. 60. There is serious disagreement here under the wide umbrella of pluralism. Noting that « we should abandon, then, the false premise that constitutionalization inevitably means the transformation of a group of individuals into a collective actor », Teubner warns that « concepts which some find helpful, such as ‘epistemic community’, ‘eco-nomic community’, or ‘nomic community’ should be used with extreme caution, since, once again, none of the sociological characteristics of a community are present ». In this respect, he argues, « Berman’s ideas are therefore problematic, since his anthropological approach always assumes the presence of culturally defined communities that function as constitutional subjects. In reality, however, the communities referred to in social constitutions are just imagined identities, just self-descriptions of their operational unity » (*ibid*, p. 68).

<sup>106</sup> Walker, 2015, p.152 : global law is « uncharted law, not yet fully registred in any of our established maps of legal authority. Its projection, then, involves a gambit, a calculated risk that its explicit self-sponsorship as a form of law should not be undermined by a prior lack of autorisation ».

<sup>107</sup> *Ibid* p.85 « Rather than discontinue older lines of legal thought new approaches purport to develop them...as in Kumm’s instance on the continuity of cosmopolitan thought across the long epoch of modernity. Or it may claim even more venerable roots as un Günther’s claim for reh classical pedigree of law’s universal code, or Tuori’s assertion that ‘deep structure’ is aprt of the *longue durée* of law, supplying a common geological core for sucessive surface cultures ».

redemption or occasional reconciliation, which “draws its liberating appeal from the widespread view that these rights are inventions of reason and justice and therefore very much incarnate the good in an evil world”<sup>108</sup>. In turn, Samuel Moyn points out the “myths of deep origins” of human rights despite their very recent emergence in global political consciousness<sup>109</sup>. Similarly, in respect of the *lex mercatoria*, Teubner shows how the constitutional self-validation of the *lex mercatoria* also appeals to the history of ancient trade customs<sup>110</sup>. The « culture of the past » of the common law<sup>111</sup> or the natural rights pedigree of the civil law tradition are other examples in more traditional spheres. The conflict of laws itself is no exception; its own « saga » comprises a dramatic narrative of its foundational moment, as Pierre Gothot has brilliantly shown<sup>112</sup>.

The requirement of a foundational myth is linked in Teubner’s account to the constitution’s first essential function, which is to supply a way of dealing with the « paradox of self-reference »<sup>113</sup> or how a political system emerges out of nothing. Self-foundation or « mystical self-recursivity »<sup>114</sup> is described as a feature of the political constitutions of nation-states. “The self-constituting social system refers to the law which in turn supports self-foundation”. This means that the problem of self-reference is dealt with as it were by externalizing the paradox to the law. The same

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<sup>108</sup> Gunter Frankenburg, « Human Rights and the ‘Belief’ in a Just World”, *Int J Constitutional Law* (2014) 12(1): 35-60.

<sup>109</sup> Moyn 2010, p. 212.

<sup>110</sup> « In the *lex mercatoria*, the agreements concluded cannot refer back to a national legal constitution. Nevertheless, a constitutional basis has been developed in support of the idea that the expectations generated by these agreements are legally binding. Instead of referring to a national constitution, the *lex mercatoria* calls upon a rich fund of relevant non-legal material – international trade and transport customs and commercial practices – that developed in the chaotic environment of the world market. When disputes have to be settled, political and legislative institutions are by-passed and it is claimed, with little basis in fact, that these social practices have ‘always’ had legal effect and have had constitutional authority since time immemorial. Similarly, reference is made to earlier arbitration awards, made not according to existing national law, but rather according to standards of ‘equity’. These decisions, although they were expressly meant as non-legal (*ex aequo et bono*), are later referred to as if they were legally binding precedents, to which the techniques of distinguishing and overruling are then applied » (Teubner 2011, p. 89).

<sup>111</sup> Louis Asser-Andrieux, *L' autorité du passé : essai anthropologique sur la Common law*, Paris, Dalloz, 2011.

<sup>112</sup> P Gothot, ‘Simples réflexions à propos du saga des conflits de lois’ in *Mélanges en l’honneur de Paul Lagarde* (Dalloz, 2005) 343.

<sup>113</sup> Teubner, 2011, p. 82. And *ibid*, p. 63 : « Systems theory understands the ‘*pouvoir constituant*’ as a *communicative potential*, a type of social energy, literally as a ‘power’ which, via constitutional norms, is transformed into a ‘*pouvoir constitué*’, but which remains as a permanent irritant to the constituted power. The ‘constitutional subject’ is then not simply a semantic artefact of communication, but rather a pulsating process at the interface of consciousness and communication, resulting in the emergence of the *pouvoir constituant* ».

<sup>114</sup> *Ibid*, p. 104 : « We should only speak of constitutions in the strict sense when the medial reflexivity of a social system – be it politics, the economy, or some other sector – is supported by the law or, to be more precise, by the reflexivity of the law »

phenomenon can be observed in other social systems: their respective paradoxes of self-foundation are externalized to the law. « When a social system gives itself a legal constitution, it finds an escape from the deficiencies of self-foundation and its paradoxes »<sup>115</sup>. This is well illustrated by the example of the *lex mercatoria*, developed below. A second function of constitutions – at least, of successful constitutions – is to « induce limits within each social system through ‘self-steering’ mechanisms ». On the one hand, sub systemic rationality can develop pathological, self-destructive tendencies (‘turbo-autopoiesis’). This compulsive growth dynamic can be seen in the politicization, economization, juridification, medialization and medicalization of the world<sup>116</sup>. External political interventions as limits or breaks on these compulsive dynamics are therefore necessary to avoid chaos. The example of the financial system provides excellent evidence here. On the other hand, such interventions need to be « transformed into a self-domestication of the systemic growth dynamic ». This means that they require a form of translation so as to be integrated within the system in ways the latter can understand, as it were in its own grammar. « Fight fire by fire; fight power by power; fight law by law; fight money by money »<sup>117</sup>.

Although societal constitutionalism developed in order to understand changes which take place within the late-modern state, these ideas apply equally well to global regimes which cross the boundaries of nation-states. « In transnational contexts, it is the issue-specific regimes that form new kernels around which collective identities crystallize ». However, these regimes are distinctive because their « primary constitutional aim is to dismantle nation-state barriers: to break down the close structural couplings between the function systems and nation-state politics and law, and to enable function-specific communications to become globally interconnected.... Constitutive rules thus serve to unleash the intrinsic dynamics of the function systems at the global level. Unburdened by nation-state restrictions, the systems are now placed to follow, globally, a programme of maximizing their partial rationality.... ». This is quite clear in the context of the global economy, where « the dismantling of national production regimes releases destructive dynamics in the global systems; destructive dynamics in which the one-sided rationality-maximization of one social sector collides with other social dynamics »<sup>118</sup>.

The most familiar illustration, for private international lawyers, of an autonomous self-constitutionalizing system with “destructive growth tendencies” can be found in the transnational market regime (the global version of the *lex mercatoria*<sup>119</sup>) which has sprung in the past few decades from the idea of party

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<sup>115</sup> *Ibid*, p. 107.

<sup>116</sup> The analysis is applicable to law itself (*ibid*): « In the case of law, we can clearly see that law not only resolves conflicts and returns to a position of rest. Rather, its own regulations actually generate conflicts, which then call for further regulation. Through its regulatory intervention in daily life, law itself produces the situations which then give rise to conflicts. And, at the same time, each norm generates problems of interpretation, which themselves generate further conflicts. Finally, the sheer mass of legal rules produces rule-conflicts which call for the production of yet more rules. It appears that the high autonomy of law enhances the number of conflicts ».

<sup>117</sup> *Ibid*, p. 88.

<sup>118</sup> *Ibid*, p.79.

<sup>119</sup> A. Fischer-Lescano and G. Teubner, ‘Regime-Collision: The Vain Search for Legal Unity in the Fragmentation of Global Law’, 25 *Michigan Journal of International Law* 999 (2004).

autonomy. Such a regime of unaccountable private authority, complete with its own inner logic, structuring principles and private jurisdictions, prospers notably through extreme liberalization of arbitration<sup>120</sup>. It shows furthermore a marked propensity to expand into neighbouring areas such as investment law, where it clashes with other regimes<sup>121</sup>. It has come complete with a philosophical doctrine designed to legitimate the “regulatory lift-off” it has achieved, in respect of limits contained either in the laws of nation-states or indeed, as the context of investment arbitration shows, fundamental rights<sup>122</sup>. This is largely “how private corporate actors govern”<sup>123</sup>. In Teubner’s words, « corporate constitutional politics have successfully dismantled nation-state production regimes whenever they impede the global expansion of corporate activities »<sup>124</sup>. But why has the market regime’s own environment not secreted limits which the system might internalise ?

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

## B. IMPERSONAL RIGHTS

Periodically, the conceptual starting point of the conflict of laws analysis moves from systems, abstract rules, policy orientations or values, to rights. The rights

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<sup>120</sup> See H. Muir Watt, « Party autonomy in global context : the political economy of a self-constituting regime », *Japanese Yearbook of PIL*, 2015 (forthcoming).

<sup>121</sup> See H. Muir Watt, « The contested legitimacy of investment arbitration and the human rights ordeal: the missing link », Mattli & Dietz: *International Arbitration and Global Governance: Contending Theories and Evidence*, OUP 2014, Chapter 9.

<sup>122</sup> E. Gaillard, ‘Aspects philosophiques du droit de l’arbitrage international’ RCADI 2007, 329.

<sup>123</sup> D . Danielson, ‘How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance’ (2005) 46 *Harvard International Law Journal* 411.

<sup>124</sup> Teubner, 2011, p. 77.

model was initially adopted within the common law tradition (in the form of Dicey's vested rights), and, after a period of dominance of the civilian conception of concurrent legal orders<sup>125</sup>, it is now dominant once again in the very different context of international and regional constitutionalism (in the form of human or fundamental rights). In a political context in which territorial sovereignty supplied a means to resist the borderless realm of the Catholic Church<sup>126</sup>, this model was imagined as a means of circumventing the monopoly of the law of the forum in order to let in (as it were through the window) foreign law, suitably tamed and deprived of its sovereign edge, in the form of previously acquired rights. Its contemporary expression is the now familiar avenue through which transcending values of a higher legal order are given primacy over norms that are not conform, displacing if necessary the horizontal choice of law rule if it is not attuned to recognition. In the European context, the *Wagner* case handed down by the ECtHR is the most striking illustration to date of the impact of fundamental rights on conflict of laws reasoning<sup>127</sup>. Here, the right to a normal family life (article 8 ECHR<sup>128</sup>) overrides the prohibitive outcome obtained by applying the choice of law rule of the recognizing forum.

While the priority of vested rights was linked to chronology, the primacy of fundamental rights is a question of content. In both cases, however, the methodological significance of the turn to a rights paradigm is that it points towards recognition (of existing rights) rather than allocation (of laws poised for future application). Recognition pre-empts the conflicts of laws by trumping the application of more restrictive laws. There is much food for thought here for private international lawyers, who have not yet fully embraced the suggestion, mooted by Teubner, that human rights "might themselves take effect as 'conflict of law rules' between partial rationalities in society ».<sup>129</sup>

Similarly to international law (from which they are deemed to stem), human rights possess a high profile in contemporary moral consciousness<sup>130</sup>. They are indubitably powerful insofar as they are currently the most disruptive language in which ostensibly non-political contestation of existing social structures can take place<sup>131</sup>. As Samuel Moyn points out in *The Last Utopia*, their relevance in the past

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<sup>125</sup> See for instance, Roberto Ago, « Règles générales des conflits de lois », *RCADI*, 1936, t. 58, p. 243 ; P. Mayer *La distinction entre règles et décisions et le droit international privé*, Dalloz, 1973.

<sup>126</sup> Joel Paul, « Comity in International Law », 32 *Harv. Int'l L.J.* 1 (1991).

<sup>127</sup> *Wagner et J.M.W.L. c. Luxembourg* du 28 juin 2007 (CEDH (Sect. 1) affaire n° 76240/01),

<sup>128</sup> **Article 8 - Right to respect for private and family life** 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

<sup>129</sup> Teubner, 2011, p 145.

<sup>130</sup> Moyn, 2010, p176.

<sup>131</sup> Colin Scott and Robert Wai, "Regulating Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational Private' Litigation", in Colin Scott (ed), *as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation*, Oxford, Hart Publishing, 2001, p. 17.

three decades owes much to “the desertion of the stage by alternative promises to transcend the nation-state”. But it is counterproductive – suicidal, even - to compel them to take on all the “burden of morality” which brought other ideologies low - including the embrace of utopian politics or global governance, which they were not designed to do<sup>132</sup>. Emerging from “a yearning to transcend politics, human rights have become the core language of a new politics of humanity that has sapped the energy from old ideological contests...”<sup>133</sup>... « Born in the assertion of the power of the powerless they have become bound up with power of the powerful ». By extending its purview from the mission of catastrophe prevention and incorporating aspirations that are emphatically visionary but necessary divisive, human rights discourse becomes “ a recipe for the displacement of politics, forcing aspirations for change to present themselves as less controversial than they really are”<sup>134</sup>. The point of Moyn’s intervention is that human rights should leave room for other political utopias to come. « Put another way, the last utopia cannot be a moral one »<sup>135</sup>.

Integrating the insights of pluralism within the conflict of laws – now newly placed to solve all manners of global legal interaction - points to a way, if not of relieving human rights of this tremendous “moral burden”, at least of questioning their epistemological dominance within the law – and thereby clarifying their role within a renewed vision of globalized conflicts. Pluralist authors such as Ladeur and Teubner insist that it is misplaced to see the conflicts of laws as colliding rights<sup>136</sup>. According to societal constitutionalism, the correct matrix for framing the contemporary conflict of social systems is « anonymous » or impersonal: « on one side of the new equation is no longer a private actor as the violator of fundamental rights, but the anonymous matrix of an autonomized communicative medium »<sup>137</sup>. “Both the ‘old’ state-centred and the ‘new’ poly-contextural human rights question should be understood as people being threatened not by their fellows, but by anonymous communicative processes ». This means that vertical conflicts are not to be understood as involving an individual right-holder against a state authority, but as pitting the impersonal exigencies of two differentiated regimes. Indeed, in this context, « fundamental rights are not defined by the fundamentality of the affected legal interest or of its privileged status in the constitutional texts, but rather as social and legal counter-institutions to the expansionist tendencies of social systems »<sup>138</sup>. This is necessarily valid, too, for the horizontal effects of human rights (that is, in the relationships between private actors). Thus, if violations of fundamental rights stem from the totalizing tendencies of sectorial rationalities, there is clearly no longer any point in seeing their horizontal effect as if rights of private actors have to be balanced against each other. ... « The imagery of ‘horizontality’ unacceptably takes the sting out of the whole human rights issue, as if the sole point of the protection of human

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<sup>132</sup> Moyn, 2011, p. 223

<sup>133</sup> *Ibid.*, p. 227

<sup>134</sup> *Ibid.*

<sup>135</sup> *Ibid.*

<sup>136</sup> K. H. Ladeur, 'Methodology and European Law?', in M. van Hoecke (ed.), *Epistemology and Methodology of Comparative Law*, Oxford: Hart, 2004, p. 91. As will be shown below, however, rights claims may be perceived, on the contrary, as conflict of laws. Teubner 2011, p. 143

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

<sup>138</sup> *Ibid.*

rights was that certain individuals in society threaten the rights of other individuals »<sup>139</sup>. 'Fundamental rights', as understood here, differ from 'subjective rights' in private law as they are not about mutual endangerment of individuals by individuals, i.e. intersubjective relations, but rather « about the *dangers to the integrity of institutions, persons and individuals that are created by anonymous communicative matrices (institutions, discourses, systems)* »<sup>140</sup>.

However, although human rights should thus be reinterpreted as expressing underlying rationalities of social systems rather than purely individual claims, they remain an indispensable heuristic both under current argumentative conventions<sup>141</sup> and given the constraints of litigation<sup>142</sup>. Interestingly, though, through their use in this respect, they actually take on the function of conflict of law rules. « By protecting, for instance, the integrity of art, family, or religion against totalitarian tendencies of science, media, or economy, fundamental rights take effect as 'conflict of law rules' between partial rationalities in society »<sup>143</sup>. The fact that human rights are *not* to be taken at surface value makes them appear all the more indispensable within the project of societal constitutionalism. The normative agenda of the latter is to « construct constitutionally guaranteed counter-institutions in different social areas ». In other words, to put a break on the growth proclivity of autonomous systems. Usefully in such a context, « fundamental rights act not only as spaces of individual autonomy, but also as guarantees to include the entire population into the function systems »<sup>144</sup>. Obviously, this new function does not solve the problem of overload as described by Moyn. But it helps see behind the monolith and invites acknowledgement of their (here, epistemological) contingency. Beyond rights, the question, now, is to frame an adequate methodology to deal with conflicts framed as collisions between two function-systems each obeying its own inner logic. This is where perspective comes, as it were, into the (renewed) picture.

### III. QUESTIONS OF PERSPECTIVE.

A significant epistemological feature of global legal pluralism lies in the necessarily de-centered perspective it advocates for envisaging modes of

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<sup>139</sup> *Ibid*, p.142.

<sup>140</sup> *Ibid*.

<sup>141</sup> For our attempt to explore a semiotic of legal argument as set out by Duncan Kennedy, in private international law see, *Swiss Yearbook of Private International Law*, Vol. XIV (2012-2013).

<sup>142</sup> The condundrum is that conflicts of social systems still occur through litigation of individual rights: " How can the law describe the boundary conflict, when after all it has only the language of 'rights' of 'persons' available? Can it, in this impoverished rights talk, in any way reconstruct the difference between con- flicts of fundamental rights that are internal to society (person-related) and external to society (human-related)? Here we reach the limits not only of what is conceivable in legal doctrine, but also the limits of court proceedings. In litigation there must always be a claimant suing a defendant for infringing his rights. In this framework of mandatory binarization as person/person-conflicts, can human rights ever be asserted against the structural violence of anonymous communicative processes? » Teubner 2011, p. 146.

<sup>143</sup> *Ibid*, p 145.

<sup>144</sup> *Ibid*, p137.

communication of social systems between beyond the state<sup>145</sup>. A similar displacement of perspective is equally an important part of contemporary thinking in other, related, fields engaged in critical reflexion on law under globalisation. It can be seen, for example, in comparative law and anthropology, which reverse the relationship between center and periphery and explore the spread of ideas and institutions (legal transfers) from the point of view of the receiving (colonized or neo-colonized) legal order<sup>146</sup>. A similar stance is adopted by critical strands of public international law, which seek to bring third world perspectives into a field which is largely dominated by a Western, capitalist center (TWAAIL studies)<sup>147</sup>. Further instances can be found within human rights doctrine, which has incorporated standpoint analysis first advocated by gender and subaltern studies<sup>148</sup>. In all these cases, the epistemology has normative underpinnings in pluralist values of mutual tolerance. It is trite but nevertheless striking in the light of these recent developments elsewhere, that de-centering also has a long intellectual history within the conflict of laws<sup>149</sup>. Therefore, when legal pluralism advocates a heterarchical, reflexive approach to manage polycentric interactions among social systems, the conflict of laws is able to make available a supportive methodological framework (A). Moreover, in response to the usual critiques of pluralism, it shows that pursuing open-ended mutual accommodation does not exclude drawing the line at the threshold of tolerance nor does it contradict the requirements of sovereignty, wherever vested (B).

#### A. RECURSIVE REFLEXIVITY: UNILATERALISM IN NETWORK MODE.

The de-centering enterprise natural to “the pluralist structure of postnational law,”<sup>150</sup> excludes any overriding perspective from which to view autonomous social regimes and order them in any reassuring semblance of hierarchy. The appropriate methodology must necessarily take the form of mutual accommodation. What, then, should be done about true or irremediable conflicts? A similar difficulty seems poised to be carried over into global space: however descriptively adequate and normatively attractive, pluralist theories are surely of little use once the autonomy of normative regimes and the ensuing competition for supremacy are established.

The conflict of law reached a similar conclusion long before contemporary globalisation, in respect of unilateralist doctrines. While normatively attractive, unilateralism suffered from its radical inability to solve problems of overlaps and

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<sup>145</sup> Walker 2015, p. 151 et s., on the importance of the epistemic dimensions of global law.

<sup>146</sup> Frankenburg, 2013.

<sup>147</sup> *Third World Approaches to International Law*. See, *International Law And The Third World: Reshaping Justice* (Richard Falk, Jacqueline Stevens, & Balakrishnan Rajagopal eds., Routledge 2008).

<sup>148</sup> See Muir Watt, *Recognition*, 2013.

<sup>149</sup> Recognizing that a right only vests as long as there is a legal system to support it was a breakthrough both in the Continental European tradition, which thereupon renounced the universalist ideal, and in strands of neo-statuism influenced by US legal realism, which thereupon denounced a certain rights fetishism which had pervaded overly formal doctrines of the conflict of laws.

<sup>150</sup> Krisch, 2015, p. XXX (forthcoming)

gaps, since it could offer no overarching perspective from which to choose between conflicting laws equally desirous of applying or not applying. The problem was a stock of “orphaned” relationships<sup>151</sup>, or in the more recent vocabulary of functionalist methodologies, “unprovided-for cases” before which even policy analysis was seen to stall<sup>152</sup>. Renvoi, which is basically a unilateralist stance within multilateralism<sup>153</sup>, is similarly and notoriously vulnerable to an unending tennis match unless chance comes up with two identical connecting factors in succession. How helpful is it, then, for the conflict of laws to succumb to the pluralist siren of « a more fluid frame that has no categorical separation among legal spheres, but that also does not fully merge them or even define “the degree of authority” the norms of these different spheres possess”<sup>154</sup>. In short, how, without central norms, do you actually solve the conflicts? When pushed on this point, however, legal pluralists agree on the fact that there comes a time where some sort of limit has to be drawn<sup>155</sup>. The threshold of toleration is conceived as something similar to the exception of public policy in the conflict of laws; correctly analysed, this exception actually belongs to a unilateralist-pluralist scheme in the conflict of laws<sup>156</sup>.

This is where it becomes interesting to follow the lead of societal constitutionalism in order to understand what the de-centered standpoint implies in terms of methodology. According to this strand, at the start, a de-centered standpoint means reasoning in terms of networks and nodes, rather than hierarchy or monism. This is a familiar move in legal theory. Networks, in the place of hierarchy, have already become the new mode of conceptualising relationships between more traditional legal systems, and provide an alternative model for the international legal order challenged by fragmentation<sup>157</sup>. Its avatars are the judicial dialogue at regional level and various recent developments in the case-law of the European regional courts in respect of their mutual relationships, and those with other international authorities<sup>158</sup>. Furthermore, the influence of economic theories of regulation inspired

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<sup>151</sup> In the words of J-P Niboyet, who switched to unilateralism after being convinced of the virtues of renvoi (in his *Traité de droit international privé français*, Sirey, 7 vol., 1938-1950).

<sup>152</sup> L. Kramer, « The Myth of the "Unprovided-For" Case”, 75 *Va. L. Rev.* 1045 (1989).

<sup>153</sup> As are other components of the « general theory » of the conflict of laws, such as preliminary questions and characterization *lege causae*. See below, FN 151.

<sup>154</sup> Krisch, 2015, p. XXX (forthcoming)

<sup>155</sup> See the debat on this point between Berman and Patterson & Galan, above.

<sup>156</sup> For a diptychon of the two methodological types and the specific implications of each, see D. Boden, *L'ordre public : limite et condition de la tolérance. Recherches sur le pluralisme juridique*, thèse, Paris I, 2002. According to this author, the two templates were progressively mixed up, for the lack of a clear theoretical conception of the inner logic of each. Multilateralism then uses such techniques as renvoi or characterisation *lege causae*, or the exception of public policy, which are logically part of unilateralism.

<sup>157</sup> François Ost & de Michel van de Kerchove, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Presses des Facultés Universitaires Saint Louis, 2002. For a social theory extending networks from human or fictional legal actors to non-human actors or things. See B. Latour, *Reassembling the Social. An Introduction to Actor-Network Theory* (OUP, 2005).

<sup>158</sup> See for example, ECJ, Cases C-402/05P and C-415/05P, *Kadi and Al Barakaat*, judgment (Grand Chamber) of 3 September 2008, insisting that the international organisations, such as the Security Council of the United Nations, respect rights constitutive of the EU ; applying in turn its own version of Solange in respect of the ECJ, the ECtHR Application No 45036/98, *Bosphorus Hava Yollari Turizm*

by systems theory have carried networks into the very heart of private law: the “organisational contract” is a networked structure, which transcends more traditional categories of contract, tort and corporation<sup>159</sup>.

On the one hand, as a matter of structure, “networks are an institutional answer to rationality conflicts that result from the differentiation and autonomization of systems, in our context of transnational function regimes »<sup>160</sup>. They are « a peculiar combination of bilateral individual relations and multilateral overall co-ordination » which responds to « the fragile co-existence of different, mutually contradictory normative orders of the network nodes ». On the other hand, as a matter of method, reasoning in terms of networks in respect of conflicting social systems implies a specific form of reactivity of each node to its environment, and vice versa, which Krisch has named “recursive reflexivity”<sup>161</sup>. Thus, writes Teuber, “networks offer an institutional answer to conflicts of norms by transforming ... external contradictions into internal imperatives of the network nodes, which can be made situatively compatible with one another ». Networks « translate the external contradictions manifested in conflicts of norms into the internal perspective of the individual nodes, which internally reflects the relations between various levels, subsystems, network nodes, and the overall network. »<sup>162</sup> This produces « a ‘paradoxical structure’ of inter-institutional interweaving » triggered by (pervasive) situations of conflicting (and by definition, unstable) norms. Here, the « rationality premises of one system are to be exposed to those of the others. Because modern society has no central authority, all efforts at conflict resolution should be decentralized, they should put pressure on ‘the function systems to develop a stronger regard for the overall social environment. Because nobody else can do this.’ ».

In this respect, an explicit connection between this new reflexive pluralist approach and the conflict of laws has been made by Gunter Teubner<sup>163</sup>. Naturally, and once again, the perception of conflict (here as the mutual interference of dynamic global processes) mandates the methodology<sup>164</sup>. De-centralized interweaving appears as the most appropriate response to the complex global processes described above. The picture which emerges is that of self-contained, self-referential regimes related by networks, that are exposed, not just to ‘horizontal’ conflicts but also to ‘vertical’

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*Ve Ticaret Anonim Sirketi v Ireland* (2006) 42 ECHR 1. Comp too, for a dialogical reading of these relationships, Nico Krisch, *Beyond Constitutionalism, The Pluralist Structure of Postnational Law*, OUP 2010.

<sup>159</sup> Stefan Grundmann, Fabrizio Cafaggi, Giuseppe Vettori (eds), *The Organisational Contract*, Ashgate 2013; Comp. H.Muir Watt, « Governing Networks: A Global Challenge For Private International Law », *Maastricht Journal of European and Comparative Law* 2015 – 3.

<sup>160</sup> Teubner, 2011, p. 159.

<sup>161</sup> Krisch, 2015, p. XXX (forthcoming)

<sup>162</sup> Teubner, 2011, p. 159.

<sup>163</sup> Once again, social differentiation mandates a polycentrism which is very far from the contemporary unifying projects of mega-constitutionalism.

<sup>164</sup> cf three dial types of conflict and three dial methods.

and 'diagonal' conflicts specific to multi-layered governance<sup>165</sup>. In response, each network node " internally develops its own conflict of laws from which perspective it can decide conflicts of norms »<sup>166</sup>. There is no network centre to decide norm conflicts between nodes; rather, the nodes decide the issues for themselves in a decentralized manner.

Of course, this is far from unheard of in the conflict of laws, albeit in respect of national legal orders. It looks much like a description of intra-federal conflict of laws in the American system, where each state manages conflicts on its own account, within a wider, loose, framework of coordination provided by the network system (such as full faith and credit or mutual recognition). Beyond regional structures, Alex Mills has proposed a similar conceptualization of the conflict of laws in terms of polyarchy, federalism and peer review<sup>167</sup>. Even from a traditional conflict of laws perspective, the insight according to which each node reacts on its own account to conflicting signals from its environment, all the while aspiring to some sort of global coordination, is perfectly comprehensible<sup>168</sup>. Indeed, it has long been accepted in this context that (unless there is an international treaty) each legal system can only decide conflicts for itself (even when it integrates elaborate devices such as renvoi that purport to integrate the viewpoint of various legal systems outside itself). This also led to the discovery that there is no such thing as a subjective right « out there »<sup>169</sup>: as Wengler showed back in 1933, a right can only exist from the extremely relative perspective of a particular forum<sup>170</sup>.

But this cursory glance at the history of the conflict of laws also shows that, conceivably, each node might function in a closed mode, as under particularist multilateralism during the twentieth century<sup>171</sup>. The difference then is in the requirement of reflexivity, which leads each node to evolve by integrating the information it receives from its environment. Thus, reflexivity takes the idea a step further and requires that « each node then has the responsibility to incorporate into its internal perspective the norms of the other nodes as well as those of the overall order »<sup>172</sup>. Once again, however, this clearly rings a bell. Under the intellectual

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<sup>165</sup> See Joerges, 2011. Network theory is seen to fit the heterarchical relations between the various semi-autonomous levels of multi-level governance within the EU.

<sup>166</sup> Teubner 2011, p. 159.

<sup>167</sup> Alex Mills, « Variable Geometry, Peer Governance and the Public International Perspective on Private International Law » in Muir Watt & Fernandez Arroyo, 2014, p. 245.

<sup>168</sup> This was no doubt, in another vocabulary, the dominant philosophical theory in continental doctrine in the twentieth century, which invested the conflict of laws with a function of coordination of particularist viewpoints.

<sup>169</sup> As opposed to a fundamental right, which does not need to be created by one of the national laws in conflict.

<sup>170</sup> W. Wengler, « The general principles of private international law », *RCADI*, 1961, t. 104, p. 273 ; F. Rigaux, « Les situations juridiques individuelles dans un système de relativité générale », *RCADI*, 1989, t. 213, p. 13, spéc. p. 84 et s.

<sup>171</sup> When equipped with a mechanism such as renvoi which operates "as if" the system were open, it demonstrates the intrusion of unilateralist-pluralist elements.

<sup>172</sup> *Ibid* p.160. This sophisticated account of societal constitutionalism yields the idea of a differentiated collision-law or conflict of laws analysis, as applicable to normative orders beyond the state. It is similar in many respects to the framework proposed by Talia Fisher, 'A Nuanced Approach to the Privatization Debate' (2011) 5 *Law and Ethics of Human Rights* 71 and discussed in Muir Watt,

influence of Rolando Quadri<sup>173</sup>, the unilateralist revolt against mainstream multilateralism explicitly rejects the closure of the latter and embraces a more complete attention to the other which is certainly more in line with the methodological dictates of reflexive pluralism. The traditional reflexive devices of the “general theory” of the conflict of laws - renvoi, preliminary questions and characterization *lege causae* - are all, after all, borrowed from unilateralism<sup>174</sup>. Moreover, reflexive responses to the conflict of laws have regularly surfaced in “cosmopolitan substantive”<sup>175</sup> or synthetic forms. Indeed, the proposal formulated by Teubner in cases of conflicts involving transnational specialized regimes (such as a conflict between party autonomy and the requirements of health, culture, finance or the environment), is for a ‘substantive law approach », which « takes up elements from the conflicting constitutional norms in each case and reflects these in the shape of a new substantive norm oriented at the same time towards the ‘ordre public transnational’. This leads to a form of hybrid law as, from the viewpoint of the deciding authority, the substantive norm internalizes alien constitutional norms into its own law, but at the same time leaves their autonomy undisturbed ». Interestingly,

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Schism 2011, p. 418. The idea here is that different methods are available to deal with issues of conflict according to the type of « social couplings » involved for different types of societal spheres. It may well be possible here to detect a similarity to the differentiated modes of treatment in traditional conflicts doctrine according to the type of legal area involved (persons, contracts, etc). Thus, in societal constitutionalism, different regimes (or nodes) each entertain particular relationships with the social. The parameter is the constitution of the nation-state, which is embedded within an encompassing legal order. In this respect, it disposes of an ‘internal balance’ constituted by mechanisms of self-limitation, notably a set of fundamental rights. By contrast, specialised transnational regimes may present a far lesser degree of social embeddedness, lacking similar internal resources. These are « tailored solely to a functionally differentiated sector of world society and as a consequence represent a ‘self-contained regime’ that develops specialized norms reflecting the independent rationality of the societal sector coupled to them. Regime constitutions are partial constitutions that are not based on overall social processes, i.e. those directed at the broader public interest ». At the other extreme, « indigeneous » normative orders are more strongly embedded at the overall social level than nation-state law. The reason is that « they appear in social areas in which no functionally differentiated legal system has been formed: their norms are inseparably interwoven with religious, political, and economic aspects ». <sup>172</sup> These differing degrees of social embeddedness, it is suggested, impact directly upon the appropriate mode of conflict resolution. In instances involving only transnational specialized regimes (such as a conflict between party autonomy and the requirements of health, culture, finance or the environment), the appropriate methodology would be the ‘substantive law approach », which « takes up elements from the conflicting constitutional norms in each case and reflects these in the shape of a new substantive norm oriented at the same time towards the ‘ordre public transnational’. This leads to a form of hybrid law as, from the viewpoint of the deciding authority, the substantive norm internalizes alien constitutional norms into its own law, but at the same time leaves their autonomy undisturbed. This recalls a conception of ordre public conceived as a positive measure of tolerance towards alterity. On the other hand, more socially embedded regimes appear as generating « intercultural conflicts ». An example, developed elsewhere, would be claims grounded on indigenous property rights against the landgrab by private investors in the context of investment arbitration<sup>172</sup>. In many cases, the issue will be brought before the courts and framed as involving a fundamental right (for instance, the right to land as property, but also as environment and furthermore as a sacred resource, which enters into collision with freedom of contract).

<sup>173</sup> R. Quadri, *Lezioni di diritto internazionale privato*, 3rd edn, Naples, Liguiri, 1961.

<sup>174</sup> Boden, 2002.

<sup>175</sup> Hannah L. Buxbaum, « Conflict of Economic Laws: From Sovereignty to Substance », *Virginia Journal of International Law*, Vol. 42, No. 4 (Summer 2002) [pp. 931-977].

some years ago, Von Mehren and Trautman had suggested this methodology for the needs of interstate conflict of laws, according to which each legal order reinvents the foreign norm in the light of a synthesis of different values<sup>176</sup>. But is there any limit, consistent with the premisses of pluralism, to this reflexive open-endedness?

## B. TOLERANCE AND THE INVERSION OF SOVEREIGNTY

Conceptualising modes of interaction is not enough to respond to the conundrum which has plagued legal pluralism constantly, within or without the state. Is there a limit to the tolerance of alterity, when the values of the receiving system are perceived to be threatened? Must a liberal, Western culture turn a blind eye to practices that it perceives as antagonistic to its political morality, such as hate-speech, or excision<sup>177</sup>? This is the point at which theories of legal pluralism usually fall short of providing an answer. Deferent to the other, respectful of alterity, they also appear as apologetic, devoid of politics, making no demands on the world<sup>178</sup>. A recent debate on the place of religious justice (sharia courts) in a secular state illustrates the apparent dilemma. Pluralists see no reason to prohibit the peaceful exercise of religious jurisdiction within a predominantly secular community. Of course, this politically liberal position is critiqued for the excess of tolerance across the political spectrum, « from rights advocates worried about illiberal practices to nation-state sovereigntists worried about giving any authority at all to non-state community ties »<sup>179</sup>. But the familiar internal – as it were, methodological – critique is formulated in the other direction, by Pattersen and Galán, who argue that pluralism is not really pluralism unless « liberal communities allow sharia courts to operate *regardless* of whether or not they violate fundamental values of the liberal community »<sup>180</sup>.

However recurrent, the objection is not insuperable, however (whether addressed to legal pluralism or to liberal theories of justice more generally). An answer can be found for instance, in terms of the Rawlsian doctrine of overlapping consensus, now also used to conceptualise heterarchical relationships between overlapping legal orders in the international arena<sup>181</sup>. In turn, global legal pluralism advocates

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<sup>176</sup> A. von Mehren & D. Trautman, *The Law of Multistate Problems*, 1965 (West case-book) under the label of 'functional analysis'.

<sup>177</sup> Pierre Legrand, « Sur l'analyse différentielle des juriscultures », *Revue internationale de droit comparé*, 4-1999, p. 1069. A comparative analysis of cultural practice, say of female genital mutilation, can tend towards an understanding within that culture. Private international law is cocnered with the place that practice can have within the culture of the receiving or forum state.

<sup>178</sup> M. Koskenniemi, *The Politics of International Law* Hart Publishing 2011, p. 35.

<sup>179</sup> Berman, 2015, p.XXX (forthcoming)..

<sup>180</sup> Alexis Galán & Dennis Patterson, « The Limits of Normative Legal Pluralism », 11(3) *Int'l J. Const. L.* 783 (2013) ; in response, P. Berman, « How legal pluralism is and is not distinct from liberalism: A response to Alexis Galán and Dennis Patterson », *Int J Constitutional Law* (2013) 11(3): 801-808.

<sup>181</sup> J. Cohen and C Sabel, 'Directly-Deliberative Polyarchy' (1997) 3 *European Law Journal* 314

acceptance (here, in the case of sharia courts), “so long as those courts do not entrench upon fundamental values of the liberal community »<sup>182</sup>. This is where the the conflict of laws provides additional insights. It is the point on which the conflict of laws diverges from legal comparatism; specifically, whereas both are geared to understanding otherness, the problem of private international law is ultimately to fit difference into the legal universe of the forum. Here, too, the methodological contest within the conflict of laws becomes highly significant<sup>183</sup>. While multilateralism is assimilationist in that reduces the acceptance of alterity to models it can immediately comprehend, unilateralism, built on mutual accommodation, responds to this challenge by pushing back the limits of acceptance of difference until it threatens the substantive values of the forum. The limit is defined by substance, not form. In continental theory, the variable intensity of the exception of public policy, according to whether a situation has been created abroad or within the forum, is part of the unilateralist scheme<sup>184</sup>. According to this doctrine, which has taken on a more contemporary form in the “principle of proximity”, situations which would normally be intolerable if they were to be created with the direct implication of the forum through close connection to local society, can nevertheless be recognized *ex post*<sup>185</sup>. This device therefore serves to push back the point at which the forum will refuse to recognize a foreign institution. This is why the pluralist response makes sense: “Just because one embraces insights from legal pluralism, after all, does not mean that the values of pluralism must necessarily and always trump any other values a community might hold. It simply cannot be that legal pluralism is only a true normative position if it is pursued to the exclusion of all other values, interests, and commitments »<sup>186</sup>.

That such a limit must be set in respect of transnational regime conflicts beyond the state is also a conclusion reached in a different way by Teubner’s societal constitutionalism. The problem is set in structural terms, as the need for “countervailing tendencies” in respect of the “compulsive growth compulsion” of autonomous regimes<sup>187</sup>. The disquieting conclusion which comes of the observation of specialized systems such as finance in the global arena is that « the self-reproduction of function systems and formal organizations follow an inexorable growth imperative »<sup>188</sup>. This idea can equally be expressed, in Polyani’s terms, as a

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<sup>182</sup> Berman, 2015 : « so long as » evokes the *Solange* doctrine of the German Constitutional Court (Bundesverfassungsgericht or BVerfGE) : See BVerfGE 37, 271 (Solange I); English translation at [1974] 2 CMLR 540; 73, 339 (Solange II); English translation at [1987] 3 CMLR 225.

<sup>183</sup> As emphasised above, various perceptions of “conflict” as including competition, or the aspiration towards international coordination, alongside outright sovereign antagonism, have been bound up historically with diverse methodologies and different conceptions of what it is (abstract rule, individualised right, legal system as a whole, policy) that is actually involved in the interaction. The allocatory function is exercised on the basis of private or public law values, domestic policy considerations, or deliberately cosmopolitan vision.

<sup>184</sup> Boden, 2002.

<sup>185</sup> The contemporary version, proximity, introduces a distance element (linked to the liberalisation of jurisdictional criteria).

<sup>186</sup> Berman, 2015, p. XXX (forthcoming).

<sup>187</sup> *Ibid* p. 71.

<sup>188</sup> *Ibid*, p.79.

consequence of the “disembedding” of such regimes from their social roots<sup>189</sup>. In terms equally familiar to the conflict of laws, they generate externalities within their environment, thereby threatening the global commons<sup>190</sup>. The explanation is to be found in the specific structure of these specialized systems, which are « oriented towards one and only one binary code ». As such, and differently from the social systems of nation-states, they destroy “the inherent self-limitations which worked effectively in the multifunctional institutions in traditional societies”. This, then, is the particular problem of globalization: « when the function systems become global, thus freeing themselves from the dominance of nation-state politics, there is no longer an agency to set them limits, stem their centrifugal tendencies, or regulate their conflicts »<sup>191</sup>. Whatever methodology is used then, to decide the conflicts which arise from such externalities, needs to set from the outside the very limits which such systems have eaten up from the inside<sup>192</sup>. Teubner proposes the concept of ‘sustainability’ with which to capture the idea. Originally, this principle was designed to restrict economic expansion at the expense of the natural environment with a view to the protection of future generations. It is proposed here, however, that it should not be limited to the relationship of the economy to nature, nor to the relationship of a social system to just one of its environments. « Sustainability must be reconsidered in application to all function regimes; it must at the same time include not just the natural environment, but all relevant environments. Environment is to be understood here in the broadest sense, as the natural, social, and human environment of transnational regimes »<sup>193</sup>.

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

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<sup>189</sup> K. Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time*, Boston, Beacon Press 2001 (1944), qualifying the idea of self-regulating market as a dangerous utopian myth. On Polanyi’s concept of « disembeddedness » and its possible use for the conflict of laws, see Muir Watt 2011 (Schism).

<sup>190</sup> On the possible use of conflict of laws as limiting negative externalities of legislation in respect of the global commons, see Muir Watt, RCADI 2005.

<sup>191</sup> *Ibid*, p. 42

<sup>192</sup> *Ibid*, p.166 : « If the goal is to limit the expansion of modern-day institutions, there is no way around reconstructing extrinsic factors using intrinsic concepts, in order to erect internal barriers in the appropriate positions ».

<sup>193</sup> *Ibid*.

Berman notes, « scholars of constitutional pluralism seek structures to guide constitutive systemic interactions beyond the nation-state, and pluralism can offer a helpful rubric for building such structures. Significantly, as Walker's work makes clear, legal pluralism provides a way to reinvigorate constitutional discourse by reorienting it away from the structure of a single state and towards a discussion of how to manage constitutive interactions among multiple normative systems »<sup>194</sup>.

In this respect, Nicole Roughan argues that what pluralists need to develop, in order to combat monist conceptions of the law (with Raz in mind, notably), is an "account of law that explains how different supremacy claims can be integrated and mutually recognized while upholding the authority of law »<sup>195</sup>. Her idea of « relative authority » aims to provide such an account: relative authorities that must "cooperate, coordinate, or tolerate one another *if they are to have legitimacy*" <sup>196</sup>. In this model, the claim to legitimate authority actually occurs *through* interdependence and interaction. Mireille Delmas-Mary develops a similar idea, the passage from « solitary sovereignty » to « solidary-sovereignty » (de la souveraineté solitaire à la souveraineté solidaire »<sup>197</sup>). Both these positions evoke the conclusions reached within international relations theory on « sovereignty as symbolic form ». This takes us back to the question of perspective. Indeed, Jens Bartelson shows how the concept of sovereignty has become inverted in international politics<sup>198</sup>. Initially designed to protect the political community of the nation-state from outside intervention, it is now used to justify external interference. Full sovereignty is the attribute of good states (benchmarked as such) who have conformed to the requirements of international law. Sovereignty, in other words, is has come to do work that is the very reverse of its initial function. The concept has been turned inside out ; perspective is reversed.

## CONCLUSION : CONFLICTING RATIONALITIES IN PRACTICE.

Bartelson's analysis, which perfectly captures the theoretical move by which contemporary pluralist legal theory establishes the conflict of laws as its new axis, is conducted in the sophisticated terms of aesthetics<sup>199</sup>. However, as is often the case, practice has not waited for theory to catch up before making an equally adventurous move. It has already had to confront conflicting claims, values, interests, ideals, and norms which appear beyond the remit of state law, in varied spheres and with diverse stakes and complex dynamics. It is naturally less free than legal theory to break out of conventional vocabularies in order to react appropriately<sup>200</sup>. However, a

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<sup>194</sup> Berman, 2015, p. XXX (forthcoming).

<sup>195</sup> « From Authority to Authorities: Bridging the Social/Normative Divide », in Cotterrell & Del Mar 2015 (forthcoming).

<sup>196</sup> *Ibid.*

<sup>197</sup> *Résister, responsabiliser, anticiper*, Paris, ed. Seuil 2013.

<sup>198</sup> Bartelson, 2014.

<sup>199</sup> For a return of aesthetics, too, in comparative legal theory, see PG Monateri, 2015.

<sup>200</sup> On the constraints of conventional argument bites, see Duncan Kennedy, *A Semiotics of Legal Argument*, Academy of European Law (ed.), Collected Courses of the Academy of European Law,

particularly daring example, which both acknowledges the conflicts between expanding autonomous regimes, and proposes an equally pluralist response in terms of its analysis, can be found in a recent child slavery case in US federal court, involving cocoa farms in the Ivory Coast. Appropriately, as an illustration of a problematic that is emblematically global, it concerns the functioning of world-wide value chains and commodities markets, which are arguably today the most potent recipes for destructive externalities in the global social and ecological environment<sup>201</sup>.

The court (US Court of Appeals for the 9th Circuit) refers (for jurisdictional purposes, under the Alien Tort Statute) to the economic leverage exercised by a particular brand in the world commodity market, from which it then draws legal inferences. In *DOE V. NESTLE USA, INC.*<sup>202</sup>, the Court asserts “.. the defendants had enough control over the Ivorian cocoa market that they could have stopped or limited the use of child slave labor by their suppliers. The defendants did not use their control to stop the use of child slavery, however, but instead offered support that facilitated it. Viewed alongside the allegation that the defendants benefitted from the use of child slavery, the defendants’ failure to stop or limit child slavery supports the inference that they intended to keep that system in place. The defendants had the means to stop or limit the use of child slavery, and had they wanted the slave labor to end, they could have used their leverage in the cocoa market to stop it. (...) the defendants participated in lobbying efforts designed to defeat federal legislation that would have required chocolate importers and manufacturers to certify and label their chocolate as “slave free.” As an alternative to the proposed legislation, the defendants, along with others from the chocolate industry, supported a voluntary mechanism through which the chocolate industry would police itself”.

Remarkably, neither territory, nor sovereignty, nor the requirements of foreign policy are part of the legal reasoning used by the court, although they have been the focus of (private international) law’s more familiar approach to the governance of corporate conduct abroad. On the other hand, what the Court is clearly attempting to do, within the formal confines of a determination of jurisdiction, is to bring the pressure of the legal system on a point (in various vocabularies, a “hub”, weakest link or “pressure point”, or a point of “jurisdictional touchdown”) in a global production chain. Furthermore, the passage cited draws attention to other normative phenomena involving private power, self-regulation, reputational pressure and certification of compliance to moral standards. The leverage of private actors within the market, through their brands, is acknowledged, as are their power of regulatory capture through lobbying, and the triumph of self-regulation. The legal response can be understood in terms of social responsibility, jurisdictional touchdown, victim access to justice (rather than territorial jurisdiction, contract, corporate form, market) and a political horizon in which the pursuit of profit or market efficiency is balanced against other values.

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Kluwer, Volume III, Book 2, 309-365; and for an attempt to apply this to the conflict of laws, H. Muir Watt, « A semiotics of private international legal reasoning », *Swiss Year- book of PIL* volume 14 (2012/2013), pp. 51-70).

<sup>201</sup> On their implications for hunger, see Olivier De Schutter & Kaitlin Y Cordes, *Accounting for Hunger. The Right to Food in the Era of Globalisation*, Hart, 2011.

<sup>202</sup> Filed September 4, 2014.

On reading the case, the time seems ripe – indeed, it may be a question of survival of the discipline – for the conflict of laws to absorb these pluralist understandings, which it can enhance, in turn, with the body of knowledge that first emerged in a pre-modern context of plural authorities, unchartered territories, and indeterminate boundaries between the public and the private spheres. Indeed, enriched conflict of laws theory has the potential to serve at the problematic heart of global law and its relationship to global justice, by contributing principles with which to govern non-state authority; infuse hybrid normative interactions with ideas of tolerance and mutual accommodation; and ensure accountability in the global decision-making processes through deliberation<sup>203</sup>, contestation<sup>204</sup>, and recognition<sup>205</sup>.

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<sup>203</sup> Jacco Bomhoff, *op cit*, conceptualizing private international law as a “site of contestation and deliberation over questions of authority, responsibility and identity”.

<sup>204</sup> Robert Wai, *op cit*.

<sup>205</sup> H. Muir Watt, « Private international law beyond the Schism », *op cit*.