Jurisprudence Without Confines: Private International Law as Global Legal Pluralism

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Abstract

This article arises from Professor Muir Watt’s keynote address to the CJICL annual conference on 8th April 2016. In her article, she considers whether private international law can offer specific insights into important issues that challenge contemporary legal theory. Specifically, she analyses whether legal pluralism can encompass private international law to craft a jurisprudence beyond borders. She argues that conflict of laws theory can contribute principles, infuse hybrid normative interactions and ensure accountability in the relationship between global law and global justice.

Keywords

Private international law, legal theory, legal pluralism, jurisprudence, conflict of laws

1 Introduction

The radical changes wrought by globalisation in the normative landscape beyond the nation-state,1 of which this conference provides so many excellent illustrations, invite us to reflect upon whether private international law as a discipline2 or an

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1 Globalisation is understood here as the specific stretching of time and space which coincides with late modernity, Anthony Giddens, The Consequences of Modernity (Polity Press 1991) 64; the coming of ‘risk society’; see generally, Ulrich Beck, La société du risque. Sur la voie d’une autre modernité (Flammarion 2008); global neo-liberal economics (which will be questioned below); the paradoxical ‘return of science’, see generally, Philip Pomper and David Gary Shaw (eds), The Return of Science, Evolution, History, and Theory (Rowman & Littlefield 2002); in a period of increasing disbelief in the values of modernity; and, with particular relevance to international law (public and private), the ‘liquidification’ of sovereignty, see generally, Zygmunt Bauman, L’identité (l’Herne 2010).

2 What is a legal discipline? See generally, Frédéric Audren, Qu’est-ce qu’une discipline juridique? (Sciences Po Press) (forthcoming).
‘intellectual style’ has specific insights to bring to some of the most significant issues that challenge contemporary legal theory. If there is such a thing as an emerging global legal paradigm, that is, a legal consciousness comprising modes of reasoning and a conceptual structure, it requires an overhauling of the concepts with which to understand (modern) law’s foundations and features. It also mandates a reconsideration of the values that constitute law’s normative horizon; calls for an adjustment of methodological and epistemological tools with which to understand social complexity; and justifies a renewal of the terms of the debate about legitimacy of political authority. The challenge for legal scholarship is clearly considerable. Arguably, the days of analytical jurisprudence are numbered; more hopeful avenues are opened by interdisciplinary attempts from various directions: studies of sovereignty from a literary or religious perspective; global legal pluralism


4 Seeing international law (public and private) as a privileged standpoint from which to view legal theoretical issues is not new. See generally, for an example, Henri Batiffol, Aspects philosophiques du droit international privé (Dalloz 1956); Rolando Quadri, ‘Le fondement du caractère obligatoire du droit international public’ (1952) 80 Recueil des Cours de l'Académie de Droit International 580; but has the modern international lawyer ‘rejected theory’ as Martti Koskennenni surmises? See Martti Koskennenni, From Apology to Utopia: The Structure of International Legal Argument (CUP 2006) 187; Today the Transnational Legal Theory journal publishes conflicts of law’s contributions to legal theory. See generally, Martin Herberg, ‘Global Governance and Conflict of Laws from a Foucauldian Perspective: The Power/Knowledge Nexus Revisited’ (2011) 2(2) Transnat’l Leg Theory 243 and Horatia Muir Watt, ‘Private International Law beyond the Schism’ (2011) 2(3) Transnat’l Leg Theory 347; See generally, Horatia Muir Watt, ‘La globalisation et le droit international privé’ in Vincent Heuzé and others (eds), Mélanges en l’honneur du Professeur Pierre Mayer (LGDJ 2015).


7 See generally, Pier Giuseppe Monateri, Geopolitica del diritto. Genesi, governo e dissoluzione dei corpi politici (Laterza 2013).
from a sociological perspective; and a critique of the contemporary quantitative turn which uses indicators as substitutes for comparative law.

At first glance, it does not seem that private international law—with all of its horizon beyond the state and its complex legal toolbox—has any relevance here at all. It has recently been discredited by Neil Walker as a 'parochial form of boundary-maintenance' among various 'lateral co-ordinate approaches' to global law. However, at this point, it is worth reflecting on a recent, striking statement by Gunter Teubner, which, in stark contrast, elevates the conflict of laws to a meta-constitutional level:

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.

Could it be, then, that private international law might fit within this ambitious strand of legal pluralism, towards the crafting of a ‘jurisprudence beyond borders’? This is the question to which this article attempts to respond. It begins first by tracking the rise of pluralism as an explanatory and normative framework (I). It then seeks to understand why the conflict of laws could be undergoing a revival in this context (II). It finally concludes by attempting to define what pluralism means when translated into the vocabulary of the conflict of laws (III) and by providing an example taken from judicial practice (IV).

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9 See generally, Kevin E Davis and others (eds), Governance by Indicators: Global Power through Quantifications and Rankings (OUP 2012); Benoît Frydman and Arnaud Van Waeyenberge, Gouverner par les standards et les indicateurs. De Hume aux rankings (Bruylant 2014).
11 Teubner (n 8) 152.
12 See generally, Berman, Global Legal Pluralism: A Jurisprudence of Law Beyond Borders (n 8).
2 Pluralism is in; conflicts are out

Indisputably, globalisation, or its contemporary (fourth\textsuperscript{13}) avatar, is inflicting an identity crisis upon the conflict of laws.\textsuperscript{14} 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 affect established forms of legal knowledge; probing them is a distinctly ‘dangerous method’.\textsuperscript{15}

Traditionally—that is, in the course of the last century and under the influence of classical legal thought in international law\textsuperscript{16}—the ordering of competing normative claims outside any particular domestic system was sought

\textsuperscript{13} For the first three, see generally, Kennedy (n 6).

\textsuperscript{14} 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 that 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 questioned below) to private transnational authority are all made in specifically legal terms, even if they occur outside the bounds of any supporting institutional system. 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 the International Labour Organization and the Organisation for Economic Co-operation and Development) and by activists, in the name of civil society, so that law appears as crucial within the many political projects undertaken with a view to reconstruct a fairer global society. Human rights as the ‘last utopia’ will be further questioned below. See generally, Samuel Moyn, \textit{The Last Utopia: Human Rights in History} (HUP 2010).

\textsuperscript{15} ‘Dangerous method’ (as Jung described psychoanalysis) is the topic of the current Private International Law as Global Governance (PILAGG) research project. See ‘PILAGG Public International Law as Global Governance’ <http://blogs.sciences-po.fr/pilagg> accessed 10 July 2016.

\textsuperscript{16} ‘Classical legal thought’ is a paradigm identified in US domestic law (see generally, Duncan Kennedy, \textit{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).
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.\(^{17}\) In the wake of displacements of power from public to non-state actors,\(^ {18}\) 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.\(^ {19}\) 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 legitimise, challenge, or govern—new, diffuse and disorderly expressions of power and normativity; specifically, those of the ‘unauthorised’ actors of late modernity\(^ {20}\) 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.\(^ {21}\) Comparative law has left behind its static

\(^{17}\) See generally, Roger Cotterrell and Maksymilian Del Mar (eds), *Authority in Transnational Legal Theory: Theorising Across Disciplines* (Edward Elgar 2016).

\(^{18}\) ibid; For an exhaustive study of multinational corporations as regulators, see Anna Beckers, ‘Taking Corporate Codes Seriously: Towards Private Law Enforcement of Voluntary Corporate Social Responsibility Codes’ (DPhil Thesis, Maastricht University 2014).

\(^{19}\) On the inversion of sovereignty, see generally, Jens Bartelson, *Sovereignty as Symbolic Form* (Routledge 2014).


\(^{21}\) See generally, Emmanuelle Jouannet, *The Liberal-Welfarist Law of Nations: A History of International Law* (Christopher Sutcliffe tr, 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 generally, Muir Watt, ‘Private International Law beyond the Schism’ (n 4).
classifications of family traditions to join forces with the anthropology of legal transfers\(^{22}\) or contribute to the aesthetics of global spaces.\(^{23}\) 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\(^{24}\) so as to grapple with the possible foundations of legal authority beyond state boundaries.\(^{25}\) Global, cosmopolitan or societal constitutionalism\(^{26}\) and, more improbably, global administrative law\(^{27}\) 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,\(^{28}\) 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.\(^{29}\)


\(^{23}\) See generally, Monateri (n 7).

\(^{24}\) Berman, *Global Legal Pluralism: A Jurisprudence Beyond Borders* (n 8).

\(^{25}\) See generally, Cotterrell and Del Mar (n 17) with various pluralist contributions from Paul Berman, Nico Krisch and 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.

\(^{26}\) See generally, Mattias Kumm, ‘The Cosmopolitan Turn in Constitutionalism: An Integrated Conception of Public Law’ (2013) 20(2) Ind J Global Legal Stud 605; for ‘societal constitutionalism’ inspired from Luhmann’s systems theory, see Teubner (n 8) discussed in detail below.


\(^{28}\) See Paul Schiff Berman, ‘The Evolution of Global Legal Pluralism’ in Cotterrell and Del Mar (eds), *Authority in Transnational Legal Theory* (n 17).

\(^{29}\) ibid.
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 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 of theories of global law, Neil Walker classifies together, as models of a 'lateral-coordinate approach', both the conflict of laws and legal pluralism. 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, while the work of Santi Romano has become a controversial reference for unilateralist doctrines. 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, is out. Why, then, has its status so declined as to be reduced to a 'parochial form of boundary-maintenance' 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'. 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 its own orbit. This is not to deny that there is a flourishing industry of traditional

30 See Walker (n 10) s 3.4.1.2.
31 See generally, Phocion Francescakis, La théorie du Renvoi et les conflits de systèmes en droit international privé (Sirey 1958).
34 Walker (n 10) 108.
private international rule-craft around the world; indeed, codification seems never to have been so popular. But this does not help to 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, 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-European Union market issues, an auxiliary to international commercial arbitration, or a largely strategic tool for cross-border forum-shoppers? Legal issues arising in connection with cross-border collisions of rights and norms seem to fall within the remit of other, more recent, more overbearing or more political principles such as federalism (or free movement in the European Union) or human rights, which both sweep away private international techniques and methods into the great sea of proportionality. 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 suffices, or conflict rules break down under the pressure of public policy. Perhaps, then, the sleeping discipline (dog or beauty?) should be left to lie, as a vestige of the pre-global age.

A further consideration is that it has missed the very turning which it was eminently well placed to take, and which might have invested it both as queen

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38 On the spread of proportionality and its signification, see generally, Duncan Kennedy, *A Social Psychological Interpretation of the Hermeneutic of Suspicion in Contemporary American Legal Thought* (forthcoming); This is not to suggest, however, that proportionality itself has a uniform content in these contexts: see generally, Antonio Marzal Y etano, *La Dynamique du Principe de Proportionnalité. Essai dans le contexte des libertés de circulation du droit de l’Union européenne* (Institut Universitaire Varenne, 2014).
40 This point has been developed more extensively elsewhere. See generally, Muir Watt, 'Private International Law beyond the Schism' (n 4).
of the great new issues of jurisprudence in a world of colliding norms, and as provider of the methodological toolbox that composes the new legal paradigm beyond state borders.\(^{41}\) It might have inspired an authoritative perspective, born of a multi-secular experience, with 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,\(^{42}\) 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 its 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.

3 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’\(^{43}\) as to contemporary ‘changes of state’.\(^{44}\) Without theoretical renewal, the once revered 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 to be invested with a new relevance. Pluralist thinking has ‘caught on’ to conflicts. In many respects, the insights of the

\(^{41}\) See generally, Michaels (n 3).

\(^{42}\) See generally, Martti Koskenniemi, ‘Empire and International Law: The Real Spanish Contribution’ (2011) 61 U Tor LJ 1.

\(^{43}\) Walker (n 10) 148–77.

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.’\footnote{Nico Krisch, ‘The Structure of Postnational Authority’ in Cotterrell and Del Mar (n 17).} The central problem singled out by contemporary legal pluralism is framed in terms of competing norms and claims to authority, while proposed solutions for their mutual accommodation take the form of deference, coordination or synthesis, and competition. The diversity thus described, the terms defined, the methods used, the values involved, are all largely familiar to the history of the conflict of laws, in one era or another. The discipline grew out of the concurrence of different claims to authority (religious and secular; political independence); had to confront heterogeneous traditions of law-making (written and oral customs; formal and informal systems); pitted what is generally known as ‘conflicts justice’\footnote{See, for instance, Jeunge presenting the conflict of laws not as a discipline devoid of substantive values but as a powerful catalyst for multistate justice. Friedrich K Juenge, \textit{Selected Essays on the Conflict of Laws} (Brill 2001).} against alternative aspirations such as economic efficiency; dealt variously in individual rights or legal systems; included unrecognised states and indigenous peoples; wheeled between public law and private law; experimented with substantive rules, principles of deference or subsidiarity; became torn between attachment to neutrality and the pursuit of values; oscillated between community-building and the dictates of sovereignty; provided the emblematic space to explore the virtues of rules and standards, security and flexibility; and 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.’\footnote{Teubner (n 8).} As Paul Berman recognises, ‘these [private international law] doctrines become a core way of navigating the interactions, using principles that navigate between legal formalism and political practicality.’\footnote{The flip side of this move is the new prominence of constitutionalism. ‘If (...) we see constitutionalism as setting the ground-rules for interaction among relative authorities, constitutionalism becomes more important than ever’, Berman (n 28) 166.} In this respect, the conflict of laws contains a sophisticated arsenal of methodological principles that certainly fit the...
pluralist idea of coordination; it is unnecessary to develop it 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, and deliberative polyarchy are but a few of the techniques at its disposal with which it can offer the navigation map that legal pluralism arguably lacks. Arguably, the conflict of laws would have been able to ‘set the ground-rules for interaction among relative authorities’, with a little nudging. Nor need it be rejected as merely a clever tool-box. 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, providing a discursive framework that structures thought, an epistemology of complex systems or a new launch-pad for global governance.

Like science, 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. 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, the traditional schemes of intelligibility which underlie the conflict of laws need to take on board

49 ibid.
50 See generally, Knop and others (n 3).
52 See generally, Horatia Muir Watt and Diego P Fernández Arroyo, Private International Law and Global Governance (OUP 2014).
53 On the (paradoxical) ‘return of science’, see generally, Philip Pomper and David Gary Shaw (eds), The Return of Science: Evolution, History, and Theory (Rowman & Littlefield 2002) for a period of increasing disbelief in the values of modernity.
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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.

4 What pluralism means in this context

Pluralism can be taken to mean many things, as Brian Tamanaha has pointed out. It has been, and can no doubt still be, used to justify the predominance of colonial law over the indigenous as much as it might be harnessed on the contrary to disrupt global trends to smooth out cultural (local) difference. In our specific context, pluralism is understood as distinct from liberalism, in exactly the same way as it can be differentiated from bilateralism (or 'multilateralism'), and likened to unilateralism or neo-statutism, within the conflict of laws. Similarly, as a mode of relationship with other autonomous legal orders, it can be differentiated, in public international law, from monism, or from hierarchical visions of the world legal order. Again, in the context of comparative law, it rejects a presumption of similarity as opposed to a valorisation of difference. What is needed, 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. There is a need to explore the ways in which the former can gain from, and contribute to, the newer insights of the latter. The anatomy of 'conflict' needs revisiting, in order to change the perspective from which questions of legal theoretical import are asked.

This exercise leads to the following insights: The use of a conflict of laws analysis within a pluralist framework pushes conflicts to centre-stage in any attempt to

56 See generally, Monateri (n 7).
57 See generally, Boden (n 55).
59 See generally, Berman (n 28).
grasp what law ‘is’ in our contemporary ‘world of struggle’.\textsuperscript{60} It highlights the ways in which law always springs from contested interests and can always be interpreted in multiple ways. It does not seek to ‘fit’ the foreign norm into its own scheme, but accepts the other, however different (as long as the threshold of tolerance is not crossed: see below) and works to ensure communication rather than assimilation. This is where pluralism differs from bilateralism, hierarchy and liberalism. Similarly, it allows other claims to law-making authority on their own terms. In other words, it accepts that when space is opened for the application of foreign law, the location of authority lies in the other.\textsuperscript{61} Pluralism, therefore, welcomes in the foreign norm, but does not decide in its place when and how it applies. This does not exclude various devices designed to best navigate inevitable gaps or overlaps, such as those developed by neo-statutist doctrines (effectivity, legitimate expectations, return to the forum, or others).\textsuperscript{62} It strives for ‘loose’ coordination on the basis that each autonomous system is at least cognitively open to the potential ‘relevance’ of the others.\textsuperscript{63} The quest for coordination may well be the only conceivable global meta-constitutional principle, as Teubner argues.\textsuperscript{64}

Pluralism does not, however, exclude the operation of an exclusionary mechanism when the threshold of tolerance is crossed. This point has been hotly debated,\textsuperscript{65} as if pluralism mandated a toleration of the intolerable, but conflict of law versions of pluralist theory show that recourse to the exception of public policy as a last resort ex post is perfectly conceivable in this context; it may even be the very condition for pluralism to work. Pluralism accepts ‘hybrids’ as inevitable. No foreign institution or claim will be given effect abroad, in another forum, exactly as it was framed initially. Monism, bilateralism, hierarchical visions of
international law and similarities-based comparative law all project to some extent the contrary idea: the foreign is introduced and made to fit as it is. But the working hypothesis of the conflict of laws is exactly the contrary: a foreign norm is always transformed through interpretation, or combination with the forum’s procedural rules, and so on.\textsuperscript{66} Pluralism could also gain from frequenting the conflict of laws by incorporating its intellectual mode (or ‘style’), which has excellently been identified as ‘as if’.\textsuperscript{67} In other words, before any definitive decision can be made on applicability, and articulation of various norms, the outcome has to be tested out. This fits well with the inevitable proportionality assessment of the final outcome, which is in itself a pluralist device.\textsuperscript{68} Borrowing from pluralism could help solve the legitimacy conundrum which is increasingly worrisome in the conflict of laws, due to the rise, or increased visibility, of non-state authority and heterogeneous forms of law-making. These are not ‘law’ in the traditional conflicts of laws paradigm; they are out of bounds as it were, by reason of an ex ante judgment on legitimacy. But under a pluralist approach, legitimacy issues are dealt with ex post: there are no a priori judgments that would serve to exclude certain claims to govern (such as non-State law).

5  Post-scriptum: The conflict of laws in pluralist mode, in practice

It will perhaps come as no surprise that 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 that 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.

A particularly daring example, which both acknowledges the conflicts between expanding autonomous regimes and proposes an equally pluralist response in terms

\textsuperscript{66} In the \textit{Kiobel} case before the Court of Appeals for the Second Circuit (\textit{Kiobel v. Royal Dutch Petroleum} 621 F. 3d 111 (2\textsuperscript{nd} Cir. 2010)), the status of international law gave rise to a debate that could be framed in exactly these terms; see Horatia Muir Watt, ‘Les Enjeux de l’Affaire \textit{Kiobel}: Le Chaînon Manquant dans la Mise en Œuvre de la Responsabilité des Entreprises Multinationales en Droit International Public et Privé’ in Comité Français de Droit International Privé, Droit international privé. Années 2010–2012 (Pedone 2013) 233.

\textsuperscript{67} Knop and others (n 3).

\textsuperscript{68} Berman (n 28).
of its analysis, can be found in a recent US federal court child slavery case involving cocoa farms in the Ivory Coast. Appropriately, as an illustration of a problem that is emblematically global, it concerns the functioning of world-wide value chains and commodities markets, which are arguably the most potent recipes for destructive externalities in the global social and ecological environment today. 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. Thus, in *Doe v. Nestle USA, Inc.*, 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.\(^6^9\)

Remarkably, none of the traditional tools of the modern legal paradigm is part of the legal reasoning used by the Court. Territory, sovereignty, or the requirements of foreign policy are the traditional focus of (private international) law’s more familiar approach to the governance of corporate conduct abroad. Here, on the other hand, the power, or leverage, of private actors over the market, through their brands, is acknowledged, as is their capacity to engage in regulatory capture through lobbying, and the triumph of self-regulation. The legal response can be understood in terms of social responsibility, jurisdical touchdown,\(^7^1\) victim access to justice (rather than territorial jurisdiction, contract, corporate form, market) and a political

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\(^6^9\) 766 F. 3d 1013 (9th Cir. 2014).

\(^7^0\) ibid 1025.

horizon in which the pursuit of profit or market efficiency is balanced against other values.

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 to 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.

These are eminently pluralist understandings of law-making power. They also hark back to the body of knowledge which first emerged in a pre-modern context of plural authorities, unchartered territories, and indeterminate boundaries between the public and the private spheres. This is why, as a conclusion to these brief remarks, we can hope that an 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, contestation, and recognition.


74 See generally, Muir Watt, ‘Private International Law beyond the Schism’ (n 4).