Globalization and private international law

I. Introduction: the disconnection

Neither the practice nor the theorization of private international law appears, paradoxically, to be affected other than superficially by the phenomena identified with globalization. If its traditional concern can be described, loosely, as being individual conduct or relationships beyond the domestic sphere of the (any) state, it might be thought to be at the very centre of the contemporary shifts wrought by technological innovation and changing forms of politics and normativity, which are currently undermining the very foundations of modern legal thought. However, it is no doubt the essentially ‘allocative’ stance of the discipline – its distance from substantive issues and its focus on method – which has disconnected and immunized it from the effects of such transformations, even while these are perceived elsewhere within the social sciences as constituting a paradigm change.

Indeed, while the extent to which the global turn is linked to the radicalization of late modernity or the shift to the postmodern,
remains controversial, there is little doubt that the Westphalian model of the state and the subsequent distinctions between the internal and external dimensions of sovereignty, and between the international and municipal legal orders, have lived out their time. The same can be said, in respect of corresponding conceptions of the domestic legal system and legal epistemology. Thus, similar tensions and uncertainties unseat theories of hierarchized sources of law and distinctions between law and fact, public and private, law and politics. Furthermore, values and methods linked to the very idea of the rule of law have been called into question, such as the meaningfulness of text, dogmatic forms of reasoning, and the pursuit of order and predictability.

To a certain extent, therefore, private international law might be doubly undermined by globalization. On the one hand, its (already) uneasy status as a subordinate, domestic branch of international law would appear to be further unbalanced by the expansion of a transversal ‘foreign relations’ law, dealing with the interference of sovereign power in individual rights. On the other, within its traditional methodological focus, postmodern hermeneutics, psychoanalysis or new views of governmentality herald in reflexivity, balancing or perspectivist reasoning. Yet the foundational assumptions of the discipline and its specific models of reasoning remain unchanged – even as dematerialization and the growth of new allegiances beyond the state are seen to require exceptions to its historical attachment to → territoriality and citizenship.

This disconnection from the global turn in political and social theory – which is arguably common to legal thought as a whole, but certainly exacerbated, and particularly problematic, in the case of private international law – has had the unfortunate consequence that it stands aloof from the very issues of global governance on which it might have made a significant impact. In the case of new forms of sovereignty or authority beyond the state, it has indeed largely participated in (or ‘co-produced’) the shifting divide between the public and the private spheres both by providing emancipatory tools for individual (generally corporate) actors in respect of national regulation without ensuring any corresponding ‘extraterritorial’ duties, and by impeding any meaningful assessment of the legitimacy of the norms created by non-state actors. Yet these are the greatest challenges that the globalized economy has left at the door of international law.

The rest of this entry first elaborates, briefly, on the paradox inherent in the disconnection just described between traditional theorizations of private international law and the ways in which it might appear to be particularly well-equipped to rise to the challenges associated with the acceleration of social exchange and the interconnectedness of markets, beyond the state (I.). It will then further explore the nature of such challenges, since the implications, and indeed the very concept, of globalization remain as controversial within the thought frames of modernity as gender theory or climate change (II.). If, as it then appears, private international law’s (three) current methodological models are actually part of the problem (III.), then it could be helpful to identify their specific blind-spots in order to suggest some future directions for the discipline of private international law in global context (IV.).

II. What’s in a name? The paradox

The paradox, then, lies in the fact that globalization appears to have very little impact on traditional conceptualizations and practices within the very discipline that would seem to be at the very heart of the turmoil and indeed co-instrumental in its production. Legal scholars from this field, as opposed to thinkers within the social sciences, tend to see global phenomena as generating technical problems in ways similar to previous societal and industrial transformations. Thus, globalization is generally perceived as creating a change of pace but not of essence, merely requiring the conflict of laws, of which the very object has always been cross-border (or transnational) relationships, to adjust its tools accordingly. After all, the hallmark of private international law has always been its predominantly methodological content, which sets it at a distance from versatile social trends or technical discoveries. Operating at a remove from substantive rules, it remains on a procedural or jurisdictional plane (or meta-level), prior to any inquiry into the equities of particular cases, which it assigns (at least metaphorically) to different (national) legal sub-systems. While this specifically ‘allocative’ stance has certainly nurtured the conventional and highly contested view that the discipline is normatively neutral, it has also created the conditions for a remarkable indifference to the profound shifts for which, in
the context of late modernity, globalization is both the impulse and the result.

Indeed, it might have been supposed that private international law’s traditional involvement with ‘transnational’ phenomena and ‘private’ (informal or contractual) forms of normativity, would have made it particularly apt to rise to contemporary challenges affecting the state itself, the idea of legal order, the notion of sovereignty, the public/private divide and the significance of territory. However, it remains wedded to these categories with little reflexive reaction to its changing environment. In this respect, one might say that there is much in a name. The ‘private’ dimension of the discipline was initially understood both in contrast to ‘public’ international law, and by reference to the public/private legal divide foundational to legal epistemology in the 19th century. Moreover, its ‘international’ reach mirrored the representation of public international law in a world of multiple territorial states, focused exclusively therefore on interactions between the municipal laws of territorial sovereigns. Its values are, on the one hand, those promoted by the liberal idea of private law, on the other, notions of justice developed within classical public international legal theory, at a time when the disciplines were still if not indistinct, at least closely intertwined.

Globalization has hardly altered this double focus. The rise of private sovereignty, the growth of law beyond the state, the strain upon the public/private divide, the declining significance of territory, all appear to fall through the private international legal-conceptual net. Despite the contemporary turn to law in international politics, private international law has contributed very little to the conceptualization of such phenomena or to the solution of the social and political issues which accompany the unsettling of traditional institutions or categories. Under the aegis of the great liberal divides between law and politics, and between the public and the private spheres, it has developed a form of epistemological tunnel vision, actively providing impunity to abusers of private sovereignty and consolidating exclusion. It has remained remarkably silent before the new and increasingly unequal distribution of wealth and authority in the world, and the growing ranks of the vagrant, the migrant and the stateless. Such limits have detracted seriously from the usefulness of private international law as a starting point for conceptualizing ‘global’ law, that is, the law governing, and produced by, actors and communities beyond the sovereign state and outside its territory. In other words, the specific stance of private international law may have acted to screen off the discipline from the effects of global change, disconnecting it from issues on which it might otherwise be unusually well qualified to make a theoretical or practical contribution.

III. The challenges: law and state in late modernity

It is perfectly arguable that globalization is not a new phenomenon in law, and that the history of legal thought has seen many instances of massive ‘transfer’ of categories, concepts or modes of reasoning, displacing more traditional ways in which law is practised and perceived. Moreover, it is usually (although not unanimously) accepted that there have been previous paradigmatic changes in (Western, if not global) intellectual history – most obviously the emergence of modernity itself – which have affected the organization of society over a large part of the globe. However, neither of these arguments disqualifies the radical effects, today, of transformations which are regarded elsewhere as undermining the modern categories of law and politics (subject, state, jurisdiction) and its values (order, reason, individual autonomy). These changes encompass phenomena as diverse as technologies which bring about extreme dissociation of time and space; the rise of private sovereignty through unprecedented concentration of capital; new claims to authority beyond the state under cover of standard-making and quantification; the financialization and intensive interconnection of the economy; the commodification of nature; the centrality of risk in society; or, most recently, the digital revolution and its potential effects on humanity and subjectivity. In all these respects, the global turn takes place within the context of the transformation – decline or radicalization? – of modernity.

Arguably, the indifference of private international law towards such phenomena may be no more than the reflection of a more general indifference of legal thought, as a whole, towards its own changing environment and the multiplication of competing social systems. Indeed, while cultures mix, capitalism expands, urbanization intensifies and the epistemological status of science itself is challenged, legal method seems to transcend these contingencies, remaining
attached to underlying conceptions of subjectivity, humanity, nature, culture and norms which were foundational to earlier modernity. Similarly, there is little linkage between private international law and the various strategies and structures of informal ‘global law’ beyond the state, and scant attention to contemporary debates in other fields such as social and political theory. Indeed, the received account of the genealogy of the discipline as constant historical recurrence of great methodological schemes serves to restrict the possible understandings of the goals which private international law is, or could be, pursuing, as well as the distributinal consequences it serves.

However, private international law has, in the past, demonstrated on occasion a certain intellectual autonomy from other fields within the law, taking a lead in experimental methods or concepts, or reaching across the dividing line between law and international politics. This was the case, for instance, of the invention of comity, or much later, governmental interests analysis (→ Interest and policy analysis in private international law). Today, such inventiveness would be all the more welcome given that the most emblematic symptoms of new global challenges are exactly within the remit of the discipline. These issues span the ‘private’ law aspects of interconnected financial markets (sovereign debt; rating agencies . . .); transnational standard-setting (corporate codes of conduct; technical norms . . .); cyber-torts (intellectual property; privacy . . .); migration, citizenship and family (status of aliens (→ Aliens law (Condition des étrangers, Fremdenrecht))); diverse bioethical cultures . . .); environmental protection and climate change, and more. At best, when framed as issues of conflict of laws, the legal tools made available are inadequate. Some may argue that this is merely a question of technical adjustment. However, it could also be the result of a more radical failure to fathom the depth of the social and political changes afoot.

The most notorious example of an apparently technical inadequacy of the discipline is the status of extraterritorial violations of human rights by private actors in the course of delocalized industrial or extractive activities. The credentials of such a situation as emblematic of the ‘global’ hardly need emphasis: it reflects, variously, the processes of expansion typical of late capitalism, the planetary spread of corporate investment, a largely financial world economy, a sustained practice of regulatory arbitrage, the commodification of both labour and nature, the liberalization of trade barriers, the growth of corporate groups, etc. Supposing corporate misconduct is undesirable in such a case – which of course begs many technical and political questions – in terms of available legal tools, such misconduct is largely protected by the screen of local tort law (see, for instance, art 3 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L 199/40) and the remedy would appear to lie simply in a change in (on the level of substantive law), or of (on the level of choice of law), the applicable law. A more attentive reading will show that the local tort law, containing insufficient or ineffective responses, is itself whisked into the competitive spiral induced by the global quest by developing economies for mobile capital. The receiving country, caught up in a prisoner’s dilemma, cannot raise its standards. Yet, the protection awarded within the legal order of the private investor’s home state is inapplicable either because fundamental rights do not reach to such conduct, or because the structure of the corporate group curtains it off in respect of the parent company. The likely presence of a bilateral investment treaty consolidates the situation, by ensuring that the same investor continues to enjoy the benefit of the lowest level of social or environmental protection in the receiving country.

Many other such examples surface on occasion in judicial practice. Vulture funds pursue defaulting states for distressed debt; investment arbitration awards (→ Arbitration, investment) consolidate the land grab; issuers of rotten securities insulate themselves from responsibility through → choice of law and forum; immigration law ‘hinges’ on the most conservative of legal categorizations of persons and family. The resulting, frequently denounced, ‘governance gap’, diversely and no doubt accurately perceived as a deregulatory trend (which does not mean a quantitative lack of regulation); or as evidence of the impotence or decline of public state regulation; or as the result of neoliberalism, etc is rarely analysed as a failure of private international law to meet the challenges of democracy, accountability and identity in a transnational society. Contractualization of regulation across borders; emerging private
standard-setting beyond the state; recognition of new forms of community and status, do not fit within traditional state boundaries and the legal categories on which private international legal methods still tend to rest.

IV. Theory and method: parts of the problem

A first part of the problem may lie with the current state of private international legal theory. The sense of a-historicity or continuum cultivated within the discipline tends to distract from the need to come to terms with the various mutations of nation and statehood linked to globalization and the correlative entrance (or return) of non-state authority and normativity. It is common to find a formulation of such theory which, couched in terms of its ends, refers back either to a world viewed from the perspective of interacting sovereign states, or from that of individual citizens whose lives are affected by the ‘phenomenon of the frontier’. Multiple, simultaneous, jurisdictional claims call for some form of coordination or pacification in order to avoid both the disruption of public ordering and the unsettling of those individual expectations whose protection has traditionally been the core concern of liberal private law. Moreover, the discipline has retained a predominantly procedural and abstract grammar, despite contestation from time to time (‘governmental interests’ analysis in the USA in the wake of legal realism; current human rights jurisprudence in Europe), and some recent overflow from various other disciplines (regulatory federalism, comparative constitutionalism, fundamental rights, feminism or theories of regulation). The spectacular rise in national codifications across the world gives credence to this version, to the extent that they all appear to assume the immutability of state, territory and sovereignty, and the separation of international and municipal law.

Today as for the medieval jurists, a series of open-textured philosophical considerations about the necessary balance to be struck between private justice and the public good, between the needs of national policy and the interests of international commerce, are used to frame the question whether and how a rule can be made to extend (metaphorically) beyond the sovereign territory of its author, so as to bring a foreign subject to account under the rules of the forum. The response is also framed as a set of standard arguments and counter-arguments, opposing → public policy and private interests; sovereignty and private autonomy; territory and extraterritoriality; substantive goals and the requirements of harmony or legal security at transnational level. From this perspective, rules of jurisdiction and choice of law are said to ensure predictability in an environment of legal pluralism; pursue a specific concept of transnational justice distinct from, and transcending, the purely domestic variety; fulfil the interests of the community of states by providing harmony and mutual adjustment when different fora are available. While fraught with political tensions and social consequences, such a debate is seen as essentially technical, dissociated from issues of accountability or responsibility, forms of authority, or identity and communities.

A second part of the problem may lie with the methodologies which derive from such theory. Three main explanatory models based, respectively, on conflict, cooperation and competition, might be said to represent the state of the art cross-culturally – that is, in the (mainly Western) world which participated in the invention of modern international law and the schism between its public and private ‘branches’. None of the three has proved useful in helping to grasp the changes wrought by globalization. Doctrinal discussion, which has tended to focus on the specific properties of one or the other of the models described above, seems to have inhibited a wider reflection within the context of private international law on glaring issues of governance of the globalized economy, and of membership and exclusion beyond the state. Here again, the overall result of their application is that there is no significant accountability of private actors for the transnational exercise of economic power; nor is there adequate state responsibility for the extraterritorial misconduct of its corporate citizens. There is no recognition of normativity beyond the state, nor individual identity outside it.

The dominant model, multilateralist methodology, proposes a form of master plan designed to allocate jurisdiction from a perspective that is deliberately external to the various (other) sovereigns involved. Since its paradigm is cooperation rather than conflict, it uses universalizable criteria to which such other sovereigns may be taken to adhere, either because this master plan is provided by a binding supranational (conventional, customary or institutional) framework, or because it issues from natural law, reason

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(or at least a shared sense of reasonableness), or from a narrower cultural ‘community of laws’. The most striking example of the latter is Savigny’s (→ Savigny, Friedrich Carl von) doctrine of the conflict of laws based on Roman law categories and the explicit assumption that the participating systems all shared a common Roman-Christian culture and therefore defined their own scope similarly. At least according to the conventional genealogy of the discipline, this discovery was a foundational moment of enlightenment. It was found, however, by the end of the century that even here, differences existed. Each national set of private international law then had to operate as a closed system, developing sophisticated technology designed to maintain the fiction that national laws are coordinated from a perspective that is in some way transcendent. If globalization is defined, as in art, as the loss of perspective, then the failure of this model is understandable. Moreover, wed to a grid-like vision of (usually territorial) jurisdiction, it holds the claims of law beyond the state to be irrelevant and excludes more reflexive or collaborative forms of settlement as may be in line with the mindset of later modernity.

→ Unilateralism or statutism, the main conceptual contender and historical predecessor, was conceived in terms of conflict between various systems of law, from the standpoint of sovereign actors in the unilateral exercise of their jurisdiction, which may be limited, countered or frustrated by that of their peers whenever a given object of regulation finds itself outside any clearly defined domestic sphere. Initially, the assumption was that law operates territorially and does not (and should not) seek to regulate persons or things located elsewhere. More contemporary applications of public-orientated unilateralism tend to be carried by the language of state interests rather than sovereignty. Either version calls for a balancing or mediating principle. ‘Comity’ played this role historically, but, like its later avatars, failed to provide a horizon other (as it were) than the Chancellor’s foot, against which such → mediation should take place. Thus, while allowing for plural normative claims – including, presumably, non-state law – this model passes over the issue of legitimacy of non-state norms and thereby provides only a rudimentary principle of choice, inapt to deal with ‘true’ political conflicts and their distributional consequences. This is indeed the familiar weakness of theories of legal pluralism and self-regulation. In the case of the ‘governance gap’ cited above, it suffices to imagine a collision between a private norm, such as a ruling issuing from an arbitration award in favour of the investor, and a principle of international soft law, such as state responsibility for its corporations. While there may be technical plumbing involved (the award is compelled by a bilateral treaty; but the soft principle is in turn arguably ‘constitutionalized’ . . .), there is a real need for a clear principle of choice.

The third and most contemporary paradigm, which might be termed competitive or neoliberal, can be read as most closely linked to the function of the law within the globalized economy. It has acted in this respect largely in the service of an ideology of free market for legal products and services, allowing regulatory arbitrage between laws of various content, pursuing dissimilar goals. Its key operative tool is the secular principle of → ‘party autonomy’, which grew up in the very different context of liberal contract law. Indeed, while the growth of a market for law and judicial services was more often than not presented either as a pragmatic step in the interests of the business community, or as a political move in the name of liberalized world trade, theorization was provided by economic accounts of interjurisdictional competition through free party choice, which could induce a globally optimal result across the board. Empowerment of economic actors to navigate various domestic laws through similar regulatory arbitrage is at the heart of global financial markets; it also facilitates regulatory competition on a transnational scale. Such barrier-crossing in respect of social, environmental and human rights standards illustrates the way in which (public) law becomes (private) product. While this third non-territorial model has a built-in political bias, therefore, it is questionable that the confiscation it has allowed of the public sphere by the private has been consciously accepted by the communities affected by it, or indeed by all those state actors in whose name it is used, and, moreover, offers no tools to connect the freedom involved in choice with correlative responsibilities.

V. Where to go from here?

The burning question, of course, concerns possible new directions for the discipline, which is unlikely to survive in its current form as a general set of coordinating principles. It may of
course have an important supportive function to fulfil in the intra-European setting, where it contributes to the administrative or judicial clockwork increasingly based on the junction of *forum and ius*. Beyond this context, its future would seem to be bound to that of the nation state, which remains on the scene but has to cope with the multiplicity of other actors and the correlative decline of monopoly and univocal perspective. Pragmatically, the easiest point of departure may be to identify the most significant blind-spots within the discipline – in other words, the problems which, at least intuitively, seem to raise issues of social justice beyond the state and which have not been identified, or tackled, as such. These include (*inter alia*) the status of non-state norms insofar as they reflect the practice of transnational communities; the public/private divide as far as it still interferes in the so-called extraterritorial reach of fundamental rights or mandatory economic law and shields contractual practices with widespread social consequences from public scrutiny; the world of corporate groups and shadow finance; the privilege and opacity of international investment arbitration (→ Arbitration, investment); science and technology as co-produced by the law rather than staying outside it; the redefinition of citizenship and community; the reconnection between community and responsibility.

Beyond intuition, this would then require a renewed research agenda. Relinquishing an exclusive focus on its own methods and internal concepts, private international legal theory needs to harness the resources of (often heterodox) thinking in other disciplines in order to understand the paradigm changes wrought within its own conceptual grammar by globalization. This may help to address some of the issues identified above, for instance, in acknowledging non-state authority, correlating commitments to spheres of influence, and integrating affectedness in the decision-making process. It might then have the potential, in the absence of more traditional expressions of democracy beyond the state, to make a significant step towards the improvement of global governance by constituting a site of deliberation, contestation and recognition.

There are indeed signs today that the function of private international law may be undergoing a re-interpretation in several respects. The first (constitutionalism) is in terms of a specific brand of transnational constitutionalism, designed to bring issues linked to the extraterritorial exercise of power within the focus of domestic process, in order to ensure the interests of foreign affected communities. A deliberative approach to normative pluralism, might in this respect be a feature of a new constitutionalism specific to private international law. This may mean recognition of individual identitarian claims for equal rights, or of those for recognition of voice of non-state communities which do not fit the formal legal criteria for status of legal subject in public international law. Furthermore, since it rests upon the practice of tolerance for the other, it can also accommodate the requirements of recognition as a political philosophy. The second (private law) brings in new thinking as to the binding nature of private codes of conduct, the inadequacies of the traditional distinction between contract and corporation to apprehend both transnational chains of supply and production, or the architecture of corporate groups. The third (social theory) seeks to ensure that non-state, private authority be treated as such in order to be able to associate it with correlative duties in respect of affected constituencies, whose interests and identities still fall through the international legal net. The fourth (public/private divide) is an increasingly critical approach to the absorption of various types of collective interests by private entities such as vulture funds, bringing international commercial and investment arbitration, and other forms of private norms, under critical scrutiny. These are merely starting points, however, since it is equally important to be aware that in the age of the global (and the digital, equally an offshoot of modernity), the whole concept of law, norm and subjectivity is undergoing radical change.

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**Literature**