



After Globalisation

New Patterns of Conflict and their Sociological and Legal Re-constructions

*Christian Joerges (ed.)
in co-operation with Tommi Ralli*

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*I anledning de grusomme ugjerningene som ble utført på Utøya og i Oslo den 22. juli 2011 ønsker alle som har deltatt i arbeidet med denne boken å uttrykke sin dypeste medfølelse og solidaritet.**

* In view of the enormity of the atrocities which occurred on the island of Utøya and in Oslo on 22 July 2011, all those involved in this volume would like to express their condolences and solidarity.

Preface

Reconstituting Democracy in Europe (RECON) is an Integrated Project supported by the European Commission's Sixth Framework Programme for Research, Priority 7 'Citizens and Governance in a Knowledge-based Society'. The five-year project has 21 partners in 13 European countries and New Zealand, and is coordinated by ARENA – Centre for European Studies at the University of Oslo.

RECON takes heed of the challenges to democracy in Europe. It seeks to clarify whether democracy is possible under conditions of pluralism, diversity and complex multilevel governance. See more on the project at www.reconproject.eu.

The present report is part of RECON's Work Package 9 'Global Transnationalisation and Democratisation Compared', which examines the conditions and prospects of democratisation in European transnational legal and political arrangements, and in postnational constellations more generally. The report contains the proceedings of the workshop 'After Globalisation – New Patterns of Conflict', which was a joint workshop by RECON and the Collaborative Research Centre 597 on 'Transformations of the State' at the University of Bremen. The workshop was organised in Loccum by the Centre of European Law and Politics (ZERP) on 5-7 September 2010.

Erik O. Eriksen
RECON Scientific Coordinator

Acknowledgements

The present report will be the last one to be published in the RECON series by our project. Hence, it seems only fitting to look back briefly at the work of nearly five years before I turn to say a word about the future.

When RECON started on 1 January 2007, I was still Professor at the European University Institute in Florence. It was, therefore, possible to engage Ph.D researchers – Poul F Kjaer, Claire Methven O'Brien and Maria Weimer – from the EUI, all of whom were working on issues which were closely related to the agenda of the RECON work package on the prospects of democratic European and transnational governance. This engagement was complemented by the support both of my former colleague Neil Walker and of Jürgen Neyer with whom I had already co-operated intensively in Bremen in a project on Comitology and throughout the Citizenship and Democratic Legitimacy in the European Union (CIDEL) Project.¹

In 2003, the Collaborative Research Centre “Transformations of the State” at the University of Bremen had already taken up its work, which was – and still is – generously funded by the German Science Foundation.² From that beginning onwards, Josef Falke and I have co-directed in this context the project on “Trade liberalisation and social regulation in transnational structures”, research which is closely related to the agenda of the RECON work package. Intense co-operation suggested itself and was accomplished – to the mutual benefit of both partners. Our very first workshop on “Re-framing Transnational Governance” at the EUI in March 2007 was already organised jointly by RECON and the “Transformations of the State” Project, as were the follow-up events, in particular, the workshop on “Transnational Standards of Social Protection:

¹ See <http://www.sv.uio.no/arena/english/research/projects/cidel/>

² See <http://www.sfb597.uni-bremen.de/pages/ueberPresseStimmen.php?SPRACHE=en>.

Contrasting European and International Governance”, the conference on “The Social Embeddedness of Transnational Markets” both held in Bremen at the “*Haus der Wissenschaft*” on 23-24 November 2007 and on 5-7 February 2009, and this also holds true for the reports and books which these events have generated.³

Not too long ago, the study of European integration was essentially in the hands of legal academia, and international law scholars were, for the most part, conceptualising their analyses of the role of law in the international system autonomously. However, this situation has changed dramatically. Political science is clearly dominating European studies and many lawyers who strive for academic survival feel the need to develop an inter-disciplinary profile. This is true not only in the RECON context, but also in the Bremen “Transformations of the State” Project, and increasingly in other spheres. Inter- and pluri-disciplinarity is by no means a bad thing in itself. However, it is not so easy for lawyers to make their concerns for what they seek to defend as the *proprium* of law understood in the neighbouring disciplines which they once used to perceive as “*Nebenfächer*” and “*Hilfswissenschaften*” – disciplines of minor significance. Within our work package, we have continuously sought a response to this challenge, which has gradually developed into an approach which we – by now – have coined “conflicts-law constitutionalism”. Rainer Nickel has become a strong ally in this endeavour,⁴ and the present report represents another step towards its further elaboration. Another legacy of legal scholarship, which political scientists tend to underestimate, is its very direct and concrete embeddedness into

³ Christian Joerges and Poul F. Kjaer (eds), *Transnational Standards of Social Protection: Contrasting European and Transnational Governance*, RECON Report No. 4 (2008), Oslo: ARENA; Christian Joerges and Josef Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, (Oxford-Portland OR, Hart Publishing, 2011).

⁴ See the RECON Report No. 7 (2009) on *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, edited by Rainer Nickel and recently transformed into a book publication with Intersentia, in Antwerp-Cambridge-Portland OR (Ius Commune Series 88), 2011.

seemingly mundane economic affairs. WP 9 can point to an effort to address this deficit.⁵

The workshop in the *Evangelische Akademie Loccum* (the Protestant Academy of Loccum)⁶ required considerable preparatory efforts, which were shouldered by Olga Batura, Henning Deters and Tommi Ralli. The Academy was a wonderful host. Anybody in search for something like an ideal speech situation should consider this academic setting seriously – and will also find excellent food and a cosy environment there, too. We once again have to thank Chris Engert for his work on our use of his language and also for his assistance in both the editorial process and the technical preparation of this volume.

This is the last report which we can publish before the RECON project comes to an end in December 2011. But the proceedings which we are publishing herein will be followed by a second *Loccum* workshop which is presently being prepared – and should eventually lead to a book presentation on the conflicts-law approach.

All of us regret the end of RECON. We have profited enormously from this stimulating academic environment and from the professional practical support by the wonderful RECON/ARENA team in Oslo.

Christian Joerges
Bremen, July 2011

⁵ Christian Joerges and Tommi Ralli (eds), *European Constitutionalism without Private Law - Private Law without Democracy*, RECON Report No. 14, Oslo 2011.

⁶ See <http://www.loccum.de/english/connect.html>.

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Abbreviations

AG	Advocate General
AGIL	Adaptation, Goal Attainment, Integration, and Latent Pattern Maintenance
BIMCO	Baltic and International Maritime Conference
CAC	Codex Alimentarius Commission
CCNR	<i>Commission Centrale pour la Navigation du Rhin</i>
CERD	Convention for the Elimination of all forms of Racial Discrimination
CoE	Council of Europe
CSR	Corporate Social Responsibility
EA/EAEC	European Atomic Energy Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECRI	European Commission against Racism and Intolerance
ECT	European Community Treaty
ECtHR	European Court of Human Rights
EEC	European Economic Community
EFSA	European Food Safety Authority
EITI	Extractive Industries Transparency Initiative
ESC	European Social Charter
ETI	Ethical Trading Initiative
EU	European Union
EUV/TEU	Treaty of European Union
FAO	Food and Agriculture Organisation
FCC	German Federal Constitutional Court
FLO/FLO-CERT	Fair Trade Labelling Organisation
FSC	Forest Stewardship Council
GATT	General Agreement on Trade and Tariffs
GG	Grundgesetz (German Basic Law)
GMO	Genetically-Modified Organism
HPVI	High Production Volume Initiative
ICANN	Internet Corporation for Assigned Names and Numbers
ICAO	International Civil Aviation Organisation
ICC	International Chamber of Commerce

ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGO	Intergovernmental Organisations
ILO	International Labour Organisation
IMF	International Monetary Fund
IMO	International Maritime Organisation
Incoterms	International Commercial Terms
INGO	International Non-Governmental Organisation
IO	International Organisation
ISO	International Standardisation Organisation
Mercosur	<i>Mercado Comú del Sur</i> - Southern Common Market
MNC	Multinational Corporations
MSC	Marine Stewardship Council
NAFTA	North American Free Trade Agreement
NATO/OTAN	North Atlantic Treaty Organisation
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Co-operation and Development
OMC	Open Method of Co-ordination
OSS	Ordinance for the Protection of Airspace Sovereignty
PIL	Private International Law
PPP	Public-Private Partnerships
RC	Responsible Care
REACH	Regulation on Registration, Evaluation, Authorisation and Restriction of Chemicals
REDD	Reduced Emissions from De-forestation and Degradation
SPD	<i>Sozialdemokratische Partei Deutschlands</i> , (The Social Democratic Party of Germany)
SPS	Agreement on Sanitary and Phytosanitary Measures
TAR	Territory, Authority and Rights
TBT	Technical Barriers to Trade Agreement
TEU	Treaty of European Union
TFEU	Treaty on the Functioning of the European Union

TNC	Transnational Corporation
UCP	Uniform Commercial Practice for Documentary Credits
UK	The United Kingdom
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNO	United Nations Organisation
USA	The United States of America
WADA	World Anti-Doping Agency
WHO	World Health Organisation
WTO	World Trade Organisation
WWII	World War Two

Introduction

Tommi Ralli

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The “conflicts-law approach” is a theory meant to deal with the effects of nation-state legal systems beyond national borders, and with the need to organise co-ordinated responses to problems arising out of the inter-dependencies of legal orders to which unilateral solutions are no longer conceivable. Elaborated by Christian Joerges during the first decade of the new century,¹ the approach re-constructs the potential of primarily European law to address – “to compensate” – the threat to democracy that is posed by the concern that citizens would increasingly be subject to the effects of laws which they themselves had not authored.² This structural democratic

¹ The first systematic presentation of the idea was in Christian Joerges, “Rethinking European Law’s Supremacy”, with Comments by Damian Chalmers, Rainer Nickel, Florian Rödl & Robert Wai, EUI Working Paper Law No. 2005/2, available at: <http://cadmus.eui.eu/bitstream/handle/1814/3332/?sequence=1>. The earlier original version can be found in Christian Joerges & Jürgen Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes”, (1997) 3 *European Law Journal*, pp 273-299.

² For a similar re-construction of the *problématique* of European governance, see Jürgen Habermas, “Citizenship and National Identity” [1990], Appendix II in Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* [1992], translated by William Rehg, (Cambridge, Polity Press, 1996), pp 491-515.

deficit, as Joerges says, calls for consideration of “foreign” demands. It also calls for co-operation and mutual respect between political constituencies. The law seeking to govern such compensatory - and, in this way, democratically-legitimate - actions is conflicts law. In the grant application for the project on “Trade Liberalisation and Social Regulation in Transnational Structures” the term is explained as follows:

At issue is neither the choice between legal orders according to the tailored rules of the continental ‘private international law’ or Anglo-Saxon ‘conflict of laws’, nor the law of international civil procedure (*internationales Zivilprozessrecht*). In the European multi-level system, particularly in the area of social regulation, multiple levels must work together with none governing autonomously. The same applies on the international plane. If we use the term conflicts law, this is to express first that European and international law will be concerned with the management of conflicts and second that this management should take place in a legal framework. Naturally, at the same time, our conceptual terminology envisages that, in the postnational constellation, there will still be horizontal conflicts.³

“Horizontal” conflicts, in this terminology, occur when different state laws claim application in the same case (for an example of a contemporary European conflict, Austria has opted against nuclear energy while, in the Czech Republic, the Temelín nuclear power station is operating fifty kilometres from the Czech-Austrian border). “Vertical” conflicts, in contrast, pit a state law against a supreme federal or European law (such as the economic freedoms or the

³ The application was prepared by Henning Deters, Josef Falke, Torstein Hüller and Christian Joerges. It was submitted to the German Science Foundation in July 2010. The full text is available in German at: <http://www.sfb597.uni-bremen.de/download/de/forschung/a1_de_110314a.pdf>. The passage cited is from p. 28 of the application. The translation was done by Rory Brown, London. For an elaboration of the argument, see, also, Christian Joerges, “The idea of a Three-dimensional Conflicts Law as Constitutional Form”, in: Christian Joerges & Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law*, 2nd ed., (Oxford-Portland OR, Hart Publishing, 2011), pp 413-456.

European Atomic Energy Treaty).⁴ The core problem of the conflicts approach, according to Joerges, is to secure continuing diversity when such conflicts are being adjudicated, and to reconcile the political autonomy of democratic orders with the need to co-operate internationally.

On 5-7 September 2010, in the tranquil surroundings of the Academy of Loccum Abbey, in Niedersachsen, Germany, scholars from around Europe came together to discuss the conflicts approach. This report compiles the contributions prepared for the workshop, which was organised jointly by RECON and the University of Bremen Collaborative Research Centre “Transformations of the State”. The participants were to explore the conflicts project from three broad angles, investigating its normative orientations, its sociological backing, and its application in individual fields. The following chapter summaries are organised around the various directions taken by the individual contributions. These range from the global context to the European constellation, and from exploring the social adequacy of the conflicts approach to examining constitutional conflicts, social justice, and the limits to the conflicts approach.

I. Global Constitutionalism?

Conflicts law, as a theory of global law, would, in one version, have to expand towards a “democratically sensitive universalism”. Thus argues Florian Rödl (Chapter 1), who favours conflicts law “instead of a World State”, a throwback to the era immediately following the cold war, when a bipolar power system was, according to some views, to be negated by one state. Today’s conflicts law, Rödl says, should democratically govern “social border crossings”. The current field of private international law is, for two reasons, unable to achieve this end. First, because, ever since the nationalisation of private international law in the Nineteenth century, the field has constituted part of state law, rather than being a “meta-law” which provides universally-valid rules on questions such as jurisdiction and the applicable legal system. Second, although numerous states became democratic during the Twentieth century, recent developments in

⁴ For a discussion on the examples given in brackets in the preceding two sentences in the text, see Christian Joerges, “Unity in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form”, Chapter 3 in this volume, Section VI.

private international law have, at the same time, increasingly freed private actors from the constraints of national, democratic states (by facilitating choice-of-court agreements, extending recognition of foreign judgments, extending private autonomy in the choice of the applicable law, attempting to allow choice of non-state law, and narrowing down public-policy exceptions). Instead of these features, Rödl argues, the potential of an expanded theory of conflict of laws in the transnational context lies in making competing validity claims of democratic self-legislators mutually compatible in the following way:

[T]he specific mode of operation of the conflict-of-laws version lies in the fact that in the event of a conflict of democratic validity claims, it lends at least one of them validity. Thus, the claim of democratic self-legislation is not dispensed with in favour of supranational intervention, but maintained as far as possible in the conflictual case.⁵

The above formulation raises questions, which are taken up by Marc Amstutz in his response to Rödl.

Amstutz (Chapter 2) usefully describes the quoted aspiration of conflicts law as a “*cumulative*” democratisation of global law. But there are questions, in particular, about the assumption - or a limitation on the object of study - that a democratically-legitimate national law would be applied: What if the legal order to be applied were not democratically established? What about applying a foreign democratic law in an undemocratic state? Amstutz also queries the characterisation of globalisation underlying Rödl’s approach. Instead of inter-dependence between individuals located on different sides of borders, Amstutz says, globalisation represents a new structure, which lacks a territorial reference point and consists purely in communication. Global patterns, such as the world economy or world literature (“function systems”), formal organisations, some epistemic communities, sports events, fairs, wars “reproduce pre-existent cultural diversity and push it back at the same time” (according to Rudolf Stichweh), so that the global structures overlay the national ones without mutual exclusiveness, even though the newer global structures may, over time, reduce the relevance of the

⁵ Florian Rödl, “Democratic Juridification without Statisation: Law of Conflict of Laws instead of a World State”, Chapter 1 in this volume, Section I.2.

older territorial ones. According to Amstutz, the functionally-differentiated world society will - gradually - acquire a new concept of law, based primarily upon cognitive, rather than normative, grounds. This global law cannot be obtained by conflicts law, he says, because conflict law is only capable of mobilising classic national legal orders, which are tailored to normative expectations. Instead, the legitimacy of global law should be sought, not in the classic democratic model, but in the global patterns themselves: a customary global (not customary international) law.

II. The European Constellation

In a multi-layered essay on the “vocation” of Europe (Chapter 3), Christian Joerges maintains that the need both to co-ordinate conflicting policies and to ensure the legitimacy of the co-ordinating moves - a task assigned to conflicts law - arises not only at European and national levels, but also on the international plane. Nevertheless, the European context is different from the international context, because of both the *degree* to which European rules and principles - as supranationally valid law - are “stronger” than the regimes of international law and the degree to which Member States have bound themselves with legal commitments. Having started from the concepts of “vertical”, “horizontal”, and “diagonal” conflicts (the last of which is defined below), Joerges observes that this system has nation-state roots: from a more comprehensive view, the innovations of “regulation” and “governance” that took place in the national context during the last third of the Twentieth century have, for some time, been under way in the European Union and even in the international system, too. In studying the transnational quasi-administrative regulatory politics, such as, in particular, the comitology committees orchestrated by the European Commission, Joerges has sought to anchor this decision-making in its deliberative quality and in the accountability of its various actors: this aim is the end of a “second dimension of conflicts law”. A “third dimension of conflicts law” tries, likewise, to find normative yardsticks for the recognition, by democratic legal orders, of the primarily private regimes, especially transnational ones, which exercise regulatory functions. Joerges concludes his essay with the suggestion that, when it comes to defining the legitimate functions of the European Court of Justice, the conflicts-law approach supplies new orientation, with its distinction between the supervision of political powers within

constitutional democracies and the compensation for the democracy failures of nation states by European law.

In responding to Joerges, Andreas Maurer (Chapter 4) proposes that, in the broader transnational setting, the third dimension of conflicts law should focus upon the question of *when* private norms acquire a sufficient degree of normativity to conflict with state law. Olaf Dilling, in a second response to Joerges (Chapter 5), also concentrates on the subject-matter of the second and third dimension, and on such transnational rule-makers as the International Standardisation Organisation, the Fairtrade Labelling Organisation, and the Forest Stewardship Council. Dilling compares Joerges' theory to the "orchestration" of governance regimes by states and international organisations, which pre-supposes that "the transnational space is no *rechtsfreier Raum*".

Rike Krämer explains the concept of "diagonal conflict" (Chapter 6). A diagonal conflict, as termed by Joerges, refers to the following situation: a national regulation, such as that on book price-fixing in Germany, may belong to the field of culture in the Member State, while the European Union lacks a true legislative competence in that field. Notwithstanding this, the regulation may conflict with European law, for example, competition law, or, if it has an effect equivalent to a quantitative restriction, the free movement of goods.⁶ Krämer argues that political will and problem-solving capacity are more fundamental than competences (while competences do shape political will, sometimes "where there is a will, there is a way", she notes, as for instance, in the case of Community environmental policy in the 1970s). And, generally speaking, competences are not the solution, either, for the problem is a deeper one of a collision of different policy goals (when one field is regulated, various different goals are concerned, and, in addition, from one point of view, one goal, for example, the environment, may be concerned, while, from another point of view, the goal is an economic matter). Krämer sums up that the concept of diagonal conflict should be modified to include

⁶ The concept of diagonal conflict, which had already been used in the 1990s by Christian Joerges and Christoph Schmid, is applied to the case in the text in Christoph U Schmid, "Diagonal Competence Conflicts between European Competition Law and National Regulation – A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing", (2000) 1 *European Review of Private Law*, pp 153-170.

the case of non-decision at European level, for the two more basic reasons, rather than the competence issue, just given.

In a case study on the authorisation of genetically-modified products in Europe (Chapter 7), Maria Weimer investigates the question of how the “joint” administrative powers exercised by different national authorities, “comitology” committees, and Union agencies such as the European Food Safety Authority can be legally framed. In an attempt to resolve the conflict of authorities, the European Commission has recently proposed that a Member State could “opt out” from a European authorisation of the cultivation of a genetically-modified organism, “on grounds other than those related to the assessment of the adverse effect on health and environment” undertaken by Union authorities. While such a separation of competences - science-based, technocratic assessments in the Union, and specific, national or regional political, economic, or ethical considerations - resembles a conflicts solution in ostensibly respecting the legitimacy of different constituencies, while simultaneously ensuring the compatibility of both national and European objectives, Weimer notes the controversy surrounding the opt-outs: legally, they are likely to constitute trade restrictions, which have to be justified with regard to the free movement of goods and the WTO Agreements. Thus, ultimately, the European courts and, possibly, the WTO adjudicating bodies, will have to develop conflicts solutions; and, indeed, the “first dimension of conflicts law” may provide guidance in this task, when principles such as proportionality are being legally interpreted.

III. Exploring the Societal Adequacy of the Conflicts Approach

As the elaboration of the conflicts-law approach has been well informed by social theory, Sabine Frerichs (Chapter 8) asks why further gap-filling, or backing from sociology should be necessary. She acknowledges the important point that conflict-of-laws theories and sociological conflict theories have different notions of conflict: the conflict-of-laws theories start from a formalistic problem, namely, which of several possible laws should apply in a certain case, while theories in sociology start with the problem of social conflict. Notwithstanding this, some common ground can be established in the modern theories. So, for instance, a conflict between European

Union law, which is based upon a market logic, and national social-security laws represents - at the same time - a social conflict, which may be solved by modern conflict-of-laws theories based upon the idea of *comitas*. Frerichs extensively describes the classical and contemporary approaches in conflict sociology, and attempts to distinguish among them between theories that are based upon a consensus paradigm and those that are based upon a conflict paradigm. She concludes that modern theories by Habermas and Luhmann cannot easily be categorised upon this basis. Nevertheless, her analysis shows that, in so far as a sociological backing of new conflict-of-laws approaches is sought at all, "Habermas is in, but Luhmann is clearly out". In his response to Frerichs (Chapter 9), Henning Deters stresses that whether "Habermas is in, but Luhmann is clearly out" depends on the issues upon which these authors are supposed to inform. As a result, Deters suggests giving more attention to the intellectual and practical problems with which conflicts law is confronted, so that sociological theory can be valuable for the legal scholarship.

In the second longer contribution of Part Two, Poul Kjaer (Chapter 10) writes that transnational regimes, compared with nation states, exemplify a "weaker synthesis between law and politics". This is so for several reasons, including that the legal regimes typically rely on judge-made law, with only weak references to legislation produced within the political system. Likewise, the political-administrative structures expand without relying upon a legal basis, with law activated, if at all, mainly *ex post*. Despite all this, the ever-increasing significance of transnational arrangements need not imply depoliticisation. Instead, Kjaer argues for a re-thinking of the concept of the political. According to him, the various transnational entities adopt concepts that serve as functional equivalents to the constitutive infrastructure of the political in nation states. In place of the "nation" or "the people", the concept of "stakeholders" delineates the (fluid) portion of the environment that a non-territorial transnational system deems relevant to its operations. In place of the "public sphere", transnational organisations develop policies of "transparency", such as rules determining access to documents. In place of democratic "representation", there is "self-presentation": public organisations develop policy programmes and establish targets for their achievement, just as multinationals and non-governmental organisations develop ethical charters which (re-) present the way in

which they conduct their activities. Finally, in place of controls through “delegation”, “accountability” charters are created, and external actors may put their faith in a “right to justification” after having been adversely affected. The institutional forms are “a-democratic”, Kjaer says, and not only law, but also political dimensions tend to arise *ex post*, in the wake of the exploitation of market demands by multinationals or the solving of concrete social problems by non-governmental organisations. While commending many valuable aspects of Kjaer’s analysis, Inger Johanne Sand (Chapter 11) points out problems with the notion that the elements of regulatory processes are the functional equivalents of the political. Namely, there may still be a lack of generalised and universal argumentation, across-the-board balancing of all relevant considerations, and fully comprehensive and inclusive decision-making processes. In short, all societal themes may not be seen together, and in a full social context, as they are in democracy.

Martin Herberg (Chapter 12) enquires about the possibilities of law to deal with the “self-referring circularity” of governance regimes operating in, for example, the field of environmental management in multinational companies. Herberg argues that law has its own knowledge, which can co-ordinate and critically scrutinise - in brief, bridge - the claims of different expert authorities. In order to achieve this aim in the transnational setting, law should not become entangled in the cognitive procedures of the other expert authorities. It should keep on drawing upon the characteristics of individual cases, and resolve conflicts impartially. In governing the supervision of private-sector regimes, conflicts law, Herberg says, should investigate the “regimes of truth” accompanying the emerging normative orders. How, exactly, this is done, in the case of epistemic conflicts between, for instance, corporate-liability regimes which conceptualise the influence of parent companies on their subsidiaries in negative terms, and self-regulatory practices which deem the supervision necessary in order to prevent harm, remains to be seen.

In his recent writings on conflicts law, Christian Joerges has relied upon Karl Polanyi’s ideas on the “always socially embedded” economy to incorporate a non-legal analysis on why markets, as

social institutions, need regulation and governance arrangements.⁷ In Kolja Möller's comparison between Polanyi's notion of social embeddedness and Michel Foucault's "governmentality" (Chapter 13), Foucault's pivoting of administrative state apparatuses is said to provide a more profound understanding of how, for example, political and legal decisions pave the way for financial-market capitalism. The importance of knowledge, such as the efficiency analyses preceding and driving the marketisation of the 1980s and beyond, and the reminder that alternatives to market liberalism need to operate at a sufficiently-detailed level of complexity and sophistication, are the normative implications of Foucault's analysis. In his response to both Herberg and Möller (Chapter 14), Hagen Schulz-Forberg adds a careful historical analysis of the concepts of governance and liberalism. Schulz-Forberg asks Herberg how the law can co-ordinate and moderate between regimes of truth, and encourages him to look at what the different regimes of environmental governance understand as "effective forms of governance". Schulz-Forberg also highlights the conceptual insecurity that liberalism is facing today, as opposed to the 1940s, when Polanyi wrote and when the socialist alternative supplied the devilish counter-concept, or the 1970s, when Foucault had a clear target in the ubiquitous liberal discourse that included rational choice.

IV. Constitutional Conflicts and Social Justice

Because the top courts in global and regional associations do not form part of the triads with a legislature and an executive, the self-determined relations among these courts, in cases of conflict, become politically intriguing. Given the scarcity of theoretical ideas about their relations, one focuses on how the courts themselves manage their co-existence in practice. In a joint contribution (Chapter 15), Rainer Nickel and Alicia Cebada Romero examine the European Court of Human Rights and how it recognises "constitutional pluralism" in preference to replacing divergent laws. They delineate several cases:

⁷ See Christian Joerges, "A New Type of Conflicts Law as the Legal Paradigm of the Postnational Constellation", in: Christian Joerges & Josef Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, (Oxford-Portland OR, Hart Publishing, 2011), pp 465-501.

- in the rare case of finding a domestic constitutional law directly violating the European Convention on Human Rights, in *Sejdić and Finci v Bosnia and Herzegovina* (2009), the Court refers to the lack of democratic legitimacy of the Bosnian Constitution;
- the *von Hannover* decisions, involving conflicting concepts of freedom of the press between the European Court of Human Rights and German high courts, illustrate that the courts apply the art of distinguishing cases in order to avoid head-on collisions (a “tactic of avoidance”);
- Articles 8 to 11 of the Convention permit restrictions of a right if these are “prescribed by law and are necessary in a democratic society”;
- the margin of appreciation allowed for Member States in the jurisprudence of the Court is applied with a surprising diversity;
- sometimes, a greater margin of appreciation has been allowed on the explicit ground of a diversity of practice among the Member States;
- the degree of legal protection provided by the European Union legal order has been deemed sufficient, so that a complainant has to show that, in his or her case, this general level of protection has not been met; and
- a democratic choice, emerging from a lengthy, complex, and sensitive debate, in the case of regulations on abortion in Ireland, could not be ignored by the Court.

Nickel and Cebada Romero give cautious support to the idea of a presumption that a Member State respects the guarantees of the Convention, provided that certain conditions are met. Simply calling for judicial self-restraint does not suffice to deal with the present “asymmetric Europe”.

Domenico Siciliano (Chapter 16) observes the erosion of the rule of law in the “*rechtsfreier Raum*” between national and international levels. His example is taken from airspace regulation in NATO states, concerning hijacked civil airplanes after the 11 September 2001 attacks: in Germany (where a parliamentary law was passed, and

later declared partly unconstitutional), in Italy (where a secret decree was issued), and in Spain (where the conservative government first issued a secret decree, and the succeeding socialist government introduced a parliamentary law). Siciliano concludes that informal politics, adopted in transnational, military-political networks, are being implemented top-down at national level, which sidesteps democratic debate.

In the remaining three contributions, social justice and the limits to the conflicts approach are addressed. Isabell Hensel (Chapter 17) reflects on the justifications for social rights, with a view to conceiving of human rights as a cross-sectorial framework for economic activity. Some writers justify social rights as necessary in order to obtain opportunities to participate in democratic processes, that is to say, with regard to political rights. But, then, social rights are limited to the relevant collectivity or governance discourse, in which one wants to participate. A universal moral justification is also problematical, because societies are pluralistic and morality can only be divided. This is why human rights would be reduced to very different interpretations and might become an instrument of power politics. Finally, if social rights were conceptualised as “subjective rights”, then rights would be ever more prone to instrumentalisation, which has already happened in the welfare state, and which, in a global context, would be even more likely to occur. How, then, can social rights be prevented from becoming instruments of power in global structures, such as private governance, Hensel asks? Her answer is that human rights can establish “taboo-areas” or autonomous spaces, where rights guarantee human autonomy, and, thus, one can justify a universal and legally-constitutive obligation to concretise human autonomy. This principle of respect for human autonomy leads to specific obligations, such as an intra-societal obligation to establish just domestic and supranational institutions, including, for example, international courts. In this manner, the respect for human autonomy can be a legal basis or a normative standard for the “humanly adequate” formation of governance networks, and can serve to complement concepts of deliberation. Then the governance structures need to adjust to this protection and to keep it free from their “sectorial logics” or the economic interests which dominate the arrangements.

In the penultimate section (Chapter 18), Tommi Ralli discusses global poverty, without rushing to think immediately about aid, which should be a secondary institution. Shirin Ebadi has proposed a convention to combat poverty. It includes global state-budget control so that no country would be allowed to spend more on military forces than on education and health. Originally a proposal for a treaty, the idea is likewise conceivable as a legal principle. Ralli argues in the chapter that the initiative makes sense within a broader perspective on the legitimacy of the state, and also fits into a duty-based approach, in which duties come before rights. Towards the end of the chapter, he contrasts the aspirational treaty idea with the case-based, example-driven field of conflicts law discussed in this volume. As poverty persists when the poor lack the resources to defend their interests and the affluent do not defend those interests, there is, indeed, a democracy failure, in so far as the causes of poverty include the very policies approved by the democracies that conflicts law addresses. But how can the European conflicts law be used as a model outside Europe? And what kind of a critical tool is the conflicts approach for changing the imbalance that keeps people poor? In conclusion, he looks at practical objections to Ebadi's proposal, such as the incentives of the arms industry in Western democracies.

The epilogue by Michelle Everson continues to probe the boundaries of the conflicts-law approach. Everson summarises the virtues and limits of conflicts law at a time when a global financial crisis is promoting both supranational co-operation and renewed nationalistic feeling, while other forces, notably within sustainable development, appear to question all forms of constructed collective order. The conflicts approach is, Everson points out, conservative, and correctly so, in procedurally-allocating the right of normative decision amongst established political communities. This is a virtue of the approach. But the approach should also open up a new dimension for emergent political communities, in order to continue recognising the reality of law's social environment. To quote Everson, "we must be aware of the limits to the conflicts approach, in particular, with regard to the ability of law to integrate and mediate the social justice demands of an infinitely complex social reality".⁸

⁸ Michelle Everson, "The Limits of the 'Conflicts Approach': Law in Times of Political Turmoil", Epilogue, Chapter 19 in this volume, Section I.

Part I

Conflicts-law

Constitutionalism in
Postnational Constellations

Part I.1

Global Constitutionalism?

Chapter 1

Democratic Juridification without Statisation Law of Conflict of Laws Instead of World State

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I. Transnational Juridification as Statisation?

“Constitution beyond the Nation State continues to be a dominant theme in legal and constitutional theory. The debate here in Germany has, for the last twenty years, followed two lines. The first reaches back to the early 1990s, when the opening of the Iron Curtain lent wings to ideas about a “new world order” that might replace the bipolar power system of the Cold War. This discussion, located primarily in political philosophy, centred round possible forms of world government or a world republic, and the various pros and cons.¹ The second line started later, and concerned the far less speculative, indeed, entirely real, project for a Constitution for

¹ See, for example, Otfried Höffe, *Demokratie im Zeitalter der Globalisierung*, (Munich, CH Beck Verlag 1999); Stefan Gosepath & Jan-Christophe Merle (eds), *Weltrepublik. Globalisierung und Demokratie*, (Munich, CH Beck Verlag, 2002); Matthias Lutz-Bachmann & James Bohman, (eds), *Weltstaat oder Staatenwelt? Für und wider die Idee einer Weltrepublik*, (Frankfurt aM, 2002); Jürgen Habermas, “Hat die Konstitutionalisierung des Völkerrechts noch eine Chance?”, in: *idem, Der gespaltene Westen, Kleine Politische Schriften X*, (Frankfurt aM, Suhrkamp Verlag, 2004), pp 113-193.

Europe, begun in the political sphere with the convocation of the European Constitutional Convention in 2001.² In both discussions, Ingeborg Maus took a consistent stance, and one very much to the point. In both connections, she penetratingly criticised the promised progress customarily associated with world government or with an EU constitution.³

We do not intend just to add another piece to one or other of these lines of discussion below. Instead, we wish to focus on one highly innovative aspect of Maus' position, which she addresses and outlines, but does not fully develop, and, perhaps for this reason, has not, as far as we can see, been adequately taken up in the debates in political theory and democratic constitutional theory. This aspect comes to bear in the following connection: Maus' critique of the speculative and real manifestations of supranational or even global constitutions disputes the essential starting-point of her proponents, namely, that the modern democratic state is under too much strain from the varieties of societal boundary-crossing associated with "globalisation", that is, the transnational integration of markets and production factors. Against this, she says that democratic statehood, as understood in the concepts of Enlightenment philosophy, has always - and this means, impressively, already in Kant's view - been oriented to boundary-crossings of such kinds.⁴

² Among works of democratic constitutional theory, see, for example, Dieter Grimm, "Vertrag oder Verfassung. Die Rechtsgrundlage der Europäischen Union im Reformprozess Maastricht II", (1995) 6 *Staatswissenschaften und Staatspraxis*, pp 509-531; Jürgen Habermas, "Braucht Europa eine Verfassung? Eine Bemerkung zu Dieter Grimm", in: *idem* (ed), *Die Einbeziehung des Anderen*, (Frankfurt aM, Suhrkamp Verlag, 1996), pp 185-191; Hauke Brunkhorst, "Demokratie ernst genommen. Europa nach dem Scheitern der Verfassung", (2005) 24 *Widerspruch*, pp 31-46; Christoph Möllers, "Verfassungsgebende Gewalt - Verfassung - Konstitutionalisierung", in: Armin von Bogdandy & Jürgen Bast (eds), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge*, (Dordrecht-Heidelberg-London-New York, Springer, 2009), pp 227-277.

³ Ingeborg Maus, "Vom Nationalstaat zum Globalstaat oder: der Niedergang der Demokratie", in: Matthias Lutz-Bachmann & James Bohman (eds), *Weltstaat oder Staatenwelt? Für und wider die Idee einer Weltrepublik*, (Frankfurt aM, Suhrkamp Verlag, 2002), pp 226-259; *idem*, "Verfassung oder Vertrag. Zur Verrechtlichung globaler Politik", in: Peter Nießen & Benjamin Herborth (eds), *Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik*, (Frankfurt aM, Suhrkamp Verlag, 2007), pp 350-382.

⁴ Maus, "Vom Nationalstaat zum Globalstaat oder: der Niedergang der Demokratie", note 3 above, p 228 *et seq*; see, also, *idem*, "Die Bedeutung nationalstaatlicher

The first resource in this practical potential of the modern concept of the state is its exclusive tie to the idea of an association of individuals (*Personalverband*). This does not mean that the state's territorial dimension is to be fully transcended; instead, it is shifted into an instrumental role as a possibility condition (*Möglichkeitsbedingung*). In this way, for instance, migration processes are, as long as the essence of the personal connection is understood in a modern way in terms of procedures of collective democratic self-determination, open, at least, to handling movements of people (labour) and enterprises (capital). The second resource is the capacity of the bounded nation state to offer a legal framework for social relations across borders, too, and thus enable social boundary crossings to be given legal form. The nation state has had this capacity for a long time, even independently of the modern idea of the state as a personal association, namely, in the form of law of conflict of laws in private legal relations. The existence of a law of conflict of laws here means a willingness to apply not only one's own private law, but also, in certain circumstances, foreign private law to border-crossing situations, while the norms of private international law determine the law of which state is to come to bear in a border-crossing situation.

Conceiving the state essentially as an association of persons is obligatory in the context of pure democratic theory. Highly attractively, this idea is bound up with the further notion that membership in this personal association is based solely upon an externally free choice on the part of the individual.⁵ Thus, the specific nature of a bounded democratic people no longer seems to amount to exclusion, and, ultimately, to domination. All the same, this second notion of free choice of membership presents various difficulties, in the present conditions of massive social and associated international inequality.⁶ These are not, however, to be the topic here. Instead, we

Grenzen. Oder: die Transformation des Territorialstaates zur Demokratie", (2001) 46 *Blätter für deutsche und internationale Politik*, pp 313-323.

⁵ In this connection, see Maus, "Vom Nationalstaat zum Globalstaat oder: der Niedergang der Demokratie", note 3 above, p 229.

⁶ They become manifest in, for instance, the hard social conflicts about (labour) migration (for an illuminating account, see Knuth Dohse, *Ausländische Arbeiter und bürgerlicher Staat. Genese und Funktion von staatlicher Ausländerpolitik und Ausländerrecht vom Kaiserreich bis zur Bundesrepublik Deutschland*, (Königstein, Taunus, 1981). It is not without reason that the idea of free choice of membership in a political community - to be sure, under otherwise socially affirmative auspices - is one of the

shall pursue the second aspect below, namely, private international law as a way of juridifying social border-crossings, which supplies a fundamental alternative to the European and global super-state projects which are regarded as necessary in the light of these border crossings.

In this connection, we shall start by once again recalling Maus' critique *in terms of democratic theory* of the Euro-state and world-state projects, and supplement it by a second critical line that might be called the *political-economic* critique. This should make it clear that there is an undeniable necessity to take somewhat further the conceptual alternatives sketched out by Ingeborg Maus, of what we shall here call the "democratic juridification without statisation" ("*demokratische Verrechtlichung ohne Verstaatlichung*") of the transnational. It is to this venture that the second part of the text is devoted. The motive and the starting-point for these discussions is not least the fact that conflict of laws as a legal discipline is itself something of a battleground. This is because, in its hegemonic articulation, law of conflict of laws could not perform the function normatively ascribed to it by Ingeborg Maus at all, namely, that of making a bounded political and an unbounded social sphere compatible. Instead, it is placed at the service of quite different social dynamics and functions, something that not only largely leaves the democratic intentions primary for Maus somewhat in a vacuum, but also even deliberately contradicts them.

I.1. Maus' Critique of Euro-state and World Government Programmes

Maus' sharp criticism of even progressively conceived world-government models operates at two levels: the first constitutes a re-construction of the positions, especially Kant's, against a world republic, and in favour of a peaceful association of nations flanked by cosmopolitan law. The second consists of a recollection of basic division-of-powers structures under conditions of developed democratic popular sovereignty, of which the models on offer regularly fall short. The first level of a re-construction of Kant's

ideological keystones of radical neoliberalism; see Viktor Vanberg, "Bürgersouveränität und wettbewerblicher Föderalismus: Das Beispiel der EU (2003)", in: Nils Goldschmidt & Michael Wohlgemuth (eds), *Viktor J. Vanberg. Wettbewerb und Regelordnung*, (Tübingen, Mohr Siebeck, 2008), pp 117-151.

critique of the idea of a world state is, admittedly, more fundamental, since it should operate irrespective of whether the principle of popular sovereignty, along with its associated model of division of powers, can be achieved institutionally in the global context. This critique ultimately starts from its sheer size:

While concepts of a World State mostly deal - apart from global conquest for an unlimited power monopoly - only with the lists of global governance tasks that can be efficiently accomplished only on a world scale, for Kant's theory the structure of democratic self-organization, within which alone decisions about State functions can be taken in the first place, takes top priority. And Kant's considerations on the appropriate size of States are also determined exclusively from the viewpoint of the compatibility of territorial extension with democracy. As for the whole eighteenth century, for Kant too it is the case that freedom, self-determination and popular sovereignty can be organized only over small areas.... Kant's essay on peace largely bases his rejection of a World State in favour of a league of nations on this viewpoint. Kant's strong verdict is directed not, say - as the pejorative equation of world republic and world monarchy confirms - against a specific structure of the World State, but primarily against its size as such. The bigger the State, the more efficient must, according to Rousseau, be the executive, until finally a growth is attained beyond which the executive either fails or can no longer be controlled by the legislature and the social base. Kant accordingly defends a league of nations in which the unchallenged sovereignty of each individual State is the condition for the possibility of popular sovereignty.⁷

Against the "arrogance of the epigones"⁸ Maus regards this argument as still valid today.

But is only once it comes to what, according to Hermann Heller, defines democracy, namely, a legal binding of the

⁷ Maus, "Vom Nationalstaat zum Globalstaat oder: der Niedergang der Demokratie", note 3 above, p 240 *et seq.*

⁸ *Ibid.*, p 241.

political power élites to the will of the ruled, that the problems of a global organization of democracy are insoluble.⁹

Admittedly, this argument of scale against a global state is somewhat harder than first appearances might suggest. This is because it might very well be suspected that the existing nation states, including such states as Brazil, the US or even Germany, may themselves have long left behind the size dimensions that can be dealt with in Kantian concepts. However, the argument remains valid even if it is not read as a democratic distinction of the order of the magnitude of existing state democracies; nor is that even necessary. One may very well regard a reduction in the size of many of the existing nation states as preferable or even democratically desirable, although it is not an aim on any agenda. Those not afraid to commit themselves to this position may, also, without further ado, object to the absorption of the existing nation states into even larger units as a further deterioration of circumstances which are already none too favourable from a democratic viewpoint.

But the attractiveness of programmes which go from supra-national up to global statisation is probably based primarily upon the widespread conviction that the border-crossing inter-dependence of national societies generates types of problems that can no longer be solved by the states on their own or through their consensual co-operation, but require a unitary political space that corresponds to the continental, or even global, scope of the problems. The appropriate size of a state unit and the democratic sovereign which ultimately constitutes it cannot be guided solely by the possibilities of effective democratic self-organisation, but ought to be oriented to the effective possibilities of political control of social conditions. However, this is not just some shift to a problematical idea of “output legitimisation”,¹⁰ it is only a reflection of the pre-condition unstated in the context of democratic constitutional theory, namely, that a concept of democratic legitimisation rightly-oriented exclusively to procedures of self-government must always assume the social relevance of the possible content of that government if this content is to be perceived as social self-determination at all. This means that any

⁹ *Ibid.*, p 242.

¹⁰ As said presumably in Maus, “Verfassung oder Vertrag. Zur Verrechtlichung globaler Politik”, note 3 above, p 374.

pure argument from scale against European or global statehood remains incomplete.

We must, accordingly, bring Maus's second argument into focus here, according to which the current world-government programmes regularly miss the normatively required division-of-power structures of actualised popular sovereignty. The democratic division of powers is marked by a functional separation between the making of law and the application of law.¹¹ And it turns out to be essentially hierarchical, since legislative law-making is superordinate to the administrative and judicial application of the law, as manifested in the strict binding by statute of the very institutions that apply it. This clear structure, necessary from both democratic and rule-of-law viewpoints, can no longer be seen in the current models of super-statehoods, which, as a rule, do not transcend nation-state structures, but seek to tie them into a continental or world-wide constitution. It is particularly the central and superordinate position of the democratic sovereign, or the legislature which directly represents it, that regularly gets lost. Instead, it is national governments or the executives of the supra-national institutions that dominate,¹² and, at best, they are flanked by a public which is only hoped-for.

Accordingly, in the debate about a European Constitution, Ingeborg Maus advocated a genuine parliamentarisation of European law-making, associated, in particular, with a right of legal initiative for the European Parliament.¹³ Realising these structures is, of course, hard enough, given Maus' argument from of scale. But this sober viewpoint does not justify letting a European constitution do without democratic rights in formal terms as well.

In this situation, one should, admittedly, go further into the question of whether the models of supra-national governance hitherto proposed display the inadequacies so penetratingly emphasised by

¹¹ Ingeborg Maus, *Zur Aufklärung der Demokratietheorie. Rechts- und demokratietheoretische Überlegungen im Anschluss an Kant*, (Frankfurt aM, Suhrkamp Verlag, 1992), p 142 *et seq*; *idem*, "Die Errichtung Europas auf den Trümmern der Demokratie?", (2005) 50 *Blätter für deutsche und internationale Politik*, p 835 *et seq*.

¹² Such as the European Council and the EU Council as assemblies of national executives and the European Commission as a supranational executive.

¹³ Maus, "Die Errichtung Europas auf den Trümmern der Demokratie?", note 11 above, p 977 *et seq*.

Maus merely by chance, or whether this is, in turn, the consequence of the structures of the global political economy. To put it more concretely, albeit briefly, it might be that the real political models with their dominance by national executives and, at most, lightweight parliamentary components ultimately reflect the basic structure: competing states in a world-embracing capitalist social formation.¹⁴ Upon the basis of this structure, national governments, which to date and for the foreseeable future will act as the key figures in international governance processes, are oriented primarily to defending or expanding the competitive position of their own state, specifically also through processes of supranational constitutionalisation.¹⁵ It would then, however, seem to be out of the question for these very governments to give up their exalted position in supranational constitutional set-ups voluntarily by enthroning a superordinate popular legislature. This could come about, no doubt, only through a genuine acquisition of supranational constitutional power by the corresponding sovereign – in Europe's case, the European people. This democratic appropriation of supranational statehood will not, however, come about as long as most political parties and broad sections of the population within the nation states for their part continue to support with might and main both their own state's and their own government's orientation towards interstate competition.

If this hypothesis, admittedly sketched only in the broadest outline here, is right, then Maus' critique, with its primarily democratic and

¹⁴ Also Immanuel Wallerstein, *Das moderne Weltsystem. Die Anfänge kapitalistischer Landwirtschaft und die europäische Weltökonomie im 16. Jahrhundert*, (Frankfurt aM, Syndikat, 1986), p 518 et seq; Joachim Hirsch, *Der nationale Wettbewerbsstaat. Staat, Demokratie und Politik im globalen Kapitalismus*, (Berlin, Id-Verlag, 1995), p 31 et seq.

¹⁵ Patrick Ziltener, *Strukturwandel der europäischen Integration*, (Münster, Westfälisches Dampfboot, 1999), p 74 et seq; see, also, Martin Höpner & Armin Schäfer, "Eine neue Phase der europäischen Integration: Legitimationsdefizite europäischer Liberalisierungspolitik", in: *idem* (eds), *Die Politische Ökonomie der europäischen Integration*, (Frankfurt aM-New York, Campus Verlag, 2008), pp 129-156. The political blocks on processes of positive integration in Europe penetratingly analysed by Fritz Scharpf, *Regieren in Europa. Effektiv und demokratisch?*, (Frankfurt aM, Campus Verlag, 1999), p 47 et seq., confirmed in *idem*, *Individualrechte gegen nationale Solidarität*, in: Martin Höpner & Armin Schäfer (eds), *Die Politische Ökonomie der europäischen Integration*, (Frankfurt aM-New York, Campus Verlag, 2008), pp 89-99), are, in turn, ultimately an expression of the basic structure as competing states.

rule-of-law approach, acquires a strong flanking position: the current models of supranational governance owe their shortcomings not just to a lack of democratic awareness of their political authors in democratic and rule-of-law terms.¹⁶ Without a prior fundamental shift in social and political circumstances, democratic and rule-of-law alternatives can have no prospect of becoming a reality.

I.2. Law of Conflict of Laws: Juridification without Statisation

Accordingly, the prospects for supranational constitutionalisation that do not abandon the structural requirements of democracy and the rule of law, but aim at meeting these requirements undiminished at the higher level too, seem to be low. Thus, particularly from a democratic viewpoint informed by social theory, there seems to be nothing left but to recognise the continuing relevance of the nation state framework. Admittedly, social development can, hardly be affected by the conceptual and normative position developed above. Border-crossing economic and social interactions will not stop in order to shift the focus of social interaction back within the democratic constitutional state. Instead, the extent of the societal border-crossing attained today will continue, and will, in future too, tend to increase rather than diminish. The problem of the democratic juridification of border-crossing relations will, therefore, continue to be a pressing issue.

¹⁶ The politico-economic establishment of this position might further make it clear why the supranational federalization in the EU that appears to many constitutional lawyers (Stefan Oeter, "Föderalismus und Demokratie", in: Armin von Bogdandy & Jürgen Bast (eds), *Europäisches Verfassungsrecht. Theoretische und dogmatische Grundzüge*, (Dordrecht-Heidelberg-London-New York, Springer, 2009), pp 73-120, at 85 *et seq*; Christoph Möllers, "Expressive versus repräsentative Demokratie", in: Regina Kreide & Andreas Niederberger (eds), *Transnationale Verrechtlichung. Nationale Demokratien im Kontext globaler Politik*, (Frankfurt aM, Campus Verlag, 2008), pp 160-182, at 178) and also to Ingeborg Maus to be unproblematical from a democratic viewpoint ("Die Errichtung Europas auf den Trümmern der Demokratie?", note 11 above, p 977), has, in fact, led to a new supremacy of civil and rule-of-law aspects over democratic and Social State aspects: democratic (re-)creations at national level with a Social State inspiration are constantly coming up against the limits of the judicially sanctioned quasi fundamental-rights guarantees at European level (on the example of the relationship between the European fundamental freedoms and Member States' collective labour law, see Christian Joerges & Florian Rödl, "Das soziale Defizit des europäischen Integrationsprojektes", (2008) 41 *Kritische Justiz*, pp 149-165.

One alternative to current statisation programmes is offered, as Ingeborg Maus has clear-sightedly pointed out in this connection, by law of conflict of laws. She sees this as already being addressed, very fruitfully in terms of conclusions to be drawn, in Kant's speech on cosmopolitan law:

Kant's outline of a 'cosmopolitan law' is already exactly suited to the problem of de facto border-crossing between national legal systems. Kant's 'cosmopolitan law' is not – something often misunderstood – in contradiction with the principle of the nation state... but indicates the rules that have to be complied with when going from the area where one national legal system applies to another.... Kant's cosmopolitan law thus does not denote some supranational order, but instead partially anticipates modern private international law, which deals with the simultaneity of national legal systems and international transactions between private legal subjects in terms of conflict of laws, and must, to answer the question of which legal norm should apply to which state affected in any individual legal case, always pre-suppose extraterritorial validity of law.¹⁷

At this point, however, there is, first of all, one thing to be expected. Private international law, or law of conflict of laws for private legal relations, concerns, first and foremost, the way in which national legal systems deal with transnational private legal relations. It decides which national law is to apply to transnational legal relations: for instance, which state's peremptory law will apply in cases of transnational contracts, to which state's liability system the victims of transnational environmental disasters can appeal, which state's rules must be complied with in cases of transnational issues of shares, *etc.* Ultimately, private international law ranges as widely in subject matter as does private law, thus including, alongside contract and tort as well as property rights, such things as company law, securities law and private-law forms of competition law. Among the subjects that are not covered are public-law legal relations which, on one side, involve a bearer of sovereign power that has territorially-bounded

¹⁷ Maus, "Vom Nationalstaat zum Globalstaat oder: der Niedergang der Demokratie", note 3 above, p 233.

scope. Public-law relations are not dependent on law of conflict of laws in a transnational situation in the same way as private ones.

Let me make this clearer: one cannot contractually owe and simultaneously not owe a sum of money at the same time, one cannot be a child's biological mother and simultaneously not be the biological mother of the same child, even if the application of different legal systems to one and the same factual situation might lead to precisely these different outcomes. Accordingly, the transnational private legal relation requires a law of conflict of laws that can decide between two legal systems competing for application in a transnational case. In contra-distinction, it is entirely possible to make an action punishable according to the law of one state, which is allowed in another, or to infringe a product-safety rule of one state that another state does not have. The combination of criminality and product marketability in public law can, quite simply, be understood as territorially bounded in the transnational context, too: the unity of a private-law relation, in contrast, cannot.

While the global problem situations which are said to exceed the nation state's powers to solve them tend to be objects of public-law regulation, requiring authority or "police" action, such as combating terrorism, protecting human rights, protecting the environment, access to natural resources, *etc*, it, nonetheless, seems, at first sight, a further strength of Maus' programmatic reference to private international law that, by doing so, she recalls the social relevance of private-law steering precisely in the context of these problems, as against the exclusive focus of constitutional theory on public law. Moreover, although this can be no more than postulated here, law on private-law conflict of laws certainly can provide a model for public-law conflicts of laws that result chiefly from the observable federalising integration movement within the world of states.

The potential of law of conflict of laws relevant in connection with the problem of juridifying transnational social relations can be understood from its basic structure alone, without any direct acquaintance with the discipline: functionally considered, law of conflict of laws is a meta-law that has, as its object, the concurrence of the legal propositions of the different national legal systems. Law of conflict of laws decides which of several competing legal systems which each, in themselves, cover and regulate a given transnational

case, is actually to be applied to the case in question. If we now bear in mind that, in the national legal systems, in the (normatively assumed) normal case,¹⁸ it is democratically-legitimated law that we are dealing with, the democratic function of law of conflict of laws becomes clear: in contrast with the statisation programmes, the democratically-legitimated law laid down in the national framework is not to be replaced by a new supranational law, the making of which would, at best, meet stunted democratic requirements. Instead, the aim of law of conflict of laws is to make the competing validity-claims of democratic self-legislators mutually compatible in the transnational context.

Accordingly, in contrast with a programme of conceptual statisation, the conflict-of-laws version of transnational juridification is, in the first place, strictly limited to the transnational context that is the only problematical one any way. It runs no danger of getting out of control and usurping the internal relations of a national democracy. Secondly, the specific mode of operation of the conflict-of-laws version lies in the fact that, in the event of a conflict of democratic validity claims, it lends at least one of them validity. Thus, the claim of democratic self-legislation is not dispensed with in favour of supranational intervention, but maintained as far as possible in the conflictual case. Accordingly, law of conflict of laws embodies a mode of transnational juridification which, in contrast with supranational statisation programmes, does not dilute the claim of democratic genesis of peremptory law to the point of vacuity, but, in fact, still seeks to meet it.

¹⁸ On the problems of the corresponding assumption of international law, see Stefan Oeter, "Prekäre Staatlichkeit und die Grenzen internationaler Verrechtlichung", in: Regina Kreide & Andreas Niederberger (eds), *Transnationale Verrechtlichung*, (Frankfurt aM, Campus Verlag, 2008), pp 90-113. However, both there and here, the appropriate answer to the problem of totally absent or completely inadequate democratic governance would seem initially to be the one given by Ingeborg Maus, following Kant: "Even if domestic State constitutions are still 'bad constitutions', i.e. are either authoritarian or simply 'constitutions *tout court*', they establish State sovereignty as potential popular sovereignty, because the latter can be developed only in Nation States." Maus, "Verfassung oder Vertrag. Zur Verrechtlichung globaler Politik" in: Peter Nießen & Benjamin Herborth (eds), *Anarchie der kommunikativen Freiheit. Jürgen Habermas und die Theorie der internationalen Politik*, (Frankfurt aM, Suhrkamp Verlag, 2007), pp 350-382, at 371.

II. The Change in Form and Function of Law of Conflict of Laws

The form and function of law of conflicts of laws¹⁹ are, however, at least as highly controversial in the relevant branch of legal science as is the extent of supranational constitutional theory in relation to such concepts as sovereignty and the separation of powers. Similarly, and comparable with the position that radically-democratic voices have in the debate in constitutional theory, in the discipline of conflict of laws, the voices asserting the above-outlined democratic functionalisation of law of conflict of laws to be its essence are marginal.²⁰ Instead, for decades, the hegemonic thinking in conflict of laws has been subject to a methodological nationalism (Section II.2), which started from a functionalisation of conflict of laws in political economy, and replaced a universalistic form oriented to the theory of free trade (see Section II.1). Now, however, more recent tendencies are departing from the national-economic sub-structure and trying out possibilities of formally using conflict-of-laws means to bring about a competition of legal systems and through it a privatisation of the function of law (Section II.3). In this way, admittedly, law of conflict of laws is developing potentials that are diametrically opposed to our venture here, namely, openly anti-democratic ones.

¹⁹ The following represents a provisional sketch of the functional shift in law of conflict of laws from the mid-Nineteenth century to date. The decisive works for the approach and methodology in analysis of functional change in legal theory are: Franz L. Neumann, "Der Funktionswandel des Gesetzes im Recht der bürgerlichen Gesellschaft", in: Herbert Marcuse (ed), *Franz Neumann. Demokratischer und autoritärer Staat*, (1937), (Frankfurt aM, Fischer, 1986), pp 31-81; Ingeborg Maus, "Entwicklung und Funktionswandel der Theorie des bürgerlichen Rechtsstaates", in: *idem*, *Rechtstheorie und politische Theorie im Industriekapitalismus*, (Munich, Fink, 1986), pp 1-86.

²⁰ Fundamentally, see Christian Joerges, "Zum Funktionswandel des Kollisionsrechts. Die 'Governmental Interest Analysis' und die 'Krise des Internationalen Privatrechts'", (Berlin-Tübingen, Mohr Siebeck, 1971); as a form of supra-national governance, Christian Joerges & Florian Rödl, "Zum Funktionswandel des Kollisionsrechts II. Die kollisionsrechtliche Form einer legitimen Verfassung der post-nationalen Konstellation", in: Galf-Peter Calliess, Andreas Fischer-Lescano, Dan Wielsch & Peer Zumbansen (eds), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag*, (Berlin, Walter de Gruyter), pp 765-778.

II.1. Law of Conflict of Laws in the 19th Century: Universal Free-trade Law

The birth of modern law of conflict of laws is inseparably associated with the name of von Savigny.²¹ He had postulated a universalism in conflict of laws. His methodological precept for defining norms of conflict of laws manifestly borrows from Kant's universalisation principles:

We always have to ask ourselves whether such a rule is probably suitable to be incorporated into that law [on conflicts of local laws, F.R.] that is common to all nations.²²

What von Savigny had before his eyes, then, was a graspable body of norms containing an allocation to one national legal system applying to a comparatively small number of naturally given types of legal relations (status, contract, tort, parent and child, and succession, *etc*) and deduced from the nature of that legal relation. Let us clarify this by using two examples: a contract should be governed by the law of the state on whose territory it is to be performed; a person's status regarding capacity to contract should be governed by the law of the state on whose territory that person has legal residence. This body of conflict-of-laws norms was able to be the same for all states, because of its ultimately rational deduction. It was certainly possible for an individual state, since von Savigny too took account of the state's formal authority over its law of conflict of laws, to disrupt this harmonious order by enacting rules which deviated from it. However, it was not only to be emphatically advised against doing so, but would also in time see the light in any case.

However - a point merely to be mentioned here and not to be explored further - the possibility of von Savigny's outline relied not only on a pre-modern understanding of law that did not associate its legitimate validity with its democratic creation, but also on a pre-modern understanding of private law that ignored the relevance of the social embedment of private legal relations.²³ At any rate, von

²¹ Friedrich Carl von Savigny, *System des heutigen Römischen Rechts, Band 8*, (Aalen, Scientia, 1981).

²² *Ibid.*, p 114.

²³ Florian Rödl, "Private Law Beyond the Democratic Order? On the Legitimatory Problem of Private Law 'Beyond the State'", in: Nils Jansen & Ralf Michaels (eds),

Savigny stood for a universalistic form of law of conflict of laws which, although, for its part, was based upon reason, was nonetheless also supposed to pay off economically. This is because the unity of law of conflict of laws would facilitate border-crossing economic transactions and thus contribute to increasing them. This would, in turn, have positive effects on prosperity as a whole.²⁴ In this conviction of von Savigny, we can easily see reflections of the national-economic promises about the consequences of free trade proclaimed a few decades earlier by Adam Smith and David Ricardo.²⁵ Although published in 1849, von Savigny's legal advance still falls within the first decade of the British-dominated international economic order (*Pax Britannica*) in the Nineteenth century, which was characterised by just that realisation of liberal free trade.²⁶ His push for a universalistic conflict-of-laws system was thus an adaptation to the prevailing theoretical conceptions and hegemonic practical endeavours towards the desired international integration of national economies in the shape of free trade, as unrestricted as possible.

Despite its pre-modern basis, the universalism of von Savigny's law of conflict of laws contains a democratic potential, albeit limited: this is because it was a law whose function it was to render competing private legal systems compatible with each other from a neutral viewpoint, by allocating to every legal system an unambiguous area of application, on an equal footing. If - differently from von Savigny - one conceives of these private legal systems as not themselves pre-modern, but as contextually-sensitive and democratically-based allocations of private rights, then a law of conflict of laws does just what it is called upon to do from the viewpoint of democratic theory: produce a balance between the competing validity claims of democratic popular sovereignties. From this viewpoint, the problem

Beyond the State. Rethinking Private Law, (Tübingen, Mohr Siebeck, 2008), pp 323-347, at 72 *et seq.*

²⁴ FC von Savigny, *System des heutigen Römischen Rechts*, Band 8, note 21 above, p 27.

²⁵ Adam Smith, (Orig.: 5. Aufl. 1789): *Der Wohlstand der Nationen. Eine Untersuchung seiner Natur und seiner Ursachen*, (Munich, Deutscher Taschenbuchverlag, 1974); David Ricardo, *Über die Grundsätze der Politischen Ökonomie und der Besteuerung*, (Berlin, Akademie-Verlag, 1959).

²⁶ Robert Cox, *Production, Power, and World Order*, (New York, Columbia University Press, 1987), p 111 *et seq.*

of von Savigny's law of conflict of laws lies not in its universalistic form as such, but in the idea that the individual norms can be deduced from the essence of the legal relations. In contrast with this, the essence of the modernisation of law of conflict of laws into "private international law" lies precisely in departing conceptually from that universalistic form.²⁷

II.2. Law of Conflict of Laws in the 20th Century: (National) Private International Law

According to the paradigm still dominant today, the law of conflict of laws is to be understood as (national) private international law.²⁸ This is associated particularly with the conceptual position that law of conflict of laws is a part of *national* law, not just in necessary and formal terms as in von Savigny, but also substantively. This means giving up the idea of law of conflict of laws as a universal meta-law. Instead, law of conflict of laws functions as a part of national *private* law: its object is to provide appropriate solutions to disputes between private persons about their reciprocal rights.²⁹ The border-crossing character of a legal relation is henceforth reflected in private international law only as a special feature of the private legal relation, which, for precisely this reason, requires special rules, namely, those of private international law. The, at least equally weighty, problem of resolving the competition of private-law rules, each of which are democratically-legitimated in themselves, is thus made to disappear.

²⁷ This united the two, otherwise contrary, undertakings of Christian Joerges on the one hand (see note 20 above) and his antagonist Klaus Schurig on the other (Klaus Schurig, *Kollisionsnorm und Sachrecht. Zu Struktur, Standort und Methode im Internationalen Privatrecht*, (Berlin, Duncker & Humblot, 1981)). For a critique of Schurig, see Rödl, "Private Law Beyond the Democratic Order? On the Legitimatory Problem of Private Law 'Beyond the State'", note 23 above, p 70 *et seq*; for the cautious universalistic turn in Joerges, see Florian Rödl, "Regime-collisions, Proceduralised Conflict of Laws and the Unity of the Law. On the Form of Constitutionalism beyond the State", in: Rainer Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, (Antwerp, Intersentia, 2010), pp 263-278.

²⁸ Gerhard Kegel & Klaus Schurig, *Internationales Privatrecht*, (Munich, CH Beck, 2004), p 9; Jan Kropholler, *Internationales Privatrecht einschließlich der Grundbegriffe des Internationalen Zivilverfahrensrechts*, (Tübingen, Mohr Siebeck, 2006), p 8.

²⁹ Kegel & Schurig, *Internationales Privatrecht*, note 28 above, p 131; Kropholler, *Internationales Privatrecht einschließlich der Grundbegriffe des Internationalen Zivilverfahrensrechts*, note 28 above, p 8.

II.2.1. Nationally-organised Capitalism

The fundamental formal distinction in favour of a concept of (national) private international law had its origin at the very outset of the Nineteenth century. Those were the times when, while Germany received its Civil Code, which, at least externally, gave the impression of wishing to supply the framework for an intact liberal capitalist system, developments had, in fact, already led to a situation of nationally-organised industrial capitalism.³⁰ Also under conditions of industrial capitalism, the nation state, while similarly not acting in isolation, continues to seek its advantage in foreign trade. But, under the new auspices, it is by no means clear any longer that a universalistic law of conflict of laws based upon a pre-modern conception of private law could best serve the state's ends. However, since, in this context, it is not so much the conception of private law as its universalism that appears problematical, what took place, in fact, was a nationalisation of law of conflict of laws.³¹ This development is associated in German legal science primarily with the name of Franz Kahn,³² who, specifically, brings out the highest principle of nationalised private international law, in his view, as follows:

Foreign law is to be applied where this corresponds to the spirit and the sense of our legal system; it is not to be applied where its application would contradict the meaning and spirit of our legal system.³³

³⁰ Gert Brüggemeier, "Probleme einer Theorie des Wirtschaftsrechts", in: Heinz-Dieter Assmann, Gert Brüggemeier & Christian Joerges (eds), *Wirtschaftsrecht als Kritik des Privatrechts. Beiträge zur Privat- und Wirtschaftsrechtstheorie*, (Königstein, Taunus, 1980), pp 9-81, at 40 *et seq.*

³¹ At the same time, law of conflict of laws drops out of international law, with the entry of positivism into the latter (for instructive matter on this see Alex Mills, "The Private History of International Law", (2006) 55 *International and Comparative Law Quarterly*, pp 1-50, at 17 *et seq.*). Its functional basis needs to be explained separately (on the political function of "will-of-the-State positivism" domestically, see Hauke Brunkhorst, "Der lange Schatten des Staatswillenpositivismus", (2003) 31 *Leviathan*, pp 362-381, at 363 *et seq.*).

³² Otto Lenel & Hans Lewald (eds), *Franz Kahn. Abhandlungen zum internationalen Privatrecht*, (1891) (Munich-Leipzig, Duncker & Humblot, 1928), pp 1-123.

³³ Franz Kahn, "Gesetzeskollisionen. Ein Beitrag zur Lehre des internationalen Privatrechts", in: Otto Lenel & Hans Lewald (eds), *Franz Kahn. Abhandlungen zum internationalen Privatrecht*, (1891) (Munich-Leipzig, Duncker & Humblot, 1928), note 32 above, p 178.

Accordingly, two features characterise the new form. First, national authority in conflict of laws is no longer merely formally recognised, but substantively asserted. Conceptually, too, the nation state, without any super-ordinate normative obligation, does, in a sense, also become sovereign over conflict of laws. While the nationalised law of conflict of laws initially continues a graspable body of norms based upon von Savigny's model, in the first place, national differences in allocations of transnational legal relations to a particular legal system in the form of general conflict-of-laws norms are henceforth no longer an expression of lingering irrationality, but a legitimate expression of differing transnational strategies. This explains, just to mention only one example which is still relevant today, the English decision to focus, for the legal relations of corporations and, especially, for their capacity to contract, not on the headquarters of the administration, but on the place of foundation. Against the colonialist background, this corresponded to the needs of British firms, which, in particular, desired to remain active in business in the Commonwealth, and at the same time did not want to have to bother with the (in part, undoubtedly, also still precarious) local legal systems.³⁴ Second, conceptually, it opened up the possibility of allowing additional exceptions to one's own conflict-of-laws norms, henceforth laid down in sovereign fashion, in favour of one's own law. The point was, not least, to allow room for foreign-trade policy interventions by the state in the transnational civil society still conceived of under von Savigny as being pure. In particular, this was done by using what are known in German legal circles as "prohibitive laws" (*Prohibitivgesetze*).³⁵ These were intended to assure the primacy of one's own law over foreign law even if that foreign law really ought, upon the basis of one's own general conflict-of-laws norms, to apply. While there such norms already existed in von Savigny's work, they were allotted a quite different role. There, they were still a sign of the period of transition to the future harmonisation of legal views in the individual states and, in particular, transition to the recognition of the purity of private law in

³⁴ Bernhard Großfeld, "Die Entwicklung der Anerkennungstheorien im Internationalen Gesellschaftsrecht", in: Wolfgang Hefermehl, Rolf Gmuer & Hans Brox (eds), *Festschrift für Harry Westermann*, (Karlsruhe, Müller, 1974), pp 199-222.

³⁵ On the functional similarity of the *ordre public* doctrine in the Roman Law world, see Kahn, "Gesetzeskollisionen. Ein Beitrag zur Lehre des internationalen Privatrechts", note 33 above.

the transnational context, too.³⁶ This function was reversed after the nationalisation of private international law. The prohibitive laws (today called “overriding mandatory provisions”) were instruments of a state which had not yet become a welfare state, but was, nonetheless an intervening state. Their use was fully legitimate and long-term oriented. In Kahn, accordingly, the systematic relation between general conflict-of-laws norms of von Savigny’s type and prohibitive laws was even explicitly reversed:

As a rule, legislation and theory have not gone about setting up general and supreme conflict-of-laws norms with the necessary prudence. Such general norms (boundary norms) are, accordingly, as such, subject to far-reaching restrictive interpretation. There is something subsidiary and relative inherent in all of them.³⁷

However, the image of a harmonious and universal legal system for the transnational economy remains dominant. But this picture is henceforth elevated into an ideal, and therefore *de facto* downgraded, as something which is desirable, but which, nonetheless, is unlikely ever to be attained.³⁸ The evident tension lying in the co-existence of national-particular and international-universal creeds is, finally, expressed in the following formula, which, in its turn, is itself contradictory:

What is aimed at are conflict-of-laws norms that attain a maximum of international legal harmony while abandoning a minimum of national legal objectives.³⁹

Thus, the substance of international orientation was by no means to be allowed to lead to a loss of national authority over private international law. This is the only way to keep the scope and the

³⁶ FC von Savigny, *System des heutigen Römischen Rechts*, Band 8, note 21 above, p 38: “It is, however, to be expected that these exceptional cases (of laws of anomalous nature) will steadily diminish, as a consequence of the natural legal development of peoples.”

³⁷ Kahn, “Gesetzeskollisionen. Ein Beitrag zur Lehre des internationalen Privatrechts”, note 33 above, p 252.

³⁸ *Ibid.*, p 121 *et seq.*

³⁹ *Ibid.*, p 326.

limits of internationalisation under control at national level. This led to the rather remarkable conceptual move of an international orientation which is not, by any means, to be perceived at the same time being as universalistic: even if every national private international law aims primarily, through its international orientation, at promoting transnational economic transactions, it asserts the claim to lay down the rules of international trade both autonomously and substantively differently from other states.⁴⁰

II.2.2. “Embedded Liberalism”

Throughout the Twentieth century, nothing changed in the authority of the nation state over private international law. However, the conceptual debates within this paradigm reflect the change in structures in the international economic order. The end of WWII saw the onset of a new phase of intensive economic integration, the most important institutional manifestations of which were the adoption of the General Agreement on Tariffs and Trade (GATT) in 1948, and the foundation of the European Economic Community (EEC). This new stage, lasting from the post-war period until the fall of the Iron Curtain, is, following John Ruggie, called “embedded liberalism” in political-science analyses of international relations.⁴¹ “Embedded liberalism” is intended to bring the paradigm of the form of international integration to a concept that can be explicated as follows: the times of pure liberalism, relying on the mechanisms and

⁴⁰ Precisely this central aspect is missed by the oft-quoted phrase of Wiethölter’s that private international law is a law that is “*national von Geblüt und international von Gemüt*” (“national in lineage and international in spirit”) (Rudolph Wiethölter, “Begriff- oder Interessenjurisprudenz - Falsche Fronten im IPR und Wirtschaftsverfassungsrecht: Bemerkungen zur selbstgerechten Kollisionsnorm”, in: Alexander Lüderitz & Jochen Schröder (eds), *Internationales Privatrecht und Rechtsvergleichung im Ausgang des 20. Jahrhunderts: Bewahrung oder Wende? Festschrift für Gerhard Kegel*, (Frankfurt aM, Metzner, 1977, pp 213-263, at 215). However, all those who seek to criticise the splitting off of private international law as national law from universalistic international law as a strategy to limit political pretensions (for example, Joel R Paul, “The Isolation of Private International Law”, (1988-1989) 7 *Wisconsin International Law Journal*, pp 149-178, at 155 *et seq.*) are in error. As the previous section and the following one show, the very nationalisation of law of conflict of laws served to provide a regulatory potential the individual nation state could never have had in a law of conflict of laws based in international law.

⁴¹ John Ruggie, “International Regimes, Transactions and Change: Embedded Liberalism and the Postwar Economic Order”, (1982) 36 *International Organisation*, pp 379-416; see, also, Jens Steffek, *Embedded Liberalism and its Critics. Justifying Global Governance in the American Century*, (New York, Palgrave Macmillan, 2006).

the effects of free markets to overcome all major social problem situations, are over. It is not only clear but also acknowledged that markets need many kinds of regulatory embedding. All the same, the liberalisation of the international economic order is not accompanied by a regulatory, institutional or social embedding at the same level. Instead, it is up to the *national* level to compensate for the disintegratory consequences of *transnational* trade, too.

It is ultimately this context of the expansion of national welfare states and the complementary new form of international economic order with its new emphasis on the need for a welfare state fence round the capitalist economy that brings private international law into a conceptual crisis.⁴² In particular, it is the ignorance with regard to the substantive social regulatory concerns admitted into the norms of substantive private law that is inherent to the *modus operandi* of general conflict-of-laws norms that becomes the object of criticism, albeit not of the national paradigm as such, but of its too-liberal orientation.⁴³

Although the attack on the foundations of liberalist-oriented law of conflict of laws could immediately be repelled by the leading figures in the field,⁴⁴ at the level of the law in force, norms which aim to do justice both to social regulatory concerns and in particular situations of contractual inequality are increasing. Thus, in particular, special conflict-of-laws norms for consumer, labour and insurance contracts are emerging. Their characteristic feature is, however, that they no longer act as prohibitive laws or as norms of intervention which are only in favour of one's own law, but as refinements of the system of general conflict-of-laws norms, making them easier to incorporate

⁴² Expression coined by Heinrich Kronstein, "The Crises of 'Conflicts of Laws'", (1949) 37 *Georgetown Law Review*, pp 483-513.

⁴³ Brainerd Currie, *Selected Essays on the Conflict of Laws*, (Durham NC, Duke University Press, 1963); Joerges, "Zum Funktionswandel des Kollisionsrechts. Die 'Governmental Interest Analysis' und die 'Krise des Internationalen Privatrechts'", note 20 above.

⁴⁴ Internationally, see Gerhard Kegel, "The 'Crisis' of Conflict of Laws", (1964) 112 *Recueil des Cours*, pp 95-268; decisive for the German debate, see Schurig, *Kollisionsnorm und Sachrecht. Zu Struktur, Standort und Methode im Internationalen Privatrecht*, note 27 above.

into the liberalist orientation.⁴⁵ In contrast, genuine intervention norms are already being gradually pushed back, and the systemic relationship between general conflict-of-laws norms and intervention norms are once more being reversed in favour of the former.⁴⁶ Again, though, this is not a movement towards some sort of universalism, but a strengthening of the liberalist orientation of the national regulatory framework of the transnational economy.⁴⁷

Accordingly, from the viewpoint of democratic theory, the private international law of the Twentieth century is to be seen as national democratic law of conflict of laws. National substantive private law is not subjected to law of conflict of laws as a universal meta-law, but, instead, supplies the way to give national democratic form to transnational economic transactions. It is only within this paradigm that battles over the scope of the liberalist orientation and the importance of social regulatory concerns are fought out. While the democratic formative rights of other popular sovereigns do certainly play a role in this paradigm, they do not enjoy the same value as the national ones. For this reason, the democratic functionality of law of conflict of laws is subject to a fundamental asymmetry in favour of national authority. Notwithstanding this, democratic functionality has not yet been entirely been disposed of.

II.3. Law of Conflict of Laws for the Twenty-first Century: Privatisation of the Function of Law

The new social, political and economic conditions offered by the “globalisation” of transnational economic transactions since 1990 has also set in motion a new conceptual dynamic in private international

⁴⁵ Klaus Schurig, “Zwingendes Recht, ‘Eingriffsnormen’ und neues IPR”, (1990) 54 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, pp 217-250.

⁴⁶ See, for example, already in Schurig, *Kollisionsnorm und Sachrecht. Zu Struktur, Standort und Methode im Internationalen Privatrecht*, note 27 above, p 321, or *idem*, “Lois d’application immédiate und Sonderanknüpfung zwingenden Rechts”, in: Wolfgang Holl & Ulrich Klinke (eds), *Internationales Privatrecht, internationales Wirtschaftsrecht*, (Cologne-Berlin, Heymann, 1985), pp 55-76, at 73 & 74 *et seq.*

⁴⁷ These major movements within nationalized law of conflict of laws that reflect the change in form and function of the state in the course of the Twentieth century are not described in most presentations of the history and function of private international law, even those conceived of as critical (for example, A Claire Cutler, “Artifice, Ideology and paradox: the public/private distinction in international law”, (1997) 4 *Review of International Political Economy*, pp 261-285, at 277 *et seq.*).

law. It is aimed at transforming private international law from a national democratic law for the co-ordination of national and foreign legal systems in the light of social transnationalisation into a framework law in which private actors should be able to choose as freely as possible which national legal norms should, in each case, apply to the private legal relations that concern them.

For this sort of private authority over the law to apply, there are two indirect ways, and one direct one. The first indirect way is to grant the parties to a transnational legal dispute the possibility of freely determining the legal venue. Given that national courts have always had to take their own private international law as a basis in adjudicating a transnational case, by choosing the venue, the parties are, at the same time, indirectly choosing the applicable law. While this possibility of agreeing the venue has, admittedly, existed for a long time, particularly in the context of procedures for recognition of foreign decisions, there were a number of procedural instruments that limited the effectiveness of the will of the parties.⁴⁸ With the repeal of some of these instruments, forum agreements in the EU area have been widely permitted;⁴⁹ comparable facilitations on a global scale are aimed at through an international agreement concluded in 2005, although it has not yet come into force.⁵⁰

The second indirect way is to recognise the decisions of foreign courts, even where their competence is not based upon an agreement, on domestic territory. Then, the law to apply is, to a certain extent, at the disposal of the plaintiff, who need no longer choose from among several possible national venues for the place with the desired configurational or enforcement effect, but can be guided entirely by which state's law is most favourable. This path, too, has been steadily extended, particularly within Europe.⁵¹

⁴⁸ Among these are *inter alia* the laying down of exclusive venues, control through domestic law of the admissibility of the agreement, or the English *forum non conveniens* doctrine.

⁴⁹ See Articles 23 & 24 of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I Regulation), EC OJ 2001 No. L 12, 16.01.2001, p 1.

⁵⁰ Hague Convention of 30 June 2005 on choice-of-court agreements Available at: <www.hcch.net>.

⁵¹ Especially by Regulation (EC) No. 44/2001, note 49 above.

But the indirectness of the two indirect ways still contains uncertainties. The certain and direct way is to allow the parties the choice of the substantive law *irrespective* of the forum. The parties to a transnational contractual relation have already long been able to agree that their contract will be governed by the norms of the national legal system upon which they themselves have decided. And it is now no longer required that the contractual relation have any connection at all with the legal system chosen. Once treated as only a makeshift solution,⁵² the parties' free choice of law has now been highly praised by many observers as the manifestation of private autonomy in private international law.⁵³ With globalisation, ways are being sought more intensively to extend this form of legal privatisation further – with objective and public validity of law being replaced by subjective and private choice of law. The point here is, on the one hand, to open up ever more areas for choice of law.⁵⁴ An example to be emphasised here is the case of international company law, where the European level, in particular, has, especially through the case law, exerted considerable pressure in the direction of the free choice of company law.⁵⁵

Moreover, a great deal of hard work has been carried out in order to allow private parties not only to choose from among the national legal systems in force, but also to determine norms as applicable which have been developed in a non-state context.⁵⁶ One practically

⁵² Kegel & Schurig, *Internationales Privatrecht*, note 29 above, p 652 *et seq.*

⁵³ See, for example, the low level of justification in Axel Flessner, *Interessenjurisprudenz im Internationalen Privatrecht*, (Tübingen, Mohr, 1990), p 102.

⁵⁴ Rödl, "Private Law Beyond the Democratic Order? On the Legitimatory Problem of Private Law 'Beyond the State'", note 23 above, with further references.

⁵⁵ European Court of Justice, Judgment of 5.11.2002, C-208/00 (*Überseering*), at [2002] ECR, I-9919. The complete shift to a free choice of company law is proposed in the ministerial draft for an Act on Private International Law of Companies, Associations and Legal Persons Available at: <<http://www.bmj.bund.de>>, 08.01.2010).

⁵⁶ At the centre here are bodies of law based upon the work of communities of legal scholars. Examples are the "Unidroit principles of international commercial contracts" (2004 version) Available at: <www.unidroit.org>, 24.11.2009) and the "principles of European contract law" of the Commission on European Contract Law Available at: <<http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/doc.html>>, 13.1.2010). The massive push to allow such private-law norms administered by legal scholars in the context of the new version of uniform European international contract

irrelevant, though much discussed, extreme position in this thread of discussion is, finally, the serious consideration of the question of whether the private parties may not also choose that their contract not be subject to *any* legal system, and generate legal bindingness from within itself alone.⁵⁷

Finally, it should be noted that *ordre public* reservations and intervention norms are increasingly being pushed back programmatically. Both represent the most explicit national democratic disruptions of an international economic order, which, while laid down in particular fashion, is, after all, conceived of as universal. Thus, in international agreements on private international law, the requirements for applying the *ordre public* clause are being worded ever more narrowly; for Europe, there are discussions of whether it could not actually be dropped.⁵⁸ Internally, intervention norms are being withdrawn from the areas of social protection and narrowed down to only the core area of a liberalist agenda, to wit, the punishment of restraints on competition.⁵⁹

Looking at the whole scenario, the following picture emerges:⁶⁰ in the transnational context, at least, private parties should, as far as

law (Rome I Regulation) was not, however, ultimately successful despite support by the European Commission.

⁵⁷ Lèna Gannagé, "Le contrat sans loi dans droit international privé", (2007) 11 *Electronic Journal of Comparative Law* 11, available at: <<http://www.ejcl.org/113/article113-10.pdf>>, also the general report on the XVIIth International Congress of Comparative Law in 2006.

⁵⁸ Decisively against this, see Karl Friedrich Kreuzer, "Die Europäisierung des Internationalen Privatrechts", in: Peter-Christian Müller-Graff (ed), *Gemeinsames Privatrecht in der Europäischen Gemeinschaft*, (Baden-Baden, Nomos Verlag, 1999), pp 457-542, at 540.

⁵⁹ Jürgen Basedow, "Das Internationale Privatrecht in den Zeiten der Globalisierung", in: Gerhard Hohloch, Rainer Frank, & Peter Schlechtriem (eds), *Festschrift für Hans Stoll zum 75. Geburtstag*, (Tübingen, Mohr Siebeck, 2001), pp 405-416.

⁶⁰ The picture sketched here is incomplete in so far as it leaves out the area of international arbitration, which represents an already long-established mechanism for privatizing the legal function (see, for example, Alec Stone Sweet, "The New Lex Mercatoria and Transnational Governance", (2006) 13 *Journal of European Public Policy*, pp 627-646, and Robert Wai, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization", (2002) 40 *Columbia Journal of Transnational Law*, pp 209-274). Genealogically, international arbitration is certainly key in the above-sketched development too; but

possible, given the nature of the case, be able to choose freely worldwide the relevant forum and the applicable law. The parties should as far as possible remain unmolested by national democratic legislative decisions. Ultimately, the substantive law is here conceived of as a commodity that the private parties can demand on the worldwide market for law, but which they do not even have to pay for. Objective law becomes a subjective supply of law that has to make its way in a competition of legal systems. However, whether the tendencies described will ultimately actually condense into a new paradigm for conflict of laws is something which we shall not explore here. What seems certain is a considerable shift in weightings within the prevailing paradigm in favour of privatising the legal function and against its democratic potential.

III. Prospects for a Cosmopolitan Law of Conflict of Laws

After what we have said, it would seem appropriate to start by recalling the democratic implications of law of conflict of laws, also in its form as national private international law, against the recent privatisation of the legal function as such, which has recently only been pursued through the medium of conflict of laws. However, a critical account should not stop here. This is because the democratic implications of national private international law relate, after all, always only to the national manifestation of democratic popular sovereignty. Asserting national popular sovereignty against the needs and interests of private and transnationally-oriented exploitative aims may, at first sight, seem to be unrestrictedly legitimate. All the same, if this undertaking is not further qualified, there is an infringement of the fundamental democratic idea of legitimation inherent to it. This is because it is in this way that foreign persons and their rights will frequently be brought under domestic (private international) law, even though they have had no chance of participating in its creation,⁶¹ be it in formal processes of election and voting, be it in unregulated democratic public practices. This makes the application of national private international law to them into an

it is only this latter development that is oriented no longer to special rights for transnational trade, but to a transformation of the legal function as such.

⁶¹ For a treatment of private international law in terms of democratic theory, see, also, Lea Brilmeyer, "Rights, Fairness, and Choice of Law", (1988-1989) 98 *Yale Law Journal*, pp 1277-1319.

illegitimate constraint, at least according to the conceptual connections of radical democratic theorisations.⁶²

But the point is not just to subject the nationals of a foreign political community to domestic (private international) law. At the same time, the assertion of the autonomy of the national private international law emphasised above is always directed against the law of other states as well, which, today, in an ordinary case is itself an expression of democratic self-determination. This, only formally - as noted above - contradictory self-assertion of national autonomy in the setting up of a uniform order of transnational economic relations is substantively aimed at the international implementation of domestic legislative ideas. This is associated with a further set of legitimacy issues, which are dealt with in the theory of international relations under the heading of "unilateralism". The possibility for a state to have its own regulatory conceptions implemented by asserting its national autonomy to such an extent as to have them accepted "autonomously" by others rise and fall not least according to the international weight of its economy and such flanking institutions as courts or arbitration tribunals. This is because the form of the system of transnational legal relations is decided not by every democratic popular sovereign autonomously and with effect for itself alone. Instead, the national regulatory regime behind which the greatest extent of economic and political power can be gathered is hegemonic.

Thus, ultimately, in the non-juridified conflict of national democratic regulatory claims, it is not a democratic sovereign (or the best argument at most in marginal areas) that decides as to the basic features of the legal form of border-crossing economic and social interactions, but social, political and economic power. For this reason, the conceptual position that is to do justice to the transnational integration of democratic legal systems definitely does not lie in a return to the national democratic paradigm of law of conflict of laws, but - allow us to advocate here - in a turn to a democratically-sensitive universalism. The programmatic name for this is

⁶² Immanuel Kant, *Metaphysik der Sitten*, (Frankfurt aM, Suhrkamp Verlag, 1977), p 432; Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, (Frankfurt aM, Suhrkamp Verlag, 1994), p 151 et seq., Maus, *Zur Aufklärung der Demokratietheorie. Rechts- und demokratietheoretische Überlegungen im Anschluss an Kant*, note 11 above, p 155 et seq.

cosmopolitan law of conflict of laws,⁶³ whose task would be to mediate the necessary juridification of transnational social integration through the given, and unavoidable, at least in anything but the very longest term, nationally-fragmented framework of democratic self-determination, in order to become understandable as a form of democratic juridification.⁶⁴ Producing such a cosmopolitan law of conflict of laws would then also be the legitimate concern of all supra-national constitution (which should, in any case, be set up as democratically as possible).⁶⁵

It is ultimately two fronts that Ingeborg Maus has opened up with her lucid pointing to law of conflict of laws and its democratic potential as the alternative to a Euro state or world state: against the statisation idea in public (constitutional) law and in political science, as well as against the privatisation idea in private (international) law and in economics. On both fronts, things do not look too good for the democratic cause.

⁶³ This fine title has already been used (Paul Schiff Berman, "Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era", (2005) 153 *University of Pennsylvania Law Review*, pp 1819-2005; *idem*, "Conflict of Laws, Globalization, and Cosmopolitan Pluralism", (2009) 51 *Wayne Law Review*, pp 1105-1145), albeit for an approach based upon other intentions: the starting point of this version of cosmopolitanism is to downgrade the relevance, for legitimising the validity of law as a whole, of democratic creation, in favour of essentialist personal membership in any communities whatever, even outside democratic polities. If, however, the connection between legitimate validity and democratic creation is denied even in the very concept of law, then the cosmopolitan aspect of this law of conflict of laws stands above all for a decided disinterest in democracy.

⁶⁴ Considerable theoretical difficulties are associated with this undertaking. Some of them I have attempted to address in Rödl, "Private Law Beyond the Democratic Order? On the Legitimatory Problem of Private Law 'Beyond the State'", note 23 above. Pursuing these lines further here, however, does not seem very fruitful as long as the conflict-of-laws approach as such is understandably meeting with great obstacles to reception in democratic constitutional theory. These, of course, also go back to the fact that in the comparatively well-known systems-theory adaptation of this approach (Andreas Fischer-Lescano & Gunther Teubner, *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts*, (Frankfurt aM, Suhrkamp Verlag, 2006)) whatever democratic intentions there might be are no longer easy to recognise.

⁶⁵ This notion appears in the postulate of a "conflict-of-laws form" for a legitimate constitution of the post-national situation; on this see Joerges & Rödl, "Zum Funktionswandel des Kollisionsrechts II. Die kollisionsrechtliche Form einer legitimen Verfassung der post-nationalen Konstellation", note 20 above.

Chapter 2

The Opium of Democracy A Comment on Rödl

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I. A Heretical Contention and a Heretical Question

I will begin with a heresy: the classic democratic model will fail as a source of legal legitimacy in the globalisation process. And then? What next? By adopting wholesale the arguments postulated by Ingeborg Maus,¹ which will be discussed below, Florian Rödl² robs himself, from the outset, of the possibility of addressing this question. This, of course, does not mean that Rödl is wrong. But he does posit democracy as a kind of civil religion. And, as we have all famously

* I would like to express my heartfelt thanks to Anne Mirjam Schneuwly and Hal Wyner for their insightful comments and constructive criticism.

¹ See Ingeborg Maus, "Die Bedeutung nationalstaatlicher Grenzen. Oder: die Transformation des Territorialstaates zur Demokratie", (2001) 46 *Blätter für deutsche und internationale Politik*, pp 313-323; *idem*, "Vom Nationalstaat zum Globalstaat oder: der Niedergang der Demokratie", in: Matthias Lutz-Bachmann & James Bohman (eds), *Weltstaat oder Staatenwelt? Für und wider die Idee einer Weltrepublik*, (Frankfurt aM, Suhrkamp Verlag, 2002), pp 226-259; *idem*, "Verfassung oder Vertrag: Zur Verrechtlichung globaler Politik", in: Peter Nießen & Benjamin Herborth (eds), *Anarchie der kommunikativen Freiheit: Jürgen Habermas und die Theorie der internationalen Politik*, (Frankfurt aM, Suhrkamp Verlag, 2007), pp 350-382.

² Florian Rödl, "Democratic Juridification without Statisation: Law of Conflict of Laws instead of a World State", Chapter 1 in this volume.

been informed, religion is a form of opium,³ which, like all drugs, narrows our perceptive horizon. This leads us to the question of how Rödl perceives world society and what conclusions this brings him to with regard to the legitimate juridification of this social formation – the main focus of his paper. The short answer is that his perception is bounded *a priori* by two axiomatic assumptions, one sociological, the other political scientific. First, in Rödl's construction, globalisation consists solely of the spatial movements of individuals, which he terms "societal boundary-crossings".⁴ Second, Rödl adopts the Kantian notion that "the civil constitution in every state... [should be] republican".⁵ He posits, in other words, the primacy of democracy, the essence of which, in Kant's view, lies in the separation of powers. The challenge Rödl sets himself is thus all too clear: How is the Kantian division of powers to be reproduced in the "societal interstices" that arise between the various statehoods?

II. "Cosmopolitan Law of the Conflict of Laws" as Project

Rödl seeks a response to this question in considerations concerning law of the conflict of laws. More precisely, Rödl seeks to identify the basic features of global law, or a global organisation of law, by playing off the alternatives of law of conflict of laws and world (state) law against each other and deciding in favour of the former. It can easily be conceded that this alternative sets very high contextual demands. It is unlikely that useful guidance can be found in traditional jurisprudence. It should first be noted, therefore, that Rödl takes his cue from a legal approach, not yet widely-accepted, that has been developed by such scholars as Rudolf Wiethölter, Christian Joerges and Gunther Teubner. As Joerges and Rödl have put it in the *Liber Amicorum in honour of Gunther Teubner*, this approach calls for a parting of law of conflict of laws from its origins in Private International Law (PIL) and attempts to transform it into a paradigm

³Karl Marx, *Zur Kritik der Hegelschen Rechts-Philosophie*, (Deutsch-Französische Jahrbücher, 1844), p 72.

⁴See Rödl, "Democratic Juridification without Statisation: Law of Conflict of Laws instead of a World State", note 2 above, p 2; Maus, "Vom Nationalstaat zum Globalstaat oder: der Niedergang der Demokratie", note 1 above, p 228 *et seq.*

⁵Immanuel Kant, *Metaphysik der Sitten*, (Frankfurt aM, Suhrkamp Verlag, 1977).

of legal intermediation processes in society at large.⁶ In other words, this approach is something in the order of a general theory of law. But this is not all. Societal law of conflict of laws, in this sense, provides only the notional background to Rödl's thinking. His actual point of departure, as he himself expressly states, are the works of Maus.

Maus has clear-sightedly pointed out, as Rödl sees it, that, in Kant's version of a "cosmopolitan law",⁷ law of conflict of laws is conceived of as an "alternative to current [global] statisation programmes".⁸ The Kantian origins of the idea that law of conflict of laws can juridically reduce transnational questions to matters of "social border-crossings"⁹ leads Rödl to an investigation of the question as to how the law of conflict of laws, as a model of global law, can also create democratic legitimacy. In this context, he first notes that the historical object of the law of conflict of laws has been to decide which of two competing legal orders is to be applied in a given transnational case. In this sense, law of conflict of laws is always to be seen also as "meta-law".¹⁰ And it is precisely therein, in Rödl's view, that its *democratising potential*¹¹ lies:

⁶Christian Joerges & Florian Rödl, "Zum Funktionswandel des Kollisionsrecht II: Die kollisionsrechtliche Form einer legitimen Verfassung der post-nationalen Konstellation", in: Galf-Peter Calliess *et al.* (eds), *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag am 30. April 2009*, (Berlin, Walter de Gruyter, 2009), pp 765-778.

⁷Maus, "Vom Nationalstaat zum Globalstaat oder: der Niedergang der Demokratie", note 1 above, p 233; see, also, Paul Schiff Berman, "Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era", (2005) 153 *University of Pennsylvania Law Review*, pp 1819-2005; *idem*, "Conflict of Laws, Globalization, and Cosmopolitan Pluralism", (2009) 51 *Wayne Law Review*, pp 1105-1145.

⁸ Rödl, "Democratic Juridification without Statisation: Law of Conflict of Laws instead of a World State", note 2 above, p 7.

⁹ Rödl, "Democratic Juridification without Statisation: Law of Conflict of Laws instead of a World State", note 2 above, p 6 *et seq*; Maus, "Vom Nationalstaat zum Globalstaat oder: der Niedergang der Demokratie", note 1 above, p 233.

¹⁰ Gunther Teubner, *Recht als autopoietisches System*, 2nd ed., (Frankfurt aM, Suhrkamp Verlag, 1996), p 15; Marc Amstutz, "In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning", (2005) 11 *European Law Journal*, pp 766-784, at 769.

¹¹ Rödl, "Democratic Juridification without Statisation: Law of Conflict of Laws instead of a World State", note 2 above, p 10 *et seq*.

If we now bear in mind that, in the national legal systems, in the (normatively assumed) normal case, it is democratically-legitimated law that we are dealing with, the democratic function of law of conflict of laws becomes clear: in contrast with the statisation programmes, the democratically-legitimated law laid down in the national framework is not to be replaced by a new supranational law, the making of which would, at best, meet stunted democratic requirements. Instead, the aim of law of conflict of laws is to make the competing validity-claims of democratic self-legislators mutually compatible in the transnational context.¹²

With its object so determined, making it applicable only to transnational relationships, law of conflict of laws does not, according to Rödl, usurp the power of democratic states. This is because, regardless of which of the competing legal orders is determined as applicable in a given case by the law of conflict of laws, the choice is always between two democratically legitimised legal orders:

Thus, the claim of democratic self-legislation is not dispensed with in favour of supranational intervention, but maintained as far as possible in the conflictual case. Accordingly, law of conflict of laws embodies a mode of transnational juridification which by contrast with supranational statisation programmes does not dilute the claim of democratic genesis of peremptory law to the point of vacuity, but in fact still seeks to meet it.¹³

In other words, Rödl observes the fact that the decision made by law of conflict of laws inevitably leads to the application of democratic law. From a democratic point of view, therefore, this leads, in his view, to “a balance between competing validity claims of democratic popular sovereignties”.¹⁴ What is involved here then is – *in a nutshell* – a model of a *fragmented, but cumulative, democratisation of global law*.¹⁵

¹² *Ibid.*, p 8.

¹³ *Ibid.*, p 8 *et seq.*

¹⁴ Rödl, “Democratic Juridification without Statisation: Law of Conflict of Laws instead of a World State”, note 2 above, p 11.

¹⁵ See Amstutz, “In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning”, note 10 above, p 780.

There can be no doubt that the trade-offs in law of conflict of laws lead to a kind of “extension” of democratic elements, and it is upon this circumstance that the model just described is founded. This Rödl has very astutely observed. At the same time, however, in positing his thesis, he jumps to a number of conclusions that cannot be simply overlooked. Rödl himself admits to a certain “asymmetry”:

[F]rom the viewpoint of democratic theory, the private international law of the Twentieth century is to be seen as national democratic law of conflict of laws. National substantive private law is not subjected to law of conflict of laws as a universal meta-law, but, instead, supplies the way to give national democratic form to transnational economic transactions. It is only within this paradigm that battles over the scope of the liberalist orientation and the importance of social regulatory concerns are fought out. While the democratic formative rights of other popular sovereigns do certainly play a role in this paradigm, they do not enjoy the same value as the national ones. For this reason, the democratic functionality of law of conflict of laws is subject to a fundamental asymmetry in favour of national authority. Notwithstanding this, democratic functionality has not yet been entirely been disposed of.¹⁶

Clearly, a simple admission of the limited reach of law of conflict of laws as a mode of democratic world law - that is, as a model of a fragmentary-cumulative democracy of global law - is not sufficient.¹⁷ A number of the difficulties can be presented in the form of questions addressed to Rödl. Is the tacit assumption that law of conflict of laws always leads to the choice of a democratically-legitimate national law always confirmed? What about cases in which the legal order to be applied was not established democratically? While there do exist potential correctives, such as the doctrine of *ordre public*, for example, such correctives are inherently one-sided (the problem of “unilateralism”), so that they are at constant risk of overlooking what is democratic or not recognising what is not democratic. In the end,

¹⁶ Rödl, “Democratic Juridification without Statisation: Law of Conflict of Laws instead of a World State”, note 2 above, p 11.

¹⁷ See Amstutz, “In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning”, note 10 above, p 780.

however, what this comes down to is the next question: What is the situation in cases in which the extra-territorial application of foreign law is not supported by the will of the foreign sovereign? Or, conversely, what is the situation in cases in which foreign democratic law is chosen by the law of conflict of laws of an undemocratic country? And further, on the conceptual level, so to speak: What about cases in which there is a conflict of public laws? For it must be recalled that the model presented is based, fundamentally, upon international *private* law.¹⁸ Moreover, the points just raised do not even touch upon the problems connected with economic power, which insists on the enforcement of the legal order which best serves the interests of the economy. Rödl is, of course, not oblivious to these or similar weaknesses to his model. He closes his remarks on an almost melancholy note:

It is ultimately two fronts that Ingeborg Maus has opened up with her lucid pointing to law of conflict of laws and its democratic potential as the alternative to a Euro state or world state: against the statisation idea in public (constitutional) law and in political science, as well as against the privatisation idea in private (international) law and in economics. On both fronts, things do not look too good for the democratic cause.¹⁹

At this level, there is nothing to criticise in Rödl's remarks. In the end, law is always an *unfinished* project, which is no reason not to continue the search for solutions better than those currently in use, even if the improvement itself leads only to a *second best* solution. But perhaps it is not Rödl's exclusive concentration on Maus' two-front approach²⁰ that should interest us here, but something entirely different - it too, a question that opens two fronts:

- Is Rödl's perception of globalisation as a sociological phenomenon plausible?

¹⁸ Rödl, "Democratic Juridification without Statisation: Law of Conflict of Laws instead of a World State", note 2 above, p 11 *et seq.*

¹⁹ *Ibid.*, p 20.

²⁰ Maus, "Vom Nationalstaat zum Globalstaat oder: der Niedergang der Demokratie", note 1 above, p 240 *et seq.*; *idem*, "Verfassung oder Vertrag: Zur Verrechtlichung globaler Politik", note 1 above, p 374.

- And further: the performance of what function does globalisation require of law?

Rödl's (partially implicit) answers to these two questions are as follows:

- Globalisation is a situation in which "societal border-crossings" occur, that is, a kind of aggregate of social contacts that take place between participants located on different sides of national (territorial) boundaries.
- And the function whose performance is required of the legal system by such social contacts remains the same as that fulfilled by Western law in the centuries since the Enlightenment: the stabilisation of normative expectations.

It is only by analysing Rödl's project in the light of these two questions - rather than in terms of the two fronts opened by Maus - that it is possible to determine whether, and, if at all, to what extent, the concept of "Law of Conflict of Law instead of a World State" - as Rödl puts it - can take us any further. I will begin with some observations on *globalisation* as a process of social formation (Section III). From there, I will turn to the question of the *function* of law in world society. Lastly, I will conclude with some speculative thoughts on the question of the legitimation of the legal system in the globalised world (Section V). My theses in brief:

- 1) Contrary to Rödl's hypothesis, it is not sufficient to consider globalisation as a simple matter of "societal border-crossing"; rather, the process of globalisation represents the emergence of a new type of social structure that is super-imposing itself on the territorial (segmented) social structures that developed have developed in modern Europe and in most countries in the world.²¹ Global society has no territorial reference-point and must thus be conceived as a purely *communicative* phenomenon, that is,

²¹ See Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, (Princeton NJ-Oxford, Princeton University Press, 2006).

as an aggregate of communications operating as spatially de-segmented social systems.²²

- 2) This sociological observation has also legal theoretical consequences: contrary to Rödl's, more or less, implicit transfer of the traditional function of law - as the stabilisation of counterfactual expectations - to the transnational domain, globalisation gradually leads to a *new concept of law*. Within global society, the legal system no longer addresses primarily *normative* expectations, but serves, above all, as an organisational basis for *cognitive* processes.²³ Global law is, first and foremost, cognitive law and, for this reason, cannot develop out of the law of conflict of laws.
- 3) If, as I am convinced, the democratic model that originates with Kant cannot be reproduced in world society, where a clear differentiation of legislative, executive and judicial powers is impossible - at least until the highly improbable emergence of a democratic world state - world law will need to seek new sources of legitimacy. Paradoxically, the required legitimacy could be constructed upon the basis of a *mechanism* of long tradition, that of *custom and usage* - customary law or *usus*, the well-known combination of *longa consuetudo* and *opinio necessitatis*.²⁴

III. Globalisation as the *Supplement* of Social Structures

How is the notion of world society to be understood? The hopelessness of any illusion that a clear and comprehensive response to this question can actually be found, has been painfully recalled by Armin Nassehi:

If that is not a big word: *globalisation*. It catches up with its own meaning by the mere fact that it fills a truly global range of meanings and must serve as an indicator for entirely different things, and this not solely in academic discourse.

²²See Niklas Luhmann, "Die Weltgesellschaft", in: *idem*, (ed), *Soziologische Aufklärung 2: Aufsätze zur Theorie der Gesellschaft*, 5th ed., (Wiesbaden, Verlag für Sozialwissenschaften, 2005).

²³ See Luhmann, note 22 above; *idem*, *Rechtssoziologie*, 3rd ed., (Opladen, Westdeutscher Verlag, 1987), p 340.

²⁴ Wolfgang Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, vol. III, (Tübingen, Mohr Siebeck, 1976), p 691.

Globalisation stands for expansive business strategies and serves at the same time as warning sign that economic calculations can no longer be made without taking other values into account. It symbolises both the vanishing political autonomy of nation states and the emergence of political spaces that go beyond national boundaries. It also refers to a spectre that threatens and de-regulates our beautiful social peace and the passably functional model of a capitalism tamed by social democracy...²⁵

And - one may add - globalisation also stands for a legal movement that is best described not as the evolution of *law*, but quite simply as the evolution of the *concept of law*. In order to establish this thesis, we will approach the concept of globalisation with the aid of Stichweh's *cumulative model of social structures*. This concept has the great advantage of marking out with high precision the continuities and discontinuities in the development of world society – a factor of particular usefulness in legal analysis.²⁶ In brief:

In Stichweh's view, world society constructs itself on structural patterns all its own, which are distinct from the structures known to nationally segmented societies. Stichweh terms these global patterns *eigenstructures*, in a borrowing from the mathematical concept of *eigenvalues* (as reworked, in particular, by von Förster²⁷). As examples, Stichweh names function systems (for example, the world economy, world science, world literature), formal organizations (intergovernmental organisations [IGOs], international non-governmental organisations [INGOs], and multinational corporations [MNCs] *etc.*), networks (internet, small worlds, *etc.*), epistemic communities (Linux developers, diasporas, trade organisations, *etc.*), world events (the French Revolution, World Fairs, the Olympics, *etc.*),

²⁵ Armin Nassehi, *Geschlossenheit und Offenheit: Studien zur Theorie der Modernen Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 2003), p 188 *et seq.*

²⁶ Rudolf Stichweh, "The Eigenstructures of World Society and the Regional Cultures of the World", in: Ino Rossi (ed), *Frontiers of Globalization Research: Theoretical and Methodological Approaches*, (New York, Springer, 2007), pp 133-149.

²⁷ Heinz von Förster, *Wissen und Gewissen: Versuch einer Brücke*, (Frankfurt aM, Suhrkamp Verlag, 1993), p 103 *et seq.*

markets, world wars, world public opinion, global cities,²⁸ and so on - whereby the list is necessarily open at both ends. What precisely is meant by the notion of *eigenstructures*? Stichweh explains it as follows: "Eigenstructures reproduce pre-existent cultural diversity and push it back at the same time, creating new social and cultural patterns of their own."²⁹

This opens the way for a highly-sophisticated image of world society with finely nuanced inter-relationships. This image is based upon a hypothesis of multiple layers in the structural composition of social systems, so that the new structures overlay the earlier ones without actually eradicating them.³⁰ In a borrowing from Derrida, one could term these new structures as a *supplement* to the traditional forms of societies.³¹ The effect of the new structures is, in essence, that they gradually reduce the informational relevance of the older structures over longer periods of time.³² Stichweh's theory of *eigenstructures* contains three elements that fundamentally distinguish it from competing globalisation theories:

- 1) First, it does away with the widespread assumption³³ of "the mutual exclusivity of the national and the global - the obverse of state capture, in which the global is seen as the opposite of the national".³⁴ Globalisation can, in no way, be reduced to a simple territorial desegmentation of large function systems.

²⁸Stichweh, *The Eigenstructures of World Society and the Regional Cultures of the World*, note 26 above, p 135 *et seq*; Saskia Sassen, *Cities in a World Economy: Sociology For a New Century*, 3rd ed., (Thousand Oaks CA, Pine Forge Press, 2006).

²⁹ Stichweh, *The Eigenstructures of World Society and the Regional Cultures of the World*, note 26 above, p 135.

³⁰ *Ibid.*, p 135.

³¹ Marc Amstutz, "The Genesis of Law: On the Paradox of Law's Origin and its *Supplément*", in: Peer Zumbansen & Galf-Peter Calliess (eds), *Law, Economics and Evolutionary Theory*, (Cheltenham-Northampton MA, Edward Elgar Publishing, 2011), pp 226-247.

³² Stichweh, *The Eigenstructures of World Society and the Regional Cultures of the World*, note 26 above, p 135.

³³ See, on this question, Klaus Röhl & Hans Christian Röhl, *Allgemeine Rechtslehre*, 3rd ed., (Cologne-Munich, Heymann, 2008), p 522 *et seq*.

³⁴ Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, note 21 above, p 405.

- 2) Second, it draws attention to the fact that both the new and the old structures, although genetically intertwined, possess their own individual and distinct eigenvalues, that is, the state of each is self-determined. Sassen has very subtly articulated this notion in connection with what she terms *assemblages*, that is, those socio-economic arrangements of territory, authority and rights (TAR) found in nation states and now, increasingly, in global society:

If there is one systemic feature that characterises these diverse assemblages it is that they are denationalised, whether their origins lie in the nation state or in self-evidently global systems. These emergent assemblages co-exist with vast stretches of older historical formations constitutive of the modern nation state.³⁵

- 3) At the same time, the fact that the *eigenstructures* also function as *eigenvalues* points to a further aspect of the relationship between the systems: because they are an element of the environment in which global structures operate, territorial structures also constitute an *eigenvalue* of the global structures. Von Förster describes this interlocking relationship with the help of the following image:

“Just as the other became one of my *eigenvalues*...so I now become one of the other’s...*eigenvalues*. I and thou create one another reciprocally.”³⁶

What this means in concrete terms, according to Saskia Sassen, is:

The nation-state and interstate system remain critical building blocks but they are not alone, and are profoundly altered from the inside out, not just as a result of external forces, because they are one of the sites for today’s foundational change.³⁷

³⁵ *Ibid.*, p 403.

³⁶ Heinz von Förster, *Sicht und Einsicht: Versuche zu einer operativen Erkenntnistheorie*, (Braunschweig- Wiesbaden, Vieweg, 1985), p 127.

³⁷ Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, note 21 above, p 403.

The preceding remarks make it clear that the understanding of globalisation as a sociological phenomenon, as argued here, diverges widely from that underlying Rödl's chapter. The next question to be addressed then is: To what conclusions regarding the function of world law does this divergent understanding of globalisation lead us?

IV. Global Law as Cognitive Law

If one accepts the existence of world social structures as we have just described them, the first question that arises is how a legal system can differentiate itself within those structures. For here (as elsewhere in society), Niklas Luhmann's maxim still applies: "society tolerates such differentiations [only] if they maintain a functional relation to the problems of society."³⁸

One could, at first glance, be led to assume that, just as in nation-states, the function of the legal system in a world society is to deal with the problem of the systemic stabilisation of normative (counterfactual) expectations. The function of world law would lie, accordingly, in its assuring a situation in which it is always known, within the *eigenstructures*, "for which expectations one finds social backing, and for which one does not".³⁹ This is implicitly assumed to be the case by Rödl. It is, however, an assumption that is highly problematical. This is due to the fact that *eigenstructures* are characterised by a high degree of specialisation, and are thus also highly complex in all their dimensions (temporal, social, and material). This circumstance is of paramount importance for an understanding of the nature of the expectations that are encountered within these structures. As Luhmann pointed out, in this regard, "it is better to react to very high and functionally specific complexity with learning processes than with counterfactual attempts to maintain prescribed expectations".⁴⁰ Because of this, he concludes that, in world society, evolutionary primacy shifts from normative to cognitive mechanisms.⁴¹ This does not, of course, mean that

³⁸Niklas Luhmann, *Law as a Social System*, (Oxford-New York, Oxford University Press, 2004), p 467.

³⁹ Luhmann, note 38 above, p 148.

⁴⁰ *Idem*, note 22 above, p 79.

⁴¹ *Idem*, note 23 above, p 340.

normative expectations are simply replaced by cognitive expectations. The diagnosis is more circumspect:

If one considers the structure of the expectations that inform the fields of interaction that have become universal in science and technology, in business and in the public dissemination of news and travel information, it is noticeable that there is a clear predominance of expectations that are cognitive, adaptive, willing to learn, while expectations that are normative, lay claim to morality and prescribe, recede into the background.⁴²

In other words, in world society, there is a marked preference for expectations that are cognitive in nature, over those that are normative. At the same time, this does not in any way imply that normative expectations entirely disappear.

The conclusion which these considerations lead to is that world society will “tolerate” the differentiation of a legal system within its structures only where the primary reference of the legal system is to the society’s cognitive expectations. In other words, it must be assumed that the primary functional reference of global law will be to expectations that are cognitive in nature, these being one of the dominant *eigenstructures* of world society.⁴³ The conception of world law as an extrapolation of the function of national law to the global domain, so that its function would then, in the main, be to stabilise global normative expectations, must be abandoned. This is my principal criticism of Rödl’s thesis, namely, that it attempts, as I have pointed out, to maintain the classic function of national legal systems

⁴² *Idem*, note 22 above, p 68.

⁴³ See Karl-Heinz Ladeur, *Negative Freirechte und gesellschaftliche Organisation: Die Erzeugung von Sozialkapital durch Institutionen*, (Tübingen, Mohr Siebeck, 2000), p 242 *et seq*; on the need for using legal means to guarantee learning capacity in a society of organizations. The author attaches great value to cognitive expectations, but does not draw the same conclusions with regard to the implications of this for the concept of law as is done in the present paper. He restricts himself to a critique of Luhmann’s autopoiesis model, seeing the notions of operative closure and the cognitive opening of legal systems as insufficient for properly grasping the reciprocal relationship between law and social cognition. See, also, *idem*, *Der Staat gegen die Gesellschaft: Zur Verteidigung der Rationalität der ‘Privatgesellschaft’*, (Tübingen, Mohr Siebeck, 2006), p 87.

within the structures of global society. The basis of this criticism is clear: the system references of national and international law, as compared to those of world law, are fundamentally different, just as the social structures within which these different “species” of legal systems operate are of a fundamentally different nature.

The conclusion that this leads to is that global law has almost nothing in common with the traditional notion of law, which is linked to the political structures of the nation state. As a result, this tradition is of little use as a paradigm for comprehending the structures of global law. This applies, in particular, to the classic democratic legitimation model, which cannot be extrapolated to global law. Because there is no more an “ontological” definition of law than there is an “ontological” definition of society, the nature of global law must be deduced functionally, by drawing inferences from the social structures upon which world society is built, its *eigenstructures*, as depicted above.

The fact that law of conflict of laws – in the “cosmopolitan” version suggested by Rödl – does not have the capacity to re-align itself with the cognitive orientation required of global law should be apparent from what has been said thus far. This relates, above all, to the fact that law of conflict of laws is able to “mobilise” only national legal orders, which, as a rule, are tailored to *normative* expectations. The possibilities for alleviating this impediment would appear to be limited – if, indeed, they exist at all. This being the case, the next question that arises is, of course, how does cognitive law come into being? Various studies, a detailed analysis of which is not possible here, suggest (although, admittedly, based upon insufficient empirical evidence) that “custom and usage” play a dominant role in this context. The questions involved are complex and have not yet been clearly articulated. It would be impossible even to sketch out the full implications of this concept here. By way of a conclusion, therefore, and as a return to the central theme touched upon by Rödl, I would like to address one partial aspect of the issue, tentatively and, one might even say, speculatively. Is it possible to see in the emergence of cognitive global law, that is, in the “custom and usage” building mechanisms by which this law gradually arises, an *alternative* to democratic legitimation in the transnational domain? My intention in raising this question is solely to open some new *pistes*

de réflexions – and not to offer, at this point, a fully developed counter-proposal to Rödl's project.

V. "Custom and Usage" as the Legitimation of World Law

The positing of "custom and usage"⁴⁴ as an alternative to democratic mechanisms as a source of legitimacy, implies, first of all, that reliance is placed not upon organised procedures ("from above") but upon the self-referential processes that go on within social systems ("from below"). The legitimation process is not political. It takes place within other sub-systems of the society, such as the economic system, the art world, the educational system, the mass media, *etc.* One could even say, if one considers the process of globalisation, that *world law arises as the emergence of social norms in comparatively slowly stabilizing usages taking place within the eigenstructures that comprise world society.* In keeping with the classic doctrines of customary law, it is possible to see this process as one of the emergence of an "(objective) will", that something be considered as a legal norm (the theory of will) or a "belief", in social communications, that a legal norm is to be respected (belief theory). There is no question that such "wills" or "beliefs" can have a legitimating effect, without any need for authorisation by a democratically-legitimated law-maker. But this is only the beginning of the legal theoretical problem.

In asking how it is that such *reflective practices* within social systems can develop a legitimating potential, the central issue to be investigated is the precise manner in which the *eigenstructures* of world society perform their operations, considering especially the acceleration of the time horizon in those structures. This involves a number of technical questions: How is customary world law to be recognised? When does it become effective? How is *longa consuetudo* and *opinio necessitatis* to be understood and defined in a globalisation context? At what point can customary world law be said to exist legitimately – that is, when does the transition from social to legal norm take place? How is the substantive content of individual norms to be defined (given that common practices are often similar, but not identical)? These are just some of the many questions that remain open to investigation. Few of these riddles have been unravelled to

⁴⁴ Fikentscher, *Methoden des Rechts in vergleichender Darstellung*, note 24 above, p 691.

date. Whether new research will lead us to a similarly melancholic conclusion as that reached by Rödl is, as yet, uncertain.

Part I.2

The European Constellation

Chapter 3

Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form

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I. Preliminary Remarks

"Unity in Diversity" was the fortunate motto of the otherwise unfortunate Draft Constitutional Treaty.¹ This motto deserves to be kept alive, despite, or even because of, this failure and the retreat of European politics from overt constitutional ambitions. It is even safe to say that, precisely through these failures, the need to come to grips with the challenges that it articulates have become more obvious. The core problem from which this chapter departs can be simply stated: the Member States of the European Union are no longer autonomous.

* Core arguments in this chapter were first presented on the Workshop "The changing role of law in the age of supra- and transnational governance" on 18-19 November 2009 at the Universidad Carlos III de Madrid; they were developed further in the Opening Lecture of the Summer School of the "New International Constitutional Law and Administrative Studies" Summer School on 5 July 2010 at the Central European University in Budapest. I would like to express my gratitude to my commentators in Madrid (Patricia Mindus, Turin, Agustín José Menéndez, Leon, and Andrea Greppi, Madrid, Carlos III and the discussants on the Summer School in Budapest). They have all very significantly inspired the elaboration of the present text.

¹ Article I-8 Draft European Constitutional Treaty (OJ C 310/1, 16/12/2004).

They are, in many ways, inter-dependent, and, hence, depend upon co-operation. However, Europe has not transformed into a federation and it *cannot* become a federation as long as its constituent actors do not agree to the federal vision. Should we, nevertheless, keep the federal perspective alive? The reaction to this question cannot be uniform. In view of the histories of European democracies, their uneven potential and/or willingness to pursue the objectives of distributional justice, to respond to economic and financial instabilities, and to cope with environmental challenges, differentiating answers suggest themselves. “Social Europe” is probably the most delicate among these challenges, as long as it remains, at best, unclear whether, and, if so, how, a European federation might respect and re-construct the embeddedness of Europe’s welfare state traditions. This example is by no means exceptional. The sustainability of the whole European project seems to depend upon the construction and institutionalisation of a “third way” between or beyond the defence of the nation state, on the one hand, and federalist ambitions, on the other. This chapter will explore the potential of the conflicts-law approach to provide perspectives within which this challenge can be met.

This is not only an immodest, if not overly ambitious, suggestion, but also one which must not be misunderstood as a sceptic retreat from the European project. As a precautionary move, the chapter will, in its first section, recall a classical address of Max Weber’s. It will use this reference to re-construct the lasting merits and accomplishments of the integration project. It will also, in the same Section II, address the legitimacy *problématique* of this project’s institutional design and discuss three significant theoretical efforts of the foundational period in order to cope with this challenge. The following section (Section III), will analyse the responses of these three theories to the post-foundational dynamics of the integration project. Arguing that all three of these traditions realise an exhaustion of their potential to cope with Europe’s present challenges, Section IV will present the conflicts-law approach as an alternative response to Europe’s legitimacy *problématique*. Two follow-up sections, one on the recent labour law jurisprudence of the ECJ (Section V), the other on its response to the conflict between the Czech Republic and Austria on atomic energy (Section VI), will illustrate the operation of the conflicts-law approach. The concluding Section VII will summarise its problems and perspectives.

II. Max Weber's Nation State

Back in 1895, Max Weber gave an inaugural address in the University of Freiburg, then situated in Bismarck's *Kaiserreich* of 1871. His lecture was published in an enlarged version under the title "The National State and Economic Policy".² It became a real classic and has now regained a fascinating topicality for two reasons. The first concerns the object of the field study which Weber used to explain some of his more abstract theoretical positions and provocative political views. The field study dealt with the reasons for, and the implications of, the migration of workers. It is of stunning topicality – and the analysis which Weber delivered excels through a precision and subtlety which is difficult to find in the current debates, at least in legal quarters. However, Weber also used this case to explain and defend a vision of the political and economic commitments of the nation state, which is, at best, a contrast to the European vocation – but is, nevertheless, at least negatively instructive, because it helps us to realise to what degree this vision is still alive in contemporary debates and legal arguments.³

Weber drew upon the empirical work which he had undertaken in 1892, while still a *Pivatdozent* in Berlin, in the context of a major *Enquête* of the *Verein für Sozialpolitik* (Association for Social Reform) on the situation of the agrarian work-force in the German *Reich*. He had focused there on "the posting of workers" from Poland to the Prussian Province of West-Prussia. His multi-faceted analysis addressed the transformation of pre-modern or patriarchal structures into a capitalist agrarian economy, identified the pressures which this processes exerted on the landowners, described the incentive structure which fostered the import of "cheap labour" from the neighbouring regions of Poland and from the deeper East Galicia.⁴ The capability of the Poles to endure the poor working

² *Der Nationalstaat und die Volkswirtschaftspolitik*, (Freiburg i.Br., CA Wagner, 1895) [citations here are from Ben Fowkes' translation in (1980) 9 *Economy and Society*, pp 420-449].

³ See the stunning example of the Austrian *Oberster Gerichtshof* discussed in Section VI.2.1 *infra*.

⁴ See the fascinating reconstruction of Weber's analysis of the underlying transformation processes by Ola Ageval, "Science, Values, and the Empirical Argument in Max Weber's Inaugural Address", (2004) 4 *Max Weber Studies*, pp 157-177.

conditions and the social situation in the new agrarian economy, so Weber observed, was fostering the gradual increase of the Polish and the decrease of the German share. The great theorist of occidental rationalism felt deeply irritated. Weber expressed his concern about the decline of “German-ness” (*Deutschtum*) in West Prussia, and, equally irritating in EU-perspectives, he called for corrective state measures: a closure of the borders to migrating workers, and the purchase of land by the state.

Even more irritating, however, is what he submits as his “subjective” position - the value judgements nurturing his political advice.

And the nation State is for us not an indefinite something that one feels one can place all the higher the more its essence is shrouded in mystical gloom, but the worldly power organisation of the nation, and in this nation State is *raison d'état* for us, the ultimate value criterion on economic considerations too. It does not mean to us, as a strange misunderstanding believes: ‘state assistance’ instead of ‘self-help’, national regulation of economic life instead of the free play of economic forces, but we want through this slogan to raise the demand that for questions of German national economic policy - including the question whether and how far the State should interfere in economic life or whether and when it ought instead to set the nation’s economic forces free to develop themselves and tear down restraints on them - in the individual case the last and decisive vote ought to go to the economic and political power interests of our nation, and its bearer, the German State.⁵

Strong words, indeed. Even Weber’s audience in Freiburg was apparently upset, and Weber distanced himself later from this strong language.⁶ What motivated his polemic? Rita Aldenhoff, in her very instructive comments on the address, starts her analysis with a quotation from Weber’s contribution to the *Verhandlungen des 5.*

⁵ The translation is not taken from the source in note 2 but was done by Iain F Fraser, Florence.

⁶ See Max Weber’s letter to his brother Alfred, cited in Rita Aldenhoff-Hübinger, “Max Weber’s Inaugural Address of 1895 in the Context of the Contemporary Debates in Political Economy”, (2004) 4 *Max Weber Studies*, pp 143-156, at 146, note 8.

Evangelisch-sozialen Kongresses held in Frankfurt in 1894. There, Weber had stated his normative premises quite succinctly:

We do want ... to shape the conditions of life in a way that makes people feel good, but such that, under the pressures of the unavoidable struggle for life, the best in the, the physical and psychological qualities that we want to save for our nation, will be preserved. Well ... these are value-judgments and they are changeable. Anyway, there is an irrational element.

Is this a pure nationalist talking? "German-ness", as defined, can neither be understood as some form of brutal nationalism; nor does it have anything in common with the *homo economicus*, as we know from mainstream economic theorising. Weber's *homini* are human beings; he exposes them to demands of a different quality. What is, at any rate, noteworthy is the care which Weber takes to differentiate between theoretical, economics, and the political orientations which should, in his view, inform the *Volkswirtschaftspolitik* (economic policy-making). When he diagnoses the readiness of migrant workers from Poland to accept the hardships of their new existence in the "host state", he is, in fact, describing what we would call a "race to the bottom" and questioning precisely the "willingness to starve the most" as the underlying mechanism.⁷ There is a very critical dimension in Weber's position, in that he rejects any claim to "objective validity" of arguments presented in the name of economics; such arguments tend to camouflage normative judgements and political choices – a cardinal sin in the eyes of Weber's epistemology. This is not to defend the substance of Weber's pronouncements. We cannot but remain irritated when reading about the "role played by physical and psychological racial differences between nationalities [sic!] in their struggle for existence".⁸ But Rita

⁷ See Ola Agevall, (note 4 above), p 174.

⁸ This opening statement of the inaugural address is a core reference in the debates on Webers nationalism, see, for example, Kari Palonen, "Was Max Weber a 'Nationalist'? A Study in the Rhetoric of Conceptual Change, (2001) 1 *Max Weber Studies*, pp 196-214. Weber's nationalism and his political interventions have later nurtured the suspicion of a *liaison dangereux* with Carl Schmitt (see Kjell Engelbrekt, "What Carl Schmitt picked up in Weber's Seminar: A Historical Controversy Revisited", (2009) 14 *The European Legacy*, pp 667-684; the young Jürgen Habermas, who had helped to provoke this debate, has clarified his assessment suggesting that

Aldenhoff's reference to Weber's trans-economic *Menschenbild* is a stringent defence of Weber the methodologist against Weber's political polemics. The methodologist remains of great topicality in his critique of spurious claims, not only of the historical school, but also of neo-classical economics⁹ - and their negligent contemporary use in misguiding rationalisations of the integration project both as a whole and in so many of its segments.

III. The European Response to the Failures of Weber's Nation States and the *Problématique* of its Institutional Design

The project of European integration can be understood and re-constructed as a response to the failures of the Weberian nation state, and, more generally and in broader perspectives, to Europe's bitter experiences in the Twentieth century. After 50 years of integration, however, we are confronted with massive challenges: ever since the turn to majority-voting in the Single European Act of 1987, the compatibility of European rule with its democratic commitments is discussed with ever increasing intensity. In the aftermath of the French and the Dutch referenda of 2005, concerns over its neo-liberal tilt and the social deficit, *i.e.*, the compatibility of its institutional design and the welfare traditions of European democracies moved to centre stage. The Irish "No" of 2008 to the Treaty of Lisbon was perceived as an erosion of the permissive consensus that had backed the progress of integration. During the present financial crisis, the instability of Europe's economic constitution has become manifestly apparent. All of these unresolved issues and queries seem to suggest that we can no longer be so sure about the sustainability of the European project, but have, instead, to re-consider our premises.

It would, of course, be absurd to assume that conceptual re-orientations, which an academic legal exercise, such as the one that we are undertaking, could produce ready-made answers to the type of problems just named, or lead to immediate practical changes. The ambitions which we pursue when suggesting a new way of thinking are much more modest. But, in their conceptualisation of the

it seems more appropriate to call Carl Schmitt Max Weber's "natural son" (see the reference in K Engelbrekt, p 668).

⁹ See Agevall, note 4 above, pp 172-74.

integration project, they propagate a change of paradigmatic proportions. To summarise and accentuate how they contrast with prevailing views, European law tends to be portrayed as an ever growing and ever more comprehensive body of rules and principles of steadily richer normative qualities. This edifice is expected to come together through successive steps of legal integration. Such visions of the integration project and process rest, in part explicitly, in part implicitly, on daring assumptions about the social functions of law and its powers – and its *leitmotiv*. Giandomenico Majone has recently characterised this conundrum as Europe's "operational code": the "priority of integration over all other competing values".¹⁰ One need, by no means, subscribe to his diagnosis in all of its aspects when realising that law can, indeed, use this operational code on its "integration through law" path *only if*, and *as long as*, it insulates itself from many specifics of national orders, from inherited varieties of conflict patterns and institutional mechanisms within economy and society – and even from the aspirations of its Member States and their governments.

The messages which we are going to submit under the title of the "conflicts-law alternative" differ from the prevailing visions most markedly in two respects. As the recourse to the notion of conflicts law indicates, the approach assigns primacy to the resolution of conflicts arising out of Europe's diversity, rather than the establishment of a unitary legal regime. Equally important, the approach takes account of the ongoing contestation about the kind of polity which the integration process is to generate. This contestation is not different in principle from the ongoing domestic contests about the proper political order – with the important difference, however, that the law of constitutional democracies provides a framework which channels political contestation, while, in contrast, the law of the integration process cannot build upon this type of legitimating framework. The modesty of the pragmatic ambitions which I have highlighted must not be understood as some complacent gesture. Quite to the contrary, we believe that the type of thinking and counter-visions which we seek to promote rests on quite solid grounds in the deeper structures of the European fabric. Its most widely-known reference point is the "unity in diversity" motto of the

¹⁰ Thus, Giandomenico Majone, *Europe as the Would-be World Power. The EU at Fifty*, (Cambridge, Cambridge University Press, 2010), p 1.

Draft Constitutional Treaty.¹¹ Further precursors and allies can be named, such as Joseph Weiler's juxtaposition of "Europe as unity" v. "Europe as community",¹² and Kalypso Nicolaïdes' vision of a European "*demosi-cracy*".¹³ All that is original about the conflicts-law approach is the plea for a resort to legal categories derived from conflict-of-laws traditions and conflict-of-laws methodologies in the legal re-construction of the "unity in diversity" challenge.

What kind of validity can our plea for re-orientation claim? The binary right/wrong, legal/illegal, lawful/unlawful codes in which the legal system operates, and to which lawyers appeal in their doctrinal argumentation, cannot be relied upon in our considerations without further ado. All of the important theories of legal integration have operated on horizons which that code cannot reach directly. They reflected the historical context of the integration project, they sought to cope with the specifics and deficiencies of its institutional design – and, indeed, they continue with similarly comprehensive reflections when addressing Europe's present challenges. The conflicts-law approach situates itself on an equivalent conceptual level. Just like its interlocutors in the legal integration theory, it seeks to re-construct both the accomplishments of the integration project and its present *impasses* and crises, and to evaluate the pros and cons of the competing visions against such a background. It is of crucial importance to underline two limitations of this kind of exercise. It would, for one, be a misunderstanding to expect, from the re-constructions of historical contexts and assumptions, that they would reveal "the true story" – a Leopold Rankan tale of "*wie es wirklich gewesen ist*". What we seek to understand is the meta-positive assumptions upon which legal conceptualisations of the integration project have relied, and from which they sought to derive normative guidance on their contributions to its operation. We will, then, necessarily, and deliberately so, have to proceed selectively, albeit not arbitrarily. Our re-construction will depart from, and be restricted to, three schools of thought of long-term significance. Each of the three approaches has some *fundamentum in re*: each of them can claim to conceptualise important elements of Europe's integration law, and

¹¹ See note 1 above.

¹² See Sections II.3 and III.2.3 *infra*.

¹³ Kalypso Nicolaïdis, "The new constitution as European 'demosi-cracy'?" (2004) 7 *Critical Review of International Social and Political Philosophy*, pp 76-93.

each of them can provide normative reasons for its specific conceptualisation: the model of European rule (*Sozialmodell*) which it defends and promotes. It is a further characteristic of our reconstruction that we take account of both the internal developments of each of these models and the continuous contestation among them, along with the ups and downs in terms of their practical impact. We will also argue, however, that all three have, notwithstanding their remarkable viability, deficits in common, which exhaust their potential to cope with the present challenges that Europe faces.

One aspect which the three models have in common can be stated negatively. They were perfectly aware of the discrepancy between the European and the national level of governance, and did not conceive of the European Economic Community as a constitutional democracy in being. What they have in common is a search for legitimate governance beyond nation-state confines and frames. Their messages on the modes of transnational governance, however, differ significantly: (1) "Europe should be institutionalised as a technocratic regime and be restricted to that function". (2) "Europe's vocation is the establishment of an 'economic constitution' which is to protect individual freedoms and to discipline the exercise of political power"; and (3) "Europe has accomplished and should preserve an equilibrium between a supranational legal order and ongoing political bargaining". We will, in this section, focus on the foundational period, underline a common deficit; the further development of the three approaches, and their potential to cope with the "transformations of Europe" will be addressed in a separate section (III).

III.1. Europe as Technocratic Administration – Hans Peter Ipsen and Ernst Forsthoff

Hans Peter Ipsen was the influential founding father of European Law in Germany. He was a very remarkable protagonist of Germany's legal scholarship. The Nazi period had left him, to paraphrase Hans Ulrich Jessurun d'Oliveira,¹⁴ "not totally flawless"

¹⁴ Hans Ulrich Jessurun d'Oliveira, "An Anecdote, A Footnote", in: Hans-Peter Mansel *et al.* (eds), *Festschrift für Erik Jayme*, (Munich: Sellier. European Law Publishers, 2004), pp 387-402. Oliveira, writing in 1968, referred to Hans Dölle, from 1954 onwards one of the Directors of the Max-Planck Institute für ausländisches und internationales Privatrecht in Hamburg; on Ipsen, see Christian Joerges, "Europe a Großraum? Shifting Legal Conceptualisations of the Integration Project", in:

(*nicht ganz fleckenlos*). His post-war work on the Basic Law of the young German democracy, however, documents very clearly democratic commitments in general, and to the *Sozialstaatlichkeit* of the new order in particular.¹⁵ He had started to work on European law at the age of 50 – and helped to establish *Europarecht* as a new legal discipline.¹⁶ Precisely his democratic commitments may explain both: Ipsen's sensitivity to the precarious legitimacy of the European system, on the one hand, and the affinities between his own response and the work of one of the most famous contemporary constitutionalist, namely, Ernst Forsthoff, on the other. These affinities are, at first sight, somewhat surprising in view of the differences in their constitutional theorising;¹⁷ they are, nevertheless, plausible in view of Ipsen's search for a type of rule whose validity was not dependent on democratic legitimacy. The communities were to confine themselves to administering questions of "knowledge", but to leave truly "political" questions to democratic and legitimated bodies.¹⁸ The characterisation of the European Communities as "*Zweckverbände funktionaler Integration*" (organisations with functionally-defined objectives)" was path-breaking. With this theory, Ipsen rejected both further-reaching federal integration notions *and* earlier interpretations of the community as a mere international organisation. He saw Community law as a *tertium* between (federal) state law and international law, constituted by its

Christian Joerges & Navraj S Ghaleigh (eds), *Darker Legacies of Law in Europe: The Shadow of National Socialism and Fascism over Europe and its Legal Traditions*, (Oxford, Hart Publishing, 2003), pp 167-191, at 182-84 (note 92).

¹⁵ Suffice it here to point to HP Ipsen, "Über das Grundgesetz" (1949), reprinted along with all of his later essays in *idem*, *Über das Grundgesetz*, (Tübingen, Mohr Siebeck, 1988), pp 1-37.

¹⁶ See Hans Peter Ipsen, "Der deutsche Jurist und das Europäische Gemeinschaftsrecht", in: *Verhandlungen des 43. Deutschen Juristentages*, (Munich, CH Beck, 1964, vol 2, L 14 *et seq*; *idem*, *Europäisches Gemeinschaftsrecht*, (Tübingen, Mohr Siebeck, 1972), p 176 *et seq*; very remarkable, in the present context, is his rejection of the idea of an economic constitution at both European and national level in his *Gemeinschaftsrecht*, pp 563-566.

¹⁷ See Ipsen, *Über das Grundgesetz*, note 15 above, reprinted also in: Ernst Forsthoff (ed), *Rechtsstaatlichkeit und Sozialstaatlichkeit*, (Darmstadt, Wissenschaftliche Buchgesellschaft, 1968), pp 16-41, on the one hand, and *idem*, "Begriff und Wesen des sozialen Rechtsstaats", in: (1954) 12 *Veröffentlichungen der Vereinigung deutschen Staatsrechtslehrer*, pp 8-36.

¹⁸ "Europäisches Gemeinschaftsrecht", (note 16 above), p 1045.

“objective tasks” and adequately legitimised by their solution.¹⁹ This theory had an implicit answer to the queries about “the social” on offer. Ernst Forsthoff had, in his contribution to the so-called *Sozialstaatskontroverse*, argued that the realisation of social objectives had to operate outside the rule of law; the provision of welfare was, hence, by virtue of the very nature of social policies, characterised as an administrative task, which was incompatible with the commitment to the *Rechtsstaat* (“rule of law”) in the Basic Law.²⁰ This was not a principled objection against welfare policies. What is, nevertheless, difficult to conceive is how the European *Zweckverband* with its transnational machinery might actively pursue the type of activities which welfare states administer domestically. In more principled terms, it seemed, at any rate, inconceivable that the type of a “hard” legal *Sozialstaats*-commitment, which Forsthoff’s opponents understood as a constitutive dimension of the Federal Republic’s democracy,²¹ could be institutionalised at European level.

III.2. Europe’s *Economis Ordo* – Walter Eucken and Franz Böhm

The notion of the “social market economy” was formally introduced into Europe’s constitutional parlance by a joint motion of Joschka Fischer and Dominique Villepin in the course of the debates on the

¹⁹See Hans Peter Ipsen, *Verfassungsperspektiven der Europäischen Gemeinschaften*, (Berlin, Walter de Gruyter, 1970), p 8 *et seq.*, and the interpretation by Marcel Kaufmann, *Europäische Integration und Demokratieprinzip*, (Baden-Baden, Nomos Verlag, 1997), p 300 *et seq.*, & 312 *et seq.*; see, also, Maurizio Bach, *Die Bürokratisierung Europas. Verwaltungseliten, Experten und politische Legitimation in Europa*, (Frankfurt aM, Campus Verlag, 1999), p 38 *et seq.*

²⁰ Forsthoff, “Begriff und Wesen des sozialen Rechtsstaates”, note 17 above.

²¹The so-called *Sozialstaats*-debate is an evergreen in German constitutionalism; for recent contributions, see Oliver Eberl, “Soziale Demokratie in Europa und zwischen Konstitutionalismus und Etatismus”, in: Andreas Fischer-Lescano, Florian Rödl & Christoph Schmid (eds), *Europäische Gesellschaftsverfassung. Zur Konstitutionalisierung sozialer Demokratie in Europa*, (Baden-Baden, Nomos Verlag, 2009), pp 245-256. A Fischer-Lescano, “Europäische Rechtspolitik als transnationale Verfassungspolitik. Soziale Demokratie in der transnationalen Konstellation”, ZERP Discussion Paper 2/2010, Bremen 2010, available at: <<http://www.zerp.uni-bremen.de//publicationen>>; Christian Joerges, “*Rechtsstaat* and Social Europe: How a Classical Tension Resurfaces in the European Integration Process”, (2010) 9 *Comparative Sociology*, pp 65-85.

Constitutional Treaty.²² Their initiative was meant to placate the anxieties over what was perceived as a neo-liberal tilt in the constitutional project. The clause on the social market economy has fulfilled this function quite well in the general public debates, and in the constitutional discourses of both lawyers²³ and political scientists.²⁴ The vague notion of the “social” and simultaneously “competitive” market economy of the Convention and the Treaty of Lisbon is situated at a great distance from the original and fairly precise contours of Germany “*sozialer Marktwirtschaft*”.²⁵ As the most important protagonist of the concept, Alfred Müller-Armack, explained repeatedly, the social market economy was to provide a “third way” beyond economic liberalism, on the one hand, and beyond socialism, on the other. There was no conditioning of social justice by requirements of “competitiveness”; quite to the contrary, the governance of market mechanisms was subjected to the commands of social justice.²⁶

²² See the references in Ch Joerges, “What is left of the European Economic Constitution? A Melancholic Eulogy”, (2005) 30 *European Law Review*, pp 461-489, at 486.

²³ See, for example, Franz C Mayer, “Die Rückkehr der Europäischen Verfassung? Ein Leitfaden zum Vertrag von Lissabon”, (2008) 68 *Zeitschrift für öffentliches Recht und Völkerrecht*, pp 1141-1217, at 1165 *et seq.*, and the contributions to: Ulla Neergaard, Ruth Nielsen & Lynn Roseberry (eds), *Integrating Welfare Functions into EU Law - From Rome to Lisbon*, (Copenhagen, DJØF Publishing, 2009), and most prominently the German Constitutional Court’s judgment of 30 June 2008 on the Treaty of Lisbon. Bundesverfassungsgericht, file no.: 2 BvE 2 / 08, 2 BvE 5 / 08, 2 BvR 1010 / 08, 2 BvR 1022 / 08, 2 BvR 1259 / 08 und 2 BvR 182 / 09, English translation available at: http://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html>, paras. 195 *et seq.*

²⁴ See, for example, Ulrike Liebert, “Reconciling Social with Market Europe? The EU under the Lisbon Treaty”, in: Dagmar Schiek, Ulrike Liebert & Hildegard Schneider (eds), *European Economic and Social Constitutionalism after the Treaty of Lisbon*, (Cambridge, Cambridge University Press, forthcoming September 2011), Chapter 2.

²⁵ See, on the following, Philip Manow, “Modell Deutschland as an Interdenominational Compromise”, Minda De Gunzburg Centre for European Studies, Working Paper 003/2001; A Ebner, “The intellectual foundations of the social market economy. Theory, policy, and implications for European integration”, (2006) 33 *Journal of Economic Studies*, pp 206-223.

²⁶ See the references in Christian Joerges & Florian Rödl, “‘Social Market Economy’ as Europe’s Social Model?”, in: Lars Magnusson & Bo Stråth (eds), *A European Social Citizenship? Preconditions for Future Policies in Historical Light. Preconditions for Future Policies from a Historical Perspective*, (Brussels, Peter Lang, 2005), pp 125-158.

Müller-Armack and his political allies were keen to underline the compatibility of their vision with the Ordo-liberal School and the essential role assigned to economic freedoms and the protection of an undistorted system of competition by law and strong politically-independent enforcement authorities. The development of Ordo-liberalism as an economic theory and vision of a political order had started in the early 1920s as a counter-move against the strong cartelisation of the German economy and its corporatist links with a weak political system. The school survived National Socialism; it was perceived as a German tradition which had not been contaminated by National Socialism and was therefore entitled to broad public recognition and influence. The details need not concern us here. What is important to note, however, is our concern for the social dimension of the European project, the initial compatibility of Ordo-liberalism and the model of the social market, and the dissolution of this alliance which was replaced by a new alliance between the second generation of Ordo-liberalism and Anglo-Saxon neo-liberalism.

The leading protagonists of the Freiburg School, the intellectual *Heimat* of Germany's post-war Ordo-liberalism in both economic and legal scholarship, namely, Walter Eucken and Franz Böhm, derived from the dual commitments to the idea of an "undistorted system of competition", on the one hand, and to the promise of social justice and security, on the other, the challenging task of institutionalising specific, albeit inter-dependent, orders, namely, a legally-structured order of industrial relations and of social security ("*Arbeits- und Sozialverfassung*") along with the legally-guaranteed economic *ordo*: the structured "economic constitution" (*Wirtschaftsverfassung*). In this sense, the economic order which they envisaged was meant to be "socially embedded".

The "really existing social market economy", however, was never as coherently realised as their conceptual *Vordenker* would have liked to see it. Even its economic core institution - its *Wirtschaftsverfassung* - was, by no means, a theoretically-uncontested and legally-consolidated project. The strongest practical challenge to the Freiburg style of *Ordnungspolitik* was the *renaissance* of Germany's corporatist traditions already in the early years of the Bonn Republic. The Federal Republic was characterised by permanent tensions between *Theorie und Praxis*: striking discrepancies between the officious rhetoric of *Ordnungspolitik*, on the one hand, and the ongoing

bargaining between the political system and the political and economic actors, on the other - a German *Lebenslüge*, to be sure, albeit an economically-successful and socially-beneficial arrangement.²⁷ The perception of this discrepancy will have influenced the (ordo)-liberal “turn to Europe”, which implied a retraction from their earlier more global political preference.²⁸ The European level of governance promised to ensure stronger barriers against the *renaissance* of Germany’s corporatist traditions and its political opportunism in economic affairs than the institutional pillars of Germany’s *Ordnungspolitik*.

III.3. Europe as Community – Joseph HH Weiler

In his very first publication on European issues,²⁹ Joseph Weiler presented a vision, which he substantiated and defended in his Ph.D thesis,³⁰ then retold, refined and complemented in his seminal narrative on the “Transformation of Europe”:³¹ Europe has, in its foundational period, so Weiler argued, managed to establish an equilibrium between legal supranationalism and political intergovernmentalism. His portrayal of European integration was inspired by his teachers in international law, on the one hand, and by the work of Erik Stein, on the other, but it was path-breaking and unique in its doctrinal lucidity and its sensitivity to the European synthesis of “the political” and the law.

Weiler’s *oeuvre* is a powerful critique of the type of national state which Weber’s inaugural address describes.³² Nowhere, however, did

²⁷ Well-documented by Werner Abelshauser, *Die Langen Fünfziger Jahre. Wirtschaft und Gesellschaft in Deutschland 1949–1966*, (Düsseldorf, Schwann, 1987).

²⁸ The scepticism and resistance of leading ordo-liberals has been re-constructed and explained in detail by Milène Wegmann, *Fruher Neoliberalismus und europäische Integration: Interdependenz der nationalen, supranationalen und internationalen Ordnung von Wirtschaft und Gesellschaft (1932–1965)*, (Baden-Baden, Nomos Verlag, 2002), in particular, p 351 *et seq.*, for the importance of the political and social constitution for the project of economic integration (pp 359–366).

²⁹ Joseph HH Weiler, “The Community system: the dual character of supranationalism”, (1981) 1 *Yearbook of European Law*, pp 257–306.

³⁰ *Idem*, *Il sistema comunitario europeo: struttura giuridica e processo politico*, (Bologna, Il Mulino, 1985).

³¹ *Idem*, “The Transformation of Europe”, (1990–91) 100 *Yale Law Journal*, pp 2403–2485.

³² See the thorough analysis by Daniel Gaus, “Legitimate Political Rule without a State? An analysis of Joseph HH Weiler’s justification of the legitimacy of the

he talk about something akin to “social Europe”. Even in the concluding passages on democracy in Europe and the legitimacy of the integration project of the “Transformations of Europe”, there is no mention of the possibility that democracy might pre-suppose social justice and that Europe’s socially-defined legitimacy might erode through a destruction of welfare state traditions. And yet, even though Weiler’s value-laden work is characterised by a profound distance from the technocratic precepts and economic rationalisation of the European Community, his visions seem surprisingly compatible with the benign neglect of the “social deficit” of the European order in European legal studies during the foundational period. To be sure, Weiler’s re-construction of Europe as a Janus-headed polity was not meant as a conceptualisation which would exclude Europe’s engagement in social issues as a matter of (legal) principle. However, it is, nevertheless, true that, thanks to the *Realpolitik*-kernel of his analysis, “social Europe” was an unlikely option, and one of very limited significance, anyway. It was highly unlikely simply because its advent was dependent on unanimous inter-governmental voting; it was, by the same token, of little concern as the later tensions between the integrationist objective and the legacy of European welfarism were still dormant.

III.4. Three Concluding Observations

As an interim summary, we can put on record an ambivalent legacy of the foundational period. On its bright side, we note the turning away from the Weberian nation state; less fortunate, however, was the benign neglect of the welfarist commitments of West European democracies. Both aspects deserve some further comments.

III.4.1. The Taming of Weber’s National State

The designers of the EEC-Treaty were both realistic and wise enough to understand that the darker legacy of the European political and economic nationalism would not fade away with the end of the war. Their objectives, however, were institutionalised prudently. The three foundational theories which we have sketched out have understood

European Union qua non-statehood”, RECON Online Working Paper 2008/12, available at:

<www.reconproject.eu/projectweb/portalproject/RECONWorkingPapers.html>.

these messages and integrated them into their conceptualisation of the European project: no discrimination on grounds of nationality, no resorting to the political power of the state as an instrument of parochial economic advantage, and common economic freedoms in the pursuit of economic prosperity – this was the lesson Europe seemed to have learned.

III.4.2. The Night of the Welfare State Legacy of European Democracies

We have defined the second communality of the early legal-integration theories negatively. It is more troubling, because the institutionalisation of welfare commitments could be, and was, in fact, widely understood as a “second pillar” of Europe’s democratic conversion, a societal shield providing protection against a rebirth of the social anxieties which nationalist movements had instrumentalised. Why is it, we are both inclined and entitled to ask, that precisely the welfare state traditions of European democracies are not visible in the legal theories of European integration? Why does it need historians such as Alan Milward³³ and Tony Judt³⁴ to remind Europe’s legal academia that welfare traditions are what Europeans *do* have in common and what distinguishes their collective memories from that of American citizens? Why does it need political-scientists like Fritz W Scharpf³⁵ and Giandomenico Majone³⁶ to remind European constitutionalists, albeit in very

³³ Alan Milward, *The Rescue of the European Nation-State*, (London, Routledge, 1992), p 21 *et seq.*

³⁴ Tony Judt, *Postwar: A History of Europe since 1945*, (New York, The Penguin Press, 2005), pp 791 *et seq.*; *idem*, *Ill Fares the Land*, (New York, The Penguin Press, 2010), pp 127- 237 and *passim*.

³⁵ See, for example, Fritz W Scharpf, “The European Social Model: Coping with the Challenges of Diversity”, (2002) 40 *Journal of Common Market Studies*, pp 645-670, at 645-646, and, recently, “The Asymmetry of European Integration or why the EU cannot be a ‘Social Market Economy’”.

³⁶ *Europe as he Would-be World Power*, (note 10 above), p 128 *et seq.* Majone is well aware, however, of the foundational moment; see his classic *Regulating Europe*, (London-New York, Routledge, 1996), p 1: “At the end of the period of reconstruction of the national economies shattered by the war income redistribution and discretionary macroeconomic management emerged as the top policy priorities of most Western European governments...”

different perspectives, of the structural asymmetries in their constitutional visions? How is it that a scholar of the format and sensitivity of Joseph Weiler, in his seminal narrative on the "Transformation of Europe",³⁷ fails to address the issue of "social Europe", and, even in his comment on the Treaty of Maastricht, continues to present "prosperity" as Europe's second value without ever relating it to social justice. What he offers, instead, is quite in line with his appeal to "Community", a somewhat metaphorical uploading of the notion of "prosperity" with a "solidarity" dimension: a soft power, which he expects to control "the demonic at the statal economic level".³⁸ Is it by chance that, in European constitutionalism, it took primarily labour lawyers to remind us of the importance of "the social" for democratic constitutionalism?³⁹

The omission of a "social dimension" in the conceptualisation of the European project seems not so much a surprising omission, as a downright failure. During the foundational period, welfare state policies and practices were, of course, controversial in many respects, but they were understood as *national* affairs. Only with hindsight have the implications and effects of this constellation become so clearly visible. Stefano Giubboni, who has carefully re-constructed both the mindset of the "founding fathers" and the political bargaining over the Treaty of Rome, concludes that we have to understand this outcome not as a mere failure, but as a "historical compromise".⁴⁰ The parties to this compromise are said to have trusted in the wisdom of eminent economists who expected very

³⁷ Note 31 above, see, in particular, p 2476 *et seq.*

³⁸ See JHH. Weiler, "Fin-de-Siècle Europe", in: Renaud Dehousse (ed), *Europe After Maastricht: An Ever Closer Union*, (Munich, CH Beck, 1994), pp 203-216, at 208 *et seq.*

³⁹ See Brian Bercusson, "Social policy at the Crossroads: European labour law after Maastricht", in: Dehousse (ed), note 38 above, pp 149-186; Stefano Giubboni, *Social Rights and Market Freedoms in the European Constitution. A Labour Law Perspective*, (Cambridge, Cambridge University Press, 2007); B Bercusson, Simon Deakin, Pertti Koistinen, Yota Kravaritou, Ulrich Mückenberger & Alain Supiot, "A Manifesto for Social Europe", (1997) 3 *European Law Journal*, pp 189-205.

⁴⁰ *Ibid.*, p. 7.

positive effects from an opening of national *Volkswirtschaften*;⁴¹ they may also have trusted in the sustainability of a constellation which eminent political scientists were to characterise as a politically and socially “embedded liberalism”.⁴² Such positive expectations seem well compatible with the stringent transnational regulation of the agricultural sector where such interventionism was held to be indispensable. Legal scholarship, however, treated this socially extremely-important and economically extremely-costly domain as an “exception” in the European edifice, which did not deserve, and did not, in fact, attract, closer academic scrutiny for a very long time to come.⁴³

III.4.3. Historical Indeterminacy and the Indispensability of Theory in Legal Argumentation

The differences in the re-construction of the foundational constellation between the institutional generalists in European legal scholarship, on the one hand, and a later generation of labour law constitutionalists, on the other, are quite illuminating: Brian Bercusson, writing under the impression of the Treaty of Maastricht, put all his hopes on the “outstanding importance” of what was accomplished therein.⁴⁴ Stefano Giubboni, writing a decade later,⁴⁵ complemented the projection of positive signals in European development in his comments on the later Treaty amendments and on the (Draft) Constitutional Treaty;⁴⁶ in addition, he started to seek legally-relevant backing for his views of the “compromise” which he read into the Treaty of Rome:

⁴¹ See, most notably, the “Ohlin Report”: International Labour Organisation, “Social Aspects of European Economic Co-operation. Report by a Group of Experts”, in (1956) 74 *International Labour Review*, pp 99-123.

⁴² John G Ruggie, “International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order”, (1982) 36 *International Organization*, pp 375-415; see Jens Steffek, *Embedded Liberalism and its Critics: Justifying Global Governance in the American Century*, (New York, Palgrave Macmillan, 2006).

⁴³ Until Francis Snyder, *Law of the Common Agricultural Policy*, (London, Sweet and Maxwell, 1985); for a comprehensive recent analysis, see Karolina Zurek, “European Food Regulation after Enlargement: Should Europe’s Modes of Regulation Provide for more Flexibility”, Ph.D Thesis EUI Florence 2010 (Chapter III).

⁴⁴ *Ibid.*, note 39 above, p 183.

⁴⁵ Giubboni, *Diritti Sociali e Mercato. La Dimensione Sociale dell’Integrazione Europea*, (Bologna, Il Mulino, 2003); English version: *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective*, note 39 above.

⁴⁶ Giubboni, *Social Rights*, note 39 above, pp 94-150.

[T]he apparent flimsiness of the social provisions of the Treaty of Rome (and of the slightly less meagre ones of the Treaty of Paris, was in reality consistent with the intention, imbued with the embedded liberalism compromise, not only preserve but hopefully to expand and strengthen the member States' powers of economic intervention and social governance: i.e., their ability to keep the promise of protection underlying the new social contract signed by their own citizens at the end of the war.⁴⁷

Lasciate ogni speranza is, instead, the main message of Florian Rödl,⁴⁸ writing in the wake of *Viking* and *Laval*, as far as the actual development of the Union is concerned. He renews, however, the defence of "Social Europe" by the re-construction of the foundational constellation as a legally significant "compromise". It seems, indeed, plausible to argue that the premises of the negotiators and their understanding of the EEC Treaty should be taken into account in the interpretation of Treaty provisions such as Article 153 (5) TFEU (ex-Article 137 (5)), which stipulates that "the provisions of this Article shall not apply to pay, the right of association, the right to strike and the right to impose lock-out".⁴⁹ The legal surplus of such suggestions seems minimal, however, and is a shaky ground for far-reaching conclusions as to the Union's social commitments. The Treaty of Rome has mentioned, in its Title III of Part Three, significant social fields, and Member States were, as Article 118 EEC Treaty confirms, expected to co-operate closely. It is also true that distributional and income policies were foreseen in an important part of the European Economy, namely, agriculture. Agustín José Menéndez⁵⁰ reads these provisions as strong elements of a federal structure foreshadowing the strengthening of the federalisation of Europe, whereas, in

⁴⁷ *Ibid.*, p 16.

⁴⁸ F Rödl, "Labour Constitution", in: Armin von Bogdandy & Jürgen Bast (eds), *Principles of European Constitutional Law*, (Oxford, Hart Publishing, 2010), pp 605-640; very similar, see Leone Niglia, "Form and Substance in European Constitutional law: The 'Social' Character of Indirect Effect", (2010) 16 *European law Journal*, pp 439-457.

⁴⁹ On the doctrinal controversies on this provision, see Section V.3.2. *infra*.

⁵⁰ Agustín José Menéndez, "United they diverge? From Conflict of Laws to Constitutional Theory? On Christian Joerges' Theory, RECON Online Working Paper, available at:

<http://www.reconproject.eu/main.php/RECON_wp_1106.pdf?fileitem=5455877>.

Giandomenico Majone's view,⁵¹ they confirm that the social-policy domain, was "considered to be outside the competence of the supranational institutions".⁵² Both of these readings are based upon the same historical evidence. Both of them can claim to be valid – but they need to base their claims upon re-constructions which are informed by non-historical theoretical premises.

What we can more safely assume is simply that the negotiators operated on the assumption of same kind of "embedded liberalism" and its sustainability, so that the protagonists of welfare policies could live with the compromise. If such expectations proved to be wrong, legal reasoning must not assume that conclusive normative arguments can be derived from "historical facts"; it must, instead, engage in conceptual deliberations and controversies. It must become aware of the non-historical normative and analytical issues underlying historical re-constructions such as those we have just mentioned. These issues are complex and sensitive: Does democratic governance, as a matter of principle, require that the objectives of social justice can be pursued by the political system? If so, is it at all conceivable that welfare policies can be successful institutionalised at European level, or is it, in view of the diversity of socio-economic conditions, political traditions and preference, more promising to preserve their variety?

IV. Hindsight and Foresight

We started this chapter by listing some enormous challenges which Europe is facing today. The "social deficit", which we have traced back to the institutional design of the Treaty of Rome, is just one of them, albeit one of particular importance in view of the collateral damage in terms of the social acceptance of the Union and the growing risks of populism and xenophobia. The social deficit furthermore illustrates particularly drastically the *impasses* of European politics, which result from the reliance of the integration project on the so-called Community Method. We will - in the first step of this section - illustrate these difficulties briefly, before we again take up the discussion of the three legal conceptualisations of the integration project. The development of these conceptualisations

⁵¹ Majone, *Europe as the Would-be World Power*, note 10 above, p 131 *et seq.*

⁵² *Ibid.*, p 132.

mirror, so we will argue, the practical *impasses* of European politics. However, it is important not to misunderstand the exercise that we are undertaking as some fundamental critique, not even as a further characterisation of Europe as a “faltering project”.⁵³ Instead, its objective is to pave the way for a paradigm shift which would defend the Union's accomplishments, and, at the same time, open new perspectives.

IV.1. Fragile Pillars of “Social Europe”

The story of Social Europe has much in common with Michael Ende's most famous fairy tale.⁵⁴ Every move in the process of economic integration was accompanied by counter-moves towards a social re-embedding of the European polity. However, these counter-moves did not just occur through the conferral of new competences to the Community in treaty amendments and subsequent legislative arenas. The ECJ, in particular through its anti-discrimination jurisprudence, operated as a progressive instigator, and the reference procedure was, often enough, prudently and successfully used by labour law networks.⁵⁵ However, most of the changes were piece-meal with no comprehensive long-term background agenda.

Social aspirations were more explicitly articulated in the aftermath of the Treaty of Amsterdam. The contours of what was to constitute Europe's “social dimension”, however, remained vague. Key concepts from national welfare states appeared in official documents without an equivalent institutional background. This held true for Germany's “*soziale Marktwirtschaft*”,⁵⁶ for France's “*services publiques*”,⁵⁷ and T.H. Marshall's notion of “social rights”.⁵⁸ The only

⁵³ See Jürgen Habermas, “European Politics at an Impasse. A Plea for a Policy of Graduated Integration”, in: *idem*, *Europe: The Faltering Project*, (Cambridge, Polity Press, 2009), pp 78-106.

⁵⁴ Michael Ende, *The Neverending Story*, (*Die unendliche Geschichte*) (New York, Penguin Books, 1983).

⁵⁵ See Silvana Sciarra, (ed), *Labour Law in the Courts. National Judges and the European Court of Justice*, (Oxford, Hart Publishing, 2001).

⁵⁶ See references above in notes 25, 26 & 35.

⁵⁷ See the comparative account in Markus Krajewski, *Grundstrukturen des Rechts öffentlicher Dienstleistungen*, (Heidelberg, Springer, 2010), p 55 *et seq.*; for the European level, see U Neergaard, “Services of General (Economic) Interest: What Goals and Values Count?”, in: U Neergaard *et al.*, (eds) *Integrating Welfare Functions into EU Law – From Rome to Lisbon*, note 23 above, pp 191-225.

transnational European innovation was the “Open Method of Co-ordination” (OMC) which the Lisbon Council of 2000 brought to bear in new areas of social policy.⁵⁹ Even Fritz W. Scharpf initially suggested that this alternative to the traditional community method “could hold considerable promise”.⁶⁰ Sophisticated theorists were persuaded by the prospect of a seemingly democratic “learning through monitoring”.⁶¹ This initial enthusiasm was to fade away with the rather modest accomplishments of the Treaty of Lisbon, on the one hand, ambivalent or inconclusive practical experiences,⁶² and, last, but not least, the recent dis-embedding moves in the labour law jurisprudence of the ECJ, on the other.⁶³

IV.2. The Foresight of Theory – Three Retractions

The rejection of all the constitutional ambitions in the Treaty of Lisbon and the present *impasses* of the integration *praxis* are also observable in the legal integration theory. Tellingly enough, this holds true for all of the three conceptualisations that we have sketched out above. This observation seems all the more significant as these three models - technocratic rule, economic rationality, and the community vision - were not chosen at random. They represent - quite comprehensively - the evolutionary options among which the

⁵⁸ Thomas H Marshall, “Citizenship and Social Class”, in: *idem, Class, Citizenship and Social Development*, (Westport CT, Greenwood Press, 1973), pp 65-122.

⁵⁹ See, for an analysis of the legal meaning of co-ordination powers by Beate Braams, “Die Kompetenzordnung im Vertrag von Lissabon”, in: Ingolf Pernice (ed), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?*, (Baden-Baden, Nomos Verlag, 2008), pp 115-134.

⁶⁰ See Fritz W Scharpf, “European Governance: Common Concerns vs. The Challenge of Diversity”, in: Ch Joerges, Yves Mény & JHH Weiler (eds), “Mountain or Molehill? A Critical Appraisal of the Commission White Paper on Governance”, EUI Florence/NYU Law School 2002, pp 1-12, at 9, available at:

<<http://www.eui.eu/RSCAS/Research/OnlineSymposia/Governance.shtml>>.

⁶¹ Charles F Sabel & Jonathan Zeitlin, “Learning from Difference: The New Architecture of Experimentalist Governance in the European Union”, (2008) 14 *European Law Journal*, pp 271-327.

⁶² For a recent comprehensive evaluation in legal theory perspectives, see Mark Dawson, *New Governance and the Proceduralisation of European Law: The Case of the Open Method of Coordination*, (Cambridge, Cambridge University Press, forthcoming 2011), for an analysis in social theory perspectives, see Poul F Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation*, (Oxford, Hart Publishing, 2010).

⁶³ See Section V.2. *infra*.

integration project could choose and kept oscillating. All of them have been continuously present since the foundational period. They have been developing, even mutating, within their particular perspectives, be it in their responses to changing contexts, be it through mutual observation and political learning. We can neither try to document the continuities and innovations within each tradition, nor discuss the affinities between them in any detail. It is sufficient, for our argument, to characterise crucial transformations within each of them - and to underline telling parallels in their diagnosis of the current *impasses*.

IV.2.1. Technocracy without Efficiency – Majone's Critical Turn

The importance of the technocratic tradition in the *praxis* of the integration project can hardly be over-estimated. Its weight was bound to increase with the involvement of the European Community in ever more regulatory policies which were to be organised at transnational levels without the backing of a consolidated democratic order. How else than through an "objective" and expertise-based conceptualisation of its enormous tasks could the European Community hope to ensure the acceptance of its involvement in ever more problem-solving activities? The by far most interesting and influential work which renewed and refined the technocratic legacy is that of Giandomenico Majone.⁶⁴ It is unique not only in its clarity and its coherence, but also in its reflections of the options for an alternative to the democratic constitutionalism of the Member States of the European Union. Majone's famous conceptualisation of Europe as a "regulatory State"⁶⁵ which operates essentially through non-majoritarian institutions was conceived as ensuring the credibility of commitments to what were, in principle, uncontested policy objectives. Welfare policies pose additional problems. The Union's failure to institutionalise a comprehensive social policy results partly from the "reluctance of the Member States to surrender control of a

⁶⁴ Who confronted Europe's integration studies right upon his return to Europe with essays like "Regulating Europe: Problems and Prospects", (1989) 3 *Jahrbuch zur Staats- und Verwaltungswissenschaft*, pp 159-177; "Cross-national resources of regulatory policymaking in Europe and the United States", (1991) 11 *Journal of Public Policy*, pp 79-106 and kept working on the perspectives outlined therein ever since (see, most recently, his *Europe as the Would-be word power*, (note 10 above).

⁶⁵ G Majone, "The European Community as a Regulatory State", 1994-V/1 *Collected Courses of the Academy of European Law*, (The Hague-Boston MA-London, Martinus Nijhoff, 1996), pp 321-419.

politically salient and popular area of public policy”; equally important is the factual difficulty and political impossibility of replacing the variety of European welfare state models and traditions with some integrated European scheme.⁶⁶ Not only does Majone respect the primacy of constitutional democracies, he is also, and with increasing urgency, underlining the fallacy of an ever more perfect and comprehensive subjection of the integration project to its “operational code”, the principle “that integration has priority over all competing values”,⁶⁷ and also the camouflage strategies which he calls “integration by stealth”.⁶⁸ This is an alarming retraction from his earlier trust in the problem-solving potential of the European project. However, his warnings do, by no means, reflect a change of theoretical premises. Majone continues to underline that Europe is not legitimated to pursue the type of distributional politics which welfare states have institutionalised.⁶⁹ He does not retract his plea for regulatory efficiency. His critical turn is, instead, motivated by the *inefficiencies* which he observes in the Union’s operations. His quest for more modesty in Europe’s ambitions (“*Geht’s nicht eine Nummer kleiner?*” [Can we not lower our sights])⁷⁰ summarises these observations. His adaptation of the “unity in diversity” formula⁷¹ is an implication of these insights to which we will return in Section IV.

IV.2.2. What is Left of the Economic Constitution – Ordo-liberal Concerns

The institutionalisation of economic rationality is most widely perceived to day, either affirmatively or critically, as Europe’s main agenda.⁷² This perception has gained prominence since the legendary

⁶⁶ Majone, *Europe as the Would-be World Power*, note 10 above, p 144.

⁶⁷ *Ibid.*, p 1.

⁶⁸ See his *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, (Oxford, Oxford University Press, 2005).

⁶⁹ Majone, *Europe as the Would-be World Power*, note 10 above, p 128 *et seq.*

⁷⁰ *Ibid.*, p 170 *et seq.*

⁷¹ *Ibid.*, p 205 *et seq.*

⁷² See, on the one hand, the contributions on European economic law in von Bogdandy & Bast, note 48 above, by Armin Haltje, “The Economic Constitution within the Internal Market, pp 589-629, and J Drexler, “Competition Law as Part of the European Constitution”, pp 659-679, which are strongly indebted to the ordo-liberal tradition, and Martin Höpner & Armin Schäfer, “A New Phase of European Integration: Organized Capitalisms in Post-Ricardian Europe”, (2010) 33 *West*

White Paper on the Completion of the Internal Market.⁷³ At that stage of the integration process, the ordo-liberal tradition had experienced a deep transformation. That mutation had started at national level with the move of Friedrich von Hayek from Chicago to Freiburg and his promotion of version of neo-liberalism situated between the Freiburg School's orthodoxy, on the one hand, and the Chicago School's normative compacency, on the other. Von Hayek's notion of "competition as a discovery process" captures the essence of his messages best. They have led the second generation of ordo-liberal scholars to re-define the objectives and the methods of national and European competition law. Attention shifted from the control of economic power to the protection of entrepreneurial freedom and the critique of anti-competitive regulation. What happened in the 1970s had been not anticipated, but was analysed with an amazing precision a good number of years ago by Michel Foucault in the course of the lectures he delivered at the *Collège de France*.⁷⁴ There, Foucault characterised the ordo-liberal vision of the strong state which is committed to the protection of the competitive ordering of the market as new type of *governmentalité*, namely, the acceptance of market governance by the political system and the whole of society.⁷⁵ There are remarkable affinities between the second generation Ordo-liberalism and the Chicago school when it comes to practical issues of competition law and policy, but they have never led to a real merger of the two schools. The heirs of Eucken and von Hayek did not subscribe to the Chicago understanding of economic output efficiency and "consumer welfare" but continued to define and defend the "system of undistorted competition" as the core of

European Politics, pp 344-368, on the other. Such theoretical controversies vary, of course, as strongly as Europe's varieties of capitalism.

⁷³ European Commission, "White Paper to the European Council on Completion of the Internal Market", COM (85) 310 final, 14 June 1985.

⁷⁴ Michel Foucault, *Naissance de la biopolitique. Cours au Collège de France*, (Paris, Seuil/Gallimard, 2004), especially the lesson of 7 February 1979, pp 105-134, and the lesson of 14 February 1979, pp 135-164.

⁷⁵ *Idem*, "... [A]u lieu d'accepter une liberté du marché, définie par l'État et maintenue en quelque sorte sur surveillance étatique... eh bien, disent les ordolibéraux, il faut entièrement retourner la formule et se donner la liberté du marché comme principe organisateur et régulateur de l'État... Autrement dit, un État sous surveillance du marché plutôt qu'un marché sous surveillance de l'État", *Biopolitique* (note 7), Lesson 5, p 120.

Europe's "economic constitution".⁷⁶ They witnessed, however, a steady decline in the impact of their visions, which became clearly visible in the substantial broadening of European economic policies in the Treaty of Maastricht,⁷⁷ the so-called "modernisation" of European competition law,⁷⁸ and the move towards a "more economic approach".⁷⁹ The weakening of their ideational power was symbolically confirmed when French Prime Minister Sarkozy saw to it that the Union's commitment to "a system ensuring that competition is not distorted" was not included in Article 3 TFEU (ex-Article 2 TEU), but moved back into Protocol 27 of the Treaty of Lisbon.⁸⁰

IV.2.3. Unity without Community – J. H.H. Weiler's Constitutional Complacency

Joseph Weiler's early work can, in hindsight, be identified as being truly path-breaking in that it synthesised, in a novel way, Europe's constitutive historical move towards a common peaceful future, the construction of a supranational legal alternative to the role of international law in the system, while remaining aware of the political embeddedness and dependency of these accomplishments. The great normative perspectives and the sensitive realism in his design of an equilibrium between "legal supranationalism" and "political intergovernmentalism", however, became gradually ever more apparent as Weiler sought to develop his construct and vision further in the light of European experiences, accomplishments and

⁷⁶ See Ernst-Joachim Mestmäcker, *Wirtschaft und Verfassung in der Europäischen Union. Beiträge zu Recht, Theorie und Politik der europäischen Integration*, (Baden-Baden, Nomos Verlag, 2003), with a collection of essays written from 1965 to 2001 and his recent critique of Eric Posner in: *A Legal Theory without Law: Posner v. Hayek on Economic Analysis of Law*, (Tübingen, Mohr Siebeck, 2007), also available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1168422.

⁷⁷ See Manfred E Streit & Werner Mussler, "The Economic Constitution of the European Community. From 'Rome' to 'Maastricht'", (1995) 1 *European Law Journal*, pp 5-30.

⁷⁸ Heike Schweitzer, "Competition Law and Public Policy: Reconsidering an Uneasy Relationship: The Example of Art. 81" (December 1, 2007), available at: <http://ssrn.com/abstract=1092883>.

⁷⁹ See Dieter Schmidtchen, Max Albert & Stefan Voigt (eds), *The More Economic Approach to European Competition Law*, (Tübingen, Mohr Siebeck, 2007).

⁸⁰ Legally speaking, the removal looks insignificant, as, for example, Peter Behrens has underlined: "Der Wettbewerb im Vertrag von Lissabon", (2008) 21 *Europäische Zeitschrift für Wirtschaftsrecht*, p 193; the Law's truth, however, is not the whole truth.

failures. In his seminal article on the "Transformation of Europe", he delivered an insightful diagnosis of the problematical implications of majority-voting in terms of Europe's legitimacy.⁸¹ He was among the first to realise the normative and political ambivalences of the completion of the Internal Market by the Delors Commission:

[T]o regard the Community as a technological instrument is, in the first place, to under-estimate the profound political choice and cultural impact which the single market involves – a politics of efficiency, a culture of market.⁸²

We can summarise the forgoing observations in a second interim conclusion: the *impasses* of the integration *praxis* are mirrored and foreshadowed by the exhaustion of the main theoretical perspectives which have accompanied and oriented legal reflections, theoretical conceptualisations and the prescriptive modelling of Europe's *finalité*. Where practice and theory concur so significantly in their retroactive moves, it seems that the time is right to consider an alternative paradigm.

V. Europe's Legitimacy Problem Revisited – The Conflicts-law Alternative

Europe's "operational code" is to prioritise integration "over all other conceivable values including democracy".⁸³ "Unity in diversity", the motto of the Constitutional Treaty, has become Majone's new *leitmotiv*.⁸⁴ The legal form of this motto is the re-conceptualisation of European law as a new type of supranational conflicts law. That approach, however, seeks to open much broader perspectives than Majone envisages in his plea for political modesty. Rather than repeating this argument once more,⁸⁵ commentary is restricted here to a depiction of its five core messages.⁸⁶

⁸¹ Weiler, "The Transformations of Europe", note 31 above, p 2461 *et seq.*

⁸² *Idem*, "Fin-de-Siècle Europe", note 38 above, p 215.

⁸³ Majone, *Europe as the Would-be World Power*, note 10 above, p 1.

⁸⁴ *Ibid.*, p 205 *et seq.*

⁸⁵ For early versions, see Ch Joerges, "The Europeanisation of Private Law as a Rationalisation Process and as a Contest of Legal Disciplines – an Analysis of the Directive on Unfair Terms in Consumer Contracts", (1995) 3 *European Review of Private Law*, pp 175-192; "The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutionalist Perspective",

V.1. Conflicts-law as Democratic Commandment

The entire construction is built upon a sociological observation with normative implications. Under the impact of Europeanisation and globalisation, contemporary societies experience an ever stronger schism between decision-makers and those who are impacted upon by decision-making. This schism is explained by Niklas Luhmann within his sociological risk theory; according to Luhmann, the problem arises because decision-making on risks is always characterised by the fact that the potential damage is not simply borne by individual decision-makers, and nor is it only suffered by the persons profiting from the decision.⁸⁷ Luhmann's sociological observation is normatively disquieting in democratic orders. Suffice it here to point to Jürgen Habermas' first essay on European integration,⁸⁸ which he published prior to the completion of his discourse theory of law and democracy,⁸⁹ and later elaborated in greater detail:⁹⁰ increasingly, constitutional states are unable to guarantee the inclusion of all of those persons who are impacted upon by their policies and politics within their internal decision-making processes. The democratic notion of self-legislation, however, which postulates that the addressees of a law should be able to understand themselves as its authors, demands "the inclusion of the other".

(1997) 3 *European Law Journal*, pp 378-406; "Deliberative Supranationalism" – A Defence", *European Integration online Papers (EIOP)*; 5 (2001) No. 8, available at: <<http://eiop.or.at/eiop/texte/2001-008a.htm>>.

⁸⁶ In the following, I draw on "Integration through Conflicts Law: On the Defence of the European Project by means of alternative conceptualisation of legal constitutionalisation", in: Rainer Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, (Antwerp, Intersentia, 2010), pp 377-400.

⁸⁷ Niklas Luhmann, *Soziologie des Risikos*, (Berlin, Walter de Gruyter, 1991); colourfully and laconically summarised in, for example, *idem*, *Das Recht der Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 1995), pp 141-143.

⁸⁸ J Habermas, *Staatsbürgerschaft und nationale Identität*, (Citizenship and National Identity), (Zurich, Erkner, 1991).

⁸⁹ *Idem*, *Faktizität und Geltung*, (Frankfurt aM, Suhrkamp Verlag, 1992), see Annex III therein, also in, *idem*, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, (Cambridge MA, The MIT Press, 1998), pp 491-516.

⁹⁰ *Idem*, "The European Nation State: On the Past and the Future of Sovereignty and Citizenship", in: *idem*, *The Inclusion of the Other*, (Cambridge, Polity Press, 1998), pp 105-128.

V.2. The Supranationality of European Conflicts Law

This plea for a new understanding of EU law, must not, the connotations of its terminological origin notwithstanding, serve as a retraction from supranationalism as such. Quite to the contrary, it furnishes a justification for the validity of the supranational jurisdiction – albeit one which is, just like the three models of legal integration theory discussed above,⁹¹ at the same time depicting the limits of supranational rule. To rephrase its sociological and normative basis slightly: as a consequence of their manifold degree of inter-dependence, the Member States of the European Community/Union are no longer in a position to guarantee the democratic legitimacy of their policies. A European law that concerns itself with the amelioration of such external effects, *i.e.*, which seeks to compensate for the failings of national democracies, may induce its legitimacy from this compensatory function. With this, European law can, at last, free itself from the critique that has accompanied it since its birth; a critique that states that it is *not* legitimate. It can thus operate to strengthen democracy within a contractual understanding of statehood, without needing to establish itself as a democratic state.⁹²

⁹¹ Sections II.1-3 and III.2.

⁹² The argument has been taken up or reinvented repeatedly: see, for example, Robert Howse & K Nicolaïdis, "Democracy without Sovereignty: The Global Vocation of Political Ethics", in: Tomer Broude & Yuval Shany (eds), *The Shifting Allocation of Authority in International Law. Considering Sovereignty, Supremacy and Subsidiarity*, (Oxford, Hart Publishing, 2008), pp 163-191; Karl-Heinz Ladeur, "The State in International Law", in: Ch. Joerges & Josef. Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, (Oxford, Hart Publishing, 2011), pp 397-418. It has also provoked critique, in particular, by Alexander Somek, "The Argument from Transnational Effects I: Representing Outsiders Through Freedom of Movement", (2010) 16 *European Law Journal*, pp 315-344; "The Argument from Transnational Effects II: Establishing Transnational Democracy", (2010) 16 *European Law Journal*, pp 375-394. It will become apparent from our exemplary discussion in Sections V and VI that, in our understanding, Part I of Somek's argument fails to acknowledge the conflicts-law framework of the argument, which is "embedded" in the Habermasian notion of the "co-originality" of private and public autonomy; the whole point of the conflicts approach is about the defence of co-originality against the supremacy of "economic freedoms" (see Section V.1 *infra* and the references in note 102); Part II of the argument seeks to take the interdependence *problématique* too lightly. As Florian Rödl has recently put it: "The border-crossing interdependence of national societies generates types of problems that can no longer be solved by the States on their own or through their consensual cooperation, but require a unitary political space that corresponds to the continental or even global scope of the problems" ("Democratic Juridification without Statization: Law of Conflict of Laws

V.3. Convergence, Re-construction, Critique

Clearly, such a democratic exoneration of European law is only plausible to the exact degree that it may be re-constructed within this perspective, or that it may be furnished with a conflicts-law orientation. This, however, is already, often enough, the case: European law has given legal force to principles and rules which serve the purpose of supranational “recognition” – the non-discrimination principle, the supranational definition and the demarcation of legitimate regulatory concerns, the demands for justification for actions that are imposed upon national legal systems, and the proportionality principle – which supplies a legal yardstick against which respect for supranationally-guaranteed freedoms may be measured. All these principles and rules may be understood as a concretisation of a supranational conflicts law, which guarantees that the actions of the Member States are reconcilable with their position within the Community. This is not to say, however, that the solutions to the conflicts at which European law has actually arrived, are always convincing. Our re-construction of European law in the normative perspectives just outlined will reveal tensions between “facticity” and “validity”, as well as failures and missed opportunities – the conflicts approach shares this type of experience with the three approaches which it seeks to replace.

V.4. The Internal Differentiation of Conflicts Law within Europ’s Multi-level System – The Idea of a Three-Dimensional Conflicts Law

The metaphor of the multi-level system asserts that European “rule” cannot be organised hierarchically. This argument is reflected, not only within the apportionment of competences within the EU, but also by the fact that vast discrepancies exist in the operational resources available at each ruling level. Accordingly, we are able to

instead of a World State”, this volume, Ch. 1). To argue that the conflicts approach conceptualises the interdependence problem adequately is not to suggest, however, that it would generate good answers to all true conflicts – see Section IV 2.3 *infra*. Also, to refer to Habermas is not to suggest that the discourse theory of law has a privileged access to a query which is raised by others, lawyers and political theorists alike, in similar ways; see N Nic Shuibhne, “The Resilience of market citizenship”, (2010) 47 *Common Market Law Review*, pp. 1597-1628, and Richard Bellamy, “The liberty of the post-moderns? Market and civic freedom within the EU”, LEQS paper No. 01/2009, available at:

<<http://www2.lse.ac.uk/europeanInstitute/LEQS/LEQSPapers.aspx>>.

distinguish between three forms of legal collision – vertical, “diagonal”, and horizontal. Diagonal collisions are an important and unique feature of multi-level systems. They are a constant feature of life within the EU, since the competences required for problem-solving are, at times, to be found at the level of the EU itself, and, at other times, at the level of the Member States. This division of competences gives rise to two forms of potential conflict – on the one hand, between divergent EU and national political orientations, and, on the other, between divergent interest constellations in the Member States – with the result that very particular mediation arrangements must be identified. This need for mediation is true for all multi-level systems, but is particularly pressing in the case of the EU, where the existence of diagonal conflict has had, as its corollary, the evolution of a particularly intense degree of administrative co-operation, the institutionalisation of advice-giving instances, and the systematic construction of non-governmental co-operative relationships. This infrastructure may be understood as furnishing the integral components of a conflicts law, a law that may no longer restrict itself to the individual adjudication of situational cases of conflict, and which must, instead, constantly busy itself with the finding of general solutions to universal problems. At the same time, such conflicts law must be – methodologically and organisationally – open to evolution, which has seen the development of post-interventionist regulatory practices and legal forms within national law. Accordingly, we may identify three types of European conflicts law, which operate in three dimensions:⁹³ conflicts law of the “first order” is flanked, on the one hand, by a conflicts law, which, most specifically in the realm of European comitology, has concerned itself with the elaboration of material (substantive) regulatory options, and, on the other hand, by a conflicts law, which governs the supervision of para-legal law and self-regulatory organisation.

⁹³ See, for more detail, Christian Joerges & Florian Rödl, “Zum Funktionswandel des Kollisionsrechts II: Die kollisionsrechtliche Form einer legitimen Verfassung der post-nationalen Konstellation”, in: Galf-Peter Calliess *et al.* (eds), *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag*, (Berlin: Walter de Gruyter, 2009), pp 765-778; Ch Joerges, “The Idea of a Three-dimensional Conflicts Law as Constitutional Form”, in: Ch Joerges & Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and International Economic Law*, 2nd ed., (Oxford, Hart Publishing, 2011), pp 413-456. For similar terminological usage, though built upon a different conceptual base, Poul F Kjaer, “Three-dimensional Conflict of Laws in Europe”, ZERP-DP 2/2009, available at: <<http://www.zerp.uni-bremen.de>>/; see, also, Kjaer, note 62 above, p 141 *et seq.*

V.5. Conflicts Law as Proceduralising Constitutionalism

It follows from the preceding sections that it would be factually and normatively mistaken to regard European law as a system of law dedicated to the incremental construction of a comprehensive legal edifice. Europe must, at last, take the motto of the draft constitutional treaty⁹⁴ to heart, and learn to accept the fact that its diversity will accompany it far into the future, so that conflict born of diversity will continue to characterise the process of European integration. It must further concede that this “process” should be overseen by a conflicts law, which, by virtue of its identification of the principles and rules that govern conflict, will generate the law of the European multi-level system. Europeanisation is not simply a process of change; it is also a learning process. Law cannot pre-determine the substance of such processes, but may yet secure its own normative character, by virtue of its self-dedication to the processes of law-making/legal-justification (*Recht-Fertigung*), which mirror and defend the justice and fairness within law.⁹⁵ This understanding is by no means simply some Teutonic idiosyncrasy.⁹⁶ It is, for example, akin to Antje Wiener’s notion of “the invisible constitution”,⁹⁷ or Deirdre Curtin’s concept of the “living constitution”.⁹⁸ Should it be that these daring ideas are realistic in the sense that they represent the only conceivable type of responses to the challenges to which the European project is exposed? In his comments on the conflicts-law approach, Andrea Greppi has identified these difficulties with radical clarity.⁹⁹ The

⁹⁴ Article I-8 Draft European Constitutional Treaty (note 1 above). The formula was dispensed with by the Lisbon Treaty on the Functioning of the EU.

⁹⁵ See Rudolf Wiehöltter, “Just-ifications of a Law of Society”, in: Oren Perez & Gunther Teubner, (eds), *Paradoxes and Inconsistencies in the Law*, (Oxford, Hart Publishing, 2005), pp 65-77, available at: <<http://www.jura.uni-frankfurt.de/ifawz1/teubner/RWTexte/justum.pdf>>.

⁹⁶ See Michelle Everson & Julia Eisner, *The Making of the EU Constitution: Judges and Lawyers Beyond Constitutive Power*, (Milton Park, Routledge-Cavendish, 2007), in particular, p 41 *et seq.*

⁹⁷ Antje Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters*, (Cambridge, Cambridge University Press, 2008).

⁹⁸ Deirdre Curtin, *Executive Power of the European Union. Law, Practices and the Living Constitution*, (Oxford, Oxford University Press, 2009).

⁹⁹ Andrea Greppi, “Procedure and substance in postnational constitutionalism: ¿Montesquieu or Sieyes?”, in: Rainer Nickel & A Greppi (eds), *The Changing Role of Law in the Age of Supranational and Transnational Governance*, (Baden-Baden, Nomos Verlag, forthcoming 2012).

proceduralisation of law risks foregoing all substance, in particular, a commitment to social justice. Its openness and its plea for deliberative problem-solving risks being seized by the logic of technocratic managerialism. To summarise these concerns and hopes in a citation:

Whether intentionally or unintentionally, legal theory and philosophy suggest that they contain a remedial potential which in fact they lack, and necessarily must lack, to the extent that they fail to incorporate the inchoate values of individuals and institutions in society, the phenomenon Ernst Cassirer called the 'constitution that is written in the citizens' minds'.¹⁰⁰

VI. The Deepening of Europe's Legitimacy Problem by the ECJ's Labour Law Jurisprudence

As indicated, the conflicts-law approach is not meant as an artificial juxtaposition to positive European law, but it does claim to take up the legacy of legal realism, and, hence, to articulate the "real life" of the law. This, however, is by no means a purely affirmative exercise. Both of the case studies in the following sections will use the approach to raise objections or to articulate reservations against important decisions of the ECJ.

VI.1. The Example of *Cassis de Dijon*

The conflicts-law approach advocates mitigation between controversies over diverging policies and complex interest configurations. With this aspiration, the approach departs markedly from the traditional treatment of public law provisions in private international law, international public and administrative law. Europe has, as Jona Israël put it, the chance and vocation to transform the *comitas* (voluntary and diplomatic co-ordination) among its states and societies into a legally-binding commitment to co-operative problem-solving.¹⁰¹ This has been accomplished in countless cases - more or less convincingly. The ECJ's legendary *Cassis de Dijon*

¹⁰⁰ Vivian Grosswald Curran, "Law's Past and Europe's Future", (2005) 6 *German Law Journal*, pp 483-512, at 486, available at: <<http://www.germanlawjournal.com>>. The reference is to Ernst Cassirer's posthumously published *The Myth of the State*, (New Haven CT, Yale University Press, 1946), p 91.

¹⁰¹ Jona Israël, *European Cross-Border Insolvency Regulation*, (Antwerp-Oxford, Intersentia, 2005), pp 123, 150-152, & 323-334.

judgment of 1979¹⁰² may serve to illustrate this point. The ECJ's response to the controversy between Germany and France over Germany's prescriptions on a minimum percentage of alcohol in liquor was as plausible as it was trifling: the confusion of German consumers could be avoided, and a reasonable degree of protection against erroneous decisions by German consumers could be achieved by simply disclosing the lower alcohol content of the competing French liqueur.

Damian Chalmers and Agustín José Menéndez have raised objections of different weight. As Chalmers rightly underlines, the "centre of gravity" of the case was in Germany and concerned conflicts of interest between a German distributor (REWE) and German liquor producers.¹⁰³ This is so, but it does not affect the involvement of the ECJ in a conflict constellation which is *within* the European multi-level system. Chalmers' critique touches upon the upgrading of economic freedoms to constitutional rights which entitle those affected to the supervision of national legislation by the ECJ. This move of the ECJ was anything but trivial, because the Court has assumed *en passant* the constitutional functions. This kind of power is inherent in any supranational supervision of national public law. Its constitutional sensitivity control becomes apparent when we reconstruct the issue within the framework of the discourse theory of law. Economic freedoms belong to the sphere of private autonomy and deserve recognition as constitutional rights. However, within consolidated constitutional democracies, the recognition of the constitutional status of the private sphere is complemented by the constitutional recognition and protection of political rights. Both spheres must be understood in the conceptualisation of Jürgen Habermas as "co-original".¹⁰⁴ The issue, then, is of whether the ECJ

¹⁰² Case 120/78, ECR [1979] 649.

¹⁰³ "Deliberative Supranationalism and the Reterritorialization of Authority", in: Beate Kohler-Koch & Berthold Rittberger (eds), *Debating the Democratic Legitimacy*, (Lanham MD, Rowman & Littlefield, 2007), pp 329-343, at 334.

¹⁰⁴ J Habermas has developed this notion in the context of his theory of democratic constitutionalism; see his *Between Facts and Norms*, note 89 above, p 118 *et seq.* Very convincingly, in my view, Rainer Nickel and Florian Rödl have suggested its application "beyond the state": see R Nickel, "Private and Public Autonomy Revisited: Jürgen Habermas' Concept of Co-Originality in Times of Globalisation and the Militant Security State", in: Martin Loughlin & Neil Walker (ed), *The Paradox of Constitutionalism*, (Oxford, Oxford University Press, 2007), pp 147-167; F Rödl,

has gone a step too far when complementing the recognition of the constitutional status of the economic freedoms by its authoritative definition of the kind of concerns which are deemed to be compatible with the establishment of a common European market. It is this latter query to which Menéndez refers in his critique of the constitutional ambitions of the conflicts-law approach.¹⁰⁵ This point is well taken,¹⁰⁶ but it does in no way affect the reading of *Cassis* as a conflicts law case. The ECJ handed down a ruling on a complex conflict constellation, a ruling which provides a legal framework for this conflict. This “is” conflicts law, albeit not necessarily good law.¹⁰⁷

VI.2. A Market Community? The ECJ's Recent Labour Law Jurisprudence

The much-debated recent labour law jurisprudence of the ECJ provides a line of cases in point. It is difficult for anybody aware of continental private and public international law or Anglo-Saxon conflict of laws *not* to realise the discrepancies between the latter disciplines and the decisions which the ECJ has handed down under

“Private Law Beyond the Democratic Order? On the Legitimatory Problem of Private Law ‘Beyond the State’”, (2008) 56 *American Journal of Comparative Law*, pp 743-768.

¹⁰⁵ See AJ Menéndez, “When the market is political: The socio-economic constitution of the European Union between market-making and polity-making”, in: Roúl Letelier & AJ Menéndez (eds), *The Sinews of Peace. Reconstituting the Democratic Legitimacy of the Socio-Economic Constitution of the European Union*, (Oslo, ARENA, 2009), pp 39-62 (RECON Report No. 10, available at:

<<http://www.reconproject.eu/main.php/RECONreport0910.pdf?fileitem=29736964>>), more recently his “United they Diverge?”, note 50 above.

¹⁰⁶ See, a good while ago, Ernst Steindorff, “Probleme des Art. 30 EWG”, (1984) 148 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht*, pp 338-355.

¹⁰⁷ There is no space in this lengthy essay to review related approaches which share this insight. Gerald Conway's Ph.D Thesis on “Values and Conflicts of Norms in EU Law and the Legal Reasoning of the European Court of Justice” (Brunel 2010), however, deserves exceptional treatment [see, also, his “Conflicts of Competence Norms in EU Law and the Legal Reasoning of the ECJ”, (2010) 11 *German Law Journal*, pp 966-1005, available at: <<http://www.germanlawjournal.com/index.php?pageID=11&artID=1280>>]. With his notion of “conflict of norms”, Conway has chosen a term which, very fortunately, avoids connotations and confusion which the “conflicts law” approach tends to provoke. Conway also does not engage extensively in constitutional deliberations. It is all the more remarkable and enlightening that his analyses documents – the avoidance of the term by the ECJ notwithstanding (see page 185, note 333) – the omnipresence of conflicts and the need for legal responses in all spheres of the law of the EU.

European law. This is not, in itself, deplorable. What deserves closer scrutiny, however, is the content of the principles and rules which the ECJ has invoked and developed in its responses to the conflict constellations which were referred to it.

VI.2.1. Viking, Laval, Rüffert

These three cases are, by now, so well-known that it should suffice here to summarise their contents very briefly.

The first case was decided on 11 December 2007.¹⁰⁸ Finnish seafarers, employed on the ferry *Rosella*, become aware of the intention of their employer to flag out to Estonia. Since they were afraid of losing their jobs or being forced to accept lower wages, they tried to impress their employer by threatening to strike. This was legal under Finnish law. But, so their Finnish employer argued, such action was incompatible with *Viking's* right of free establishment as enshrined in Article 43 EC.

The response of the ECJ is conciliatory in its tone, but is, in fact, quite rigid. The ECJ starts out by underlining that the “right to take collective action, including the right to strike ... [is] a fundamental right which forms an integral part of the general principles of Community law”.¹⁰⁹ Then, however, the Court fundamentally re-configures the traditional balance between economic freedoms at European level and social rights at national level, explaining that the Member States, although “still free, in principle, to lay down the conditions governing the existence and exercise of the rights in question...must nevertheless comply with Community law [...]”. Consequently, the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the application of Article 43 EC”.

The second case was decided only one week later.¹¹⁰ *Laval*, a company incorporated under Latvian law, had won the tender for a school

¹⁰⁸ Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, judgment of 11 December 2007, [2007] ECR I-10779.

¹⁰⁹ Case C-438/05 (*Viking*), para 44.

¹¹⁰ Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet*, judgment of 18 December 2007, [2007] ECR I-11767.

building on the outskirts of Stockholm. In obtaining the tender, it had profited from the differences in the wage levels of Latvia and Sweden. In May 2004, when work was to start, and after *Laval* had posted several dozens of its workers, the Swedish trade unions resorted to hostile actions against *Laval* with such determination and intensity that *Laval* gave up.

The Unions had acted legally according to Swedish law, but the Court referred to Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.¹¹¹

This Directive requires, with respect to a number of essential working conditions, that foreign workers are not to be disadvantaged. According to Article 3, workers are to be guaranteed the minimum rates of pay. According to the general principle of the same Article, the rates of pay must be laid down either "by law, regulation or administrative provision" or "by collective agreements which have been declared universally applicable within the meaning of paragraph 8". Sweden, however, had refrained from changing its pertinent laws, but had, instead, relied on the exceptions listed in Article 3 Paragraph 8 (providing therein the absence of a system for declaring collective agreements or arbitration awards universally applicable. It left the determination of wage levels to collective agreements concluded among the undertakings themselves. The Court argued that, in this respect, Sweden was in breach of (secondary) Community law.¹¹²

In the third judgment, which was handed down on April 2008, the ECJ further entrenched its position.¹¹³ *Rüffert* concerned the legality of a tender proffered by one of the German *Länder*, Lower Saxony, which contained a clause indicating that the public authorities were bound to respect existing collective-bargaining agreements, so that tendering firms would also be required to abide by the relevant collective-bargaining agreements. The ECJ held that Lower Saxony's legislation was irreconcilable with Article 49 EC, since it prevented

¹¹¹ Directive 96/71/EC OJ 1996, L18/1.

¹¹² See paras. 70-71 of the judgment.

¹¹³ Case C-346/06, *Rüffert v Land Niedersachsen*, Judgment of 3 April 2008, European Court Reports [2008] ECR I-01989.

foreign service-providers from benefiting from lower wage costs within their country of origin.

The vital point within the judgment is its evaluation of the protective purpose of the clause committing the public authorities to respect collective agreements: in this respect, the Court held that:

contrary to the contentions of Land Niedersachsen and a number of the Governments, such a measure cannot be considered to be justified by the objective of ensuring the protection of workers.

This finding is all the more remarkable in view of a prior pertinent decision of Germany's Constitutional Court, which had explained only in 2006:¹¹⁴

The combating of unemployment, together with measures that secure the financial stability of the social security system, are particularly important goals, for the realisation of which the legislator must be given a relatively large degree of decisional discretion, and especially so under current, politically very difficult, labour market conditions.¹¹⁵

VI.2.2. Dissenting Opinions in Luxembourg and their Disregard

In all of the three cases, the Court's Advocate Generals - Poiares Maduro in *Viking*, Mengozzi in *Laval*, Bot in *Rüffert* - had submitted Opinions which differed, more or less significantly, from the Court's later judgments. In two more recent cases, the signals of dissent were becoming stronger and more articulate.

The first case concerns the applicability of Directive 2004/18 on a German pension scheme for public employees, and has considerable affinities with *Rüffert*.¹¹⁶ The German scheme foresaw the involvement of Trade Unions in the transformation of parts of their remuneration into pensions ("*Entgeltumwandlung*"). The European

¹¹⁴ Bundesverfassungsgericht, - 1 BvL 4/00 - (First senate, 16 July 2006), available at the Court's website at: http://www.bverfg.de/entscheidungen/ls20060711_1bvl000400.html.

¹¹⁵ Para. 103 (translation by the author; references to earlier judgments omitted).

¹¹⁶ Case C-271/08, *European Commission v Federal Republic of Germany*.

Commission found the involvement of the trade unions in the selection of insurers to be compatible with the Directive.

The opinion which AG Verica Trstenjak delivered on 14 April 2010 does not directly question the Court's labour law jurisprudence.¹¹⁷ She explicitly refrains from supporting Germany's quest for an "*Albany* exclusion",¹¹⁸ and confirms the applicability of the economic freedoms. She then adds, however, that the social right to collective-bargaining and the freedoms are of equal weight and invokes the principle of proportionality as a guide for its resolution.¹¹⁹ The conflict is to be resolved at the level of primary law and this resolution has then to guide the interpretation of secondary legislation. This leads her to question the validity of the Commission's reading of the said directive and to suggest that the complaint be dismissed.¹²⁰

The second case concerns the compatibility of Belgian requirements relating to the posting of workers in Belgium with the Posted Workers Directive.¹²¹ It is, in this respect, closer to *Laval*. AG Cruz Villalón, in his opinion of 5 May 2010, characterises this directive as a response to the conflicts between the social values and the economic freedoms which the internal market is bound to generate,¹²² and then complements the argument of his Slovenian colleague by a reference to Articles 9 and 3 TFEU, suggesting that, under Treaty of Lisbon, social protection is no longer to be understood as an exception from the economic freedoms, but as commitment of general validity. Like his colleague, he then invokes the proportionality principle to resolve these tensions.¹²³

The two Opinions move the conflict between economic freedoms and social rights to the European level and thereby strengthen Europe's judicial supranationalism. The premises and implications of this

¹¹⁷ See, in particular, para. 196 *et seq.*, on the *Rüffert* case.

¹¹⁸ See her discussion of Case C-67/96 [1999] ECR I-5751 in para. 54 *et seq.*

¹¹⁹ See para. 186 *et seq.*

¹²⁰ See para. 237.

¹²¹ Case C-515/08, *Vitor Manuel dos Santos Palhota and Others*. The judgment of the ECJ case dates from 7 October 2010.

¹²² Para. 38.

¹²³ Para. 52 *et seq.*

projection are difficult to understand. Both cases concern policy fields in which national law has *not* been replaced, but is *only partially* affected by European prerogatives. The prospects for a clarification of such queries, however, do not seem bright. In its judgement of 15 July 2010, the ECJ (Grand Chamber) rather flatly rephrased what had been stated in *Viking* and *Laval*:

[W]hile it is true that the right to bargain collectively enjoys in Germany the constitutional protection conferred, generally, by Article 9(3) of the German Basic Law upon the right to form associations to safeguard and promote working and economic conditions, the fact remains that, as provided in Article 28 of the Charter, that right must be exercised in accordance with European Union law.

Exercise of the fundamental right to bargain collectively must therefore be reconciled with the requirements stemming from the freedoms protected by the FEU Treaty, which in the present instance Directives 92/50 and 2004/18 are intended to implement, and be in accordance with the principle of proportionality.¹²⁴

VI.3. The Conflicts-law Alternative

What is wrong with all this? There is no space here to comment on the European wide discussion of this jurisprudence. The following remarks will be restricted to some aspects which illuminate the specifics of the conflicts-law approach.

VI.3.1. Sweden's Social Democratic *Sonderweg*

Patricia Mindus¹²⁵ has, after her review of social and legal integration theories, turned to a dimension of the *Laval* case which she is

¹²⁴ Case C-271/08, paras. 43-44. In Case C-515/08 (note 119), the ECJ has handed down its judgment of the ECJ on 7 October 2010. The Court confirmed that "overriding reasons relating to the public interest capable of justifying a restriction on the freedom to provide services include the protection of workers" and "recognised that the Member States have the power to verify compliance with the national and European Union provisions" (paras. 47-48) without mentioning the TFEU and the Charter. In their proportionality analysis of the Belgian legislation, the AG and the ECJ concurred.

¹²⁵ Patricia Mindus, "Theorising Conflicts and Politicisation in the EU", in: Nickel & Greppi (eds), *The Changing Role of Law*, note 99 above.

extremely well-equipped to take up in such sophistication: the *Laval* litigation does, indeed, illustrate aspects of “the Swedish *Sonderweg*” such as the legal status and social function of *kollektivavtalssystemet* which the Swedish legislature did not want to (dare to?) touch when implementing the Posted Workers Directive. She argues very convincingly that the “Swedish model” is, by now, politically contested, and not only under pressure exerted by some “kleptomaniac competence extension” of the ECJ. In a conflicts-law language, Sweden has to become aware of the tensions between its *Sonderweg* and its European commitments. The Union and its highest Court must defend these commitments which are, at the same time, Community entitlements - and also be aware of the instrumentalisation of European law and court proceedings in internal Swedish power battles¹²⁶ - the *Laval* case was, after all, initiated and financed in Sweden.¹²⁷ This is an instructive explanation of the background and the implication of *Laval*. It is also, at the same time, an instructive illustration of the conflict patterns which the Europeanisation process generates. This observation confirms the assertion that European law “is” conflicts law. But is *Laval* “good conflicts law”? The constellation is structurally the same as in *Cassis de Dijon*,¹²⁸ but so much more dramatic. The message of the conflicts-law approach is seemingly abstract: the law should civilise the contest over divergent policies and interests without assuming the mandate to streamline Europe's diversity.

VI.3.2. Conflicts Law's Prudence

“Judicial restraint” *versus* “judicial activism” is a misleading dichotomy here, and does not exhaust the potential of the traditions on which the conflicts-law approach builds at all.

Antoine Lyon-Caen, the doyen of French labour law, has, without resorting to the conflict of law or private international law terminology, recalled one core message:

¹²⁶ Mindus, text accompanying note 35 *et seq.*

¹²⁷ Battle is going on in Swedish politics, legislation and jurisprudence. In a judgment of 2 December 2009, the Swedish *Arbetsdomstolen* imposed “exemplary damages” on the trade unions which had taken action against *Laval*. See the annotation by Norbert Reich, “Laval ‘Vierter Akt’”, (2010) 21 *Europäische Zeitschrift für Wirtschaftsrecht*, pp 21-22.

¹²⁸ See Section V.1 *supra*.

Dans les sociétés d'Europe de l'Ouest, le droit du travail s'est constitué par émancipation du droit du marché, dénommé moyennant les variations terminologiques qu'il importe de ne pas oublier: liberté du commerce ici, freedom of trade ailleurs... Ce n'est pas que des règles sur le travail n'existaient pas avant cette émancipation, mais elles relevaient d'avantage d'une police du travail, partie plus ou moins autonome d'une police du ou des marchés.¹²⁹

There is a categorical difference between economic law and labour law, Lyon-Caen argues. The most basic notion which conflicts law has at its disposal is "characterisation"¹³⁰ and, Ernst Rabel's universalist visions notwithstanding, characterisation has, according to the prevailing view, to take the views of the forum seriously. The categorical difference is not written in stone and not pre-given as some transpositive *ordo*, but deeply rooted, albeit in a variety of forms, in the history of industrial and democratised societies.

The European law parallel is the principle of enumerated competences. However, awareness of this parallel is no longer widespread among European law scholars, which is unfortunate because the sensitivity of the elder discipline for the specifics of legal fields provides some guidance in the interpretation of such opaque provisions as Article 137 (5) EC (now Article 153 (5) TFEU).¹³¹

¹²⁹ "In West European societies Labour Law as was constituted as an alternative to the law of the market. It developed terminological distinctions which one must not disregard... *liberté de commerce* here, freedom of trade there... To be sure, legislation relating to work had been in place prior to that emancipatory move, but pertinent rules were meant to controlling work in a way which was more or less distinct from the laws policing the market or markets in general" (translation by the author); thus Antoine Lyon-Caen, "Droit communautaire du marché v.s. Europe sociale." Contribution to the Symposium on "The Impact of the Case Law of the ECJ upon the Labour Law of the Member States", Berlin 26 June 2008, organised by the Federal Ministry of Labour and Social Affairs, available at:

<http://www.bmas.de/portal/27028/2008_07_16_symposium_eugh_lyon-caen.html>.

¹³⁰ Ernst Rabel, "Das Problem der Qualifikation", (1931) 5 *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, pp. 241-288.

¹³¹ See von Bogdandy & Bast, "The Federal Order of Competences", in: *idem*, *Principles*, note 48 above, pp 275-307, at 294, note 144; but see, also, for example, Conway, "Values and Conflicts of Norms in EU", note 107 above, Chapter 5.6, p 285 *et seq.*

The prudence suggested by conflicts law coincides with what we have noted in our references to the discourse theory of law and democracy.¹³² What the ECJ did in the perspective of this theory was to disregard the autonomy and co-originality of private and political autonomy, and to assign supremacy to economic freedoms over political citizenship. The conflicts-law approach does, of course, claim to have delivered an elaborated re-construction of this interdependence at European level. What its understanding of the constitutionalisation strongly suggests, however, is to respect the *variety* in Europe's social models and to promote their co-ordination in the light of practical experiences. It seems perfectly justified to further the efforts of the new Member States to exploit their competitive advantages. It is by no means plausible that "direct wage competition"¹³³ would signal solidarity with these countries, and further both the prosperity within, and distributional justice among, Europe's diverse regions. It may be that, through the opening of the Western Markets for cheap labour, we foreclose the chances for the accession states to build up their own social model. Should we really assume that the Swedish employer organisations seek to give a hand to the development of Estonia by the kind of strategies they pursued with Laval and the financing of the lengthy litigation in that case? European law should know more about the social price to be paid for the bringing of cheap labour to Old Europe before engaging in the flattening of Europe's diversity.¹³⁴

"Restraint" *versus* "activism" is not the proper frame for these issues. The type of prudence which the conflicts-law approach requires is at least as demanding as, albeit not identical with, what we expect from the constitutional courts of consolidated nation states or federations in their supervision of legislation. To this issue, however, we will have to return.

¹³² See notes 92 and 102 above.

¹³³ See Florian Rödl, "Transnationale Lohnkonkurrenz: ein neuer Eckpfeiler der 'sozialen' Union?", in: Fischer-Lescano *et al.*, (eds), *Europäische Gesellschaftsverfassung*, note 21 above, pp 145-160.

¹³⁴ Tellingly enough, in the US, nobody seems to doubt that, in cases in which an enterprise from a poorer and lower-wage state brings its workers to a higher-wage, more generous, state, the latter's higher labour standards apply to those workers. Communication from Professor Cynthia Estlund, NYU Law School.

VII. Conflicts Law or Community Method? Responses to Upper Austria's Concerns with Atomic Energy

The protection of the "health and life of humans, animals and plants" was mentioned as a legitimate regulatory concern in Article 36 EEC Treaty and complemented by the recognition of environmental protection as a matter of "general interest" in the aftermath of *Cassis de Dijon*. Environmental issues are, indeed, the best conceivable case for the theoretical and normative core of the conflicts-law approach. Nowhere is it more evident that national decision-making has external effects, and that those affected in another territory are regularly excluded from intra-state/domestic decision-making processes. Nowhere does it seem more plausible to establish a transnational regime with the potential to correct such failures. Last, but not least, environmental issues are, often enough, of such political sensitivity that it makes sense to insist on the kind of horizontally-inclusive constitutionalism which the conflicts law advocates.

European law and pertinent theoretical conceptualisations were, for a long time, far from respecting such insights. The unanimity rule governed in environmental policies. Political scientists provided us with the distinction of product and process regulation which seemed to rationalise the autonomy of national preference-building. However, since Maastricht, environmental protection has become a commitment of constitutional dignity – and has retained this status ever since.¹³⁵

It should, hence, be easy to provide plausible evidence militating in favour of our claim that the conflicts-law approach is not something external to the integration project, but a dimension of it which can be re-constructed in Europe's political and legal development. However, the discussion here will be restricted to one troubling example of particular sensitivity, namely, the litigation over the Temelín nuclear power plant, between its operator ČEZ, a power-supply undertaking in the Czech Republic, and the Austrian Land of *Oberösterreich*, the owner of a piece of land located at a distance of just 60 km from

¹³⁵ See Article 11 TFEU.

Temelín. The Temelín saga began in the 1980s long before the Czech Republic became a member of the European Union.¹³⁶

The Temelín nuclear power plant was built close to the Austrian border and authorised by Czechoslovakian authorities back in 1985. The Austrians were concerned about its technological standards from the very beginning. In the enlargement process, three similar power plants were closed down while Temelín was modernised by *Westinghouse*, an American company. The Austrian position must be understood in the context of its own principled rejection of atomic energy. This took legal shape in the *Atomsperrgesetz* ("Anti Zwentendorf-Gesetz") (statute on the prohibition of atomic energy) of 1978, then in the *Bundesverfassungsgesetz für ein atomfreies Österreich* (federal constitutional law on an Austria free of atomic energy) of 1999. Intergovernmental negotiations, in which the European Commission became involved, continued. This led to the "*Melk Protocol*" of 2000, an agreement signed by the Austrian and the Czech government, and to the "*Brussels Agreement*" of 2001, which substantiated the follow-up of the *Melk Protocol*. Jörg Haider profited from the Austrian sentiments through a referendum which sought to make the accession of the Czech Republic to the EU dependent upon the closure of Temelín¹³⁷

While the political conflict was not settled, the Temelín plant, modernised according to EU standards, went into operation at full capacity in 2003. The Austrian opponents turned to law for help.

VII.1. Case C-343/04: Land Oberösterreich ČEZ

They had done so before throughout the whole history of Temelín and explored, always in vain, the potential, first, of international law, then of European law. Now they turned to what was left, namely, private law. The protection offered by Austrian private law is twofold: an owner of land can, by the *actio negatoria* of § 364 (2) ABGB, prohibit damaging interference beyond "the normal local

¹³⁶ For a detailed and instructive account ending, however, in 2007, see Werner Hummer, "Temelín: Das Kraftwerk an der Grenze", (2008) 62 *Zeitschrift für öffentliches Recht*, pp 501-557, and the recent account of Sebastian Wolf, "Euratom, the European Court of Justice and the Limits of Nuclear Integration in Europe", (2011) 12 *German Law Journal* No. 7 (forthcoming).

¹³⁷ The populist move had a very remarkable resonance; see Hummer, *ibid.*, p 526.

level”.¹³⁸ This is what the Province of Upper Austria argued against the Czech power-supply undertaking (ČEZ) as the owner of the land located in the North of *Oberösterreich*, which is used for agricultural purposes including trials relating to plant cultivation, and is also home to an agricultural college. What the complaint held to be beyond “the normal local level” was the ionising radiation emanating from the plant and crossing the border into Austria. But is Austrian law at all applicable? Do Austrian Courts have jurisdiction, and, if so, will their judgments be enforceable in the Czech Republic? These issues bring us to the pertinent rules of private international law and the jurisdictional provisions of the Brussels Convention of 1968.

AG Poiares Maduro, in his opinion of 11 January 2006, and the ECJ, in its judgment of 18 May 2006,¹³⁹ accordingly asked: Are there rights *in rem* at issue here, so that the Austrian courts could claim exclusive jurisdiction as provided for under Article 16 of the Convention? Or, is this matter, instead, to be qualified as a tort in the sense of Article 5 III, governed by the *lex loci delicti*? (“the place where the harmful event occurred”). The answer given by the ECJ to the questions so framed sounds plausible:

... it cannot be considered that an action such as that pending before the national court should in general be decided according to the rules of one State rather than the other and in conclusion: this is no case of exclusive Austrian *in rem* jurisdiction.¹⁴⁰

¹³⁸ That provisions reads: “(2) Der Eigenthümer eines Grundstückes kann dem Nachbarn die von dessen Grund ausgehenden Einwirkungen durch Abwässer, Rauch, Wärme, Geruch, Geräusch, Erschütterung und ähnliche insoweit untersagen, als sie das nach den örtlichen Verhältnissen gewöhnliche Maß überschreiten und die ortsübliche Benutzung des Grundstückes wesentlich beeinträchtigen. Unmittelbare Zuleitung ist ohne besonderen Rechtstitel unter allen Umständen unzulässig.” (“The owner of land may prohibit his neighbour from producing effects, emanating from the latter’s land, by effluent, smoke, gases, heat, odours, noise, vibration and the like, in so far as they exceed normal local levels and significantly interfere with the usual use of the land. Direct transmission, without a specific legal right, is unlawful in all circumstances.”)

¹³⁹ [2006] ECR I-04557.

¹⁴⁰ Case C-343/04, para. 36.

Plausible as it sounds, one remains puzzled: if Austrian standards must not govern, does it follow that the defendant can operate the plant according to the standards of the Czech Republic without due regard for the Austrian concerns? This would constitute a democracy failure of the type described above.¹⁴¹ AG Poiares Maduro, in one of his scholarly opinions, was, however, digging deeper: the courts of both interested states should be able to claim exclusive jurisdiction for the analysis of the statutory restrictions on ownership over immovable property located in their respective territories.¹⁴² This, however, implies the risk of conflicting judgments.¹⁴³ “In such cases, the judgment to be delivered must pay special attention to the transnational character of the situation.”¹⁴⁴ This may sound a bit sibylline, but it does, in fact, indicate, the need for a conflicts-law response:

If the national legal system allows the protection of property either through a property rule or a liability rule, the transnational dimension of the case and the possible difficulty of making a full cost-benefit analysis may be relevant to such a choice. Secondly, the same concern for the consideration of the transnational character of the situation may be relevant in seeking a balance of all relevant elements with respect to the assessment of the amount of damage or the assessment of the risk that such damage may occur.¹⁴⁵

The ECJ took a more comfortable way out, explaining merely that Austria cannot claim exclusive jurisdiction. However, this was only a preliminary end of the saga's first chapter.

VII.2. Case C-115/08: Land Oberösterreich vČEZ A.S.

The Czech Republic and Austria returned to negotiating. Finally, both states “declared that they would fulfil the series of bilateral obligations, including safety measures, monitoring free movement rights and the development of energy partnerships, set out in a

¹⁴¹ Section IV.1.

¹⁴² Para. 90.

¹⁴³ Para. 91.

¹⁴⁴ Para. 93.

¹⁴⁵ AG Maduro in Case C-342/04, para. 95.

document known as ‘The Conclusions of the Melk Process and Follow-Up’, which was concluded in November 2001”.¹⁴⁶

VII.2.1. The Shadow of Weber over Austria’s Oberster Gerichtshof?

But this agreement did not stop Upper Austria from pursuing its complaint further. In April 2006, they obtained a judgment from the *Oberster Gerichtshof*, which was based upon the exception from § 364 (2) adopted in § 364a. This provision reads:

However, if the interference is caused, in excess of that level, by a mining installation or an officially authorised installation on the neighbouring land, the landowner is entitled only to bring court proceedings for compensation for the damage caused, even where the damage is caused by circumstances which were not taken into account in the official authorisation process.

The Austrian Court’s judgment is as traditional as it is interesting in the reasons stated for the refusal to recognise the authorisation of the Czech plant. Such authorisations, the Court explained, have to weigh conflicting considerations and interests. This weighing, however, occurred in a foreign jurisdiction, and, hence, there was “no reason why Austrian law should restrict the property rights of Austrian landowners purely in the interests of protecting a foreign economy and public interests in another country”.¹⁴⁷ This can be read as a tribute to the political nature of decisions on high-risk activities and the need for a democratic basis for such decisions. A blatant refusal of Austrian courts to recognise the legitimacy of foreign authorisation would be irreconcilable with the transformation of pure comity among European nations into legal commitments among the Member States.¹⁴⁸ Unsurprisingly, both the ECJ and its Advocate General concurred in their conclusions. The delicacy of the case, however, stems from the constitutional background of the Austrian refusal to recognise the Czech authorisation. It was not a discretionary balancing of economic interests and of risks to health and the environment, but the principled rejection of atomic energy by a constitutional amendment which was the foundation for the Austrian

¹⁴⁶ AG Maduro, *ibid.*, para. 3; ECJ (note 136), paras. 43 *et seq.*

¹⁴⁷ Thus the report at para. 51 of the judgment in Case C-115/08, [2009] ECR I-10265.

¹⁴⁸ See Israël, *European Cross-Border Insolvency Regulation*, note 101 above.

Higher Court's refusal to respect the foreign administrative act.¹⁴⁹ Neither the Court nor the AG addressed acknowledged this objection. They differed, however, significantly and illuminatingly, in the reasoning upon which they based their findings.

VII.2.2. Administrative Supranationalism in the ECJ's Grand Chambre?

When confronted with the differences between Austria and the Czech Republic, the ECJ started to search for a resolution at a higher legal level. This search, however, did not lead to conclusive results. True, the EAEC Treaty of 1957, in its Title II, contains "provisions designed to encourage progress in the field of nuclear energy". However, neither this treaty, nor any other provision of European law grants the competence "to authorise the construction or operation of nuclear installations".¹⁵⁰ All that Articles 30-31 EAEC provide for are procedures for the co-ordination of national standards for the protection of human and animal life from ionising radiation.¹⁵¹ The gap between these articles remains puzzling – and the way out of this dilemma which the ECJ took is troubling: it would be discriminatory, so the ECJ explains, to subject a nuclear power plant situated in the territory of another Member State to an injunction in a case in which the foreign undertaking is in possession of the necessary official authorisations. What follows substantiates this reasoning:

It is for the national court to give, in so far as possible, to the domestic legislation which it must apply an interpretation which complies with the requirements of Community law. In the last instance, however, the national court is bound to protect the rights which Community law confers on individuals.¹⁵²

VII.2.3. AG Poiares Maduro's Flirt with Conflicts Law

The Opinion which AG Maduro had delivered to the Court on 22 April 2009 sounds more elegant:

¹⁴⁹ See the summary of the Austrian reasoning reported in para. 56.

¹⁵⁰ Para. 103.

¹⁵¹ See para. 111 *et seq.*

¹⁵² See paras. 138-140.

This case may be characterised as one which turns on the question of reciprocal externalities. On the one side, Austria and, in particular, the Land Oberösterreich believe they are victims of an externality imposed on them by ČEZ and the Czech authorities in installing a nuclear power plant next to the Austrian border without taking into account the risks imposed on those living on the other side of the border. On the other side, ČEZ and the Czech Republic argue that it is the interpretation of Austrian law made by the Austrian Supreme Court that imposes on them an externality by requiring them to close the Czech nuclear power plant simply to protect the interests of Austrian citizens and without taking into account the situation in the Czech Republic.¹⁵³

It is not only the diagnosis, but also the suggested therapy, which, at first sight, seems to be in line with the conflicts-law approach. Maduro defines the law's proper objective as:

making national authorities, insofar as is possible, attentive to the impact of their decisions on the interests of other Member States and their citizens since this goal can be said to be at the core of the project of European integration and to be embedded in its rules.¹⁵⁴

He arrives at his solution in two bold steps. The first is an upgrading of the economic freedoms, which he had already prepared in his Ph.D.,¹⁵⁵ and later on famously developed further.¹⁵⁶ He transforms the "argument from external effects" into a legal duty to respect the extra-territorial interests of economic actors:

[T]he rules of free movement aim at eliminating any restriction imposed by a Member State on economic activity in or with another Member State. A cross-border element is required but that cross-border element does not need to

¹⁵³ Para. 1.

¹⁵⁴ *Ibid.*

¹⁵⁵ Miguel Poiarés Maduro, *We the Court. The European Court of Justice and the European Economic Constitution*, (Oxford, Hart Publishing, 1998), p 150 et seq.

¹⁵⁶ Very markedly, for example, in *Viking*, note 108 above, and in his opinion in Case C-210/06, *Cartesio Oktató és Szolgáltató bt*, delivered on 22 May 2008.

involve an actual hindrance of free movement from or to the State imposing the measure. It is sufficient that the extraterritorial application of that State measure may affect economic activity in another Member State or between other Member States.¹⁵⁷

This move implies that it is up to Austria to justify the impact of its restrictive non-authorisation policy on the Czech Republic. In this respect, he seems to proceed more subtly than the ECJ. The duty to take the impact of Austrian decisions on its neighbours into account is, indeed, an implication of the "argument from external effects".¹⁵⁸ It is also worth noting that the AG does not camouflage the *lacunae* of European law in the present constellation.¹⁵⁹ This argument, however, if taken seriously, would have to work both ways. The Czech Republic must take the concerns of its neighbours seriously. This is precisely the type of "true" conflict which should, according to the conflicts of law theory of the American conflicts scholar Brainerd Currie, be brought to a higher legislative authority. Although AG Maduro does not refer to such theorising, he seems to be perfectly aware of the *problématique* to which Brainerd Currie responded in such an uncomfortable way. He implicitly subscribes to the "true conflict" analysis with his notion of "reciprocal externalities"¹⁶⁰ – and then seeks to forego Currie's *non possumus* in a search for a reconciliation of both concerns:

In balancing the achievement of public policy goals, such as protection of human health and property rights, with the restriction of rights protected by Article 43 EC and other free movement provisions which a refusal to recognise a Czech authorisation will entail, the Austrian court must take account of the fact that Community law specifically authorises the development of nuclear installations and the development of nuclear industries in general. It must also give weight to the fact that the authorisation granted to the Temelín facility by

¹⁵⁷ Thus AG Maduro in para. 16 of his opinion in Case 115/08, para. 16, delivered on 22 April 2009.

¹⁵⁸ See Somek, note 92 above.

¹⁵⁹ *Ibid.*, paras. 1 & 13.

¹⁶⁰ AG Maduro, note 153.

the Czech authorities was granted in accordance with the standards established by the relevant Community law.¹⁶¹

The first step in the argument sounds nothing but logical; the second, however, is not so easily reconciled with the AG's observation that "the EAEC rules are only aimed at regulating the conditions under which a nuclear facility should be authorised to operate".¹⁶² It is by no means clear why such regulations should trump Austria's constitutionalised "No" to atomic energy.

VII.3. *Quis Ludicabit* in "True Conflicts"?

Would the conflicts-law approach provide a superior response? Its analysis would, at least, be closer to the challenging issues of our case. We can identify no less than seven queries:

- 1) There is a horizontal conflict between two Member States. The Czech Republic has opted for, Austria has opted against, atomic energy. Is the Czech Republic entitled to expose Austria to the risks of atomic energy? Is Austria entitled to impose its views on the Czech Republic?
- 2) There is a vertical conflict between European law and Austrian law if we assume that the EA-Treaty's encouragement of atomic energy trumps Austrian constitutional law.
- 3) There is also a vertical conflict if we assume that the economic freedoms are supreme.
- 4) There is a "diagonal" conflict between the two levels of government if we assume that the EA-Treaty is incomplete and respects the autonomy of the Member States in the realm of atomic energy policy.
- 5) Can we read the European competence to establish safety standards as a resolution of the conflict, or is that a spurious response?
- 6) The most challenging conflict is temporal: Back in 1957 atomic energy was not a nightmare but a cherished future. How can the law get away from a Panglossian past?
- 7) Last, but not least: *Quis judicabit*? Is the European Court of Justice legitimated to decide upon all this?

¹⁶¹ AG Maduro, *ibid.*, para. 16.

¹⁶² AG Maduro, *ibid.*, para. 13.

Let us first re-consider the Weberian flavour to the refusal of Austria's *Oberster Gerichtshof* to acknowledge the authorisation granted in the Czech Republic.¹⁶³ Why not read this disrespect as a tribute to the political nature of decisions on high-risk activities and the need for a democratic basis to such decisions? Why not take it seriously, in legal terms, that, under Austrian law, the authorisation granted by the Czech Republic would not have been conceivable? Here, we return to the beginning: Does European law entitle the Czech Republic to impose risks on Austria which Austria is not prepared to take? In the shadow of the noble anti-discrimination principle, the ECJ has decided upon a politically highly-sensitive issue. Would it have been better to decide in Austria's favour? Normative reasons can be given. Atomic energy imposes ultra-hazardous risks. They produce irreversible damages if they materialise. Hence, they must not be taken.

It would seem problematical, however, to entrust a Court with the task of taking such a decision. It seems, in such a case, even more stringent than in the types of "true conflicts" which Brainerd Currie had in mind when he argued that their resolution should be left to a higher legislative authority (namely, Congress in the American federal system).¹⁶⁴ Europe, *hélas*, has no such authority. Why, then, was the conflict not left to the political process? Here, just as in *Viking*, the ECJ did not hesitate to take a decision. This is a dis-empowerment of politics by law. How responsible would it be to re-deliver the case into Europe's political arenas? After Fukushima, it seems likely that the contest over atomic energy is arriving precisely there anyway, even though Europe remains well-advised to debate its safety standards.

VIII. The "Geology" of Contemporary Law and the Project of a Three-dimensional Conflicts Law

"Unity in Diversity", *unitas in pluralitate*, the motto of the Constitutional Treaty, transposes the European ambitions and the perspectives of the conflicts-law approach. Neither the significance of

¹⁶³ See IV.2.1. *supra*.

¹⁶⁴ See Brainerd Currie, "The Constitution and the Choice of Law: Governmental Interests and the Judicial Function", in: idem, *Selected Essays on the Conflict of Laws*, (Durham NC, Duke University Press, 1958), pp 188-282, at 272.

this motto, nor its translation into the language and proceduralising methodology of the conflicts-law approach are confined to Europe's postnational constellation. The need to cope with conflicting policies and to ensure the legitimacy of both their "weight" and their co-ordination is present at all levels of governance, in the international system as well as within constitutional democracies. At all levels, this *problématique* has provoked a turn to "proceduralisation", and fostered the insight that legal decision-making cannot be deductive, but must be constructive and must derive its legitimacy from the quality of the procedures guiding its decision-making processes. The identification of this *problématique* at all levels of governance and in the "diagonal conflicts constellations" between them, which multi-level constellations generate, is just one message of the conflicts-law approach, which these concluding remarks wish to underline. Equally important is a second message which requires a three-dimensional differentiation of the conflicts-law approach. The title of this section alludes to this second message. "Geology" is a term borrowed from Joseph Weiler, who introduced it to explain transformations of international law of paradigmatic importance.¹⁶⁵ "International law as Regulation" is a notion which he contrasts with "international law as Transaction" and "international law as Community". It represents "a new mode of international law, specific in its normativity and legitimacy". This latter insight corresponds to the grand debates on the new functions and normative qualities of the law of post-*laissez faire* welfare states, which dominated the agenda of the pre- and post-1968 generations.

VIII.1. Post-interventionist Law and the Turn to Regulation and Governance

These two generations witnessed, or participated in, two big waves of theorising. The first wave was preoccupied with the social deficits and methodological flaws of "legal formalism"; the replacement of formalism by substantive rationality criteria was the slogan of the day.¹⁶⁶ "Law as regulation" was not the then prevailing terminology;

¹⁶⁵ JHH Weiler, "The Geology of International Law - Governance, Democracy and Legitimacy", (2004) 64 *Heidelberg Journal of International Law (ZaöRV)*, pp 547-562, at 552.

¹⁶⁶ See Ch Joerges, "Politische Rechtstheorie and Critical Legal Studies: Points of Contacts and Divergencies", in: *idem*, & David M Trubek (eds), *Critical Legal Thought: An American-German Debate*, (Baden-Baden, Nomos Verlag, 1989), pp 597-643, at 611

substantive rationality was to be carried into law through “interventionism”. As all this did not really work out, a second wave of theorising was initiated: substantive rationality was replaced by post-interventionist programming, in particular through reflexive law and the quest for a proceduralisation of the category of law.¹⁶⁷

These moves sought to come to grips with the law's assumption of, and involvement in, ever new tasks and problem-solving activities. The search for post-interventionist programming (“governance structures” is the now widely-used term) and legal methodologies sought – or should have sought – to reconcile the erosion of formerly “conditional” legal programmes with the legacy of the rule of law and the idea of law-mediated legitimacy of democratic rule. Nobody has characterised this new challenge as pointedly as Rudolf Wiethölter in one of his early essays: “Purposive programming” is the living law and legal *conditio sine qua non* (*Lebenselexier*) of modern democracies, he wrote back in 1973,¹⁶⁸ and complemented this message in 1977 through the discovery of the affinities or structural analogies with conflict of laws.¹⁶⁹ In the meantime, he had already proclaimed the need for a “proceduralisation of the category of law”.¹⁷⁰

et seq., republished in (2011) 12 *German Law Journal*, pp 554-598, available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=1333>.

¹⁶⁷ See Christian Joerges, *ibid.*, p. 626 *et seq.*, and previously Gert Brüggemeier & Christian Joerges, “Workshop zu Konzepten des postinterventionistischen Rechts”, Zentrum für Europäische Rechtspolitik, Materialien 4, Bremen 1984.

¹⁶⁸ See his “*Rechtswissenschaft in Kritik und als Kritik*”, (Critique of legal science and legal science as critique), (Mainz: Universitätschriften, 1973), available at: http://www.jura.uni-frankfurt.de/1_Personal/em_profs/wiethoelter/RWTexte/KritikalsRecht_Sonderdruck.pdf.

¹⁶⁹ R Wiethölter, “Begriffs- oder Interessenjurisprudenz – Falsche Fronten im IPR und Wirtschaftsverfassungsrecht: Bemerkungen zur selbstgerechten Kollisionsnorm”, in: Alexander Lüderitz *et al.* (eds), *Festschrift für Gerhard Kegel*, (Frankfurt aM: Metzner, 1977), pp. 213-263. G Teubner, “Dealing with Paradoxes of Law: Derrida, Luhmann, Wiethölter”, in: Perez & Teubner (eds), *Paradoxes*, note 95 above, pp 41-64; partisan positions are cited there in note 5; to be added to this list now is Conway, “Values and Conflicts of Norms in EU Law”, note 107 above, Chapter 1 and *passim*.

¹⁷⁰ “Materialization and Proceduralization in Modern Law”, in: Gunther Teubner (ed), *Dilemmas of Law in the Welfare State*, (Berlin-New York, Walter de Gruyter, 1986), pp 221-249.

Practice, sociological research and theoretical reflections did not come to a standstill. We have, for many years now, accustomed ourselves to ever more sophisticated regulatory programming, and we have, more recently, witnessed a turn to “governance”, a notion encompassing a grand variety of widely-used co-operative arrangements between governmental and non-governmental actors. There is neither space nor need to elaborate on all this here. The only observation to be underlined concerns the structural parallels in the national and the postnational constellations. The geology which Joseph Weiler has depicted in international law can be observed at all levels, even within constitutional law. Parallel structures generate similar challenges. Regulatory politics need to be institutionalised and governance arrangements established both within the European Union *and* beyond its “borders”. The practical challenges and normative problems that these developments pose, however, vary considerably.

VIII.2. The Need for a Three-Dimensional Conflicts Law

Throughout the preceding sections, we have dealt with primary and secondary European law, on the one hand, and the legal systems of the Member States, on the other. The sociological background analytics and the normative premises of the doctrinal fabric of the conflicts approach can, quite plausibly, claim to capture the distinctiveness of the EU multi-level system and its vertical, horizontal and diagonal conflicts adequately. With regard to the latter, it should have become particularly apparent why the conflicts-law approach cannot be reduced to the choice of a particular legal order. However, European conflicts law is also distinct in the conceptualisation of “vertical” and “horizontal” conflicts. Its rules and principles are supranationally valid, and, in this respect, stronger than the legal regimes established by international law; equally unique is the degree to which European law has transformed the *comitas* among Member States into binding legal-commitments.¹⁷¹ However, this conflicts-law system is by no means comprehensive. The structural reasons have just been addressed: the transformations which have occurred at national level in the turn to regulation and

¹⁷¹ For a comparison with WTO law, see Howse & Nicolaidis, “Democracy without Sovereignty”, note 92 above, and Joerges, Three-dimensional Conflicts Law”, note 93 above.

governance are also under way in the EU and in the international system.

Regulatory politics in the European Union have led to the establishment of complex transnational non-legislative quasi-administrative regimes, which we have been characterised as a *second dimension of conflicts law*. It responds to the irrefutable need to accompany the Europeanisation of the economy by transnational regulatory politics which must operate outside the administrative-law frameworks which nation states have at their disposal. These needs have triggered the co-operation of national bureaucracies with networks of epistemic communities with the European Commission in the much criticised - but also much praised - comitology system, the establishment of ever more European agencies most of which are without genuine decision-making powers. The conflicts-law approach seeks, here too, to defend the idea of the rule of law and law-mediated legitimacy. Its constitutional hopes and prospects focus on the quality of transnational decisions-making and its anchoring in, and supervision by, democratically legitimated actors - hence, again, on a proceduralisation of law.¹⁷²

The *third dimension of conflicts law* reacts to the "privatisation" of regulative tasks and the development of new "governance arrangements", which can also be observed at national level, but which are, unsurprisingly, particularly important at transnational levels.¹⁷³ Any sharp differentiation between primarily administratively-anchored regulative forms with which the conflicts law of the second dimension is concerned from the primarily private regimes is not possible, because of the participation of expert communities and societal actors in both of them. What the law needs to be concerned about is the regulative function which both types exercise, and what it has to consider is its potential to ensure their legitimacy. The conflicts-law approach in its third dimension does, therefore, not qualify these regimes complacently and without further

¹⁷² See Christian Joerges & Michelle Everson), "Re-conceptualising Europeanisation as a public law of collisions: comitology, agencies and an interactive public adjudication", in: Herwig CH Hofmann & Alexander H Türk (eds), *EU Administrative Governance*, (Cheltenham, Edward Elgar Publishing, 2006), pp 512-540.

¹⁷³ See Olaf Dilling, Martin Herberg, & Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transaction*, (Oxford, Hart Publishing, 2008).

ado as transnational “law”. Instead, it seeks to develop and promote the impact of normative yardsticks for their recognition by democratic legal orders; it, furthermore, builds upon the law’s shadow, particularly the interests of non-statal orders in external recognition and their ensuing readiness to subject themselves to a stringent procedural discipline.¹⁷⁴

VIII.3. The Mandate of the ECJ in Conflicts-law Perspective

Critical assessments of the ECJ, as they have been submitted above, are apparently difficult to digest even in the relatively progressive law quarters of European law scholarship and with the critics who are stigmatised as “enemies”.¹⁷⁵ The circle of potential addresses is widening. It not only includes political organisations such as trade unions, but may also be directed against those who argue that the ECJ operated outside good legal manners in the *Mangold* case,¹⁷⁶ and, without further ado, it included the German Constitutional Court after its pronouncements on the Treaty of Lisbon.¹⁷⁷ The discovery of such enemies may, however, signal more of a crisis of the courts and the Dominicans among their academic allies, than some malicious anti-European scepticism among its critics. It should be recalled that the first seminal article on the constitutionalising activity of the ECJ explained the Court’s success by the fact that the ECJ operated “tucked away in the fairytale Kingdom of Luxembourg”.¹⁷⁸ Eric Stein’s most famous disciple warned, as early as 1994, that the “extended honeymoon” between the Court and its interlocutors may have come to an end.¹⁷⁹ We know, indeed, too much about the

¹⁷⁴ Thus is the conclusion of the extensive inquiries of Harm Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, (Oxford, Hart Publishing, 2005), p 223.

¹⁷⁵ See Franz C Mayer, “Der EuGH als Feind? Die Debatte um das soziale Europa in der europäischen Rechtsprechung”, (2009) 14 *Integration*, pp 247-265.

¹⁷⁶ See Dieter Grimm, “Die große Karlsruher Verschiebung”, in: *Frankfurter Allgemeine Zeitung*, 09 September 2010, Nr. 209, p 8.

¹⁷⁷ Note 23 above.

¹⁷⁸ Erik Stein, “Lawyers, Judges and the Making of a Transnational Constitution”, (1981) 75 *American Journal of International Law*, pp 1-27.

¹⁷⁹ JHH Weiler, “The Least Dangerous Branch: A Retrospective and Prospective of the ECJ in the Arena of Political Integration”, in: *idem*, *The Constitution of Europe. “Do the new clothes have an Emperor?”*, (Cambridge, Cambridge University Press, 1999), pp 188-218, at 206.

context and the conditions which have fostered the broad acceptance of the Court's jurisprudence simply to assume that the Courts performance and the Court's recognition by its interlocutors will remain stable.¹⁸⁰

Should the impact of the ECJ have resulted from the belief in the non-partisan and the non-political nature of its adjudication and the beneficial effects of these beliefs, the conflicts-law approach has to plead guilty to the accusation of not respecting this fiction. This unmasking of what cannot be concealed anyway builds upon both so many conclusive analyses of the ECJ in particular and the politicisation of the integration project as a whole.¹⁸¹ The state of the Union is too critical and the integration project too precious to benefit from this type of critical exchange. Europe and its Court would deserve a more serious effort. Lawyers and political scientists have produced very strong analyses of the Court's performance and impact.¹⁸² It is, nevertheless, stunning to observe how cautious the *maître penseur* of constitutional and legal theory operates when it comes to defining the theoretical basis and legitimate functions of the ECJ.¹⁸³ What these analyses do not include is a political theory of the kind and of the quality of the theorising on constitutional courts and their legitimacy. The conflicts-law approach cannot claim to fill this gap conclusively. The distinction, however, between the supervision of political powers within constitutional democracies, on the one hand, and the compensation of democracy failures of nation states by

¹⁸⁰ Antoine Vauchez, "The transnational politics of judicialization. *Van Gend en Loos* and the making of EU polity", (2010) 16 *European Law Journal*, pp 1-28.

¹⁸¹ See the pathbreaking study by Anne-Marie Burley (Slaughter) & Walter Mattli, "Europe before the Court: A Political Theory of Legal Integration", (1993) 47 *International Organisation*, pp 41-76, and, for the politicisation thesis, Michael Zürn & Matthias Ecker-Ehrhardt (eds), *Gesellschaftliche Politisierung und internationale Institutionen*, (Frankfurt aM, Suhrkamp Verlag, forthcoming).

¹⁸² See, recently, Karen Alter, *The European Court's political power: selected essays*, (Oxford, Oxford University Press, 2009), p 34 *et seq.*

¹⁸³ Suffice it to point here to Michel Rosenfeld, "Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court", (2008) 4 *International Journal of Constitutional Law*, pp 618-651; on p 633, we read: "In spite of the remarkable success ... that the ECJ has had with national judges, it does have a vertical division-of-powers legitimacy problem. ... Unlike the U.S. Constitution, ...the EU treaties do not address the supremacy issue. It is the ECJ itself that has ruled that Community law is supreme in its landmark *Costa* decision." Does Rosenfeld provide us with an answer or a re-statement of the problem?

European law, on the other, should at least provide some new orientation for further research.

Chapter 4

Normativity in Private Regulation A Comment on Joerges

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I. Introduction

In several recent papers, Christian Joerges has explained and developed a concept of a three-dimensional conflicts law.¹ Yet, whereas the term “conflicts law” or “conflict of laws” is usually associated with private international law, Joerges takes private international law only as a starting-point. With reference to Rudolf Wiethölter and other legal theoreticians, Joerges re-conceptualises conflicts law. Whereas conflicts law is usually understood as a set of rules that determine which legal system and which jurisdiction applies to a given case,² Joerges widens the scope of the term. Conflicts law is not just to be applicable to cases in which different legal systems collide. According to Joerges, the long-established thoughts, ideas, structures and concepts of conflicts law should be transferred to similar conflicts between political systems (1st dimension), to decision-making processes of transnational administrative bodies (2nd dimension), and, finally, to conflicts

¹ See Ch Joerges, “Unity in Diversity as Europe’s Vocation and Conflicts Law as Europe’s Constitutional Form”, Chapter 3 in this volume, p 94 *et seq.*

² G Kegel & K Schurig, *Internationales Privatrecht*, (Munich, Beck, 2004), p 4.

between national legal orders and private legal regimes (3rd dimension).

In this comment, I will first put Joerges' concept of a three-dimensional conflicts law into the context of a theorised and enriched understanding of the term "conflict of laws". I will then focus on Joerges' third dimension of conflict laws and develop some criteria under which a private transnational legal system can be conceived as a normative order which should be respected and accepted by national legal orders.

II. Conflict of Laws as a Legal Paradigm

Societal fragmentation increasingly undermines the semantics of unity that were hitherto inseparably linked to the nation state. In particular, globalisation and cross-border trade challenge traditional concepts of the state as well as concepts of law. As early as the 1970s and early 1980, the legal scholar Rudolf Wiethölter responded to the problem of ever increasing social fragmentation and the intertwining of law, society and politics with the concept of proceduralisation.³ In contrast to conflicts law, which does not decide cases but only decides which law should decide the case, procedural law receives different legal and societal normative claims and reconciles them. This development of the idea of conflict of laws towards a concept of proceduralisation has inspired many legal scholars⁴, among them Christian Joerges. They have conceptualised the formerly very limited scope of the notion of conflicts of law towards an entirely new legal paradigm which now helps us to scrutinise conflicting legal and social normative orders.⁵

³ R Wiethölter, "Materialization and Proceduralization in Modern Law", in: G Teubner (ed), *Dilemmas of Law in the Welfare State*, (Berlin, Walter de Gruyter, 1986), pp 221-249, at 226.

⁴ See, for instance, A Fischer-Lescano & G Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", (2004) 25 *Michigan Journal of International Law*, pp 999-1046; WE Scheuerman, "Reflexive Law and the Challenges of Globalization", (2001) 9 *Journal of Political Philosophy*, pp 81-102; R Rogowski, "Reflexive Regulation of Labour and Employment Conflict Resolution", in: G-P Calliess, A Fischer-Lescano, D Wielsch & P Zumbansen (eds), *Soziologische Jurisprudenz*, (Berlin, Walter de Gruyter, 2009), pp 573-585.

⁵ For a more comprehensive description of conflicts law, see R Krämer, "The Notion of Diagonal Conflicts as a Key concept of European Conflicts Law", Chapter 6 in this volume, Section I-2.

III. Three Dimensional Conflicts Law

Christian Joerges' concept of a three-dimensional conflicts law conceptualises strategies of coping with conflicts within the European system of multi-level governance. The *Cassis de Dijon* case of the European Court of Justice (ECJ) serves Joerges as the initial point of a first dimension of conflicts law. With reference to Christoph Schöneberger, Joerges conceives the imposition of legal duties on the Member States in the *Cassis* case to recognise foreign law mutually regardless of its private or public nature as the establishment of a European *Bund* and therefore as the constitutionalisation of the European Union,⁶ whereupon the mutual recognition is a concept of conflicts law. The ECJ has ruled that a free internal market is the European Union's primary goal behind which national policies had to retreat if they were not properly justified. Against this background, Joerges sees the *Cassis de Dijon* case as a meta-norm, which is generally acceptable for the Member States even if a substantial decision between different Member-State policies would not be acceptable.

The second dimension of conflicts law relates to a co-operative administrative law within the European Union. In this regard, Joerges mainly focuses on the phenomenon of comitology. Comitology committees are involved in manifold activities, which include giving support to the Commission in implementing European legislative programmes as well as supervising and amending existing legislation or preparing new initiatives.⁷ Joerges is concerned that the comitology system lacks legitimacy and that the normative quality of the "political administration" that comitology committees conduct is incompatible with democratic standards within the European Union. For Joerges, the system of comitology seems to be both the problem and the solution at the same time. It is a solution as far as it combines and mitigates national interests at European level and has the potential to organise the administration of the internal market co-operatively. The problem, however, is that the operations of the comitology system are highly normative, but are still not under democratic control. The second dimension of conflicts law is to address this problem. However, the concept does not yet seem to be

⁶ Ch Joerges, "The Idea of a Three-Dimensional Conflicts Law as Constitutional Form", RECON Online Working Paper 2010/05.

⁷ *Ibid.*, p 19.

elaborated to a level that allows for its direct application. Instead, Joerges proposes a “constitutionalisation of transnational co-operation”⁸ which could mean that legal rules control the scope and processes of European comitology.

The third dimension of conflicts law seems to be the most challenging. It reflects and refers to problems that arise in the context of the privatisation of regulatory tasks within processes of globalisation. But whereas Joerges limits his field of observation to the European level, global developments demand a concept of conflicts law on many different levels. When Joerges thinks of privatisation in European legislation, he mainly focuses on strategies of harmonisation through standardisation, and criticises a “*de facto* delegation” of law-making powers to private organisations that can merely hide their political biases behind technical standards. In his concept of law, however, he is only able to conceptualise these private authorities as (quasi-) law-makers because democratically-legitimised bodies, such as national legislatures or the European Commission, have appointed them. Private standard-setting is only relevant because democratic institutions recognise it. Joerges’ application for conflicts law is, therefore, a constitutionalisation of these private standard-setting bodies.

But Joerges’ concept of conflicts law as a mitigator between national and private legal orders is much too rich and promising to limit its scope to the European Union. It should be expanded to the transnational realm.

IV. Conflicts Law in the Transnational Realm

At European level, Joerges only accepts private standard-setting organisations as quasi law-makers on condition that they are appointed and accepted by government actors. Joerges himself speaks of a “*de facto* delegation of law-making powers” which, however, “could not be openly admitted”.⁹ The core of the acceptance of these institutions, however, is still a kind of delegation even though it is concealed behind allegedly non-political technical standards.

⁸ *Ibid.*, p 20.

⁹ *Ibid.*, p 21.

At transnational level, the question has to be expressed differently. If privately-made norms demand acceptance from national legislatures and jurisdictions, under which circumstances can they be accepted? In a transnational realm, one hardly ever finds “delegation” or even “*de facto* delegation”. Private law-making bodies or standard-setting organisations are rarely legitimised by national legal orders. Their legitimacy mainly derives from their acceptance in certain industries and branches of trade. The acceptance of certain rules, again, derives from participation in the process of their creation. We thus can see new forms of legitimacy in private transnational realms which are often compared to basic democratic patterns. My thesis is that privately-generated norms can be legitimate if the process of their generation involves democratic patterns of participation. This kind of participation certainly cannot compare to democracy, as we have seen it develop in the nation state during the last 200 years. But, in the age of globalisation, new forms of democracy and participative involvement must be conceptualised.

IV.1. Transnational Law and Conflicts Law

The term “transnational law” has been under debate for decades.¹⁰ However, I will not dwell on this particular debate here. For my purposes in this comment, it is sufficient to point out that the term *transnational law* also includes norms and rules that were created by private actors. If it is true that private actors create transnational law, the question arises as to how this privately-made transnational law interacts with other forms of law such as traditional national law. It is clear that not every privately-made norm, every standard contract and every technical standard can be considered law with the normative quality of democratically-legitimised national law. On the other hand, the transnational realm provides modes of norm creation

¹⁰ See, for instance, PC Jessup, *Transnational Law*, (New Haven CT, Yale University Press, 1956); CM Schmitthoff, “International Business Law: A New Law Merchant”, (1961) 129 *Current Law and Social Problems*, pp 129-142; *idem*, “The Unification of the Law of International Trade”, (1968) 5 *Journal of Business Law*, pp 105-119; N Horn & CM Schmitthoff (eds), *The Transnational Law of International Commercial Transactions*, (Deventer, Kluwer, 1982), pp 171-185; A Goldstajn, “The New Law Merchant Reconsidered”, in: F Fabricius (ed), *Law and International Trade: Festschrift für Clive M. Schmitthoff zum 70 Geburtstag*, (Frankfurt aM, Athenäum, 1973), pp 171-185; G Eörsi, “Regional and Universal Unification of the Law of International Trade”, (1967) 4 *Journal of Business Law*, pp 144-150. For many aspects of recent debates, see Olaf Dilling, “Legitimacy-Collisions in 3-D: Some Queries with the Third Dimension of Joerges’ Conflicts Law”, Chapter 5 in this volume, Section I-2.

that are subject to participative processes, and, therefore, are equipped with certain normativity. This conclusion, however, needs some explanation. In the following, I will briefly explain the normative power of social processes before I go on to argue why Christian Joerges' concept of conflicts law can be especially helpful in the conception of transnational law.

IV.2. The Normative Power of Private Regulation

During the last years, a debate on the normative quality of privately-made law has developed, in the USA in particular. "Bottom-up lawmaking",¹¹ "Private Lawmaking",¹² or "Rough Consensus and Running Code"¹³ are only some examples of attempts to conceptualise norm creation by private actors in a transnational field. What these approaches have in common is that they refer to modes of norm creation and governance that, themselves, create normativity and legitimacy through certain procedures that allow for the acceptance of the respective norms by those to whom they are addressed. Janet Koven Levit's concept of bottom-up lawmaking, for instance, refers to the creation of norms by private actors, whereupon these norms are commercial practices that are deployed in day-to-day businesses and - eventually - are transferred into state law.¹⁴ Bottom-up lawmaking, however, remains in a state centred legal theory, which only accepts state law as "hard law". In this regard, David Snyder exceeds Koven Levit with his concept of private law-

¹¹ J Koven Levit, "A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments", (2005) 30 *Yale Journal of International Law*, pp 125-209; *idem*, "A Cosmopolitan View of Bottom-Up Transnational Lawmaking: The Case of Export Credit Insurance", (2005) 51 *Wayne Law Review*, pp 1193-1208; *idem*, "Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law", (2007) 32 *Yale Journal of International Law*, pp 393-420; *idem*, "Bottom-Up Lawmaking through a Pluralist Lens: The ICC Banking Commission and the Transnational Regulation of Letters of Credit", (2008) 57 *Emory Law Journal*, pp 1147-1225.

¹² DV Snyder, "Private Lawmaking", (2003) 64 *Ohio State Law Journal*, pp 371-449; *idem*, "Contract Regulation, With and Without the State: Ruminations on Rules and their Sources. A Comment on Jürgen Basedow", (2008) 56 *The American Journal of Comparative Law*, pp 723-742.

¹³ G-P Calliess & P Zumbansen, *Rough Consensus and Running Code. A Theory of Transnational Private Law*, (Oxford-Portland OR, Hart Publishing, 2010).

¹⁴ See, for instance, J Koven Levit, "A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments", note 11 above.

making.¹⁵ Snyder particularly focuses on international trade practices such as the Uniform Commercial Practice for documentary credits (UCP), and describes how these trade practices have the effect of state law.¹⁶ Snyder's interesting turn is that he categorises law with regard to the effect that the respective norms have, not with regard to their creator.¹⁷ The unique feature of the UCP, however, is that they are not regular standard contract terms which are imposed by one contractual party on the other. They are created and administered by the International Chamber of Commerce (ICC), a non-state actor in international business. The ICC not only creates the UCP, but also the International Commercial Terms (Incoterms), which also have immense effects on everyday global businesses. But it is not only the ICC that creates important business norms. In maritime law, the Baltic and International Maritime Conference (BIMCO) plays a very important role in drafting standard contracts, especially charter-parties. The BIMCO, like the ICC, is a private actor. The characteristic of these organisations is that they represent the entire field of global commerce and all stakeholders in maritime trade. They are not representatives of special interests, but, instead, try to mitigate between different interests in particular branches of trade. In the process of norm creation, all stakeholders and constituencies are involved and have the opportunity to exert influence on the result. These particular processes make the results acceptable for all those who are affected by them. In this light, those processes create normativity. This kind of normativity is not, of course, comparable to normativity created by a democratic process in which also interests of those who are not involved but affected are (or at least should be) respected. In the transnational field, however, where a democratic legislature is not available, we might have to accept lower thresholds in normativity in order to include and embrace normative powers in private lawmaking.

IV.3. The Third Dimension of Conflicts Law in the Transnational Realm

At this point, Joerges' concept of conflicts law becomes important. The third dimension of conflicts law applies to collisions between

¹⁵ See Snyder, "Private Lawmaking", note 12 above, pp 371-449.

¹⁶ *Ibid*, p 405.

¹⁷ *Ibid*.

national law and privately-made law. Nevertheless, Joerges only applies this concept to European contexts. It can, however, be easily transferred to the transnational level because, at transnational level, the selfsame conflicts between national law and private norms can occur. The question of whether or not a private norm has sufficient normative power to be in conflict with a nation state norm then demarcates the conflict-lines. This, of course, implies that normativity is gradual. A norm can have more or less normativity. This might be the concession we have to make to a globalised world without one unique globalised legislature. A transnational conflicts law would, therefore, decide whether a private norm has gathered sufficient normativity to find itself in conflict with other norms, which, in turn, can be of a public or a private nature.

V. Conclusion

Christian Joerges' concept of conflicts law in general, and the third dimension of conflicts law in particular, can be transferred from European level, in which Joerges scrutinises legal collisions, to a transnational level. At a transnational level, both private actors and public actors create norms with different levels of normativity. A transnational conflicts law would, then, have to be capable of deciding whether conflicting norms have reached certain levels of normativity. It is not possible to be more precise in the measure that should be applied to normativity at different levels. But it is important that traditional national law observes and respects private norm-creation in transnational realms. A transnational conflicts law will not be able to constitutionalise transnational law in Joerges' sense, in which conflicts law offers a framework of legal control over private standard-setting and norm-creating action. But transnational conflicts law could set up rules which decide which processes of norm creation also create normativity and thus which privately-made norms are conflicting at all.

Chapter 5

Legitimacy-collisions in 3D Some Queries with the Third Dimension of Joerges' Conflicts Law

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The acknowledgement of a transnational legal space beyond national or conventional international law has led to an almost explosive proliferation of literature on emerging global governance arrangements. Generally, this strand of literature exceeds the narrow scope of a legal positivist conception of law, and often refers to concepts of legal realism.² However, until recently, this literature has primarily contributed to a descriptive inventory of these phenomena. Although questions about the legitimacy of the emerging transnational law have often been addressed, the discussion has remained rather conventional in this respect. While the scope of the attention has shifted from state-centred public international law “in

¹ This text draws on work in the project “Transnational Regulation and the Constitutional State” as part of the DFG-funded CRC597 “Transformation of the State” at Bremen University. I have to express my special gratitude for the stimulating intellectual environment provided by my colleagues Alexandra Lindenthal, Karsten Engelke, Friedhelm Hase, Martin Herberg and Gerd Winter.

² F. Hanschmann, “Theorie transnationaler Rechtsprozesse”, in: S. Buckel, R. Christensen & A. Fischer-Lescano (eds), *Neue Theorien des Rechts*, (Stuttgart, Lucius & Lucius, 2006), p. 354.

the books" to transnational administrative law "in action", normative conceptions of constitutionality and legitimacy seem to be far more resistant to the change in the post-Westphalian order.

This reveals a considerable and growing gap between the perceived effectiveness of transnational rule-making and a conventional evaluation of ("input"-) legitimacy in terms of national constitutional law.³ Often, concepts of legitimacy and accountability, which have originally been tailored for legislation within the nation state, are, without further ado, applied to the problems of transnational rule-making. Transnational rules are sometimes dismissed as illegitimate, although traditional concepts do not necessarily imply strict and precise criteria. Instead, they are used to construct formalistic requirements, which hardly have any evidential value for the possibility of substantial public control. Examples of such criteria include the existence of - often rather indirect - chains of democratic accountability, the wholesale adoption of transnational standards by legislative "rubber-stamping", and universal requirements of transparency or public participation. In most cases, these criteria do not allow for a nuanced and case-specific evaluation. They also tend to ignore the diversity of different institutions, which have all been subsumed under transnational law or global administrative law.

Christian Joerges' 3D-vision of the conflict of laws clearly stands out from the rather one-dimensional attempt to frame legitimacy primarily in terms of hierarchical chains of political accountability. Joerges builds upon the conflict-of-laws theory developed by Brainerd Currie, which focuses on legitimacy issues by positing that a foreign law should only be applied when the forum state has no legitimate interest in the application of its own law.⁴ However, Joerges' conflicts law is trying to get away from both the intra-state conflict-of laws, as developed in the American "Conflicts revolution", and the traditional perspective of private international law, which seeks to identify the most adequate local law for cases relating to

³ O Dilling, M Herberg & G Winter, "Introduction: Exploring Transnational Administrative Rule-Making", in: *idem* (eds), *Transnational Administrative Rule-Making*, (Oxford, Hart Publishing, 2011), pp 1-19; see, also, J Black, "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes", (2008) 2 *Regulation & Governance*, pp 137-164.

⁴ B Currie, "Notes on Methods and Objectives in the Conflicts of Laws", (1959) *Duke Law Journal*, pp 171-181.

more than one jurisdiction. Instead, it deals with the elaboration of substantive regulatory options and the supervision of para-legal and self-regulatory phenomena.⁵ By applying his conflicts of law theory to the transnational sphere, Joerges takes Currie's approach at least one step further. He acknowledges that conflicts of laws may not only reflect divergent governmental interests in the application of norms, but also expectations of transnational administrative networks and epistemic and business communities which "self-regulate" issues according to functional demands.

The "first dimension" of Joerges' conflicts-law approach concerns the resolution of conflicts in multi-level systems such as the EU and the WTO. The "second" and "third dimension" are reactions to the transnationalisation of rule-making: administrative expert commissions and private actors both claim to regulate issues of global concern which are beyond the limitations of national and international law.

Joerges' approach recognises that there is a variety of foundations to normative claims, as opposed to the strict positivist position which tries to base all legitimacy issues on a Kelsenian *grundnorm*. Therefore, Joerges does not reject any of the major competing attempts to re-construct legitimacy beyond the nation state, but brings them all into perspective. A pluralistic notion does not regard legitimacy as an inherent quality of law, which is either given or not, but depends upon the social contexts of both rule-making and application.⁶ Legitimacy is then understood as a relational concept in terms of a correspondence between rule-making and rule-application. Joerges adopts this line, when reflecting upon the extraterritorial spill-over of a norm, and stresses that all the addressees of a democratic norm should be able to understand themselves as its authors. Therefore, legitimacy not only concerns the legislative process, but also the scope of application and the *de facto* effects of a norm.

⁵ Ch Joerges, "Integration through Conflicts Law: On the Defence of the European Project by Means of Alternative Conceptualisation of Legal Constitutionalisation", in: R Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, (Antwerp, Intersentia, 2010).

⁶ Black, note 3 above.

As Joerges demonstrates in his analysis of Maduro's opinion in the *Temelín* case, such spill-over effects are notorious for EU Law: An Austrian environmental law may be perfectly democratic if its effects can be restricted to Austria, but in as far as it also affects people living in the Czech Republic, its democratic legitimacy may be called into question. At the same time, Austrians are affected by the Czech legal decision to issue a permit for a nuclear power station in Temelín, just a few kilometres from the Austrian border. Thus, questions of legitimacy and accountability cannot be separated from the selection and definition of the relevant democratic constituencies or professional communities which make and apply their norms in order to settle common affairs.⁷ By co-ordinating national laws and resolving conflicts arising from spill-over, EU law may contribute to democratic legitimacy. The virtue of Joerges' conflicts-law approach is that it develops a methodology to cope with these inter-dependencies between different legitimacy communities and their norms.

These inter-dependencies not only concern territorially-defined constituencies in horizontal conflicts, as in the *Temelín* case, but also expert communities, as in the case of EU comitology and especially in transnational rule-making. As Joerges shows in his discussion of the three major European integration theories, EU law itself is based upon conflicting technocratic, ordo-liberal and political foundations. Transnational governance, which is the subject-matter of the second and third dimension of Joerges' conflicts law, is even more detached from the constitutional framework of the state, and dependent on functional modes of legitimacy. To unfold these dimensions further, the following will show how different elements and sources of legitimacy emerge in the transnational space. What is regarded as self-regulation of functionally-differentiated societal sub-systems involves a fundamental "clash of rationalities".⁸

⁷ Black, note 3 above; see, also, B Lange, "Procedure and Legitimacy in Environmental Networks", in: O Dilling, M Herberg & G Winter (eds), *Transnational Administrative Rule-Making: Performance, Legal Effects and Legitimacy*, (Oxford, Hart Publishing, 2011), pp 41-76.

⁸ A Fischer-Lescano & G Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", (2004) 25 *Michigan Journal of International Law*, pp 999-1046, at 1007.

A sociological analysis of legitimacy communities and their conflicting rationalities in the transnational space has been attempted by Julia Black. Accordingly, three different sets of reasons for the social acceptance of transnational rule-making can be distinguished:

- the rule-making body and the standards and practical routines that it produces are regarded as cognitively necessary;
- the standards of the rule-making body are considered to be legally or morally appropriate;
- political or economic interests are taken into consideration by the rule-making body through representational or participatory arrangements.

These different elements of legitimacy can be found in various combinations in the organisational settings of transnational rule-making.⁹ Depending on the main focus of a rule-making body, its legitimacy may be more cognitively-based, morally-based or interest-based.

The International Organisation for Standardisation (ISO) is a well-known transnational standardisation body and a good example of a rather cognitively-based mode of legitimacy. The main stakes of the ISO have traditionally been in the consensual production of voluntary standards of a fairly technical character with the aim of harmonising already existing national standards. The ISO is made up of representatives of standardisation bodies of over 100 nation states. These national standard-setting bodies may be more public or more private in character according to the institutional setting in the respective countries. Notwithstanding this, the ISO itself can be considered as an “outsized NGO”, which represents its members’ economic interest in the reduction of transaction-costs and the enhancement of technical compatibility. This voluntary and technical

⁹ However, types of legitimacy may be further differentiated and applied to societal contexts. For example, Bettina Lange distinguishes between a political, economic and technical discourse in analysing standardisation processes in EU environmental law, (Lange, note 7 above). Marshaw distinguishes at least nine different regimes of public, market and social accountability, see J Marshaw, “Accountability and Institutional Design: Some Thoughts on the Grammar of Governance”, in: MW Dowdle (ed), *Public Accountability: Designs, Dilemmas and Experiences*, (Cambridge, Cambridge University Press, 2006), pp 115-156, at 116.

character of ISO-standardisation started to change slightly with the ISO 9000 series in 1987, which deals with quality management and involves third-party certification.¹⁰ Only relatively recently has the ISO come up with the standardisation of more political and normative issues, such as environmental protection (ISO 14000) or social responsibility (ISO 26000). Despite these standards, the ISO tries to maintain its apolitical image. In both series, it endeavours to omit substantive requirements and restricts itself to the more formalist meta-rules of management or standard-setting procedures.

Less based upon expertise, but more on moral standards and basic human-rights, instead, the Fairtrade Labelling Organisation (FLO) is another transnational rule-making body. It was founded in 1997 and is an umbrella for standards and programmes which aim at equitable trading conditions at national level. Both civil-society activists and business actors are involved.

An often-cited example for regulatory activity of private actors can be found in the Forest Stewardship Council (FSC), which develops and implements standards for sustainable forestry worldwide.¹¹ The FSC aims to protect public goods, but is entirely made up of non-governmental (including business) actors. In contrast to the ISO and similar to the FLO, the legitimacy of the FSC is not so much based upon technical expertise, but upon a balanced representation of interests. The FSC General Assembly consists of three chambers which – conforming to the idea of sustainability – represent social, environmental, and economic interests by including trade unions or workers, environmental NGOs, and business firms. These chambers are sub-divided into sub-chambers, which represent the regional interests from the North and the South. However, Julia Black remarks that the legitimacy of the FSC stems from various legitimacy communities: consumers, for instance, consider the sustainably-grown FSC-certified wood legitimate on normative grounds. Compliance, consequently, becomes a legitimate economic interest

¹⁰ M Chon, "Marks of Rectitude", (2009) 77 *Fordham Law Review*, pp 2311-2351, at 2322.

¹¹ E Meidinger, "Multi-Interest Self-Governance through Global Product Certification Programmes", in: O Dilling, M Herberg & G Winter (eds), *Transnational Administrative Rule-Making: Performance, Legal Effects and Legitimacy*, (Oxford, Hart Publishing, 2011), pp 259-291.

for business firms. The fact that the FSC-label competes with other labels for sustainable forestry on a growing market for sustainable forestry products has been described as a means of achieving efficiency and continuous innovation.¹²

There may be a variety of reasons why rule-making bodies emphasise different modes of legitimacy. From an institutionalist perspective, the evolution of normative claims is a path-dependent development, which can only be explained with reference to the institutional history. In the case of the ISO, cognitively-based legitimacy, which has played a major role in technical standardisation, prevails even as more political issues are regulated.

It could also be argued that the emergence of transnational governance arrangements is interest-driven: then, the managerial approach, which leads to a de-politicisation of environmental and social issues, would appear to be pursued by the ISO in order to serve particular economic interests aimed at overcoming command-and-control. In contrast, a strict ban on all forms of child labour, without pragmatically considering alternative opportunities for children, could be regarded as an example of unhelpful moralisation. In some cases, such a ban could take the form of hidden protectionism and serve the interests of industrialised countries with high labour standards.

This illustrates that from a functional perspective, there are not only differences between the various governance arrangements, but also between different types of policy issues, which justify their differential treatment according to a certain cognitive, normative or interest-based logic. In the terminology of conflicts law, a “characterisation” of policy issues is necessary for an adequate resolution of scientific, political, economic or ethical modes of decision-making. Therefore, to some extent, there is a correspondence between policy issues and governance solutions. While, in fact, all three – morally-, interest- and cognitively-based – modes of legitimacy play a role, and may even be understood as irreducible (or “co-original”) perspectives, a critical approach to conflicts law should

¹² E Meidinger, “Competitive Supragovernmental Regulation: How could it be Democratic?”, (2008) 8 *Chicago Journal of International Law*, pp 513-534.

pay due consideration to the functional correspondence between the characteristics of a policy issue and its adequate governance solution.

As already mentioned, modes of legitimacy are based upon specific communities and their relational understanding of legitimacy.¹³ For example, a transnational standard of some relevance, which has been based upon the decision of an expert committee, will have to stand up to a substantive and methodological examination of the scientific community at large. Similarly, on several occasions, the ecological standards of the FSC have come under the close scrutiny of environmental advocacy groups, which, although they were not involved in the setting of standards, indirectly contributed to their improvement.

The different sources of legitimacy will also lead to differences in the organisation and procedure of transnational governance arrangements.¹⁴ For example, cognitive-based legitimacy is often associated with consensus procedures, as the determination of facts is considered to be incompatible with forms of compromise, which are typical of interest-based legitimacy. Whereas interest-based procedures will often directly involve the representatives of governments or the affected groups in decision-making, in cognitively-based procedures, decision-making is normally not based upon a political mandate. Usually, civil society actors will only have observer status. In certain respects, normative-based legitimacy occupies an intermediate position between cognitive- and interest-based legitimacy, as consensus-procedures or a political mandate may or may not be considered necessary.

To overcome the specific disadvantages of single modes of legitimacy and to treat complex issues adequately, different logics of legitimacy have to be combined in differentiated organisational settings.¹⁵ The Codex Alimentarius Commission (CAC) is an example of a highly-developed organisation of a transnational governance regime. This standardisation body sets food standards with the primary objective

¹³ Black, note 3 above, p 4.

¹⁴ Black, note 3 above; Lange, note 7 above.

¹⁵ Lange, note 7 above.

of protecting the health of consumers.¹⁶ It is legally based upon a joint resolution of the FAO and WHO. In order to employ different sources of legitimacy, the CAC tries to separate the technical aspects of risk assessment from the political aspects of risk management.¹⁷ Risk assessments have to be carried out by various expert committees, which consist of independent scientists selected by the parent institutions, the FAO and the WHO. Risk management is in the responsibility of the CAC General Commission, whose members are national government delegates.

While some of the conflicts arising from different modes of legitimacy at transnational level may already be resolved in such a complex organisational setting, the CAC is far from being beyond critique.¹⁸ The genuine sources of legitimacy at transnational level, technocratic expertise, basic normative commitments and pluralistic representation of interests by civil-society actors suffer from similar set-backs and *impasses*, as diagnosed by Christian Joerges for the three major European models of integration represented by Hans Peter Ipsen, Franz Böhm and Joseph Weiler.

The limitations of a technocratic approach to standardisation have become clear in the attempts on the part of the ISO to regulate politically contentious issues.¹⁹ The ISO 14000 series may be considered as a negative example of what has been denoted as “regulatory ritualism”.²⁰ The Australian legal sociologist John Braithwaite defines ritualism as an individual adaptation to normative expectations, which accepts the “institutionalized means for securing regulatory goals while losing focus on achieving the

¹⁶ A Herwig, “The Contribution of Global Administrative Law to Enhancing the Legitimacy of the Codex Alimentarius Commission”, in: O Dilling, M Herberg & G Winter (eds), *Transnational Administrative Rule-Making: Performance, Legal Effects and Legitimacy*, (Oxford, Hart Publishing, 2011), pp 171-212.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ O Boiral, “Corporate Greening Through ISO 14001: A Rational Myth?”, (2007) 18 *Organization Science*, pp 221-236.

²⁰ J Braithwaite, *Regulatory Capitalism. How it Works, Ideas for Making it Work Better*, (Cheltenham, Edward Elgar Publishing, 2008), pp 140-156; for a general characterisation of ritualism, see, already, M Power, *The Audit Society. Rituals of Verification*, (New York, Oxford University Press, 1997). ISO 14001, Boiral, note 19 above.

goals or outcomes themselves”.²¹ Ritualism is especially problematical for a technocratic type of standardisation, which – for lack of an adequate alternative – is extended to political issues. The determination of normative or political goals cannot be openly placed at the disposal of scientific experts or engineers. Thus, goals either have to be taken for granted, while ignoring any doubts concerning their definition, or they will be referred to another decision-making body, which follows another less technocratic logic.

With regard to a mode of legitimacy which rests on common normative commitments, another problematical adaptation is possible. In contrast to ritualism, this approach only accepts the general goals, while the technical means, which are necessary to achieve these goals, are not successfully institutionalised. The initiatives of the private sector to address environmental concerns are often criticised as “greenwashing”. As they are perceived as only paying lip service to shared norms and values, corporate codes of conduct of social responsibility are dismissed as the shallow rhetoric of public relations. Such evasive responses on the part of organisations to the normative demands of their environment have been highlighted as “organisational hypocrisy” by organisational sociologists.²² The ethical commitments of this deficient form of transnational “governance” are so abstract that they cannot be verified at the level of organisational practice.²³

In order to claim interest-based legitimacy, political or economic interests should be taken into account by the rule-making body. In this case, the major set-back at transnational level is the high

²¹ See Braithwaite, note 20 above, who uses a typology of individual adaptation to normative order, which goes back to RK Merton, *Social Theory and Social Structure*, (New York, The Free Press, 1968), p 194.

²² N Brunsson, *Organization of Hypocrisy. Talk, Decisions and Actions in Organizations*, (Chichester, John Wiley & Sons, 1994), pp 27-31; see, also, V Tacke, “Systemrationalisierung an ihren Grenzen - Organisationsgrenzen und Funktionen von Grenzstellen in Wirtschaftsorganisationen”, (1997) 7 *Managementforschung*, pp 1-44.

²³ For an analysis of such negative, but also of positive examples of corporate Codes of Conduct from a perspective of linguistic pragmatism, see M Herberg, “Global Legal Pluralism and Interlegality: Environmental Self-Regulation in Multinational Enterprises as Global Law-Making”, in: O Dilling, M Herberg & G Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions*, (Oxford, Hart Publishing, 2008), p 24 & 26.

selectivity of the usual models of representation and participation. Due to the lack of a global *demos*, or – for some critics – even due to lack of a transnational public sphere, the possibility for genuine democratic legitimacy at the transnational sphere is often called into question.²⁴

Many of the conflicts and deficiencies of transnational rule-making cannot be resolved at the informal level of global governance alone. What Christian Joerges has demonstrated in detail for EU law holds equally true for transnational law: rule-making beyond state-based law cannot simply be reduced to the necessity of a technical standard, to a market rule which leaves no alternative, or to the plain evidence of universal legal values or common political objectives. Notwithstanding this, all these elements can be understood as building blocks, which may be adapted to a master plan of transnational conflicts law.

The fragmentation of the different global governance regimes has been addressed as an “orchestration deficit” by international lawyers and political scientists.²⁵ Accordingly, states and international organisations should act as “orchestrators” of the newly-emerging transnational governance mechanisms. This is actually very similar to what Joerges would call a 3D-conflicts law perspective on international or constitutional law.

Orchestration would pre-suppose that the transnational space is no *rechtsfreier raum*,²⁶ but that there is still some shadow of law.²⁷ Indeed,

²⁴ For a discussion of the issue of Global Democracy, see J Cohen & CF Sable, “Global Democracy?”, 2006) 37 *International Law and Politics*, pp 763-797; see, also, K Dingwerth, *The New Transnationalism: Transnational Governance and its Democratic Legitimacy (Transformations of the State)*, (Basingstoke, Palgrave Macmillan, 2007). For a critical assessment of the democratic legitimacy of the FSC, see *idem*, “North-South Parity in Global Governance: The Affirmative Procedures of the Forest Stewardship Council”, (2008) 14 *Global Governance*, pp 53-71.

²⁵ K Abbott & D Snidal, “Strengthening International Regulation Through Transnational New Governance. Overcoming the Orchestration Deficit”, (2008) 42 *Vanderbilt Journal of Transnational Law*, pp 501-578; *idem*, “International Regulation without International Government. Improving IO Performance through Orchestration”, (2010) 5 *The Review of International Organizations*, pp 315-344.

²⁶ German for “area not regulated by law”.

²⁷ This idea of the “shadow of the law” was systematically developed by Braithwaite into a “regulatory pyramid”, which allows for self-regulatory and cooperative

many of the transnational standards are not self-enforcing, but depend upon recognition by the organs and authorities of the state, be they public administration officials or courts.²⁸ Even if the biggest part of transnational business activities which affect a state territory takes place abroad, nation states or jurisdictions such as the EU can still exert considerable influence by policing their borders.²⁹

An orchestration of transnational regimes would require the balancing of transnational norms from different sources and their endorsement by national law. While the balancing of transnational norms follows very much the logic of conflicts law in the first dimension at European level as outlined in Joerges' chapter, the endorsement of transnational constitutional law is substantially different.

According to the rule of law, transnational norms must not directly violate national or EU law. In this respect, formal law simply derogates the informal rules at transnational level. In many cases, however, transnational norms can supplement or even substitute formal legal requirements. If these norms are officially applied within territorial jurisdictions, a conflicts-law approach would not consider this as delegation, but as recognition of pre-existing legitimate authority. This means that the differences and the specific characteristics of procedures in different policy fields would have to be acknowledged. It will be an important doctrinal challenge for constitutional law to develop criteria for the quality of transnational rule-making procedures which enable a sufficient level of protection for constitutional rights whilst remaining context-sensitive.

decision-making at the base and hierarchically escalates in several steps up to the top; Braithwaite, note 20 above, pp 87-108.

²⁸ J Black, "Legitimacy and the Competition for Regulatory Share", *LSE Legal Studies Working Paper 14/2009*.

²⁹ In the case of chemicals and waste policy, compliance is usually a precondition for market access, see O Dilling, "Proactive Compliance? Repercussions of National Product Regulation in Standards of Transnational Business Networks", in: O Dilling, M Herberg & G Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions*, (Oxford, Hart Publishing, 2008); N Sachs "Jumping the Pond: Transnational Law and the Future of Chemical Regulation", (2009) 62 *Vanderbilt Law Review*, pp 1818-1869.

Chapter 6

The Notion of Diagonal Conflicts as a Key Concept of European Conflicts Law

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I. Introduction

Within the last decades, the conflicts between the European legal order, especially primary law, and the legal orders of the Member States, as well as the public awareness of such conflicts, have all increased.

Generally, there are two main categories of conflicts between different legal orders; *horizontal* and *vertical* conflicts. *Horizontal* conflicts are conflicts between or among different state laws, *i.e.*, conflicts between laws from the same level. These conflicts are mainly dealt with in the field of Private International Law (PIL). They are also sometimes known as conflict of laws in common law-oriented jurisdictions. If a case is linked to different national legal orders, PIL will be concerned with questions such as: Which law will apply in this case? Will a foreign judgment be recognised or will the national court even hear this case? *Vertical* conflicts are, in contrast, conflicts

¹ I am grateful to Markus Krajewski, Anne Peters and Susanne K Schmidt. The research was funded by the German Science Foundation's Collaborative Research Centre 597 "Transformations of the State" at Bremen University.

between laws or norms from different levels, for example, between or among state and federal law, or, in the case addressed by this chapter, between or among European Law and the legal orders of the Member States.

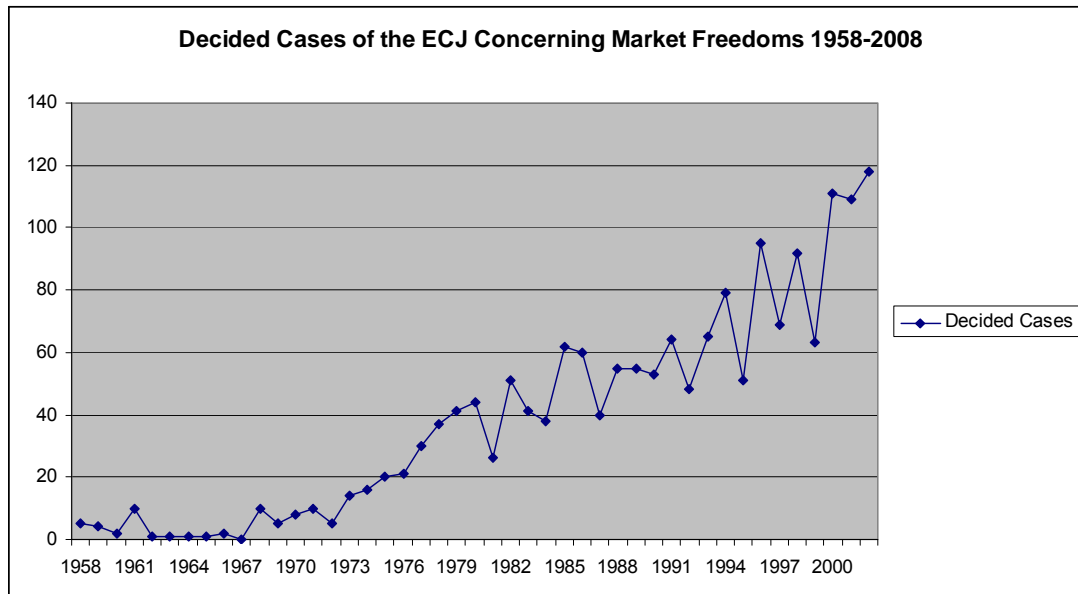


Figure 1

Source: Eur-Lex, own calculation

In the 1970s and 1980s, two terms were developed in the legal literature regarding vertical conflicts between the European Law and the legal orders of the Member States: *direct* and *indirect* conflicts.² However, until the first half of the 1980s, the European project was paralysed and the integration process stagnated.³ The stagnation ended with the enactment of the Single European Act, which gave the EU more power and simplified the decision-making procedure. Further steps towards European integration have been taken since then. Thus, it is reasonable to ask the question of whether these two terms – direct and indirect conflicts – grasp and describe all the problematical issues occurring in conflicts between the European legal order and the legal order of the Member States today. The

² W Komendera, *Normenkonflikte zwischen EWG- und BRD-Recht - insbesondere indirekte Kollisionen*, (Heidelberg, 1974); KE Huthmacher, *Der Vorrang des Gemeinschaftsrechts bei indirekten Kollisionen: eine Studie zum Verhältnis von EG-Recht zu nationalem Vollzugsrecht, dargestellt am Beispiel des Konflikts zwischen materiellem EG-Recht und nationalen Rechtsmittelfristen*, (Cologne, Heymann Verlag, 1985), p 134 et seq.

³ G Brunn, *Die europäische Einigung von 1945 bis heute*, (Bonn, Bundeszentrale für politische Bildung, 2006), p 229.

conflict situations today are, in many ways, different from the conflicts which emerged in the 1970s. To describe these new conflicts, another term was introduced in the literature some years ago: *diagonal* conflicts.⁴ Not only do different legal orders collide in such cases, but different policy goals are also at the core. However, the term diagonal conflict, as described in the literature up to now, deals mainly with the issue of the lack of competence, at European level, to regulate whole areas of issues which are specifically addressed at the European level, instead of only parts of an issue. This chapter argues that the occurrence of such conflicts is not only due to a lack of competence, at European level, to establish, for example, a social and cultural Europe, but also, and more importantly, due to the lack of both political will and problem-solving capacity.

This chapter addresses this argument in three steps. First, the two terms *indirect* and *direct* conflicts will be described. Second, the term *diagonal conflicts*, as presented in the literature nowadays, will be introduced. Up to now, this concept has overlooked the problem of non-decisions. In order for a decision to be taken at European level, the competence is only one pre-condition. More important, however, is the will actually to take a decision. Therefore, the third part broadens the concept of diagonal conflicts by including the question of non-decisions. The concluding section summarises the argument presented and gives a broad definition for diagonal conflicts.

⁴ Ch Joerges, "Der Europäisierungsprozess als Herausforderung des Privatrechts: Plädoyer für eine neue Rechts-Disziplin", ZERP-Diskussionspapier 2006, p 1-51; *idem*, "Europarecht als ein Kollisionsrecht neuen Typs: Wie eine europäische unitas in pluralitate verfasst werden kann", in: M Führ, R Wahl & P von Wilmowsky (eds), *Umweltrecht und Umweltwissenschaft. Festschrift für Eckard Reh binder*, (Berlin, Erich Schmidt Verlag, 2007), pp 719-747; *idem*, "Integration Through Conflicts Law: On the Defence of the European Project by Means of Alternative Conceptualisation of Legal Constitutionalisation", in: R Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, ARENA Report No 1/2009. CU Schmid, "Vertical and Diagonal Conflicts in the Europeanisation Process: Preliminary Thoughts on a Methodological Reconstruction of the Interface between European and National Law on a Conflict of Laws Basis", in: Ch Joerges & O Gerstenberg (eds), *Private Governance, Democratic Constitutionalism and Supranationalism*, (Brussels, European Commission, 1998), pp 185-190; CU Schmid, "Diagonal Competence Conflicts between European Competition Law and National Regulation - A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing", (2000) 8, *European Review of Private Law*, pp 153-170.

II. Direct and Indirect Conflicts

The concept of direct and indirect conflicts was introduced by Wolfram Komendera.⁵ It was developed further by Karl Eugen Huthmacher,⁶ and was also used in administrative law, for example, by Stefan Kadelbach.⁷

II.1. Direct Conflicts

A direct conflict consists of the overlapping of two norms from different legal orders sharing the same or functionally-equivalent subject matter.⁸ If the German cartel law contains an exemption, which the European law does not include, a direct conflict could occur. The circumstance, with different exemptions at Member State and European level, could lead to a situation in which an agreement between European enterprises is lawful under German law, but illegal under European law. However, due to changes in the German cartel law, this case is only fictional and can no longer arise. Generally, such conflicts between European primary law and national norms sharing the same subject matter, such as cartels in this case, are rare nowadays. But notwithstanding this, they can still be observed in the implementation of a harmonisation directive. One example mentioned in the literature is Case 158/88.⁹ There the subject matter was the Directive 69/167.¹⁰ The directive provided tax exemptions for turnover tax and excise duty for goods contained in the personal luggage of travellers. In implementing the directive, the Irish government added another requirement. In Ireland, tax exemptions could be claimed only for goods contained in the personal luggage of travellers who arrive at the Irish border after having spent a period of 48 hours outside Ireland. The ECJ stated

⁵ Komendera, note 2 above.

⁶ Huthmacher, note 2 above.

⁷ S Kadelbach, *Allgemeines Verwaltungsrecht unter europäischem Einfluss*, (Tübingen, Mohr Siebeck, 1999), p 25.

⁸ Schmid, "Vertical and Diagonal Conflicts in the Europeanisation Process: Preliminary Thoughts on a Methodological Reconstruction of the Interface between European and National Law on a Conflict of Laws Basis", note 4 above, p 187.

⁹ ED Cross, "Pre-Emption of Member State Law in the European Economic Community: A Framework for Analysis", (1992) 29, *Common Market Law Review*, pp 447-472, at 463.

¹⁰ Judgment of ECJ, 15 June 1990, *Commission v Ireland* [1990] ECR I-02367, Case C-158/88.

that, with this additional requirement, Ireland had failed to fulfil its obligations under the EEC Treaty.¹¹

Solutions for such conflicts can be developed from two different points of view, that of the European Union and that of the Member State. For the European level, the ECJ has developed the principle of supremacy. The arguments of the ECJ for supremacy range from the creation of a legal system to the principle of sincere co-operation (Article 4 III TEU).¹²

In the ground-breaking decision in *Costa v ENEL*, the ECJ stated:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply. By creating a community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the community, the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.¹³

In the Treaty establishing a constitution for Europe, the principle of supremacy was laid down in Article I-6.¹⁴ However, the Treaty of Lisbon only contains a declarative confirmation in Declaration 17.

From the perspective of the Member States, the primacy of European law is generally accepted.¹⁵ However, the principle is subject to

¹¹ A more recent example is the judgment of the ECJ, 25 July 2008, *Metock* [2008] ECR I-6241, Case C-127/08.

¹² M Herdegen, *Europarecht*, (Munich, CH Beck, 2008), p 207.

¹³ Judgment of the ECJ, 15 July 1964, *Costa v ENEL* [1964] ECR 585 Case C-6/64, 1253.

¹⁴ The Constitution and law adopted by the institutions of the Union in exercising competences conferred upon it are to have primacy over the law of the Member States.

constraints, which are mainly seen in the restricted competences at European level. The German Federal Court stated in the well-known Maastricht decision, that a European act lacking a European competence would not be valid in Germany. As a result, the primacy of European Law is only valid in connection with a competence clause at European level.

II.2. Indirect Conflicts

As European law contains only few procedural norms, European law is mainly carried out or executed with the help of national procedural rules. If such a national procedural rule is in conflict with substantive European law, this is called *indirect conflict*. The subject matter of indirect conflicts is, therefore, not direct, but *indirect* damage of the European legal order, which appears through the execution of European law through national procedural rules. One field in which a lot of the indirect conflicts occur is state aid, mainly, the recovery of unlawful-granted state aid. In the Case C-5/89, the ECJ stated that:

in principle the recovery of aid unlawfully paid must take place in accordance with the relevant procedural provisions of national law, subject however to the proviso that those provisions are to be applied in such a way that the recovery required by Community law is not rendered practically impossible.¹⁶

The argument for the recovery was the *effet utile* principle, more clearly stated in the *Alcan*¹⁷ case. Here, the ECJ stated that:

It must be noted that where state aid is found to be incompatible with the common market, the role of the national authorities is, as the Advocate General stated in point

¹⁵ PM Huber, "Offene Staatlichkeit: Vergleich", in: A von Bogdandy, PC Villalón & PM Huber (eds), *Handbuch Ius Publicum Europaeum: Band II Offene Staatlichkeit - Wissenschaft vom Verfassungsrecht*, (Regensburg, CF Müller, 2008), pp 403-459, § 26, para. 34.

¹⁶ Judgment of the ECJ, 20 September 1990, *Commission v Germany* [1990] ECR I-3437, Case C-5/89.

¹⁷ Judgment of the ECJ, 20 March 1997, *Land Rheinland-Pfalz v Alcan Deutschland GmbH*, [1997] ECR I-1591, Case C-24/95.

27 of his Opinion, merely to give effect to the Commission's decision.¹⁸

III. Diagonal Conflicts as Conflicts of Competences

The two terms *direct* and *indirect conflicts*, however, do not grasp all the types of conflicts that arise between the legal order of the European Union and the Member States. Both terms are far too simplistic to capture the problems that arise between these two legal orders today. As a result, Christian Joerges and Christoph Schmid have developed another term: *diagonal conflicts*.¹⁹ A good example of diagonal conflict is the quarrel about book price-fixing agreements in the German language area.²⁰ Guarantees and agreements on the price of books are aiming at maintaining the variety of different books on the market and thereby guaranteeing the availability of the cultural good, the book. Therefore, regulations concerning book price-fixing agreements are assigned to the field of culture. Within this field, the European Union lacks the competence to regulate. Furthermore, the jurisdiction for culture is limited in various ways, based upon Article 167 TFEU.²¹ Article 167 V TFEU, in particular, prohibits measures of

¹⁸ *Ibid.*

¹⁹ Schmid, "Diagonal Competence Conflicts between European Competition Law and National Regulation - A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing", note 4 above; *idem*, "Vertical and Diagonal Conflicts in the Europeanisation Process: Preliminary Thoughts on a Methodological Reconstruction of the Interface between European and National Law on a Conflict of Laws Basis", note 4 above; Ch Joerges, "Der Europäisierungsprozess als Herausforderung des Privatrechts: Plädoyer für eine neue Rechts-Disziplin", in: A Furrer (ed), *Europäisches Privatrecht im wissenschaftlichen Diskurs*, (Bern, Stämpfli, 2006), pp 133-188; Ch Joerges, "European Law as Conflict of Laws", in: Ch Joerges & J Neyer, "'Deliberative Supranationalism' Revisited", EUI Working Paper 2006/20, pp 15-32, available at: <<http://cadmus.iue.it/dspace/handle/1814/6251>>; Ch Joerges, "Europarecht als ein Kollisionsrecht neuen Typs: Wie eine europäische unitas in pluralitate verfasst werden kann", in: M Führ, R Wahl & P von Wilmsky (eds), *Umweltrecht und Umweltwissenschaft. Festschrift für Eckard Rehlinger*, note 4 above; Joerges, "Integration Through Conflicts Law: On the Defence of the European Project by Means of Alternative Conceptualisation of Legal Constitutionalisation", note 4 above.

²⁰ Schmid, "Diagonal Competence Conflicts between European Competition Law and National Regulation - A Conflict of Laws Reconstruction of the Dispute on Book Price Fixing", note 4 above.

²¹ "The Union shall contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity and at the same time bringing the common cultural heritage to the fore.

harmonisation, *i.e.*, direct interferences with the legal systems of the Member States.²² This “competence clause” is, therefore, called a “negative competence clause”.²³ Due to the missing authority, regulations on book price-fixing agreements cannot be passed at European level. Despite this fact, it is possible that national regulations concerning book price-fixing agreements are in conflict with EU laws. National regulations concerning this topic can collide either with the free movement of goods (as they have an effect equivalent to a quantitative restriction) or with EU competition law. This type of conflict is called *diagonal conflict*.

Joerges argues that these conflicts were produced by the principle of conferred powers. This principle is stated in EU law since the Treaty of Maastricht (at that time Article 3 b ECT, now Article 5 (2) TEU).²⁴ It

2. Action by the Union shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in the following areas:

- improvement of the knowledge and dissemination of the culture and history of the European peoples,
- conservation and safeguarding of cultural heritage of European significance,
- non-commercial cultural exchanges,
- artistic and literary creation, including in the audiovisual sector.

3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of culture, in particular the Council of Europe.

4. The Union shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures.

5. In order to contribute to the achievement of the objectives referred to in this Article:

- the European Parliament and the Council acting in accordance with the ordinary legislative procedure and after consulting the Committee of the Regions, shall adopt incentive measures, excluding any harmonisation of the laws and regulations of the Member States,
- the Council, on a proposal from the Commission, shall adopt recommendations.”

²² G Ress & J Ukrow, in: E Grabitz, M Hilf & M Nettesheim, *Das Recht der Europäischen Union, Article 151 EGV*, (Munich, Beck, 2009), para. 166.

²³ B de Witte, “The Cultural Dimension of Community Law”, in: Academy of European Law (eds), *Collected Courses of the Academy of European Law*, 1995, (Dordrecht, Kluwer Law International, 1995), pp 229-299, at 293.

²⁴ “Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the

provides that the EU has only the competences which are assigned to it by the treaties. All powers not transferred to the EU, remain at national level. This principle generally serves to guarantee the federal balance between the EU and the Member States.²⁵ In Joerges' view, this principle is theoretically significant, but it often leads to problems in reality.²⁶

Diagonal collisions are an important and unique feature of multi-level systems. They are a constant feature of life within the EU, since the competences required for problem-solving are, at times, to be found at the level of the EU itself, and, at other times, at the level of the Member States.²⁷

[S]ince the Member States have delegated legislative competences only in limited fields, responses to functionally interdependent problem constellations often require a co-ordination of different, semi-autonomous levels of governance.²⁸

To summarise, the term "diagonal conflict" refers to a structural problem of the European multi-level system. Problems which require a legal solution can neither be fully responded to at European level, nor at national level. For this reason, the actors are forced to co-ordinate.²⁹

objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States."

²⁵ A von Bogdandy & J Bast, "Article 5 EGV", in: Grabitz, Hilf & Nettesheim, note 22 above, para 9.

²⁶ Joerges, "Der Europäisierungsprozess als Herausforderung des Privatrechts: Plädoyer für eine neue Rechts-Disziplin", note 4 above, p 36.

²⁷ Joerges, "Integration Through Conflicts Law: On the Defence of the European Project by Means of Alternative Conceptualisation of Legal Constitutionalisation", p 549 *et seq.*, in: R Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, RECON Report No 7 (2009).

²⁸ Ch Joerges, "Conflict of Laws as Constitutional Form: Reflections on International Trade Law and the Biotech Panel Report, RECON Online Working Paper 2007/03, footnote 28.

²⁹ Joerges, "Europarecht als ein Kollisionsrecht neuen Typs: Wie eine europäische unitas in pluralitate verfasst werden kann", note 4 above, p 737.

The principle of conferred powers, as Joerges explains, forbids the applicability of the principle of supremacy in such conflict cases.³⁰ He justifies his thesis with the fact that the Member States have not transferred any competence to the European Union in such cases.

Using the example of book price-fixing agreements, as mentioned above, the application of the principle of supremacy in this case is not convincing, either. Due to the missing authority to regulate book price-fixing agreements at European level, the application of the principle of supremacy would lead to the fact that no public authority could regulate book price-fixing agreements at all. Through the transfer of authority to regulate only competition and the free movement of goods to European level, the jurisdiction or power to regulate book prices would be abolished.³¹ To solve such conflicts, other collision rules have to be created. According to Joerges, they should be designed in a way in which the Member States are forced to justify their national politics with regard to others effected by these national laws.

In the most recent case concerning book price-fixing agreements, the ECJ came close to a solution of this kind. In its judgment of 30 April 2009, the ECJ stated that:

the protection of books as cultural objects can be considered as an overriding requirement in the public interest capable of justifying measures restricting the free movement of goods, on condition that those measures are appropriate for achieving the objective fixed and do not go beyond what is necessary to achieve it.³²

According to this, the crucial point was, whether the Austrian government could justify their regulation as an appropriate measure.

³⁰ *Ibid.*

³¹ This is called *compétences abolies*. V Constantinesco, "Compétences et pouvoirs dans les Communautés Européennes. Contribution à l'étude de la nature juridique des communautés", (1974) 28 *Revue internationale de droit comparé*, p 231 *et seq.*, & 248. D Simon, *Le système juridique communautaire*, (Paris, Presses Univ. de France, 1998), p 83 *et seq.* Both cited after FC Mayer, "Die drei Dimensionen der Europäischen Kompetenzdebatte", (2001) 61 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, pp 577-640, at 587.

³² Judgment of the ECJ, C-531/07, BeckRS 2009, 70467.

In the end, they could not. The ECJ found that the Austrian regulation violates Article 28 EC and that it goes far beyond what is necessary.

IV. Diagonal Conflicts and Non-decision

To summarise what has been illustrated, in the literature, three different conflict categories are referred to: *direct*, *indirect* and *diagonal*. The question arises as to whether these three types exhaustively describe the conflicts and problems that arise between the European legal order and the legal order of the Member States.

The main criterion for diagonal conflicts is the lack of competence at European level to regulate a problem constellation extensively. In constellations, where a competence at European level exists, diagonal conflicts cannot arise. However, the competence is, in most instances, not the main criterion to enable a European solution; even more crucial is the political will to act at European level and the chances for a political solution at European level. Therefore, it is argued that the concept of diagonal conflicts should generally include conflicts between different political goals. In the European Union, we can observe more and more of such conflicts between different political goals, and, in fact, this is what lies behind diagonal conflicts.

IV.1. The Crucial Fact of Political Willingness

In the Treaty of Lisbon, the competences at European level are defined in Article/Articles 3-5 TFEU. With the enactment of the Treaty of Lisbon, generally, the field of competences has not been broadened within the area of exclusive competences (Article 3), the area of shared competences (Article 4), or in the area of co-ordinative competences.³³ If the term diagonal conflict is constrained to constellations, in which no competence or even a negative competence exists at European level, the term would be applicable only in a very few conflict constellations, mainly measures in the field of employment (Article 149 TFEU), the field of education (Articles 165 IV, 166 IV TFEU), and measures in the field of human health protection (Article 168 V TFEU). For example, conflicts between competition policy and environmental goals are excluded from the

³³ E Lenski, in: CO Lenz & K-D Borchardt (eds), *EU-Verträge: Kommentar nach dem Vertrag von Lissabon*, 5, (Cologne, Bundesanzeiger, 2010): Article 3, Rn 3, Article 4, Rn 4 and Article 5, para. 3 AEUV.

category of diagonal conflicts, as a competence to harmonise and regulate such questions already exists at European level.

Let us assume that competences to regulate cultural issues exist at European level. Notwithstanding this, the required majority to enact a book price-fixing regime could not be reached at European level due to different the regulatory systems in the Member States. The above described conflict between the German law and the European law would occur anyhow. So, instead of asking the question of whether we have a European competence, the question should either be whether a problem-solving capacity exists at European level in this regard, or whether the problem of non-decision occurs. In this fictional example, one would say that the EU lacks the problem-solving capacity in this case.

By looking towards Brussels, it can be seen that full harmonisation rarely occurs. However, in the field of environmental policy, we can observe that, where there is a will, there is a way. In the 1970s, the EU started to develop an environmental policy even though an explicit competence norm was lacking.³⁴ Such measures were mainly based upon Articles 100 and 235 EEC Treaty.

More generally, it can be observed that, even in cases where a competence to regulate the whole problem constellation exists, the EU only partially regulates in complex issues. Regulations taken by the EU are rather punctual and capture only parts of a sector.³⁵ This is due to political will and not arbitrary, as such an approach helps to fulfil the difficult task of harmonisation by reducing the critical questions to only a few points.³⁶ Thus, some controversial aspects were not set on the agenda and simply remain *not decided*.³⁷ In sum,

³⁴ G Ress, "Europäische Gemeinschaften", in: O Kimminich, H Freiherr von Lersner & PC Storm (eds), *Handwörterbuch des Umweltrechts*, 2. Aufl. 1994, Bd. I, (Berlin, Erich Schmidt, 1994), p 548 *et seq.*

³⁵ C Ohler, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts: Strukturen des deutschen Internationalen Verwaltungsrechts*, (Tübingen, Mohr Siebeck, 2005), p 7.

³⁶ *Ibid.*, p 8.

³⁷ FW Scharpf, *Governing in Europe: Effective and Democratic?*, (Oxford, Oxford University Press, 1999), p 76 *et seq.*, footnote 34.

not only the power to decide, but also the capacity to come to a decision, is important.³⁸

IV.2. The General Conflict in Diagonal Conflict

If the competence is not the only crucial criterion for diagonal conflicts, what then is the criterion? The argument raised by Joerges is that complex problems cannot be solved within one competence norm when more than one jurisdiction is at stake. Yet, this fact is only the symptom and consequence of a deeper problem: the collision of different policy goals. Usually, different policy goals are laid down in different competence norms, such as the competence to regulate environmental issues and the competence to enact norms for enterprises. However, by regulating one field, such as the internal market, different other political goals are concerned, for example, culture. Furthermore, from one point of view, a regulation could mainly concern the environment, and, from another point of view, the same regulation could clearly relate to economic matters. So the conflict behind such a diagonal conflict is not, in the first place, about competences, but about different and sometimes competing political goals at diverse governing levels.

For example, a European directive concerned with procurement law can collide with a national norm in the area of procurement law aimed at securing the environment. This conflict should be called a diagonal conflict even though the EU also has the power to regulate environmental issues in procurement law. The reason for this inclusion is that, in this case, different political goals and interest are concerned, as in the case described as book price-fixing. Furthermore, the same co-ordinative problems are involved.

V. Conclusion

In the 1970s and 1980s, for conflicts arising between the European and the Member State legal orders, the two terms direct and indirect conflict might have described these conflicts exhaustively. However, as the awareness of the European legal order has grown since then, as well as the number of cases brought before the ECJ, these terms are no longer sufficient. The classification of conflicts as direct conflicts

³⁸ For an overview about the European problem-solving capacity, see Scharpf, note 37 above, p 117.

has been derived in part from a superficial glance. By looking more closely, more and more diagonal conflicts pop up, as conflicts between policy goals behind the surface are revealed.

Market regulation can concern various other policy goals, for example, culture. If the power to regulate the market lies within the EU, and the competence to regulate cultural matter lies with the Member States, and both regulations collide, Joerges and Schmid call these diagonal conflicts. It has been argued that such a collision can also occur if the competence lies at European level but is not exercised. The concept of the term diagonal conflict should also include such conflicts. The general aspect of diagonal conflict is the collision of different policy goals at different levels of the European multi-level-system. Even if the power to regulate exists at the European level, areas are regulated only fragmentary because of the lack of the political will and decision-making capability (non-decision).

A diagonal conflict should be characterised as a conflict between different policy goals pursued at different levels of government.

Chapter 7

Administrative Constitutionalism and European Conflicts Law

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I. Introduction

Using the example of European risk regulation, this chapter seeks to make a contribution to the ongoing scholarly project concerned with the transformation and constitutionalisation of EU administrative law. It departs from the assumption that EU risk regulation is best understood as transnational governance carried out by a politicised, differentiated and plural EU joint-administration operating in heterarchical networks. The emergence of this EU network administration brings into question the viability of the traditional legal concepts of EU law, as pre-supposed by the legal framework of the EU Treaties to capture analytically and to guide normatively the exercise of administrative power within the EU. It, therefore, raises serious concerns about the law's capability of ensuring legitimacy, accountability, and the stabilisation of legal expectations within EU administrative governance. In the search for answers to these concerns, we need to embark on the project of a theoretically-informed normative re-construction of EU administrative law as transnational administrative law of governance.

This chapter approaches the main theme of this edited volume, namely, the identification of new patterns of conflicts within post-national governance constellations, from the standpoint of European administrative governance. It proceeds within the context of two parallel, but intersecting, scholarly discourses: the debate on the constitutionalisation of European administrative law, on the one hand (see Section II below), and the debate on the European turn to governance, on the other (see Section III below). Both debates serve as trajectories along which the analysis of EU risk regulation, and the role of law within it, needs to proceed.

Debates about the role of law in the organisation of the European polity both in general, and within EU governance in particular, are deeply intertwined with debates about the constitutional form of the EU as a post-national constellation.¹ As a consequence, EU risk regulation - as the case study of this work - will need to be analysed also against the background of the scholarly debate on transnational constitutionalism (see Section IV below), which is concerned with concepts of law and political rule beyond the nation state. In particular, this work will deal with legal conceptualisations based upon conflict of law approaches. Mainly, it will explore the model of a three-dimensional European conflicts law, which is currently being developed by Christian Joerges as a constitutional form for the EU, and which promises to constitutionalise European governance, while, at the same time, resolving the legal and political struggles involved in it (see Sections V and VI below). As an example of this type of constitutionalisation process, this chapter will examine one particularly contested field of EU risk regulation, namely, the legislative framework for genetically-modified organisms (GMOs). This example is a particularly interesting one from a conflicts law perspective, because EU authorisation of GMOs is confronted with multiple conflict constellations that threaten both the search for common legal solutions at EU level, *and* the legitimate interests of national, and regional constituencies. EU regulation of GMOs has thus become a serious test for Europe's unity in diversity, which, at the same time, questions the overall legitimacy of the European order to regulate certain politically sensitive areas.

¹ See Jürgen Habermas, *The Postnational Constellation: Political Essays*, (Cambridge, Polity Press, 2004).

II. The Transformation of EU Administrative Law – Constitutionalisation I

Engaging with issues of administrative law at EU level is not new to European public lawyers. Initiated by the seminal work of Jürgen Schwarze² as early as in 1988, the legal debate on the constitutionalisation of European administrative law has become more sophisticated over time, which has led to the emancipation of the subject from being a *niche* subject to an independent field of legal study.³ One major achievement of this debate is, arguably, that it has been able to capture analytically the complex reality, in which EU public administration operates today, and to juxtapose this reality to traditional concepts of the implementation of EU law.

Thus, several scholars have observed that EU law is today being implemented through a complex co-operative system of joint,⁴ or integrated, administration.⁵ The emergence of this co-operative system of EU administration challenges the aptness of the traditional

² Jürgen Schwarze, *Europäisches Verwaltungsrecht: Entstehung und Entwicklung im Rahmen der Europäischen Gemeinschaft*, (Baden-Baden, Nomos Verlag, 1988).

³ See Herwig Hofmann & Alexander Türk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, (Cheltenham-Northampton MA, Edward Elgar Publishing, 2009); Eberhard Schmidt-Assmann, *Der europäische Verwaltungsverbund Formen und Verfahren der Verwaltungszusammenarbeit in der EU*, (Tübingen, Mohr Siebeck, 2005); Paul P Craig, *EU Administrative Law*, (Oxford, Oxford University Press, 2006); Thomas von Danwitz, *Europäisches Verwaltungsrecht*, (Berlin-Heidelberg: Springer, 2008); Sabino Cassese, "European Administrative Proceedings", (2004) 68 *Law and Contemporary Problems*, pp 21-36; Edoardo Chiti, *L'integrazione Amministrativa Europea*, (Bologna, Il Mulino, 2003); Hanns Peter Nehl, *Principles of Administrative Procedure in EC Law*, (Oxford, Hart Publishing, 1999); Martin Shapiro, "The Institutionalization of European Administrative Space", in: Alec Stone Sweet, Wayne Sandholtz & Neil Fligstein, (eds), *The Institutionalization of Europe*, (Oxford-New York, Oxford University Press, 2001), p 94; Gernot Sydow, *Verwaltungskooperation in der Europäischen Union: zur horizontalen und vertikalen Zusammenarbeit der europäischen Verwaltungen am Beispiel des Produktzulassungsrechts*, (Tübingen, Mohr Siebeck, 2004); Jürgen Schwarze, *European Administrative Law*, (Luxembourg-London, Office for Official Publications of the European Communities; Sweet and Maxwell, 2006).

⁴ See Schmidt-Assmann, *Der europäische Verwaltungsverbund Formen und Verfahren der Verwaltungszusammenarbeit in der EU*, note 3 above.

⁵ See Hofmann & Türk, *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, note 3 above.

model of EU executive federalism⁶ with its underlying distinction between (limited) direct Community implementation of EU law, on the one hand, and indirect implementation through the Member States, on the other, to describe adequately and to guide normatively the realities of the European integration process.⁷ Instead, the recent scholarly debate has shown that the process of European integration in the Twenty-first century takes place not solely by means of integration through law, but also by means of integration through administrative co-operation within a common European administrative space.

At the same time, while the EU Treaties do not mention a joint EU administration,⁸ the question arises as to how this administrative space should be constituted and institutionalised⁹ in order to preserve the accountability of the different administrative actors involved, with regard to the outcome of their respective co-operative contributions. In fact, the network character of EU administrative co-operation challenges the traditional legal concepts of both national and European administrative law, such as the rule of law, democratic accountability, and judicial protection, by eroding the validity of the traditional, legally pre-supposed distinctions between legislation and implementation, public and private, and national and supranational.¹⁰

⁶ See Jens-Peter Schneider, "Regulation and Europeanisation as Key Patterns of Change in Administrative Law," in: Matthias Ruffert (ed), *The Transformation of Administrative Law in Europe*, (Munich, Sellier European Law Publishers, 2007), pp 309, at 313.

⁷ On the need and existence of co-operation between administrations as the co-ordination of the enforcement of EU law, see Herwig Hofmann & Alexander Türk, *EU Administrative Governance*, (Cheltenham-Northampton MA, Edward Elgar Publishing, 2006), p 3.

⁸ A recent exception is the mentioning of EU Agencies in the Treaty of Lisbon, for example, in Article 263 TFEU.

⁹ See, on the latter, Martin Shapiro, "The Institutionalization of European Administrative Space", note 3 above, p 94.

¹⁰ On network as legal concept in EU law, see Karl-Heinz Ladeur, "Towards a Legal Theory of Supranationality - The Viability of the Network Concept", (1997) 3 *European Law Journal*, p 33; on challenges for traditional Law through EU joint administration, see Schneider, "Regulation and Europeanisation as Key Patterns of Change in Administrative Law," note 6 above, p 318; Cassese, "European Administrative Proceedings", note 3 above, p 35; Hofmann & Türk, *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, note 3 above.

An additional difficulty for EU administrative law arises because EU administrative networks operate, and are embedded, within a context of legal pluralism. In contrast to other harmonised areas of EU law, no legal hierarchy has been established with regard to the administrative rules and procedures which govern the activity of the different administrative actors which contribute to the network. With the exception of certain general requirements formulated for national administrative procedures by the European Courts,¹¹ the Member States enjoy procedural autonomy with regard to their national administrations. Thus, EU joint-administration is characterised by a plurality of administrative laws and administrative legal cultures. In the multi-level process of EU authorisation of a GMO, for example, the contribution of each administrative entity involved (for example, different national authorities, European Food Safety Authority (EFSA), and EU comitology committees) to the overall process of authorisation is governed by its own national or supranational administrative rules. As a consequence, conflicts between different laws are likely to arise, and cannot be resolved through legal hierarchy.

Legal scholars involved in research into the transformation of EU administrative law are undertaking efforts to constitutionalise¹² these new forms of transnational administrative activity through networks, in order to ensure that general principles such as accountability, legality, and legitimacy are still respected;¹³ herein, indeed, lies the main future challenge for the scholarly project on the constitutionalisation of EU administrative law.

¹¹ On this body of EU administrative law (in German: *das Gemeinschaftsverwaltungsrecht*) see von Danwitz, *Europäisches Verwaltungsrecht*, p 467.

¹² This term is used with various connotations; see Paul Craig, "The Constitutionalization of Community Administration", (2003) 28 *European Law Review*, p 840; Christoph Möllers, "Verfassungsgebende Gewalt - Verfassung - Konstitutionalisierung", in: Armin von Bogdandy (ed), *Europäisches Verfassungsrecht*, p 1, at 47 *et seq*; the German administrative law school emphasises systematisation and rationalisation of the existing legal frameworks of EU admin law against the background of the requirement of *Rechtsstaatlichkeit* as the main features of constitutionalisation, see von Danwitz, *Europäisches Verwaltungsrecht*, note 3 above, pp 2-4.

¹³ See, for example, Herwig Hofmann & Alexander Türk (eds), *Legal Challenges in EU Administrative Law: Towards an Integrated Administration*, note 3 above; Herwig Hofmann, "Seven Challenges for EU Administrative Law", (2009) 2 *Review of European Administrative Law*, pp 37-59.

III. The European Turn to Governance – Constitutionalisation II

The above-described transformation of EU administrative law through the emergence of joint co-operative structures between the EU and the national administrations can be seen as one aspect of a broader transformation of EU law, which European integration scholars have been discussing as the “European turn to governance”¹⁴ or as “new modes of governance”.¹⁵ Similar to the discussion on the constitutionalisation of EU administrative law, the discussion of the new modes of governance has mainly been driven by the empirical observation of institutional change and evolution in the course of European integration, which altered the premises under which the traditional concepts of EU law and supranational governing continued to operate.

Essentially, this change has either been taking place outside of the formal framework of the EU Treaties, as represented by the Classical Institutional Structure, which consists of the triangle between the Council, the Commission and the Parliament, or it has extended this framework in an evolutionary manner. Thus, in addition to classical supranational governing¹⁶ through the Community Method associated with a top down or hierarchical mode of achieving greater integration, governance through heterarchical networks which mainly aim at co-ordination and exchange between a variety of actors has emerged.

¹⁴ Christian Joerges & Michelle Everson, “The European Turn to Governance and Unanswered Questions of Legitimacy: Two Examples and Counter-Intuitive Suggestions”, in: Christian Joerges, Bo Stråth & Peter Wagner (eds), *The Economy as a Polity: The Political Constitution of Contemporary Capitalism*, (London, UCL Press, 2005), p 159.

¹⁵ See Charles F Sabel & Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture*, (Oxford-New York, Oxford University Press, 2010); Grainne de Búrca & Joanne Scott, *Law and New Governance in the EU and the US*, (Oxford-Portland OR, Hart Publishing, 2006); Joanne Scott & David M Trubek, “Mind the Gap: Law and New Approaches to Governance in the European Union”, (2002) 8 *European Law Journal*, pp 1-18; Beate Kohler-Koch & Rainer Eising, *The Transformation of Governance in the European Union*, (London-New York, Routledge, 1999).

¹⁶ On the conceptualisation of governing *versus* governance, see Poul F Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation*, (Oxford-Portland OR, Hart Publishing, 2010).

The main institutional structures mainly associated with the European turn to governance are the EU system of comitology committees, EU agencies, and the Open Method of Co-ordination (OMC).¹⁷ These structures can also be described as an emergent (and constantly changing) transnational bureaucracy that operates through administrative networks, in which several conceptual boundaries characteristic of the traditional supranational model become blurred: the boundary between the EU and national administrations, together with the adherent distinction between direct and indirect implementation of EU law; the boundary between the EU institutions, *i.e.*, the Commission, the Council, and the European Parliament, which is distinctive of the EU's power sharing,¹⁸ which is embodied in the idea of an institutional balance between these institutions; and lastly, the boundary between the public and the private spheres, as private actors are involved, albeit to different degrees, depending on the particular network, as co-operation partners.

The emergence of governance structures in the EU has been evaluated differently. Praised by some as a better way of achieving a European "unity in diversity", since it is more reflexive and flexible, they also received somewhat sceptical attention, essentially from EU lawyers. It is not surprising that legal scholars have been critical of governance,¹⁹ since the departure from the classic Community Method also comes at the price of a decrease in control (through the Parliament or the European Courts) and less transparency in decision-making, which is seen by some as "integration by stealth"²⁰ or de-formalisation and even the abandonment of law.²¹ The observed tension between traditional legal concepts of (EU) law and

¹⁷ See references in note 15 above.

¹⁸ See Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation*, note 16 above, p 41.

¹⁹ *Ibid.*, p 155 with reference to OMC.

²⁰ See Giandomenico Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth*, (Oxford-New York: Oxford University Press, 2005); Joseph HH Weiler, *The Constitution of Europe: "Do the New Clothes have an Emperor?" and other Essays on European Integration*, (Cambridge, Cambridge University Press, 1999).

²¹ See Christian Joerges, "Integration through De-Legislation? An Irritated Heckler", (2007) 07 *European Governance Papers (EUROGOV)*, available at: <<http://www.connex-network.org/eurogov/pdf/egp-newgov-N-07-03.pdf>>.

governance has stimulated a research agenda concerned with determining the adequate relationship between law and governance.²² This agenda implies a mutual adjustment: law needs to be re-constructed to be able to capture and guide governance normatively, at the same time as governance needs to be constitutionalised through law in order to ensure that it is both legitimate and accountable.

IV. European Constitutionalism between National and Transnational

The ongoing discourse on transnational constitutionalism²³ aims, in the words of Christian Joerges, at finding a “normative response to the migration of law production within constitutional states into institutionally unforeseen arenas on the one hand, and the erosion of nation-state polities through Europeanisation and globalisation processes on the other”.²⁴ Constitutionalism is a vague term, in that it does not, as such, indicate any particular concept, neither of public government, nor of law. Instead, it serves as a frame for discourse, in that it expresses the general idea that government can, and should, be legally limited in its powers, and that its authority depends upon its observing these limitations.²⁵ Consequently, when government turns to governance, the idea of constitutionalism becomes that of *transnational* constitutionalism, as it is concerned with the question of how, legally, to frame the exercise of power beyond the constitutional nation-state. In the relevant context of the EU governance of GMOs, the question, therefore, can be rephrased as how, legally, to frame administrative power exercised through the transnational networks of the EU joint-administration, when decisions on the EU authorisation of biotech products are taken. The term *transnational*, in

²² See Scott & Trubek, “Mind the Gap: Law and New Approaches to Governance in the European Union”, note 15 above; Mark Dawson, *New Governance and the Proceduralisation of European Law: the Case of the Open Method of Co-ordination*, EUI Ph.D theses (Florence, European University Institute, 2009).

²³ See, for example, the contributions in Christian Joerges, Inger Johanne Sand & Gunther Teubner, *Transnational Governance and Constitutionalism*, (Oxford-Portland OR, Hart Publishing, 2004).

²⁴ See Joerges, “Constitutionalism and Transnational Governance: Exploring a Magic Triangle”, in: *Transnational Governance and Constitutionalism*, note 23 above, p 373.

²⁵ See Miguel Poiras Maduro, “How Constitutional can the European Union be? The Tension between Intergovernmentalism and Constitutionalism in the European Union”, Jean Monnet Working Paper 5/04, p 2.

this perspective, indicates the existence of institutional structures which operate between the organisational structures of the national and supranational administrations, and which, at the same time, link up with private actors.²⁶

Existing approaches to constitutionalism beyond the nation state revolve around the (partly conceptual, partly normative) question of whether, and, if so, to what extent, the constitutional nation state can or should serve as a prototype for the modelling of constitutional concepts in post-national constellations; *i.e.*, whether, above all, the constitutional principles of democracy and the rule of law as developed to organise and harness the exercise of political power in modern Western nation states are also transmittable to post-national political constellations, such as the EU.

In this sense, the increasing role of the European parliament evidenced by the gradual expansion of the co-decision procedure (now, the ordinary legislative procedure under Article 294 of the TFEU) to the majority of EU policy areas, the Parliament's politicisation (for example, the political majorities in the Parliament must be reflected when electing the President of the Commission²⁷), and its recent strengthening under the Treaty of Lisbon²⁸ can be understood as a process of constitutionalisation of the EU in the sense of its democratisation and, thus, an approximation to the EU final status as a European majoritarian state.²⁹

On the other hand, the EU still lacks the sovereign element of statehood, *i.e.*, the right to establish the rules of its own territory,³⁰ the

²⁶ For the characterisation of transnational governance as "in-between" structures, see Kjaer, *Between Governing and Governance On the Emergence, Function and Form of Europe's Post-national Constellation*, note 16 above.

²⁷ See Article 17 (7) TEU.

²⁸ Through granting the Parliament more control over the Commission's delegated acts, for example. See Article 290 TFEU.

²⁹ See Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe's Post-national Constellation*, note 16 above; Maduro, "How Constitutional Can the European Union Be? The Tension between Intergovernmentalism and Constitutionalism in the European Union", note 25 above, p 11.

³⁰ See Michael Zürn, "The State in the Post-National Constellation - Societal Denationalization and Multi-Level Governance," *ARENA Working Papers* WP 99/35

so-called *Kompetenz-Kompetenz*. In addition, it is not only the feasibility of an ultimate European state, but also the normative desirability of such a construction that is disputed in view of the EU's self-imposed objective of achieving a "unity in diversity", rather than just unity.³¹ However, a detailed engagement with the debate on Europe's *finalité* goes beyond the scope of this chapter. The point to be made here is that, even though elements of statehood can, indeed, be identified within the EU,³² at most they represent "partial statehood".³³ Thus, a concept of transnational constitutionalism for the EU cannot be rooted in "methodological nationalism", the demise of which has already, for some time now, been powerfully argued within the social and political sciences.³⁴

Having said that, the debate on transnational constitutionalism and on the legitimacy of transnational governance leaves the safe harbour of the constitutional nation state and has to embark on an uncharted sea.³⁵ Or, does it? The main obstacle to the transmission of the traditional nation-state constitutionalism to the European polity seems, indeed, to be the European turn to governance, and thereby, to the organisation of political-administrative power within heterarchical networks such as Comitology, EU agencies, or the OMC. However, it has already been observed that these forms of governance are not actually new, since they have been part of the

(1999), available at: http://www.arena.uio.no/publications/working-papers1999/papers/wp99_35.htm.

³¹ See Christian Joerges, "The Idea of a Three-Dimensional Conflicts Law as Constitutional Form", in: Christian Joerges & Ernst-Ulrich Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, 2nd ed., (Oxford-Portland OR, Hart Publishing, 2010), who rejects a hierarchical European polity because of the complexity and diversity of conflict constellations within EU multi-level governance and the inability and undesirability of resolving them through hierarchy.

³² See Zürn, "The State in the Post-National Constellation - Societal Denationalization and Multi-Level Governance", note 30 above, who argues that statehood can be found beyond the nation state. Similar Kjaer, *Between Governing and Governance On the Emergence, Function and Form of Europe's Post-national Constellation*, note 16 above.

³³ *Ibid.*, p 144.

³⁴ On this term, see Daniel Chernilo, "Social Theory's Methodological Nationalism", (2006) 9 *European Journal of Social Theory*, pp 5-22.

³⁵ See Joerges, "Constitutionalism and Transnational Governance: Exploring a Magic Triangle", note 24 above, p 344.

European integration project for a long period of time.³⁶ What seems to be new is their recognition as permanent structures inherent to the functioning of the EU political and legal order; such recognition automatically entails increased attention being paid to both these governance structures *and* their functioning, which, sometimes, inevitably leads to an amplified perception of their role, when compared to the classical supranational method of governing in the EU.

The insight that the EU, in fact, relies on both forms of political organisation, hierarchy as associated with traditional statehood, on the one hand, and heterarchy as a form of transnational governance, on the other, calls for a combination of both traditional nation-state constitutionalism *and* the complementary concepts of transnational constitutionalism within one concept of European constitutionalism. Poul Kjaer has convincingly argued the need for the development of such a third category of constitutionalism. According to him, the point of departure for the conceptualisation of a *sui generis* European constitutionalism should be the identification of the EU as a hybrid operating between the Member States and the wider world. Consequently, in constitutionalising the EU, it is necessary to reach beyond traditional nation-state constitutionalism, while at the same time acknowledging the differences between the EU and truly global transnational governance.³⁷

The EU has rightly been described as the institutional *avant-garde* of legal globalisation. However, its political organisation is much more complex than that of truly global transnational regimes and of nation states due to its status of being “in-between” both. Thus, an adequate concept of European constitutionalism also needs to take into account

³⁶ Comitology, for example, initiated in the 1960s, see Kjaer, *Between Governing and Governance On the Emergence, Function and Form of Europe's Post-national Constellation*, note 16 above, p 50.

³⁷ See Kjaer, *Between Governing and Governance On the Emergence, Function and Form of Europe's Post-national Constellation*, note 16 above, p 141. See, also, Möllers, “Transnational Governance without a Public Law?”, in: Joerges, Sand & Teubner (eds), *Transnational Governance and Constitutionalism*, note 23 above, pp 333-334, who argues that nation states, and thus concepts of hierarchical government remain relevant for transnational governance, because nation states serve as context providers or interpretive communities, and, even where they do not generate new norms, they are crucial for any form of law production and implementation.

the multi-level governance character of the EU, which indicates the dispersion of decision-making authority, both across different territorial levels *and* to non-state actors.³⁸ Such dispersion implies three things: firstly, conflicts between different territorial sources of authority, for example, between the Member States and the EU or among Member States, are likely to arise; secondly, there are also conflicts between the different state and non-state actors involved in EU decision-making and their respective interests and rationalities (*i.e.*, economic, political, scientific, *etc*); finally, the resolution of the different types of conflicts occurring within the EU's multi-level system follows the logic of pluralism,³⁹ rather than a top-down ordering of one source of authority over another.⁴⁰ This last point follows from the observation that the EU represents, at most, only partial statehood (see above) as it shares its sovereignty with the Member States and their political systems. It also follows from the EU's self-imposed objective, and, in fact, main benchmark of legitimacy, of representing "unity in diversity".

V. European Constitutionalism as Three-dimensional Conflicts Law

A constitutional framework which reflects the hybrid structure of the EU between governing and governance while at the same time offering legal mechanisms for the reconciliation of multi-level governance conflicts in a pluralistic manner is currently being developed as part of the research agenda on a three-dimensional European conflicts law. This concept, which has its origin in the

³⁸ Ian Bache & Matthew V Flinders (eds), *Multi-level Governance*, (Oxford-New York, Oxford University Press, 2004), p 4; see, also, Gary Marks, Liesbet Hooghe & Kermit Blank, "European Integration from the 1980s: State-Centric versus Multi-level Governance", (1996) 34 *Journal of Common Market Studies*, p 341; for a critical overview on the discussion within political sciences, see Stephen George, "Multi-level Governance and the European Union", in: Bache & Flinders (eds), *Multi-level Governance*, this note above, p 107.

³⁹ On constitutional pluralism see Miguel Poiares Maduro, "Interpreting European Law - Judicial Adjudication in a Context of Constitutional Pluralism", (2008) 1 *European Journal of Legal Studies*, p 1.

⁴⁰ See Christian Joerges, "Integration through Conflicts Law: On the Defence of the European Project by means of Alternative Conceptualisation of Legal Constitutionalisation", in: Rainer Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, ARENA Report No 1/2009, pp 531-561, at 549.

discipline of international private law, has been recently re-conceptualised by Joerges as a constitutional form for the EU.⁴¹

The originality of this concept lies in its quality of being simultaneously both modest and ambitious in its aspiration to preserve the relevance and capacity of law to structure post-national governance arrangements. The modesty of Joerges' version of conflict laws lies in its "being in touch with the reality" of European legal and political developments. In fact, for Joerges, EU law (for example, its principles of mutual recognition, non-discrimination, proportionality, *etc*) already represents a new species of conflict law.⁴² As Kjaer puts it, Joerges' conflicts law's:

(...) central strength is that it does not deduct a normative vision for Europe from a purely analytical ideal model concerning how Europe ought to be. Instead, it departs from an inductive functional perspective the main focus of which is the pragmatic solution of common problems. It provides a normative justification for the processes of conflict resolution which evolves in Europe on a day-to-day basis.⁴³

⁴¹ The conceptual reach of this model of conflicts law, however, goes beyond the EU and encompasses legal constitutionalisation processes in post-national constellations more generally; see Christian Joerges, *Perspektiven einer kollisionsrechtlichen Verfassung transnationaler Märkte*, TranState Arbeitspapier, No. 146, 2011; Christian Joerges, "The Idea of a Three-Dimensional Conflicts Law as Constitutional Form", in: Joerges & Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, 2nd ed., note 31 above, Joerges, "Integration through Conflicts Law: On the Defence of the European Project by means of Alternative Conceptualisation of Legal Constitutionalisation", note 40 above, Christian Joerges, "Rethinking European Law Supremacy: A Plea for a Supranational Conflict of Laws", in: Beate Kohler-Koch & Berthold Rittberger (eds), *Debating the Democratic Legitimacy of the European Union*, (Lanham MD, Rowman & Littlefield, 2007), p 311; see, also, contributions in Rainer Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, note 40 above (and Antwerp, Intersentia, 2010), and similar conceptualisation by Kjaer, *Between Governing and Governance On the Emergence, Function and Form of Europe's Post-national Constellation*, note 16 above, p 141.

⁴² See Christian Joerges, "Rethinking European Law's Supremacy", EUI Working Paper Law No. 2005/12 (2005).

⁴³ Kjaer, *Between Governing and Governance On the Emergence, Function and Form of Europe's Post-national Constellation*, note 16 above, p 149.

The ambition of a European conflicts law, therefore, is *not* to create a grand theory or normative vision of Europe's *finalité*. It is, nonetheless, highly ambitious in that it claims to be able legally to organise diversity in the EU, while, at the same time, securing the continuation of the European integration process. In the words of Joerges, European conflicts law:

strives for a conceptualisation of the *unitas in diversitas* formula; it seeks to conceptualise Europeanisation as a process, a discovery procedure of practice in which law generates and supervises public power.⁴⁴

Conflicts law, therefore, should be understood as an inherently pluralistic project.⁴⁵ Joerges insists on the need to ensure that different constituencies continue to co-exist within the EU. Hence, they need to resolve the problems and conflicts caused by their mutual interdependency through rules and principles which are acceptable to all, rather than through the hierarchical supremacy-rule imposed by a central European authority. Joerges, therefore, pleads for a deliberative re-interpretation of the EU law's supremacy.⁴⁶ The way to accomplish this, he argues, is the proceduralisation of the category of law for the sake of preserving the deliberative nature of legal rules and principles. Thus, Joerges' version of conflicts law is both inspired by, and draws upon, the Habermasian argument for the procedural paradigm of law.⁴⁷

In more concrete terms, Joerges elaborates three dimensions of his concept, each one considering a distinct problem, and, hence, a distinct function of EU law. The first dimension, *Conflicts Law I*, deals with the relationship between the legal orders of the EU and the Member States, thus responding to vertical and horizontal legal

⁴⁴ See Joerges, "Rethinking European Law's Supremacy", note 42 above, p 27, here, still with a reference to deliberative supranationalism, which can be considered the conceptual forerunner of his conflicts law.

⁴⁵ Although its relationship to the discussion on legal pluralism is not clear. On legal pluralism, see Maduro, "Interpreting European Law- Judicial Adjudication in a Context of Constitutional Pluralism", note 39 above.

⁴⁶ See Joerges, "Rethinking European Law's Supremacy", note 42 above, p 18.

⁴⁷ Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, (Frankfurt aM, Suhrkamp Verlag, 1992).

conflicts arising both between the EU and the Member States *and* among Member States through “horizontal constitutionalisation”.⁴⁸ Before offering his view of how such conflicts should be resolved, however, Joerges makes a normative argument in order to ascertain the democratic legitimacy of EU law to engage in such activity in the first place. *En passant*, he turns upside-down the debate on the democratic deficit of the EU by stressing the democracy deficit of the nation states, which the establishment of the EU is helping to correct. The failure of national democracies lies in their inability to avoid the extra-territorial effects which their democratic decisions have upon those living outside their national constituencies. Globalisation entails the increased economic, social, and environmental interdependence between states. As a consequence, national economic, financial, and environmental decisions, for example, have transboundary effects which require mechanisms of external accountability⁴⁹ on the part of nation states towards their neighbours. One such mechanism is supranationalism; the constitutionalisation of the EU, therefore, is complementary to nation-state constitutionalism, as it helps to reduce the negative externalities arising from the operations of national political systems.⁵⁰

Subsequently, Joerges argues that horizontal constitutionalisation as a response to legal conflicts in the EU requires the development of procedural “meta-norms”, which all parties to the conflict can accept, a task which he mainly seems to ascribe to the European Courts as the adjudicators of conflicts. By presenting, among other, the example

⁴⁸ See Joerges, “The Idea of a Three-Dimensional Conflicts Law as Constitutional Form”, note 31 above, p 15 with a reference to the notion of “Bund” and the similarities between “Bund” conceptualisations of the EU with conflicts law.

⁴⁹ See Robert O Keohane & Ruth W Grant, “Accountability and Abuses of Power in World Politics”, (2005) 99*American Political Science Review*, p 29.

⁵⁰ See account in Kjaer, *Between Governing and Governance On the Emergence, Function and Form of Europe's Post-national Constellation*, note 16 above, p 148. Joerges developed this argument on several occasions. See Joerges, “Rethinking European Law's Supremacy”, note 42 above, p 17; The latest reformulation can be found in Joerges, “The Idea of a Three-Dimensional Conflicts Law as Constitutional Form”, note 31 above, where he states: “the debate on Europe's democracy failure and the constitutionalisation of the European polity should be transformed fundamentally. It should start from the insight that democracy as nation states organize it is necessarily deficient, whereas European law has the potential to cure such deficits. Europe is then not the problem but the potential cure, a precondition for legitimate governance.”

of the *Cassis de Dijon* jurisprudence on mutual recognition of technical standards, Joerges illustrates that such conflict-mediating “meta-norms” are already part of European law. Their main objective is twofold: to ensure that the legitimacy of different constituencies within the EU is respected, while at the same time ensuring the external accountability of the Member States; in other words, the compatibility of national objectives with the overall interest of the EU as a Community.⁵¹

The second and third dimensions of Joerges’ conflicts law deal with the constitutionalisation of Europe’s transnational governance. He distinguishes between the governance through administrative networks, such as comitology, agencies and the OMC, on the one hand (*Conflicts Law II*), and governance by private actors, such as under the *new approach for harmonisation and standards*⁵² in the EU, on the other (*Conflicts Law III*). While the function of EU law under *Conflicts Law I* is to respond to the inter-dependency between EU Member States and to control the external effects of national decision-making, the other two dimensions respond to the inability of nation states to accomplish regulatory objectives autonomously and in isolation.⁵³ The implementation of common European regulatory programmes as transnational co-operation (either between EU and national administrations or between private actors) poses normative challenges of its own. The function of conflicts law in the last two dimensions, therefore, is to solve conflicts between the different interests and between the different rationalities of the actors involved in transnational governance, such as between the economic, scientific, environmental and other rationalities. Here, conflicts law organises diversity by constitutionalising governance through procedural law,⁵⁴ in order to ensure its accountability and law-mediated legitimacy.

⁵¹ See, for example, Joerges, “Rethinking European Law’s Supremacy”, note 42 above, pp 18-19.

⁵² See Council Resolution of 7 May 1985 on a New Approach to technical harmonisation and standards, OJ (1985) C 136/1.

⁵³ See Joerges, “The Idea of a Three-Dimensional Conflicts Law as Constitutional Form”, note 31 above.

⁵⁴ See Joerges, “Rethinking European Law’s Supremacy”, note 42 above, p 27.

VI. Probing Conflicts Law in EU Risk Governance

European risk regulation presents an interesting field in which to study the implementation of conflicts law approaches in EU law. Not only is a growing body of EU law at present concerned with risk regulation,⁵⁵ but the social complexity of risk regulation and its inherent problems of risk evaluation, technocracy, expert involvement, scientific uncertainty, *etc.*, also seem to have significantly stimulated the turn to network governance in the EU. The growing expansion of EU policies into areas of risk regulation, for example, food safety, environment, and general product safety, has required the mobilisation of decision-making and implementation resources from outside the existing EU institutions. Risk regulation, therefore, is one of the main causes for decisional outsourcing,⁵⁶ and thus reflects the growing power of administrative governance in the EU. Holding this power to account through legal mechanisms is one of the key issues within the debate on transnational constitutionalism.

A particularly challenging example of European risk regulation at present is the authorisation procedure for genetically-modified products (above all, food and agricultural plants). It is politically a highly-contested field which is characterised by a variety of rationality conflicts and conflicts between different legal authorities (see next sub-section). The search for pluralistic legal solutions to these conflicts seems to be particularly salient for the legitimacy of EU law, given the intrinsic difficulty to achieve this. Hence, the case study of GMO regulation presents a particularly challenging, and therefore, presumably, best test upon which to verify the viability of conflicts law to re-conceptualise EU law as embodying unity in diversity.

VI.1. The Conflicts of EU Governance of GMOs

Agricultural biotechnology is a polarising topic in itself. Thus, conflicts involved in GMO regulation can be said to begin with the already divergent views over the benefits and risks of employing this

⁵⁵ See Alberto Alemanno, "The Birth of the European Journal of Risk Regulation", (2010) 1 *European Journal of Risk Regulation*, p 1.

⁵⁶ See, on decisional outsourcing, Kjaer, *Between Governing and Governance On the Emergence, Function and Form of Europe's Post-national Constellation*, note 16 above, p 46.

controversial technology.⁵⁷ The polarisation continues also at the level of the regulatory discussion across countries and continents,⁵⁸ about how, legally, to design adequate regulatory frameworks, on the one hand, and how to take “good” risk decisions on GMOs in the implementation of such frameworks, on the other. Within the EU, the academic discussion dealing with these questions can be summarised as revolving mainly around four inter-connected conflict constellations with each offering a different perspective on the GMO *problématique*.

VI.1.a The Conflict between Science and Democracy

First and foremost, the current debate is dominated by what has been described as the “science/democracy” dichotomy of European risk regulation.⁵⁹ This dichotomy points to the existence of two conflicting rationalities when it comes to determining the basis for the EU authorisation decisions on GMOs: a technocratic and scientific rationality, on the one hand, and a political rationality, on the other. As a consequence, the relationship between expertise and the public, between technocratic and popular decision-making, is perceived as a significant challenge in the regulation of agricultural biotechnology.⁶⁰

⁵⁷ The relevant debates on the pros and cons of agricultural biotechnology have already been presented extensively in scholarly literature; see, above all, Mark A Pollack & Gregory C Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods*, (Oxford-New York, Oxford University Press, 2009), p 34; Maria Lee, *EU Regulation of GMOs: Law and Decision Making for a New Technology*, (Cheltenham-Northampton MA, Edward Elgar Publishing, 2008), p 22.

⁵⁸ On transatlantic differences in regulatory approaches and regulatory co-operation in the area of GMOs see Pollack & Shaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods*, note 57 above.

⁵⁹ See a critical presentation of this dichotomy in Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism*, (Oxford-Portland OR, Hart Publishing, 2007).

⁶⁰ See Lee, *EU Regulation of GMOs: Law and Decision Making for a New Technology*, note 57 above, p 41; in a similar vein, see Zeynep K Forsman, “Community Regulation of Genetically Modified Organisms: a Difficult Relationship Between Law and Science”, (2004) 10 *European Law Journal*, pp 580-594; Theofanis Christoforou, “The Regulation of Genetically Modified Organisms in the European Union: The Interplay of Science, Law and Politics”, (2004) 41 *Common Market Law Review*, p 637; Kritikos, “Traditional Risk Analysis and Releases of GMOs into the European Union: Space for Non-Scientific Factors?”, (2009) 34 *European Law Review*, p 405.

This discussion mainly concerns the structuring of the process of risk evaluation (or risk analysis⁶¹), which precedes the final authorisation decision on a genetically-modified product at EU level. The science/democracy dichotomy can be found along the different stages of this process (*i.e.*, risk assessment and risk management). It encompasses a complex set of partially intertwined questions relating to the nature of the scientific process and the contested notion of “sound science”; the epistemic and epistemological problems involved in, and the value-laden nature of, the scientific assessment of what is referred to as “uncertain risks”;⁶² the role of the risk management and its prerogative to deviate from scientific reasoning and to consider further socio-economic, ethical, or political factors. In a nutshell, the science/democracy dichotomy represents the somewhat intractable contention over which rationality should be pivotal in deciding upon the use of agricultural biotechnology (as upon the use of new technologies in general), to wit, the presumably universal logic of scientists or the political choice of democratic constituencies.

This contention is intractable because it cannot ultimately be resolved in favour of one or the other rationality. Arguably, nobody could possibly want public regulators totally to disregard either science or the political will of electorates. Instead, the conflict at stake is more nuanced, because it is about the relative authority of science and politics respectively. This is where law becomes involved, which is expected to frame the relationship between these two rationalities within a legal framework designed, in the case of GMOs, to balance risk control with other political and social considerations.

What is more, the science/democracy dichotomy is also misleading in so far as it indicates the conflict between only two rationalities involved in European authorisation of GMOs. Instead, the process of risk evaluation has to consider the interplay between multiple rationalities and, thus, the different societal systems which have a stake in GMO regulation: such as the environment, public health,

⁶¹ See definition in Article 3 (10) of Regulation 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority, and laying down procedures in matters of food safety, OJ (2002) L 31/3.

⁶² See Ellen Vos & Michelle Everson (eds), *Uncertain Risks Regulated*, (Abingdon-New York, Routledge-Cavendish, 2009).

biodiversity, economy and trade, and ethics. Appropriate legal constitutionalisation of the conflicts involved in GMO governance, therefore, needs to consider the multiple tensions arising from the participation in the risk governance of different functionally-differentiated systems.⁶³

VI.1.b. The Conflict between Different Paradigms of Administrative Constitutionalism

The second conflict constellation shifts the analytical focus towards yet another aspect of European GMO regulation - namely, the administrative nature of authorising GMOs for the common market. As risk decision-making in the EU is mainly the task of the European joint-administration (see above), which is authorised and structured through (administrative) law, legal concepts and models of public administration necessarily influence notions of “good” risk regulation. At the same time, within the plural and transnational structures of the EU joint-administration, various legal cultures and, hence, various concepts of public administration, interact and potentially conflict with each other.

In this regard, Elizabeth Fisher provides an astute account of the co-dependent relationship between the notions of risk regulation (for example, science, risk, *etc*) and administrative constitutionalism. In doing so, she transfers the idea of constitutionalism (see above) to the institution of public administration. Administrative constitutionalism, therefore, represents a normative discourse about the role and nature of public administration, and the different concepts of how it should be legally constituted, legitimised and held to account.⁶⁴ Just like constitutionalism, administrative constitutionalism, therefore, does not, by itself, transmit a particular concept of how to constitutionalise public administration. Instead, it provides an arena for contestation between different competing concepts.

With regard to risk regulation, Fisher essentially identifies two competing paradigms of administrative constitutionalism: the

⁶³ See Poul F Kjaer, “A Hybrid within a Hybrid: Contextualising REACH in the Process of European Integration and Constitutionalisation”, (2010) 4 *European Journal of Risk Regulation*, p 383.

⁶⁴ See Fisher, *Risk Regulation and Administrative Constitutionalism*, note 59 above, p 22.

rational-instrumental paradigm and the deliberative-constitutive paradigm.⁶⁵ While the rational-instrumental paradigm perceives public administration as a hierarchically-organised instrument of the legislature, as in a Weberian model of bureaucracy, the deliberative-constitutive paradigm grants it more independence to address the factual and normative complexities of technological risk evaluation as a political institution. This has consequences for the further conceptualisation of the notions of risk, risk evaluation, administrative discretion, judicial review, *etc.*, respectively. The rational-instrumental paradigm is based upon an understanding of risk as manageable, and of science as both objective and able to address scientific uncertainty. The deliberative-constitutive paradigm, in contrast, pre-supposes a more complex socio-political notion of risk, and recognises the epistemological problems of risk evaluation.

The merit of Fisher's work on administrative constitutionalism in risk regulation is the recognition of the importance of legal discourse and law for the framing of disputed concepts of risk, science, democracy, *etc.* It brings law back into the risk discourse by stressing the importance of legal normative choices in risk decision-making. According to Fisher:

Law is not just another site for carrying on a scientific or political debate. Legal disputes over technological risk decision-making are carried on in legal terms, and law has its own internal logic and philosophy, which will influence these debates. Legal imperatives will shape understandings of the nature and role of public administration and the nature of the problems that public administration is dealing with. At the same time understandings of public administration, and the problems they deal with, will shape the law.⁶⁶

The last sentence of this citation, however, indicates that the argument goes both ways. Law, public administration, and the problems that they deal with, namely, risk, science, and uncertainty, are mutually constructed. Fisher recognises this by referring to the symbiotic relationship and, thus, the co-production of notions of law,

⁶⁵ *Ibid.*, p 26.

⁶⁶ *Ibid.*, p 23.

public administration and risk evaluation.⁶⁷ As a consequence, this requires an exercise of mutual (de-) construction of different, not just the legal, discourses. Law often over-simplifies notions in order to adjust them to its own rationality, thus, at the extreme, running the risk of becoming inadequate to guide social practices legally. An adequate constitutionalisation of European governance of GMOs, therefore, will need to embrace the inter-disciplinary nature of risk regulation. Law matters, especially for lawyers. But its role is confined to the legal framing and mediation of conflicts between different social rationalities, which it cannot simply substitute by the legal rationality.

Despite this criticism, Fisher's paradigms of administrative constitutionalism are valuable, in so far as they draw attention to the presence and relevance of legal normative conflicts, and choices in risk regulation. Most importantly, they indicate that European risk governance, such as in the case of GMOs, operates within a context of plural legal (administrative) cultures, and that solutions to problems cannot be found through the imposition of uniform legal concepts.⁶⁸ Thus, Fisher's administrative constitutionalism fits in with the idea of European constitutionalism through conflicts law (see above), the viability of which, for the EU regulation of GMOs, will be further explored.

VI.1.c. The Conflict between the EU and the Member States

The third conflict constellation to be presented can best be characterised as a type of multi-level conflict between actors at different territorial levels of European risk governance.⁶⁹ It mainly refers to the relationship between the supranational EU authority and

⁶⁷ *Ibid.*, p 25.

⁶⁸ *Ibid.*, p 240.

⁶⁹ See, on this type of conflicts in the GMO context, Sara Poli, "The EU Risk Management of Genetically Modified Organisms and the Commission's Defence Strategy in the Biotech Dispute: Are They Inconsistent?", in: Francesco Francioni & Tullio Scovazzi (eds), *Biotechnology and International Law*, (Oxford-Portland OR, Hart Publishing, 2006), p 388; Joanne Scott, "European Regulation of GMOs: Thinking about 'Judicial Review' in the WTO", (2004) *Jean Monnet Working Paper* 04/04; Mark A Pollack & Gregory C Shaffer, "Biotechnology Policy: Between National Fears and Global Disciplines", in: Helen Wallace, William Wallace & Mark A Pollack (eds), *Policy-making in the European Union*, (Oxford-New York, Oxford University Press, 2005).

the authorities of the Member States, when it comes to the implementation of the EU-wide authorisation of a GMO through cultivation in different national territories.⁷⁰

Ever since the restarting of the EU authorisations after the *de facto* moratorium between 1998 and 2004,⁷¹ the implementation of EU authorisations for biotech products has been marked by the continuing national non-compliance. Member States are invoking so-called safeguard measures on genetically-modified plants in order to prevent the implementation of EU decisions. The national justifications for these *de facto* national bans on GMO cultivation often refer to the precautionary principle, thus, on the face of it, making recourse to scientific rationality and indications of the potential risks arising from GMO cultivation for both health and the environment. At the same time, the precautionary rhetoric is deeply intertwined with political, socio-economic and ethical arguments, such as the interference of GMOs with ecological agriculture or the negative attitudes towards GMOs among the national constituencies. Such conflicts created by non-compliance can best be described as conflicts about the allocation, within the multi-level governance of GMOs, of the final authority to decide upon the use of, above all, genetically-engineered plants in European agriculture.⁷²

The problems described in relation with the science/democracy dichotomy (see above) perpetuate themselves also within this type of multi-level conflict. So far, EU law providing for derogations from central EU decisions on GMOs, *i.e.*, former Article 95 EC-Treaty (now Article 114 TFEU) and special provisions for national “safeguard”

⁷⁰ The continued opposition of a majority of the Member States in the Council to the Commission proposals to authorise GMOs in the first place, thus at the comitology stage, could also be considered as an expression of the multi-level conflicts as discussed here. The double role of the Member States in this procedure blurs the boundaries in this respect. However, we prefer to include this *problématique* under the first conflict constellation described above – the science/democracy dichotomy – because in comitology the Member States act in their capacity of Council members, therefore, expressing supranational authority.

⁷¹ See, for a description of developments, Pollack & Shaffer, *When Cooperation Fails: the International Law and Politics of Genetically Modified Foods*, note 57 above, p 53.

⁷² See Lee, *EU Regulation of GMOs: Law and Decision Making for a New Technology*, note 57 above, p 98.

measures in EU secondary law, has been interpreted in very narrow terms requiring Member States to present new scientific information evidencing real, and not merely hypothetical, risks stemming from the GMO product to be restricted within a national territory.⁷³ At the same time, the efforts of the Commission to enforce national compliance in the absence of such clear scientific evidence have been seriously undermined by the politically-motivated rejection, on the part of the Member States in the Council, of several Commission draft decisions aimed at annulling national safeguard measures.⁷⁴

VI.1.d. The Conflict between the EU and the WTO

The fourth and final conflict constellation leads us beyond EU governance to the level of the World Trade Organisation (WTO). European GMO regulation is often discussed against the background of the potential conflicts which arise between the EU regulatory approach towards agricultural biotechnology and the objective of free international trade.⁷⁵ Such conflicts arise due to divergent, and often less strict, regulatory schemes on GMOs in third countries which are EU trading partners.

The recent *EC-Biotech* case⁷⁶ at the WTO clearly illustrates that trade conflicts can have a global scale, since it involved several important trading nations on both sides of the Atlantic, namely, the United States, Canada and Argentina, all of which took proceedings against the EU. In WTO disputes of this kind, European legislation and administration is under legal scrutiny by a global authority, the WTO adjudicating bodies, which are established and recognised through

⁷³ Poli, "The EU Risk Management of Genetically Modified Organisms and the Commission's Defence Strategy in the Biotech Dispute: Are They Inconsistent?", note 69 above; Lee, *EU Regulation of GMOs: Law and Decision Making for a New Technology*, note 57 above, p 89.

⁷⁴ See Lee, *EU Regulation of GMOs: Law and Decision Making for a New Technology*, note 57 above, p 89.

⁷⁵ See Pollack and Shaffer, *When Cooperation Fails: the International Law and Politics of Genetically Modified Foods*, note 57 above; Poli, "The EU Risk Management of Genetically Modified Organisms and the Commission's Defence Strategy in the Biotech Dispute: Are They Inconsistent?", note 69 above; Joanne Scott, "European Regulation of GMOs: Thinking about 'Judicial Review' in the WTO", note 69 above; David Winickoff *et al.*, "Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law", (2005) 30 *The Yale Journal of International Law*, p 81.

⁷⁶ See Panel Report, *EC - Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291, WT/DS292, WT/DS293, adopted 26 September 2006.

international law. In the panel report concluding the EC-Biotech proceedings, the panel scrutinised, and subsequently rejected, the compliance of EU legislation on GMOs as well as its implementing practices with the WTO free trade agreements, especially the Agreement on Sanitary and Phytosanitary Measures (SPS). Whilst the relationship between the WTO and the EU legal orders is not marked by the same degree of legal hierarchy as that between the EU and the legal orders of the Member States - *i.e.*, as a signatory party to the WTO, the EU is bound by its obligations, but there is no direct effect of WTO law or rulings in EU law⁷⁷ - WTO adjudication represents an influential parameter in internal EU decision-making and regulation.⁷⁸ The WTO legal order can, therefore, be considered as one layer of a global multi-level-governance arrangement, within which European GMO regulation is operating, and which implies the dispersed allocation of decision-making authority across the national (including regional), supranational, and global (WTO) levels.⁷⁹ Hence, this fourth type of conflict between the EU and the WTO is structurally similar to the conflict between the EU and the Member State authorities as described above.

There are, of course, crucial institutional differences between the supranational EU system, which is marked by a high degree of political integration, and the WTO system, which is a global governance regime serving the abolition of unjustified barriers to free trade. However, in particular, the adjudication in the areas of the SPS Agreement and the Technical Barriers to Trade Agreement (TBT) can be described as fulfilling a regulatory function. WTO law, under these two agreements, requires non-tariff trade barriers, in the form of domestic regulation in the areas of product safety and public health, to be objectively justifiable in the light of a universal scientific

⁷⁷ See ECJ Case C-149/96, *Portugal v Council* [1999] ECR I-08395, at paras. 34-49; ECJ Case-377/02, *van Parys v Belgische Interventie Restitutiebureau*, available at: <http://curia.eu.int/en/content/juris/index_form.htm>, at paras. 38-54.

⁷⁸ See Gráinne de Búrca & Joanne Scott, "The Impact of the WTO on EU Decision-making", in: *idem* (eds), *The EU and the WTO: Legal and Constitutional Issues*, (Oxford-Portland OR, Hart Publishing, 2001), p 1; Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism*, (Oxford-Portland OR, Hart Publishing, 2007), p 224.

⁷⁹ For a similar analysis see Joerges, "The Idea of a Three-Dimensional Conflicts Law", note 31 above, and Fisher, *Risk Regulation and Administrative Constitutionalism*, note 59 above.

rationality,⁸⁰ which goes beyond the original non-discrimination test of traditional international trade law.⁸¹ In the words of Joerges: “(t)he SPS and the TBT Agreements are institutionalised responses to health and safety concerns...”

They deal with the soundness of domestic regulatory schemes by authoritatively-defining the legitimate concepts of, in the case of GMOs, risk standard-setting. As a consequence, they deal with issues of administrative constitutionalism.⁸²

In the GMO case, the European precautionary approach to risk regulation continues to be a bone of contestation within the WTO trade regime. The conflicts adjudicated within the WTO are ultimately conflicts between different trade partners litigating about the effects of certain domestic regulatory schemes on international trade. Thus, the WTO can be described as fulfilling a similar compensatory function of holding states to account for the external effects of their domestic policies, in the same way in which the EU does (see Section V above). At the same time, when WTO dispute settlement bodies authoritatively decide upon the WTO compliance with domestic regulations, they also interfere with the internal decision-making of democratic constituencies. In the *EC-Biotech* case, this has led to a clash between the global (WTO) and the European authorities over the question of how to define legitimate concepts of risk standard-setting, including the precautionary principle.⁸³ Thus, this fourth type of conflict involved in the EU regulation of GMOs refers to the debate on the “constitutional” status of the WTO, and its limits to challenge non-discriminatory domestic regulation, thus,

⁸⁰ This applies to a higher degree to the SPS than to the TBT Agreement, because SPS measures shall be based upon a scientific “risk assessment”; see Article 5.1 of the SPS Agreement. See, for an overview, Gabrielle Marceau & Joel P Trachtman, “The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade - A Map of the World Trade Organization Law of Domestic Regulation of Goods”, (2002) 36 *Journal of World Trade*, p 811.

⁸¹ See the National Treatment Principle of the General Agreement on Tariffs and Trade 1947, Article III.

⁸² See Fisher, *Risk Regulation and Administrative Constitutionalism*, note 59 above, p 166, at 175).

⁸³ See James Flett, “If in Doubt, Leave it Out? EU Precaution in WTO Regulatory Space”, (2010) 1 *European Journal of Risk Regulation*, p 20.

precluding democratic policy choices at national and supranational levels.⁸⁴

It is argued that the legal resolution of trade conflicts between the EU and the trading nations represented in the WTO needs to follow a similar pluralistic logic to the legal resolution of conflicts between the EU and the Member States when it comes to the authorisation of GMOs. Thus, the parties to WTO disputes need to resolve the problems and conflicts caused by their mutual inter-dependency as global trading partners through rules and principles which are acceptable to all ("meta-norms"), rather than through the hierarchical imposition of unitary solutions by a central global trade authority. With regard to the SPS Agreement, Joerges states that:

it does not invoke a supranational legislative authority. It provides a framework within which WTO Members may seek a resolution of conflicts arising from the extra-territorial impact of their regulatory policies.⁸⁵

Because of the influence of WTO law on the EU governance of GMOs and its various conflicts, attempts to constitutionalise this area legally will need to encompass and probe this global dimension of conflicts law within the framework of European constitutionalism.

VI.2. Current Reform of the EU Framework for GMO Authorisation – First Dimension of European Conflicts law in Action?

The persistence of the above-described conflicts together with the weakness of the supranational authority to implement EU law in this area have motivated calls for more national autonomy in the authorisation of, above all, genetically-engineered plants. The reform debate initiated under the French EU presidency in 2008 seems to have further strengthened those Member States opposed to GMO cultivation in their territories. The second Barroso Commission, at the beginning of 2010, announced plans, legally, to ensure more national autonomy. In July 2010, the European Commission presented a

⁸⁴ See Lukasz Gruszczynski, *Regulating Health and Environmental Risks under WTO Law: A Critical Analysis of the SPS Agreement*, (Oxford-New York, Oxford University Press, 2010).

⁸⁵ Joerges, "The Idea of a Three-Dimensional Conflicts Law", note 31 above, p 491.

reform proposal for the GMO legal framework.⁸⁶ It adopted a legislative proposal⁸⁷ to amend Directive 2001/18⁸⁸ on the Deliberate Release into the Environment of GMOs (Deliberate Release Directive) in order to grant Member States more freedom to restrict or ban the cultivation of GMOs on their territory. At the same time, the Commission adopted a new Recommendation⁸⁹ concerning national strategies on the co-existence of GM crops with conventional or organic crops. With this initiative, the Commission seeks to improve the situation of GMO authorisations in the EU by striking a compromise between the political opposition in the Member States and the requirements of the internal market. The new “recipe” of the Commission is flexibility and subsidiarity,⁹⁰ and it represents a substantial policy turn compared to previous Commission policy towards national restrictions on GMO cultivation.

The Commission proposal to amend the Deliberate Release Directive with regard to the possibility for the Member States to restrict or to prohibit the cultivation of GMOs on their territory of July 2010⁹¹ represents the latest attempt of the Commission to remedy the “lock-in” situation in EU decision-making on GMO authorisations. The proposal aims at introducing a new Article 26b of the Directive containing an “opt-out” clause, which, under certain conditions, would allow a Member State to restrict or to prohibit the cultivation of GMOs previously authorised for cultivation at EU level (under the Deliberate Release Directive or Regulation 1829/2003) in all or part of

⁸⁶ See, for comments on this proposal, “Symposium on the EU’s GMO Reform”, (2010) 4 *European Journal of Risk Regulation*, pp 339-369.

⁸⁷ See Proposal for a Regulation of the European Parliament and of the Council amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of GMOs in their territory, COM (2010) 375 final of 13 July 2010, The proposal is currently awaiting the 1st reading in the European Parliament as part of the ordinary legislative procedure (former co-decision) according to Article 294 TFEU.

⁸⁸ Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically-modified organisms, OJ 2001 L 106/1.

⁸⁹ See Commission Recommendation on guidelines for the development of national co-existence measures to avoid the unintended presence of GMOs in conventional and organic crops, OJ 2010 C 200/1.

⁹⁰ See Commission proposal, note 87 above, p 3, 8 & 11.

⁹¹ COM (2010) 375 final.

its territory. The aim of this proposal, according to the Commission, is to grant Member States more flexibility to decide on GMO cultivation after it has been authorised at EU level, and, thereby, “to address specific national or local aspects raised by the cultivation of GMOs”.⁹² In return, the Commission hopes for a facilitation of, and more clarity in, decision-making in future authorisation procedures at EU level. The new Article 26b states:

Member States may adopt measures restricting or prohibiting the cultivation of all or particular GMOs authorised in accordance with Part C of this Directive or Regulation (EC) No 1829/2003, and consisting of genetically modified varieties placed on the market in accordance with relevant EU legislation on the marketing of seed and plant propagating material, in all or part of their territory, provided that:

- (a) those measures are based on grounds other than those related to the assessment of the adverse effect on health and environment which might arise from the deliberate release or the placing on the market of GMOs; and,
- (b) that they are in conformity with the Treaties.

By way of derogation to Directive 98/34/EC, Member States that intend to adopt reasoned measures under this Article shall communicate them to the other Member States and to the Commission, one month prior to their adoption for information purposes.

Article 26b stipulates mainly two substantial conditions⁹³ for the lawful adoption of restrictive “opt-out” measures by a Member State.⁹⁴ Firstly, the national measure must be based upon grounds

⁹² See Commission proposal, note 87 above, p 3 & 6.

⁹³ A further procedural requirement for the application of this “opt-out” clause would be the notification of the planned national measure to the other member states and the Commission one month prior to its adoption. In addition, the formulation “reasoned measures” in the last paragraph of the clause indicates a reason-giving requirement for the Member State.

⁹⁴ Note that this provision does not as such provide the freedom to regulate GMO cultivation at national rather than at EU level. The EU authorisation procedures as set out in the Deliberate Release Directive with regard to the cultivation of GM crops and in the Regulation 1829/2003 with regard to the cultivation of GMOs to be marketed in or as food are, at least formally, not affected by this amendment. Another implied condition for recourse to Article 26b, therefore, would be that the GMO in question has already been authorised at EU level in accordance with the

other than those covered by the environmental and health risk assessment carried out in the EU authorisation process. And secondly, it must be in conformity with the general law of the EU Treaties. The first of these conditions, concerning “*grounds other than those related to the assessment of the adverse effect on health and environment*”, is likely to refer to the so-called socio-economic aspects of GMO cultivation, although this notion has not yet been sufficiently clarified.⁹⁵ There are indications that such grounds can be somewhat diverse, varying from political or economic motivations such as meeting the demand of GM-free markets to biodiversity, or even ethical considerations.⁹⁶ However, the text of the Commission proposal does not provide for sufficient clarity in this regard. What seems to be fairly certain, however, is that the Commission aims at providing for a further, more extensive option than those already foreseen in EU law⁹⁷ for Member States to deviate from EU authorisations on GMO cultivation on non-scientific grounds. This supports an understanding of the recent Commission proposal as aiming to reduce the scope of EU harmonisation of the current legal framework on GMO cultivation.

Seen from a conflicts-law perspective, the recent Commission reform proposal represents an interesting new development in the EU policy on agricultural biotechnology. It could arguably be seen as an attempt to resolve the above-described multilevel conflict of authorities in GMO authorisations. As described above, the first dimension of a conflict laws approach as developed by Joerges deals precisely with this type of conflict between the EU and the Member State legal orders. A response to such conflicts requires the

Deliberate Release Directive or Regulation 1829/2003. Otherwise, of course, the free circulation of the GMO on the EU market would be unlawful as such due to the general prior-authorisation requirement for all GMOs to be marketed in the EU.

⁹⁵ See the Commission report on socio-economic aspects of GMO cultivation expected in the end of 2010.

⁹⁶ See the reference of the Commission to the experience with previous national bans on GMOs in its Communication on the freedom for Member States to decide on the cultivation of genetically-modified crops, COM (2010) 380 final, p 6 adopted together with the legislative proposal to amend the Deliberate Release Directive and the new co-existence recommendation.

⁹⁷ For example the already existent Article 26a of the Deliberate Release Directive concerning the right of the Member States to adopt appropriate measures to avoid the unintended presence of GMOs in other (conventional or organic) crops.

development of procedural “meta-norms”, which all the parties to the conflict can accept. The main objective of the conflicts law “meta-norms” should be to ensure that the legitimacy of different constituencies within the EU is respected, while at the same time ensuring the compatibility of national objectives with the overall interest of the EU as a Community.

With its proposal the Commission hopes to provide for a better separation of competences with regard to GMO cultivation by maintaining its authority to assess the environmental and health safety of GMOs - supported by the European Food Safety Authority - while at the same time leaving it up to the Member States to address *specific* national and regional socio-economic factors of GMO cultivation. By so doing, it hopes to prevent the Member States from continuing to base their decision-making in the comitology⁹⁸ upon socio-economic grounds undermining the scientific authority of EFSA’s risk assessments in the future.

Could the proposed legislative amendment possibly constitute the type of pragmatic legal solution to a common European problem - namely, the difficulty of authorising and cultivating GMOs in Europe - which is characteristic for a conflicts law model of European constitutionalism? Does it represent a kind of “discovery procedure of practice” in which an attempt is being made legally to organise unity in diversity within the GMO policy area? It seems that the Commission’s new flexible approach on GMO cultivation is, indeed, motivated by pragmatism in that it recognises that a EU authorisation regime, which is enforced against the opposition of a majority of Member States, cannot be sustainable in the long term. In addition, it is also a strategic move, because, in return for its flexibility, the Commission hopes to facilitate the GMO authorisation process at EU level, and to strengthen its scientific basis. However, regardless of the political motivation, the proposed “opt-out” clause of draft Article 26b of the Deliberate Release Directive does, arguably, carry the pluralistic idea of enabling diverse solutions for GMO cultivation on national territories while preserving a common EU authorisation

⁹⁸ See, on ongoing reform of comitology, M Weimer, “What Price Flexibility? – The Recent Commission Proposal to allow for national ‘opt-outs’ on GMO cultivation under the Deliberate Release Directive and the Comitology Reform Post-Lisbon”, (2010) 1 *European Journal of Risk Regulation*, p 345.

procedure. At the same time, it also aims to resolve the conflict between science and democracy as two conflicting rationalities underlying the authorisation procedure for GMOs (see Section VI.1 above). While decision-making by the supranational administration at EU level is supposed to be science-based and technocratic taking only the assessment of the adverse effect of GMOs on health and environment into account, the political aspects of GMO cultivation encompassing the socio-economic effects are treated as a matter of national and/or regional decision-making. Furthermore, this reflects an idea of European constitutionalism, in which the existence and relevance of different legal cultures is acknowledged. The new draft “opt-out” legislation, therefore, can be seen as an instance of conflicts law aiming to resolve the conflicts within EU authorisation of GMOs. Instead of imposing a uniform and almost fully-harmonised legal framework on the Member States, with the new reform proposal the Commission aims at providing for a procedure to accommodate diverse socio-economic concerns arising within the national constituencies.

Having said that, the Commission proposal has also provoked a controversy concerning the conformity of national “opt-outs” on GMOs with EU’s internal market rules.⁹⁹ Several Member States as well as the Council legal service have strongly criticised the Commission proposal as breaching not only EU, but also the law of the World Trade Organisation (WTO).¹⁰⁰ In fact, future national “opt-outs” based upon draft Article 26b of the Deliberate Release Directive are likely to constitute trade restrictions to be justified under EU provisions on the freedom of movement of goods and under the free-trade provisions of the WTO Agreements.¹⁰¹ Therefore, in order to qualify the recent reform proposal as an adequate conflicts law

⁹⁹ On this topic, see appraisal in Weimer, “What Price Flexibility? – The Recent Commission Proposal to allow for national ‘opt-outs’ on GMO cultivation under the Deliberate Release Directive and the Comitology Reform Post-Lisbon”, note 98 above.

¹⁰⁰ See Euractiv, “EU governments slam Brussels’ GM crops plan”, 3 October 2010 available at: <<http://www.euractiv.com/en/cap/eu-governments-slam-brussels-gm-crops-plan-news-498188>> (last accessed on 26 October 2010). See Commission Staff Working Document, Considerations on Legal Issues on GMO Cultivation Raised in the Opinions of the Legal Service of the Council of the European Union of 5 November 2010, SEC (2010) 1454 final.

¹⁰¹ Above all, the GATT, SPS and TBT Agreements.

solution it would ultimately need to fulfil a further criterion, namely, to represent a procedural “meta-norm” acceptable to all parties of the GMO conflict. The compatibility of national deviations on GMO cultivation with the overall interest of the EU as a Community might turn out to be problematical, because of the alleged non-compliance of such deviations with EU internal market law. At present, the Commission reform proposal is undergoing the ordinary legislative procedure (Article 294 TFEU), in the course of which institutional actors such as the Council and the Parliament will express their views on the proposed legislation including its compatibility with EU law.

Provided that the Commission proposal is adopted, the European Courts and possibly the WTO adjudicating bodies may, in the future, need to respond to legal challenges brought against national deviations based on the new “opt-out” legislation. In this case, the European Courts, in particular, may be called upon to decide whether or not, and under which precise circumstances, national “opt-outs” on socio-economic grounds related to GMO cultivation can be accepted under EU law. While restrictions of the freedom of movement of goods in the EU can, in principle, be justified under primary law (for example, under Article 36 of TFEU), on grounds such as public morality or public policy, the outcome of potential judicial procedures before the Courts will strongly depend on the circumstances of the individual case, especially on the specific justification and restrictiveness of the measure. Even if a national measure were based upon a legitimate ground in the sense of Article 36 TFEU, such as, for example, ethical concerns about GMO cultivation, it would need to be substantiated as a concern specific to the situation in the Member State that issued the measure. In its proposal the Commission states that the “opt-out” clause should allow the Member States “to address specific national or local aspects raised by the cultivation of GMOs.” Also, the European Courts have not, to date, accepted that general references to public opinion or ethical concerns without further substantiation suffice to justify a trade restrictive measure under EU law.¹⁰² Therefore, a decisive aspect in the assessment of future national “opt-outs” will be the proportionality of these measures.

¹⁰² See the recent Case-165/08, *Commission v Poland*, [2009] ECR, I-6843.

From this, it follows that it will ultimately be the task of the Courts to develop the kind of “meta-norms” implied by a conflicts law approach to European constitutionalism. Thus, the multi-level and rationality conflicts arising in GMO authorisation in Europe are to be resolved through adjudication on a case-by-case basis. This is where the conflicts law idea becomes influential, and has, indeed, been influential in the past,¹⁰³ namely, in guiding the legal interpretation of principles, such as subsidiarity and proportionality. Despite of all legal and political difficulties, with the new draft “opt-out” legislation, the Commission has begun an innovative process, which can, and should, be understood as a “discovery procedure of practice”, in which new pluralistic solutions to the conflicts of GMO governance are being searched for.

VII. Concluding Remarks – European Constitutionalism between Theory and Practice

Driven by the observation of the tensions between the traditional legal concepts and EU administrative governance, this chapter has embarked on the project of a normative re-construction of EU administrative law as law that is normatively able to frame the complex reality within which European public administration operates today. We hope to have been able to illustrate that the constitutionalisation of EU administrative law does not proceed by means of a systematic evolution of legal doctrines, but as a process in which law evolves as a reaction to the interplay between legal practice and constitutional theory. Moreover, the constitutionalisation of EU administrative law is subject not only to legal, but also to political, contestation about the distribution of decision-making power and different trade and non-trade related interests of and within the Union.

In the same vein, the normative foundations of the EU executive power have rightly been described as a “living constitution”.¹⁰⁴ This chapter has presented European conflicts law as an approach to European constitutionalism, which responds to this reality. We have shown that conflicts-law constitutionalism is an attractive model for

¹⁰³ See references to European case law in Section V above.

¹⁰⁴ See Deidre Curtin, *Executive Power in the European Union*, (Oxford, Oxford University Press, 2009).

the constitutionalisation of EU governance, because it reflects the EU's nature as a hybrid multi-level system between Member States and global institutions, and is able to offer legal mechanisms for the resolution of the various conflicts arising from this constellation.

In addition to the theoretical reflections on EU administrative governance and constitutionalism, we have also made an attempt to test the viability of the first dimension of the European conflicts law approach in one of the most contested fields of European risk governance, namely, in EU authorisation of GMOs. As this example shows, conflicts-law ideas are already present in European governance. They suggest that conflicts inherent in supranational governance should be resolved through procedures and "meta-norms" which legally help to organise unity in diversity as a constitutional goal for the Union; and that, at least with regard to multi-level conflicts between different legal authorities (*i.e.*, first dimension of conflicts law), the European Courts are likely to be the main actors developing such "meta-norms" and procedures.

However, the conclusions of this chapter can only be preliminary. They indicate the need for a broader research agenda, in which European conflicts-law and its different dimensions can be conceptualised and probed in a more encompassing way. The GMO example offers only a fragment of European administrative governance. Other areas also need to be researched and their conflicts studied. One particular challenge which lies ahead is to find a more concrete conceptualisation of the second and third dimensions of the conflicts-law approach, one which will be able to respond to the normative challenges of EU transnational governance in networks, especially to the need of framing such governance in a transparent, accountable and legitimate way.

Part II

**Exploring the Social
Adequacy of the Conflicts
Approach**

Part II.1

Sociological Theory

Chapter 8

What Sociological Backing for the Conflicts-law Approach? A Gallery of Candidates

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I. Introduction: On the *Wahlverwandtschaft* (Elective Affinity) between Habermas and Polanyi

This chapter starts by taking things too literally, namely, the notion of “conflict”. It investigates the role of conflicts in legal and social theory, and thereby tries to link the “new” conflict of laws approach, which is discussed in this volume, with the “old” tradition of conflict sociology. In other words, it pursues the question of whether, and, if so, to what extent, the sociology of conflicts lends itself to substantiate the (empirical and normative) claims of conflicts law. However, matching conflicts law, on the one hand, and conflict sociology, on the other, is no better than comparing apples and oranges. The category of conflict referred to in both approaches is hardly the same. The very general concept of (social) conflicts used by conflict sociologists and the very specific notion of (legal) conflicts meant by conflict lawyers seem to be largely incongruous. There is thus no common denominator. So why embark on this endeavour at all? The reason is, of course, that there is more to it. Besides the accidental homonymy of both approaches, there is also a more substantial affinity, at least between recent re-interpretations of

conflicts law and classical as well as contemporary approaches in conflict sociology. This also explains why legal theorists of the “postnational constellation”¹ may turn to the economic sociology of the “great transformation”.² In short, it explains why Habermasians can become Polanyians. My major ambition in the following is to expound how this is possible - and also what problems it entails.

In order to do so, I will undertake a motivated *tour d’horizon* of socio-legal thinking - which often includes, or is even inspired by, socio-economic thinking - as it is exemplified in the works and ways of Marx and Durkheim, Ehrlich and Pound, Polanyi and Parsons, Luhmann and Habermas, and Bourdieu and Foucault. In this parade of great minds of the Nineteenth and Twentieth centuries (and beyond), four names seem to matter most for the ongoing discussion - Niklas Luhmann and Jürgen Habermas, and Karl Polanyi and Michel Foucault (see the related chapters in this volume). Their respective contributions to (conflicts) law and (conflict) sociology can, however, be better understood against the background of other theories of law and society, similar, as well as dissimilar, ones.

In the following, I will roughly distinguish between classical and contemporary approaches. The separating line between the two - which is somewhat artificial, but not completely arbitrary - is the Second World War. The first group of thinkers includes two of the founding fathers of modern sociology, namely, Karl Marx (1818-1883) and Emile Durkheim (1858-1917), as well as two classics of legal sociology, namely, Eugen Ehrlich (1862-1922) and Roscoe Pound (1870-1964). The economic historian, anthropologist and sociologist, Karl Polanyi (1886-1964) is taken to mark the end of this period, notably with his famous work “*The Great Transformation*” which directly responded to the catastrophe of World War II. Arguably, this is also the punch line of the more “holistic” and historical accounts of what can be termed “normative embeddedness”. By this, I refer to certain moral visions of society and of social science - namely, sociology - which were still underlying Polanyi’s work, and classical sociology more generally.

¹ J Habermas, *The Postnational Constellation: Political Essays*, (Cambridge MA, The MIT Press, 2001).

² K Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, (1944), (Boston MA, Beacon Press, 1957).

Postwar sociology was highly influenced by Talcott Parsons (1902-1979), who is thus taking the lead of the second group of thinkers to be discussed in this chapter. His theory of social systems is an important reference point for contemporary scholars such as Niklas Luhmann (1927-1998) and Jürgen Habermas (born 1929), who have, nevertheless, come to stand for quite different approaches to law, economy, and society. At the same time, but again from a different background, Pierre Bourdieu (1930-2002) and Michel Foucault (1926-1984) have each developed their own versions of modern conflict theory, and of what I will conceive of as “cognitive embeddedness”. Accordingly, we can thus witness a move from normative, ontological accounts, to cognitive, epistemological accounts of social embeddedness. The latter notably spell out the links between power and knowledge (as already foreshadowed in the classical sociology of knowledge). Together, all these thinkers offer not only complementary, but also conflicting, views of the “new patterns of conflict” (see the title of this volume) which seem to characterise the global age.

But before we start our guided tour through this gallery of socio-legal thinkers, I would briefly like to explain the initial idea of this study: to wit, to distinguish between two kinds of sociology - consensus paradigm and conflict paradigm - and to link the latter with new understandings of conflicts law. Within this chapter, I will, however, refrain from covering conflicts law as such. I will thus neither discuss the classical (*international*) foundations nor the more recent (*transnational*) re-interpretations of conflicts law, but leave all this, for the time being, to the experts, such as the other authors of this volume.

II. Preliminaries: Social Order, Conflict of laws and the Sociology of Conflict

Thinking about what law and sociology might have in common as scientific disciplines, one can quickly point to their shared interest in the normative order of society. Even though their perspectives on the social order may differ - lawyers typically take a participant’s point of view, sociologists an observer’s point of view - both are interested in the rules and norms that make up society. What about the category of conflict then? References to the ubiquity of social conflicts seem to challenge the very idea of social order, or of a normative consensus

that holds society together. But, again, we can claim that both law and sociology are also preoccupied with conflicts. Law is, not least, about conflict resolution, that is, the “normation” and, hence, also the “normalisation” of social conflicts. This is most obvious in courts. Their bipartite structure – with the judge as a mediating third – imitates and, thereby, also acknowledges the many antagonisms of social life (even though the aim of justice is normatively to overcome them). And sociology, which will be the focus of this chapter, is itself split into two paradigms: a consensus paradigm and a conflict paradigm. Adherents of the latter, that is, the sociology of conflict, explicitly rebut the idea of a harmonious social order that is based upon shared norms and values. In their view, this vision of society is nothing but ideology (namely, of those who reign or otherwise benefit from it). In contrast, they argue that conflicts play a central, if not constitutive, role in the societies that we know. Accordingly, all polities are also marked by certain scarcities and rivalries, and, hence, struggles for power, be it on a material or an intellectual level. Thus, the notions of conflict, change and crisis often seem to capture social realities better than the opposite ideas – or ideals – of consensus, stability and order.

I will use this all-too-simple picture of a “consensus *versus* conflict” sociology as a starting-point for dealing with the following question: What happened at the “front door” of the conflict of laws approach when the sociology of conflict has to be (re-) introduced by the “back door”? In other words, why does the new conflicts law actually need a sociological backing – such as, in the works of Polanyi, Bourdieu and Foucault – when it already draws on sociological theories, namely, those of Luhmann (in one version) and Habermas (in another)? In fact, the conflict of laws approach, as it is discussed in this volume, seems, from the outset, intimately connected with two rather comprehensive theories of society, namely, Luhmann’s systems theory and Habermas’ discourse theory, which also have a lot to say about social conflicts. However, they are not (in the case of Luhmann), or less (in the case of Habermas), representative of conflict sociology, as it is understood here, and as it is also sought in other chapters of this volume, than the approaches of, say, Polanyi, Bourdieu or Foucault.

Accordingly, the question that I would like to address to the proponents of a “new” conflicts of law approach (not mentioning the

“old” one, which is not at stake here), and which I will try to tackle to some extent in this chapter, can be framed as follows: What theoretical, or methodological, role do conflicts play in your theory of law before it turns into a theory of conflicts law? Or, to put it differently: Is your theory of conflicts law already based upon a theory of conflict? Anticipating the answers, my claim would then be the following: if it is not a “conflict theory of conflicts law” that we are talking about, there is also no theoretical, or methodological, continuity between conflicts law and conflict sociology. This would be the case in a pure (or “orthodox”) systems-theoretical approach to conflicts law that follows closely in the footsteps of Niklas Luhmann. However, if there is at least some conflict-theoretical basis for the conflict of laws approach, an alignment with the sociology of conflict would re-invigorate these very elements. To my mind, this would be the logical consequence for a discourse-theoretical approach to conflicts law, which is inspired by the works of Jürgen Habermas, even though its conflict-theoretical legacy is often lost sight of.

My general impression of the ongoing debate on transnational conflicts law (and transnational constitutionalism respectively), which I cannot assess comprehensively though, is, however, a different one: while there is some interest in a sociological backing of the respective legal theories – which is then also found in the “functionalist” Luhmann and the “normativist” Habermas – a backing in conflict sociology proper is precisely what is not sought for. This comes as no surprise since conflict sociology has its roots, after all, in the works of Karl Marx (even though most conflict sociologists would nowadays distance themselves from any Marxist orthodoxy). Accordingly, conflict sociology – including its progeny in legal sociology – has rarely been supportive of the normative claims of conventional legal theory, notably with regard to law’s self-perceived autonomy and/or unity. Hence, what does it mean when representatives of the new conflict of laws explicitly turn to conflict-theoretical perspectives? Would that not also have some unintended consequences for the authority of the (conflicts) law to be proclaimed?

In this chapter, I will thus follow the somewhat naïve intuition that the “new patterns of conflict” that we observe “after globalisation” (see the title of this volume) would, from a sociological point of view, fall into the domain of the sociology of conflict, and that the sociology

of conflict would, hence, also be instructive for a conflict of laws tailored to conflict constellations in the global age. However, as foreseen, conflict sociology is not undisputed as the paradigm of choice behind the new conflict of laws approach as it is represented, in various forms, in this book (as well as in related works).

In the following, I will use the *topos* of the “two sociologies” - one pre-occupied with moral consensus, one with material conflicts - to classify and compare a number of scholars that seem to be relevant for the question at hand: What is the “hidden social theory”³ of the new conflict of laws approach; What sociological background can it draw upon? Or, what sociological backing would a theory of transnational conflicts law actually need; against which social theories should it be critically assessed? In this context, the distinction between consensus and conflict paradigm mainly serves heuristic purposes - it helps us to identify a “genuine” sociology of conflict, including a sociology of conflict of laws. In other words, this dichotomy is not irrevocable, nor is it always applicable. I thus do not claim that the categories of conflict and consensus are, in fact, mutually exclusive, nor that they are exhaustive in describing the whole range of sociological theories. In fact, we should, instead, think of a continuum of approaches (which either lean towards the one or the other end) than of two clear-cut groups. Some respectable theories eventually seem to elude any taxonomies - in the end, it is all in the eye of the beholder.

III. From Marx to Polanyi: Classical Sociology and the Crisis of Modern Society

In the first step, I will introduce a handful of scholars who represent the classical period of modern sociology (here, notably including economic and legal sociology), namely, Karl Marx and Emile Durkheim, Eugen Ehrlich and Roscoe Pound, and, last, but not least, Karl Polanyi. I will structure my presentation along the notions of a consensus and conflict paradigm, which are first substantiated through the works of two of the founding fathers of the sociological discipline (Marx and Durkheim), but which can also be applied to classical scholarship in the fields of legal sociology (Ehrlich and

³ K Tuori, *Ratio and Voluntas: The Tension Between Reason and Will in Law*, (Ashgate, Aldershot Publishing, 2010), p 20.

Pound) and economic sociology (Polanyi). All this scholarship forms part of an era in which sociology was notably conceived as a moral science - a science of order (*nomos*) as well as of crisis (*anomie*), which is ultimately meant to recreate the moral order of modern, industrial society. I consider this normative mission typical for the “first generation of socio-legal thinking” which can roughly be characterised by the predominance of rather fairly holistic historical approaches, here labelled as “historicism”.⁴ By this notion, I refer to what the “historical schools” of jurisprudence, of economics, and of sociology, which prospered throughout the Nineteenth century, actually had in common, notwithstanding the many disputes that emerged both within and between these schools over the decades.

A broad-brush account of the early period of socio-legal thinking would thus emphasise the link between the three disciplines mentioned, which were, at that time, not fully differentiated. This link can also be conceived as a “spill-over effect” which works from the historical school of jurisprudence to the historical school of economics and then proceeds to classical, historical sociology. Thus learning - and borrowing legitimation - from one another, historical lawyers, economists, and sociologists also seemed to share some very basic ideas about how to study modern society (which was then typically couched in national terms). They notably propped up their moral visions of modern society with historical expertise, that is, with knowledgeable insights into the legal, economic and social developments that ultimately brought it into being. As a matter of fact, these historical accounts, or narratives, of “modernisation” (including economic and legal reforms) were motivated by very different political agendas, conservative as well as progressive ones, particularistic as well as universalistic ones. However, these different policies notwithstanding, historical scholarship can generally be characterised by the relative ease with which moral claims were made. How to preserve the social order, or how to change it for the better, was part and parcel of social scientific analysis, at that time. Until various “battles of methods” cleared the field, social science

⁴ S Frerichs, “Oikeus yhteiskuntateoreettisessa ajattelussa: lyhyt historia [A Short History of Socio-Legal Thinking]”, in: T Kotkas & S Lindroos-Hovinheimo (eds), *Yhteiskuntateoroiden oikeus*, (Helsinki, Tutkijaliitto, 2010) [original version in English, translated into Finnish by the editors].

was, indeed, closely-linked to social policy - at least by what can be identified as the “spirit of the time”.

This spirit is both national and historical – “national” in terms of the preferred subject matter (nation state, national economy, national community) and “historical” in terms of the preferred method of study (historical jurisprudence, historical economics, historical sociology). In a way, the *Volksgeist* (the spirit of the people) referred to by von Savigny, one of the pioneers of historical jurisprudence, thus also haunted contemporary scholarship in economics and sociology, focussing on *Volkswirtschaft* (national economy) and - why not? - *Volksgemeinschaft* (national community) respectively. However, the intellectual continuity between the historical school of jurisprudence and classical, historical sociology, with historical economics as a mediating third, shows not only in these - somewhat esoteric - terminologies, but also in the ways that modern society is actually conceived in legal categories. In fact, some of the founding fathers of the sociological discipline had, themselves, first studied law (Marx, Weber), or were, at least, well-read in jurisprudence (Durkheim, Tönnies). But the idea of the “birth of sociology out of the spirit of jurisprudence” that has been put forward by Werner Gephart, one of today’s lawyer-sociologists in Germany,⁵ also lends itself to another interpretation. Accordingly, modern society can itself, by and large, be understood as a legal construction. It builds on relatively abstract forms of solidarity, a “solidarity among strangers” which are, in this case, citizens of the same country, but otherwise do not have much in common or have any personal links. Such expansive “integration through law” is a highly demanding and, thus, highly improbable form of social organisation which could only be realised through the close liaison of the modern society with the nation state, relying on all its material and ideological powers.

The first generation of socio-legal thinking thus builds on the “elective affinities” between historical jurisprudence and classical sociology, or what Werner Gephart considers the “original unity of legal and social theory” (represented by sociological all-rounders

⁵ W Gephart, *Einführung in die Rechtssoziologie Max Weber: Vorlesung im Sommersemester 2003*, available at: <http://www.soziologie.uni-bonn.de/institut/lehrkoerper/prof.-dr.-werner-gephart/Gephart_Webers_Rechtssoziologie_SS03.doc>.

such as Marx, Durkheim and Weber).⁶ Both perspectives will be specified in turn.

With regard to jurisprudence, Harold Berman, a legal historian, distinguishes “three principal schools of legal thought [...] that have competed with each other both in Europe and in America during the past two centuries”, namely, the positivist school of law, the natural law school, and the historical school of law.⁷ The positivist school focuses on the “legal text”, that is, written rules and doctrines, or black letter law, literally understood. In Berman’s words, positivism “treats law as essentially a political instrument, a body of rules promulgated and enforced by official authorities, representing the will, the policy, of the lawmakers”.⁸ The natural law school emphasises, in contrast, the “moral subtext” of the law, that is, its implied or deeper meaning, or what has to be read between the lines. According to Berman, naturalism “treat[s] law as essentially a moral instrument, an embodiment of principles of reason and conscience implicit in human nature”.⁹ The historical school of law - the present focus of our inquiry - stands out in its reference to the “social context”, which is also the natural starting-point of socio-legal thinking. Law is here understood as being entrenched in the history and culture of a given community. As Berman puts it, historicism “treat[s] law as essentially a manifestation of the group memory, the historically developing ethos, of the society whose law it is”.¹⁰ In a way, the emphasis is thus more on tradition than modernity, more on the emergence of law in society than its instrumentalisation by the state.

With regard to sociology, Roger Cotterrell, a British sociologist of law, explains the founding fathers’ peculiar interest in jurisprudence with the particular legal nature (or constructedness) of modern societies. These developed notably within the “jurisdictional reach of

⁶ W Gephart, *Gesellschaftstheorie und Recht: Das Recht im soziologischen Diskurs der Moderne*, (Frankfurt aM, Suhrkamp Verlag, 1993), p 7.

⁷ HJ Berman, “The Historical Foundations of Law”, (2005) 54 *Emory Law Journal*, Special Edition, p 13, at 13.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

nation-state legal systems". In more detail, Cotterell's argument goes as follows:

In the classic social theory of the late nineteenth and early twentieth century, 'society' was mainly typified by the politically organized and territorially bounded society of the modern Western nation-state. Given this position, it is not surprising that a strong sensitivity to law is found in the most ambitious and influential contributions to this theory.¹¹

In other words, the early sociologists could hardly ignore the role that the state and (positive) law played for 'modern' forms of social organisation. Cotterell continues:

As social theory examined the general social relations and structures comprising society, it encountered modern law as a society-wide system of definition and regulation of these relations and structures. In a sense, law and social theory competed in characterizing modern society, but law could [also] be treated in social theory as exemplifying certain structures and patterns fundamental to that society.¹²

Classical sociologists, hence, studied the law, just as historical jurists studied society, and both ways of thinking seemed to converge - or compete - in what can be seen as the beginnings of "law and society" scholarship. Both sociologists and jurists dealt, in different ways, with the trinity of law, society, and the nation state. The "methodological nationalism" behind this position was long taken for granted and became only questionable after "globalisation" entered the scene.

III.1. Karl Marx (1818-1883)

Our tour of the ground floor of sociological wisdom about law, economy, and society leads from Karl Marx to Karl Polanyi. In the present context, these two thinkers thus mark the era - the beginning and the end - of classical sociology. Both are, at the same time, important representatives of the sociology of conflict. While Marx's and Polanyi's accounts of modern society, its conflicts and crises, are

¹¹ R Cotterell, "Law in Social Theory and Social Theory in the Study of Law", in: *idem* (ed), *Law in Social Theory*, (Ashgate, Aldershot Publishing, 2006).

¹² *Ibid.*

thus clearly linked, they also share certain characteristics with other scholars of the “classical” period, both of general sociology and of legal sociology. While Emile Durkheim, Eugen Ehrlich, and Roscoe Pound are not known, at any rate, as theorists of conflict, their works do take part in the spirit of the time which fostered the moral ambitions of holistic-historical scholarship. To lay the groundwork for the distinction between conflict and consensus paradigm, the first pair of theorists to be discussed in this section will be Marx and Durkheim, who, although they represent different generations (and also different countries), can equally be considered as founding fathers of sociology as a modern scientific discipline.

Like Durkheim and other sociological classics, Karl Marx stands for a historical type of scholarship that characterises the early social sciences more generally. However, it would be somewhat double-edged simply to label him as a “historicist”. His link with the historical school of jurisprudence, or with what we considered the prototype of socio-legal thinking, is, in fact, highly ambivalent. He was certainly no adherent, but instead a strict opponent, of the historical school of law which prospered, at his time, under the leadership of Friedrich Carl von Savigny (1779-1861). Nevertheless, he developed a historical approach to the study of society (and its law) which can still be understood as a response to historical jurisprudence. While he was thus most critical towards contemporary legal scholarship, he was also “constructive” in continuing the historical study of law and society with different means. In sociology, he is accordingly considered one of the best examples of historical scholarship. In a recent handbook, Duncan Kelly defines historical sociology as follows:

As a specific type of intellectual enterprise, historical sociology tries to make explicit the relationship between social theory and historical change; that is, historical sociology uses social theory in a self-conscious way to outline general propositions about the nature of historical development.¹³

There is no doubt that this definition also covers Marx’s work, which “offers a powerful explanatory social theory based on an

¹³ D Kelly, “Karl Marx and Historical Sociology”, in: G Delanty & EF Isin (eds), *Handbook of Historical Sociology*, (London, SAGE Publications, 2003), p 11.

understanding of human progress".¹⁴ The overall approach of studying modern (capitalist) society in the light of its history seems, actually, to be dominant in classical sociology.

Marx's exposure to historical jurisprudence starts with his first year of study:

Karl Marx began his student life at the University of Bonn in October 1835, enrolling in the law faculty. During the year he studied there, over half of the courses he took were in either law or legal history, and all his professors in this field were adherents to the broad methods and assumptions of the Historical School of Law.¹⁵

In the following year, he moved to the law faculty at the University of Berlin and stayed there until 1841. One year later, he published a treatise entitled, "The Philosophical Manifesto of the Historical School of Law"¹⁶ in the *Rheinische Zeitung*, in which he claimed:

It is commonly held that the *historical school* is a reaction against the frivolous spirit of the *eighteenth* century. The currency of this view is in inverse ratio to its truth. In fact, the eighteenth century had only one product, the essential character of which is frivolity, and this *sole frivolous* product is the *historical school*.¹⁷

While historical jurisprudence cultivated a backward-looking interest in the common consciousness of a nation, here: the norms and beliefs that crystallised, over the centuries, in its legal customs and traditions, Marx argued that this emphasis had gone much too far:

The historical school has taken the study of sources as its watchword, it has carried its love for sources to such an

¹⁴ *Ibid.*

¹⁵ *Ibid.*, p 12.

¹⁶ K Marx, "The Philosophical Manifesto of the Historical School of Law", *Rheinische Zeitung*, Supplement, available at: <http://www.marxists.org/archive/marx/works/1842/08/09.htm>.

¹⁷ *Ibid.*; original emphasis.

extreme that it calls on the boatman to ignore the river and row only on its source-head.¹⁸

Marx's own intention was, at this early stage in his career, to develop both a critique of political economy *and* a critique of jurisprudence. In his preface to "The Economic and Philosophical Manuscripts",¹⁹ he thus announces:

I shall [...] issue the critique of law, ethics, politics, etc., in a series of distinct, independent pamphlets, and at the end try in a special work to present them again as a connected whole showing the interrelationship of the separate parts, and finally, shall make a critique of the speculative elaboration of that material.²⁰

In doing so, he wanted to show, in greater detail, the "interconnection between political economy and the state, law, ethics, civil life, etc.",²¹ which was only touched upon in the work in question. However, this more encompassing agenda remained largely unfulfilled. This leads Robert Fine, in his review of "Marxism and the Social Theory of Law", to conclude that "Marx [...] never returned to the project he set himself in his youth: to complement his critique of political economy with a critique of jurisprudence".²² However, bearing in mind his background in legal studies and his involvement in the related controversies of his time, we can still claim that Marx's sociology was born out of the spirit - or rather the *critique* - of historical jurisprudence. In fact, "given the broad-ranging nature of his legal education, many of the ideas and theories that he would later develop in a more systematic form as the method of historical materialism find their basis in his early relationship to contemporary jurisprudence".²³

¹⁸ *Ibid.*

¹⁹ K Marx, *The Economic and Philosophical Manuscripts* [here: Preface], available at:

<<http://www.marxists.org/archive/marx/works/1844/epm/preface.htm>>.

²⁰ *Ibid.*

²¹ *Ibid.*

²² R Fine, "Marxism and the Social Theory of Law", in: R Banakar & M Travers (eds), *An Introduction to Law and Social Theory*, (Oxford, Hart Publishing, 2002), p 101.

²³ Kelly, note 13 above, p 12.

According to Fine, the main driving force behind Marx's critique of jurisprudence was to "resist all forms of historicism, dispel all teleologies of progress, in short, to criticise all claims to perfect harmony which conceal real social antagonisms beneath sanctified juridical categories".²⁴ In this context, "historicism" is - as a negative point of reference - thus equated with the historical idealism, idealisations, or the ideologies of contemporary jurisprudence, which were to be overcome by Marx's own approach, called "historical materialism". What is in question is thus not the historical method as such, but the subject of historical analysis: Is it the history of legal ideas which are taken to represent the common consciousness of the nation (as in von Savigny's approach)? Or is it the history of economic relations that reveal the "social antagonisms" upon which modern capitalism is built (as in Marx's approach)? Marx's theory thus forms part of, or even lays the groundwork for, the sociology of conflict, which is, in this case, both materialist and historical. As far as the material substance is concerned, we can draw on the famous distinction between "base" and "superstructure", a centrepiece of Marxian thought which already explains how the critique of the political economy and the critique of jurisprudence would ultimately come together.

In his preface to "A Contribution to the Critique of Political Economy",²⁵ Marx gives a well-known statement:

In the social production of their existence, men inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production.²⁶

This is the material base which all social organisation rests upon. He continues:

²⁴ Fine, note 22 above, p 102.

²⁵ K Marx, *A Contribution to the Critique of Political Economy* [here: Preface], available at: <http://www.marxists.org/archive/marx/works/1859/critique-pol-economy/preface.htm>.

²⁶ *Ibid.*

The totality of these relations of production constitutes the economic structure of society, the real foundation, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness.²⁷

The superstructure is thus of a more idealistic, or ideological, nature. And it is secondary with regard to the economic base, as is emphasised in the sentence which immediately follows:

The mode of production of material life conditions the general process of social, political and intellectual life.²⁸

The essence of “historical materialism”, as opposed to “historical idealism”, is then summarised as follows:

It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness.²⁹

We can combine this centrepiece in the reception of Marx with a section in “German ideology”³⁰ which further elaborates on the social consciousness that is thereby produced. This text dates, again, back to Marx’s early career when the critique of jurisprudence was still ranking high on his agenda. Again, he claims: that:

[t]he hitherto existing production relations of individuals are bound also to be expressed as political and legal relations [...] Within the division of labour these relations are bound to acquire an independent existence over against the individuals.³¹

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ K Marx (and F Engels), *The German Ideology*, [here: Chapter Three: Saint Max, B. My Intercourse, I. Society], available at: <<http://www.marxists.org/archive/marx/works/1845/german-ideology/ch03k.htm>>.

³¹ *Ibid.*; sic.

Even though they are only of a secondary nature, the political and legal relations thus develop a life of their own - namely, in the "form of concepts".³² There are even professions that specialise in and 'idealise' these concepts. And this is where legal and political theory comes in:

[T]hese general ideas are further elaborated and given a special significance by politicians and lawyers, who, as a result of the division of labour, are dependent on the cult of these concepts, and who see in them, and not in the relations of production, the true basis of all real property relations.³³

However, there are also traces of another notion of social (and legal) consciousness in Marx's work, namely, in his article entitled "Debates on the Law on Thefts of Wood",³⁴ which was published in the *Rheinische Zeitung* in the same year as his pamphlet on historical jurisprudence. It deals with the customary rights of the poor - namely, to collect, and thereby "appropriate", fallen wood in the forests. These customary rights are depicted as both natural and justified:

It will be found that the customs which are customs of the entire poor class are based with a sure instinct on the *indeterminate* aspect of property; it will be found not only that this class feels an urge to satisfy a natural need, but equally that it feels the need to satisfy a rightful urge. Fallen wood provides an example of this.³⁵

The debated law on thefts of wood would criminalise these customs and thus fly in the face of the "instinctive sense of right" of the poor class, the existence of which Marx considers, in turn, to be "a *mere custom* of civil society".³⁶ In other words, positive law and the respective legal concepts are biased towards the "aristocracy"; they

³² *Ibid.*

³³ *Ibid.*

³⁴ K Marx, "Debates on the Law on Thefts of Wood", *Rheinische Zeitung, Supplement*, available at:

<<http://www.marxists.org/archive/marx/works/1842/10/25.htm>>.

³⁵ *Ibid.*; original emphasis.

³⁶ *Ibid.*; original emphasis.

no longer correspond to the “instinctive” legal consciousness of the poor class which has thus “not found an appropriate place in the conscious organisation of the state”.³⁷

III.2. Emile Durkheim (1858-1917)

While we have thus located Marx in the broad current of historical scholarship, which spanned the Nineteenth and early Twentieth centuries, and connected jurisprudence with economics and sociology, we have, *en passant*, also identified him as a theorist of class divisions and social conflicts. His critique of the idealistic tendencies inherent in historical jurisprudence was, at the same time, a step towards developing his own approach of historical materialism which has become exemplary for the conflict paradigm in sociology (including legal sociology). In contrast, Emile Durkheim - the next theorist to be discussed - laid the groundwork for the consensus paradigm. In the following, we will adhere to the logic of the previous section, and, hence, first describe Durkheim's relation to contemporary historical scholarship, and then discuss the view of law, economy, and society, which emerges from his work. Again, we find that classical sociology is inspired, not least, by historical jurisprudence, even though there are certainly as many continuities as discontinuities between von Savigny's original ideas about the “society whose law it is” and Durkheim's projected sociology of law.

As before, we will thus begin with some biographical remarks:

Durkheim was only twenty-nine years of age when, as *chargé d'un cours*, he was assigned to teach at the University of Bordeaux both sociology and pedagogy.³⁸

This was in the year 1887, when Durkheim also held his first “course of social science”. By then, he had already been working, for five years, as a teacher of philosophy. In the school year 1885-86, he was, however, granted a leave of absence which allowed him to go abroad and study the state of the art of “moral science” in Germany. The results of this study visit were summarised in an article entitled, “The

³⁷ *Ibid.*

³⁸ H Alpert, “France's First University Course in Sociology”, (1937) 2 *American Sociological Review*, p 311, at 314; original emphasis.

Positive Science of Morality in Germany",³⁹ which was published after his return. All this information is relevant for our present account of Durkheim's work: his philosophical background, his new course in sociology, and his treatise on the positive science of morality (which is itself based upon historical scholarship). Just as in the case of Marx, it is also in Durkheim's career the early years that really proved "formative" for his overall approach to law, economy, and society.

With regard to his relation to philosophy, or his turn from philosophy to sociology, to historical sociology, we can draw on a comment made by Peter Burke in the above-mentioned handbook of historical sociology: Accordingly,

Durkheim himself was interested in history, though also concerned to legitimate his own sociological enterprise by distinguishing its approach from that of history, on one side, and philosophy, on the other.⁴⁰

Sociology was thus sought by Durkheim as an alternative both to philosophy and history. The French economic sociologist Philippe Steiner explains why sociology might actually have become his discipline of choice:

[It] provides a way out of the existing dilemma between the excessively general position of the philosopher who refuses diversity and the excessively detailed position of the historian who refuses comparisons.⁴¹

According to this, historical sociology allows general statements about society (or societies in plural) without neglecting its many variations across time and space.

³⁹ E Durkheim, *La science positive de la morale en Allemagne*, available at: <http://classiques.uqac.ca/classiques/Durkheim_emile/textes_1/textes_1_12/sc_pos_morale_allemande.pdf>.

⁴⁰ P Burke, "The *Annales*, Braudel and Historical Sociology", in: G Delanty & EF Isin (eds), *Handbook of Historical Sociology*, (London, SAGE Publications, 2003), p 58.

⁴¹ P Steiner, "Durkheim's Sociology, Simiand's Positive Political Economy and the German Historical School", (2003) 20 *European Journal of the History of Economic Thought*, p 249, at 253.

Against this background, it seems only plausible that Durkheim's new course in sociology - the first of its kind in France - became part of the teachings of the faculty of humanities where philosophy and history were also taught. However, as Harry Alpert argues fifty years later, this was not at all clear at first. Commenting on the concomitant dispute about the right location of the course, he argues that:

one might have expected the new course in sociology to be assigned to the Faculty of Law, inasmuch as it was there that political science, economics, and jurisprudence were [...] taught.⁴²

In fact, the faculty of law seemed, at that time, the proper place for instruction in the social sciences - hence also for sociology. At least one could have thought so.

Both economists and jurists, however, looked upon this bizarre science of society with disdain, and everyone seemed agreed in regarding it as an essentially philosophical discipline. It is to be noted that history too is assumed to be, if not a philosophical, at least a humanistic, discipline and is taught in the Faculty of Letters.⁴³

Considering this curious "contest of the faculties" about the new discipline of sociology, it is interesting to see how Durkheim, himself, approached the (other) social scientific disciplines, namely, jurisprudence and economics.

In order to do so, we will have a closer look at Durkheim's "The Positive Science of Morality in Germany",⁴⁴ which includes chapters on "economists and sociologists", "jurists" and "moralists". The juridical chapter discusses the work of Rudolf von Jhering (1818-1892), who replaced Friedrich Carl von Savigny as the leader of the historical school of law in the second generation. Endorsing von Jhering's overall position, Durkheim emphasises the social function of the law:

⁴² Alpert, note 38 above, p 314.

⁴³ *Ibid.*

⁴⁴ Durkheim, note 39 above.

To replace Jhering's somewhat metaphysical expressions with a more scientific language, we can say that all human behaviour, both individual and social, has as its aim the adaption of the individual or of society to their environment. [...] What is, then, the practical cause of the genesis of law? It is, replies the author, the need to guarantee the conditions of existence of society [...].⁴⁵

According to this functionalist perspective, which became characteristic of Durkheim's own work, law cannot be assessed without reference to the society encompassing it; it is socially contingent.

[L]aw is neither true nor false, it is or it is not appropriate for achieving its purpose.⁴⁶

With regard to the ways von Jhering's study of law is linked to a theory of morality, Durkheim acknowledges, despite various criticisms, that "Jhering has the merit of sensing and of indicating clearly how morality can become a positive science".⁴⁷ Durkheim thus sides with his attempts to establish a positivist science of morality, which, according to Cotterrell, "threatens to displace philosophy in so far as the latter fails to conduct and interpret the empirical social inquiries without which the meaning of moral prescriptions cannot be understood".⁴⁸ What is sought is, thus, not moral philosophy, but an empirical science of morality. In other words, Durkheim's move from philosophy to sociology does not imply that moral questions will, henceforth, be neglected, but that they would be studied empirically – notably, including law as an indicator for the moral integration of society.

In his chapter on "economists", Durkheim deals, amongst others, with the position of Gustav von Schmoller (1838-1917), who is considered the leader of the "younger" historical school of

⁴⁵ *Ibid.*, p 19. Here, I draw on the English translation of the chapter on "jurists", (1986) 15 *Economy and Society*, p 346, at 348-349.

⁴⁶ *Ibid.*, p 20; in the English translation at 349.

⁴⁷ *Ibid.*, p 24; in the English translation at 354.

⁴⁸ R Cotterrell, *Émile Durkheim: Law in a Moral Domain*, (Edinburgh, Edinburgh University Press, 1999), p 57.

economics. This engagement with historical economics has eventually been interpreted as a strategic move. As we have already seen, both the new course and the new discipline of sociology were received with reservations, notably by jurists and economists. It thus seemed reasonable to borrow legitimation from more established fields of studies which, nevertheless, shared a similar outlook, namely, historical economics.

Since sociology was a branch of science of doubtful intellectual status and without official institutional recognition at that time, it was both necessary and useful for Durkheim to make reference to the German economists. This enabled him both to get a foothold in the important debate among economists on the nature of political economy and social science, and to take up position in opposition to the liberal economists.⁴⁹

What is already at issue here is the “battle of methods” between historical economics (and economic sociology), on the one hand, and liberal (neo-classical) economics, on the other.

The fact that Durkheim “used reference to the views of German [historical] economists [...] in order to establish his own perspective on the social sciences”,⁵⁰ reminds us of a similar constellation that prevailed only one generation earlier. At that time, it was Wilhelm Roscher (1817-1894), one of the founders of the “older” historical school of economics, who seemed to draw legitimacy for his own enterprise from the historical school of jurisprudence. According to Heath Pearson, he was thus “explicitly hitching his own research program to the coat-tails of the German Historical School of Jurisprudence” which was a “masterstroke of marketing”.⁵¹

The exchange between the historical schools of jurisprudence, economics, and sociology is thus based both upon push and pull

⁴⁹ P Steiner, “Durkheim’s Sociology, Simiand’s Positive Political Economy and the German Historical School”, (2003) 10 *European Journal of the History of Economic Thought*, p 249, at 254.

⁵⁰ *Ibid.*

⁵¹ H Pearson, “Was There Really a German Historical School of Economics?”, (1999) 31 *History of Political Economy*, p 547, at 548.

factors. One common denominator between all three schools can be seen in the reference to the *Volksgeist* (the spirit of the people) which stems from von Savigny's work, which then found a parallel in the *Volkswirtschaft* (national economy), and is now re-interpreted in sociological terms. Referring to the work of von Schmoller and others, Durkheim thus argues:

For them, [...] society is a veritable being which is, without doubt, nothing beyond the individuals that compose it, but which has, nevertheless, its own nature and personality. Expressions of a common language, a social conscience, a collective spirit, a national collective do not merely have verbal value, but also express eminently concrete facts.⁵²

The national collective has thus taken the form of a national economy, which lends itself not only to economic, but also to sociological, analysis.

To substantiate Durkheim's own approach, we will briefly come back to his "course of social science",⁵³ namely, the introductory lecture, which also contains a first sketch of a historical sociology of law. In this context, Durkheim claims that students of law should not confine themselves to "purely exegetical studies", that is, the interpretation of legal texts and of the intention of the legislator. "This would mean taking the letter for the spirit, the appearance for the reality."⁵⁴ The "real" spirit of the law has thus to be found elsewhere - namely, in society. In Durkheim's words:

It is in the very intestines of society that the law develops, and the legislator only consecrates the work already performed without him. It is thus necessary to teach the student how the law is formed under the pressure of social needs, how it solidifies little by little, the degrees of crystallization it goes through successively, how it transforms.⁵⁵

⁵² Durkheim, note 39 above, p 8; my translation.

⁵³ E Durkheim, *Cours de science sociale: Leçon d'ouverture*, available at: http://classiques.uqac.ca/classiques/Durkheim_emile/sc_soc_et_action/texte_1_01/cours_sc_sociales.rtf.

⁵⁴ *Ibid.*, p 23; my translation.

⁵⁵ *Ibid.*; my translation.

Now, if the law emerges from society, thus embodying its moral principles, the systematic study of law would also help to assess the state of society's moral integration critically.

In fact, Durkheim also specifies, in this very lecture, his vision of sociology as a positive moral science. He declares that:

Under the influence of causes which it would take too long to analyse here, the collective spirit has weakened in our country. Each of us is so exorbitantly concerned with himself that he does not perceive the boundaries that constrain him everywhere.⁵⁶

This primacy of the individual self-interest has, not least, been fostered by liberal economics - the neo-classical school to which Durkheim is so vehemently opposed. He therefore claims:

It is necessary to counteract this dispersive tendency with all our forces. It is necessary that our society restore the consciousness of its organic unity."⁵⁷

He concludes with a *credo* in the educational function of sociology:

I believe that sociology is, more than any other science, in a condition to restore these ideas. It will teach the individual what the society is, how he is complemented by it, and how little is due to his own forces. It will make clear that he is not an empire among other empires, but the organ of an organism, and demonstrate all the beauties of committing oneself conscientiously to one's role as an organ. It will make him feel that there is no loss in showing solidarity to others, in not completely relying on oneself.⁵⁸

Against this background, the sociology of law which forms part of his treatise on "The Social Division of Labour",⁵⁹ and which is further

⁵⁶ *Ibid.*, p 24; my translation.

⁵⁷ *Ibid.*; my translation.

⁵⁸ *Ibid.*; my translation.

⁵⁹ E Durkheim, *De la division du travail social: Livre I*, available at: http://classiques.uqac.ca/classiques/Durkheim_emile/division_du_travail/division_travail_1.pdf.

developed elsewhere,⁶⁰ resorts, not surprisingly, to the law - or certain types of law - in order to measure morality, or solidarity, empirically, and thus to make it accessible to comparative studies.

[S]ocial solidarity is an entirely moral phenomenon which, in itself, does not yield to precise observation or, above all, to any measurement. To arrive at this classification and this comparison, we must substitute the inward fact that escapes us, with an exterior fact that stands as a symbol for it, and study the first by means of the second. This visible symbol is the law.⁶¹

Durkheim's theory of society (and social change) - which is, notably, a theory of modernisation - thus also includes a theory of law (and legal change).

At a general level, he claims a transformation of the collective conscience - the moral consensus of society - from one type, or principle, of solidarity, to another. Whereas traditional societies were marked by "mechanical" forms of solidarity based upon similarity, modern societies are characterised by "organic" forms of solidarity based upon diversity. Structurally, this change is caused by functional differentiation, that is, the increasing significance of the division of labour as a principle of social organisation. Semantically, it is expressed in a general shift of moral convictions from more collectivistic, to more individualistic, principles. After a period of moral crisis, the new morality would, then, eventually be adapted to the new structure. In terms of the law, this transformation is reflected in a move away from the more "repressive" to the more "restitutive" forms of law. Social change and legal change are thus closely interconnected. Whereas drastic forms of punishment used to reinvigorate the collective mindset that was prevalent in traditional societies, the modern "cult of the individual" furthers the restoration and respect of the rights of persons (both of victims and offenders), instead. However, the process of modernisation and individualisation of the law does not have to lead to moral disintegration - on condition that the individual considers himself or herself "the organ

⁶⁰ E Durkheim, "Two Laws of Penal Evolution", (1973) 2 *Economy and Society*, p 285.

⁶¹ Durkheim, note 59 above, p 54; my translation.

of an organism", that is, as part and parcel of a functionally-differentiated and inter-dependent whole.

III.3. Eugen Ehrlich (1862-1922) and Roscoe Pound (1870-1964)

If we compare Marx's and Durkheim's approaches, we will find a different emphasis on the respective roles of the state and the community, the legislator and the people, in creating and enacting law. According to Durkheim, law originates in society, not in the state. It emerges organically from social interaction, and represents the collective consciousness shared by all members of a given community. In contrast, Marx locates law in the superstructure, which is closely-linked to the state. Considering the realities of the capitalist economy, law, then, seems to fulfil ideological functions. If there is a collective consciousness, it has not grown in society but been manipulated by the state - thus privileging the rich and penalizing the poor. On these grounds, Durkheim can be seen as a representative of the consensus paradigm and Marx of the conflict paradigm. At the same time, Marx and Durkheim share, however, a similar background in historical scholarship which inspires them both to "holistic" theories about law, economy, and society and the process of modernisation. Moreover, in both approaches, sociology is also envisioned as a moral science - a science that not only criticises, but also helps to overcome, the dark sides of modernity.

In the present section, connections will be drawn between Marx and Durkheim, both known as founding fathers of sociology more generally, and two classics in the more specific field of legal sociology, namely, Eugen Ehrlich and Roscoe Pound. My main intention here is just to demonstrate the continuities within historical scholarship and, hence, to identify Marx and Durkheim, and Ehrlich and Pound as contemporaries who share the same "spirit of the time". At the same time, the notions of the consensus and conflict paradigm will be substantiated with complementary distinctions that help us to classify and distinguish Ehrlich's and Pound's respective works. The following account of their writings will, however, be very rough and schematic. I will also take a risk in discussing Roscoe Pound under the label of historical scholarship here and not under that of legal realism. There are two reasons for this: on the one hand, Twentieth century legal realism, which would actually add a fourth school to the three schools of law that have been introduced above,

will not be particularly covered in this chapter. Instead, I will directly move from classical-historical theorists of law and society (the first group of thinkers), to scholars that do not form part of the realist movement as it emerged from jurisprudence, but who are sociologists in a more encompassing sense - sociologists who are, amongst other social spheres and society, in general, also interested in the legal sphere (the second group of thinkers). Moreover, as will be argued in more detail below, their style of thinking can often be characterised as post-realist. On the other hand, Roscoe Pound's sociological jurisprudence still seems to share the vision of (legal) sociology as a moral science, and has not yet fully-adopted the worldview of scientific positivism, which then became characteristic of realist scholarship.

According to Marc Hertogh, a sociologist of law who specialises in legal consciousness, Ehrlich and Pound "were near contemporaries and both men have a lot in common".⁶² Ehrlich was, however, a European scholar who followed closely in the footsteps of historicism, which originated on the European continent. In contrast, Pound was an American scholar who had already anticipated the pragmatist mood of American legal realism. One could say, that historicism was more European, and realism more American, in spirit, and this difference is also captured by Ehrlich's and Pound's respective approaches in legal sociology.

Eugen Ehrlich was born in the Bukowina, which was a province of the Austro-Hungarian Empire at that time. He reflects on the multi-cultural environment of his birthplace - which was characterised by a *mélange* of various ethnic groups and their respective legal customs - in "*The living law of the peoples in the Bukowina*".⁶³ Almost a hundred years later, the "global Bukowina" has been popularised as a metaphor for "legal pluralism in the world society".⁶⁴ What is referred to as "living law" here, is, clearly, not the law of the state,

⁶² M Hertogh, "A 'European' Conception of Legal Consciousness: Rediscovering Eugen Ehrlich", (2004) 31 *Journal of Law and Society*, p 457, at 472.

⁶³ E Ehrlich, "Das lebende Recht der Völker in der Bukowina", in: E Ehrlich, *Recht und Leben: Gesammelte Schriften zur Rechtsstatsachenforschung und zur Freirechtslehre*, (edited by M Rehbinder) (Berlin, Duncker and Humblot, 1967).

⁶⁴ G Teubner, "Global Bukowina: Legal Pluralism in the World Society", in: G Teubner (ed), *Global Law Without a State*, (Aldershot, Ashgate-Dartmouth Publishing, 1997).

but the law of the people. But in a multi-ethnic, multi-cultural context, there is not just one legal community, but many overlapping ones. This legal pluralism - as it lives in the minds and the practices of the people - challenges, however, the unity of the state and its rule of law. In analytical terms, Ehrlich's notion of living law embodies what Hertogh calls a "European" conception of legal consciousness. From this perspective, the legal consciousness of the people precedes the law of the state. It can thus be characterised by a focus on "What do people experience as 'law'?", without any reference to the state.⁶⁵ Hertogh also points to Ehrlich's explicit criticism of "Savigny and other representatives of the Historical School for not entirely following their own ideas".⁶⁶ His work thus gives yet another example of how to overcome the shortcomings of historicism, and not historicism itself. In "*The living law of the peoples in the Bukowina*", Ehrlich argues accordingly:

It is about time that the supporters of the Historical School, who in the past century repeatedly have argued that the law develops in the popular legal consciousness, finally take this statement more seriously; and start studying this legal consciousness.⁶⁷

Roscoe Pound made his career at Harvard Law School on the other side of the Atlantic. He is considered to be the spearhead of the sociological school of jurisprudence or, in short, of sociological jurisprudence, which he proclaims as "the movement for pragmatism as a philosophy of law, the movement for the adjustment of principles and doctrines to the human conditions they are to govern".⁶⁸ In 1910, Pound published a paper on "Law in Books and Law in Action". The dichotomy between these two types, or, rather, views, of law corresponds to the contrast between (text-based) legal positivism and (practice-related) legal realism, or between the respective approaches of legal theory and legal sociology, more generally. More specifically, however, it stands for the double-standards employed in legal institutions, namely, between what they say (adhering to the old principles) and what they do (adapting to the

⁶⁵ Hertogh, note 62 above, p 475.

⁶⁶ *Ibid.*, p 474.

⁶⁷ Ehrlich, p 48; cited and translated as in Hertogh, note 62 above, p 474.

⁶⁸ R Pound, "Liberty of Contract", (1909) 18 *Yale Law Journal*, p 454.

new realities). Pound addressed his critique, not least, to American representatives of historical jurisprudence, such as James Coolidge Carter (1837-1905), whom he considered, as Grossmann summarises, somewhat polemically, to be “an irrelevant dinosaur”.⁶⁹ Nevertheless, his approach still resonates with the mission of historical jurisprudence, if it is understood more “progressively”. The above-mentioned paper thus culminates in the call to adapt the law to social change:

For the lawyer, the moral of the difference between law in books and law in action is not to be obsessed with the notion that the common law is the beginning of wisdom and the eternal jural order. Let us not be afraid of legislation, and let us welcome new principles, introduced by legislation, which express the spirit of the time.”⁷⁰

Lawyers are thus invited to be proactive with regard to the moral needs of a changing society; they are meant “to induce a consciousness of the role of ideal pictures of the social and legal order both in decision and in declaring the law”.⁷¹ In the literature, this is explained as follows:

Pound’s insistence that judicial decision-making was continually influenced by current moral, political, and social ideas allowed him to suggest that adjudication could function as a force for moral cohesiveness in society.⁷²

Ehrlich and Pound thus stand for two fairly distinct approaches in legal sociology, which respond, in different ways, to the legacy of historical scholarship. We can further classify these different

⁶⁹ LA Grossman, “‘From Savigny Through Sir Henry Maine’: Roscoe Pound’s Flawed Portrait of James Coolidge Carter’s Historical Jurisprudence”, *American University, WCL Research Paper No. 2009-21*, available at: <<http://ssrn.com/abstract=1407623>>, p 20.

⁷⁰ R Pound, “Law in Books and Law in Action”, (1910) 44 *American Law Review*, p 12, at 35.

⁷¹ R Pound, “The Theory of Judicial Decision, Part III”, (1923) 36 *Harvard Law Review*, p 940, at 958.

⁷² GE White, “From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America”, (1972) 58 *Virginia Law Review*, 999, at 1011.

approaches with the help of Brian Tamanaha, who found two different concepts of law within law and society scholarship. These are based upon, what he calls, “two distinct versions of the gap problem.”⁷³

One version is the gap between state legal rules (or the rules cited as binding by non-state ‘legal’ institutions) and *what people in the community actually do*, the rules they actually follow in the course of social life. [...] A second version is the gap between state legal rules (or the rules cited as binding by non-state ‘legal’ institutions) and *what the legal institutions actually do*, which norms they, in fact, enforce and how they do so, regardless of what they claim.⁷⁴

The first version of the gap problem is connected to a “European” conception of legal consciousness, which includes *any* law as it is experienced by the people; the latter is linked with an “American” conception of legal consciousness, which is confined to *the* law of the state. The question is, then, “How do people experience (official) law?”⁷⁵

According to Tamanaha’s classifications, law can thus either be understood as “lived norms” or as “enforced norms”. Lived norms (which recall Ehrlich’s “living law”) refer to customary or community law, that is, the legal commitments that emerge from society as it is outside and before the state. In contrast, enforced norms (which refer to Pound’s “law in action”) can be equated with positive or state law, that is, the whole package of rules that are enforced and enacted by the state. Tamanaha emphasises that lived norms rely on a complex of social obligations, whereas enforced norms draw on a system of institutionalised sanctions. The former work primarily through socialisation, or the effects of culture (internal control in a culture of conformity), while the latter are implemented through coercive means, or the effects of power (external control by a powerful government). Hence, we can consider lived norms as a spontaneous legal order which is developed “bottom-up” in society, and enforced

⁷³ BZ Tamanaha, “An Analytical Map of Social Scientific Approaches to the Concept of Law”, (1995) 15 *Oxford Journal of Legal Studies*, p 501, at 512.

⁷⁴ *Ibid.*; original emphasis.

⁷⁵ Hertogh, note 62 above, p 475.

norms as an artificial legal order which is imposed “top-down” by the state.⁷⁶ One may link these divergent views of the law to the respective preoccupations of the consensus and conflict paradigm. Durkheim’s view of law as a consensual expression of the community is thus replicated in Ehrlich’s approach, which points, however, to the plurality of legal communities, which may undermine the unity of state law. At the same time, Marx’s polemic against law as an ideological instrument of the state finds resonance in Pound’s criticism of partial judgments (for example, favouring liberalism/capitalism, such as in *Lochner v New York*) that do not respond to general social needs. This is not to claim that Ehrlich and Pound are fully-fledged representatives of the consensus and conflict paradigm (since one could also argue otherwise), but simply to locate their work in the heuristic framework established for this study.

III.4. Karl Polanyi (1886-1964)

Now, what has Polanyi got to do with it? Even though he started his academic career as a Doctor of Law, his most famous work “*The Great Transformation*” qualifies him much more as an economic sociologist than as a legal sociologist.⁷⁷ But he is also a representative of classical, historical sociology which is characterised by a “holistic” approach to law, economy, and society - its history and modernity. Just as Marx’s and Durkheim’s general sociological theories included many references to what would later become economic sociology, on the one hand, and legal sociology, on the other, Polanyi’s economic sociology can both be generalised and re-specified on the grounds of the historical paradigm. And just as Ehrlich’s and Pound’s respective works form part of a larger “spirit of the time”, so does Polanyi’s. In a way, it thus already entails both a general and, at least *in nuce*, also a legal sociology of - the market society. Even though Polanyi did not specialise in the legal dimension of the market society as it emerged in the Nineteenth century, we can thus still find cues in his work of how the law forms part of the whole. Moreover, we can also speculate about the different roles that it plays in the context of the “dis-embedding” and “re-embedding” of market relations. Finally, we can also re-consider Polanyi’s work in terms of consensus and conflict paradigms. On the one hand, it seems clear to locate him on the side of conflict theorists working in the legacy of Marx. Social

⁷⁶ Tamanaha, note 73 above, p 523.

⁷⁷ Polanyi, note 2 above.

antagonisms are naturally the driving force behind the “movements” and “counter-movements” which Polanyi observes. On the other hand, the “embeddedness” paradigm also lends itself to a different reading. Accordingly, markets are always embedded - embedded in a (pre-existing?) moral order, or a culture that provides them with a normative backing. However, what is the dependent and what the independent variable in the relation of market and morality often seems hard to tell.⁷⁸ This analytical question notwithstanding, there is clearly also a normative impetus behind Polanyi’s work. His critique of market society is thus, at the same time, an effort to strengthen the “self-protection of society” against an intrusion of markets in each and every social sphere. In this regard, his seminal study still forms part of the classical project of furthering sociology as a moral science.

To substantiate these claims, Polanyi’s approach in *“The Great Transformation”* can be summarised (and partly reframed) as follows. Overall, his book contains a theory of modernisation that focuses on the processes that brought the modern market society into being. The market society can briefly be characterised as reversing the traditional relationship between economy and society:

Instead of economy being embedded in social relations, social relations are embedded in the economic system.⁷⁹

The “embeddedness” term is used here in two different ways. On the one hand, Polanyi refers to the “social embeddedness of the economy” *before* markets became the prevailing mode of social organisation; on the other, he relates to the “economic embeddedness of society” *after* markets have become a dominant principle, and everything seems to be subsumed to their logic. If we do not think of “economy and society”, which is the subject matter of economic sociology, but of “law and economy”, which is the subject matter of an “economic sociology of law”, and read this into Polanyi’s work,⁸⁰ we can re-formulate the same idea in the following way: instead of

⁷⁸ M Fourcade & K Healy, “Moral Views of Market Society”, (2007) 33 *Annual Review of Sociology*, p 285.

⁷⁹ Polanyi, note 2 above, p 57.

⁸⁰ S Frerichs, “Re-embedding Neo-liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law”, in: Ch Joerges & J Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, (Oxford, Hart Publishing, 2011).

the economy being embedded in the law, the law is embedded in the economic system - which would mean that the law has changed sides from containing the logic of the market, to implementing it throughout society. Whereas traditional societies were thus characterised by the social regulation of the economy, including “custom and law, religion and magic”,⁸¹ modern societies stand out by increasingly ordering social relations according to economic principles, namely, the ideal of the “one big self-regulating market”.⁸² This means nothing less than putting “the laws governing a market economy [...] under the authority of Nature herself”,⁸³ and, one could add, assimilating the man-made law to the - so perceived - law of nature.

What allows us to re-interpret Polanyi’s work in economic sociology from the viewpoint of legal sociology is his background in historical scholarship. In this regard, we can draw on Kurtuluş Gemici’s account. On the one hand, he emphasises that Polanyi’s approach is, first of all, historical, and thus exemplary of historical sociology:

The Great Transformation is a book devoted to historical analysis not solely for the sake of understanding the past, but also for making an argument about the present and future.⁸⁴

On the other hand, it is argued that “embeddedness as a methodological principle is derived from a holistic view of society”.⁸⁵ The choice of this “holistic-historical” terminology in characterising Polanyi’s approach is not accidental. Instead, it indicates well what schools of thought he has, at least to some extent, drawn inspiration from - namely, the trinity of historical jurisprudence, economics, and sociology. In this regard, Gemici hints at his reception of the German historical school of economics:

Methodologically, Polanyi is influenced by a diverse array of authors including representatives of The German Historical

⁸¹ Polanyi, note 2 above, p 61.

⁸² *Ibid.*

⁸³ *Ibid.*, p 125.

⁸⁴ K Gemici, “Karl Polanyi and the Antinomies of Embeddedness”, (2008) 6 *Socio-Economic Review*, p 5, at 11; original emphasis.

⁸⁵ *Ibid.*, p 24.

School, such as List and Schmoller, as well as Marx, Weber and Lukács.⁸⁶

Historical economics can, in fact, be considered to be a forerunner of economic sociology, which inherited its role as an antidote to neo-classical economics, or what became standard economics. The reference to Karl Marx and György Lukács (1885-1971) indicates the relevance of historical materialism - the first embodiment of conflict theory - for Polanyi's work.

However, Gemici also gives another hint which links Polanyi back to historical jurisprudence. He thus shares the prevailing ideas of his time, which spilled over from jurisprudence to economics and sociology. Polanyi's main source to be mentioned here is Henry James Sumner Maine (1822-1888), the leader of the English school of historical jurisprudence, while Ferdinand Tönnies (1855-1936), a German sociologist, might have acted as the mediator.

Apparently, it is these two thinkers to which Polanyi owes his ideas about the "changing place of economy in society".⁸⁷ It should be noted that the reference is here the economy and not the law. Gemici explains:

Along with a great majority of 19th century social thinkers and academics, Polanyi contrasts ancient societies based on status with modern societies based on contract.⁸⁸

Here, the legal categories in which the economic relations are framed are already recognisable. In fact, the move from status to contract - or, more specifically, from status-based to contract-based legal and economic relations - is a centrepiece of Maine's *"Ancient Law: Its Connection With the Early History of Society, and Its Relation to Modern Ideas"*.⁸⁹ It was this argument that led Ferdinand Tönnies to his

⁸⁶ *Ibid.*, p 20.

⁸⁷ *Ibid.*, p 23.

⁸⁸ *Ibid.*

⁸⁹ HJ Sumner Maine, *Ancient Law: Its Connection With the Early History of Society, and Its Relation to Modern Ideas*, (London, John Murray, 1861), available at: <http://en.wikisource.org/wiki/Ancient_Law>.

famous distinction between “*Gemeinschaft und Gesellschaft*”,⁹⁰ that is, community, on the one hand, and society, or association, on the other. Again, modernisation is understood as a move from status-based communities to contract-based associations to which corresponds, as Mathieu Deflem summarises, “a transformation of law from common or customary law to contract or statutory law”.⁹¹ Tönnies’ view can be seen as being fundamental in understanding modern society (*Gesellschaft*), which is the proper notion of the subject matter of sociology, as defined by law – to wit, modern law. As a theory of reflection of modern society, sociology has thus notably to reflect upon the law and its constitutive role for society. However, as a representative of classical, historical sociology, Tönnies also thought of the economy, namely, the formation of modern capitalism, in terms of a transition from customs to contracts. This is why Polanyi could easily link himself to his work with his own treatise on “*The Great Transformation*”.⁹²

In this linear and dichotomous view of the modernisation process, it is, however, not to be neglected that this is not (only) reigned by functional necessities but (also) the result of conflicting forces, or – as Polanyi calls it – of a “double movement”, an interplay of economic liberalism (‘movement’) and social protectionism (‘counter-movement’):

For a century the dynamics of modern society was governed by a double movement: the market expanded continuously but this movement was met by a countermovement checking the expansion in definite directions. Vital though such a countermovement was for the protection of society, in the last analysis it was incompatible with the self-regulation of the market, and thus with the market system itself.⁹³

⁹⁰ F Tönnies, *Gemeinschaft und Gesellschaft: Grundbegriffe der reinen Soziologie*, (Berlin, Curtius, 1922).

⁹¹ M Deflem, “Ferdinand Tönnies (1855-1936)”, in: E Craig (ed), *Routledge Encyclopedia of Philosophy*, (London, Routledge, 2004), available at: <<http://www.rep.routledge.com/article/R048>>.

⁹² Polanyi, note 2 above.

⁹³ *Ibid.*, p 130; emphasis omitted.

In this regard, Polanyi's theory of the market society and its inherent conflicts - the expansion of the "satanic mill" of the market (Part II, Ch. 1) is confronted with increased efforts in the "self-protection of society" (Part II, Ch. 2) - shows clear traits of a conflict theory. With regard to the law, we can translate this social antagonism into two conflicting types of *modern* law. One is the law of the liberal movement that works towards the "dis-embedding" of the economy, namely, the market, from society at large, and the moral order it has inherited from the past, say customary law (or the law of the - traditional - community). The other is the law of the social counter-movement that tries to achieve a "re-embedding" of the economy in a society that also allows for other modes of organisation than the market. This type of law is functionally equivalent to traditional forms of law, but now takes the form of modern state law, as exemplified by the social welfare state.

These two counter-acting types of law can further be characterised with the help of Polanyi's concept of "fictitious commodities" which include land, labour, and money. He argues that these "as if" commodities have been invented by economic liberalism in order to create "flexible" markets that provide business with a steady flow of production factors. But, according to Polanyi, "[l]abor is only another name for a human activity which goes with life itself" and "land is only another name for nature, which is not produced by man",⁹⁴ while money needs to be backed up by substantial values. However, the "commodity fiction" allows land, labour, and money to be treated as marketable commodities and, consequently, allows markets to be organised for them, which then follow the quasi-natural law of supply and demand - at the expense of man and nature in as much they are *not* free contractors. What is important here is to emphasise that these "fictitious commodities" which lead to artificial markets are not only economic fictions, but also *legal* fictions. This has recently been emphasised by legal theorist Alain Supiot in his book "*Homo Juridicus*".⁹⁵ With reference to Polanyi, he writes:

[T]he market [...] rests on dogmatic foundations. If we need to be reminded of this today, it is because the dominant

⁹⁴ *Ibid.*, p 72.

⁹⁵ A Supiot, *Homo Juridicus: On the Anthropological Function of the Law*, (London, Verso, 2007).

economic *doxa* has fallen into the trap of the legal fictions on which it is based. In order for the system of free trade to be introduced two centuries ago, people had to behave *as though* work, land and money were products that could be exchanged – commodities.⁹⁶

And he continues, underlining the moral necessity to revise these categories:

If we forget that these are fictions informed by the dogmas founding the legal order, and if we go on to treat men and nature as pure commodities, we are not only morally reprehensible but we will also inevitably court major ecological and humanitarian disaster.⁹⁷

Based upon all this, we can claim that the two conflicting types of law within modernity are: a “commodified” law that itself contributes to the “commodification” of social relations and, thus, the “dis-embedding” of markets from society, and a “de-commodified” law that lends itself to the “de-commodification” of social life and, thereby, the “re-embedding” of markets in society. At the same time, the notions of commodified and de-commodified law also allow us to conceive the law itself as being subject to both commodification and de-commodification. In the first case, law would itself be considered a commodity, something to be traded on the law market. In the second case, law would be based upon something more substantial - such as (to borrow from Durkheim) the solidarity that characterises a modern and notably abstract community of law, and that also forms the backbone of the modern welfare state. We could thus add a fourth type to the list of fictitious commodities developed by Polanyi. On the one hand, we would have man and nature, which are transformed into labour and land. On the other hand, we have money and law. Money is either based upon exchange value in the commodified form, or upon use value in the non-commodified form. Law is either based upon economic freedom (free choice, free contracts), or upon social obligations which are historically and culturally given - be it in the context of a traditional community or of the modern welfare state. The latter distinction borrows from

⁹⁶ *Ibid.*, p 94; original emphasis.

⁹⁷ *Ibid.*

Wolfgang Streeck's adaptation of Polanyian ideas. While these were originally about "the rise and fall of market economy", Streeck discusses the rise and fall of the *social* market economy.⁹⁸ Herein, he draws a distinction between "Durkheimian" and a "Williamsonian" institutions, or, as I would put it, *understandings* of institutions⁹⁹ - which may very well include the law. In this context, Durkheimian institutions are defined as being obligational and exogeneously imposed, while Williamsonian institutions are defined as being voluntaristic and endogenously contracted.¹⁰⁰ All in all, we can thus see commodification not only as a legal artefact, but also law as an artefact of commodification. At the same time, law - understood as solidarity, that is, as social bonds that go beyond exchange relations - can also be both the premise and the result of de-commodification.

All this has been said in order to elaborate on the category of conflict which underlies Polanyi's economic sociology but which also extends into the sociology of law from which it is derived. It needs to be emphasised, however, that, despite all conflicts, his work follows a clear moral vision in which one side defeats the other. Polanyi considers the market society as not being sustainable, and even attributes the catastrophe of World War II to its inherent conflicts and shortcomings. Considering the blatant alternative of fascism and socialism that offered itself to a "market society that refused to function" at Polanyi's time of writing,¹⁰¹ he rejects any totalitarian regime, and opts, instead, for a third way which one may call "liberal socialism" (in contrast to "economic liberalism"), which would lead to "a society [that] can afford to be both just and free".¹⁰² The modern welfare state might once have led in the right direction, but nowadays suffers the fate so aptly described by Streeck. Accordingly, the *social* market economy of the post-war era is still a market economy and has never lost the "slowly grinding force" inherent in

⁹⁸ W Streeck, *Re-Forming Capitalism: Institutional Change in the German Political Economy*, (Oxford, Oxford University Press, 2009).

⁹⁹ S Frerichs, "Review of Wolfgang Streeck: *Re-Forming Capitalism: Institutional Change in the German Political Economy*", (2010) 50 *Management International Review*, p 827.

¹⁰⁰ Streeck, note 98 above, p 155.

¹⁰¹ Polanyi, note 2 above, p 239.

¹⁰² *Ibid.*, p 256.

capitalism itself.¹⁰³ It is this momentum which ultimately undermined, according to Streeck, the protective components of the German social model - which is what his case-study is all about. We can conclude that whatever happened later in the post-war economies, Polanyi initially had a substantial idea of what they should look like. His notion of embeddedness was thus not only an analytical, but also a normative, concept. Markets were meant to be re-embedded in a modernised moral order.

IV. From Parsons to Foucault: Contemporary Sociology and the Crisis of Modern Science

Before we reach, somewhat out of breath already, the upper floor of socio-legal theory-building, and walk alongside the portraits of some of the greatest sociological scholars of the post-war era and the late Twentieth century - up to present times - we will take a break to see what happened in between. "In between" has a twofold meaning here: on the one hand, it refers to a generation of socio-legal scholarship that succeeded "historicism", the prevailing paradigm in the Nineteenth and early Twentieth century, and preceded "constructivism", the paradigm that emerged in the late Twentieth century and still seems pivotal today.¹⁰⁴ "In between" is the second generation of socio-legal thinking, namely, "realism", which prospered in the middle of the Twentieth century (let us say, from the 1920s to the 1980s). On the other hand, "in between" also refers to the particular location of this movement between sociology and jurisprudence. After the social sciences, including sociology, had been established as distinctive disciplines - each claiming its own subject matter, theories and methods - academic multi-tasking in different branches of science became increasingly difficult. Roger Cotterrell describes this differentiated (or "disciplined") state of sociology and jurisprudence as follows:

The sociological study of law has been marginalized in the image of sociology-as-discipline at the same time as empirical social theory has been marginalized in the dominant forms of

¹⁰³ Streeck, note 98 above, p 146.

¹⁰⁴ Frerichs, note 4 above.

jurisprudence constrained by the demands of law-as-discipline.¹⁰⁵

In somewhat simpler terms, lawyers, then, were only lawyers, and sociologists were nothing but sociologists. Those who were still crossing the boundaries and working in the space “in between”, at that time referred to as “law and society”, were usually doing so in a selective manner. Lawyers thus developed their own ways of practising sociology at the margins of the legal discipline (analysing legal behaviour with sociological methods). At the same time, holistically-minded sociologists started speculating, once again, about the social nature of the law (theorising about law as a social sphere). This picture might not cover all the socio-legal scholarship of this period, but it does help us to understand why Twentieth century legal-realism - a movement mainly led by practitioners - appears quite different from the more theoretical inquiries into law for which contemporary sociologists are known. Before we turn to this “rediscovery of the law in social theory”,¹⁰⁶ we will first recount what happened on the other side of the inter-disciplinary fence.

In order to understand - and locate - legal realism, it is important to distinguish between two kinds of positivism: “scientific positivism” and “legal positivism”. Legal realism builds on the former, but rejects the latter. Scientific positivism is taken as the state of the art in the natural and social sciences. Adherents of sociological jurisprudence and legal realism are eager to draw on its theories and methods in order to study the behaviour of legal actors and institutions. Legal realism thus is diametrically opposed to legal positivism (also referred to as legal formalism), or what is considered a self-referential discourse about legal concepts with questionable social effects. Ironically, some sociological theorists take legal positivism as a fairly accurate description of the empirical functioning of the legal system. But their view is not based upon a narrow “positivistic” understanding of science, but, instead, draws on more “constructivist” interpretations. In the following, I will substantiate all three notions - scientific positivism, legal positivism, and legal realism - with reference to the literature.

¹⁰⁵ R Cotterrell, *Law's Community: Legal Theory in Sociological Perspective*, (Oxford, Clarendon Press, 2005), p 70.

¹⁰⁶ Gephart, note 6 above, p 6.

For *scientific positivism*, we can draw, again, on Brian Tamanaha's account. He notes:

Scientific positivists believe that social phenomena can and should be studied through application of the objectivistic methodology of the natural sciences, with its emphasis on observation, measurement, data-gathering and quantification.¹⁰⁷

The emphasis is thus on quantitative empirical methods, the purpose of which is to explain, and possibly predict, certain forms of behaviour:

Pursuant to positivism, the goals of scientific enquiry are to produce explanations based upon the formulation of causal laws.¹⁰⁸

The overall approach can also be labelled as behaviourism. As such, it disregards the intentions which the actors might actually have, or the justifications which they give for their behaviour.

[B]ehaviourism insists that social scientists must focus on what people do - on how people actually behave, rather than on what they say.¹⁰⁹

Tamanaha also relates more macro-analytical approaches to the micro-analytical paradigm of behaviourism:

[S]tructuralism or functionalism [...] focus on behaviour as a means to identify the structures in society or to determine how the functions of subsystems are satisfied.¹¹⁰

This is, however, only justified as long as macro-sociology has not yet embodied constructivism, which allows more subjective and inter-subjective features of reality to be included.

¹⁰⁷ Tamanaha, note 73 above, p 511.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

For *legal positivism*, a pointed summary is given by Douglas Vick, who discusses the role of “inter-disciplinarity” in the “discipline of law”.¹¹¹ Here, legal positivism is equated with legal doctrine.

Doctrinal research treats the law and legal systems as distinctive social institutions and is characterized by a fairly unique method of reasoning and analysis.¹¹²

This is how the legal discipline encloses itself. Accordingly, there does not have to be any continuity with the scientific methods of the (other) social sciences. Instead, the focus is solely on the legal text:

In its purest form, ‘black-letter’ research aims to understand the law from no more than a thorough examination of a finite and relatively fixed universe of authoritative texts consisting of cases, statutes, and other primary sources, the relative importance of which depends on the legal tradition and system within which the legal researcher operates.¹¹³

It is this text-based approach which also allows us to claim the unity of the legal system, and of the logic of legal argumentation. From this perspective, law is a science - not because it adopts the methods of (other) social sciences, as in legal realism, but because its method is unique to the legal system.

The law [...] is treated as a sealed system which can be studied through methods unique to the ‘science of the law’, and legal developments can be interpreted, critiqued, and validated by reference to the internal logic of this sealed system.¹¹⁴

Faithfulness to the legal text is, ultimately, what legal positivism is all about:

This approach was positivist in orientation, in that the law was seen to consist of data - primarily, legal rules derived

¹¹¹ D Vick, “Interdisciplinarity and the Discipline of Law”, (2004) 31 *Journal of Law and Society*, p 163.

¹¹² *Ibid.*, p 178.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, pp 178-179.

from legislation or cases - that could be recognized and observed without speculating about what lies behind those rules.¹¹⁵

Scientific positivism and legal positivism thus share a “positivistic” attitude to data as they are “given”. However, the former uses behavioural observations, while the latter uses legal writings as the respective data - substantially, they thus have little in common.

With regard to *legal realism*, it clearly refers to behavioural data and disregards textual data. It thus turns Roscoe Pound’s re-orientation from the “law in the books” to the “law in action” into a principle of legal realist research. The link between scientific positivism and legal realism is most clear in Brian Leiter’s characterisation:

Realism [...] was deeply ‘positivistic’, in the sense that it viewed natural science as the paradigm of all genuine knowledge, and thought all other disciplines (from the social sciences to legal study) should emulate the methods of natural science. Chief among the latter was the method of *empirical testing*: hypotheses had to be tested against observations of the world.¹¹⁶

Empirical testing was notably used to reveal the gap between legal words and legal deeds. In other words, “the Realists frequently claimed that existing articulations of the ‘law’ were not, in fact, ‘confirmed’ by actual observation of what the courts were really doing”.¹¹⁷ The law was thus conceived as “*causally or explanatorily indeterminate*, in the sense that legal reasons did not suffice to explain why judges decided as they did”.¹¹⁸

To conclude this digression on the second generation of socio-legal thinking, which will, nevertheless, lead us to the third generation, we will also briefly relate it back to first generation thinking. The

¹¹⁵ *Ibid.*, p 180.

¹¹⁶ B Leiter, “American Legal Realism”, *Public Law and Legal Theory Research Paper No. 042*, available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=339562>, p 2; original emphasis.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, p 3; original emphasis.

question is thus what distinguishes realism from historicism. In this respect, a recent paper by Tamanaha proves instructive enough for the present purpose. While both groups, or generations, of socio-legal scholarship clearly share an interest in law as formed by society - by "social norms, social influences, social values, social interests, and social attitudes"¹¹⁹ - and as directed to social needs, there are also some major differences. One point of distinction is, naturally, the influence of scientific positivism, which was, in the main, missing in the first generation, but which became characteristic of the second:

A prominent theme for a number of Realists was the social-scientific study of law, about which Historical Jurists had said little, because the social sciences were in their infancy in the late nineteenth century.¹²⁰

Another point is the alleged conservatism of historical jurisprudence and the more progressive outlook of legal realism. This includes various factors, such as self-image, scholarly style, and political ambitions. In terms of self-reflection,

[t]he Realists were less complacent than Historical Jurists about the possibility that judges' views reflected the interests of the élite class rather than the whole society.¹²¹

This is also expressed in different styles of legal thinking: while the arguments of historical jurists were more backward-looking (to legal sources), those of legal realists were more forward-looking (to political goals). The same difference also marks political attitudes and agendas. In the American context of the 1930s, both groups were notably split over the New Deal - the political response to the Great Depression:

Historical Jurists [...] valued liberty and perceived a clear distinction between the public and private spheres, and they

¹¹⁹ BZ Tamanaha, "Understanding Legal Realism", (2009) 87 *Texas Law Review*, p 731, at 756.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

criticized what they considered an alarming expansion of state police power and a host of intrusive legislation.¹²²

In contrast, “key Realists supported New Deal reforms, and were more enthusiastic about utilizing law - legislation in particular - to advance social objectives, situating them on the other side of the political spectrum from the Historical Jurists”.¹²³ It has to be noted, however, that this comparison only holds for historical jurisprudence and not historical styles of thinking in the social sciences, more generally. In fact, as critics of too “liberal” styles of (economic) thinking, historical economists and sociologists were often on the side of reformers - if not, revolutionaries, as in historical materialism.

Now, why do we need all this before we can finally enter the second storey of our gallery stocked with even more socio-legal wisdom? Since being comprehensive cannot be a point in a study that is, in any case, highly selective, I will only give two inter-related reasons. The first reason is to understand how the starting-point of many sociological theorists - both postwar and contemporary ones - differs from what legal realists were, and are, doing, including the “law and economics” and “law and society” movements of the second half of the Twentieth century. The “re-discovery of law in social theory”¹²⁴ is notably not founded on scientific positivism (if this is narrowly understood as empiricism and behaviourism, as in the present context). What is behind this is a new wave of “holistic” sociological theorising, and the new grand theories to be developed clearly had to include the law as one of the most distinctive social spheres. Curiously, the legal discourse - namely, legal positivism - is not, therefore, necessarily rejected, as in legal realism, but is, in fact, often taken as the inner logic according to which the legal system actually works. One might say that law, thus, became “bracketed” in sociology. While law is understood as constitutive for modern society and therefore covered in sociological theories, it is also acknowledged as a self-enclosed, self-referential discourse for which sociological wisdom does not really matter.

¹²² *Ibid.*, p 760.

¹²³ *Ibid.*

¹²⁴ Gephart, note 6 above, p 6.

The second reason for this long digression is that, in the third generation of socio-legal thinking, scientific positivism has completely lost credibility. The scientific worldview and, notably, the belief in social engineering based upon social scientific knowledge, are shattered. Legal realism thus had to give way to what is cautiously labelled as “post-realism” and characterised, among others, by the following features:

[d]isputes about what counts as social knowledge as well as new theorizations that have drained some of the optimism about the political utility of social knowledge,

and the

[i]ncreasing abandonment of the reformist policy orientation of scholarship in favor of the description and analysis of the processes through which law performs in various social domains.¹²⁵

Sociological scholarship which builds, in one way or another, on constructivist arguments, or on arguments of the sociology of knowledge, would thus seem “post-realist” in character, but more ambitious in outlook. It is less about the ontological knowledge of an “objective” reality than about epistemological insights into its “inter-subjective”, or social, construction. It has not fully-dispensed with the idea of sociological enlightenment (sometimes de-constructing, sometimes re-constructing social constructions), but it is no longer united behind the project of modernity, which notably includes sociology as a positive moral science. It is against this background that I would claim that contemporary scholarship is less about normative embeddedness, as classical historical sociology, than about cognitive embeddedness.

IV.1. Talcott Parsons (1902-1979)

In the remainder of this chapter, we will continue and conclude our gallery of socio-legal thinkers with the portraits of five scholars whose work marks the second half of the Twentieth century, starting

¹²⁵ A Sarat, “Vitality Amidst Fragmentation: On the Emergence of Postrealist Law and Society Scholarship”, in: *idem* (ed), *The Blackwell Companion to Law and Society*, (Malden MA, Blackwell Publishing, 2004), p 7.

with Talcott Parsons. In the present group of thinkers, Parsons might count the least as a “contemporary” scholar. But his sociological systems theory is an important reference for more recent approaches, namely, the works of Niklas Luhmann and Jürgen Habermas (which cannot be considered as Parsonians though). On the other hand, Parsons’ ideas, and the reactions that they provoked, have notably been reflected in the debate on consensus *versus* conflict theory. His “structural-functional” systems theory has actually become the epitome of the consensus paradigm. Pierre Bourdieu and Michel Foucault can, in contrast, be seen as representatives of the conflict paradigm, even though they were not directly engaged in the dispute about Parsonian sociology. In this regard, we can draw on Jäger and Meyer’s account:

Conflict theory began to establish as a specific sociological paradigm at the time of predominance of structural functionalism in the 1950s and 1960s. It questioned the functionalist orientation towards consensus, integration and social order and offered itself as an alternative programme to functionalism (Ralf Dahrendorf) or as a shift in the orientation of functional analysis (Lewis A. Coser).¹²⁶

The names given here are thus Dahrendorf (1929-2009) for Germany, and Coser (1913-2003) for the United States - two scholars who share a (certain) background in Marxist sociology. More specifically, the conflict-theoretical programme consists, following Jäger and Meyer,

in replacing the *suppositions* of integration and consensus in the structural-functional theory by an *empirically substantiated* theory about conflict and consensus, stability and change in *social processes*.¹²⁷

Accordingly, criticism is notably raised against the too theoretical and too static nature of structural functionalism. On the other hand, a conflict-theoretical setting would not simply ignore instances of stability and consensus in a society; it just would not take them for granted.

¹²⁶ W Jäger & H-J Meyer, *Sozialer Wandel in soziologischen Theorien der Gegenwart*, (Wiesbaden, Westdeutscher Verlag, 2003), p 36; my translation.

¹²⁷ *Ibid.*; original emphasis, my translation.

This is, in fact, the main charge on Parsonian sociology - that it seems always already to presume normative integration, and not to explain it as the contingent outcome of social processes. It is in this regard that we can introduce yet another distinction, namely, between "normative paradigm" and "interpretive paradigm". In this case, structural functionalism is identified with the normative paradigm. The fact that Parsonian sociology had to be attacked from different angles - not only from conflict sociology, but also from interpretive sociology - only demonstrates its temporary dominance. While conflict theory is typically connected with macro-sociological terminologies and research orientations, the interpretive paradigm adopts a micro-sociological perspective and thus forms part of sociological action-theories (rational choice being the other pole). In the centre are thus not general social structures, systems, and functions that live an abstract life in the minds of theorists, but concrete individuals, and their intentions and interactions in the lifeworld. What the notions of "consensus" paradigm and "normative" paradigm have in common is, clearly, an emphasis on the "normative consensus" in society. The contested core assumption of the normative paradigm can thus be seen in the - more or less pre-existing - normative integration of society. According to this perspective, society is integrated through norms and values which are institutionalised in a system of roles and sanctions, and internalised by the individuals through a process of socialisation. In this setting, individuals generally conform to the social expectations addressed to them. This does not mean that they cannot become "deviant" - but this would be nothing but an exception to the norm. In the normal, equilibrium, state of society, all members of society thus share the same norms and values. This vision of society entails a model of man based upon norm conformity, which is, in fact, what the classical *homo sociologicus* is all about (and what makes him so unattractive for a, presumably, highly-individualised society).

Within this theoretical context, it is easy also to conceive of a normative "integration through law". In fact, Parsons can be considered as one of those sociologists that have "re-discovered", according to Gephart,¹²⁸ the law in social theory, and thus continued with the legacy of classical sociology in combining and integrating

¹²⁸ Gephart, note 6 above, p 6.

studies of law and society. Invoking this great tradition, Parsons eventually opens one of his essays as follows:

After the brilliant start by Durkheim and Max Weber about the turn of the century, it is something of a mystery why the social sciences and particularly, perhaps, sociology have shown so little interest in the study of law and legal systems.¹²⁹

The title of the paper is also significant, in this respect: “*Law as an Intellectual Stepchild*”. While this tells all about the previous “loss of law in social theory”,¹³⁰ it also relates, in an artful way, to the idea that sociology was “born” out of the spirit of jurisprudence. Whereas in times of historicism, legal and social theory were thus closely-related, and sociology could actually be considered to be the “child” of historical jurisprudence, this relation was subsequently lost. In sociology-as-discipline, law is no longer considered to be its mentor, but is, instead, treated as a step-child. But even though the law has been re-discovered in Parsons’ work, it does not play the same role as in the times of the “original unity of legal and social theory”.¹³¹ In the hundred years that have passed by since, legal and social theory have clearly become differentiated, and have started to follow different pathways. What sociologists think about the law, then, rarely matches the respective theories of lawyers (even though they might also contain some “hidden social theories”). Against this background, Cotterrell’s verdict appears accurate, but futile:

Parsons’ monumental sociological writings [...] do not seriously engage with lawyers’ conceptions of law or with significant issues about the nature of legal doctrine. Though Parsons frequently discusses law and clearly regards it as an important matter for sociological analysis, no confrontation with legal discourse takes place.¹³²

¹²⁹ T Parsons, “Law as an Intellectual Stepchild”, (1977) 47 *Sociological Inquiry*, p 11, at 11.

¹³⁰ Gephart, note 6 above, p 5.

¹³¹ *Ibid.*, p 7.

¹³² Cotterrell, note 105 above, p 70.

Here, Cotterrell notably refers to the “transformations occurring in Western legal doctrine in recent decades”, which were neglected by Parsons, but would, in his opinion, “demand sociological analysis”.¹³³ However, this shortcoming has its deeper reasons not simply in sociological disinterest, but in the inter-disciplinary division of labour which Cotterrell previously described so well.

On the other hand, one can argue that the law eventually played a central role in Parson’s work, even though this might, at first, not be so obvious.¹³⁴ Considering the four main functions that he assigns to the social system - adaptation (A), goal attainment (G), integration (I), and latent pattern maintenance (L) - and about the subsystems which represent the respective functions, the legal system actually seems to be missing. The economic system provides for adaptation, the political system for goal attainment, the system of the societal community for integration, and the cultural system for latent pattern maintenance. However, there are two ways to find the law in Parson’s approach. One of them takes the integration function as a starting-point, the other the concept of “inter-penetration”. With the help of both, we can locate the law right in the middle of Parson’s analytical framework. On the one hand, we can thus start from the notion of integration, and the integrative sub-system of the “societal community”. This terminological crossover of society and community (notions which Tönnies used to distinguish between traditional and modern forms of organisation) hints at the integrative core of society in which the community is given a modern, associative form. This ultimately amounts to a legal community, a community of citizens. Richard Münch, one of the Parsons experts in Germany, argues:

Modern society is not characterized by a complete dissolution of the societal community in the course of the differentiation of function systems, but by the parallel development of a free civil society (*citizenship*) as the solidarity core [*solidarischer Kern*] of an extremely differentiated and pluralistic society.¹³⁵

¹³³ *Ibid.*

¹³⁴ S Frerichs, *Judicial Governance in der europäischen Rechtsgemeinschaft: Integration durch Recht jenseits des Staates*, (Baden-Baden, Nomos Verlag, 2008), pp 229-246.

¹³⁵ R Münch, *Globale Dynamik, lokale Lebenswelten: Der schwierige Weg in die Weltgesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 1998), p 60; original emphasis, my translation.

Normative integration thus rests, last, not but least, on legal integration - on a workable community of law which includes "solidarity among strangers". On the other hand, the legal system can also be depicted as a product of the "inter-penetration" of economic, political, community and cultural function systems. In fact, the modern law requires all four functions: cultural generalisation, social integration, political specification, and economic adaptation. Again, in the words of Münch:

The modern law cannot be explained in its historical development without the interplay of cultural, social, economic, and political forces. At least in principle, the modern law is characterized by the comparably strongest interpenetration of these factors, however variable its development might actually have been.¹³⁶

In Parsons' approach, the law is thus not at the periphery, but at the centre of society. It is, arguably, the best expression of how the different functions interact empirically, and the best description of the form that solidarity, or normative integration, has actually taken in a modern society.

IV.2. Niklas Luhman (1927-1998)

Parson's seemingly all-encompassing theory was high profile in post-war sociology and thus found many followers as well as critics on both sides of the Atlantic. It also left its marks on the works of Niklas Luhmann and Jürgen Habermas, the two theorists to be discussed next. Each of them developed, however, a new twist in his work, which, therefore, can no longer be identified with Parsonian sociology, or with the consensus paradigm as such. In contrast, both Luhmann and Habermas developed their own theories of society, in general, and of law, in particular, which also entail new styles of thinking about law *and* society. But their common starting-point in (a critical reception of) Parsons' work still offers a good standard of comparison, which helps us to re-assess the respective outcomes, notably with regard to consensus and conflict paradigm. In anticipating the following, one could perhaps claim that Luhmann

¹³⁶ *Idem*, *Die Struktur der Moderne: Grundmuster und differentielle Gestaltung des institutionellen Aufbaus der modernen Gesellschaften*, (Frankfurt aM, Suhrkamp Verlag, 1984), p 446; my translation.

“de-constructed” any notion of a social consensus and de-centred the role of law in society, whereas Habermas “re-constructed” the idea of normative integration and brought the law back into the middle. However, more importantly, in this context is the fact that only one of them, to wit, Habermas, started out from a conflict-theoretical background and could thus develop something akin to a “conflict theory of law” where a moral consensus is not given, but achieved (although it remains contested how much cultural unity, or unanimity, has already to be taken for granted).

While Luhmann’s and Habermas’ works cannot generally be avoided in any account of contemporary social theories that have “re-discovered” the law, there is a particular point in discussing them in the context of this chapter, and they certainly deserve more space than is given to them in this treatise (which is already far too long). With regard to the “new” conflict of laws approach that is outlined and discussed in this volume, as well as in related works, both theorists do, in fact, play a pivotal role - as does the conflict, or mismatch, between them. What one may learn from the ongoing discussions is that there are many Luhmannians (“right” and “left” ones, “orthodox” and “unorthodox” ones) and, probably, as many Habermasians. And there are many, often younger, scholars who are eager to build a bridge between the two, thus becoming something like Habermasian Luhmannians or Luhmannian Habermasians. While this endeavour is ambitious and difficult enough, it becomes even more complicated when other thinkers also come into play, namely, critical theorists of the modern market society, such as Karl Polanyi (see above) and, in different terms, Michel Foucault (see below). By this, I do not want to claim that there is no such thing as a synthesis of all, or only part, of the theories in question, but that it is nonetheless daring, and that one should be aware of what one is doing. One of the principal motivations of this chapter is thus to add to this awareness, if only by drawing some connections, and some distinctions.

Talking about ambitions, Luhmann’s work can best be introduced by himself. In *“The Society of Society”*,¹³⁷ one of his latest (self-edited) monographs, he writes:

¹³⁷ N Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 1997).

Upon my admittance to the Sociological Department of the University of Bielefeld, which was newly established in 1969, I found myself faced with the demand to name the research projects on which I was working. My project was then and ever since: theory of society; duration: 30 years; costs: none.¹³⁸

This was at a time when Luhmann was in his early forties and could already look back on a respectable career - not as a sociologist, however, but as a lawyer. He had studied law in Freiburg and become Doctor of Law in his early twenties. Thereafter, he took different positions in the administration and the legal system. Only in the 1960s did he re-orient himself towards sociology, probably initiated by studies at Harvard University, where he first met Talcott Parsons. Back in Germany, Luhmann also formally studied sociology, completing both doctoral and post-doctoral dissertations in this new discipline. As an experienced lawyer and sociologist, Luhmann was thus, at the middle of his career, pre-destined for a new attempt to integrate legal and social theory. While, in the 1960s and 1970s, his works in legal sociology could still be considered as fairly conventional (continuing, more or less, with the structural-functionalist tradition), the 1980s and 1990s were characterised by a paradigm shift, and a radicalisation of his systems-theoretical approach for which he has since become famous. He notably introduced the concept of "autopoiesis" (self-production) which is inspired by the natural sciences and emphasises the operative closure and self-referentiality of systems - including functional sub-systems such as the law - and thus stands in sharp contrast to Parsons' concept of intersystemic exchange and "inter-penetration".

Similar to Parsons, Luhmann develops a fairly abstract theory, the empirical use of which is always questioned. It is this level of abstraction which Luhmann himself describes in *"Social Systems"*¹³⁹ - his groundbreaking work with regard to the concept of "autopoiesis" - as a "flight [that] must take place above the clouds, and we must reckon with a rather thick cloud cover".¹⁴⁰ Nevertheless, one may, according to Luhmann, occasionally "catch glimpses" of a somewhat familiar landscape below, including "the extinct volcanoes of

¹³⁸ *Ibid.*, p 11; my translation.

¹³⁹ N Luhmann, *Social Systems*, (Stanford CA, Stanford University Press, 1995).

¹⁴⁰ *Ibid.*, p 1.

Marxism".¹⁴¹ What the latter note already indicates is that Luhmann is definitely not writing from a Marxist background, and, in fact, often considered a conservative critic of any progressive cause. With regard to his notion of reality, his major claim is that "there are systems",¹⁴² meaning that systems do exist in reality. By this, he means that reality is, and can only be, experienced by drawing distinctions (such as between subject and object, self and other, and, notably, system and environment). This is considered the basic operation of systems - including first-order observations, second-order observations, and even third-order observations (Luhmann's preferred stance). In other terms, Luhmann understands reality as a construction, and social reality, consequently, as a social construction which emerges from communications. This is demonstrated by the following example which already takes us near a system-theoretical view of conflict. It is about social movements (Polanyi's counter-movements) which work, in Luhmann's setting, outside the logic of established function systems, such as legal, political, economic, or scientific systems. In this context, he claims that social movements do not have a better knowledge of the world as it is than function systems which are known to give only a very selective account of reality. Protest movements thus only increase the "resistance of communication against communication". However, in doing so, they actually "provide society with reality, which they could not construct otherwise".¹⁴³ While this is about the construction of reality, it is also about conflicts - namely, conflicting constructions of reality.

The fact that Luhmann accounts for conflicts - basically conceiving them as conflicts of communications - does not make him a representative of the conflict paradigm as it has been characterised above. On the other hand, his theory is not as conflict-averse as Parsons' approach. In this regard, we can follow Torsten Bonacker's account:

Whereas Parsons could still be charged for seeing conflicts in social systems as dysfunctional disruptions and for ignoring their positive social content, for Luhmann the notion of

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*, p 12.

¹⁴³ Luhmann, note 137 above, p 865; my translation.

conflict assumes, due to its link with communication, and not action, a central position.¹⁴⁴

In Luhmann's approach, conflicts are thus not understood as a challenge to the system in which they appear - they are just another form of communication, which is what social systems are all about. One can, then, even consider conflicts as a new type of social systems:

[C]onflicts are social systems, indeed, social systems formed out of occasions that are given in other systems but that do not assume the status of subsystems and instead exist parasitically.¹⁴⁵

Again, "parasitical" means something productive here, "productive" in the sense of autopoiesis.

Conflicts are, notably, also constitutive for the legal system, since law is nothing but the continuation - or the processing - of conflicts with other communicative means. The legal system is itself conceived as a function system that follows a distinctive, binary code (legal/illegal) which is applied according to certain, alterable programmes (legal doctrine). This implies that, for the law, there is only the law, and everything else is seen through the lens of the law. Any "cognitive openness" is conditioned by "operative closure", that is, the law can only refer to its environment, including other function systems, upon the basis of its constant self-reference in terms of the code of legality. According to Luhmann, the "autopoiesis" of each system has, in fact, priority over "structural couplings" between the systems, which makes inter-system communication, or attempts to govern systems from the outside, always precarious. Within this theoretical setting, one can hardly conceive of a meaningful social integration (other than the idiosyncratic co-existence and co-evolution of systems) that would provide a common ground, or a normative consensus, for all systems. In fact, moral discourse - protest communication such as in social movements - is considered to have little more than "irritating"

¹⁴⁴ T. Bonacker, *Kommunikation zwischen Konsens und Konflikt: Möglichkeiten und Grenzen gesellschaftlicher Rationalität bei Jürgen Habermas und Niklas Luhmann*, (Oldenburg, BIS, 1997), available at: <<http://oops.uni-oldenburg.de/volltexte/1999/722/>>, p 67; my translation.

¹⁴⁵ Luhmann, note 139 above, p 389.

effects on the established systems. All in all, the law is thus conceived as one of many function systems, none of which form the core of society.

In this radical view, the functional-differentiated society has thus lost its centre and can no longer rely on integration through law, or morality. This almost nihilist vision of law and society is curiously due to a sociological re-interpretation of the principle of “positivity” of the law. It is in this respect that Luhmann seems to draw, to a certain extent, on (legal) positivism, thus taking legal discourse (too?) seriously.

Positive law is *valid*, because it *could be changed by decision*. It is valid *on the grounds of its revisability* and can, in spite of that, achieve a relative consistency over time, if, at the very moment nobody thinks of initiating, or nobody has the possibility or power to initiate, a revision procedure.¹⁴⁶

In a way, positive law is thus reduced to the minute acts of its continuous operation, or re-enactment. It only exists from one moment to another in the endless chain of communications within the legal system. In this respect, “positivity” comes close to Luhmann’s concept of “autopoiesis”. In a way, this systems-theoretical term even replaces the earlier concept of positivity which was emphasised in his earlier works, but still forms part of the semantics of the legal system. In *“The Law of Society”*, which was written after the “autopoietic turn”, Luhmann thus explicitly states that he “reconceptualised the [previously] inadequately labelled problem of positivity”.¹⁴⁷ Nevertheless, Luhmann’s initial theorising about legal positivity can be considered to be quite the opposite of what legal realists were doing at the same time, with “autopoiesis” only widening the gap between the two. Being no legal realist, in the classical sense, Luhmann is no consensus or conflict theorist, either. In the end, all these labels are marked by his own theory as

¹⁴⁶ N Luhmann, “Die Rückgabe des zwölften Kamels: Zum Sinn einer soziologischen Analyse des Rechts”, in: G Teubner (ed), *Die Rückgabe des zwölften Kamels: Niklas Luhmann in der Diskussion über Gerechtigkeit*, (Stuttgart, Lucius und Lucius, 2000), p 35; original emphasis, my translation).

¹⁴⁷ N Luhmann, *Das Recht der Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 1993), p 40; my translation.

distinctions that only point to the observer, or the observing system, who or which has drawn them.

IV.3. Jürgen Habermas (born 1929)

Whereas Luhmann cannot be considered a representative of either the consensus or of the conflict paradigm according to the above argument, Habermas will be introduced here as a representative of both. This does not mean that he is an *oxymoron*, a logically impossible creature, but that he succeeded in providing a theoretical synthesis which contains and conserves elements of both paradigms. But before making this point, we will first have a look at the systems-theoretical *ménage à trois* of Parsons, Luhmann, and Habermas. As a matter of fact, Habermas' approach is often contrasted with Luhmann's approach, not least since they seem to suggest, or are often connected with, different political agendas. But this is not the point to start from; instead, we will first emphasise, again, the common roots that the two opponents have in the work of Talcott Parsons. Their shared background in a theory of social systems, which was originally consensus-laden, facilitates, not least, their comparison.

Both Luhmann and Habermas have thus originally been impressed and inspired by a systems-theoretical approach that treats economic, political, social and cultural systems in equal terms and allows them to "inter-penetrate". In Luhmann's approach, the design is, however, somewhat different: whereas economic and political function systems do play an important role (without being dominant in any way), the social and cultural "functions" seem not to be represented on the same general level anymore - even though "autopoietic" systems can be found for more specific social or cultural functions. Compared to Parsons schematic approach developed around the magic number of four (that is, the AGIL functions: adaptation, goal attainment, integration, latent pattern maintenance), Luhmann's theory thus seems somewhat asymmetrical in this respect. For the comparison, it is therefore interesting to see what remnants of Parsons' approach we may find in Habermas' work, which is generally no longer regarded - or referred to - as a systems theory. But it still is, at least to a certain extent: Most strikingly, we again find economic and political systems, or the two systems of the market and the state. While these function systems actually seem to be the "hard core" of any theory of social systems, they are singled out, in this case, as particularly powerful

systems (economic power, and administrative power). However, other than in Luhmann's theory, the social and cultural dimensions of society at large are not missing (or dissolved into more specialised functions) in Habermas' approach. Instead, they appear here as constitutive, but relatively undifferentiated "functions" of the lifeworld. In this conception, the lifeworld provides the cultural, social and personal substrates of social life, including cultural reproduction (creating common values), normative integration (creating solidarity) and socialisation (creating social identities). Like the function systems, the lifeworld has itself become "rationalised", albeit in a different sense: it is not based upon a restrictive code, or on a symbolically generalised means of exchange, but conceived as a sphere of unrestricted communication and open discourse. But just like the traditional lifeworld, the modern, rationalised lifeworld also relies on the taken-for-grantedness of at least some core assumptions. In this respect, a minimum of cultural consensus would have to be considered as given (by primary socialisation) and not as achieved (by discursive means).

Before exploring how the lifeworld is related to the law, and the law to the administrative and economic systems, we will briefly reflect on Habermas' position in a series of battles, or debates, within the social sciences, which include the battle on value judgments (*Werturteilsstreit*) and the battle on positivism (*Positivismusstreit*). The first battle took place long before Habermas was born, and furthered the establishment of sociology along the lines of Max Weber's famous postulate of "freedom from value judgements" (*Postulat der Werturteilsfreiheit*). However, it was never concluded, in the sense that the methodological and theoretical questions at stake were never fully solved. The second battle can thus, to a certain extent, be seen as a continuation, or renewal, of the first, even though the terms of the debate have changed. This allows us to gain more insights into Habermas' position by relating it back to Weber's position. Since the latter cannot be properly understood if it is reduced to the "freedom from value judgements" (according to which empirical statements of the "is" are to be separated from normative questions of the "ought"), or even to the "freedom from values", as a scientific dogma, I will first recapitulate some of Weber's ideas which are also reflected, albeit with a different emphasis, in Habermas' work. This will both help us to understand Habermas' background in critical theory, here understood as a version of conflict theory (following in the footsteps

of Karl Marx), and his own turn to a normative theory which builds on strong notions of a rational, or enlightened, consensus.

Max Weber (1864-1920) was skipped in our account of classical, historical sociologists above, even though he gives us a perfect example of how a (historical) lawyer can become a (historical) sociologist *via* (historical) economics. In fact, his academic life is sometimes divided into three phases: a legal one, an economic one, and a sociological one. According to the economic sociologist and Weber expert Richard Swedberg, “Weber’s legal period began in 1882, when he enrolled at the University of Heidelberg”, and his legal education was, notably, characterised by an “emphasis [...] on the historical dimension of law”.¹⁴⁸ Similarly, his notion of sociology was “inherently historical”, as Robert Holton argues in the above-mentioned handbook of historical sociology:

The distinctiveness, the dynamics and the inertias of the present could only fully be grasped in historical perspective, which for Weber stretched over 2,500 years.¹⁴⁹

Following the argument of the first part of this chapter, Weber could thus be regarded as another representative of sociology as a historical, holistic, and inherently moral science. However, this would ignore his position in the battle on value judgements which paved the way, not least, for scientific positivism, as characterised in this chapter and as criticised, amongst others, by Habermas.

Nevertheless, Weber does not represent a narrowly-confined behaviourist science which only focuses on “what people do” instead of “what they say”, but tries to bring both aspects together: actual behaviour *and* intended meaning. In fact, Weber claims that the former cannot be sufficiently explained without also considering the latter. Methodologically, explanation (*erklären*) and understanding (*verstehen*) thus have to go hand in hand. This shows, not least, in his

¹⁴⁸ R Swedberg, “Max Weber’s Contribution to the Economic Sociology of Law”, (2006) 2 *Annual Review of Law and Social Science*, p 61, at 75.

¹⁴⁹ R Holton, “Max Weber and the Interpretative Tradition”, in: G Delanty & EF Isin (eds), *Handbook of Historical Sociology*, (London, SAGE Publications, 2003), p 27.

'ideal types' of action which are defined in "Economy and Society".¹⁵⁰ Accordingly, social action "may be oriented in four ways", including "instrumentally rational" and "value-rational action".¹⁵¹ The former ideal type describes action that is "determined by expectations as to the behavior of objects in the environment of other human beings"; the latter is defined by action that is "determined by a conscious belief in the value for its own sake or of some ethical, aesthetic, religious or other form of behavior, independently of its prospects of success".¹⁵² These ideal types clearly foreshadow Habermas' own four models of action, which notably include strategic and communicative action. With regard to strategic action, he declares that:

[t]he central concept is that of a *decision* among alternative courses of action, with a view to the realization of an end, guided by maxims, and based on an interpretation of the situation.¹⁵³

In contrast, communicative action, is characterised by:

[t]he central concept of *interpretation* [which] refers [...] to negotiating definitions of the situation which admit of consensus.¹⁵⁴

Ideally (or ideal-typically), this consensus can only be reached through deliberation.

But there is more that links Habermas back to Weber in terms of in bringing together "objectivity" and "subjectivity". This can be demonstrated by Weber's understanding of social science as cultural science (*Kulturwissenschaft*). Accordingly, social science strives for "objectivity" but is, nevertheless, built on "subjective" commitments,

¹⁵⁰ M Weber, *Economy and Society: An Outline of Interpretive Sociology*, (edited by G Roth & C Wittich) (Berkeley CA, University of California Press, 1978).

¹⁵¹ *Ibid.*, p 24.

¹⁵² *Ibid.*, pp 24-25; original emphasis.

¹⁵³ J Habermas, *The Theory of Communicative Action, Vol. 1: Reason and the Rationalization of Society*, (Boston MA, Beacon Press, 1985), p 85; original emphasis.

¹⁵⁴ *Ibid.*, p 86; original emphasis.

or pre-conceptions. In his essay on “*The ‘Objectivity’ of Knowledge in Social Science and Social Policy*”,¹⁵⁵ Weber thus argues:

The concept of culture is an *evaluative concept* [value-concept]. Empirical reality is for us ‘cultural’ in the sense, and to the extent that, it is related to evaluative ideas [value ideas]; it comprises those elements of reality rendered *meaningful* by this relationship, no more.¹⁵⁶

The same qualification applies to a cultural science, which, hence, “concerns itself only with those components of reality which have some relationship, however indirect, to events to which we attach cultural *significance*”.¹⁵⁷ In doing so, that is, in choosing its subject matter according to culturally-significant criteria, it is said to involve “‘subjective’ presuppositions”.¹⁵⁸ Weber is thus well-aware of the inherent value relations of any social science *as* a science of culture. His postulate of freedom from value judgements, which distinguishes social science from social policy, therefore, does not mean the eradication of the intrinsic value-relatedness (*Wertbezogenheit*) of science as such, or of any scientific engagement with culture. These cultural commitments can be considered to be the relics of sociology as a moral science in Weber’s work. In Habermas’ approach, the inner relation - or tension - between facts and values becomes pivotal again. This already shows in his understanding of the social sciences as “hermeneutic sciences” which constantly have to deal with interpretations, or, in other terms, with facts, *as* social constructions. He notably outlines a “hermeneutic re-constructionism” which is “ready to drop the conventional postulate of value neutrality”¹⁵⁹ and promises to generate empirically objective and inter-subjectively valid knowledge, at the same time.

¹⁵⁵ M Weber, “The ‘Objectivity’ of Knowledge in Social Science and Social Policy”, in: S Whimster (ed), *Essential Weber: A Reader*, (London, Routledge, 2004).

¹⁵⁶ *Ibid.*, p 377; original emphasis.

¹⁵⁷ *Ibid.*, p 382; original emphasis.

¹⁵⁸ *Ibid.*

¹⁵⁹ J Habermas, “Rekonstruktive vs. verstehende Sozialwissenschaften”, in: *idem, Moralbewußtsein und kommunikatives Handeln*, (Frankfurt aM, Suhrkamp Verlag, 1983), p 37; my translation.

This agenda reflects his criticism of more positivistic approaches within the social sciences, including, first of all, scientific positivism, as defined above, but also certain (somewhat one-sided) readings of Weber. In the battle on positivism, which mainly took place in the 1960s - after an American prelude in the 1930s and 1940s - Habermas represents the younger generation of "critical theory", or the so-called Frankfurt School based, both then as now, at the Institute for Social Research in Frankfurt am Main, (but which re-located to New York in the heyday of national socialism in Germany). As the Frankfurt School stands for contemporary re-interpretations of Marxist thought, notably extending it into the cultural dimension, Habermas' work is indubitably informed by conflict theory. Even though this specific intellectual background might have been most relevant for his early career, it also remains visible in his later work, including *"Between Facts and Norms"*,¹⁶⁰ the book that bears most relevance for legal scholarship. Since this particular audience is notably interested in the normative dimension of Habermas' work, its conflict-theoretical basis seems often neglected. This certainly has to do with the dominance of legal over sociological interests in the respective readership. However, for a balanced account of Habermas' sociology of law, or his "re-discovery" of law in social theory, both poles deserve equal attention - consensus and conflict, facts and norms.

Borrowing from the blurb of another book in the Frankfurt tradition,¹⁶¹ the ambition of critical theory is to combine "an empirically informed diagnosis of the age with a normative social theory", or what is called "normative (or critical, or rational) reconstruction". While positivistic sciences focus on objective/empirical knowledge about the observable structures of reality, such as behavioural laws, re-constructive sciences also generate normative/theoretical knowledge about the "deep structures", or cultural matrix, of a reality which appears to us as always being symbolically pre-structured. In simpler terms, facts are reflected in norms and norms in facts. But this relationship is not only an observed one, but also an interpreted one. It is not only given in its positivity, but can also be re-constructed in its potentiality. Law, then,

¹⁶⁰ J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (Cambridge MA, The MIT Press, 1996).

¹⁶¹ A Honneth, *Suffering from Indeterminacy. An Attempt at a Reactualization of Hegel's Philosophy of Right*, (Assen, Van Gorcum, 2000).

is not only a (measurable) indicator of a (seemingly non-measurable) reality - such as solidarity, or morality - but a criterion according to which reality can be re-constructed, both in a conservative, backward-looking sense (*re-construction*) and a progressive, forward-looking sense (*re-construction*). Again, Habermas thus seems to go beyond Weber, who clearly considered legal theory and legal sociology as distinct endeavours, one dealing with the legal order as it ought to be (normative validity), and one considering how it actually is, that is, how it works in practice and affects social action (empirical validity). In the latter, sociological context, legal order thus “refers not to a set of norms of logically demonstrable correctness, but rather to a complex of actual determinants [...] of human conduct”.¹⁶² Weber hereby confirms the division of labour between law-as-discipline and sociology-as-discipline, which seems to make legal theory and empirical sociology incompatible.

Now, how does Habermas re-construct the law in society? As we have already seen, he contrasts the two function systems of the economy and the state, which build on strategic forms of action and power, with the rationalised lifeworld which is itself the source of a different form of power, namely, discursive power. Discursive power arises from communicative action which brings about mutual commitments and furthers a “rational” consensus. It is this communicative form of power that makes modern law, and its implementation within a polity, legitimate. In Habermas’ theory design, law appears, in fact, as the vital link between the two opposing spheres and their respective forms of power, that is, between systems and lifeworld, or between administrative and economic power, on the one hand, and discursive power, on the other. In this simplified picture, law thus plays a central role. In this regard, Habermas’ approach is similar to Parsons’ approach. But, at the same time, the law can also be considered as divided - or as caught in a double bind - between the two spheres: as a “medium” that is formally “legitimized through a positivistic reference to legality”,¹⁶³ it regulates the state and the economy, as an “institution” that is substantively legitimised through moral, ethical, or pragmatic arguments it forms part of the orders of the lifeworld. In the first

¹⁶² Weber, note 150 above, p 312.

¹⁶³ J Habermas, *The Theory of Communicative Action, Vol. 2: Lifeworld and System*, (Boston MA, Beacon Press, 1987), p 365.

sense, law furthers “juridification” according to the functional logic of systems (or, the modalities of strategic action); in the second sense, it furthers “justification” according to the principles of rational discourse (or, the modalities of communicative action). Despite all these differences, Habermas claims that “[l]aw as a medium [...] remains bound up with law as an institution”.¹⁶⁴ This normative appeal responds to an empirical concern about the increasing “colonisation” of the lifeworld through the systems, that is, an overweight of strategic, as opposed to communicative, forms of power.

This was, at least, his initial conception of the law in “*The Theory of Communicative Action*”.¹⁶⁵ In “*Between Facts and Norms*” (1996; in German: *Faktizität und Geltung*),¹⁶⁶ which is introduced as “a pluralistic approach that combines the perspectives of moral theory, social theory, legal theory, and the sociology and history of law”,¹⁶⁷ and Habermas’ major work, in this respect, he re-conceives the law “as a category of mediation between facts and norms”.¹⁶⁸ But again, facticity (*Faktizität*) can be related to a factual overload of legal norms, their enactment and enforcement in the world of systems, that is, to phenomena of juridification (*Verrechtlichung*), whereas validity (*Geltung*) calls for constant justification (*Rechtfertigung*) of the legal leviathan through discursive procedures of consensus-building in the lifeworld. In other terms, legality has to be backed up with legitimacy. If there is thus some notion of consensus, or consensus-building, in discourse theory, what about the category of conflict then? The most striking conflict in Habermas’ conception, as it is presented here, is clearly the conflict between function systems and the lifeworld, and, hence, between two related ideal types of law. This reminds us of the Polanyian design, and how the law could be placed on either side. In terms of power, this is the antagonism between economic power and administrative power, on the one hand, and discursive power (the power of arguments), on the other. We can thus conclude that Habermas’ theory builds on a major social

¹⁶⁴ *Ibid.*

¹⁶⁵ Habermas, notes 153 & 163 above.

¹⁶⁶ Habermas, note 160 above.

¹⁶⁷ *Ibid.*, xxxix.

¹⁶⁸ *Ibid.*, 1.

conflict, or two antagonistic logics of action, including law-in-action. And, in as much as this conflict can be considered constitutive for modern society - thus assuming that it materialises in many forms and at many levels - we can speak of a genuine conflict theory which, nevertheless, includes a moral vision of law and society. The latter is not derived from theoretical axioms, but is, instead, re-constructed from social practices which make use of the "universalising" medium of language.

IV.4. Pierre Bourdieu (1930-2002)

What we have found in Habermas' approach is thus elements of both the consensus and the conflict paradigms. In this regard, it has, in fact, striking parallels with Polanyi's approach (or what we developed as such above). While Habermas' focus is more on law and society, and Polanyi's focus is more on economy and society - first in the national, then in the postnational constellation of law, economy, and society - their notions of conflict seem largely compatible. In both cases, the functional imperatives and impositions of systems seem to clash with the social demands, or simply the power, of the people. Also, the idea that law can be captured by either side is present in both approaches. In Polanyi's terms, law plays a central role both for the implementation and the containment of the market society; it serves economic liberalism (movement) as well as social protectionism (counter-movement). In Habermas' terms, it can lead to excesses of juridification or further processes of justification; it can either promote or prevent the colonisation of the lifeworld through the logic of the systems. Both theories also share a certain idea of normative embeddedness, which is more than just an analytical point of reference. It forms part of the moral vision which is inherent in their "re-constructive" criticisms of contemporary society and represents the consensus sought amidst the conflicts which they describe. Seen from this angle, the endeavour to combine Habermasian and Polanyian perspectives on the "new patterns of conflict" that the law is confronted with "after globalisation" (see title of this volume) seems actually viable - while it would be somewhat futile to match Polanyi with Parsons or Luhmann, instead. What is missing, however, is a stronger emphasis on cognitive embeddedness, as suggested in the following. What effects this conceptual shift has for the consensus and conflict elements in contemporary theories of law and society will be demonstrated in the works of Pierre Bourdieu and Michel Foucault.

Bourdieu's work is discussed here because it bears all the characteristics of a sociology of conflict, and is, at the same time, representative of contemporary approaches that closely link knowledge and power.¹⁶⁹ In a way, the traditional focus on power combined with the present turn to knowledge thus leads to a "structuralist-constructivist" account of social spheres and relations. "Structuralism" refers here to the objective side of the equation, the observation of power structures from the outside. "Constructivism" points to the subjective side, instead, the ways in which people see both the world and the power games that they are in. In Bourdieu's approach, conflicts are acknowledged as a constitutive element of society as well as of theory-building about society. The result is a "theory of social fields" which makes hierarchies and conflicts the structuring principle of social action and interaction in all social spheres without, however, neglecting the effects of functional differentiation. In other words, field theory combines a theory of systems which puts emphasis on horizontal differentiation with a theory of power that still highlights vertical differentiation. Sure enough, the notion of systems is not used in Bourdieu's approach, but replaced with the notion of fields. Social fields are not the effect of any functional logic that can only be put in abstract terms, but the practical result of inter-actions and inter-dependencies between individual and institutional actors. They are not defined theoretically, but empirically. Any social context that can be described in terms of power relations and power struggles - if manifest or latent - can thus be considered a field in which something is "at stake" or contested. Thus, the notion of field includes both the conflict between the opposing parties, be it actors or institutions, and their complicity in playing the power game by acknowledging its rules and their respective roles therein. Bourdieu locates all social fields in the general social space, which is depicted as a "field of class relations", and with regard to the "field of power", which is located on the dominant side of this overall space.¹⁷⁰ As argued below, the legal field can generally be located within the field of power, that is, at the top of the social pyramid.

¹⁶⁹ Frerichs, note 134 above, pp 291-311.

¹⁷⁰ P Bourdieu, *The Field of Cultural Production*, (Cambridge, Polity Press, 1993), pp 37-38.

Another reason to introduce Bourdieu's approach in the present context is that, even though he is more of a cultural sociologist (specialising in all kinds of cultural practices) than an economic sociologist (analysing genuine economic action), his terminology looks, at first sight, very "economistic" - with actors having interests, owning capital, making investments, *etc.* On the other hand, the "field of cultural production", which means, here, the literary field, but which could also refer to any other non-economic sphere (including the law) is characterised as "the economic world reversed".¹⁷¹ This gives us an important clue to understanding Bourdieu's approach. From his perspective, the economic logic is generalised in a way that includes all social practices. This does not mean that all social life is, in fact, subdued to the "one big self-regulating market", but that there are many different "economies" at work in society, which regulate the supply and demand of all kinds of (symbolic) goods, and which are themselves - positively or negatively - inter-linked. This leads to a different understanding of the relationship between the economy and society, or of the embeddedness of the one in the other. Other than Polanyi, Bourdieu therefore claims:

[T]he immersion of economy in the social dimension is such that [...] the true object of a real economics of practices is nothing other, in the last analysis, than the economy of the conditions of production and reproduction of the agents and institutions of economic, cultural and social production and reproduction or, in other words, the very object of sociology in its most complete and general definition.¹⁷²

Bourdieu thus speaks of an "economics of practices", including economic as well as cultural practices, and of the "economy of production and reproduction", which again includes economic, as well as cultural, production and reproduction. All this makes up the "very object of sociology". What about the economics of *legal* practices then, or the economy of *legal* production and reproduction? Law itself can, of course, be considered as a cultural practice which is much detached from the world of commerce. Legal reasoning is, in

¹⁷¹ *Ibid.*, p 29.

¹⁷² P Bourdieu, *The Social Structures of the Economy*, (Cambridge, Polity Press, 2005), p 13.

fact, much different from profit-seeking behaviour on economic markets. But the legal field is not characterised, in the same way, by cultural autonomy as, for example, the literary field. And this has less to do with the (somewhat variable) relation between the law and the economy than with the (rather stable) relation between law and the state. This can, at least, be seen as Bourdieu's starting-point.

Bourdieu has not written much about the law, but, in what he has written, the law is closely-related to the state, and the power of the state. And a crucial concept in order to understand this link is *nomos* - the Greek term for law - which appears in both essays that are pivotal in this respect: "The Force of Law",¹⁷³ Bourdieu's major work on the law (an article of forty pages), and "Rethinking the State".¹⁷⁴ The concept of *nomos* is explained as follows:

[I]n differentiated societies, the state has the ability to impose and inculcate in a universal manner, within a given territorial expanse, a *nomos* (from *nemo*: to share, divide, constitute separate parts), a shared principle of vision and division, identical or similar cognitive and evaluative structures.¹⁷⁵

Understood as a "shared principle of vision and division", *nomos* thus represents the cognitive dimension of power. Bourdieu refers to the same principle when he explains the social function of legal practices, namely, the trial. In conflict theoretical terms, he first claims that:

the trial represents a paradigmatic staging of the symbolic struggle inherent in the social world: a struggle in which differing, indeed, antagonistic, world-views confront each other.¹⁷⁶

¹⁷³ P Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field", (1987) 38 *Hastings Law Journal*, p 805.

¹⁷⁴ *Idem*, "Rethinking the State: Genesis and Structure of the Bureaucratic Field", (1994) 12 *Sociological Theory*, p 1.

¹⁷⁵ *Ibid.*, p 13; original emphasis.

¹⁷⁶ Bourdieu, note 173 above, p 837 [sic].

He then argues that this symbolic struggle is to be “solved” by the “power of naming”,¹⁷⁷ which belongs to the state - and to the judiciary as one of its powers.

What is at stake in this struggle is [the] monopoly of the power to impose a universally recognized principle of knowledge of the social world - a principle of legitimized *distribution*.¹⁷⁸

Imposing a “principle of vision and division”, or a “principle of legitimised distribution”, are thus two alternative ways to describe what *nomos*, or the “power of naming”, is all about. This power is claimed by the state, which holds, according to Bourdieu, not only the legitimate monopoly of physical violence, but also the “monopoly of legitimized symbolic violence”.¹⁷⁹ In this regard, the judiciary thus represents the “sovereign vision of the State”,¹⁸⁰ that is, its cognitive principles of order.

The concept of symbolic violence that has just been put forward points to the two dimensions of power that the state can draw upon: the physical and the symbolic dimension. In “*Rethinking the State*”, Bourdieu thus argues:

If the state is able to exert symbolic violence, it is because it incarnates itself simultaneously in objectivity, in the form of specific organizational structures and mechanisms, and in subjectivity in the form of mental structures and categories of perception and thought.¹⁸¹

Again, the structuralist-constructivist account that Bourdieu subscribes to, allows us seeing the objective and the subjective sides of power, at the same time. Under the subheading “Minds of State”, he notably emphasises the need to “overcome the opposition between a physicalist vision of the social world that conceives of social relations as relations of physical force and a ‘cybernetic’ or

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*; original emphasis.

¹⁷⁹ *Ibid.*, p 838.

¹⁸⁰ *Ibid.*

¹⁸¹ Bourdieu, note 174 above, pp 3-4.

semiological vision which portrays them as relations of symbolic force, as relations of meaning or relations of communication".¹⁸² While his special focus is on symbolic violence, this is still violence in a comprehensive sense which does not exclude, but includes, the physical harm that occurs as a "legitimate" side-effect of imposing certain categories, of drawing certain distinctions, rather than others. Hence, we end up with *nomos* again, as Bourdieu continues:

The most brutal relations of force are always simultaneously symbolic relations. And acts of submission and obedience are cognitive acts which as such involve cognitive structures, forms and categories of perception, principles of vision and division.¹⁸³

In Bourdieu's view, the law thus plays a pivotal role in all this. The "right to determine the law" which is at stake in the juridical field forms part of the power of naming.¹⁸⁴ This power, which is also translated as the "power of nomination",¹⁸⁵ is not only restrictive, but productive, in the widest sense; it brings things into existence and produces social identities. It is performed:

[b]y stating with authority what a being (thing or person) is in truth (verdict) according to its socially legitimate definition, that is what he or she is authorized to be, what he has a right (and duty) to be, the social being that he may claim.¹⁸⁶

What truths these are, what verdicts are spoken in the law, depend not on the cultural autonomy of law alone, even though this might be the preferred self-description of legal scholarship. Instead, Bourdieu emphasises that the *nomos* inside the legal field also reflects, or translates the principles of vision and division that are applied elsewhere in the field of power. The legal field is only relatively autonomous; it is "characterized by an independence achieved in and through dependence".¹⁸⁷ Bourdieu even argues that:

¹⁸² *Ibid.*, p 12.

¹⁸³ *Ibid.*, pp 12-13.

¹⁸⁴ *Ibid.*, note 173 above, p 817.

¹⁸⁵ *Ibid.*, note 174 above, p 10.

¹⁸⁶ *Ibid.*, p 12.

¹⁸⁷ Bourdieu, note 173 above, p 829.

[g]iven the determinant role it plays in social reproduction, the juridical field has a smaller degree of autonomy than other fields, like the artistic or literary or even the scientific fields, that also contribute to the maintenance of the symbolic order and, thereby, to that of the social order itself.¹⁸⁸

This means that what happens inside the legal field can often be attributed to external forces. Such translation mechanisms are, however, at work between all kinds of fields. One term used to describe this is “structural homologies”, that is, the commonalities, affinities, complicities, and solidarities between those in power in and across any social field - and between those lacking power, respectively. Bourdieu can thus claim that:

the practice of those responsible for ‘producing’ or applying the law owes a great deal to the similarities which link the holders of this quintessential form of symbolic power to the holders of worldly power in general, whether political or economic.¹⁸⁹

What remains to be said is that, if the *nomos* is the consensus that unites and divides the society, at the same time, it is, first of all, the jurists who produce and reproduce this belief, or *doxa* - they are “guards of the collective hypocrisy”.¹⁹⁰ And it is also the jurists who believe most in the law, which is, after all, the constitutive *illusio* (illusion) of their field.

IV.5. Michel Foucault (1926-1984)

All this demonstrates, of course, that a conflict theory that has taken the “cognitive turn” would be even more alert about ideologies, or any “false” or deceitful form of collective consciousness (including legal consciousness) that seems to hide rather than to elucidate the “normalising” functions of law in society. A legal theory derived from this would have to be critical, de-constructive, if not self-defeating. Not surprisingly then, there is no clear normative outlook

¹⁸⁸ *Ibid.*, p 850.

¹⁸⁹ *Ibid.*, p 842.

¹⁹⁰ P Bourdieu, “Les juristes, gardiens de l’hypocrisie collective”, in: F Chazel & J Commaille (eds), *Normes juridiques et régulation sociale*, (Paris, E.J.A., 1991); my translation.

in Bourdieu's theory. Sure enough, in highlighting the conflicts and cleavages that seem to mark any social field or setting, he also enlightens the endless game between the (relatively) powerful and the (relatively) powerless. This sociological exercise may have negative, denunciatory effects for the powerful, and positive, emancipatory effects for the powerless. In other words, by laying bare what needs to be hidden, or else ignored, in order to function smoothly, Bourdieu also interferes, if only academically, with the power game he describes. However, the main purpose of his work is not to challenge, or even change, the given power relations, but to generate knowledge about a society that is, in many ways, hierarchically ordered, or stratified - in spite of a functional differentiation that presumably includes everyone in a horizontal manner and in spite of its normative ideals of freedom, equality, and equity. In this sense, the normative functions of his work are only accessory - which is different in Habermas' approach (in which they seem to be constitutive), but similar in Foucault's approach. Bourdieu and Foucault are also similar in merging categories of power and knowledge, and, hence, in exploring phenomena of cognitive embeddedness from a critical vantage point.

Michel Foucault is the last thinker in this gallery, but certainly not the least, as his high profile in the present discourse and also in the present volume demonstrates. Considering the more extensive coverage of Foucault, and his links to Polanyi, in the following chapters (see Möller; Herberg; and comments on Möller and Herberg), this section is nothing but an introduction. But it is also a conclusion of the present chapter, or of our travel through two centuries of socio-legal thinking. If this tour has begun with Marx and now ends with Foucault, leaving Polanyi somewhere in the middle, this also means that we can no longer stand on the shoulders of the old giants without climbing onto the shoulders of the new ones. If going back to Polanyi means being trampled by Foucault, we have to move ahead and integrate - or, at least, confront - the two. But it does not mean dwarfing Polanyi, either. This is why it makes sense to ask both if Foucault was a Polanyian (as Möller does) and, somewhat anachronistically, how Polanyi could become a Foucauldian. But this assimilation, and sometimes dissimulation, of the different approaches has been exercised throughout this chapter. In the remainder, I will thus portray Foucault in the way that seems best to conclude our extended walk through the sociological gallery. My

focus will thus be on the ways in which he brings law, economy, and society together. Just like Bourdieu, Foucault aims at the “mind of the state” - or what is called “governmentality” in his approach and much more elaborate, in this respect. Just like Bourdieu, he also strives for a general “economy of power”:

What we need is a new economy of power relations - the word ‘economy’ being used in its theoretical and practical sense.¹⁹¹

But more than Bourdieu, he actually investigates the interplay of the law and the economy in the mind, or reason, or rationality, of the state.

But it is not really the modern state which Foucault analyses, but the forces that brought it into being, the conditions of its existence, the constructions that make it possible. In the end, he thus claims:

It must be possible to do the history of the state on the basis of men’s actual practice, on the basis of what they do and how they think.¹⁹²

It is thus, again, both the actual behaviour and the actual beliefs of the people which are the subject(s) of study. But they are not studied directly, but only in the collective effects which they have, one of which is government, including, in Foucault’s wide understanding, the techniques of the government of others as well as of self-government. What drives him, over two years, in his governmentality lectures¹⁹³¹⁹⁴ is thus the ambition to come to grips with the history of the state, the genealogy of government. In this context, it is worth mentioning that the concept of governmentality had originally been (mis-) understood as a “semantic connection of governing (*gouverner*) and mentality (*mentalité*)”, thus highlighting the

¹⁹¹ M Foucault, “The Subject and Power”, (1982) 8 *Critical Inquiry*, p 777, at 779.

¹⁹² M Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978*, (edited by M Sennelart; translated by G Burchell) (Basingstoke, Palgrave Macmillan, 2009), p 358.

¹⁹³ *Ibid.*

¹⁹⁴ M Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979*, (edited by M Sennelart; translated by G Burchell), (Basingstoke, Palgrave Macmillan, 2008).

“connection of power technologies and political rationalities”.¹⁹⁵ Later, it was noted that the term is simply “derived from the French adjective ‘*gouvernemental*’ (concerning the government) and should by no means be reduced to a mere ‘mentality of governing’”.¹⁹⁶ The idea of a mentality, or rationality, of governing is not wrong, but has to be understood as an all-encompassing productive force, and not simply as the ideological topping of a ready-made state machinery. To grasp the constitutive “exterior” of the state, Foucault thus tries to abstract from what is usually understood as the institution, the function, or the object of the state. Instead, he “de-institutionalises”, “de-functionalises”, and “de-objectifies”,¹⁹⁷ and, hence, de-constructs all our constructions, or taken-for-granted assumptions, about what the state really is.

But before we take a closer look at Foucault’s critique of the market society (and its law) in terms of the governmentality lectures, we will introduce his notions of power and knowledge more generally, and also briefly recapitulate on his initial understanding of the law. Like Bourdieu, Foucault emphasises the ubiquity, ambiguity, and inevitability of power in society. In his view, power is not simply negative or repressive, but also “productive”. It is irreplaceable and irreducible:

We must cease once and for all to describe the effects of power in negative terms: it ‘excludes’, it ‘represses’, it ‘censors’, it ‘abstracts’, it ‘masks’, it ‘conceals’. In fact, power produces; it produces reality; it produces domains of objects and rituals of truth.¹⁹⁸

Accordingly, power is constitutive of all social relations, of the regimes that they are embedded in and of the actors that enact them. With respect to politics, it constitutes both states and subjects, and the links between them. Nevertheless, power cannot be reduced to

¹⁹⁵ T Lemke, *Eine Kritik der politischen Vernunft: Foucaults Analyse der modernen Gouvernementalität*, (Hamburg, Argument, 1997), p 146, note 21; my translation.

¹⁹⁶ *Idem*, *Gouvernementalität und Biopolitik*, (Wiesbaden, Verlag für Sozialwissenschaften, 2007), p 13, including note 5; my translation.

¹⁹⁷ Foucault, note 192 above, pp 118-119.

¹⁹⁸ M Foucault, *Discipline and Punish: The Birth of the Prison*, (New York, Vintage, 1979), p 194.

politics, but is pervasive in all social spheres. Last, but not least, power also generates truth, the ways we know, and what we know. Power and knowledge can thus be considered as being closely intertwined in Foucault's work. The history of the state is thus also a history of truth, or of how truth is produced in governmental practices. Foucault thus explains, in his very first lecture given in this context, that his ambition, which he cannot clearly assign to any established scientific discipline, is to discover the "politics of truth":

But what I am doing [...] is not history, sociology, or economics. [...] [W]hat I am doing is something that concerns philosophy, that is to say, the politics of truth, for I do not see many other definitions of the word 'philosophy' apart from this.¹⁹⁹

What he means by this is then explained in the (conflict theoretical) terms of power and knowledge:

So, insofar what is involved in this analysis of mechanisms of power is the politics of truth, [...] I see its role as that of showing the knowledge effects produced by the struggles, confrontations, and battles that take place within our society, and by the tactics of power that are the elements of this struggle.²⁰⁰

With regard to the place of the law in Foucault's theory, we can first draw on the terminology of law and 'counter-law' that he suggests in "*Discipline and Punish*".²⁰¹ Here, the notion of counter-law is introduced in order to distinguish the material effects of the "disciplines" from the formal effects of the law. The main idea here is that the modern society is a "disciplinary society" that works on the individual bodies which are trained in order to fulfil their functions in the social system optimally. Foucault's focus is thus on the material counter-law that goes much deeper, and actually counteracts and betrays, the formal law. An example of this can be found in a relationship which is based upon a legal contract, but also develops disciplinary effects that go beyond - or rather beneath - the legal

¹⁹⁹ Foucault, note 192 above, pp 2-3.

²⁰⁰ *Ibid.*, p 3.

²⁰¹ Foucault, note 198 above.

agreement. This can be considered the second, or hidden, nature of power. The subliminal side of power is illustrated with the panopticon, - a prison, the architecture of which allows us to observe every prisoner all of the time without the guard himself being noticed. Foucault can thus contrast “juridicism” with “panopticism”, or the ideologies of the law with the realities of the counter-law:

[A]lthough the universal juridicism of modern society seems to fix limits on the exercise of power, its universally widespread panopticism enables it to operate, on the underside of the law, a machinery that is both immense and minute, which supports, reinforces, multiplies the asymmetry of power and undermines the limits that are traced around the law.²⁰²

While the distinction between law and counter-law is helpful in order to see the realities of power outside the law, it seems also somewhat misleading since it tends to downplay the role of the law itself. Hence, it could be understood in the way that the law has lost its pertinence for ordering society, in the course of modernisation, and been replaced, more or less, by the minute disciplines. Drawing on this reading, Foucault has, in fact, been credited with an “expulsion of law”²⁰³ from society.

However, in his later governmentality studies, Foucault paid greater attention to the role of law as such. This was noted as “a renaissance of the law *as law*” in the Foucault community.²⁰⁴ I would put it somewhat differently since what is suggested in the governmentality lectures is not a re-assessment of the law as such, but an account of its transformation within the context of the modern political economy. Hence, it would be more appropriate to speak of a renaissance of the law as an economic instrument, or, in brief, of law *as economics*.²⁰⁵

²⁰² *Ibid.*, p 223.

²⁰³ A Hunt, “Foucault’s Expulsion of Law: Towards a Retrieval”, (1992) 17 *Law and Social Inquiry*, p 1.

²⁰⁴ T Biebricher, “Macht und Recht: Foucault”, in: S Buckel, R Christensen & A Fischer-Lescano (eds), *Neue Theorien des Rechts*, (Stuttgart, Lucius & Lucius, 2006), p 148; original emphasis.

²⁰⁵ S Frerichs, “Zwischen Gerechtigkeit und Wahrheit: Das Rechtssubjekt in der Marktgesellschaft”, (2010) 31 *Zeitschrift für Rechtssoziologie*, p 231.

The overall argument that leads to this conclusion builds on the idea that the “history of truth [...] is coupled, from the start, with a history of law”.²⁰⁶ In other words, law is one of the technologies of power that also generates truth. Science is another. In fact, Foucault distinguishes, in an earlier lecture series - the so-called Rio lectures - which is also pertinent for his view of law, between an “internal history of truth” and an “external history of truth”. The former is “the history of truth as it is constructed in or on the basis of the history of the sciences”.²⁰⁷ What the latter history of truth is about is explained as follows:

[T]here are in society (or at least in our societies) other places where truth is formed, where a certain number of games are defined - games through which one sees certain forms of subjectivity, certain object domains, certain types of knowledge come into being.²⁰⁸

These sites of truth are the basis upon which to “construct an external, exterior history of truth”.²⁰⁹ One of these sites is the law, as the Rio lectures demonstrate:

Judicial practices, the manner in which wrongs and responsibilities are settled between men, [...] seem to me to be one of the forms by which our society defined types of subjectivity, forms of knowledge, and, consequently, relations between man and truth which deserve to be studied.²¹⁰

Another site of truth, or of the generation of truth, is the market. This is what the governmentality lectures are about. And this is also where both threads are ultimately woven together.

The renaissance of law *as* economics, both in Foucault’s work and in the government - or the governmentality - of the modern market society means nothing less than a shift from justice to truth, or, more

²⁰⁶ Foucault, note 194 above, p 35.

²⁰⁷ M Foucault, “Truth and Juridical Forms”, in: *idem, The Essential Works of Foucault: Power*, (edited by JD Faubion) (New York, New Press, 2000), p 4.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

precisely, from judicial knowledge (here understood as justice) to economic knowledge (here understood as truth). These terms can first be explained with regard to the rationalization of government alongside the principles of modern economics. In Foucault's words:

The possibility of [self-] limitation and the question of truth are both introduced into governmental reason through political economy.²¹¹

This basically means that a reasonable government would no longer interfere with the quasi-natural laws of the market. For example, it would no longer prescribe prices that are considered as "just", but allow them to fluctuate with the free interplay of supply and demand. The government thus acknowledges the "truth" of the economic discipline.

Consequently, the market determines that a good government is no longer quite simply one that is just. [...] The market now means that to be good government, government has to function according to the truth.²¹²

This shift can also be explained as a move from "jurisdiction" (that is, the practice of proclaiming and performing justice) to "veridiction" (that is, the practice of proclaiming and performing truth). In other words, the introduction of economics into the art of governing causes a shift from a judicial mode of knowledge creation to an economic mode, or, in brief, from law to economics. This shift is anything but complete. But it leads Foucault to the question of "how will government be able to formulate this respect for truth in terms of laws which must be respected?"²¹³ To be sure, the law which is sought would no longer reign into the sphere of the market; instead, it becomes a vehicle of economic truth itself. It would no longer constrain the market from the outside, but would legally constitute it from within.

²¹¹ Foucault, note 194 above, p 17.

²¹² *Ibid.*, p 32.

²¹³ *Ibid.*, p 38.

V. Conclusion: What Sociological Backing, what Conflicts-law?

A chapter, or argument, that culminates in a critique of law as radical as Foucault's - with law turning into economics, legal persons into market citizens - has problems in turning from conflict to consensus and from de-construction to re-construction again. If law is nothing but the continuation of economics by other means, what normative vision would remain for the market society? Can the *de facto* reality of ubiquitous conflicts eventually be sublated into a *de jure* world of universal consensus? Since Marx - the giant that stood right at the entrance of this gallery - the law's claim for universality has been watched with the highest suspicion. An all-inclusive ideology may actually create consensus, but it still remains, after all, only an ideology - a "false" consciousness in need of enlightenment. But enlightenment *à la* Foucault - the politics of truth - is not a legal exercise. Instead, it requires the suspension of legal thinking, in as much as it forms part of the given regime, and the given rationality, that is, the power-knowledge nexus that characterises contemporary society. The outcome of emancipative practices, of thinking and acting outside the box, outside the state, outside the market, and outside the law, is yet unknown. Since this is not the place to imagine the unimaginable, we could simply leave it at that.

But bearing in mind the present limitations, this chapter will conclude on a more reconciliatory note. If there is a common denominator of the "conflict theories of law" that have been outlined above, something that links Marx and Polanyi, Habermas, Bourdieu, and Foucault, then it is the warning of a commodified form of law, a *nomos* that perpetuates the divisions of the class society, and notably, of modern capitalism. At the same time, law has always been envisioned as the genuine property of the community, as an expression of the moral bonds and relations of solidarity that may even prosper among strangers (as long as they recognise each other as citizens of the same polity). It is this line of thinking that links Polanyi with Durkheim, and Habermas with Parsons. In our gallery of socio-legal thinkers, Polanyi and Habermas thus seem to stand out in allowing for two competing readings, and two competing realities of the law: law as economic choice, or fictitious commodity, on the one hand, and law as social obligation, or imagined community, on the other. These two ideal types of law are both normatively and

cognitively distinct, and we can draw on the works of classical, as well as contemporary, sociologists - including economic and legal sociologists - to elaborate on their differences. What the economic sociology of law tries to counteract, by analytical means, is law's increasing (?) embeddedness in economics.²¹⁴ This means taking Polanyi's concerns seriously by translating them into what seems to be the state of the art today. Embeddedness is then not only understood in a normative, but also in a cognitive, sense. With regard to the new approaches of a (meta-) law of conflicts-laws, it seems that we can observe the same bifurcation of two models of law. The first model emphasises the free choice of law, and considers every citizen as a consumer, or even as an entrepreneur, in what has been called "*The Law Market*".²¹⁵ The second model still starts from political communities whose members share a certain territory, a history, and a future, and are, therefore, willing to consent to a law that builds, not least, on social obligations.²¹⁶

With regard to the battle between Luhmann and Habermas (or Luhmannians and Habermasians), which is staged on the sideline, our diagnostic categories of consensus *versus* conflict at first seemed to fail. While theories of conflict in the Marxist and post-Marxist tradition markedly differ from consensus theories of society in the Durkheimian tradition - with the former emphasising the polarising effects of power, and the latter the unifying effects of culture - neither Luhmann's nor Habermas' approach seems to fit in this scheme clearly. With regard to the consensus paradigm, we demonstrated that both Luhmann and Habermas use Parsons' theory as a point of departure as well as one of distinction. Luhmann radicalises the notion of systems, de-centres the law and deprives society of its moral core. In contrast, Habermas, counter-poses systems and lifeworld, reclaims moral integration and brings law back into the middle. In this regard, Habermas comes closer to the consensus paradigm than Luhmann. However, even though Luhmann's view of society is devoid of a moral consensus, it is still, in an abstract sense, about functional stability and order. Conflicts contribute to the

²¹⁴ M Callon, "Introduction: The Embeddedness of Economic Markets in Economics", in: *idem* (ed), *The Laws of the Markets*, (Oxford, Blackwell Publishing, 1998).

²¹⁵ EA O'Hara & LE Ribstein, *The Law Market*, (Oxford, Oxford University Press, 2009).

²¹⁶ Streeck, note 98 above.

differentiation and integration of systems; they are, themselves, systems of communication. Other than Luhmann, Habermas works more decisively from a conflict-theoretical background in this respect. First of all, conflicts are not a source of stability, but of crisis. They indicate real social problems and are not merely taken as artefacts of communication. In Habermas' view, modern society is notably characterised by a major conflict that sets function systems against the lifeworld, strategic efficiency against discursive legitimacy, and hence, one sort of power against the other. The normative impetus of his approach is based upon the perceived asymmetry between the different forms of power, with the legitimising forces of the rationalised lifeworld always being at risk. However, it seems that one can indulge in a "normativist" reading of Habermas without ever engaging in conflict theory. In the end, Luhmann is neither a representative of the consensus, nor the conflict, paradigm, while Habermas is a little bit of both. The classification thus remains somewhat ambiguous in this respect. What seems less ambiguous is that *if* a sociological backing of the new conflict of laws approach is sought in conflict sociology - such as in Polanyi's work or Foucault's - Habermas is in, but Luhmann is clearly out.

Chapter 9

Some Reflections on the Use of Theories and Typologies A Comment on Frerichs

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Living already “after globalisation”, we have become accustomed to the fact that adjudication may cut across legal orders – be it different national jurisdictions or multiple levels of governance. Legal scholarship and social science have since tried to re-invent and adapt a number of central concepts to this “post-national constellation” without compromising their normative ambition. Prominent examples from the legal discourse include transnational constitutionalism, global administrative law and a new type of conflict of laws.¹ The latter takes up certain principles of private international law – the legal discipline concerned with the question

¹ Andreas L Paulus, “Zur Zukunft der Völkerrechtswissenschaft in Deutschland: Zwischen Konstitutionalisierung und Fragmentierung des Völkerrechts”, (2007) 67 *Zeitschrift für ausländisches Öffentliches Recht und Völkerrecht*, pp 695-719; Anne Peters, “Rechtsordnungen und Konstitutionalisierung: Zur Neubestimmung der Verhältnisse”, (2010) 65 *Zeitschrift für Öffentliches Recht*, pp 3-63.

“which legal system should govern”² in trans-border adjudication. In particular, it starts from a general premise of tolerance towards foreign law; but it also delineates its normative confines: whenever deep-seated interests loom behind the choice-of-law-question, the new conflict of laws *inter alia* promotes “self-restraint” and calls on the judiciary to support efforts at deliberative problem-solving among the concerned actors.³

I. In Search of Theoretical Backup

Sabine Frerichs is interested in the (implicit) sociological underpinnings of this discourse. She asks “if so, to what extent, the sociology of conflicts lends itself to substantiate the (empirical and normative) claims of conflicts law”.⁴ This is certainly a topic worth exploring. My crude summary of conflict of laws thinking already encourages a number of questions from a social-science perspective – about the nature of supranational deliberation, the nexus of law and politics, the types of conflict that are amenable (or not) to a conflict of laws approach, and the institutional setting in which it is supposed to work. Many of such questions, to be sure, have been addressed in the literature by now.⁵

The preceding chapter follows a more general, more theoretical, direction. It begins with the confession of possibly taking the notion of conflict “too literally”,⁶ although it may signify different things within the legal and the sociological discourse. Yet, Frerichs is confident that “[b]esides the accidental homonymy of both approaches, there is also a more substantial affinity”.⁷ Frerichs observes that conflict of laws thinking, which also includes, in her view, current systems-theoretical interpretations of the

² Ch Joerges, “Reconceptualizing the Supremacy of European Law: A Plea for a Supranational Conflict of Laws”, in: Beate Kohler-Koch & Berthold Rittberger (eds), *Debating the Democratic Legitimacy of the European Union*, (Lanham MD, Rowman & Littlefield, 2007), pp 311-328, at 312.

³ Ch Joerges, “Deliberative Political Processes’ Revisited: What have we learnt about the Legitimacy of Supranational Decision-Making”, (2007) 44 *Journal of Common Market Studies*, pp 779-802.

⁴ Sabine Frerichs, in this volume, p 199.

⁵ Joerges, note 2 above

⁶ Frerichs, in this volume, p 199

⁷ *Ibid.*, p 199.

“fragmentation” of international law,⁸ is at least inspired by different variants of social theory but, up to now, lacks a firm root in conflict sociology. Since, at this point, Frerichs has already decided (albeit tentatively) that conflict sociology should be the proper theoretical background for conflict of laws, she draws a distinction between what she the “conflict and consensus paradigm” in sociology⁹ and applies it as a guideline for her “*tour d’horizon* of socio-legal thinking”.¹⁰

What follows is a highly ambitious treatment of the works of at least a dozen (male) sociologists and a similar quantity of associated “isms”. The account given is as extensive as it is subtle. Frerichs applies her typology - conflict *versus* consensus paradigm - and, in addition, finds a number of similarities and divergences between the works under study, which seem fairly unrelated to this scheme; instances where, in the history of ideas, one author has either borrowed or refuted the ideas of the other. At different points, this means that Frerichs has to introduce “yet another distinction”¹¹ to bring order into the erratic stream of conflict sociological thinking. I am not competent to criticise the exegetic work that is done here or to challenge any particular interpretation (for example, whether Polanyi would have approved of calling the law a fictitious commodity).¹² My brief remarks will be more formal. The first concerns the choice and purpose of the theories under investigation, the second is about the use of typologies.

II. The Use of Theory

Imagine the very a-theoretical situation in which you would like to prepare a fancy dinner for your friends. For the party to be a success, it is highly advisable first to plan the menu, and then run the errands. Certain criteria regarding what to shop for will follow naturally: white wine with fish, either pastries *or* ice cream, and please remember the vegetarians. Another approach would be to go

⁸ See, for example, Andreas Fischer-Lescano & Gunther Teubner, *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts*, (Frankfurt aM, Suhrkamp Verlag, 2006).

⁹ Frerichs, in this volume, p 209.

¹⁰ *Ibid.*, p 200.

¹¹ *Ibid.*, p 245.

¹² *Ibid.*, p 276f.

shopping with a minivan instead of a grocery list. If you cannot decide on the menu, you had better have a large trunk (and a golden credit card). This procedure requires less preparation, but it is also less efficient. Inevitably, there will be many leftovers; and worse still, we still do not know what is for dinner.

In some respects, Frerichs' "gallery of candidates" is more akin to the latter approach. The criteria for both the selection and evaluation of the presented theories remain vague. The general objective is clearer. On the one hand, Frerichs wants to *find*, in the stock of sociological literature, one or several theories that are suitable to back up the conflict of laws approach.¹³ On the other hand, the aim is to *uncover* its existing "hidden social theory".¹⁴

With regard to the first objective, Frerichs does not spell out which features render a theory suitable as a "backing" for conflict of laws thinking. In fact, her account skips the whole "menu planning" business. Therefore, we do not learn about the particular issues and questions - "the (empirical and normative) claims of conflicts law"¹⁵ - which sociological theory is supposed to address.¹⁶ By not specifying what exactly she needs theory for, Frerichs is forced to adopt a "shopping mall approach"¹⁷ to theory selection. While her quest for comprehensiveness is laudable, it also comes across as an embarrassment of riches. But not only does the admission into the "gallery of candidates" appear arbitrary, it is also difficult to subscribe to Frerichs' evaluation. Whether, for example, "Habermas is in, but Luhmann is clearly out",¹⁸ evidently depends on the issues upon which these authors are supposed to inform. Instead of explicating these issues and asking what the plethora of theories presented can contribute to their elucidation, Frerichs introduces the distinction between, the conflict side and the consensus side of the paradigm and argues that the members of the former are better suited as a "backing" for conflict of laws. However, due to the lack of

¹³ *Ibid.*, p 199.

¹⁴ Tuori, quoted in Frerichs, p 204.

¹⁵ *Ibid.*, p 199.

¹⁶ See my non-exhaustive list of examples above.

¹⁷ Martti Koskenniemi, "Letter to the Editors of the Symposium", (1999) 93 *American Journal of International Law*, pp 351-361, at 352

¹⁸ Frerichs, in this volume, p 199.

specification, the “substantial affinity¹⁹ between the conflict paradigm and conflict of laws remains, to a large extent, declaratory. For the second objective – the uncovering of conflict of laws’ implicit sociological underpinnings – Frerichs’ extensive interpretive work would have been better directed at the conflict of laws discourse, rather than at a particular array of sociological scholarship. Thus, the approach taken amounts to putting the cart before the horse. In any case, the cursory treatment of actual conflict of laws writing is a disservice to both objectives.

III. The Use of Typologies

Frerichs typifies the many theories under consideration by using, as common denominator, a distinction between the two sides of the “paradigm of conflict and consensus”. The purpose of typological reasoning is, I believe, twofold: it serves, first, to bring order into a previously undifferentiated world; and second, to produce generalisations across a number of entities that share the same position within the typology. However, not all typologies serve this purpose equally well. Some are too broad; they lump things together when they should observe differences, and therefore fall short of creating order. Others are too narrow; they miss out on opportunities for generalisation. In a way, the distinction between the conflict and consensus sides of the paradigm is both too broad and too narrow at the same time.

It is too broad, because it teams up authors who have little more in common than being sociological classics and sharing either a functionalist or a Marxist heritage. It is too narrow, because there are a number of theorists who do not fit into either of the conflict side or the consensus side of the paradigm. This is true of Polanyi: “On the one hand, it seems clear to locate him on the side of the conflict theorists”, while on the other hand, part of his work also “lends itself to a different reading”.²⁰ The problem is clearest, however, in the case of Luhmann and Habermas; the former being “neither a representative of the consensus nor the conflict paradigm”, and the latter “a little bit of both”.²¹ Apparently, the categories are neither

¹⁹ *Ibid.*, p 199.

²⁰ *Ibid.*, p 229.

²¹ *Ibid.*, p 278.

mutually exclusive nor jointly exhaustive. They are “cat-dogs”.²² As a consequence, Frerichs tacitly abandons her typology. Instead, she introduces a number of auxiliary distinctions (for example, a “normative” and an “interpretive” paradigm),²³ and highlights many family resemblances between the theories. These are valid and intelligent observations, but it does not render them very informative. It is always easy to identify some sort of similarity or difference.

That the distinction seems too broad and at the same time too narrow probably suggests that it is simply not very productive to compare sociological theories with regard to their take on “the idea of a harmonious social order that is based upon shared norms and values”.²⁴ This perspective, moreover, does not respect the intellectual aims and theoretical interests of the thinkers under consideration. Frerichs seems to justify the choice of her common denominator by the conjecture that only theories belonging to the conflict side of the paradigm are fit to back up conflicts of law, but this conjecture is not explicitly defended anywhere.

IV. What's Next?

Sabine Frerichs has assigned herself an inter-disciplinary task that may seem of daunting ambition, but, without a doubt, is of great importance. For both her objectives, the identification of the “hidden” sociological theory implicit in conflict of laws thinking and the formulation of a suitable sociological backup, the horse still needs to be put before the cart: more attention should be given to the intellectual and practical problems with which conflict of laws is, indeed, confronted. Inter-disciplinarity does not oblige social scientists to become lawyers, but it does require them to ask what their methods and theories can contribute to the issues which legal scientists are actually facing. Theory is not “*l'art pour l'art*”. It is always *for* something. The real inter-disciplinary challenge is to show how sociological theory can be valuable, even for legal scholarship.

²² Giovanni Sartori, “Comparing and Miscomparing”, (1991) 3 *Journal of Theoretical Politics*, pp 243-257.

²³ Frerichs, in this volume, p 245.

²⁴ *Ibid.*, p 202.

Chapter 10

The Concept of the Political in the Concept of Transnational Constitutionalism A Sociological Perspective

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I. Introduction: Two Discourses on Transnational Constitutionalism

At the Congress of Vienna in 1815, the process leading to the establishment of the first public international organisation, the

¹ I would like to thank the participants of the CRC 597 / RECON Workshop: After Globalisation - New Patterns of Conflict, Loccum, 5-7 September 2010 for many useful suggestions. Special thanks are due to Christian Joerges and Tommi Ralli for organising the event and to Inger Johanne Sand for commenting on the paper. The paper is part of a larger and on-going project on transnational constitutionalism and merely represents the latest stand. For earlier and partly overlapping perspectives related to specific dimensions, see in particular, Poul F Kjaer, "The Metamorphosis of the Functional Synthesis: A Continental European Perspective on Governance, Law and the Political in the Transnational Space", (2010) 2 *Wisconsin Law Review*, pp 489-533; but also Poul F. Kjaer, "The Structural Transformation of Embeddedness", in: Christian Joerges & Josef Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Oxford, Hart Publishing, 2011), pp 85-104; and Poul F Kjaer, "Law and Order Within and Beyond National Configurations", in: Poul F Kjaer,

Commission Centrale pour la Navigation du Rhin (CCNR), was initiated.² In the same year, the first volume of Friedrich Carl von Savigny's *Geschichte des Römischen Rechts im Mittelalter*³ was published. This work served as a preliminary exercise which subsequently led to the development of the essential principles of modern international private law in his *Systems des heutigen Römischen Rechts* (1840-49).⁴ These two developments illustrate that neither public nor private transnationality is a new phenomenon. More importantly, they also indicate that the particular form of modern statehood which materialised in the *époque* framing the American and French revolutions has never stood alone, as there have always been substantial structures of ordering operating beneath, beside and above the state. And even more importantly they highlight that, historically-speaking, the consolidation of modern statehood has implied more, and not less, transnationality. In other words, the relationship between nation state and transnational structures has, to date, always been characterised by a relationship of mutual increase.

But, in spite of this intrinsic relationship between statehood and transnationality, the latter cannot merely be understood upon the basis of the classical international law and international relation categories. Transnational structures are not just emerging "in-between" states, as a way of achieving a limitation (*Hegung*) of inter-state conflicts.⁵ Instead, the transnational space is a structure in its own right, which is reproduced upon the basis of an independent logic. From a sociological perspective, the transnational space must

Gunther Teubner & Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation*, (Oxford, Hart Publishing, 2011), pp. 395 – 430.

² See, also, Christian Walter, "Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law", (2001) 44 *German Yearbook of International Law*, p 176.

³ Friedrich Carl von Savigny, *Geschichte des römischen Rechts im Mittelalter*. Bd. 5, (Bad Homburg, 1961).

⁴ *Idem*, *System des heutigen römischen Rechts* / Bearb. von O. L. Heuser - 2. Aufl., (Berlin, 1974).

⁵ For such as view, see, especially, Georg WF Hegel, *Grundlinien der Philosophie des Rechts. Oder Naturrecht und Staatswissenschaft im Grundrisse*, (Frankfurt aM-Hamburg, Fischer Bücherei, [1821] 1968); p 350 *et seq*; Carl Schmitt, *Der Nomos der Erde. Im Völkerrecht des Jus Publicum Europaeum*, (Berlin, Duncker & Humblot, 1950).

be understood as a conglomerate of Eigenstructures (*Eigenstrukturen*)⁶ which reproduces an independent form of social patterns. The world is characterised by a plural level of structure formation with several distinct, but interwoven, logics which operate at the same time.⁷ This plurality is also illustrated by the fact that modern statehood merely acts as an overlay which emerged “on top” of already existing feudal structures. Feudal structures which, although increasingly marginalised, continue to operate “beneath” the structures of the modern states, for example, in the form of constitutional monarchies, inherited seats in the British upper house and closed nobility networks.⁸ Thus, apart from feudal structures and modern statehood, the transnational realm must be understood as a third layer of social-pattern reproduction unfolding within world society.

However, the multiple layers of world society are not adequately reflected in the mainstream self-understanding of the academic disciplines of law, sociology and political science.⁹ These disciplines remain essentially state-centred, with the consequence that they are methodologically incapable of grasping the kind of social structures reproduced outside the realm of the state. From Hegel¹⁰ to Bourdieu,¹¹ the central emphasis has, instead, been on the totality of

⁶ Rudolf Stichweh, “Strukturbildung in der Weltgesellschaft - Die Eigenstrukturen der Weltgesellschaft und die Regionalkulturen der Welt”, in: Thomas Schwinn (ed), *Die Vielfalt und Einheit der Moderne. Kultur- und strukturvergleichende Analysen*, (Wiesbaden, Verlag für Sozialwissenschaften, 2006), pp 239-257; Rudolf Stichweh, “Das Konzept der Weltgesellschaft: ‘Genese und Strukturbildung eines globalen Gesellschaftssystems’”, (2008) 39 *Rechtstheorie*, pp 329-355.

⁷ Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, (Princeton NJ, Princeton University Press, 2006); Kjaer, “The Metamorphosis of the Functional Synthesis”, note **Error! Bookmark not defined.** above.

⁸ See, for example, Simon Deakin, “The Return of the Guild? Network Relations in Historical Perspective”, pp 53-73, in: Marc Amstutz & Gunther Teubner (eds), *Networks: Legal Issues of Multilateral Co-operation*, (Oxford, Hart Publishing, 2009).

⁹ The tendency to methodological nationalism, however, seems to be less profound with sociology. See Daniel Chernilo, *A Social Theory of the Nation-State: The Political Forms of Modernity beyond Methodological Nationalism*, (London, Routledge, 2007); *idem*, “Social Theory’s Methodological Nationalism. Myth and Reality”, (2006) 9 *European Journal of Social Theory*, pp 5-22.

¹⁰ Georg WF Hegel, *Grundlinien der Philosophie des Rechts. Oder Naturrecht und Staatswissenschaft im Grundrisse*, (Frankfurt aMain-Hamburg, Fischer Bücherei, [1821] 1968).

¹¹ See, for example, Pierre Bourdieu, *La Noblesse d’État. Grandes Écoles et Esprit de Corps*, (Paris, Minuit, 1989).

the state. Thus, the modern disciplines of law and social science have systematically sabotaged any attempt to grasp the other layers of society profoundly.

The relationship between nation-state and transnational structures has, however, undergone substantial changes since the mid-Twentieth century.¹² Thus, the world might have arrived at a “tipping point”,¹³ which implies that the relationship between state-hood and transnationality is undergoing a profound re-configuration. This does not mean that the nation-state layer is bound to disappear, but it does mean that the relative status and centrality of nation states within the broader framework of world society is changing. Thus, an adequate sociological understanding of the way in which social order is produced within world society will have to depart from the insight that states only represent one form of ordering among several. Instead, the contemporary world is characterised by two dominating forms of ordering which rely on two different organisational principles: states rely on a territorial principle of organisation. In contrast, contemporary forms of transnational ordering rely on functional differentiation as their central organisational principle. In addition, pre-modern “traditional” forms of ordering which rely on segmentary differentiation continue to play an important role. The development of a relational perspective aimed at understanding how the different layers of world society and the multitude of social orders which operates both within and in-between these layers interact is, therefore, one of the essential challenges with which contemporary legal and social theory is confronted.

From where we stand now, the territorially-delineated nation states, which, to a certain extent, were internally stabilised through organisational forms which relied on stratification as their central inclusion/exclusion mechanism, and which have, to date, operated upon the basis of the self-proclaimed idea that all other societal processes are subordinated to the state, seems to reflect a form of “transitional semantics”. Classical modernity, which, with a couple of

¹² Neil Walker, “Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders”, (2008) 6 *International Journal of Constitutional Law*, pp 373-96.

¹³ Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, note 7 above, p 9 *et seq.*

symbolic dates, can be said to span the period between 1789 and 1989, was characterised by a double-movement in which the emerging functionally-differentiated society was re-stabilised through the development of novel and distinctively modern forms of territorial and stratificatory differentiation within the different functional systems.¹⁴ To the extent that modernity is defined as the primacy of functional differentiation¹⁵ it is possible to understand the ongoing developments as representing a radicalisation of modernity, since the exponential expansion of functionally-delineated transnational structures in recent decades and the shifting balance between the nation-state layer and the transnational layer indicates that the reliance on functional differentiation in world society is deepening. The functional systems of, for example, the economy, science, the mass media, sports and education gradually free themselves from their internal reliance on stabilisation mechanisms which rely on territorial and stratificatory forms of differentiation, thereby introducing a qualitative break *vis-à-vis* classical modernity. Both public and private structures as well as all sorts of hybrid public/private structures which principally rely on functional differentiation have emerged (to name a few: ICANN for the internet, the WHO for health, and ISO for product standards). So even though the political system in the nation-state form is likely to continue to produce collectively-binding decisions, it is increasingly being demystified, because the ability of states to maintain the essentially early modern (Sixteenth and Seventeenth century) self-understanding that states are organic or holistic entities which encompass society as a whole is being progressively undermined.

In particular, the political and the legal systems were characterised by a strong internal reliance on territorial delineations in classical modernity. However, on both accounts, this seems to be changing. The emergence of functionally-delineated legal and political structures with a truly global reach might still be at an embryonic stage, but, for the first time in history, such structures did emerge in the latter half of the Twentieth century, just as the continued expansion of such structures seems to be a credible forecast for the

¹⁴ Kjaer, "The Structural Transformation of Embeddedness", note **Error! Bookmark not defined.** above.

¹⁵ Niklas Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 1997), p 1143 *et seq.*

decades to come. Accordingly, it is possible to observe a semantic shift: “Global law without a State”¹⁶ as well as “Cosmopolitan Democracy”¹⁷ have become meaningful statements, thereby indicating that the legal and the political systems are also in the process of freeing themselves from their internal reliance on territorially-delineated stabilisation mechanisms in the form of nation states.

Transnational legal and political structures are, however, not likely to imply a simple transfer of nation-state forms of law and politics to the transnational realm through the constitution of a world state or any other form of structure which merely copies the form and function of nation states. Attempts to justify a one-to-one transfer of nation-state norms and institutions to the transnational realm only make sense if they are carried out as a purely philosophical reflection without any sociological foundation.¹⁸ Moreover, from a sociological perspective, it is impossible to ignore the profoundly different structural composition of the transnational space when compared to the nation-state realm.

The contemporary structure of the transnational layer of world society has partly emerged through a metamorphosis of the kind of public and private inter-state structures, in the form of public international organisations and state-based international private law, which emerged in classical modernity. These structures have, first of all, gained in importance to such a degree that they can no longer be understood as mere reflections of state-based delegation.¹⁹ The evolution of international organisations such as the European Union (EU),²⁰ the World Trade Organisation (WTO) and the World Bank into extremely complex norm-producing regimes illustrates that these

¹⁶ Gunther Teubner (ed), *Global Law without a State*, (Aldershot, Ashgate-Dartmouth Publishing, 1997).

¹⁷ Daniele Archibugi & David Held (eds), *Cosmopolitan Democracy: An Agenda for a New World Order*, (Cambridge, Polity Press, 1995).

¹⁸ For such a philosophical attempt, see Otfried Höffe, *Demokratie im Zeitalter der Globalisierung*, (Munich, CH Beck Verlag, 1999).

¹⁹ Joshua Cohen & Charles F Sabel, “Global Democracy?”, (2005) 37 *NYU Journal of International Law and Politics*, pp 763-797.

²⁰ Poul F Kjaer, *Between Governing and Governance: On the Emergence, Function and Form of Europe’s Post-national Constellation*, (Oxford, Hart Publishing, 2010).

structures have gained a level of autonomy which makes it impossible to understand them as a pure reflections of inter-state bargaining. In addition, the sheer number of such entities has increased dramatically since the mid-Twentieth century.²¹ But apart from this transformation of public inter-state structures, new forms of transnational structures, which do not fit into the classical categories of international law and politics, have emerged. Multinational companies,²² globally-operating law firms,²³ think-thanks and leading NGOs are increasingly operating as autonomous norm-producing entities outside the nation-state framework. They have become autonomous forms of social ordering which constitute their own cognitive spaces on a global scale. Thus, an exclusive focus on public international organisations does not suffice if one seeks to describe the current structure of the transnational space.

However, within academic scholarship, public and private forms of transnationality are being reflected in two separate discourses. On the one hand, the vast majority of scholars who depart from public law and political science tend to orient their attention towards public international organisations, and issues such as the emergence of a global administrative law complex,²⁴ or the question of how norms of interaction emerge between states. Essentially, this strain of research merely deals with the displacement of public decision-making away from the spheres of the nation states and towards the transnational

²¹ For example, in 2001, the Yearbook of International Organisations estimated the number of intergovernmental organisations to be around 7,000 and the number of private international organisations to around 48,000. See, also, <www.uia.org/statistics/organisations/11.1.1a.pdf>.

²² Larry Catá Backer, "Economic Globalization and the Rise of Efficient Systems of Global Private lawmaking: Wal-Mart as Global Legislator", (2007) 37 *University of Connecticut Law Review*, pp 1739-1784.

²³ Grahame Thompson, "Tracking Global Corporate Citizenship: Some Reflections on 'Lovesick' Companies", *IIIS Discussion Paper*, No. 192, 2006.

²⁴ For a very useful public law inspired typology of global administrative structures, see Benedict Kingsbury, Nico Krisch & Richard B Stewart, "The Emergence of Global Administrative Law", (2005) 68 *Law and Contemporary Problems*, pp 15-62. For the special case of the EU, see Poul F Kjaer, "The Societal Function of European Integration in the Context of World Society", (2007) 13 *Soziale Systeme. Zeitschrift für Soziologische Theorie*, pp 367-378. For the vision and self-understanding underpinning public international organisations see Jens Steffek, "Tales of Function and Form: The Discursive legitimation of International Technocracy", (2011) 02 *Normative Orders Working Paper*.

realm. As such, this strand of research, in essence, remains devoted to an ambition of re-formulating the nation-state concepts of law and the political in order to make them compatible with on-going global developments. In most cases, the basic assumptions concerning the form and function of law and political power have, however, remained unchanged. On the other hand, a minority group of scholars, who mainly depart from the international private law tradition, seeks to develop novel concepts concerning how social order is produced in the transnational realm through a deliberate attempt to establish a break with the reliance on classical international law and international relation concepts.²⁵ The real-world processes which the two groups focus upon differ accordingly. As already mentioned, public lawyers and political scientists mainly analyse the dislocation of public power from the nation-state realm to the transnational sphere. In contrast, scholars who depart from private law tend to emphasise phenomena such as *lex mercatoria*²⁶ and *lex digitalis*²⁷ within the framework of a research programme aimed at conceptualising global forms of social ordering which operate beyond the public realm.

This division of labour is, however, problematical in so far as what can be observed is the emergence of a whole range of functionally-delineated configurations within the transnational space in terms of regulatory conglomerates within areas such as the economy, science, the mass media, sports, the environment and so forth. These

²⁵ See, for example, Marc Amstutz, "In-Between Worlds: *Marleasing* and the Emergence of Interlegality in Legal Reasoning", (2005) 11 *European Law Journal*, pp 766-784; Marc Amstutz & Vaios Karavas, "Weltrecht: Ein Derridasches Monster", in: Galf-Peter Calliess, Andreas Fischer-Lescano, Dan Wielsch & Peer Zumbansen (eds), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag*, (Berlin, Walter de Gruyter, 2009); Marc Amstutz & Vaios Karavas, "Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum", (2006) 8 *Rechtsgeschichte*, pp 14-32; Gunther Teubner & Andreas Fischer-Lescano, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, (Frankfurt aM, Suhrkamp Verlag, 2006); Gunther Teubner & Andreas Fischer-Lescano, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", (2004) 25 *Michigan Journal of International Law*, pp 999-1045.

²⁶ See, for example, Tania Liekweg, *Das Recht der Weltgesellschaft. Systemtheoretische Perspektiven auf die Globalisierung des Rechts am Beispiel der lex mercatoria*, (Stuttgart, Lucius & Lucius, 2003).

²⁷ Vagias Karavas, *Digitale Grundrechte. Elemente einer Verfassung des Informationsflusses im Internet*, (Baden-Baden, Nomos Verlag, 2007).

conglomerates are characterised by a highly-complex interaction between public and private elements, in terms of public and private international organisations, public and private international courts and court-like tribunals, private companies,²⁸ think-thanks, non-governmental organisations²⁹ and so forth. Such conglomerates of social ordering cannot, therefore, be adequately grasped through a one-dimensional emphasis on either the public or the private dimension at the cost of the other.

The principle of mutual disregard which seems to guide the relation between the two discourses is all the more puzzling in so far as references to constitutional language can be detected within both discourses, just as their research interest essentially remains the same in so far as the central objective within both discourses is to identify and normatively to evaluate the constitutive and limitative structures of transnational processes. However, in doing so, they act as ships that pass in the night since the constitutional concepts to which they refer are markedly different. A large segment of private lawyers tend to orient their work towards the question of the capability of the legal system to frame the transnational dimension of social processes related to, for example, the economy and migration, while systematically downplaying the political aspect of the processes in question.³⁰ In contrast, scholars departing from a public law or a political science perspective tend to explore the possibility of ensuring the primacy of the political system or - less ambitiously - to investigate the potential for ensuring the political accountability of

²⁸ See, for example, Olaf Dilling, Martin Herberg & Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions*, (Oxford, Hart Publishing, 2008); Catá Backer, "Economic Globalization and the Rise of Efficient Systems of Global Private Lawmaking: Wal-Mart as Global Legislator", note 22 above.

²⁹ See, for example, Heike Walk, "Formen Politischer Institutionalisierung: NGOs als Hoffnungsträger globaler Demokratie", in: Jens Beckert, Julia Eckert, Martin Kohli & Wolfgang Streeck (eds), *Transnationale Solidarität. Chancen und Grenzen*, (Frankfurt aM, Campus Verlag, 2004), pp 163-180.

³⁰ Needless to say, this is not the case for all private lawyers. See, for example, Christian Joerges & Michelle Everson, "The European Turn to Governance and Unanswered Questions of Legitimacy: Two Examples and Counter-intuitive Suggestions", in: Christian Joerges, Bo Stråth & Peter Wagner (eds), *The Economy as a Polity. The Political Constitution of Contemporary Capitalism*, (London, UCL Press, 2005), pp 159-180.

transnational structures.³¹ Irrespective of the level of ambition, scholars departing from a public law and political science perspective tend to understand law as an instrument which is merely deployed in order to achieve political objectives.

The development of a theory of transnational constitutionalism capable of bridging this gap is becoming pivotal. However, such an endeavour cannot take the form of a mere reconciliatory exercise aimed at achieving a compromise between the different positions. Instead, the point of departure must be the insight that law and politics operate in a radically different environment within the transnational space when compared to the nation-state context. The societal function of law and politics, and thus the position of the systems of law and politics both in society and *vis-à-vis* each other, are substantially different within the transnational space when compared to the nation-state setting. Thus, it is pivotal that an adequate theory of transnational constitutionalism re-configures the nation-state distinction between the public and the private spheres as well as systematically-emphasising the co-evolutionary transformation of both law and politics in relation to the increased reliance on functional and sectorial delineations. But, even more importantly, such a theory must be built upon the basis of a fundamentally different conceptuality. New context-adequate concepts of law, politics and constitutionalism must be developed upon the basis of a general theory of society (*Gesellschaftstheorie*) capable of describing the basic structures (*Tiefenstrukturen*) of the transnational space as well as the intertwined relationship between the different layers of world society;³² a theory which, moreover, must be inductive in nature, since it must be problem-oriented and take a focal perspective which makes it capable of observing how new political and legal forms immanently emerge within broader societal processes. In other words, such a project can only succeed if it is carried out as genuine sociological project, since sociology remains

³¹ David Held & Mathias Koenig-Archibugi (eds), *Global Governance and Public Accountability*, (Oxford, Blackwell Publishing, 2005).

³² For the multiple layers of world society, see Kjaer, "The Metamorphosis of the Functional Synthesis", note **Error! Bookmark not defined.** above; Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, note 7 above.

the only discipline which is capable of representing the ambition to describe the structure of society in its entirety.³³

II. Structural Transformations of the Multi-layered World Society

The increased academic attention given to transnational developments in recent decades can be understood as a reflection of two inter-related structural transformations. First, the nation-state layer has undergone substantial transformations since the mid-Twentieth century. What, in mainstream language, is typically denoted as the nation state is the result of century-long configurative processes which implied the emergence of complex and tangled conglomerates which combined not only political and legal, but also, for example, religious, economic and scientific, organisations, networks and professions within a limited segment of world society.³⁴ However, the massive increase in the internal complexity (*Eigenkomplexität*) of the state with the emergence of increasingly-complex welfare provisions throughout the Twentieth century and the increased linking of sectoral, and thus functional-delineated, segments of national configurations with their counterparts within other national configurations³⁵ means that the mutual stabilisation between the different dimensions of national configurations are being increasingly strained; a development which has subsequently had substantial (in-) direct effects on the transnational layer. Second, the transnational layer itself has undergone substantial transformations, which have had substantial consequences for the nation-state layer as well. We are, in other words, dealing with a dialectical development between mutually-constitutive layers.

In relation to the nation-state layer, it is worth noting that, until the mid-Twentieth century, the modern form of statehood had only been

³³ Jürgen Habermas, *Theorie des kommunikativen Handelns, Band 1 Handlungsrationalität und gesellschaftliche Rationalisierung*, (Frankfurt aM, Suhrkamp Verlag, 1981), p 19 *et seq.*

³⁴ Kjaer, "The Structural Transformation of Embeddedness", note **Error! Bookmark not defined.** above.

³⁵ Anne-Marie Slaughter, *A New World Order*, (Princeton NJ, Princeton University Press, 2004).

materialised within a relatively small part of the world.³⁶ Only in the wake of de-colonisation did statehood become a truly global phenomenon. It was only then that the globe in its entirety became divided into independent states.³⁷ Whereas modern statehood emerged through a metamorphosis of already-existing feudal structures in Europe, which subsequently led to a marginalisation of the selfsame feudal structures from which it emerged, modern statehood was externally imposed through imperialism in the (post-) colonial settings. The consequence is, as also indicated by legal pluralism approaches, that large parts of the world, most notably in Africa, Asia and Latin America, continue to be characterised by a duality between (in the western sense) pre-modern and modern state-based layers, because modern forms of organisation, essentially of European origin, such as codified legal-systems and generalised bureaucratic structures, have been imposed “on top” of traditional forms of societal organisation, without actually achieving a complete marginalisation of the “traditional” forms of societal organisation. Thus, the different social logics which they represent continue to operate simultaneously, either in a separate but entangled manner, or through the formation of hybrid structures which combine elements from both the two dimensions.³⁸ The basic features of the modern state and society, such as constitutions, contract law, property rights and so forth, might be in place at the same time as pre-modern forms of differentiation, to different degrees and in different variations, and continue to define the form of social operations “beneath” the formal structures of the state, often in a manner which short-circuits the operative practices of the modern structures.³⁹ States such as

³⁶ Poul F Kjaer: “Embeddedness through Networks - a Critical appraisal of the Network Concept in the *Ceuvre* of Karl-Heinz Ladeur”, (2009) 10 *German Law Journal*, pp 483-499.

³⁷ Rudolf Stichweh, “Dimensionen des Weltstaats im System der Weltpolitik”, in: Mathias Albert & Rudolf Stichweh (eds), *Weltstaat und Weltstaatlichkeit. Beobachtungen globaler politischer Strukturbildung*, (Wiesbaden, Verlag für Sozialwissenschaften, 2007), pp 25-36, at 27.

³⁸ For example, for the case of Brazil, see Leonardo Avritzer, “Culture, Democracy and the Formation of the Public Space in Brazil”, in: Jessé Souza and Valter Sinder (eds), *Imagining Brazil*, (Lanham MD, Rowman & Littlefield, 2005); Marcelo Neves, *Verfassung und Posivität des Rechts in der peripheren Moderne*, (Berlin, Duncker & Humblot, 1992).

³⁹ As pointed out by Luhmann, Southern Italy is an excellent place to observe this: see Niklas Luhmann, “Kausalität im Süden”, (1995) 1 *Soziale Systeme. Zeitschrift für Soziologische Theorie*, pp 7-28. See, also, Kjaer, “Embeddedness through Networks - a

Australia, Canada and the United States, in this sense, present an anomaly, because they belong to the small group of states with a colonial past in which the indigenous cultures were almost completely eradicated, thereby making the question of multiple layers a less defining feature.⁴⁰ Thus, it is possible to observe a somewhat ambiguous development. On the one hand, the majority of the world continues to be characterised by “weak states”, in the sense that statehood in large parts of the world only constitutes a thin layer which merely represents one segment of society because the forms of social ordering which existed prior to the establishment of modern statehood continue to be of vital importance. On the other hand, the reach of the state phenomenon has continued to expand rapidly, not only through the expansion of the number of states in the wake of decolonisation, but also in terms of their ability to re-construct the social structures operating within their territories.⁴¹ For example, the strong modernising trends which can currently be observed in relation to states such as Brazil, China and India indicate that these states have also gradually become capable of marginalising their pre-state structures.

The structural transformations through the expansion of the reach of statehood is clearly having important (in-) direct effects on the transnational layer of world society, as it implies changes to the inter-

Critical appraisal of the Network Concept in the *Cŕuvre* of Karl-Heinz Ladeur”, note 36 above, p 486.

⁴⁰ Even though the size of indigenous groups living within the territory of these states are so small that they hardly can be understood as constitutive segments of the society the way the relation between indigenous and non-indigenous segments of society is framed can however still be understood as a “test case” for the normative quality of constitutional structures of these states. See, for example, James Tully, *Strange Multiplicity. Constitutionalism in an Age of Diversity*, (Cambridge, Cambridge University Press, 1995). For the interaction between indigenous, national and transnational law, see, also, Christoph Beat Grabher, “Wanjina and Wunggurr: The Propertisation of Aboriginal Rock Art under Australian Law”, in: Galf-Peter Calliess, Andreas Fischer-Lescano, Dan Wielsch & Peer Zumbansen (eds), *Soziologische Jurisprudenz. Festschrift für Gunther Teubner zum 65. Geburtstag*, note 25 above. The American South, moreover, presents a special case; see, for example, Wolfgang Knöbl, “Of Contingencies and Breaks: The US American South as an Anomaly in the Debate on Multiple Modernities”, (2006) XLVII *Archives Européennes de Sociologie*, pp 125-157.

⁴¹ Michel Foucault, *Security, Territory, Population. Lectures at the Collège De France 1977-78*, (Basingstoke, Palgrave Macmillan, 2007).

state system. But, more importantly, the transformation of an ever larger part of the world's states into modern states means that they tend - to a higher extent than before - to mirror the functionally-differentiated nature of society in their internal organisation, for example, through the differentiation (*Ausdifferenzierung*) of an increased number of functionally-delineated ministries, agencies and parliamentary committees, thereby increasingly undermining the illusion that states possess a singular centre of power. States are becoming "disaggregated states", which do not operate as closed units. Increased disaggregation implies that the different functionally-defined dimensions of states tend to fulfil different functions and to pursue different objectives in a more or less uncoordinated manner at the same time as these dimensions establish institutionalised relations both to their counterparts in other states as well as to public and private structures which operate in the transnational space.⁴² Moreover, the expansion of the modern form of statehood means that the kind of centre-periphery differentiation which, to date, has been a central feature of world society is slowly, but gradually, being reduced. The Twentieth century was essentially a transitional phase. At the beginning of the century, the world was constituted upon the basis of a distinction between "Europe and the rest", in which Europe could be conceived of as a specific legal space (*Raum*).⁴³ After the self-inflicted implosion of the European space, a new distinction between "the West and the rest", relying on US-American hegemony, emerged. But, in today's world, characterised by the rapid rise of a large number of non-western states, the North Atlantic area no longer constitutes the exclusive centre of the world. Consequently, the relative centrality of centre-periphery differentiation is diminishing.

A concurrent transformation has taken place within the transnational space itself. The expansion of statehood evolved hand in hand with the emergence of transnational structures. Modern (Western) European states such as Denmark, France, the Netherlands, Spain, Portugal and the United Kingdom all emerged through century-long processes which unfolded in conjunction with the gradual expansion of transnationality in the colonial form. The constitutional orders of

⁴² Slaughter, note 35 above.

⁴³ Schmitt, *Der Nomos der Erde. Im Völkerrecht des Jus Publicum Europaeum*, note 5 above.

nation states have, therefore, always been part of far larger and far more complex structures of social ordering.⁴⁴ Thus, the phenomenon of colonialism testifies that transnationality is by no means a new phenomenon, just as it illustrates that statehood and transnationality have, historically speaking, been mutually re-inforcing, since the transnational layer seems to be just as constitutive for nation states as nation states are constitutive for the transnational layer. Thus, the emergence of modern statehood cannot be adequately understood without taking the simultaneous emergence of overarching transnational structures into consideration. In the same manner as early modern and classical modern European states emerged in conjunction with colonial structures, the expansion of statehood in the Twentieth century unfolded in combination with the progressive strengthening of functionally-delineated transnational structures. If one ranks the 193 states currently existing according to the influence which they have on global society, and compare them with other structures of social ordering, such as the International Monetary Foundation (IMF), the G-10 Basel Banking Committee, Wal-Mart and the International Red Cross according to the influence that they have on global society, the latter entities will most likely appear more powerful than many, and, in some cases, even the majority, of the states currently existing.⁴⁵

Against this background, the degree to which the transnational layer of world society has changed since the mid-Twentieth century becomes somewhat clearer. The fundamental transformation which occurred is that transnational structures gradually moved away from centre-periphery differentiation,⁴⁶ and towards an ever-increasing reliance on functional differentiation, since the colonial form of centre-periphery transnationality was gradually replaced by an increased reliance on functionally-differentiated forms. Today,

⁴⁴ James Tully, "The Imperialism of Modern Constitutional Democracy", in: Neil Walker & Martin Loughlin (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, (Oxford, Oxford University Press, 2007).

⁴⁵ J Braithwaite & P Drahos, *Global Business Regulation*, (Cambridge, Cambridge University Press, 2000), p 488; Rainer Nickel, "Legal Patterns of Global Governance: Participatory Transnational Governance", CLPE Research Paper 5/2006, Vol. 2, No. 1 (2006), 1.

⁴⁶ For an attempt to maintain centre-periphery differentiation as the central category, see the work of Wallerstein; for example, Immanuel Wallerstein, *World-Systems Analysis. An Introduction*, (Durham NC, Duke University Press, 2004).

maritime affairs are dealt with by the International Maritime Organisation (IMO), air safety by the International Civil Aviation Organisation (ICAO), banking by the G-10 Basel Committee, food standards by the UN Food and Agriculture Organisation (FAO), international trade by the WTO, and so forth. Similar forms functional delineation can be observed in relation to (semi-) private regulatory organisations such as ISO and ICANN. Moreover, at the other end of the public/private continuum, multinational companies, in their capacity as functionally-delineated organisational systems operating within the economic sphere, have emerged as autonomous structures in their own right.⁴⁷

A common feature of public and private organisations operating in the transnational space is that they - in spite of the numerous predictions to the contrary - internally tend to have a vertical nucleus in the form of a hierarchical organisational structure of the sort originally described by Weber.⁴⁸ The ability to impose negative sanctions remains a defining feature of the internal set up of these organisations, albeit to varying degrees. Multinational companies tend to develop sophisticated forms of control and compliance mechanisms, such as auditing systems, which are deployed internally between the mother companies and their subsidiaries (and, to various degrees, also externally in relation to supply chains).⁴⁹ Similar structures can be detected within major globally-operating NGOs and public international organisations.⁵⁰

Moreover, a common feature for both public and private organisations operating in the transnational space is that they must be understood as autonomous norm-producing structures. They are complex systems, and, as such, they are forced to develop general principles which are capable of guiding the multi-faceted social

⁴⁷ Catá Backer, "Economic Globalization and the Rise of Efficient Systems of Global Private lawmaking: Wal-Mart as Global Legislator", note 22 above.

⁴⁸ Max Weber, "Bureaucracy", in: H Gerth & C Wright Mills (eds), *From Max Weber: Essays in Sociology*, (New York, Oxford University Press, 1946).

⁴⁹ For example, for the case of Wal-Mart; see Catá Backer, "Economic Globalization and the Rise of Efficient Systems of Global Private lawmaking: Wal-Mart as Global Legislator", note 22 above.

⁵⁰ A particularly clear example is the certification system for fair trade in foodstuffs operated by Flo-Cert (See: <<http://www.flo-cert.net>>).

processes which they reproduce upon the basis of explicit statements concerning what kind of operations are acceptable and what kinds of operations are not.⁵¹ This functional need tends to lead to the establishment of criteria which are aimed at guiding the selection of operations. The consequence of this is not only rules and shared expectations but also a hierarchisation of in order to solve or restrain conflicts between different segments of norms.⁵²

In addition, it is possible to observe the emergence of overarching regimes which bind together a whole range of actors within a given functionally-delineated field. What is common for both regulatory organisations and multinationals is that they tend to become parts of larger conglomerates which include a multiplicity of actors in the form of producers, consumers, regulators and so forth, which, in turn, become part of functionally-delineated configurative processes which produces a convergence of expectations between the actors in question upon the basis of a (more or less well-developed) set of principles, norms and rules, all of which constitute a “higher order”.⁵³

Furthermore, such developments imply the development of independent sources of authority. A key example here is the function of “scientific knowledge” within risk regulation (for example, within the EU Comitology structure and the SPS committee of the WTO). In other cases, the backbone of functional regimes tends to be constituted through the emergence of specialised institutions which develop ranking instruments which are deployed globally. This is, for example, the case in relation to capital markets,⁵⁴ sports,⁵⁵ freedom of

⁵¹ Talcott Parsons, *The System of Modern Societies*, (Englewood Cliffs NJ-Hemel Hempstead, Prentice-Hall, 1971).

⁵² In relation to private enterprises, see, for example, Klaus Dieter Wolf, Annegret Flohr, Lothar Rieth & Sandra Schwindenhammer, *The Role of Business in Global Governance. Corporations as Norm-entrepreneurs*, (Basingstoke, Palgrave Macmillan, 2010).

⁵³ Stephen D Krasner, “Structural Causes and Regime Consequences: Regimes as Intervening Variables”, in: *idem* (ed), *International Regimes*, (Ithaca NY, Cornell University Press, 1983), p 1. For a practical example, see, for example, the UN Global Compact.

⁵⁴ In relation to rating agencies, see Timothy J. Sinclair, “Global Monitor: Bond Rating Agencies”, (2003) 8 *New Political Economy*, pp 147-161.

⁵⁵ Tobias Werron, *Der Weltsport und sein Publikum. Zur Autonomie und Entstehung des modernen Sports*, (Weilerswist, Velbrueck Verlag, 2009).

press,⁵⁶ and higher education.⁵⁷ Such ranking instruments serve as forms through which the operations of actors within the area in question are benchmarked, thereby producing a global cognitive space. Ranking and benchmarks instruments are used to establish foundational structures in relation to which other actors within the functional area in question have to position themselves.⁵⁸ They provide the constitutive basis for functionally-delineated universes with a global reach. In some cases, the rankings are, moreover, supplemented by certification instruments, such as those developed by ISO (product standards) and FLO-CERT (fair-trade in foodstuff), which, even more proactively, seek to transform the way in which the actors within a given area operate.

The consequence of this is that a multitude of different forms of normative orders can be observed in the transnational space. A highly-complex disorder of normative order⁵⁹ exists, as a whole range of structures which produce their own forms of normativity operates and collides like billiard balls in the transnational space. In particular, small- and middle-sized states are, therefore, reduced to one set of actors among many, when they operate transnationally. The consequence is that their decisional autonomy is structurally limited, as they are *de facto* forced to seek convergence with the norms produced transnationally.⁶⁰ The above examples underline the entangledness of both the national and the transnational layer. State structures operating in the transnational space are national structures which tend to develop an additional transnational dimension. As

⁵⁶ For example, see the Global Press Freedom Index made by Reporters without Borders. Available at: http://www.rsf.org/index.php?page=rubrique&id_rubrique=2. Last accessed 20 October 2009.

⁵⁷ For example, the Shanghai Ranking available at: <http://www.arwu.org>, and the The Times Higher Education Ranking available at: <http://www.timeshighereducation.co.uk>. Last accessed 21 October 2009.

⁵⁸ On the constitutive role of rating agencies in relation to the global financial system, see Timothy J Sinclair, "The Problems of Growing up and getting rich: How the truly obscure became very important in global financial market and to us all" (Typescript on file with author).

⁵⁹ Walker, "Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders", note 12 above, pp 373-96.

⁶⁰ Danny Nicol, *The Constitutional Protection of Capitalism*, (Oxford, Hart Publishing, 2010).

such, they simultaneously operate within a multiplicity of contexts. Both domestically and externally, they abide by different problem constellations, norms and procedures, thereby making the challenge of establishing internal coherency between the different sets of expectations a central challenge for modern state organisations.

The case for private actors is the same. Most multinational companies started out in a national setting and only developed into global companies over time. Thus, most multinational companies tend to be closely aligned with the business culture and legal order of their country of origin. Thus, *Wal-Mart* remains a very American company and *Toyota* a very Japanese company. On the other hand, they are engaged in business operations on a global scale. The consequence is that they encounter different expectations and norms in different contexts. A similar multi-dimensionality can be observed in relation to other institutions, such as universities, research institutions, law firms and NGOs, which develop a transnational dimension. Thus, it is common for public and private structures to tend to be both national and transnational at the same time, thereby highlighting that transnationality must be understood as a specific *social practice* through which specific norms emerge.⁶¹ Thus, as also highlighted by Saskia Sassen,⁶² national and transnational structures represent different logics, despite the fact that they do not operate in a separate manner. Instead, they are deeply entangled and intertwined. Today, all middle-sized European cities with respect for themselves maintain a representation office in Brussels, and all universities engage in dense transnational co-operation arrangements, and so on. In fact, all formal organisations of a certain size tend to operate within multiple contexts.⁶³

⁶¹ Antje Wiener, *The Invisible Constitution of Politics: Contested Norms and International Encounters*, (Cambridge, Cambridge University Press, 2008).

⁶² Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, note 7 above.

⁶³ As pointed out by Inger Johanne Sand in her comment, sovereign wealth funds are another excellent example of this as they at the same time face the need to respond to expectations emerging from the national polity which have initiated them, the states within which they invest, global financial markets, the international organisations and regimes which regulate the areas they invest in, and globally operating NGOs which insist that, for example, social, environmental and human rights concerns should be reflected in their investment policies.

Due to the increased establishment of functionally-delineated cognitive spaces, the relative importance of the transnational dimensions is, however, increasing. For example, universities increasingly measure their degree of success in relation to the performance of universities operating in other national settings, instead of measuring themselves upon the basis of the contribution which they provide to their own national setting.⁶⁴ Thus, it is common for organisations which are developing a transnational dimension to find that some of the activities in which they engage may be effectively controlled by states capable of imposing legal constraints at the same time as they, the organisations, - at least partly - are capable of escaping national control when operating in a transnational capacity.

Moreover, a variation of this duality can be observed in relation to public international organisations. These organisations are *international* organisations which are normally founded and funded by states. A central characteristic of such organisations is, therefore, that they rely on competences delegated to them by their member states. At the same time, they - to varying degrees - tend to develop an additional transnational dimension which escapes the kind of control which can be ensured through delegation. This is especially apparent in relation to the EU, which is - in most instances - described as a structure which is composed of an intergovernmental *and* a supranational dimension. The former dimension remains - at least ideally - under the control of the Member States, while the latter operates beyond the exclusive control of the Member States. But, even within less-developed international organisations, an additional transnational dimension tends to emerge. For example, the WTO has, within a very short time span, developed an additional transnational dimension guided by an independent logic which cannot be exclusively captured by the concept of intergovernmentality, since it produces rules of ordering which cannot be directly traced back to its member states. In addition, international organisations must be understood as autonomous normative orders, which internally rely on a - albeit often very weak - hierarchical nucleus. Although they embody fundamentally different logics and produce different

⁶⁴ Rudolf Stichweh: Centre and Periphery in a Global University System, MS available at:

<http://www.unilu.ch/deu/prof._dr._rudolf_stichwehpublikationen_38043.aspx>.

outcomes, national and transnational structures share one fundamental thing in so far as both dimensions rely on legal and organisational hierarchy.

III. Law and Politics within National Configurations

Another common feature of both public and private transnational entities is that they are order-producing entities, and, as such, they produce governing or functional equivalents to governing. This insight makes it pivotal to uncover the specific legal and political quality of such structures as well as the form of constitutional order which they produce when compared with the orders which characterise nation-state settings.

The central axis on which the nation states rest is the specific way in which the political and the legal systems orient themselves towards each other. For Habermas, this leads to a conceptualisation of an “internal connection between law and political power”.⁶⁵ The law’s stabilisation of normative expectations and political will-formation is seen as emerging under a condition of simultaneousness, and, thereby, in a manner which ensures a legitimate and just societal order. For Luhmann, the internal link between law and power is replaced with a “certain functional synthesis between politics and law”.⁶⁶ In contrast to Habermas, Luhmann emphasises the difference between the two dimensions. He underlines that the synthesis emerges upon the basis of two different functions: the stabilisation of normative expectations by the legal system, and by collectively-binding decision-making on the part of the political system. Nonetheless, the difference between the two positions is more gradual than fundamental, since the transfer of the meaning components from one sphere to the other is addressed from a procedural perspective by both scholars. Moreover, Luhmann also acknowledges that the functional synthesis is likely to ensure certain “overlaps” in the modes of self-description of both the legal and the political system in relation to concepts such as legitimacy and

⁶⁵ Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats*, (Frankfurt aM, Suhrkamp Verlag, 1992), p 167 (transl. by the author).

⁶⁶ Luhmann, *Das Recht der Gesellschaft*, note 15 above, p 153 (author’s translation).

justice.⁶⁷ Thus, it is, indeed, possible to steer in-between the two positions.⁶⁸

The major problem facing the theoretical complexes of Habermas, in particular, but also Luhmann, should be found elsewhere. The problem is that they presume (Habermas) or describe (Luhmann) a hierarchical order as they see the political and legal systems as being characterised by Weberian organisational and Kelsian legal hierarchy. Although Luhmann, early on, expressed his scepticism about the future viability of such structures,⁶⁹ his descriptions of modern society, nonetheless, retain a strong nation-state outlook. This might seem paradoxical when taking his emphasis on society as a single world society into consideration.⁷⁰ Especially in relation to the legal and the political systems, the concept of world society is, however, less radical than it looks, in so far as Luhmann's central focus continues to be on hierarchical legal and organisational structures which are unfolding within territorially-delineated sub-systems. Thus, the bulk of his descriptions of the operations of the political and legal systems continue to refer to hierarchical nation-state structures.⁷¹

Moreover, the attempt to justify the claim that the sum of a single societal sub-system is larger than the sum of society as a whole led Luhmann to ignore the configurative aspects of society. The nationally-delineated legal and political sub-systems are also within the nation state-layer parts of larger configurations. These configurations consist of a dense web of mutually re-inforcing and partly overlapping structural couplings between the functional sub-

⁶⁷ *Ibid.*, p 407.

⁶⁸ Gunther Teubner, "Reflexives Recht: Entwicklungsmodelle des Rechts in vergleichender Perspektive", (1982) 68 *Archiv für Rechts- und Sozialphilosophie*, pp 13-59.

⁶⁹ Niklas Luhmann, *Rechtssoziologie*, (Opladen, Westdeutscher Verlag [1972], 1983), p 339.

⁷⁰ *Idem*, "Die Weltgesellschaft", (1971) 57 *Archiv für Rechts- und Sozialphilosophie*, pp 1-35; *idem*, *Die Gesellschaft der Gesellschaft*, note 15 above, p 145 *et seq.*

⁷¹ For example, his two main works on law and politics, *Recht der Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 1993) and *Politik der Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 2000), deal almost completely with law and politics in the nation state form. For other systems, according to theoretical scholars, such as Marc Amstutz and Gunther Teubner, this is, however, different.

systems of law and politics as well as systems such as the economy, education, science, health, sports, and so forth. These sub-systems are not necessarily delineated along completely identical territorial lines,⁷² but, in most cases, are characterised by strong overlaps between the territorial delineations to which they refer. Moreover, it is possible to observe a “variety of configurations” since substantial differences exist between the existing configurations, thereby indicating that they are producing an additional value which makes it necessary to define them as independent social phenomena.

National configurations can, moreover, be described as “organisational societies” (*Organisationsgesellschaften*). It was the Seventeenth and Eighteenth century organisational revolutions which provided the basis for the political and economic revolutions which are typically regarded as the driving forces behind the establishment of the nation-state configurations.⁷³ Thus, a heavy reliance on organisational systems is, in many ways, the strongest characteristic of national configurations, in the sense that the territorially-delineated functional sub-systems sail upon a sea of organisations. The integrative force (*Zusammenhangskraft*) of the configurations is, therefore, mainly established at the organisational level, since a whole range of organisations - from constitutional courts and central banks to universities - serve as structural couplings between functional systems. Such couplings are, moreover, complemented by a whole range of regimes, ranging from nationally-delineated corporatist labour market structures to national football leagues, which cannot be subsumed under the categories of organisational or functional systems.⁷⁴ The complex interaction between a whole range

⁷² An example in relation to the economic system where that is not the case is the monetary union between Belgium and Luxembourg prior to the adoption of the Euro. The German social and humanistic science and higher education regime, moreover, seems to be delineated along linguistic, rather than territorial, lines, in the sense that Austria and the German-speaking parts of Switzerland are included as well. Moreover, within the area of sports, one can observe that Canadian baseball clubs play in the US League. For more general reflections see also: Poul F Kjaer, “Law and Order Within and Beyond National Configurations”, in: Poul F Kjaer, Gunther Teubner & Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation*, note **Error! Bookmark not defined.** above.

⁷³ Gorm Harste, *Modernitet og Organisation*, (Copenhagen, Forlaget Politisk Revy, 1997).

⁷⁴ Luhmann did develop an elaborated theory of organisations. See, in particular, Niklas Luhmann, *Organisation und Entscheidung*, (Opladen-Wiesbaden:

of organisational structures on which national configurations rely makes it hardly surprising that constitutional structures have always existed outside the realm of the state. Not only non-state functional and organisational systems, but also regimes that have continuously been constitutively and restrictively stabilised through law within the nation-state layer of world society as the existence of a multitude of, for example, church constitutions, economic and labour constitutions, and company constitutions testify.

From a Hegelian perspective, such structures can, of course, also be understood as part of the state, in so far as Hegel introduced a three-dimensional concept of the state.⁷⁵ Firstly, he understood the state as being composed of the legal and the political system in the “narrow sense”, that is, of functionally-delineated structures such as the government, the state bureaucracy and the courts. Secondly, he understood the state as an entity composing society as a whole. In this understanding of the state, corporatist labour market regimes, for example, can be understood as part of the “larger state”. Thirdly, he understood the state as a container which constitutes itself through the delineation of one state towards other states. Conceptually, however, this three-dimensional concept suffers from obvious shortcomings, because it remains unclear what the relation between the three forms of the state is, and how the unity of the three forms is constituted. The acceleration of the structural drift away from national and towards global configurations over the last 50 years has, moreover, made the theory empirically outdated.⁷⁶

Westdeutscher Verlag, 2000). The problem is the limited status which he grants to organisational systems *vis-à-vis* functional systems within society as such. For example, one notices that organisational systems occupy only 21 pages of his 1,164 page general theory of society. See Luhmann, *Die Gesellschaft der Gesellschaft*, note 15 above, pp 826-847.

⁷⁵ Neil Walker uses the term “Keynesian-Westphalian frame” to describe what is essentially identical to the state and society constellation described by Hegel. See Georg WF Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse*, *Werke Band 7*, (Frankfurt aM, Suhrkamp Verlag, [1821] 1970); Neil Walker, “Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders”, note 12 above, pp 373-96.

⁷⁶ For empirical investigations into the transformation of the state, see Stephan Leibfried & Michael Zürn (eds), *Transformation of the State?*, (Cambridge, Cambridge University Press, 2005).

Luhmann, on the other hand, essentially reduced the state to Hegel's first dimension, upon the basis of the idea that clear-cut boundaries exists between the political system and other spheres of society.⁷⁷ This position is, however, only possible because he reduced the political to a phenomenon which is merely unfolding within the medium of power, which is again characterised by the ability to impose formalised negative sanctions.⁷⁸ However, this position is both conceptually, as well as empirically, problematical. The reduction of power to the ability to deploy formalised negative-sanctions essentially relies on an old-European (*Alteuropäische*) concept of power, and the idea that power can be clearly located within specific institutional structures.⁷⁹ Empirically, the sharp distinction which he introduces between power and influence, with the latter being characterised by the absence of the ability to deploy formalised negative-sanctions, has been a defining element of society. Instead of Luhmann's Manichaeian distinctions, society is, instead, characterised by a continuum representing different tones of grey, in which the borderline between power and influence is not well-defined.⁸⁰ For example, (neo-) corporatist structures serve(d) as regimes which ensure(d) the embeddedness of the political system in the nation-state form in the wider society which established institutionalised links between the political and the economic realm. Similarly, governance structures today ensure the embeddedness of the political system of the European Union (EU) in the wider society.⁸¹ The existence of such

⁷⁷ Niklas Luhmann, *Die Politik der Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 2000).

⁷⁸ In contrast to the late Luhmann, the earlier Luhmann specifically acknowledged the existence of societal power. See Niklas Luhmann, *Macht*, (Stuttgart, Ferdinand Enke Verlag, [1975] 1988), p 88 *et seq.*

⁷⁹ Christian Borch, "Systemic Power: Luhmann, Foucault, and Analytics of Power", (2005) 48 *Acta Sociologia*, pp 155-167; Urs Stäheli, *Sinnzusammenbrüche. Eine dekonstruktive Lektüre von Niklas Luhmanns Systemtheorie*, (Velbrück, Weilerswist, 2000), p 230 *et seq.*

⁸⁰ For example, the Open Method of Co-ordination within the context of the European integration process and its predecessors within the OECD do not rely on the ability to invoke negative sanctions, but is, nonetheless, producing power. See Poul F Kjaer, "Three Forms of Governance and Three Forms of Power", in: Erik Oddvar Eriksen, Christian Joerges & Florian Rödl, *Solidarity in a Post-national Union. The Unsettled Political Order of Europe*, (London, Routledge, 2008), pp 23-43, at 31 *et seq.*

⁸¹ Kjaer, "Embeddedness through Networks - a Critical appraisal of the Network Concept in the *Ceuvre* of Karl-Heinz Ladeur", note 36 above.

regimes makes the political system a gradualistic or concentric phenomenon, which is denser the closer you are to the nucleus of the system and more porous the further out in the periphery you are. The supremacy of political rationality is thus becoming gradually weaker the further you move out towards the periphery. For example, whereas economic rationality is clearly subordinated to the supremacy of the political when states conduct fiscal policy, the political element, although still present, becomes subordinated to economic rationality within the sphere of corporate lobbying. Such clear-cut cases of supremacy are, however, rare. In *praxis*, political and non-political forms of rationality, instead, glide into each other in an impalpable manner, thereby nurturing systematic uncertainty. Not surprisingly, the relationship between political rationality and non-political rationalities has, therefore, led to a continuous battle of supremacy concerning the appropriate delineations of the political sphere.⁸²

Thus, national configurations are not totalising political entities in the Hegelian sense, in which society in its entirety is subsumed under the rationality of the political system within the framework of the state. On the other hand, they are not purely metaphorical entities which merely reflect the instrumental semantics of the political system, as argued by Luhmann. Instead, we are faced with the need to develop a coherent concept of the political sphere which acknowledges that political forms of communication are present throughout society albeit in different forms and with different intensity.

This is also apparent in relation to the kind of constitutional structures which emerged within the wider society throughout the nation-state era. The nation states were only partially successful in their attempt to eradicate earlier forms of feudal constitutionalism,⁸³ but, if they are understood as a legal structure which stabilises non-legal structures over time through the re-production of constitutive and limitative rules, a whole range of constitutional structures can, as

⁸² See, for example, Karl-Heinz Ladeur, *Der Staat gegen die Gesellschaft. Zur Verteidigung der Rationalität der Privatrechtsgesellschaft*, (Tübingen, Mohr Siebeck, 2006).

⁸³ For an early critique of the continued impact of feudal structures in the German context, see Georg WF Hegel, "Die Verfassung Deutschlands", pp 451-610, in: *idem*, *Gesammelte Werke, Band 1*, (Frankfurt aM, Suhrkamp Verlag, [1800-02] 1971).

already noted, be observed: for example, in the form of economic constitutions, labour constitutions, media constitutions and church constitutions. Such constitutions are, in some cases, oriented towards functional systems as such. In other cases, they are oriented towards specific regimes or merely towards organisations. Some of these constitutions are closely-linked to the political system. They are either established on the initiative of the political system, or are at least subject to political supervision, whereas, in other cases, they emerge in an autonomous manner and evade the attempt of the state to exercise control. But apart from the elements derived from the specific system in question, they all entail a legal, as well a political, element, thereby making it possible to understand the functional synthesis of law and politics as the central axis or nucleus around which national configurations are organised.⁸⁴

IV. Constitutional Metamorphosis

The different nature of the national and the transnational space is also apparent in relation to the specific phenomenon of constitutionalism. In spite of the large/great differences in the function and form of transnational structures, it seems that a common feature of global structures is that the “functional synthesis” between law and politics is even weaker, if it exists at all, when compared to the nation-state setting. Transnational legal regimes often rely on “judge-made law” to a far higher extent than is the case within nation-state structures, since legal norms are developed without, or only with very weak, reference to the formal legislation produced within the political system. In addition, as highlighted by the emergence of “soft law” modes, transnational political-administrative structures often expand their operations without relying upon a formal legal basis. If it occurs at all, law is mainly activated *ex-post* in order to formalise already existing structures.⁸⁵ In their internal organisation, transnational political-administrative structures are, moreover, characterised by an absence of democracy, since none of them operate upon the basis of

⁸⁴ *De facto* Luhmann also acknowledges that the axis between law and politics, in terms of societal function, enjoy a privileged position in so far as the political-legal complex produces compatabilisation of the time structures of society in its entirety (“gesamtgesellschaftlichen Zeitausgleichs”). See Niklas Luhmann, *Das Recht der Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 1993), note 15 above, p 429.

⁸⁵ Karl-Heinz Ladeur, “Towards a Legal Theory of Supranationality - The Viability of the Network Concept”, (1997) 3 *European Law Journal*, pp 33-54.

hierarchy “with a divided peak” through the institutionalisation of the distinction and continued oscillation between government and opposition,⁸⁶ or in a manner which corresponds to more traditional concepts of parliamentary democracy.⁸⁷ What we are witnessing is an evolutionary development in which the attempt to channel communication-flows into democratic procedures has become increasingly marginalised because such procedures are not complex and flexible enough to handle the massive increases in social complexity which characterise radical modernity. In addition, the territorial limitation, which is established through the reference to the metaphor of the people within democratic forms of communication, has become an obstacle for adequate problem-solving in a global world. Hence, the functional synthesis between law and (democratic) politics does not seem to exist within the transnational space.⁸⁸

Thus, the legal system has been forced to establish direct “partnerships”, taking the form of functionally-delineated societal constitutions, with other functional systems. For example, the socio-economic constitutions, which were an important feature of (European) national configurations, has been somewhat marginalised due to the emergence of new functionally-delineated economic constitutions, as was the case within the framework of the European Community in its early days,⁸⁹ and is still the case with the WTO regime today. However, these regimes represent a much more narrow economic view of the world, when compared with the broader socio-economic perspective that characterises the fading phenomenon of nation-state corporatism. Thus, the economic constitutions have been complemented by a whole range of functional constitutions in the form of, for example, a global digital

⁸⁶ Niklas Luhmann, “Die Zukunft der Demokratie”, in: *idem*, *Soziologische Aufklärung 4, Beiträge zur Funktionalen Differenzierung der Gesellschaft*, (Opladen, Westdeutscher Verlag, 1994), pp 126-132, at 127.

⁸⁷ Jürgen Neyer, “The Justice Deficit of the EU and other International Organisations”, in: Christian Joerges & Poul F Kjaer, (eds), *Transnational Standards of Social Protection: Contrasting European and International Governance*, Arena Report Series, Oslo, nr. 5, 2008, pp 199-222.

⁸⁸ Marc Amstutz & Vaios Karavas, “Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum”, (2006) 8 *Rechtsgeschichte*, pp 14-32.

⁸⁹ See, for example, Ernst-Joachim Mestmäcker, “Zur Wirtschaftsverfassung in der Europäischen Union”, in: *idem*, *Wirtschaft und Verfassung in der Europäischen Union*, (Baden-Baden, Nomos Verlag, 2003), pp 507-537.

constitution, a global health constitution, a global sports constitution, and so forth.⁹⁰ These constitutions are non-state centred constitutions and spontaneous, acting as complex, structural couplings between the legal system and specific functional systems. Such constitutions provide a basis for a stabilisation of the systems in question through legal means, as well as for the establishment of reflexive mechanisms capable of ensuring that they exercise self-restraint to a degree which leads to a reduction in negative externalities, asymmetries and crowding-out effects *vis-à-vis* other systems. As such, they counter the consequences of the reduced absorption capacities of democratic procedures.

V. Re-introducing the Political

The metamorphosis of the functional synthesis and the emergence of a whole range of constitutional partnerships between the legal system and the various functional systems poses the question of what institutional structures and pre-legal conditions need to be in place within the non-legal systems in order for them to act as adequate partners for the legal system. Whereas the existing work on (global) societal constitutionalism seems to assume that such structures *are* in place, one could argue that this cannot simply be assumed. The claim that such structures exist would have to be derived from empirical observations made upon the basis of a conceptual framework which makes the observation of such structures possible.

The hypothesis which will be pursued here is that the condition which needs to be in place in order for specific systems to be capable of engaging in structural couplings which possess a constitutional quality with the legal system is the immanent existence of regulatory structures which produce functional equivalents to political decision-making in the nation-state form and not just in the direct manner between the law and a given focal system, as argued by Teubner. Only when such structures exist is normative ramification through constitutionalisation possible. Thus, constitutional couplings do not foremost occur between law and a given system as such, but, instead, between law and regulatory structures which possess a distinct

⁹⁰Gunther Teubner, "Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie", (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, pp 1-28.

political quality which immanently emerges within focal systems.⁹¹ In relation to the 125 transnational courts and court-like structures currently operating,⁹² the presumption which will be pursued is, therefore, that the vast majority of these structures have a political counterpart. For example, the Court of Arbitration for Sport develops legal norms upon the basis of references to the essentially political processes evolving within the International Olympic Committee. In the case of the WTO, the Dispute Settlement Body is embedded in the larger decisional structure of the WTO. Thus, the functional synthesis between law and politics might not have disappeared at all. Instead, it has just undergone a metamorphosis which is, however, unobservable as long as one remains committed to a concept of the political which was developed within the nation-state context.

Hence, the increased significance of transnational structures *vis-à-vis* nation-state structures should not *necessarily* be understood as implying de-politicisation, but merely calls for a rethinking of the different dimensions of the concept of the political. The challenge is to develop both a concept of the political that is freed from methodological nationalism,⁹³ and holistic thinking which will enable the observation of the new form of politics which is unfolding within transnational structures.

An exhaustive theory of global societal constitutionalism would thus have to be a two-dimensional theory in so far as the already existing legal perspectives, as developed by, for example, Amstutz, Joerges, Koskeniemi and Teubner, would have to be complemented with a corresponding theory of political processes as they unfold within, or in relation to, each functional system. To the earlier definition of constitutional structures as legal structures which ensure a constitutive and limitative framing of societal processes over time,

⁹¹ Boris Holzer, "Governance without Politics? Administration and Politics in the Basel II Process", in: Torsten Strulik & Helmut Wilke (eds), *Towards a Cognitive Mode in Global Finance. The Governance of a Knowledge-Based Financial System*, (Frankfurt aM, Campus Verlag, 2006), pp 259-278.

⁹² According to the project on International Courts and Tribunals. For further information, see <<http://www.pict-pcti.org>>.

⁹³ Michael Zürn, "Politik in der postnationalen Konstellation. Über das Elend des methodologischen Nationalismus", in: Christine Landfried (ed), *Politik in einer entgrenzten Welt. Beiträge zum 21. Kongreß der Deutschen Vereinigung für Politische Wissenschaft*, (Cologne, Verlag Wissenschaft und Politik, 2001), pp 181-204.

one should, in other words, add that the structural condition for such processes to emerge is that they develop institutional forms which are capable of reproducing political forms of communication, and that the immanent development of legal and political structures is likely to evolve in a co-evolutionary fashion with neither of the two elements serving as the primary dimension.

Transnational political processes are functionally-delineated processes which unfold within the boundaries of global configurations. Three dimensions, which serve as the functional equivalents of Hegel's three-dimensional concept of the political within the framework of territorial states, can be observed: 1) Political processes which unfold through collectively-binding decision-making. For example, within the economic sphere, public international organisations such as the WTO and the IMF act as genuinely political institutions which produce collectively-binding decisions at the same time as they are primarily guided by political rationality, and only secondarily by economic rationality. As such, they serve as the functional equivalents, which are functionally-, instead of territorially-, delineated, of the first of Hegel's three dimensions of the state. 2) Regime-based processes which bundle both a variety of elements *and* public and private actors operating within a given functional system or sphere. For example, in the form of the complex supply- and production-chains upon which multinational companies rely, through globally-operating trade associations, private forms of (self-) regulation and norm production in the form of certification programmes and private standardisation bodies, and so forth. Here, the rationality of the system in question, such as the economic system, is likely to be the guiding-point at the same time as the system takes on a secondary political quality to the extent that the social orders that they constitute remain contested. 3) Through the emergence of structures aimed at handling negative externalities, crowding out effects and asymmetries (for example, in the form of corruption and pollution) between functionally-differentiated spheres, through, for example, Corporate Social Responsibility (CSR) measures, public and private risk-regulating structures, and partnerships between, for example, firms, NGOs and research institutions. Such "in-between" structures tend to act as the no-man's-land in which different normative orders collide because different spheres of meaning (*Sinnwelten*) are colliding.

It is, moreover, possible to observe that transnational structures have adopted a number of concepts which serve as the functional equivalents to concepts which provide the constitutive infrastructure of the political in the nation-state form. The concepts of "nation", "the public sphere", "representation" and "delegation" are being substituted by the concepts of "stakeholders", "transparency", "self-representation" and "accountability". As will become apparent below, the transnational concepts have a far higher cognitive component than their nation-state counterparts, thereby illustrating that not only transnational law but also transnational politics are characterised by a high degree of cognitivisation.

With regard to the stakeholders, the medium of the political system in the nation-state form is the nation (or "the people"), understood as a generalised and abstract construction consciously developed by territorial-delineated sub-systems of the global political system in order to: 1) delineate the reach of their power; 2) act as a form through which power is transposed into other parts of society; and 3) as a form through which social complexity is reduced because the concept of the nation is used to delineate the part of the world which a given political sub-system takes account of in its decision-making. The latter form is closely associated with the concept of democracy, as democracy can be understood as a specific form through which the political system observes its environment. A form which is characterised by a duality between stability and change since the people, through the conception of the nation, is defined as a (relatively) stable entity at the same time as the "nature of the people" in terms of preferences, interests and norms is dynamic, thereby allowing the political system to increase its level of reflexivity and thereby its ability to adapt when changes occurs in its environment. Thus, the specificity of democracy (when compared to other forms of rule, such as feudalism and totalitarianism) is that, within the framework of the nation, it remains open to the future, in the sense that what counts as a politically-relevant problem or how it should be dealt with is not prescribed.⁹⁴ In this specific sense, democracy is characterised by a high level of adaptability, and this is probably the

⁹⁴ Michel Foucault, *Il faut défendre la Société. Cours au Collège de France, 1975-76*, (Paris, Gallimard, 1997), p 24 *et seq*; Niklas Luhmann, "Die Zukunft der Demokratie", in: *idem, Soziologische Aufklärung, Band 4. Beiträge zur Funktionalen Differenzierung der Gesellschaft*, (Opladen, Westdeutscher Verlag, 1994).

reason why it has proved to be “evolutionary superior” when measured against the other forms of rule which have existed to date.

The stakeholder concept essentially fulfils a similar role in the transnational space. Transnational structures are characterised by an absence of territorially-delineated polities. This leads to systematic uncertainty concerning what the “collective” is which decision-making within transnational structures is oriented against, just as it remains uncertain who exactly are affected by such decisions, just as it remains far more uncertain which segment of their social environment transnational structures should observe in order to be able to adapt to changes in their environments. The concept of stakeholders can be as seen as a response to such uncertainty. Stakeholders are an institutionalised set of “actors” who are granted the privileged status of “affected parties” and thereby the right to “feed into” decisional processes at the same time as they also serve as the addressees for such decisions. Thus, the stakeholder status serves as a form through which the entity in question delineates the section of its social environment which it regards as relevant for its operationability. It is the form through which it transmits the meaning components (such as legal acts, industrial products or political decisions) that it reproduces at the same time as it serves as a frame through which the changes in the social environment can be observed, thereby providing a basis for increased adaptability through increased reflexivity. When viewed from a historical perspective, nations have rarely been particularly stable in terms of their extent and composition. The stakeholder form is, however, even more “fluid”. The dynamics of inclusion and exclusion operate with a far higher speed in relation to stakeholders. The borders of stakeholder regimes are, in this sense, extremely contingent. This flexibility, on the one hand, makes them more adaptive than the form of the nation and thereby potentially even more “evolutionary superior” than democratic structures. On the other hand, the price paid for such fluidity is a “loss of depth”, as the kind of impact which can be achieved through this form might be relatively limited, as it can be dismissed as a mere form of “cheap talk” with little or no substantial impact.

V.1. Transparency

The public sphere, in the nation-state context, is widely understood as the form through which the will-formation of the polity takes

place.⁹⁵ Radical increases in social complexity, however, mean that only a very limited number of potentially relevant issues can be processed within the public sphere. Although the mass media system, which serves as a central component of the public sphere, has undergone a profound globalisation in recent decades, the public sphere remains essentially limited to the nation-state form.⁹⁶ In the transnational space, organisations such as multinational firms, public and private international organisations and other transnational bodies have, instead, upon the basis of self-reflexive processes, developed principles and policies of transparency which are aimed at increasing their *observability* by other structures. Examples of such structures include rules determining access to documents within public international organisations and the steps taken towards the development of a global regime of financial accounting standards. Moreover, in relation to this aspect, this development implies an increased reliance on cognitive structures, since strategies of transparency enable other social entities to observe developments within the social entity in question, and to adapt accordingly without necessarily engaging in the demanding task of common will-formation.

V.2. Self-representation

Within continental philosophy, the notion of representation was deconstructed long ago.⁹⁷ However, within legal and political theory, as well as in relation to the self-understanding and institutional set-up of nation-state democracies, the concept continues to play a central role. In the absence of representative structures of the kind which characterise democracies, entities operating in the transnational space have, instead, been forced to develop strategies of self-representation upon the basis of - to use a Habermasian term - dramaturgical

⁹⁵ Jürgen Habermas, *Strukturwandel der Öffentlichkeit. Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, [1962] 1990).

⁹⁶ Though for the European context, see Klaus Eder, "Zur Transformation nationalstaatlicher Öffentlichkeit in Europa. Von der Sprachgemeinschaft zur issue spezifischen Kommunikationsgemeinschaft", (2000) 10 *Berliner Journal für Soziologie*, pp 167-184; Klaus Eder & Hans J Trenz, "The democratising dynamics of an European public sphere. Towards a theory of democratic functionalism", (2004) 7 *European Journal of Social Theory*, pp 5-25.

⁹⁷ Hauke Brunkhorst, *Constitutionalism and Democracy in the World Society*, in: Petra Doubner & Martin Loughlin (eds), *The Twilight of Constitutionalism*, (Oxford, Oxford University Press, 2010), pp 179-98.

rationality. Transnational structures re-present themselves towards their environments, thereby actively creating an image of themselves for their environments to observe (thus being different from the passive form of observability outlined above). Public organisations develop policy programmes and establish targets for their achievement just as multinationals and NGOs develop ethical charters concerning the way in which they conduct their activities. They publicly declare their intentions in the form of illocutionary acts which tend to become (more or less) self-binding,⁹⁸ since they otherwise get caught in performative contradictions which can be seized and used by “opponent” groups (for example, by NGOs in relation to multinationals).

V.3. Accountability

Closely-related to the concept of representation, the concept of delegation plays an important role in the institutional set-up of states as well as in their interaction with the transnational layer due to the delegation of competences to international organisations. As previously noted, delegation is, however, always more than just delegation. Each delegation of legal competencies implies a *de facto* recognition of the autonomy of the structures to which competencies are delegated. Structures operating upon the basis of delegation tend to exercise significant discretionary powers and to frame policy areas in a manner which produces a limited number of options for further policy development. They also tend to develop specific norms and become policy actors in their own right.⁹⁹ The delegation of competencies always implies a step into the unknown and the uncontrollable. Thus, a “gap” exists between what can be controlled through delegation and the structures which are actually in place. It is this gap which is being filled out through the emergence of different forms of accountability measures, for example, through the development of accountability charters which lay down operational standards and norms. This development can also be seen as being

⁹⁸ For this perspective, see, in particular, the work of Martin Herberg: for example, Martin Herberg, *Globalisierung und private Selbstregulierung. Umweltschutz in multinationalen Unternehmen*, (Frankfurt aM, Campus Verlag, 2007); *idem*, “Global Legal Pluralism and Interlegality: Environmental Self-Regulation in Multinational Enterprises as Global Law-Making”, in: Olaf Dilling, Martin Herberg & Gerd Winter (eds), *Responsible Business: Self-Governance and Law in Transnational Economic Transactions*, (Oxford: Hart Publishing, 2008), pp 17-40.

⁹⁹ Cohen & Sabel, “Global Democracy?”, note 19 above.

closely-related to the development of a “right to justification” since the external actors which are (negatively) affected by a given activity, for example, in relation to the effect of the exploitation of natural resources on local populations, tend to develop claims that the effect must be justified.¹⁰⁰

The institutional forms of the different dimensions of the transnational form of the political are radically different from democratic structures in the nation-state form. If one remains committed to the cognitive framework of classical theories of democracy, the transnational forms of the political are not *non-democratic* structures, but *a-democratic* structures, because they are beyond democracy. Any adequate conceptualisation of these structures will thus necessitate a deliberate conceptual move aimed at “getting past democracy”¹⁰¹ or at least past democracy in the forms which we have known to date.

Although, at a first glance, they produce societal effects which are similar to those of democratic structures, transnational forms of the political have a fundamentally different status and position in society when compared with the nation-state form of the political. The societal function of the political in the heyday of nation-state building was “to take society forward”. Ideologies such as liberalism and socialism aimed to achieve emancipation through a break with tradition. They were engines of social change which aimed to accelerate social time through processes of modernisation. Historically speaking, nation-state universes, and, with them, modern capitalist economies, were, therefore, to a high extent, deliberately constructed by the state.¹⁰² Transnational structures are, instead, far more spontaneous orders which have emerged incrementally as a result of functional needs. The explicit political dimensions of these

¹⁰⁰ Jürgen Neyer, “The Justice Deficit of the European Union and other International Organisations”, note 87 above; Jürgen Neyer, “Justice, Not Democracy. Legitimacy in the European Union”, (2010) 48 *Journal of Common Market Studies*, pp 903-21. More generally, see Rainer Forst, *Das Recht auf Rechtfertigung - Elemente einer konstruktivistischen Theorie der Gerechtigkeit*, (Frankfurt aM, Suhrkamp Verlag, 2007).

¹⁰¹ Edward L Rubin, “Getting Past Democracy”, (2001) 149 *University of Pennsylvania Law Review*, pp 711-792.

¹⁰² Poul F Kjaer: “Post-Hegelian Networks: Comments on the Chapter by Simon Deakin”, in: Marc Amstutz & Gunther Teubner (eds), *Networks: Legal Issues of Multilateral Co-operation*, (Oxford, Hart Publishing, 2009), pp 75-85.

structures tend to emerge *ex post*. Neither multinationals nor NGOs are inclined to have an explicit political project as their starting-point. Instead, they are interested in exploiting uncovered market demands and in solving concrete social problems. The “political consciousness” of such structures tends to emerge as they grow and become increasingly autonomous structures which produce their own forms of social order. Actors which, by their very existence, are likely to produce substantial unintended effects *vis-à-vis* their social environments, thereby triggering a need for the institutionalisation of the processes aimed at handling such effects.

The same is the case for international organisations. The predecessors of what is now the EU¹⁰³ were founded as “legal communities” which were, in many ways, deliberately constructed as technocratic entities which had the avoidance of high level politicisation of their respective functional areas as a central objective. Only because it has continued to expand its reach has the EU been forced to develop genuine political features. In the transnational world, the pursuit of political objectives is not the primary *raison d’être*. As such, transnational forms of the political tend to be political community which seems impossible to achieve for structures which operate without well-defined territorial compensatory forms, which merely deal with negative externalities which fall far short of the nation-state ideals of a political community as an end in itself. Thus, it is a kind of boundary.

¹⁰³ The European Coal and Steel Community, The European Economic Community, and the European Atomic Energy Community.

Chapter 11

A Comment on Kjaer

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I. The Concept of the Transnational

In the classical era of modernity, nation states and their institutions have been vital in shaping the pre-conditions, the infrastructure and the emergence of law and politics. National constitutions and the institutions to which they have conferred competence, have been the vital points of reference and of production of law and politics. The semantics, the concepts and the self-understanding of law and politics have pre-dominantly been shaped by the nation-state frame-of-reference and its historically-situated institutions. As Poul F. Kjaer refers to, in his chapter, the pre-conditions, the subject areas and the institutions of law and politics are, however, increasingly influenced by the various dynamics of the transnational sphere and its various social and institutional configurations.¹ The territorial principle of demarcation for political organisations is increasingly insufficient and not always functional. Global trade and finance, environmental and climate change, technological exchange, internet communication,

¹ Poul F Kjaer, "The Concept of the Political in the Concept of Transnational Constitutionalism", in this volume; and *idem*, "Formalisation or De-formalisation through Governance", in: Rainer Nickel (ed), *Conflict of Laws and Law of Conflict in Europe and Beyond*, (Antwerp, Intersentia, 2010).

migration, *etc.*, are all factual dynamics which cannot be fully or sufficiently comprehended or dealt with by territorially-designated institutions. International and transnational institutions, both existing and emerging, are, however, different from the “classical” legal and political institutions of democratic nation states in many dimensions. Politically-based international organisations rely upon delegated, rather than direct, political- and democratically-based mandates. Accountability in active and dynamic international organisations is difficult to achieve. Their purposes and mandates are often complex, and their political and social context is extremely heterogeneous. Economic or technological organisations may have accountability within their rationalities, but they will also often exceed these, and, in fact, act more politically than their formal mandates actually allow for. There is an increasing mismatch between the transnational character of many problems and social dynamics, and the formats of the institutions and the communications of generalised decision-making designed to handle the relevant problems.

At the international level, there is also a schism between the international and the transnational, and between the public- and the privately-organised dynamics. Many social and institutional dynamics are more related to the diverse, but politically and legally institutionally under-developed, *transnational* level than to the more formal *international* level connected to the mandates of states and their politico-legal institutions. This adds to the asymmetry between the lack of formally-recognised forms of political and legal institutions, and the need for political and legal norms and decision-making also at transnational level.² This situation also leads to the need to ask the questions of, and to define more closely, both what the transnational is, and what the political is, within the transnational context.³ These are also the questions which Poul Kjaer’s chapter makes a significant and interesting contribution towards the further understanding of. I fully agree with Kjaer that these are qualitatively

² See various examples in Christian Joerges, Inger Johanne Sand & Gunther Teubner (eds), *Transnational Governance and Constitutionalism*, (Oxford, Hart Publishing, 2004); Andreas Fischer-Lescano & Gunther Teubner, “Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of International Law”, (2005) 25 *Michigan Journal of International Law*, pp 999-1046; M Koskenniemi & P Leino, “Fragmentation of International Law?”, (2002) 15 *Leiden Journal of International Law*, pp 553-579.

³ Saskia Sassen, *Territories, Authorities, Rights*, (Princeton NJ, Princeton University Press, 2006).

new questions to be dealt with.⁴ I will, however, argue that there are several different qualities to the present asymmetry between the actualised societal problems and the political and legal institutions involved, and several different questions to be analysed, which may have to be distinguished even more clearly than proposed in his chapter in order to understand the relationship between the political and the transnational. There is the national *versus* the international and transnational, the formal *versus* the informal political, the political *versus* the other social functions of economics and science, the welfare state *versus* the risk society, *etc.*

II. Challenges to the Political in the Transnational

The highly complex and differentiated society in which we presently live has created a combination of highly-specialised and autonomous, but also closely inter-dependent, social and functional dynamics. This represents significant challenges to any regulatory system. The present global economy has emerged upon the basis of highly-specialised industries and liberal trade and financial regulations. This has, at the same time, contributed to environmental degradation, hazards and harsh working conditions, particularly in developing countries. The increased international trade and environmental change and degradation have produced inter-dependencies and links between states and regions with extremely different and asymmetric socio-economic and political conditions. Any social *problématique* and theme will consist of a number of highly-specialised elements which may need to be addressed specifically. Irrespective of the territorial level of the regulatory institutions, there are new and qualitatively-complex challenges to any political or regulatory system. One aspect of this is the highly-specialised economic system which demands economic efficiency across the board for all social activities and functions. The health and education sectors are also demanded to produce their services according to increasingly-efficient standards. Another aspect is the highly-specialised fields of new knowledge and technologies. The levels of specialisation, autonomy and complexity in, for example, scientific, technological and economic areas, contribute to the production also of authoritative decision-making in

⁴ Poul F Kjaer, Chapter 10 in this volume.

the equivalent communicative systems.⁵ The degree of specialisation challenges the abilities of the legal and political institutions to intervene effectively. The co-ordination of different specialised semantics and factors represents a significant challenge for a situation in which the transnational level of social dynamics is relatively active, and often has insufficient politico-legal institutions. The demand for economic efficiency has contributed to the production of risk-taking technologies, to serious environmental scandals and hazards, and to ethical problems. The transnational level has, however, insufficient institutions to deal with these challenges.

Politics applied at the national or at a local level may refer to common historical, social, normative and cultural frameworks. This may not always produce rational or coherent decisions, but there will be a common notion of the pre-conditions for the decision-making which may contribute to a conceived legitimacy. At the international and transnational levels, political communication will have to deal with a qualitatively more heterogeneous social and communicative context. The common frame of references will be highly generalised, vague, indeterminate or non-existent. Formulating legal norms and political treaties or decisions in such highly-heterogeneous environments is extremely risky both in terms of being correctly understood and in terms of legitimacy and acceptance. The question is whether politics is possible under highly-heterogeneous conditions, or whether a new type of the political emerges.

III. What is the Political and the Legal in the New Transnational

Kjaer argues that, in spite of the overwhelming challenges, there are new social and institutional dynamics emerging at the transnational level, which, over time, is creating new conditions for a form of political communication and new institutional forms which should be recognised as political. Within various social fields, such as the economy, the mass media, science, sports, *etc.*, a new, often transnational and many-dimensional, institutional landscape is evolving, even if the institutions are still sectoral and specialised. Kjaer argues that “law and politics operate in a radically different

⁵ Niklas Luhmann, *Risk: A Sociological Theory*, (Berlin, Walter de Gruyter, 1992), Ch. 9; Inger Johanne Sand, “Hybrid Law”, in: G-P Calliess, A Fischer-Lescano, D Wielsch & P Zumbansen (eds), *Soziologische Jurisprudenz*, (Berlin, Walter de Gruyter, 2009).

environment within the transnational space", when compared to the nation-state context.⁶ He further argues that new forms of decision-making have evolved within the sector-institutions which can be recognised as having authoritative functions as collective decision-making and as equivalents to political and legal decision-making. Some of these are public law international organisations, others are transnational and more related to private law origins. Kjaer mentions, as examples, the WTO, ICANN, the IMF, the G-10 Basel Banking committee, and the International Red Cross, and also the largest transnational corporations. Many of these organisations start off with a specific function which may be political, regulatory, normative, commercial, voluntary, *etc.*, but they often evolve with more combined and complex functions or as existing coupling organisations in the boundary areas between functions. They also develop new institutional features, rules, standards, guidelines, practices, *etc.*, as they proceed.⁷

The lack of explicit politically-based government or traditional public law has, in many areas, created *lacunae* in which various types of public and private institutions have created their contributions to new, more combined or boundary forms of governance. Technical or knowledge-based standards, often internationally-recognised, have, to some extent, taken the place of politically initiated and driven regulations. Many of the new international or transnational organisations are, however, often initiated by political authorities, or accepted by them, and linked to national or sovereign institutions, but are constructed as delegations to expert or scientific regimes. Experts or corporate lawyers and economists are used instead of politicians. Both courts and various types of dispute-settlement tribunals are used to settle difficult or conflictual cases with combinations of legally- and scientifically-based methods. Transnational corporations are also part of the transnational institutional landscape, often operating in the absence of efficient public authorities and with internal guidelines on labour, the working environment, *etc.* The lack of co-ordinating regimes at transnational level, and also, to a large extent, at international level,

⁶ Poul F Kjaer, "The Concept of the Political in the Concept of Transnational Constitutionalism", in this volume, p 294.

⁷ See, further, on this in, for example, Gunther Teubner, "Constitutionalising Polycontextuality", (2011) 20 *Social and Legal Studies*, pp 209-252.

opened up for the possibilities of the multitude of regimes. The fragmentation may be functional for the solving of highly-specialised problems one by one within the different sectors, but there is a serious lack of co-ordination and of dealing with the problems both at the boundaries of, and in-between, the sectors. The unintended consequences of the collisions between the specialised sectors are clearly insufficiently dealt with.

I agree with Kjaer in his description and analysis of the emergence of a variety of new international and transnational organisations which reflect both the general tendency of an increasingly functionally-differentiated society with increasingly differentiated and specialised organisations in the different spheres and the tendency of transnational and global communications. I also agree that some of these institutions develop “independent sources of authority”, that they can be seen as “autonomous norm-producing structures”, and that we can see a multitude of different forms of normative orders.⁸ The ICANN, the G-Basel Banking Committee, the IMF, various sports organisations, the anti-doping agency, the World Anti-Doping Agency (WADA), the Red Cross, and many more are all good examples of relatively authoritative organisations with decision-making and often norm-producing competences which function and are largely accepted in their respective spheres. Some also have dispute-settlement and sanction systems which have vital functions in the respective areas. Some forms of collective decision-making processes and norm-production are therefore occurring in many of the above-mentioned social areas. What these processes are and should be designated is, however, a matter of some controversy. Some of the guidelines and standards may be seen as private law or at least as normative. Scientific and economic semantics and concepts are emerging as the substantive parts of standards, guidelines, internal regulations and also vital parts of the *de facto* vital regulations of social, economic and technological areas. The degree of internal specialisation particularly in scientific, technological and economic areas is so significant that external public law and politically-based regulations seem difficult to create without applying the internal standards and semantics. Whether the resulting regulations and their semantics are purely continuations of systems-internal

⁸ Poul F Kjaer, in this volume, p 300.

communications, law, or structural couplings between the two, is a matter of controversy.⁹

Kjaer makes an attempt to identify elements in the transnational, which may be seen as the equivalent of elements in democratic nation states or international political organisations. There may be interesting possibilities in this, but some of the supreme qualities of democracy, such as openness, universality, freedom, representativity, accountability and reflexivity, are difficult to identify to the same extent in what is here defined as a stakeholder position. Stakeholders are affected or interested parties, but do not necessarily include all those affected. They are, in some way, de-limited and partial to the sector in question. It is proposed that transnational organisations are increasingly developing elements of transparency and accountability which may be the basis for a more comprehensive exchange of information and reflection in civil society, but it is also recognised that the transnational form is radically different from the democratic structures of the nation states. The general character of the legal and the political functions and the various forms under the principles of democracy, legality and rule-of-law have potentials of transparency, openness, accessibility, and authoritativeness, which individual organisations cannot match. Many of the procedural and humanistic principles which have been developed by democratic states can, however, be applied also by organisations. Transparency, accountability and social responsibility may also be applied even by commercial corporations. But, notwithstanding this, there are still distinctive differences in both the general and the de-limited applications of such standards.

The most complex element of this field and the most controversial aspect of Kjaer's analysis concerns the role of the political in the emerging transnational organisations and institutions. There is a high degree of consensus in the literature in this area that there is an insufficient institutionalisation of the political at both the international and the transnational levels. Whether this is a problem, and, if so, how this situation may be improved, is, however, a matter of great controversy. Kjaer takes a bold approach here in accepting

⁹ Niklas Luhmann, *Das Recht der Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 1993), Ch 12, p 555; Gunther Teubner, "The King's Many Bodies", (1997) 31 *Law and Society Review*, p 778.

the unavoidable differences in relation to democratic and representative government and legislation on the national and the transnational levels respectively, and in suggesting that new forms of the political are emerging through other channels in the different function systems at both the national and the transnational levels, and that these should be seen as a rethinking of the concept of the political.¹⁰ He suggests that many of the new forms of authoritative decision-making have many of the vital qualities of the political: collective decision-making processes, public and private actors, which possess the ability to handle negative externalities, and that they serve as functional equivalents to the concepts which provide for the political on the nation-state level. The advantage with the emergence of a differentiation of a variety of decision-making processes in the different fields of society is clearly the closeness to the substantive semantics and the procedures of the field itself. Kjaer argues that the more differentiated and specialised procedures convey the flexibility needed, and that traditional democratic procedures, in many areas, are not sufficiently flexible and complex.

The problems of making such internally-oriented forms of decision-making the most authoritative and also giving them a political function do, however, both concern and arise from the same qualities as those conveying the selfsame flexibility and the adaptability as referred to above. Kjaer describes a variety of stakeholders, forms of transparency, self-representation and accountability in some of the more differentiated procedures which he considers to be possibly equivalent to political procedures. There are numerous interesting and valuable aspects of this analysis. However, the main problem with this discussion is that some of the vital qualities of democracy are not included. Democracy in the classical sense and in the form(s) in which it has been practiced in some of the most mature democratic nation-states, requires a notion of a society including all individuals and giving them an equal access to, and the possibility of, participation, and that all vital societal themes are to be discussed and decided in arenas with general and representative participation. All themes can then be seen in relation to each other and in a full social context which does not exclude any factors.

¹⁰ Poul F Kjaer, in this volume, p 314 *et seq.*

The more differentiated, specialised and thus de-limited arenas or institutions at the international and transnational level referred to above may be highly-functional within their respective institutional spheres. They may be flexible and transparent, but they do not have the vital generalised qualities of democracy and social equality. They may be "open" in their specific spaces, but they will not function in a sufficiently generalised manner in which any social consideration or interest may be included in the process on an equal footing. In the free trade areas of the WTO and the EU, the free movement of goods and services, and for the EU also persons and capital, are given argumentative preference above arguments concerning social and environmental protection. In the International Maritime Organisation (IMO), maritime matters have the primary interest. In banking committees, banking matters have preference. In the ICANN, the functioning of the Internet is vital. All these and other international and transnational organisations may be highly functional, effective and praiseworthy. I also agree that many of the examples mentioned in Kjaer's article may have contributed to a richer and broader notion of collective forms of decision-making and also of the political. I would agree to a more varied and complex notion of the political in complex differentiated societies. The examples mentioned may also, in their differentiation, be necessary elements of regulatory processes. I do, however, still have problems with accepting their functions as being the equivalent of the political both in its classical sense and as it has been applied in (some) nation states. It should be kept in mind as an unresolved problem of the political at international and transnational levels that there may be a lack of generalised and universal argumentation, across-the-board balancing of all the relevant considerations and of all the fully-comprehensive and inclusive decision-making processes. It is undoubtedly a complex, and possibly impossible, task to create democratic and fully-inclusive institutions and procedures at highly aggregated and significantly heterogeneous levels, but the crucial significance of the equal value and participation of all citizens and universal and fully-generalised forms of decision-making processes should be kept as vital qualities of the political and of the democratic. The account given in Kjaer's chapter does, however, remind us of the enormous challenges of the democratic and the political in a truly transnational world and in highly functionally-differentiated societies. The many new specialised, but also, to some extent, the many-dimensional, institutions at the different levels of governance also reveal an

increasingly rich landscape of public and private decision-making bodies which supplement the generalised democratic assemblies in necessary ways.

Part II.2

Theorising Transnational Governance and Governmentality

Chapter 12

The Power/Knowledge-Nexus Revisited Global Governance and Conflicts of Law from a Foucauldian View

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I. Introduction: Knowledge and its Role in a Postmodern Conception of Governance¹

It is commonplace now that governance - be it at national, or at transnational, level - always involves knowledge. The types of knowledge that are relevant here include, among others, statistical data on the situation of the population, information on technical risks and hazards, as well as the various results of scientific evaluation studies on political programmes, be it in the sector of education policy, economic policy, or environmental and health policy. As is widely acknowledged now, many *normative* decisions of national governments are based upon, and partly replaced by, *cognitive* decisions, which are not rooted in a democratic vote.² Instead, the

¹ I would like to thank Marc Amstutz, Michelle Everson, Christian Joerges, Kolja Möllers and Gerd Winter for their instructive comments on an earlier version of this chapter.

² To name just two recent publications on this issue, see GF Schuppert & A Voßkuhle (eds), *Governance von und durch Wissen*, (Baden-Baden, Nomos Verlag, 2008), and H Willke, *Smart Governance. Governing the Global Knowledge Society*, (Frankfurt aM, Campus Verlag, 2007).

necessary knowledge-work is conducted by numerous expert committees, technical groups and members of professions. To some degree, the dangers that arise from this, with regard to the rule of law, can be mitigated if the political system sets the parameters for these discourses, including rules of participation and accountability as well as diverse review procedures. Due to globalisation and the rise of quite different types of epistemic authority beyond the state, however, a situation has emerged which makes it fundamentally necessary to re-consider the relationship between power and knowledge.

An important reference point for this kind of analysis can be found in the work of Michel Foucault, in particular, his thoughts on modern governmentality. The concept of “*governmentality*” makes us aware of the interplay of governance (in the sense of mobilising power in order to shape social processes) and the various mentalities that are involved in this (in the sense of the underlying epistemologies and constructions of reality).³ The fact that both components are closely-intertwined in the emerging private sector regimes of the transnational sphere gives rise to numerous problems: as each governance formation sheds light on specific aspects of reality, it leaves other aspects of the same reality in the dark. Moreover, since the intellectual climate of a given time or era seems to privilege certain problem-definitions and world views over others, there is the danger that our attention becomes absorbed by such regimes which fit best into the prevailing political or scientific discourse, while other, more unconventional approaches become marginalised. Accordingly, conducting research on the emerging governance regimes is always accompanied by the danger that we become captivated by the particularistic views and “truths” which are embodied in these regimes, and that we lose the critical distance which we need towards our objects of research.

The same applies to the law, which also runs the risk of becoming captured by the emerging authorities of the transnational sphere. While the juridification of the emerging governance mechanisms may result in new and innovative forms of regulation, an uncritical

³ As for this twofold meaning of Foucault’s concept of “*governmentality*”, see M Dean, *Governmentality: Power and Rule in Modern Society*, (London, SAGE Publications, 2010), p 25.

adoption of them may just as well lead to an erosion of the rule of law. Traditionally, the legal problems resulting from globalisation were rather one-sidedly seen as conflicts between different national legal systems and/or between the national and the supranational level. Against this backdrop, extending the debate towards the private sector regimes of the transnational sphere can be seen as an important milestone in conflicts-of-law theory.⁴ While in the old, state-centric constellation, the law has developed several mechanisms in order to cope with various forms of private authority and epistemic power, it is highly questionable as to whether these mechanisms can be transferred to the transnational context. The key question is how the law can decide on the *pros* and *cons* of the emerging (and often highly competing) standards and governance mechanisms, and how it can learn from them without falling victim to them.

As a starting-point, I will draw on some of Michel Foucault's famous thoughts on the power/knowledge nexus (Section II). Although, for Foucault, the law was never a central issue in his writings, his ideas are most fruitful for today's debate on the future of the law in a situation of plural governance formations (Sections III and IV). The examples chosen to illustrate the applicability of Foucault's concepts are taken from the field of environmental management in multinational companies. What makes this area so relevant are the manifold private sector regimes which have emerged here, as well as the various epistemic conflicts between them (Section V). This leads to some reflections on the possibility of re-coding the emerging self-regulatory practices in legal terms (Section VI), and the role which the conflicts-of-law approach could play in this process (Section VII).

⁴ For this extension of the conflicts-of-law approach by a "third" dimension, see Ch Joerges, "Integration through Conflicts Law: On the Defence of the European Project by means of Alternative Conceptualisation of Legal Constitutionalisation", in: R Nickel (ed), *Conflicts of Laws and Laws of Conflicts. Patterns of Supranational and Transnational Juridification*, ARENA Report No 1/2009, pp 531-561, at 550.

II. Exploring Foucault's Tool Box – Knowledge, Power, and their Interplay in Sectorial Governance Regimes

The particular strength of Foucault's work lies in his endeavour to re-think the problem of power outside the conventional, state-centric und sovereignty-bound framework. In its broadest sense, power can be seen as the capacity to act upon the actions of others - which presupposes specific power resources, instruments of governance, and technologies of intervention. The focus on this technical aspect of governance helps us to overcome many of the shortcomings and dichotomies through which we are used to perceiving the problem of power: As many Foucault-inspired studies have shown, the major innovations in the sphere of power do not occur within the state, but in a variety of rather unsuspecting power locations, which are often only loosely-connected to the state. Whereas power, in the view of Max Weber, was so *amorphous* that it could not be defined,⁵ Foucault emphasises the *polymorphic* nature of power, and he discovers it in places where one would not have expected to find it, at least not from a classical political-science perspective. What emanates from this is a new topography of power, which runs counter to the political geography of sovereign nation-states bound to a territory.

While we have long become accustomed to defining politics as the production of binding-decisions, and domination as a relation of command and obedience, Foucault sensitises us to a number of other instruments of power, which prove to be just as effective, but operate in a more subtle way. Examples of this include various forms of knowledge production, as well as various forms of using this knowledge for practical purposes. From this point of view, power does not necessarily take the form of command-and-control; instead, it can just as well come in the form of examination, surveillance, observation, monitoring, advice-giving, rating, benchmarking, scientific evaluation, and ranking.⁶ Normally, we do not call the legitimacy of these activities into question, but, instead, take them as

⁵ See M Weber, *Economy and Society*, ed. by G Roth & C Wittich, (Berkeley CA, University of California Press, 1978), p 53.

⁶ In the political science literature, such strategies and instruments are now discussed under the heading of "soft power", without, however, being able to reach the subtlety of Foucault's writings; see J Nye, *Soft Power: The Means to Success in World Politics*, (New York, Public Affairs, 2004).

“normal” or unproblematical (which makes them even more powerful). Taking this idea one step further, it appears that many of our common-sense dichotomies, such as the distinction between the public and the private sphere, domination and freedom, coercion and voluntary action, turn out to be highly inadequate. In fact, most governmental activities rely on the commitment and collaboration of those towards whom these activities are directed, and, often enough, the invention of new power technologies goes hand in hand with an increase in status for those governed, and a change of their identity and self-perception.⁷

The most general formula, in which the interplay of knowledge and power can be brought, reads as follows: “The exercise of power perpetually creates knowledge and, conversely, knowledge constantly induces effects of power.”⁸ What Foucault has in mind here is the complex inter-dependence of power and knowledge, which also becomes evident in their historical co-evolution: scientific knowledge and other types of expertise must be seen as the condition for certain governmental practices, while, in turn, these practices give rise to various types of knowledge and truth. The intense interplay between power and knowledge becomes manifest in all social sciences, from modern psychology to economics and sociology. While each of these sciences claims to generate true statements on universal laws, their historical condition of possibility lies in non-scientific factors - namely, in the way in which social processes are organised. Normally, the interplay of power and knowledge takes place in distinct institutional settings, in which both components are combined in a most synergetical way. Against this backdrop, it also becomes clear why Foucault insists that power is not *restrictive*, but *productive* in character: power makes things visible. It brings to light phenomena that have previously been hidden (Bentham’s *Panopticum* being only the most famous example for this), while, at the same time, its own mechanisms are largely hidden from the public view.⁹

⁷ With regard to this “transfigurative” dimension of power, see P Miller & N Rose, *Governing the Present: Administering Economic, Social and Personal Life*, (Cambridge, Polity Press, 2008), p 13 & 14.

⁸ M Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, ed. by Colin Gordon, (New York, Pantheon, 1980), p 52.

⁹ Methodologically, this calls for an “ascending analysis of power”, which traces how power and knowledge interact in distinct spatial settings and institutional arrangements; see, *ibid.*, p 99.

Although only very few experts are aware of this co-dependency of power and knowledge, it still manifests itself in many ways. For example, it should not be seen as a purely science-immanent issue which problem-definitions scientists use as a starting-point for their work. As Foucault has shown, the nature of social problems should not be taken as something objective, but must, instead, be seen as a result of our interpretation of them. In principle, the fact that both scientists and actors of (global) governance develop their own problematisations guarantees the possibility of mutual learning and mutual criticism. Often enough, however, scientists who evaluate the emerging governance regimes and programmes of social reform abstain from developing their own problem-definitions, but simply use the criteria which are internal to these programmes themselves, which leads to the loss of these critical faculties. Likewise, it is surely not just an academic issue which criteria one uses in order to resolve conflicts between competing theories and scientific models. Indeed, the rise of particularly dominant (or hegemonic) approaches at certain points in time can be explained by the fact that the representatives of these approaches were successful in attaching themselves to the great socio-technological experiments of their time.¹⁰

Up to this point, it seems that the concepts developed by Foucault are highly compatible with some of the basic ideas of critical theory and the sociology of knowledge:¹¹ governance-related knowledge, from this point of view, is by no means neutral or objective; instead, it is closely intertwined with the power relations of society. At the same time, it is one of the particular strengths of Foucault's approach that he also takes the opposite direction of influence into account, that is, the external or "performative" effects of knowledge. In fact, the kind of discourse that Foucault is concerned with has its own power effects: since, in modern societies, it is becoming increasingly difficult to make sense of reality without the intermediation of scientific

¹⁰ See Dean, *Governmentality*, note 3 above, p 85.

¹¹ To mention just two standard works on the sociology of knowledge, see P Berger & T Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, (Garden City NY, Anchor Books, 1966), and K Mannheim, *Structures of Thinking*, (London, Routledge, 1980). As for the similarities and differences between Foucault's approach and the sociology of knowledge, see R Keller, "Analysing Discourse. An Approach From the Sociology of Knowledge", (2005) 6 Forum Qualitative Sozialforschung.

categories or theories, discourse determines the categories through which human actors can understand both themselves and the world in which they live. In many cases, science contributes to legitimising certain forms of governance, and, at the same time, it tends to marginalise less popular (or less visible) initiatives by withdrawing attention from them. Thus, while science sheds light on certain objects, it also creates specific zones of darkness.

Another illustration of the co-dependency of power and knowledge can be found in the methods used for data-gathering, for investigation and inquiry, as well as the different procedures which govern the transfer, circulation and distribution of knowledge. It is one of Foucault's central theses that even the mere surveillance of people can have a real-world impact on their conduct: the creation of new forms of observation results in new spaces of visibility, which not only penetrate ever more deeply into the private life of individuals, but also make the behaviour of larger entities (such as the population) more observable and governable. As Larry Catá Backer has pointed out, the creation of cross-border systems of surveillance is one of the most crucial pre-conditions for the emergence of the transnational sphere: "What was once relatively unconnected, becomes connected through the medium of surveillance."¹² In addition, most knowledge practices such as consultation, evaluation, or benchmarking, are organised along a binary code such as "normal/abnormal", and thus result in new inequalities and asymmetries between different social groups or forms of practice. In fact, although such expert-judgements do not come in the form of commands or decisions by decree, they can have a tremendous, and often very immediate, impact on those governed. Clearly, we cannot simply wish away expert authority, given the complexity of modern society. However, this makes it even more important to tackle the dangers of modern governmentality, of which Foucault's work make us aware. One of these problems is that the emerging governance regimes might "enclose" themselves, as Miller and Rose put it:¹³ theoretically, there is always the possibility that governance-related knowledge will be contested during its

¹² LC Backer, "Global Panopticism: States, Corporations and the Governance Effects of Monitoring Regimes", (2007) 15 *Indiana Journal of Global Legal Studies*, pp 101-148, at 123.

¹³ Miller & Rose, *Governing the Present*, note 7 above, p 108.

application, and that the competition of different governance regimes will result in the survival of the one with the highest problem-solving adequacy. However, since many governance regimes seem to be accompanied by their own expert discourse and evaluation studies, it is often very complicated to compare and evaluate them from an independent and impartial point of view. What possibilities does the law provide in order to disentangle, at least to some degree, this inter-relatedness of power and knowledge? How can we deal with the “self-referring circularity”¹⁴ of those governance regimes which are wrapped in the esoteric language of their own expertise, and thus, tend to immunise themselves against critique?

III. “Cutting off the King’s Head” – Towards a Post-sovereigntist Concept of Law

Although (or precisely because) Foucault’s conception of the law must be re-constructed from a handful of statements scattered throughout his books, his work has become the subject of intense debate in socio-legal literature.¹⁵ If one adopts Foucault’s power analysis, the law appears as just one mechanism of social ordering among many others; and consequently, the focus is less on searching for the universal essence of the law, but, instead, on the role which the law plays in the emerging fields of power and societal force. The relation between the law and these forces can assume different forms: partly, the capacity to regulate things shifts from the law to other actors and regimes; partly, the law is infiltrated and usurped by these extra-legal powers, while, in other cases, it seems that the law has learned to control, shape, and influence the emerging powers of society.

A common objection to Foucault is the criticism against his too broadly-defined concept of power. However, as it is argued here, Foucault’s thesis of the ubiquitous nature of power is only the first step towards the classification of various *types of power*, which, in

¹⁴ M Foucault, “Governmentality”, in: G Burchell, C Gordon & P Miller (eds), *The Foucault Effect. Studies in Governmentality*, (London, Harvester Wheatsheaf, 1991), p 95.

¹⁵ See, only, B Golder & P Fitzpatrick (eds), *Foucault and Law*, (Aldershot, Ashgate Publishing, 2010); A Hunt & G Wickham, *Foucault and Law. Towards a Sociology of Law as Governance*, (London, Pluto, 1994); B Golder & P Fitzpatrick, *Foucault’s Law*, (Oxford, Routledge, 2009).

turn, provides the basis for analysing the patterns of conflict between them. For Foucault, the specific form which power assumes in modern societies is discipline. Disciplinary power is based upon the discovery of some highly-efficient techniques of observation in diverse educational, industrial and penal institutions. Here, power becomes highly pedantic: surveillance is exerted by seeking to control virtually all the actions of those governed. Discipline gives rise to specific norms against which individuals can be judged and classified. At the same time, the emergence of these tiny, everyday mechanisms, called the disciplines, gives birth to a broad range of new forms of sanctions: where once a “great law” established principles backed by penal threats, we now live in the time of small decisions and rather unspectacular sanctions such as grades, marks, test scores, and the loss of minor privileges. Since these decisions represent an enormous intervention in the biographies of those governed, it becomes clear why Foucault characterises this form of power as a “micro-penalty” of modern life.¹⁶

Importantly, these micro-mechanisms of power come to light only if one emancipates oneself from the classical hierarchical and “sovereignist” understanding of power, which has its origin in the “juridico-political discourse”¹⁷ which views all power as being concentrated in, and exercised by, the state. However, since large parts of today’s political and legal discourse are still organised around the belief in the sovereign - for we have not “cut off the King’s head”¹⁸ - we still tend to under-estimate the emerging extra-legal power mechanisms. An important thesis which is implied in these thoughts (and which will be further elaborated in the following sections of the chapter) is what might be called the Foucauldian *paradox of visibility*: some power structures may be highly visible, while, in practice, they prove to be rather ineffective, whereas the most powerful arrangements are often hidden from public

¹⁶ This is quite clearly illustrated in the following passage: “The judges of normality are present everywhere. We are in the society of the teacher-judge, the doctor-judge, the educator-judge, the ‘social worker’-judge; it is on them that the universal reign of the normative is based”; M Foucault, *Discipline and Punish: The Birth of the Prison*, (New York, Vintage Books, 1977), p 304.

¹⁷ M Foucault, *The History of Sexuality*, vol. 1, (New York, Vintage Books, 1990), pp 87-88.

¹⁸ M Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, note 8 above, p 121.

awareness. For Foucault, this situation calls for an unprejudiced analysis of power in its “positivity”; an analysis in which researchers emancipate themselves from their common-sense notions of democracy and modern statehood in order to take a fresh and unprejudiced look at the emerging forms of post-sovereign power.

If one accepts the thesis that modern society is interspersed with a variety of power mechanisms which are exterior to the law, the question arises as to whether the law will be able to adapt to this situation. According to Foucault, disciplinary power is “the antithesis of that mechanism of power which the theory of sovereignty described”.¹⁹ Disciplinary power is a sort of “counter-law”,²⁰ which renders state-based law somewhat irrelevant or even “pre-modern”, as Hunt and Wickham put it.²¹ Apart from the above-mentioned passages, however, one also finds statements in which Foucault is not counter-posing law and discipline, but is, instead, highlighting the interactions between them. According to this, state-based law is by no means marginal, but continues to exert considerable influence, to the extent that it becomes enmeshed with the emerging disciplinary mechanisms. How can we make sense of these (seemingly) contradictory statements? As I would like to propose here, it might be helpful to consider whether these diverging constellations could be seen as different *stages* in a historical sequence, in order to put the pieces together in a more coherent picture.

According to this interpretation, the birth of modern discipline is only the beginning of a twisted story. Initially, the emerging technologies of power-knowledge fill the gaps which have been left open by the juridical framework. At this point of time, the law does not take notice of the way in which human beings are governed by disciplinary practice. Partly, this is because the emerging forms of observation, monitoring, or governance seem to be too trivial or

¹⁹ *Ibid.*, p 104.

²⁰ Foucault, *Discipline and Punish: The Birth of the Prison*, note 16 above, p 222.

²¹ Hunt & Wickham, *Foucault and Law. Towards a Sociology of Law as Governance*, note 14 above, p 44. The authors’ assumption that, in Foucault’s conception of modern society, the law would play only a marginal role (the so-called “expulsion thesis”), is one of the most widely-discussed topics in the socio-legal literature revolving around Foucault’s work. See, only, Golder & Fitzpatrick, *Foucault and Law*, note 15 above, p 2; and V Tadros, “Between Governance and Discipline: The Law and Michel Foucault”, (1998) 18 *Oxford Journal of Legal Studies*, pp 75-103.

unspectacular to be taken seriously by the law. Furthermore, it is due to the undemocratic and dubious origin of the relevant norms and standards that the law abstains from incorporating them. Theoretically, it is always possible that the workings of disciplinary power become the target of critique. However, in this period, these counter-movements are still in their infancy, so that both mechanisms - the law and the micro-powers of society - stand side by side in an unconnected way, and barely come into contact with one another.

At the next stage, disciplinary power expands so much that the law can no longer ignore its influence. As Victor Tadros has pointed out, there was a point in history where the disciplinary regimes of different institutions began to re-inforce one another, which was accompanied by the installation of a circuit of power between different institutions in different sectors. The law, too, became an element in this circuit, which resulted in its "colonisation" by forces which were alien to it (the often-mentioned psychiatrisation of criminal law being just the most famous example of this).²² The result is a deep inter-penetration between juridical power and disciplinary power, which leads to the "transformation of the former into an alter ego of the latter".²³ The law falls victim to the world views and ideologies which are embodied in the emerging power mechanisms, and instead of challenging the authority of the new "judges of normality", it gives them additional support. In this process of hybridisation, the law becomes blinded to fact that the micro-powers of society are not without problems such as malpractice, fraud and manipulation; and it also ignores the fact that the emerging regimes of practice, although they appear, on the first glance, more problem-oriented than the law itself, often come with their own dogmatism and perceptual boundaries.

However, it would be wrong to conclude the analysis at this point. The law is not just a passive plaything of the emerging powers and forces of modern (disciplinary) society. Instead, it has the capacity to adapt to the new situation by responding to what is outside its

²² Tadros, note 21 above, p 169.

²³ B de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, (London, Routledge 1995), p 4.

definite context, and by acting as a restraint on disciplinary power.²⁴ Roughly speaking, what becomes manifest in these developments can be described as a model of “inter-legality”.²⁵ Step by step, the legal institutions of the constitutional state are working towards integrating the power mechanisms of society into their scope, and, on a case-by-case basis, they try to juridify and discipline the emerging normative orders. By taking notice of these extra-legal technologies, and by articulating its own expectations towards them, the law manages to improve both the acceptability of these practices, as well as its own autonomy and problem-solving capacity. From this point of view, the hybridisation of law and discipline turns out to be part of a double movement, which also contains - as a counter-movement - the attempt to exert some form of supervision over the abuses and excesses of the disciplines. Admittedly, in Foucault’s work, it is not always clear what should be seen as an abuse or excess of power. However, Foucault leaves no doubt that power always evokes resistance, and that certain forms of power are, indeed, worth resisting.

Thus, it is not very plausible to criticise Foucault - as Habermas does - for rejecting the belief in progress and human emancipation.²⁶ In fact, both authors remain firmly within the tradition of critical theory, even though they approach the problem from two different angles: while Habermas is primarily engaged in developing a normative model, Foucault is more concerned with re-constructing the particular dangers which result from contemporary power relations. These dangers become evident as soon as we compare disciplinary power to the classical juridical model: just like the law, disciplinary power is based upon its own rules, norms and sanctions. In contrast to the law, however, the judgements made by the experts of disciplination are not subject to public debate and rational control. Furthermore, the sanctions imposed by disciplinary power are often more direct and immediate than those imposed by state law, which

²⁴ See T Frost, “Agamben’s Sovereign Legalization of Foucault”, (2010) 30 *Oxford Journal of Legal Studies*, pp 545-77, at 562.

²⁵ Santos, note 23 above, 473; see, also, M Amstutz, “In-Between Worlds. Marleasing and the Emergence of Interlegality in Legal Reasoning”, 11 *European Law Journal*, (2005), pp 766-784.

²⁶ J Habermas, *The Philosophical Discourse of Modernity*, (Cambridge MA, The MIT Press, 1990), pp 266-293.

normally declares sanctions only after a formal procedure or trial has taken place: disciplinary power judges “immediately, and without appeal”.²⁷

Today, many of these problems have been discovered and are mitigated through specific legal rules. Clearly, the law possesses its own “governmentality”, which implies specific problem-definitions, its own conception of man as a free and responsible human being, as well as its own cognitive procedures and critical faculties. Some of the mechanisms which help to disentangle power and knowledge can be found in modern codes of court procedure, in which numerous criteria have been developed in order to govern the admissibility, validity and quality of expert knowledge. In addition, many specialist fields of law, such as labour law, medical law and education law, have generated manifold rules which help to limit the power of today’s “judges of normality” by shaping and re-shaping their authority. In this regard, the law is not just another transit station in the circuit of power. Instead, it serves as an important filter and as a clearing-house, where the validity claims of the different forms of expert authority are both discussed and contested.

However, while many of the micro-powers of modern society have now – more than 35 years after the publication of *Surveiller et Punir* – been detected and legally-regulated, the law sees itself confronted with several new challenges due to globalisation and the emergence of new power-knowledge formations beyond the state. But what are these new challenges, and how can they be addressed? Are there indications that the just described sequence (from the co-existence of unconnected regimes towards a more intense interplay) repeats itself at global level, and what are the conflicts which the law sees itself confronted with under these conditions?

IV. Extensions and Applications – Transnational Governance, Private Authority, and the Rise of the Audit Society

With globalisation, many of Foucault’s ideas on post-sovereign governance and the tension between state-based law and the

²⁷ M Foucault, *Madness and Civilization. A History of Insanity in the Age of Reason*, (New York, Vintage, 1988), p 266.

emerging “counter-laws” of society have gained new relevance. Over the last years, a host of Foucault-inspired studies have paid increasing attention to transnational policy areas such as the regulation of the global financial market,²⁸ global environmental policy,²⁹ development policy,³⁰ and the emergence of a transnational security field.³¹ As these studies demonstrate, a variety of new authorities has emerged in the gaps and loopholes of traditional national and international law, which all operate according to their own rationality, and which still need to be recognised and re-shaped by the law. As has been shown in the previous section, the situation in the old national context can be described as a synergistic constellation of highly inter-dependent forces and societal powers, which are, at least to some degree, legally-embedded. Today, in contrast, we see ourselves confronted with the emergence of several new spaces beyond, below, and across, the national territory, in which things are far less inter-connected.³²

As empirical studies have shown, the rise of Foucauldian forms of micro-power in the gaps of national and international law can even be observed in international organisations such as the World Bank or the World Trade Organisation.³³ In fact, the logic of decision-making inside these organisations is often only weakly-based upon the specifications of the founding treaties. Many international organisations serve as global centres of knowledge, in which socio-demographic statistics concerning the economy of individual countries are aggregated, and in which expert authority is exerted by

²⁸ See V Yadav, *Risk in International Finance*, (Oxford-New York, Routledge Frontiers of Political Economy, 2008).

²⁹ See A Agrawal, *Environmentality. Technologies of Government and the Making of Environmental Subjects*, (Durham NC, Duke University Press, 2005), with further references.

³⁰ See A Escobar, *Encountering Development*, (Princeton NJ: Princeton University Press 1995).

³¹ See D Bigo, “Security and Immigration. Towards a Critique of the Governmentality of Unease”, (2002) 27 *Alternatives*, pp 63-92.

³² As for the growing literature on globalisation and legal fragmentation, see, only, G Teubner, “‘Global Bukowina’: Legal Pluralism in the World Society”, in: G Teubner (ed), *Global Law without a State*, (Aldershot: Ashgate-Dartmouth Publishing, 1997).

³³ See A Anghie, “Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations”, (2002) 34 *NYU Journal of International Law & Politics*, pp 513-634, at 513.

detecting various “abnormalities” with regard to the institutions and the welfare of the populations in these countries. While these techniques and mechanisms are highly consequential, they are mainly taking place in a legal grey area. The same is true with regard to many expert groups and committees inside different organisations of the UN or the OECD, which deal with the matter of technical standard-setting. As Anne-Marie Slaughter has pointed out, many of these processes take place in a quasi-autonomous way, and, often enough, these processes result in norms and standards which evade critical examination on the part of national parliaments and the heads of states.³⁴

At the same time, transnational actors, such as multinational enterprises, international business associations, banking corporations, providers of internet services and global standards bodies such as the International Standardisation Organisation (ISO), are creating their own governance regimes, which often prove to be even more powerful than classical legal mechanisms such as national statutes and international treaties.³⁵ The issue-areas which give birth to such private sector regimes include environmental management, the protection of workers’ rights, issues of internet governance, and many other policy areas. Often, transnational actors adopt the relevant tasks without any mandate from the institutions of the state-centric world: instead of applying for an authorisation from “above”, they seem to authorise themselves. Sometimes, these initiatives take the form of NGO-business partnerships, but, in most cases, private governance presents itself as a more unilateral process, in which actors from industry and members of various professions develop their own tools of self-regulation. While, at a first glance, the emergence of private governance seems to indicate a power shift from the state-centric sphere to the corporate world, it may just as well result in new forms of interlocked governance. Accordingly, the challenge for future research is twofold: first, it seems necessary to re-construct more closely the *modus operandi* of the different governance

³⁴ A-M Slaughter, *A New World Order: Government Networks and the Disaggregated State*, (Princeton NJ, Princeton University Press, 2004).

³⁵ As for the growing literature on private sector regimes and different forms of private authority, see R Hall & Th Biersteker, *The Emergence of Private Authority in the International System*, (Cambridge, Cambridge University Press 2002).

regimes; and furthermore, as a second step, we need more research on the interactions and relationships between these regimes.

With regard to the first step, conducting issue-oriented case studies on single governance regimes, it appears that a more detailed discussion of Foucault's analysis of power can serve as an important reference point for this kind of work. In particular, it is the Foucauldian method of an ascending analysis of power, which helps us to examine, in a micro-founded way, how reality is constructed, shaped and re-shaped in the context of different governance systems. Bearing in mind Foucault's famous reflections on surveillance, one might say that each governance regime possesses its own methods of making things visible, and thus, governable. Or, expressed differently, each governance formation of the transnational sphere has its own "regime of truth", that is, its own causal beliefs, cognitive schemes and taken-for-granted assumptions as well as specific strategies of information gathering, monitoring and fact-finding. Whereas much of the literature on global governance assumes that the objects of governance "pre-exist their co-ordination through specific governance mechanisms",³⁶ Foucault-inspired studies put great emphasis on re-constructing in detail how certain problems, identities and interests are constituted in the course of governing.

An important aspect which is related to this is what Miller and Rose have called the "transfigurative" dimension of governance.³⁷ In fact, doing research on different governance regimes also includes analysing the way in which these initiatives change the identity of the different actors in the relevant fields of practice. For example, instead of taking the expert status of those participating for granted, the making of experts (and the assignment of specific tasks to them) should, instead, be seen as a contingent process which may vary from context to context. At the same time, the emerging governance regimes are also highly consequential with regard to the personal identity of those governed: For example, it is the special achievement of product certification initiatives, such as the much-quoted *Marine Stewardship* or *Forest Stewardship Council*, that they contribute to the

³⁶ B Jessop, *From Micro-Powers to Governmentality: Foucault's Work on Statehood, State Formation, Statecraft and State Power*, (Institute of Advance Studies Lancaster University, 2003), p 6.

³⁷ See Miller & Rose, *Governing the Present*, note 7 above.

creation of what has been called “the enlightened global citizen”, whose purchase-decisions are based upon ethical and global aspects.³⁸ At the same time, such mechanisms provide corporate actors with the opportunity to shape and re-shape their societal role and gain new sources of legitimacy; and even for actors from civil society, the respective regimes can come with a higher social status and new forms of identity (such as the role of experts, or business consultants).

Drawing on the results of these case studies, the second step would consist of exploring how these regimes interact with each other, and at which points we can identify synergies, overlaps, conflicts, alliances and other forms of inter-regime relationships. In the debate on global governance, it was only recently that researchers found fault with the practice of studying the emerging governance regimes in isolation from each other.³⁹ Partly, different governance regimes complement each other; while, in other cases, their relationship is one of competition; and, in addition, there are also cases in which different regulatory mechanisms co-exist side by side, and in which possible conflicts are obviated, rather than resolved. At the same time, it seems that international organisations such as the UN or OECD are making a greater effort to co-ordinate and “orchestrate” the emerging governance regimes.⁴⁰ While this may lead to a greater degree of co-operation and mutual learning between different governance regimes, we should not neglect the possibility that such attempts at orchestration may also result in the marginalisation of particular, more unconventional, approaches, hiding them more and more from visibility and public awareness.

This leads to the question of which specific forms of power have become dominant in today’s constellation. Arguably, the Foucauldian concept of disciplinary power is, in some ways, not the right tool with

³⁸ See E Meidinger “The Administrative Law of Global Private-Public Regulation: the Case of Forestry”, (2006) 17 *The European Journal of International Law*, pp 47-87, as well as L Gulbrandsen “Creating Markets for Eco-labelling: Are Consumers Insignificant?”, (2006) 30 *International Journal of Consumer Studies*, pp 477-89.

³⁹ See the growing literature on institutional interactions, as reflected in H Loewen, *Towards a Dynamic Model of the Interplay between International Institutions*, (Hamburg, German Institute for Global and Area Studies, 2006).

⁴⁰ See KW Abbott & D Snyder, “Overcoming the Orchestration Deficit”, (2009) March *Vanderbilt Journal of Transnational Law*.

which to analyse the relations of power in today's post-national constellation. One of the most interesting ideas in this regard is the observation that power is becoming ever more "managerial".⁴¹ In fact, the main targets of (post-) modern disciplination are no longer individuals, but organisations and institutions, instead. Accordingly, besides disciplinary power in the classical sense, several other types of power and paradigms of governmentality come into the picture now: with regard to the task of monitoring and fact-finding, we are witnessing different forms of standardised surveys, assessments, and auditing, in which the trend seems to shift from inspection-based auditing towards more paper-based auditing.⁴² Moreover, the instruments of governance and behavioural control which are employed in this context include various forms of benchmarking, rankings and certificates, and other market-based instruments. By making things comparable, these techniques contribute to the emergence of new spaces of economic action and governance beyond the state; and since such methods raise their own claims to objective validity, they tend to de-politicise many of today's political issues.

While, at first glance, this type of "managerial" power bears little resemblance to the classic disciplines described by Foucault, one important similarity lies in the fact that managerialism, too, represents a very powerful alternative to the classical model of sovereignty (although at the time of Foucault, such techniques did not have the practical relevance that they have today). Just like disciplinary power, the emerging techniques of auditing, benchmarking, rating and scientific evaluation can be seen as a form of authority which "judges immediately and without appeal":⁴³ for those governed, it is often far from being transparent or evident

⁴¹ As for the emerging forms of "managerial" power in general, see M Valverde, "Specters of Foucault in Law and Society Scholarship", (2010) 6 *Annual Review of Law and Social Science*, pp 45-59, at 49. An interesting example for this "managerial turn" is given by S Decasper-Chacón, "REDD: Taking the Climate Change into Forests? An Environmentality Analysis", Geneva 2009, available at: http://graduateinstitute.ch/webdav/site/developpement/groups/hufty_greg/public/Memoire_Decasper.pdf.

⁴² See M Power, *The Audit Society. Rituals of Verification*, (Oxford, Oxford University Press, 1999); see, also, W Larner & R Le Heron, "Global Benchmarking: Participating 'at a Distance' in the Globalizing Economy", in: W Larner & W Walters (eds), *Global Governmentality*, (New York, Routledge 2004), pp 212-232.

⁴³ Foucault, *Madness and Civilization*, note 27 above, p 266.

which methods were used in order to determine the facts; and besides, they often have little chance of defending themselves against the decisions made on their case.

How do these mechanisms relate to the law? Theoretically, the three scenarios described in the previous section would be conceivable here, too: (1) the first scenario is that the law (be it national or international law) becomes the witness of a situation in which many of its regulatory functions are displaced towards other powers and forces of society; (2) on the other hand, it is also conceivable that the post-national constellation will result in new forms of hybridisation between the law and the emerging micro-powers of (world) society. Here, the danger is that the law falls short of examining the emerging power-knowledge formations for their compatibility with the basic principles of justice; a situation which might easily result in the colonisation of the law by the emerging extra-legal mechanisms; and, (3) the third possibility is that the law learns to co-ordinate and critically scrutinise the emerging powers and authorities, and thereby contributes to their domestication.

However, in order to assume this role of a co-ordinator and moderator, the law must tackle a number of new challenges. As is argued here, most of these tasks are of a *cognitive* character, and are not *normative* problems in the first place. Or, to express it differently, what is key here is the capability of the law to gain detailed insights into the emerging governance mechanisms, their *modus operandi*, as well as their problem-solving capacity and their limits. In this vein, three aspects deserve further explanation:

- a) How can the law attach more accountability to epistemic practices such as auditing? Epistemic technologies such as statistical evaluation, benchmarking, and auditing figure among the most privileged instruments of contemporary governance.⁴⁴ Today, such technologies of investigation provide the basis of governance in areas as diverse as health, pharmaceuticals, food services and financial forecasting. From a Foucauldian perspective, it is important to note that, by applying instruments such as auditing and benchmarking, one does not just represent facts, but, rather, one constructs these facts. Sometimes, it might

⁴⁴ See Power, *The Audit Society*, note 42 above.

even be argued that many of the predictions, ratings and categorisations which are produced by these methods only become true because they function as a kind of self-fulfilling prophecy by which societal expectations in the relevant field of practice are shaped and framed.

However, many of the institutions which are concerned with global data collection and evaluation tend to describe their own history - which is full of mistakes and errors - as a continuous learning process in which the applied methods are permanently refined. In this regard, the law can serve as an important antidote to the irrational belief in the infallibility of these systems, especially if the law helps to limit the greatest abuses of this kind of power-knowledge. As a precondition for this, it is important that the law does not become entangled in the cognitive procedures of the emerging expert authorities of world society, and that it, instead, tries to pierce the veil of objectivity in which these authorities are wrapped.

- b) How can the law cope with the Foucauldian “paradox of visibility”? Importantly, the most powerful governance mechanisms of the transnational sphere do not necessarily attract the greatest share of public attention, while, conversely, the most visible regimes are not necessarily among the most effective ones. Or, to put it differently, the widely-held belief that divergent standards will lead to public debate or negotiation must be relativised. In fact, for multinational companies (and other actors), it can be strategically advantageous to apply their own norms and standards within their own sphere of influence without much debate or public attention. Consequently, it is one of the greatest *desideratums* of future research to gain more detailed insight into these more informal and “silent” governmental practices, especially if the latter were created as an alternative to the more visible, official and well-established regimes.

Under these conditions, it is important that the law does not wait until the less visible governance mechanisms find their own voice. Instead, legal practitioners, who see themselves confronted with disputes arising from the transnational sphere, should go searching on their own for the relevant norms, standards, governmental practices and stocks of knowledge in the relevant field of practice. At the same time, those applying the law should be able to compare

different extra-legal initiatives and governance regimes in order to view their inherent problem-solving capacity, irrespective of their popularity or their degree of distribution. Roughly speaking, it should be taken into account that an instrument of great quantitative importance is not necessarily better than an instrument which is applied only by a limited number of actors. Principally, the law is not based upon average values or statistical means, but draws, instead, on the characteristics of individual cases, and this is exactly what turns the law into such an indispensable building-block of the emerging governance architecture.

- c) To what extent can the law rely on the evaluation studies which accompany many of the emerging governance regimes? As pointed out above (Section II), such evaluation studies are often far from being neutral or objective – not least because these evaluations often share numerous problem-definitions and causal beliefs with the programmes under review, which are often not called into question. Moreover, legal practitioners often see themselves confronted with the fact that different scientific evaluations of one and the same regime can lead to very divergent and contradictory findings. In such cases, it seems that, in order to resolve such cognitive conflicts, courts must try to compare the emerging governance regimes on their own by determining the problem-solving capacity and the limits of each regime.

In doing this, different courts at different levels and in different countries develop their own cultures of knowledge, which would be worth a more detailed analysis. Sometimes, it seems that, of all the experts involved, it is these who enjoy the greatest respect, who present their views in a somewhat dogmatic, absolutist and “waterproof” way. Sometimes, in contrast, it seems that some courts also encourage those appointed as experts to mention frankly the issues which could not be resolved, to confess their doubts, and thus make their background assumptions more explicit. Such an approach is certainly the best way to avoid a situation in which the emerging governance regimes “enclose” themselves,⁴⁵ and in which the law becomes enmeshed in the circularity of self-referring and self-validating systems.

⁴⁵ See Miller & Rose, *Governing the Present*, note 13 above, p 108.

As the overview shows, many of the legal structures and techniques which help to co-ordinate the micro-powers of society are still in flux. Perhaps the most important aspect to stress here is that the emerging governance regimes of world society can present themselves with very different levels of quality and problem-solving capacities. As will be pointed out in more detail below, even two initiatives with share the same goals can lead to very different results due to their techniques of monitoring and fact-finding. Accordingly, it would be a cardinal error to assume that any form of private governance is inherently effective just because of its close relationship to practical problems and practical knowledge. In a fragmented world, it is the ability to differentiate between governance regimes of higher and lower quality, which becomes one of the most important legal skills. From this point of view, the rationality of the law does not exhaust itself in applying pre-defined norms in a routinised manner. Instead of applying the norms of the one and only, unitary and codified law, the judge today is in the business of negotiating between different normativities, trying to gain substantiated insights into the extra-legal mechanisms of the transnational sphere.

V. Post-sovereign Governance and the Paradox of Visibility: ISO 14000 and its Discontents

Some of the most illustrative examples of the emergence of new forms of power-knowledge in the transnational sphere can be found in the context of environmental self-regulation in multinational companies. In the light of the tragedy at Bhopal and other accidents at their foreign subsidiaries, many Western corporations have fundamentally changed their corporate structure. One important implication of this is the installation of specific environmental departments, which conduct regular checks and audits at their foreign production sites. The function of these units is threefold. To some extent, they meet the function of rule generators, which create intra-firm environmental standards and new forms of corporate governance. They also have an important investigative function, and, in addition, they have the task of intervening in the event of serious shortcomings, and of informing the Board of Directors of the parent company about the problems observed.⁴⁶

⁴⁶ See M Herberg, *Globalisierung und private Selbstregulierung: Umweltschutz in multinationalen Unternehmen*, (Frankfurt aM, Campus Verlag, 2007); S Jasanoff, *Learning from Disaster: Risk Management After Bhopal*, (Philadelphia PA,

Although many corporations publish their own corporate guidelines and codes of conduct, the specific techniques and standards applied internally remain, for the most part, invisible to the public view. A great deal is circulating here in the form of internal instructions, and often, in addition to these instructions, corporate managers for the environment also apply rules and practical standards which are not established in writing, but which nevertheless constitute an indispensable pre-requisite to orderly and safe operations. All of these rather technical and “microscopic”, fine-grained rules and standards can only be brought to light through detailed empirical research. At the time being, however, these technical rules are only seldom mentioned in the voluminous literature on environmental management.

Instead, what has absorbed most of the attention over the last decades, is the ISO 14000 Standard for Environmental Management. Just like its precursor, the ISO 9000 standard for quality management, ISO 14000 is intended to be applicable to all firms in any industrial sector. In the absence of more substantive standards of performance, such as quantitative emission limits, regulation is conceptualised here in a somewhat indirect way. Instead of focussing on technical issues, the emphasis is on organisational aspects. According to the underlying logic of ISO 14000, an appropriate design of the organisational structures of firms results in an improved environmental performance.⁴⁷ From a Foucauldian point of view, what becomes evident here is that ISO 14000 (just like any other governance regime) does not just represent the existing facts or problems under investigation, but actively constructs these problems - and sometimes provides a quite narrow and reduced version of them. That is to say, in the context of ISO 14000, environmental problems are defined as those problems which can be prevented by means of an adequate or optimised organisational structure, whereby the structure of an organisation is seen - again in a very one-sided

University of Pennsylvania Press, 1994); G. Teubner, “The Corporate Codes of Multinationals. Company Constitutions beyond Corporate Governance and Co-determination”, in: R Nickel, *Conflict of Laws and Laws of Conflicts. Patterns of Supranational and Transnational Juridification*, note 4 above), pp 261-276.

⁴⁷ Today, as the International Standardisation Organisation proudly announces on its website, ISO 9000 and ISO 14000 are implemented by over a million of organisations in 175 countries.

way - as the totality of formalised rules and written procedures that a firm has at its disposal.

In fact, as recent empirical case studies have shown, it turns out that the impact of ISO 14000 on the environmental performance of firms is much smaller than expected, due to its over-emphasis on such formalistic aspects.⁴⁸ As a matter of fact, certified firms do not necessarily perform better than those which are not certified; and, furthermore, even heavy polluters can easily pass the audit by simply possessing all the necessary documents. In some regards, it seems that the procedure, as defined by the ISO standard, even stimulates a fairly superficial and uncritical adaptation: ironically, the fact that most auditors lack the necessary technical qualification often leads to the situation in which firms that try to discuss more substantial problems face great difficulty in their communication with the auditors, whereas those which just use the managerial jargon in a superficial way often pass the audit without any problems.⁴⁹ In sum, the broad shift in orientation on the part of practitioners from technical issues to managerial systems, and from substance to form, can lead to an erosion of those skills which are essential for the improvement of the environmental performance of a firm. In view of these paradoxes, ISO 14000 appears to be an almost paradigmatic example of a self-validating system, or of what might be described in Foucaultian terms as a self-structuring closed-circuit of power and knowledge. Irrespective of its success or failure, ISO 14000 operates as "a system which builds for itself the facts which are relevant to its continued functioning".⁵⁰

However, in the debate revolving around ISO 14000, the sceptical studies just mentioned represent only a minority opinion. In fact, until recently, the toolbox provided by the International

⁴⁸ R Andrews *et al.*, "Environmental Management Systems: Do They Improve Performance?", in: *Final Report of the National Database on Environmental Management Systems Pilot Project*, (Chapel Hill NC, University of North Carolina, 2003); see, also, M Potoski & A Prakash, "Green Clubs and Voluntary Governance: ISO 14001 and Firms' Regulatory Compliance", (2005) 49 *American Journal of Political Science*, pp 235-248.

⁴⁹ See O Boiral, "ISO 9000: Outside the Iron Cage", (2003) 14 *Organization Science*, pp 720-737.

⁵⁰ *Ibid.*

Standardisation Organisation was hailed with great enthusiasm.⁵¹ Thus, what has been said about the quality of most scientific evaluation studies seems to apply here, too: all too often, scientists are so much under the spell of the great social-technical developments of their time that they fail to see the flaws and blind-spots of the latter. What can be learned from Foucault here is that, in order to evaluate the emerging regimes of private governance (such as that provided by the ISO 14000 standard), the focus should not be on their explicit goals, objectives or intentions, but, instead, on the procedures of investigation, the problem definitions and “regimes of truth” by which these initiatives are coined.

However, the failure of ISO 14000 should not lead us to reject voluntary corporate initiatives too quickly. Outside the formalised regime of ISO 14000, a complex structure of self-regulatory practices has emerged throughout the corporate world, which often takes a less visible, and less formalised character than ISO 14000. This brings us back to the practice of internal auditing in many of today’s multinational companies, which is accomplished by special task forces often called Corporate Managers of the Environment. Unlike the auditors in the context of ISO 14000, who are often trained as management consultants, these intra-firm auditors have technical qualifications and are familiar with the technical installations used at the foreign facilities. In a 2-3 year cycle, each location of the corporation undergoes a special inspection, usually taking a full working-week. Another difference with ISO 14000 is that investigations do not solely focus on internal documents; instead, inspections are oriented towards the technical equipment at the site, and the state of its condition.

The methods of inquiry which are used here, include oral examination of the staff (whereby mid-level practitioners are often more important than members of the management), as well as an optical investigation of the plant, the water treatment plant and waste disposal sites. As I have shown in greater detail elsewhere, this mode of investigation calls for specific skills on the part of those conducting

⁵¹ See, only, V Haufler, *A Public Role for the Private Sector. Industry Self-Regulation in a Global Economy*, (Washington, DC, Carnegie Endowment for International Peace, 2001), with further references.

the audits.⁵² Roughly speaking, auditors re-construct the technical arrangements under investigation just like a text, which can be deciphered in a sequential way. The auditors' knowledge of frequently occurring and "typical" mistakes helps them to detect possible deficiencies, while, at the same time, their attempts to detect even unexpected problems results in a continuous expansion of their job-related knowledge. In this regard, the practice of auditing has many similarities with criminological practice. Apart from searching for the existing deficiencies, auditors also define the necessary counter-measures to be taken. Normally, the results of the audits are documented in a special audit report, which is also circulated to the Board of Directors of the parent company. If severe problems are identified, the auditors are authorised to take immediate action in order to ensure that the deficient operations are stopped immediately.

What comes to light in these systems of corporate governance is a remarkable change in the self-perception of the multinationals under examination. While two decades ago, the subsidiaries (including those in developing countries) were given great discretion, many multinationals have learned now that producing in less developed countries is accompanied by specific risks and dangers, which calls for an extraordinary degree of responsibility and diligence on the part of the parent company. In fact, the way in which these companies see themselves is characterised by the insight that it is not enough to equip their subsidiaries with adequate technologies. Instead, the transfer of Western technologies to other regions must be embedded in a system of continuous surveillance and monitoring. In this context, the position of the subsidiaries can be characterised as autonomy "under reservation", to wit, under the reservation of corrective action by the parent company in the event of serious deficiencies.

As the overview shows, what can be found in the field of corporate environmental management is the co-existence of two highly incompatible governance formations, which are diametrically opposed to each other, and both of which come with their own techniques of investigation. The most visible system is the one established by ISO 14000, whose steering philosophy might be called

⁵² See Herberg, note 46 above, p 133.

“managerial”, and which is mainly based upon the design of formal procedures. At the same time, and as an alternative to ISO 14000, many companies have established their own company-wide systems of corporate governance, which are quite different in character. Rather than using standardised methods, practitioners try to enter into a reflective conversation with the situation, so to speak; and, instead of paper-based auditing and the use of pre-defined checklists, each case is assessed in an open-ended way. Clearly, this does not exclude undergoing ISO 14000 certification: on the contrary, it does, in fact, seem that the actors of the corporate world often apply both systems – that of ISO 14000 (whose main benefit is seen in aspects of reputation), and the rather informal strategies of corporate-wide auditing, whose effectiveness goes far beyond that of ISO 14000.

Why is it that the conflicts and discrepancies between both mechanisms are not disputed in an open manner, and that the in-house management systems of most companies are widely hidden from the public eye? Firstly, the above-mentioned systems of corporate governance were neither created under public pressure nor with the participation of NGOs, but take a more unilateral form, instead. Since ISO 14000 still enjoys a good reputation, most companies prefer to avoid open criticism, but, instead, apply a dual strategy by decorating themselves with the ISO certificate, while nevertheless holding onto their own management systems. Secondly, these in-house systems of corporate governance are a means of avoiding harm with relatively low costs; and thus, individual companies do not regard it as necessary to have their standards accepted by their competitors. A third reason why most companies hesitate to communicate their intra-firm standards to the public are the new risks of corporate liability which might emerge as a result of them: while the legal systems of most countries seem to privilege a more decentralised corporate structure, the emerging responsibilities on the part of the parent company may easily lead to new forms of veil piercing (see Section VI).

These are some of the reasons why the intra-firm governmental practices of the corporate world are only partially discussed in public debate, and why most attention has been absorbed by ISO 14000. Another possible explanation of the predominance of ISO 14000 and its formalistic procedure lies in the fact that ISO 14000 lulls us with the comfortable feeling that environmental protection is a matter of

awareness-raising, of business ethics and of drafting documents, rather than an issue of engineering, or of the nitty-gritty of technical problems such as waste water treatment or garbage incineration. This makes ISO 14000 one of the best and most illustrative examples of what some Foucault-inspired authors have called the “transfigurative” dimension of power:⁵³ for many actors from civil society, ISO 14000 provides them with the opportunity to present themselves as experts in the field of environmental protection without having the slightest technical knowledge or engineering qualifications. The irony is that even actors from the anti-industry lobby are blind to the fact that other, much more effective, forms of environmental governance are also available.

VI. Conflicts of Law – Coping with Transnational Regime Collisions and Conflicting Governmentalities

Governmentality, from a Foucauldian point of view, is “an undertaking conducted in the plural”.⁵⁴ In fact, the transnational sphere has given birth to numerous regimes, sets of governmental practices, and initiatives, which partly overlap, partly compete with one another, and which all follow their own rationality and trajectory. Due to this fragmentation, the co-ordination of the emerging regimes becomes increasingly important. An important tool for this can be seen in the methods of conflicts law. While, until recently, conflicts law was mainly concerned with mediating interstate legal conflicts, what comes into the picture here are conflicts between state-based law and the para-legal systems created by non-state actors. While the emerging regimes often fulfil an important function for society, they also create a lot of new problems: many initiatives do not live up to their promises; a great deal remains invisible and intransparent, and often, private governance regimes lack effective complaints procedures or possibilities of appeal and review. Consequently, under today’s conditions, conflicts-of-law in the traditional sense must be flanked by “a conflicts law, which governs the supervision of para-legal law and self-regulatory organisation”.⁵⁵

⁵³ See Miller & Rose, *Governing the Present*, note 13 above.

⁵⁴ Dean, *Governmentality: Power and Rule in Modern Society*, note 3 above, p 18.

⁵⁵ Joerges, “Integration through Conflicts Law”, note 4 above, p 550.

From this point of view, state-based law is not undermined by globalisation, but assumes the task of critically examining the emerging governance mechanisms for their problem-solving adequacy and their inherent rationality. In order to accomplish this, the law develops its own strategies and techniques, which make it possible to re-code the emerging powers in legal terms. One of these strategies is comparison: since there are many different regimes (which often relate to the same issue area), legal practitioners are in a position to compare these regimes and to pose questions such as why in the case under debate, a certain standard A was used, which, in comparison with another standard B, could be seen as being rather outdated and ineffective. Accordingly, the key question is no longer *whether* the extra-legal mechanisms are legitimate as such, but rather *how* the law can contribute to combat possible forms of power abuse, fraud and failure, and *how* it can exert pressure on actors from the industry to adopt, in all their activities, the most progressive and effective standard.

As a pre-condition for this, the nation state and its legal institutions must avoid committing themselves, in a premature way, to one particular solution or standard, regardless of how popular or how prominent it may be. In fact, while it is often assumed that the emerging normative orders of the transnational sphere are “more real, more legitimate, more innovative, more complex, closer to the ground, than the State itself”,⁵⁶ some of them might also turn out to be highly dysfunctional. As the example of ISO 14000 shows, it would be a serious mistake to conceptualise the adoption of transnational private norms as a value in itself. However, this is exactly what has happened in many countries in Africa, Asia and Latin America, where a certification in accordance to ISO 14000 is often defined as a legal requirement in order to apply for an operating licence, and where national governments hope that this will help to compensate for existing gaps in their environmental law systems.⁵⁷ What becomes manifest in this example is the above-mentioned scenario of

⁵⁶ See A Riles, “The Anti-Network: Private Global Governance, Legal Knowledge, and the Legitimacy of the State”, (2008) 58 *American Journal of Comparative Law*, pp 604-630, at 619.

⁵⁷ See E Kamau, “Environmental Regimes and Direct Investment in Third World Countries”; as well as J Kleba, “Kontrollkompensation, Rechtssynergie, Greenwashing?”, both in: G Winter (ed), *Die Umweltverantwortung multinationaler Unternehmen*, (Baden-Baden, Nomos Verlag, 2005).

“colonisation”, where national legal systems fall victim to peculiar world views and ideologies which are alien to them.

However, as is argued here, the pluralism of such extra-legal mechanisms provides an important antidote to this danger, since it enables legal practitioners to consider alternatives and to compare different regimes. At the same time, a more intense engagement with the problem definitions, stocks of knowledge and practical experience which are inherent to the emerging private sector regimes can provide the law with the possibility of critically examining its own constructions of reality. Here, again, the interaction between state-based law and the para-legal systems of the transnational sphere is not harmonious at all, especially if there are different views on the issues dealt with. However, in certain cases, the arising epistemic conflicts can also be highly productive and fruitful, in as much as they stimulate processes of institutional learning and legal creativity.

This innovative potential of epistemic conflicts can also be illustrated by the case of environmental management in multinational companies. As has been shown, beyond ISO 14000 (and as an alternative to it), a set of governmental practices has emerged which are clearly more effective than the former. Although the juridical analysis of these practices and their legal implications is still an outstanding task, there are already indications that a closer look at them may result in highly innovative juridical developments. An important area of such developments is the field of corporate liability law, and here, in particular, the way in which the parent-subsidiary relationship is perceived and shaped: Should the parent company keep out of the decisions of the subsidiary and leave things their run, or should it play a more active role by conducting regular checks and audits?

Due to internationally accepted doctrines of corporate law, most legal systems of the world are reluctant to ascribe specific duties of care to corporate headquarters. Accordingly, it is only in exceptional situations that parent companies are held accountable for environmental harm or health injury caused by their subsidiaries. In most cases, the reasons for these exemptions are situations where the harmful event was caused by direct instructions on the part of the parent company, or where the subsidiary was so excessively dominated that autonomous decision-making is undermined. Or, to

put it differently, veil-piercing mainly occurs in situations in which the courts find that the parent company has either ignored, or has affected by its own decisions, the autonomy of its subsidiary.⁵⁸ The opposite constellation, in contrast, that is to say, situations in which the damage is caused by an inadequate attitude of *laissez-faire* on the part of the parent company, is only seldom taken into consideration. While the multinationals under research seem to take a rather positive stance towards company-wide auditing and self-regulation, it appears that broad parts of state-based law still tend to conceptualise the different units of a corporate group as independent entities with their own separate obligations and duties.

In order to overcome this restricted view, it seems necessary that the law learns to build on the emerging systems of corporate governance as described in the previous section. In fact, some recent legal developments seem to follow this path. One of these techniques is the so-called Good Samaritan Doctrine.⁵⁹ Here, self-regulatory activities, such as company-wide auditing, are explicitly endorsed by the courts, and corporations which conduct their audits in a too selective or superficial way can be held liable upon the basis of tort and negligence. In this regard, the Good Samaritan Doctrine makes it possible to sue the parent company for its own, independent failures and omissions. An important pre-condition for this is that lawyers restrain from constructing the respective duties of care on their own, and that they take into account what has already emerged as common practice in the relevant context. Here again, it is crucial to strengthen what might be called the epistemic capacities of the law, which means that courts and national agencies should form their own, independent judgment upon the basis of detailed investigations and comparisons of different regimes and standards.

To put it in Foucaultian terms, the lesson to be learned is that the power inherent in the parent-subsidiary relationship is not *per se* negative, restrictive or suppressive. While the corporate liability

⁵⁸ This is also illustrated by numerous metaphors which characterise the subsidiary as a "mere department", a "puppet", an "agent" or a "dummy" of the parent. See K Vandekerckhove, *Piercing the Corporate Veil: A Transnational Approach*, (Alphen a.d. Rijn, Kluwer Law International, 1991), p 79.

⁵⁹ See A Crawley, "Environmental Auditing and the 'Good Samaritan' Doctrine: Implications for Parent Corporations", (1993) 28 *Georgia Law Review*, pp 223-268.

regimes in most countries still tend to conceptualise the exertion of influence by the parent company in negative terms, it appears that many enterprises have for a long time realised that regular checks and audits are necessary in order to prevent harm. This achievement is not, at least not necessarily, something which stands outside the context of state-based law. Instead, the law can learn to build on such practical achievements by translating them into its own language and logic. In some regards, such forms of interplay between state-based law and the emerging governance mechanisms of the corporate world seem to correspond to one of Foucault's most central theses on the nature of power: as Foucault kept emphasising, the co-existence of different powers cannot adequately be described as a zero-sum game, in which power on one side always means that the other side lacks power or is powerless, but rather that it should be conceptualised as a process in which different forces and powers stimulate and re-enforce each other and enter into new and unforeseen relationships.⁶⁰

VII. Conclusion: Power, Knowledge, and Law's Responsiveness to Otherness

An objection frequently raised against Foucault's writings is that they correspond to a philosophy of nihilism and despair.⁶¹ Since power is no longer concentrated in the hands of a sovereign (or, as might be added here, in the hands of a legislator or parliament), the chances seem to be small that these powers can effectively be controlled or tamed. In fact, the new forms of power which have emerged in the interstices of the state-centric world may easily result in a constellation in which power becomes ever more anonymous, opaque, and uncontrollable. Foucault's emphasis on the positive, productive and creative side of power offers only cold comfort in this regard: all in all, the productivity of power seems to result in an ever-tighter network of observation and the loss of judicial remedies on the part of those governed. In some passages of his work, Foucault seems to suggest that society as a whole has been transformed into a

⁶⁰ Hunt & Wickham, *Foucault and Law. Towards a Sociology of Law as Governance*, note 14 above, p 15.

⁶¹ See C Gordon, "Governmental Rationality: An Introduction", in: G Burchell, C Graham, C Gordon & P Miller, *The Foucault Effect. Studies in Governmentality*, (Chicago IL, University of Chicago Press, 1991), pp 1-52, at 4.

big laboratory in which everything revolves around observing, measuring, and manipulating the population.

Whether one shares this pessimism or not, it is important to see that Foucault has pointed to some important aspects of modernity which can easily escape our attention: knowledge, even if it presents itself as value-neutral and objective, is always closely intertwined with power. Whereas the prevailing methods of fact-finding and information gathering contribute to making visible certain aspects of reality, other aspects of reality remain in the dark. Furthermore, the production of governance-related knowledge is always influenced by certain problem-definitions and world views, which are only rarely questioned. Since most forms of governance-related knowledge are not just characterised by the binary code of true and false, but also crystallise around distinctions such as normal/abnormal, harmful/safe, or effective/ineffective, they often have an enormous impact on social reality. Clearly, the political relevance of technical standard-setting has often been discussed in the literature on global governance. However, Foucault's work transcends the realm of codified standards and formalised governance regimes by far. What comes into the picture now are the manifold techniques of knowledge production, of auditing, monitoring, surveillance, and examination, which are often not fixated in writing, but nevertheless constitute an important element, if not the epistemic foundation of transnational governance and transnational law.

A detailed analysis of these techniques of monitoring and fact-finding in the tradition of Michel Foucault helps to fill an important gap in our theories of today's governance architecture. Especially for those who are interested in how to design better institutions for the world, paying due regard to the epistemic or cognitive dimension of governance is highly relevant. As has been argued, even two initiatives which share the same goal may lead to very different results due to the way in which they produce and process the relevant data. As the example of ISO 14000 shows, some of the emerging governance regimes of the transnational sphere, in particular those which are very popular and highly visible, are accompanied by their own evaluation studies. However, since those who conduct these studies often abstain from developing their own problem-definitions, but simply use the criteria which are internal to these regimes, we see ourselves confronted with various artefacts,

rational myths, circular forms of self-validation, and the emergence of manifold credibility bubbles. As opposed to this, conducting governmentality studies in the Foucauldian tradition - which also includes searching for alternative forms of governance - can serve as an important tool in order to investigate the emerging governance regimes in a more critical way, and thus, to disentangle (at least to some degree) the nexus of power and knowledge.

With regard to the future of law in a situation of plural governance formations, Foucault's work contains different and highly contradictory statements. In some passages of his work, he gives us the impression that we have entered into a period of "juridical regression".⁶² In part, the emerging micro-mechanisms of power have the potential to bypass the law. In part, there is also the danger that the law becomes usurped by the emerging powers. In this scenario, the law is overwhelmed by the norms that come from outside, or becomes enmeshed in a relationship of complicity with them. However, while modern law is thoroughly dependent upon the emerging power-knowledge formations of (world) society, this dependence should not be seen as a one-way street. Instead, the law has, at least to a certain degree, the potential to shape private authority and epistemic power according to its own principles. In this vein, the law is capable of exerting considerable influence upon the powers that lie beyond it. As the empirical example of corporate governance and corporate liability shows, it is not necessarily a situation of incompatibility which characterises the relationship between formal law and the informal (micro-) powers of society. Although it is a relationship characterised by numerous epistemic conflicts, these conflicts can lead to mutual learning and enormous inventiveness.

Herein lies an important link between the writings of Foucault, and the debate on a post-sovereign law-of-conflicts. Admittedly, it may be questionable as to whether conflicts law will ever assume a "cosmopolitan" character, as postulated by Berman.⁶³ Instead, it appears that the confrontation between the law and the governmental

⁶² Foucault, *The History of Sexuality*, note 17 above, p 144.

⁶³ P Berman, "Towards a Cosmopolitan Vision of Conflicts of Law: Redefining Governmental Interests in a Global Era", (2005), 153 *University of Connecticut School of Law Articles and Working Papers*. Paper 24.

practices of world society always takes place in highly-contextualised and specific settings, which leads to solutions which occur at the “meso”-level of governance, instead of at the “macro”-level. All in all, this is a situation which is quite different from the pessimistic scenarios which are often associated with Foucault’s writings. As Foucault reminds us, the law can never be “the master of its truth”.⁶⁴ Instead, what keeps the law moving is the continuous confrontation with other different sources of truth, perceptions, problem-definitions and identities, which come from outside the legal system. From this perspective, - which seems highly compatible with the debate on a new law-of-conflicts - the law “functions and justifies itself only by this perpetual reference to something other than itself”.⁶⁵

⁶⁴ Foucault, *Discipline and Punish*, note 20 above, p 98.

⁶⁵ Golder & Fitzpatrick, *Foucault’s Law*, note 21 above, p 22.

Chapter 13

Is Michel Foucault a Polanyian? Michel Foucault's Analysis of Governmentality and the Embeddedness of Market Societies

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Once more the recent economic crisis reveals the destructive potentials of marketisation that Karl Polanyi already depicted in "*The Great Transformation*" published in 1944. His famous *œuvre* provides a capacious analysis of modern societies in which he insists on the social embeddedness of market relations. Polanyi argues that functioning markets depend on the already established social and cultural requirements by assuming that the "market economy can function only in a market society".¹ But market society is a contested and precarious terrain. It strives towards the marketisation of all social relations, including "fictitious commodities" such as labour, land and money, which lead to destructive outcomes as well as to re-embedding counter-movements.² It is clear that the Polanyian legacy cannot be restrained to a descriptive inquiry into market societies.

¹ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time*, (1944), cited here according to the second Beacon paperback edition, (Boston MA, Beacon Press, 1957). p 60.

² *Ibid.*, p 71 et seq., &138.

Instead, Polanyi presents these re-embedding struggles as the bearers of hope for a liberal-socialist project which subordinates the “self-regulating market” to a “democratic society”.³ In recent years, the so-called “new economic sociology” has evolved around Polanyi’s embeddedness theme and has delivered insights into the mutual relegation of markets and social structures.⁴ Not least, theorists, such as Nancy Fraser, make use of the Polanyian framework in order to capture the ongoing economic crisis, the predominance of neo-liberalism and alternative economic pathways.⁵ The question arises as to whether Polanyi delivers a viable framework which contributes to an appropriate account in both descriptive, and in normative, regards.

Certainly, it is not that he was not the only one who elaborated a critical approach on the transformation of market societies. Perhaps the most outstanding is the late Michel Foucault’s analysis of modern governmentality, which focuses on the genealogy of economic liberalism. His work inspires the research branch of “governmentality studies” which analyses the increasing trend of marketisation in the course of neo-liberal predominance.⁶ In his posthumously published

³ *Ibid.*, p 242.

⁴ See, for example, Mark Granovetter, “Economic Action and Social Structure: The Problem of Embeddedness”, (1985) 91 *American Journal of Sociology*, pp 481-510; Neil Fligstein, *The Architecture of Markets: An Economic Sociology of Capitalist Societies*, (Princeton NJ-Oxford, Princeton University Press, 2002); Sandy Randles, “Issues for a Neo-Polanyian Research Agenda in Economic Sociology”, (2003) 13 *International Review of Sociology*, pp 409-434. To some extent, only a loose coupling with Polanyi can be identified. For instance, Beckert points out that, in new economic sociology, Polanyi’s “social-reformist connotations have been neglected”, (The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology, MPIfG Discussion Paper 07/01, 7).

⁵ See Nancy Fraser’s “Storrs Lectures” (2010) at Yale University where she elaborated a “neo-polanyian conception of capitalist crisis” (<http://www.law.yale.edu/news/10133.htm>).

⁶ See Graham Burchell, Colin Gordon & Peter Miller (eds), *The Foucault Effect: Studies in Governmentality*, (Chicago IL, University of Chicago Press, 1991); Nikolas Rose & Peter Miller, “Political Power beyond the State: Problematics of Government”, (1992) 43 *British Journal of Sociology*, pp 173-205; Nikolas Rose, Pat O’Malley & Mariana Valverde, “Governmentality”, (2006) 2 *Annual Review of Law and Social Science*, pp 83-104; for a perspective on European governmentality, see Kolja Möller, “European Governmentality or Decentralised Network Governance? The Case of the European Employment Strategy”, RECON Online Working Paper 2010/08, available at: www.reconproject.eu/projectweb/portalproject/AbstractRECONwp1008.html.

lectures on the history of governmentality at the *Collège de France* from 1977 to 1979, Foucault elaborated a comprehensive genealogy of market societies and the administrative state.⁷ To Foucault, economic liberalism and the idea of a self-regulating market announce the advent of a new “system of power”,⁸ which has tended to over-determine the whole process of social transformation from the Eighteenth century onwards. Drawing on Polanyian vocabulary, it seems that Foucault, too, traces a “*Great Transformation*” that starts with the emergence of modern state-hood in the Seventeenth century and even foreshadows the success of “American neo-liberalism”⁹ during the last decades.

In the following, it is shown how Foucault’s analysis is characterised by some parallels to the structure of Polanyi’s argument, while emphasising a more profound notion of “cognitive embeddedness”¹⁰ as the driving force of marketisation (Section 1). Furthermore, Foucault highlights a more sophisticated periodisation of market dis-embedding and re-embedding movements within modern capitalism (Section 2). His approach is less economistic than Polanyi’s interplay of marketisation and social protection, and, contrary to Polanyi’s accentuation of the anti-social and destructive forces of Liberalism, it departs from the mutual relegation of modern political authority, civil society and liberal markets. As will be demonstrated, the relation between the state and the economy amounts to a dialectic of freedom and security, which also entails securitising the dynamics and normalising patterns of state regulation. Above all, it is argued that

⁷ Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France, 1977–1978*, (Basingstoke, Palgrave Macmillan, 2007), and *idem*, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–79*, (Basingstoke, Palgrave Macmillan, 2008).

⁸ Foucault, *Security, Territory, Population*, note 7 above, p 66.

⁹ *Ibid.*, note 7 above, p 115.

¹⁰ I borrow the concept of “cognitive embeddedness” from Sharon Zukin & Paul DiMaggio, “Introduction”, in: Zukin & DiMaggio (eds), *Structures of Capital: The Social Organisation of the Economy*, (Cambridge, Cambridge University Press, 1990), pp 1–37, although I do not restrain its meaning to “mental” processes as they do. Instead, “cognitive embeddedness” should be understood as a social process that also implies inter-subjective power relations, symbolic order and disciplinary institutions. Frerichs draws on “cognitive embeddedness” as well: see Sabine Frerichs, “Re-embedding Neo-liberal Constitutionalism: A Polanyian Case for the Economic Sociology of Law”, in: Christian Joerges & Josef Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, (Oxford, Hart Publishing, 2011), pp 65–83.

the Foucauldian perspective leads to more radical prospects in order to overcome “liberal governmentality” (Section 3). While Polanyians often abide by re-calibrating the relation between marketisation and social protection, the Foucauldian perspective suggests that both dynamics are entangled in the power-knowledge nexus of modern market societies. Possible change can only emanate from emancipatory struggles which challenge not only the way that markets and securitising counter-movements are arranged, but also shift the whole order of knowledge in a progressive direction. In the face of the recent economic crisis, it will be argued that both varieties of critique, Polanyian and Foucauldian, are in need of each other. In order to achieve market re-embedding counter-movements in a Polanyian vein, it is absolutely crucial that a more radical type of critique turns new problematisations and forms of knowledge against the neo-liberal *dispositif*.

I. Governmentality and the Embeddedness of Markets

Michel Foucault’s analysis of modern governmentality contains an extremely rich framework which elucidates the advent of the modern market societies.¹¹ Throughout the lectures, Foucault deals with a *pot-pourri* of issues relating to modern society and social theory, such as power/knowledge complexes,¹² the history of modern statehood, markets and capitalism, and administrative structures and security apparatuses. By making use of a perspective which assumes the omnipresence of power relations, his intention is to elaborate an “overall analysis of society” and a “genealogy of the modern state”.¹³ Foucault’s concept of power can be regarded as ontological to the extent that, in every social relation, we can trace an underlying relation of power as a “complex strategical situation” which

¹¹ See, for this aspect, also Mariana Valverde, “Genealogies of European States: Foucauldian Reflections”, (2007) 36 *Economy and Society*, pp 159-178.

¹² Or as Axel Honneth once put it, “systems of cultural knowledge”: Axel Honneth, *The Critique of Power: Reflective Stages in Critical Social Theory*, (Boston MA, The MIT Press, 1991), p 109.

¹³ Foucault, *Security, Territory, Population*, note 7 above, p 2 & 354. Foucault’s methodological approach can be qualified as “nominalistic”, focussing on the “effects” of power relations (see Michel Foucault, “Zärtlichkeiten zwischen Männern in der Kunst (1982)”, in: *idem, Dits et Ecrits, Band IV, Nr. 314*, (Frankfurt aMain, Suhrkamp Verlag, 2005), pp 376-379, at 377).

constitutes the central nexus of the social.¹⁴ Since power relations cannot be reduced to disciplinary mechanisms, they also imply regulative, inciting and normalising practices. Although Foucault sticks to his methodological commitment of analysing specific constellations, and tends to be sceptical towards universal narratives, it is perfectly possible to read the history of governmentality as Foucault's most encompassing contribution to the making of market society. Thereby, he elaborates his own account of modernity, by focussing on the way in which modern market society relies on particular systems of power.¹⁵ According to Foucault's account of modernity, one should take a closer look at the mutual instigation of state-formation, market-making and subjectification. Only if one brings the mutual instigation of state-formation, marketisation and the modern subject into focus, does a perspective evolve that is neither economistic nor state-centred, and is, therefore, able to acknowledge the enormous complexity of modern power relations. For Foucault, it is neither the state nor the market that is the driving force of modernisation, but a "type of regulative power"¹⁶ which operates through "hard" as well as "soft" mechanisms.

In particular, Foucault attempts to show that modern power relations depend immensely on the constitution of knowledge. It is not surprising that the most prominent conception in his lectures – "governmentality" – points directly at this intersection of power relations and the constitution of knowledge. In a nutshell, Foucault's main thesis can be summarised as follows: modern societies are characterised by the dominance of a power-mode which he calls "governmentality".¹⁷ The latter assembles the constitution of the knowledge, political rationalities and techniques of both individual and collective self-governance under the aspect of "governability", and connects them in a power network or – to use Foucault's words –

¹⁴ Michel Foucault, *Sexualität und Wahrheit 1 - Der Wille zum Wissen*, (Frankfurt aM, Suhrkamp Verlag, 1977), p 114.

¹⁵ Valverde, "Genealogies of European States: Foucauldian Reflections", note 11 above, pp 159-178, at 160, is sceptical about such an "epochalist misreading" of Foucault's late works.

¹⁶ See Wolfgang Detel, *Foucault und die klassische Antike - Macht, Moral, Wissen*, 2. Aufl., (Frankfurt aM, Suhrkamp Verlag, 2006), p 60 et seq.

¹⁷ Foucault, *Security, Territory, Population*, note 7 above, p 108.

in a “system of power”.¹⁸ In this context, Foucault’s notion of “government” is crucial.

He departs from a wide notion of “governing”, which is not restrained to state-centred steering mechanisms, but, instead, includes a broader idea of conduct that implies epistemic, cultural and subjective strategies of “governing”. Not least, Foucault focuses on the way in which individuals govern themselves as members of a particular group or community.

By introducing this somewhat bulky neologism “governmentality”, Foucault tends to generalise the assumption that modern power relations are grounded in “governing” techniques and rationalities that structure social relations. But, maybe even more importantly, the governmentality approach implies a strong and dynamic relationship between these modern “forms of knowledge”¹⁹ and their practical implications in policy-making and state-building. Foucault assumes that the visualisation of problems and truths backed up by scientific disciplines and modern institutions initially amounts to what is commonly called *common sense*. When it comes to the sphere of political government, the epistemic anatomy of this common sense ultimately serves as a matrix for “governing” patterns of state intervention.²⁰ Hence, central impulses which contribute to this anatomy of political reason, can be identified in different layers. Apart from state-governed political spheres, *scientific disciplines* institutionalise forms of knowledge which influence the structure of political rationalities. However, such “productions” of truth can also be found within the *political process*, particularly in the *acquisition of knowledge and in the statistics of public administration* (“governmental management”²¹).

In order to demonstrate this intersection of knowledge-constitution and power relations, Foucault focuses on the appearance of “security apparatuses”.²² For instance, in the Seventeenth and Eighteenth centuries, the emerging problematisation of the “population” and the

¹⁸*Ibid.*, p 66.

¹⁹*Ibid.*, p 350.

²⁰*Ibid.*, p 108, 116, 351 & 354.

²¹*Ibid.*, p 107.

²²*Ibid.*, p 108.

political economy played a decisive role in the choice of political strategies.²³ By depicting the knowledge-driven emergence of modern security apparatuses, Foucault reveals the interplay of *episteme* and *techne* within modern governmentality:²⁴ in the first place, there is an antecedent problematisation that directs attention to the fact that a collective-body or “population”, exists, which should be governed by public authorities. In the next step, public authorities gradually invent techniques which respond to the challenge of securitising the population. Then, it is the political economy as a form of knowledge which instigates the circulation of goods and the “population” in a given territory which provides the cognitive framework for market-making policies and original accumulation of capital.

In this way, Foucault anchors the process of knowledge-constitution and truth-telling not just at a general level. The mere constitution of knowledge is not the only criteria; modern systems of knowledge affect at least two more levels: at the societal level, they are combined with corresponding techniques of conduct and political strategies; at the subjective level, the way in which individuals govern themselves and their “self-techniques” contribute to this dynamic. Foucault illustrates how modern market society relies on a network of economic, political, and cultural techniques of conduct and self-conduct.²⁵ From this perspective, the advent of the modern market society relies on the fact that the liberal political economy is successful in bringing the interaction among these different layers of governmentality to perfection. Thus, Liberalism represents more than just an economic theory about markets and money. Foucault shows how Liberalism implies a rationality of government, which also refers to the state and the individual. The government of modern market societies searches for rationalities which make use of “the rational behaviour of those who are governed”.²⁶ It also takes advantage of their *prima facie* un-political economic and cultural impulses. For instance, market Liberalism provides an agenda that also makes use

²³*Ibid.*, p 55 *et seq.*

²⁴ For the distinction of *Episteme* and *Techne*, see Mitchell M Dean, *Governmentality: Power and Rule in Modern Society*, (London, SAGE Publications, 1999), p 31 *et seq.*

²⁵ Foucault, *Security, Territory, Population*, note 7 above, p 93 *et seq.*

²⁶ Foucault, *The Birth of Biopolitics*, note 7 above, p 312.

of the individual's self-conduct as both as a market subject and as an *entrepreneur*.²⁷

The strength of the Liberal paradigm consists in its "politics of truth".²⁸ Foucault shows how the market serves as "agency of veridiction" which tells the "truth" about state regulations.²⁹ Furthermore, the political economy (as a form of knowledge) delivers insights which serve as benchmarks for evaluating the appropriateness of state interventions:

And it is not economic theory but this place itself that from the eighteenth century became a site and a mechanism of the formation of truth. And [instead of] continuing to saturate this site of the formation of truth with an unlimited regulatory governmentality, it is recognized - and this is where the shift takes place - that it must be left to function with the least possible interventions precisely so that it can both formulate its truth and propose it to governmental practice as rule and norm.³⁰

Prices tell the truth about products; monetary stability tells the truth about whether political regulation understands the natural-harmonious processes of the market appropriately; the preservation of a job depends on whether the subjects have internalised the rules of competition and *entrepreneurship*. In modernity, all government is constantly being evaluated by a tribunal that "tells the truth" about the adequacy of state interventions:

The market now means that to be good government, government has to function according to the truth.³¹

²⁷ See, for a closer examination of the "entrepreneurial self", for example, Ulrich Bröckling, *Das unternehmerische Selbst. Soziologie einer Subjektivierungsform*, (Frankfurt aM, Suhrkamp Verlag, 2007).

²⁸ Michel Foucault, *Gespräch mit Michel Foucault* (1977), in: *idem, Dits et Ecrits, Band III*, Nr. 192, note 13 above, pp 186-213, at 210 *et seq.*

²⁹ Foucault, *The Birth of Biopolitics*, note 7 above, p 33.

³⁰ *Ibid.*, p 30.

³¹ *Ibid.*, p 32.

State regulation organises its exercise of power according to a particular form of politics which is brought to the fore by the market's truth procedure. Thus, the paradigm of the market economy determines the anatomy of modern political rationality to a great extent, and tends to encroach upon all social and cultural spheres. Foucault demonstrates that, in the modern territorial state, one can detect not only a political economy of the economy, but also an economy of administration, an economy of security, an economy of the household, and so forth. Patterns of evaluation, and criteria of efficiency and appropriateness are directly transferred to other social spheres.

In this sense, Foucault echoes the Polanyian idea that market Liberalism "means no less than the running of society as an adjunct to the market. Instead of economy being embedded in social relations, social relations are embedded in the economic system".³²

But it seems that there are profound differences between the reasoning of Polanyi and Foucault. Foucault attributes more importance to the "productive" aspects of Liberalism and to its complex system of power. For Foucault, the Liberal market economy represents more than a mode of economic reproduction which destroys social embeddedness in a one-way street; instead, Liberalism contains a social ideal and "governs" the whole of society according to its rationality. The main difference between Polanyi's "social embeddedness" and Foucault's "governmentality" is probably located in this contrast: while Polanyi emphasises the destructive, anti-social outcomes of market-disembedding movements, Foucault tries to reveal that these dis-embedding movements set in motion productive and positive social ideals, forms of knowledge, and individual self-techniques. These features belong to the selfsame materiality of dis-embedding movements, and, therefore, they cannot be reduced to a mere destruction of the social protection or the ideological phenomena which hide the destructive forces of modern capitalism. Compared to Polanyi's social embeddedness theme, Foucault's conception of governmentality amounts to a more sophisticated approach with regard to three aspects.

³² Polanyi, *The Great Transformation*, note 1 above, p 60.

First, Foucault's notion of embeddedness represents, above all, "cognitive embeddedness".³³ In the history of governmentality, the driving force of market society is the advent of new systems of knowledge. Admittedly, they emanate from particular opportunity structures and material capacities,³⁴ but, initially, they set in motion liberal governmentality as a new system of power. In modern market societies, statehood and the modern subject are not overwhelmed by destructive economic forces, as even they are essential to the breakthrough of the market economy and part of a cognitive framework which relies on instances of veridiction and procedures of truth-telling.³⁵ Foucault reveals that the market paradigm perfectivises this intersection and establishes an innovative "line of force"³⁶ which is central to the "*Great Transformation*" and the making of modern market society.

Second, Foucault extends his analysis of market society to the role of state-formation for (and not against!) the advent of modern capitalism. His account of modernity starts with the emergence of administrative state apparatuses, territorialisation and bio-politics in the Seventeenth century. In this period, security apparatuses occur which acknowledge the existence of a population within territorial boundaries.³⁷ They establish risk regulation, administrative statistics, as well as modern bio-politics. In the next step, the liberal political economy develops from these already existing structures and normalising regulations (see, for a closer examination, Section II below). Thus, the history of modern markets must take the role of modern administration and (political) market-making practices into account. Furthermore, processes of subjectification play a key role for/in market society, and it is especially in this aspect that Foucault insists on a broader cultural approach which focuses on the self-

³³ See note 10 above.

³⁴ Therefore, it is questionable if Foucault is a "constructivist", although some IR-scholars want him to be one.

³⁵ Towards the end of his life, this idea of veridiction amounts to a red thread in Foucault's reasoning: "Analyse des formes des véridictions; analyses des procédures de gouvernementalité; analyse de la pragmatique du sujet et des techniques du soi"; Michel Foucault, *Le gouvernement de soi et des autres. Cours au Collège de France 1982-1983*, (Paris, Gallimard-Seuil, 2008), p 6.

³⁶ Foucault, *Security, Territory, Population*, note 7 above, p 108.

³⁷ *Ibid.*, p 55 et seq.

conduct of the subjects and how they contribute to market-making dynamics.

Third, Foucault seems to draw on Polanyi's idea of the "economic" embeddedness of all social relations. He reveals that Liberal governmentality represents a complex mode of power which connects procedures of truth-telling at the epistemic, societal and subjective level. Thus, Liberalism is not limited to restraining effects. Moreover, there is an underlying positive vision of the good market society, which is extremely difficult to challenge. This is why one could read the lectures on governmentality both as a critique and as a warning. Foucault is sceptical about state- and economy-centred accounts of modernity. In his view, the state does not appear as Weberian unitary "*Anstaltsstaat*". Instead, the modern state grew out of particular security apparatuses which discharged its competences to a network of inter-linked institutions. Against economy-centred theories, Foucault argues that modern capitalism cannot be reduced to the progress of (economic) productive forces alone. Market society is grounded in the governmental mode of power-embracing epistemic and cultural dynamics that are central to the breakthrough of Liberalism. From this critique of the existing accounts of modernity, there results a far-reaching warning: market society can only be challenged by a different rationality of government and a new governmentality that needs to be "invented".³⁸

II. Periodisation of Market Society: A Dialectics of Freedom and Security?

As already pointed out in Section I, Foucault elaborates a double-stage argument about the advent of the modern territorial state and capitalism. At the *first stage*, Foucault reveals the emergence of securitising practices in European statehood during the Seventeenth and the Eighteenth centuries. In this period, it seems that "the general economy of power in our societies is becoming a domain of security".³⁹ In the Seventeenth and Eighteenth centuries, new phenomena occurred, which transformed state regulations to a great extent. Foucault demonstrates how the idea of the "population" increasingly determined patterns of state invention and inspired

³⁸ Foucault, *The Birth of Biopolitics*, note 7 above, p 94.

³⁹ Foucault, *Security, Territory, Population*, note 7 above, p 11.

preventive, securitising public policies.⁴⁰ The beginning of the fight against epidemics serves Foucault as a paradigmatic event which allows public authority to direct its policies towards a “population” and a society.⁴¹ The population is invented as a collective body which represents more than an amorphous mass of people but a “body” which should be cultivated, strengthened, regulated, vaccinated, educated and so forth. Ultimately, this emergent problematisation goes hand in hand with new administrative structures and their normalising exercise of power:

The government of populations is, I think, completely different from the exercise of sovereignty over the fine grain of individual behavior. It seems to me that we have two completely different systems of power.⁴²

Above all, administrative statistics construe “normality” as a fertile ground for regulating techniques.⁴³ In that period, Foucault detects a new system of power which relies on security apparatuses which are constituted through discourses, techniques and institutions. It is precisely this emerging problematisation which inspires a deeper transformation of power structures.

While, at the first stage, a securitising transformation of public policy sets in motion governmental ways of exercising power, Foucault illustrates the advent of Liberalism and liberal rationality in the Eighteenth century at the *second stage*. The liberal political economy and the emergence of markets represent the next threshold in Foucault’s history of power relations. But is it really a threshold? While trying to make sense of Foucault’s history of modern governmentality, the relation between security *dispositifs* and the liberal art of government tends to be ambiguous, and Foucault often does not seem to be clear about this relationship: on the one hand, Foucault emphasises that Liberalism makes use of those security *dispositifs* as “essential technical instruments”.⁴⁴ Liberalism appears as a further development which connects to the existing modes of

⁴⁰ *Ibid.*, p 44 *et seq.*

⁴¹ *Ibid.*, p 58.

⁴² *Ibid.*, p 66.

⁴³ *Ibid.*, p 100.

⁴⁴ *Ibid.*, p 108.

power. Thus, one should be “clear” that there is no passage from “an authoritarian government in the seventeenth century and at the start of the eighteenth century to a government which becomes more tolerant, more lax, and more flexible”.⁴⁵ On the other hand, Liberalism entails a strong critique of *raison d'état* and *big government* in general. At the heart of liberal rationality lies the assumption that there is always too much governing and that government should be limited and oriented towards the veridiction of the market, which is always suspicious of political intervention. The market “limits the exercise of government power internally”.⁴⁶ How should we deal with this ambiguous view on market society? Is Liberalism a completely new system of power or a mere prolongation of already existing power relations?⁴⁷

My suggestion is to conceive of the relationship of freedom and security in Foucault as a dialectical relationship. They are both related to each and collide at the same time. Clearly, there are some parts in Foucault's lectures which lend support to this interpretation:

Liberalism turns into a mechanism continually having to arbitrate between the freedom and security (...) of the individuals. (...) liberalism is an art of government that fundamentally deals with interests, it cannot do this (...) without at the same time managing the dangers and mechanisms of freedom/security, the interplay of security/freedom which must ensure that individuals or the community have the least exposure to danger.⁴⁸

⁴⁵Foucault, *The Birth of Biopolitics*, note 7 above, p 62.

⁴⁶*Ibid.*, p 27.

⁴⁷ Having in mind this ambiguity, it is not surprising that they are also reflected in the reception of Foucault's analysis of governmentality. Within the broader research branch of “governmentality studies”, there are those who use this theoretical register in order to analyse liberalism (see, for example, Rose & Miller, “Political Power beyond the State: Problematics of Government”, note 6 above, pp 173-205, while others focus more on the securitising and normalising developments in modern societies (for example, François Ewald, *Der Vorsorgestaats*, (Frankfurt aM, Suhrkamp Verlag, 1993); Mitchell M Dean, *Governing Societies: Political Perspectives on Domestic and International Rule*, (New York, Open University Press, 2007).

⁴⁸Foucault, *The Birth of Biopolitics*, note 7 above, p 67.

The securitising dynamic tends to encroach all social spheres and leads to big administrative apparatuses. In fact, Foucault shows that the liberal art of government heavily depends on these features. But at the same time, Liberalism installs a critique of “governing too much”. Its economic dynamics seem to embrace all social spheres and evaluate every move under the aspect of efficiency and appropriateness. Liberalism establishes “exchange on the side of the market” and “utility on the side of the public authorities”.⁴⁹ It seems that there are two inter-connected and totalising dynamics in modern market society, which constitute modern governmentality: one economising, the other securitising.

This is why Foucault hesitates to give a teleological image of modern government. On the contrary, he reveals the internal struggles among these different dynamics and their contradictory articulation in different historical periods. He identifies “a series of governmental rationalities overlap, lean on each other, challenge each other, and struggle with each other”.⁵⁰ If internal tensions among these dynamics are acknowledged, it is necessary to have closer look at the concrete articulations in a particular period. Apparently, Foucault tries to meet this challenge by proposing a “periodisation” of modern governmentality. He draws on the origins of economic Liberalism in the Seventeenth and Eighteenth centuries, but also on developments in the Twentieth century: not only are his analyses of German *ordo-liberalism* and American neo-Liberalism objects of investigation, but Keynesian ideas and real existing socialism are also addressed.⁵¹ Foucault attempts to demonstrate how all these patterns represent articulations of heterogenous power systems evolving in the shadow of modern governmentality’s “line of force”.⁵² Even real existing socialism seems to articulate a more authoritarian and state-centred variety of governmentality. It does not represent a counter-movement against modern governmentality in general, only the way that

⁴⁹*Ibid.*, p 44.

⁵⁰*Ibid.*, p 313.

⁵¹*Ibid.*, p 75 *et seq.*, 215 *et seq.*, 69 & 92 *et seq.*

⁵²Foucault, *Security, Territory, Population*, note 7 above, p 108.

economic, securitising and statal dynamics are arranged, and differs decisively from Western societies.⁵³

Regarding these aspects – the periodisation as well as the whole idea of an inter-connected relation of securitisation and Liberalism – Foucault's argument seems to borrow some conceptual hints from (structural) Marxist accounts on modern statehood and capitalism.⁵⁴ Although, in many parts of the lectures, Foucault attacks Marxist accounts on modernity as being either economistic or state-centred,⁵⁵ the structure of his argument echoes the Marxist idea of a mutual instigation of public authority and the capitalist market economy. Furthermore, Foucault's conceptual reasoning tends to be framed by structural Marxist accounts on modern capitalism. It was Louis Althusser and Etienne Balibar who tried to refine their analytical perspective by distinguishing different "social formations" which are characterised through a specific "articulation" of dominant and inferior modes of production.⁵⁶ They conceived social formations not as merely mirroring economic mechanisms:

A plurality of instances must be an essential property of every social structure (...); the problem of the science of society must be precisely the problem of the forms of variation of their articulation.⁵⁷

Their starting-point was the assumption that capitalist formations always "articulate" different social structures in an articulated whole which is determined by the capitalist mode of production only "in the last instance".⁵⁸ Interestingly, we find a similar approach in

⁵³ Foucault argues that "Socialism is not the alternative to Liberalism. They do exist on the same level, although there are levels at which they come into collision (...)", (Foucault, *The Birth of Biopolitics*, note 7 above, p 94).

⁵⁴ Louis Althusser & Etienne Balibar, *Reading Capital* (1968), (London-New York, Verso Books, 1997); Nicos Poulantzas, *State, Power, Socialism* (1978), (London-New York, Verso Books, 2001).

⁵⁵ See, for example, his critique of functionalism; Foucault, *Security, Territory, Population*, note 7 above, p 109.

⁵⁶ Althusser & Balibar, *Reading Capital*, note 54 above, p 203 *et seq.*

⁵⁷ *Ibid.*, p 207.

⁵⁸ *Ibid.*, p 216. See, also, Ernesto Laclau & Chantal Mouffe's attempt to de-economise Althusser's concept of articulation, in: Laclau & Mouffe, *Hegemony and Socialist*

Foucault's attempt to differentiate among particular systems of power. It seems that he transfers this structure to the analytics of power as he distinguishes among the different dynamics of power (liberalism, sovereignty, disciplinary power, *etc.*), which are articulated within modern governmentality. This move allows Foucault to draw distinctions between different "periods" of modern governmentality and to examine the way in which inferior and dominant modes of power interact with each other. By introducing these conceptual aspects, Foucault's notion of market embedding, re-embedding or dis-embedding movements can be qualified.

First, Foucault highlights a dialectic of freedom and security that constitutes the horizon of modern power structures. Throughout his periodisation of power relations, he identifies different ways of articulating the varying dynamics and of arranging them through internal struggles among the totalising tendencies either of the market and/or security apparatuses. Above all, these securitising dynamics do not represent the main obstacle to the market society, they are a necessary pre-requisite, instead. Without the regulation of the "population", bio-politics and security *dispositifs*, no market society is imaginable. From the initial securitising dynamics, "the extension of procedures of control, constraint and coercion"⁵⁹ are inherent to political and economic liberalism.

Second, the idea of articulation implies that the concrete variety of "embeddness" is highly contingent and evolves around social struggles as well as stabilising or de-stabilising events. Apart from the fact that modern governmentality constitutes a "line of force"⁶⁰ which is almost impossible to avoid, different ways of arranging freedom and security can be localised.

To a certain extent, Foucault is more profound and more radical than Polanyi: his notion of embedding movements takes into account the emergence of the modern security state and the modern subject as well as the complex articulation of different power modes. The dark side of modernity does not just consist of commodifying dynamics;

Strategy - Towards a Radical Democratic Politics, 2nd ed., 2001, (London-New York, Verso Books, 1985), p 97 *et seq.*

⁵⁹ Foucault, *The Birth of Biopolitics*, note 7 above, p 67.

⁶⁰ Foucault, *Security, Territory, Population*, note 7 above, p 108

there are also normalising patterns and securitising moves which play a key role in modern market societies. Up to this point, Foucault's profoundness appears to provide a more nuanced approach to the making of market society. Not least, a lot of research on the transformation of modern capitalism has shown that we should not conceive the relationship of market regulation and (dis-embedding) market liberalisation as a zero-sum game. According to the zero-sum hypothesis, the more political regulation is imposed, the less marketisation can be observed and *vice versa*. But regulation theory and the varieties of capitalism approach have insisted convincingly that market liberalisation is itself part of market re-regulation and often affords new regulations as well.⁶¹ Even nowadays, public authorities and legal institutions cannot be regarded as innocent social institutions overwhelmed by financial market speculations. Instead, political and legal decision-making played a key role in creating a fertile ground for financial market capitalism.⁶² In this respect, Foucault's analysis of governmentality revises Polanyi's embeddedness theme and introduces a more profound notion of embeddedness.

But Foucault's argument on the mutual relegation of market-making and securitising dynamics turns out to be problematical in another aspect. He assumes an on-going trend of securitisation that starts with the invention of society and ends with modern administrative structures, including the welfare state and social insurance mechanisms.⁶³ In this way, he puts a lot of different, even colliding historical transformations into one (teleological?) setting that observes on an all-too-general level that the bio-political regulation of society is extended. Although Foucault opens up new possibilities for

⁶¹ See Peter A. Hall & David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, (Oxford, Oxford University Press, 2001); Robert Boyer & Yves Saillard (eds), *Regulation Theory: The State of the Art*, (London-New York, Routledge, 2001).

⁶² For the case of Germany, see the analysis of Alex Demirovic, in: *idem*, "Kehrt der Staat zurück? Wirtschaftskrise und Demokratie", (2009) 157 *Zeitschrift für kritische Sozialwissenschaft*, pp 589-605), and Peter Derleder, "Subprime Judikatur. Die Bewältigung der Finanzkrise und die Anforderungen an eine risikoadäquate Zivilrechtssprechung", (2009) 1 *Kritische Justiz*, pp 3-24) both showing how political re-regulations and legal decisions opened the floor for financial market speculation.

⁶³ For an exemplary Foucauldian study on the welfare state, see Ewald, *Der Vorsorgestaat*, note 47 above.

criticising administrative institutions, he fails to differentiate between the developments that represent a formative aspect of population policies and the very struggles of subalterns for social protection which led to welfare state arrangements. It is not that Foucault was not right in pointing out that the Fordist state establishes new power techniques.⁶⁴ However, in Foucauldian approaches, one can diagnose the on-going danger of collapsing the result of historical struggles into *one* securitisation movement. Foucault's position probably makes sense from the standpoint of a radical critique that he clearly advocates, although it can be problematical if Foucauldians lose the ability to assess historical conjunctures critically and (unintentionally) re-inforce the polemic on social protection and the welfare state, which we have witnessed in recent years. But it is also clear that Polanyi's romantic perspective on social protection, in general, misses the fact that "social protection" and market re-embedding policies can be the source of new types of domination. Accordingly, a closer examination of Foucauldian and Polanyian approaches is needed and how they relate to each other in a normative vein needs to be explored.

III. Subordinated Knowledge and Progressive Governmentality: Radicalising Polanyi?

In Section I, it was shown that Foucault draws on a broader notion of cognitive embeddedness (governmentality), and in Section II, it was pointed out that he carries out a particular way of "periodising" modern capitalist societies by introducing a dialectic of freedom and security. Although Foucault seems to share Polanyi's point of departure – the social embeddedness of markets and the economic embeddedness of social relations – his account of modern market societies provides a more pivotal role for administrative state apparatuses and the modern subject. Somehow, it seems that he takes Polanyi's dictum that all social relations are economically embedded more seriously than Polanyi himself. For Foucault, the liberal political economy represents a whole system of power and is not reducible to mere economic exchange, but is deeply rooted in epistemic, cultural and societal foundations. Above all, he reveals that the register of

⁶⁴ See, for example, Nancy Fraser's reading of Foucault's *œuvre*, *idem*, "From Discipline to Flexibilization? Rereading Foucault in the Shadow of Globalization", (2003) 10 *Constellations*, pp 160-171.

modern security *dispositifs* and Liberalism are both rich paradigms which rely most importantly on their own forms of knowledge. Both set in motion a politics of truth which coins the anatomy of modern political reason and brings to the fore problematisations which ultimately embed the advent of modern statehood and markets. Most notably, Liberalism is characterised by a complex interplay of truth-telling, governing techniques and the self-conduct of the subject. In this regard, a Foucauldian perspective on the embeddedness of markets could deliver an innovative contribution which could expand the “embeddedness-theme” to epistemic systems of power and the way in which they interact with political strategies and their subjectifying effects.

Apart from the fact that Foucault’s analysis of governmentality opens up new areas of research, a further, normative implication shines through. In the following, it is argued that a Foucauldian perspective could tackle some of the problems that have emerged in the recent debates on the embeddedness of markets and the pathways which lead beyond “disembedded” liberalism. Focussing on a history of the present, the affirmation that “we are all Polanyians” is questionable,⁶⁵ even when the economic crisis indicates the destructive outcomes of marketisation. Paradoxically, the exhausted dis-embedding of financial markets and over-accumulation does not lead to Polanyian re-embedding movements. Apart from a Polanyi-renaissance in different scientific disciplines, Polanyian alternatives, such as economic democracy and re-distribution, have recently *not* been at the heart of public debates. Instead, a rhetoric of ordo-liberal “control of the financial markets” through vague rules and ethical commitments (the responsibility of management) is emphasised and combined with the emergence of networks among executive state authorities in the financial and economic ministries and “system-relevant” global players.⁶⁶ Thus, to date, a progressive re-embedding movement inspired by Polanyian ideas of economic democracy is not

⁶⁵ See Jens Beckert, “The Great Transformation of Embeddedness: Karl Polanyi and the New Economic Sociology”, MPIfG Discussion Paper 07/01, 7.

⁶⁶ For this diagnosis and a governmentality perspective on the G20, see Kolja Möller, “Struggles for Law. Global Social Rights as an Alternative to Financial Market Capitalism”, in: Poul F Kjaer, Gunther Teubner & Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation*, (Oxford, Hart Publishing, 2011), pp 305-332.

on the agenda.⁶⁷ Instead of experiencing their heyday, it seems that Polanyians really have problem. In the public sphere, no real attempts of progressive re-embedding movements can be identified, while, in academic debates, the intuition that markets are embedded often amounts to a variety of soft-ordo liberalism (which also delivers “embedded” markets, as Foucault shows⁶⁸) and not to perspectives of liberal socialism and progressive re-embedding. Thus, the catchphrase that “We are all Polanyians now” is, perhaps, exaggerated and misleading, although Polanyian re-embedding movements appear to be a viable alternative to the pursuit of dis-embedded liberalism and its destructive potential.

In this regard, Foucault’s analysis of governmentality could be helpful in providing more radical perspectives which challenge the market liberal regime of truth. Since Foucault follows a practical interest with his reasoning on market society, it is absolutely/fundamentally important not to abide by a mere description of liberal government. Although the lectures on governmentality are often seen as rather “cold” analytics of power countering normative accounts on modernity,⁶⁹ Foucault himself construed his practical interest as follows:

By de-institutionalizing and de-functionalizing relations of power, we can see the respect in which they are unstable.⁷⁰

Thereby, Foucault tries to enhance the “accessibility” of these power relations to “struggles or attacks”.⁷¹ Thus, his lectures on governmentality tend to be part of larger project aiming at a “critique

⁶⁷ For economic democracy, see, seminally, Franz Naphtali, *Wirtschaftsdemokratie. Ihr Wesen, Weg und Ziel*, (Berlin, Verlagsgesellschaft des allgemeinen deutschen Gewerkschaftsbundes, 1928), and Ota Šik, *Humane Wirtschaftsdemokratie. Ein dritter Weg*, (Hamburg, Knaus-Verlag, 1979).

⁶⁸ Referring to German Ordo-Liberalism: “Government must accompany the market from start to finish”, Foucault, *The Birth of Biopolitics*, note 7 above, p 121).

⁶⁹ See Thomas Lemke, “An Indigestible Meal? Foucault, Governmentality and State Theory”, in: Michael A Peters, AC Besley, Mark Olssen, Susanne Maurer & Susanne Weber (eds), *Governmentality Studies in Education*, (Rotterdam, Sense Publishers, 2009), pp 35-54.

⁷⁰ Foucault, *Security, Territory, Population*, note 7 above, p 119.

⁷¹ *Ibid.*, p 120.

of power",⁷² and not praise of the innovative features of modern liberal rule. A careful reading of the lectures is able to identify an underlying strand of reasoning which strongly refers to the possibilities and – maybe more importantly – the boundaries of such critique. At least two normative aspects can be identified in Foucault's account of modernity:

The *first* aspect evolves around the normative implications of Foucault's main thesis. If modern governmentality articulates the dialectics of freedom and security, and Liberalism brings a complex interplay to the different levels of cognitive embeddedness to perfection, then every attempt to challenge this dynamic should operate at a level which is at least similar in its complexity and sophistication. Without its own politics of truth and mechanisms of "conduct", without a new governmentality that needs to be "invented",⁷³ it is impossible to challenge modern governmentality's "line of force".⁷⁴ Thus, new sites of veridiction, new ways of subjectification and counter-expertise are necessary in order to challenge the predominance of market Liberalism. According to Foucault, the critique of market Liberalism is a really hard job that can only bring promising alternatives to the fore by stepping beyond the established system of power, its politics of truth and complexity (and not de-differentiating the system by focussing solely on narrow economic market regulation without installing new cultural and epistemic *common sense*).

However, this progressive politics of truth does not need to be a "*creatio ex nihilo*" or voluntaristic ambition. For Foucault, there is a subcutaneous dynamic of subordinated knowledge that should be revealed and turned against the dominant power/knowledge structures. Thus, he refers *secondly* to the process of truth production and the internal struggles within it. According to him, there is not only a remarkable struggle surrounding the forms of knowledge, but also a struggle between the different sources and asymmetries within the constitution of knowledge. Beside the modern forms of knowledge and the scientific disciplines, a subversive type of

⁷² Honneth, *The Critique of Power: Reflective Stages in Critical Social Theory*, note 12 above.

⁷³ Foucault, *The Birth of Biopolitics*, note 7 above, p 94.

⁷⁴ Foucault, *Security, Territory, Population*, note 7 above, p 108.

“subordinated knowledge” can be detected. This aspect is most prominently pointed out in Foucault’s lectures at the *Collège de France*, entitled “Society must be defended”.⁷⁵ In the introductory lecture, Foucault highlights an “insurrection of subordinated knowledge” drawing on the struggles about epistemic hegemony.⁷⁶ Ultimately, the subcutaneous knowledge that Foucault identifies serves him as an anchor for critique. On the one hand, “subordinated knowledge” represents the very episteme which is overwhelmed and made invisible by the dominant forms of knowledge and is thus lost from view.⁷⁷ Foucault argues that, in the interior of modern institutions and systems of power, one can reveal the epistemic resources that directly lead to the possibility of criticising power relations by showing their non-natural and hard-fought character. Hence, one has to re-construct and to bring to the fore these “*blocs* of historical knowledge” which lie under the surface of modern systems of power.⁷⁸ On the other hand, he conceives subordinated knowledge as those forms of knowledge which do not meet the established criteria of hegemonic knowledge and are, therefore, disqualified.

According to Foucault, there are forms of knowledge which are subcutaneous to the existent epistemic hegemony. In both aspects, it is the task of critique to carry out an “historical knowledge of struggles” and make them visible to “recent tactics”. A “return” of the already existing knowledge is envisaged.⁷⁹ Subaltern forces should tackle the existent epistemic hegemony by introducing new problematisations and rationalities. Promising attempts to attack the prevailing power relations should evolve around an “insurrection of knowledge” against the procedures of truth-production and the invisibilisation of subordinated knowledge. Although very far from proposing meticulous ways of re-arranging marketisation and social protection, this approach can claim strong plausibility. Not least, the

⁷⁵ Michel Foucault, *In Verteidigung der Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 1999).

⁷⁶ *Ibid.*, p 21. See, also, Martin Saar, *Genealogie als Kritik. Geschichte und Theorie des Subjekts bei Nietzsche und Foucault*, (Frankfurt aM, Campus Verlag, 2007), p 219, who interprets this knowledge as “the experiences of underdogs within the struggle about epistemic hegemony”.

⁷⁷ *Ibid.*

⁷⁸ Foucault, *In Verteidigung der Gesellschaft*, note 75 above, p 21.

⁷⁹ *Ibid.*, p 20.

predominance of marketisation since the 1980s has, to a great extent, driven by new forms of knowledge, the hegemony of neo-liberal economics, the problematisation of a seemingly inefficient public sector, of statistics and expertise in favour of marketisation, and a general orientation towards an “entrepreneurial self”.⁸⁰ It is the obvious strength of the governmentality approach to emphasise that the possible alternatives to financial market capitalism can only emanate from new problematisations and types of conduct which shift the common sense towards other priorities.

Returning to the main question of whether Foucault is Polanyian, he is clearly advocating a more radical transformation of epistemic embeddedness as a necessary pre-requisite for social change. In Foucault, one will not find ideas on market socialism, economic democracy or de-commodifying market regulations, as they are emphasised in the Polanyian tradition. Instead, his prospects of critique affect the whole economy of power which is paradigmatic for Liberal governmentality. However, such Foucauldian analysis could explain why progressive re-embedding in a Polanyian sense has recently been weak: during the last decades, market liberalisation movements have established categories and sites of veridiction that cannot be tackled without a progressive governmentality paving the way for a progressive reform agenda. Such *progressive episteme* will not emanate from experts or élite circles but – as Foucault highlights – from subordinated knowledge and social struggles. To this extent, Foucauldians and Polanyians are related to each other.

⁸⁰ Bröckling, *Das unternehmerische Selbst. Soziologie einer Subjektivierungsform*, note 27 above.

Chapter 14

Critique, Time and Space: The Role of Concepts and History in Global Governance A Comment on Möller and Herberg

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Is Foucault a Polanyian? How much Foucault is already in Polanyi? Both authors remain relevant today because of their alternative analyses of the market-society nexus, Foucault because he showed the intricate entanglements of power and knowledge and the fact that government, economy and society are all related through this power-knowledge link by a certain hegemonic governmentality, Polanyi because of his historical critique of the utopia of the self-regulating market and the emergence of the social question in national polities as a reaction to global capitalism.

I will structure my comment by first discussing two of the core concepts tackled by Möller and Herberg, governance and liberalism, and by secondly addressing the relation between Foucault and Polanyi along the guiding terms of critique, time and space, which serve to highlight the differences and similarities of Polanyi and Foucault in a slightly different way to those proposed by Möller and Herberg. I will mainly highlight that Polanyi takes spatial and temporal relations into account, and not only focuses on the

embedding and dis-embedding of markets and societies, but crucially also includes the tension between global-market relations and local polity-building as the main source of tension in globalised economies without clear governance structures, which had been provided, for example, by the gold standard until the 1920s. When the London conference in 1933 for the renewal of the gold standard failed, it was up to the nations alone to react to the crisis of the capitalist economy (it is often forgotten that the Soviet Union coped quite well with the stock market crash of 1929).

Polanyi inserts the emergence of the social as a political concept within the nation-building process and the nationalist movements of the Nineteenth century into the historical context of the Nineteenth century, and ponders the tension between global trade and national closure as a reaction against global insecurities, beginning with the melting of the gold standard and the experience of economic crises in the 1920s and 1930s, and further exacerbated by a hypocritical reaction on the part of Western actors who, instead of honestly scrutinising the problems of Western economies, embraced a rhetorical *flucht nach vorn*, or flight forward, that would put faith in the self-healing qualities of markets.¹ Thus, the *Great Transformation* took place over a long stretch of time. Foucault, on the other hand, has not taken the global dimension into account, but makes his critique a critique of Western European enlightenment and state-building during which the invention of the state population, which turned “the peasants into Frenchmen” - to paraphrase Weber’s well-known study² - took place under the auspices of universalist claims. The idea of the single state, just like the idea of the single nation, is inherently a transnational idea, because it includes the logical acceptance of other states and nations as equals that base their claims on the selfsame universalistic claims. While Foucault is deconstructing the power-knowledge nexus that emerged during the spatialisation of universalistic claims within national territories, he develops a notion of power and knowledge that is much more refined

¹ For a definition of hypocrisy in the historical theory of Reinhart Koselleck, see his *Critique and Crisis. Enlightenment and the Pathogenesis of Modern Society*, (Cambridge MA, The MIT Press, 1988); for an application of the critique-crisis-hypocrisy nexus, see Hagen Schulz-Forberg & Bo Stråth, *The Political History of European Integration: The Hypocrisy of Democracy-Through-Market*, (London, Routledge, 2010).

² Eugene Weber, *Peasants into Frenchmen. The Modernization of Rural France*, (Stanford CA, Stanford University Press 2007).

than Polanyi's critique of the utopia of the self-regulating market. "Governmentality" is a combination of government (not governance) and mentality. After unveiling the connections between hegemonic discourse and the practice of political power, Foucault calls for the need to critique, the need to de-construct the existing power-knowledge nexus. But does he hint at something that can be linked to the approach which the German conceptual historian Reinhart Koselleck developed in his work on *Critique and Crisis*?

I. Governance and Governmentality

Governance is a concept. It is thus notoriously diverse in its meaning. It signifies practices of power and hierarchy as well as the deliberation arrangements within these practices and a possibly new way of practicing democracy. It is descriptive and discursive simultaneously. From its original setting within corporate structures, describing certain ways in which companies or organisations manage their interior hierarchies and decision-making structures, governance emerged as a "catch-all" concept. From the corporate world, governance made an impressive entry on the political and legal stage, even serving as a concept to denote a transition into firmer political structures at the level of the European Union as expressed in its *White Paper on Governance*. Furthermore, while variations of its meaning depend on the adjective which precedes it, good governance, transnational governance and global governance all connote different things such as efficiency, consensus, democracy, and state-of-the-art management, governance always inherently represents a market logic that is connected to transparency, ethical regimes and self-control, as well as democratic processes in areas and legal settings which are not covered by traditional legal regimes.

Governance emerged as a concept of transnational agency in the 1980s and more strongly in the 1990s. Initially, it was coined by the World Bank and other international organisations that operate in overlapping legal systems or, indeed, with no legal framework at all, but for their self-proclaimed adherence to good governance in transnational space. Transnational governance became a sort of self-regulating legal system,³ based upon ethical codes and promises to adhere to transparency. Interestingly, governance, over a certain

³ German allows for describing governance practices as *Selbstregieren*.

period of time, became almost a counter-concept to government, because the World Bank was looking for adequate, effective and reliable management of the funds provided to developing countries where government connoted simply appalling resource management and corruption.

The World Bank collocated good government in civil society, where the market and civil society (as opposed to the market and the state) triggered mutually re-inforcing - and reliable - dynamics. A book of great academic and political influence in this movement from state and market towards civil society and market was Robert Putnam's *Making Democracy Work* (1993). The book fit hand-in-glove with the World Bank's anti-corruption campaign under the term governance as it emerged after the 1980s. Putnam analysed the cultural and political differences between Northern and Southern Italy. It was not the state, Putnam concluded, but the civil society based upon republican virtues in the North Italian city states that provided the input for the more modern and progressive political and social organisation there, as compared to the southern parts which are regarded as retarded and corrupt.⁴ Governance remains a concept of very vague definition and the critical approach to governance as a self-regulating, self-legitimizing "regime of truth", as proposed by Martin Herberg, promises to be good theoretical access to a critical analysis of Transnational Corporations (TNCs) and other transnational actors. However, Herberg's call for "the Law" - if there is such a thing as the Law in the universal singular and with the definite article - to step in and clean up the mess seems to be less realistic when institutions that would legitimately formulate and represent "the Law" are lacking. Under which legal institutional umbrella are TNCs to be regulated? Do they fall under the responsibility of the UN or the OECD?

Originally, governance was defined by the World Bank as: *the exercise of political authority and the use of institutional resources to manage society's problems and affairs*. Beginning as a concept to reduce corruption, governance became embedded in a semantic field connected to softer variants of power and authority than government, and shares this field with terms such as "co-ordination", "co-

⁴ See Schulz-Forberg & Stråth, *Political History of European Integration*, note 1 above, Chapter 6.

operation", "collaboration", "networking", "partnership", etc., as key concepts. It connotes de-centralised, informal and fragmented decision structures with unclear responsibilities, whereas government connotes formal, centralised and hierarchical organisation with, at least in theory, clear responsibilities.

In general terms, *governance* occurs in three broad ways: 1) through top-down methods that primarily involve governments and the state bureaucracy, as, for example, in the case of the EU's Open Method of Co-ordination (OMC); 2) through the use of market mechanisms in which market principles of competition are employed to allocate resources while operating under government regulation; and 3) through networks involving public-private partnerships (PPPs) or with the collaboration of community organisations.

In contrast to the traditional business-related meaning of governance, some authors, such as James Rosenau, have used the term "global governance" to denote the regulation of inter-dependent relations in the absence of an overarching political authority.⁵ The term can theoretically be applied wherever a group of free equals needs to form a regular relationship. And while Foucault used the term *government*, and not *governance*, Herberg's terminological jump can be justified by the similarity of the inherent logics of governance and governmentality (at least to a certain degree). But is governance already such an all-encompassing regime of power that it is as hard to penetrate as governmentality? I do not believe this to be the case, despite the fact that the governance language has been all-pervasive in transnational settings in recent years.

Herberg rightly points to the problem of norms that are created through practice by TNCs, or, in fact, by any group of free equals acting beyond established legal spaces. This emergence of norms among actors is an everyday procedure that can be routinely witnessed in any society. New norms emerge and are, in some cases, not in all, absorbed by political and legal processes, and - as, for example, with many environmental laws - poured into legal form and practice. While the UN and the OECD try somehow to obtain a hold on the constantly emerging transnational governance regimes, the

⁵ James Rosenau, *Along the Domestic-Foreign Frontier. Exploring Governance in a Turbulent World*, (Cambridge, Cambridge University Press, 1997).

question remains as to where “the Law” is located and represented. Here, Herberg could elaborate on more practical grounds when he claims that “the Law” must assume the role of co-ordinator and moderator⁶ to get a grip on the regimes of truth. How is “the Law” supposed to achieve this? The example of ISO 14000 is a case in point for the problems of deliberating possibly global norms, because they become diluted on their way to consensus. Certainly, as Herberg points out, ISO 14000 is not able to prescribe the nitty-gritty of all technical problems, but nonetheless remains a benchmark. To find compromises between different legal traditions (of, for example, the USA and many European countries) in areas such as environmental protection or other risk- and pollution-related areas is a tough negotiating process, which drives home the insight of how powerful national traditions of engineering are. Different engineering cultures have different security standards and different implementation philosophies. Some, such as the US, employ a liberal logic based upon the notion that actors in a market will sooner or later act according to best practice because, if they did not, the market would punish them, and because of their rational choices; others, such as Germany and other EU states, follow a very different philosophy and make sure that government agencies monitor the “nitty-gritty” constantly and implement regulations. To call this difference in engineering cultures and the different implementation methods of global or transnational standards a Foucauldian moment of transfiguration might be a bit far-fetched. What Herberg may examine in greater detail is what different regimes of environmental governance understand as “effective forms of governance”, and how these different understandings translate into the formulation of different interests that need to be brought to a consensus within transnational deliberation settings.

II. Liberalism – What Liberalism?

The question of different philosophies of security and risk management as well as how governance may be most effective brings me to the chapter by Kolja Möller on the comparison of Foucault and Polanyi and his debate of liberalism. I will begin my comments first by pointing out that liberalism is not a clearly-defined term at all. And neither is neo-liberalism, as Foucault himself points out in his

⁶ Martin Herberg, Chapter 12 in this volume, page 353.

lesson on biopolitics of 31 January 1979.⁷ Secondly, I will focus on the different points of departure taken by Polanyi and Foucault in order to reach a more balanced perspective when comparing the two authors. Thirdly, I will argue against Möller's claim that no Polanyian reaction of closure can be witnessed in the face of the ensuing crises since the early 2000s. In the European Union in particular, such cases of closure occur.

- 1) The term neo-liberalism was coined in August 1938, during the so-called Walter Lippmann Colloquium held in Paris, as the reaction of a small liberal network in the face of the hegemonic concept of planning. In the 1920s and 1930s, planning, indeed, became the leading concept for organising the economy.⁸ The market had failed, the succession of crises had proven this as a seemingly unchangeable fact - at least to the contemporaries. Not only fascist Italy, which was, as a transitional political system, granted the historical position as the "saviour of civilisation" by the leading liberal thinker and teacher of Friedrich von Hayek, Ludwig von Mises in 1927,⁹ but also Western democracies such as France, Belgium, England and the USA had embraced planning. It was from this position of insignificance that liberalism prepared a comeback. Throughout the 1920s and 1930s, liberals from all over Europe and the US struggled over the meaning of the very term, "liberalism". The word had been disconnected from its semantic field: freedom, sustainable growth, development, well-being, happiness... all had been de-coupled from liberalism and re-coupled with planning, or worse, socialism. Liberalism connoted failed markets, mass unemployment, uncontrollable inflation, international cartels and national helplessness. Neo-liberalism, as it was coined in 1938, signified liberalism with a social face and not the market-radical liberalism associated with neo-liberalism today. There were other proposals for the renovation of liberalism among the international networks of scholars and activists. Among the most powerful ones was the notion of new liberalism proposed by Alexander Rüstow and developed in 1932 as a form

⁷ Michel Foucault, *Naissance de la biopolitique. Cours au Collège de France (1978-1979)*, (Paris, Gallimard, 1979), p 77 et seq.

⁸ For an overview, see Dirk van Laak, "Planung. Geschichte und Gegenwart des Vorgriffs auf die Zukunft", (2008) 34 *Geschichte und Gesellschaft*, pp 305-26.

⁹ Ludwig von Mises, *Liberalismus*, (Jena, Verlag Gustav Fischer, 1927), p 45.

of liberalism that embraces a strong state in the vein of Carl Schmitt. While Foucault sees Third Way reactions to the economic crisis, like that in the USA, as mere variations of liberal governmentality, these variations of the liberal theme have led to heated debates and fierce struggles; but he rightly points to the fact that the Godesberger programme of 1959 of the German social democrats meant nothing less than the final embrace of the market by the SPD. Despite all efforts to attain social justice, social justice was no longer to be attained through socialism.

Because of the semantic struggles between the Schmittian and the social version of a renovated liberalism, neo-liberalism is called “neo” and not “new”. From the 1920s to the 1940s, liberals would not abandon the central role of the market, however. It was still believed to lead the way, not the political or even the social. For Karl Polanyi, in opposition to his market utopian younger brother Michael, it was clear that global economic relations had developed a life of their own of global magnitude, disconnected from local social ties. European and American societies were paying the price for the invention of land, labour, and money as commodities and their global circulation.

Polanyi wrote in the same climate as his fellow economists of the 1940s, who assumed the end of capitalism. Polanyi’s ideas about a political economy that embraces key values and rights first, and then submerges the market to these, need to be seen in their historical context. He sees a tension between the global capitalist and the national closure of social and economic relations against the backdrop of very real experiences of crises and two world wars. Thus, while he is critical of the utopian idea of the self-regulating market, he is, at the same time, convinced that this doctrine is dying. He nevertheless blames it as the main cause of the world crisis.

- 2) When Möller rightly points out that Foucault has convincingly stressed the fact that the market itself is a social doctrine, and is not separate from society (and can thus also not be re- or dis-embedded), he should not forget that Polanyi’s position in 1944 was quite a unique proposal of a middle way at a time when two clear-cut ideologies were dominant: free market capitalism and state planning; and that Polanyi’s perspective was far from being “romantic” in

relation to social protection, but was an effort to save key values and rights.

While neo-liberalism and liberalism have many different meanings, it is, nevertheless, correct to claim that liberalism managed to regain the normative terrain that it had lost after the Second World War. While the early post-war logic of national and international economics was dominated by Keynesian notions of a pro-active state that embraces a demand-based market – and creates demand incentives if necessary – as opposed to the supply-based market ideology embraced by classical liberal doctrine and also by the American neo-liberals in the vein of Friedrich von Hayek and his disciple, Milton Friedman.

Just like Polanyi, Foucault should also, to some degree, be understood in the context of his time. In the late 1970s, the liberal doctrine had a clear enemy: socialism. Liberals were busy fighting socialism with the means of science by building neat, assumption-based scientific arguments that would show, beyond any doubt, how irrational and false socialism was; as opposed to the rational and true liberalism, of course. Rational choice and the notion of the individual-based free market in which humans would be able to build perfect and sustainable human relations became a prime weapon in the Cold War against the doctrine of planning, or, indeed, any form of interference of the state in the market.¹⁰ The intellectual beginnings of rational choice theory and its relations to notions of Western civilisation can be traced back to at least 1932 when Lionel Robbins published his foundational essay on the nature and significance of economic science.¹¹ Here, he significantly wrote that, if you scratched a would-be planner, you would usually find a would-be dictator, laying bare the character of Western economic science as being a normative social and political doctrine. To use both Polanyi and/or Foucault today would thus also necessitate a conscious contextualisation before embarking on a comparison or an uploading of their theories to today, when liberalism is experiencing another period of conceptual insecurity.

¹⁰ See Sonja Michelle Amadae, *Rationalizing Capitalist Democracy: the Cold War Origins of Rational Choice Liberalism*, (Chicago IL, University of Chicago Press, 2003).

¹¹ Lionel Robbins, *An Essay on the Nature and Significance of Economic Science*, (London, Macmillan, 1932).

- 3) Does the liberal globalisation credo really not face the winds of Polanyian closure? Sure, the financial crisis has not led to a failure of the banking system, which was regarded as system relevant, but it has severely damaged the self-confidence of Western ways of running the economy, and, at least in Iceland, a national election ousted the government that had brought high-risk banking to the far north and voted a left-wing social democrat in order to clean up the mess and make sure that no more utopian financial market bubbles threaten Iceland's economy. Furthermore, cases of closure should also not be expected in a schoolbook fashion, *i.e.*, in a way completely similar to the 1930s and 1940s. When the "True Finns" were among the winners of the Finnish elections in 2011, almost all European countries host politically-established populist and right-wing parties. All of them mobilise the European Union and economic globalisation as very tangible threats to national stability. Values, traditions, certainties: all is eroding in the face of evermore European integration and mobility, according to the populist logic. While governments in Europe still maintain that the European Union is based upon values of freedom, tolerance and the rule of law, maybe with the exception of Hungary, which tolerates anti-Semitic public claims, everywhere in Europe, a fundamentalist reaction against a thus-perceived erosion of traditions and national origins can be witnessed in Scandinavia, in the Netherlands, Belgium, Austria, Poland, *etc.* The European market realities as well as a fear of globalisation feed these movements. The Polanyian tension of a transnational market opposed to national social and political organisation is a European reality when a Europe *à la* von Hayek, to use Perry Anderson's words,¹² dominates notions of how to build a successful polity for a free market economy. Furthermore, has the German reaction to the European enlargement of 2004 not been a very tangible Polanyian moment? What did the Schröder government do? It sealed off the German labour market against Eastern European workforces, especially directed against its Polish neighbour, until 2011. Furthermore, when French president Nicolas Sarkozy calls *Renault* factories back home to France from Romania

¹² Perry Anderson, *The New Old World*, (London, Verso, 2010).

with the explanation that *Renault* was French after all, another example of national closure can be found.

The fact that there is a homogenous liberal creed can be safely regarded as a myth today. Instead, in the face of the financial crisis, the systemic shock of the banking crisis, the odd upsurge of the Tea Party liberal radicals, the rise of China as an alternative market economy, the strength of alternative market-based societies such as Brazil and India, and the conceptual insecurities within the Western core of market globalisation may all indicate an unraveling of the liberal global regime. Möller is certainly on the right track when he employs Foucault's approach to understanding the connection between markets and social imaginations. The very fact that the art of economic science entails a normative claim to a certain form of society as the true society should be taken as a point of departure to analyse variations of liberalism and contested claims on key concepts.

III. Critique as the Key to Regime Change and Regime Sustainability

The normative foundation of the neo-liberals forms one of the key elements alongside the claim of scientific truth. To overcome planning as the key approach thus entailed a complete overhaul of the normative landscape as well. The normative foundations of the neo-liberal post-war doctrine can be illustrated by the development of the liberal networks after World War Two. While Walter Lippmann was the key figure in 1938, he was not invited by Friedrich von Hayek when the Mont Pèlerin Society was founded in Switzerland in April 1947. Here again, leading liberal economists gathered and pondered ways in which liberalism could stage a comeback of global scope. Why was Lippmann not invited? It can be assumed that he was not invited because of his praise of John Maynard Keynes. In his book on the *Good Society* (1937), Lippmann mentions Keynes' then most recent insights and conclusions from only a year ago (1936) about unemployment as the only sustainable way in which the market economy may be organised without the help of an authoritarian state or dictatorship.¹³ To move from supply

¹³ Walter Lippmann, *An Inquiry into the Principles of the Good Society*, (Boston MA, Little, Brown and Company, 1937); John Maynard Keynes, *The General Theory of Employment, Interest and Money*, (London, Macmillan, 1936).

to demand, as Keynes did, and to thus move towards the possibility of economic stimulations emanating from the state, was indigestible for a large part of the liberal camp. But it was more than a mere scientific dispute. Why was Keynes such a strong enemy? Because his new theory meant an erosion of normative securities for the liberals. As Wilhelm Röpke explained in his book in 1950 entitled *Maß und Mitte* (an expression he preferred to be translated as *Measure and Moderation*), Keynes not only had an interesting economic theory and a practical solution to downward-facing economic cycles, he had also developed a perspective that meant nothing less than the erosion of norms. This erosion of norms was again nothing less than the very reason for the crisis of Western societies.¹⁴ To win back these norms, which included a normative history of civilisation and progress that had to be defended against possible perversions as well, was the task of liberal economists and activists. Foucault was acutely aware of the all-encompassing normative - and norm producing, disciplining, standardising - drive of the liberal project. To work against this all-encompassing discourse is a very difficult task, he rightly claimed.

As Möller interestingly points out, Foucault reminds us of the role of critique and the very possibility of critique against a knowledge-power nexus that has seeped into all corners of meaning-making and norm production. The liberals had an easy target; they could simply evoke the socialist alternative as a devilish counter-concept to the West and its ideals. Foucault also had a clear target: the liberal discourse, especially in the 1970s, was developed into a fully-fledged normative-political worldview that had reached all arenas of normative practice in Western societies.

Today, it is less obvious against whom critique should be addressed? How can counter-concepts be developed? By criticising the G20, the World Bank or the International Monetary Fund? The EU? Who

¹⁴ Wilhelm Röpke, *Maß und Mitte*, (Zurich, Rentsch, 1950), p 155 *et seq.* Röpke writes: "Lord Keynes (...) hat nicht nur demoliert, was morsch war, sondern dadurch, daß er einen wirtschaftspolitischen Pragmatismus predigte und gegen tief im moralisch-politischen Erdreich verwurzelte Prinzipien zu Felde zog, hat er sich zugleich als eine der stärksten Kräfte jener Aufweichung der Normen erwiesen, die das eigentliche Wesen unserer Gesellschaftskrisis ausmacht. (...) Ist es nicht die natürliche Ordnung der Dinge, die uns am Herzen liegt, in dem doppelten Sinne einer naturgemäßen, sozio-biologisch [sic!, HSF] richtigen Einbettung des Menschen und des 'ordre naturel' einer wohlgeordneten und wohleingehetzten Marktwirtschaft?" (My italics).

enacts and implements today's governmentality in a transnational space in which state, government and science are not territorialised? Here, it may be helpful to integrate not only an understanding of history as actors in context, but also an understanding of history as temporalisation of legitimacy claims as developed by the German conceptual historian Reinhart Koselleck.

The right to critique, indeed, the very concept of critique, emerged during the Enlightenment. This core claim is connected to the logic of the individual as the ultimate source of all sovereignty in social contract theories. In the interior moral space of the individual lies the ultimate right to critique because it is the very origin of all legitimacy.¹⁵ Inherent in all critique is a claim on the future, because critique entails an alternative to the present. Since the Enlightenment, all economic thought has been future-oriented; and thus is also past-oriented, because every claim on the future includes a re-interpretation of the past and the present, every future produces its history.¹⁶ This is another core feature inherent to modernity's claims on legitimacy.

In order to phrase legitimate critique, the hegemony about the meaning of key concepts must be fought for. Alternatives to the contemporary normative hegemony are thus not (only) about inventing new ideas and concepts, but also about re-interpreting existing concepts. The struggle over core concepts, be it against the hegemony of the utopian belief in the self-regulating market unearthed by Polanyi, or the normative notions of what citizens in a market economy should think and feel like, as unearthed by Foucault, includes a temporal dimension about re-interpretations of the past.¹⁷ When reflecting on the use of both authors in order to approach today's global complexities, this role of time and history

¹⁵ Reinhart Koselleck, *Critique and Crisis. Enlightenment and the Pathogenesis of Modern Society*, (Cambridge MA, The MIT Press, 1988 [1959]).

¹⁶ See my "Which Way to the Good Society? The Liberal Crisis and the Birth of Neo-Liberalism after the First World War", in: Hagen Schulz-Forberg (ed), *Zero Hours - Conceptual Insecurities and Ideas of New Beginnings in the Interwar Period from a Global Perspective*, (Brussels et al., P.I.E.-Peter Lang, 2011).

¹⁷ To give only one example: when the constitutional treaty of the European Union failed in 2005, the EU was faced with the need to imagine a new future and had to explain the failure of the past future that did not lead to the successful ending of a constitutional process.

could constitute a helpful additional perspective. Furthermore, normative tensions emerge from all claims on time that include tensions about the very territorialisation or spaces of implementation of these claims on time. Where should regimes of governance be enacted, framed, tamed? Today's reactions of closure against transnational and global regimes have not (yet?) arrived fully at the level of national political economies. But tendencies of populism, a new old claim on what true Finns, true Danes, true Dutch, *etc.*, are like, point towards cultural/ethnic reactions against a deeply secular logic of state legitimacy¹⁸ that is strongly influenced by the tension between spatial units of agency, that is, between global, European, regional, and national units.

There is no progressive cosmopolitan force inherent in critique, fundamentalists and populists do it too; just as there is no progressive force inherent to "the Law", and it is therefore very important to continue the reflections of Martin Herberg and Kolja Möller with the help of Polanyi and Foucault, and maybe Koselleck, in order to observe - both critically and creatively - transnational regimes of governance and governmentality that have moved beyond clearly-delineated territorialisations. Polanyi worked on the emergence of the social as a force which opposed global trade patterns; Foucault worked on the invention of society and population as representatives of a normative liberal order and ways of controlling this order by the state. Can we, by adding a conceptual approach to Polanyi and Foucault and their theories of power and critique, begin to deal with the conflicts and diverging knowledge practices of transnational regimes and their constant para-legal norm production? It looks promising.

¹⁸ See Mark Juergensmeyer, *Global Rebellion. Religious Challenges to the Secular State*, (Berkeley CA *et al.*, University of California Press, 2008).

Part III

**Constitutional Conflicts,
Human Rights and
Globalisation**

Chapter 15

Conflicting Constitutional Laws and Constitutional Pluralism in an Asymmetric Europe

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Our goal in this chapter is to show that a new wave of constitutional conflicts in transnational constellations challenges the role of national constitutions. At the same time, these developments have repercussions on the legitimacy of supranational, and transnational public legal orders: institutions erected by these condensed international treaty systems often lack democratic legitimacy and accountability. An additional goal is, therefore, also to describe the role of international tribunals in the constitutionalisation of the international legal order and to analyse the consequences of the action of these tribunals with regard to the role of national constitutions and national constitutional courts. We will discuss proposals for a conflict of laws approach and develop our own understanding of this approach in the context of human rights adjudication in Europe.

In an ideal Westphalian world - which never existed - there were no constitutional conflicts between nation-state constitutions (at a horizontal level), only *international* conflicts between states. In our contemporary post-Westphalian world, we are still searching for a new constitutional ideal,¹ a vision of “the” constitution of world society. Nonetheless, empirically as well as sociologically,² we can state that, during the last sixty years, Europeanisation and globalisation have created a new world order in which public international law plays a key role: step by step, Public International Law is changing into International Public Law.³ Amidst this movement, constitutionalism has moved to the transnational and supranational level, and transnational and supranational constitutionalism has permeated the nation state and its

¹ For different aspects of constitutionalism beyond the nation-state, see J Habermas, “Does the Constitutionalisation of International Law Still Have a Chance?”, in: *idem*, *The Divided West*, (Cambridge, Polity Press, 2006), pp 115-193; Bardo Fassbender, “The United Nation’s Charter as Constitution of the International Community”, (1997) 36 *Columbia Journal Of Transnational Law*, pp 529-619; both authors suggest - in one way or another - that international law can be (or has been) transformed into a transnational constitutional order. Others advocate constitutionalisation processes within subdivisions (“regimes”) of international law, see, for example, for a ‘constitutional’ understanding of WTO trade law, E-U Petersmann, “Multilevel Trade Governance Requires Multilevel Constitutionalism”, in: Ch Joerges & E-U Petersmann (eds), *Constitutionalism, Multilevel Trade Governance and Social Regulation*, 2nd ed., (Oxford, Hart Publishing, 2006, 2010), pp 5-57, and, for a critique of such an approach, M Krajewski, “Democratic Legitimacy and Constitutional Perspectives of WTO Law”, (2001) 35 *Journal of World Trade*, pp 167-186.

² See Poul F Kjaer’s chapter in this volume, entitled, “The Concept of the Political in the Concept of Transnational Constitutionalism - A Sociological Perspective”.

³ One crucial aspect is the development towards a “humanised law” (we follow Cancado Trindade here): the perspective of international law has changed; it is not exclusively bound to the interests of the states anymore, but also has to take the needs, interests, and rights of other international actors, including persons, into account. See Alicia Cebada Romero, “El Derecho internacional al servicio de una transformación democrática global”, in: Manuel Villoria & Isabel Wences (eds), *Instituciones, procesos y estructura de la cultura de la legalidad*, (Madrid, Los libros de la Catarata, 2010), pp. 195-224; *idem*, “Global Law: the Human Face of International Law”, in: Rainer Nickel & Andrea Greppi (eds), *The Changing Role of Law in the Era of Supra- and Transnational Governance*, (Baden-Baden, Nomos Verlag, forthcoming 2011); see, also, Stefan Kadelbach, “From Public International Law to International Public Law: A Comment on the “Public Authority” of International Institutions and the “Publicness” of their Law”, in: Armin von Bogdandy, Rüdiger Wolfrum, Jochen von Bernstorff, Philipp Dann & Matthias Goldmann (eds), *The Exercise of Public Authority by International Institutions*, (Berlin-Heidelberg, Springer, 2010), pp 33-49.

constitutional order.⁴ The primary and initial actors in this constitutionalisation processes were not the supranational and transnational courts, such as the ECJ, the ECtHR, or the WTO panels and appellate body, but the states themselves as the “masters of the treaties” (this term is borrowed from the notorious Maastricht decision of the German Federal Constitutional Court, FCC⁵). They were responsible for new legal treaty regimes that tend towards constitutionalism, and they agreed upon judicial oversight, for example, in the framework of the EU, the ECHR, and the WTO. The decision to grant a constitutional dimension to the international legal order is not a decision of the international institutions themselves but of the states. Once this decision is taken, the constitutional dimension will be gradually strengthened in those frameworks in which we find an international court, and this is even clearer if the court is open to individuals. As a result, the courts and panels erected by these condensed treaty regimes have become the sorcerer’s apprentices. They decide upon the structure and the fine-print of their respective legal order, including the basic principles and “values” embedded in them.⁶ They do not act in isolation from general international law, but

⁴ See, for an analysis of the growing constitutionalism discourse, Rainer Nickel, “Transnational Borrowing Among Judges: Towards a Common Core of European and Global Constitutional Law?”, in: *idem* (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, (Antwerp-Oxford-Portland OR, Intersentia, 2010), pp 239-261; Brun-Otto Bryde, “Konstitutionalisierung des Völkerrechts und Internationalisierung des Verfassungsrechts”, (2003) 42 *Der Staat*, p 62; *idem*, “The Constitutional Judge and the International Constitutionalist Dialogue”, (2005) 80 *Tulane Law Review*, p 203. Strong resistance against this development is reported from the U.S.; for example, in November 2010 legislative referenda were successfully lodged in the U.S. states of Oklahoma, Arizona, and Iowa, banning the use of “foreign or international law” in state courts. Oklahoma’s “Save Our State” amendment reads: “The courts shall not look to the legal precepts of other nations or cultures. Specifically, the courts shall not consider international law or Sharia law”. See <<https://www.sos.ok.gov/documents/questions/755.pdf>>.

⁵ This is the German Federal Constitutional Court’s terminology, famously shaped in its Maastricht decision (BVerfGE 89, 155 of 12 October 1993, cases no. 2 BvR 2134, 2159/92).

⁶ Starting with *van Gend & Loos* (1963), the ECJ has successfully interpreted the EC Treaty as a distinct and autonomous legal order, and has shaped the legal design of European law since then; most recently, it even defended a “constitutional identity” of the EU against the UN Charter; see the *Kadi and Al-Barakaat* judgements. In a similar, but less spectacular, way, the ECtHR has interpreted the Convention as a “living instrument”, which gives it a powerful tool to re-interpret the Convention and to adjust it to a changing societal environment; see, for example, ECtHR,

rather contribute to the interpretation and constitutionalisation thereof.

In a first step, we will define our understanding of constitution and constitutionalism for the purpose of this chapter. We address the meaning of the terms and ask how conflicts of constitutional laws at different levels are presently solved in a transnational environment. We opt for a reduced meaning of the terms “constitution” and “constitutional law” by limiting them to an established constitutional order whose norms are considered, from the domestic perspective,⁷ to be of a higher rank than the rest of the norms of this order.⁸ The European Convention on Human Rights challenges this higher rank of national constitutional law, and *vice versa*. Therefore, in a second step, we will discuss a number of cases in which the European Court of Human Rights (ECtHR) has challenged national constitutional courts, either by delivering a strikingly different interpretation of similar constitutional provisions, such as the freedom of press (the *Caroline* case), or by flatly rejecting any kind of supremacy of national constitutional law (the Bosnia case: *Sejdic and Finci*).

We present and analyse the European Convention of Human Rights and its court as a possible blueprint for transnational constitutional conflicts. We find that the court fulfils various functions, and that it is oscillating between jurisprudence on details such as the regulations on first names in Finland (the *Axl* case), and proactive decisions against severe and massive human rights violations. In this context, we endeavour to apply Christian Joerges’ idea of vertical and horizontal conflicts to the ECtHR and its jurisprudence. As the conflict of laws approach takes the inter-connectedness of legal orders into account and asks for methodological self-restraint, it addresses important aspects of transnational conflicts law. In

judgment of 16 December 2010, case of *A, B and C v Ireland*, application no. 25579/05, para. 234 with further detailed references to the jurisprudence of the Court.

⁷ From a perspective of international law, one can hold that international law is the highest level, the apex of the pyramid of norms; see Articles 27 and 46 of the Vienna Convention on the Law of Treaties, available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf >.

⁸ Two major features are: constitutional norms take up the first rank in legal hierarchy, and they can be amended or abandoned only under restricted conditions (by a super-majority or a referendum).

addition, his approach tries to find answers to the legitimacy *problématique* of transnational legal orders.

In a third step, we discuss the idea of constitutional pluralism and find that many contributions to the debate about constitutional pluralism refer to the situation in Europe in a very general sense. We hold this to be a mistake, because pluralism in the realm of the Council of Europe has a completely different meaning and structure than pluralism in the EU. We argue that a more precise approach is needed, an approach that adapts to the particular nature of the conflicts and collisions arising in the respective legal order.

In our concluding remarks, we concentrate on the European Court of Human Rights. We insist that the ECtHR system needs to take the fact of an asymmetric Europe into account, and that the ECtHR should re-define its role. In order to safeguard an appropriate degree of constitutional pluralism in the Council of Europe system, we propose a two-tier test that needs to be applied in order to resolve constitutional conflicts appropriately. This has to go hand in hand with a better clarification of the relations between the different layers of constitutionalism. The constitutional constellation at supranational and international levels cannot reckon without the member states and therefore without national constitutions. While it is true that, at international level, even the validity of domestic constitutional norms can be monitored, it is no less true that the courts, tasked with the duty of preserving constitutions beyond the state, are expected to acknowledge the existence of the domestic constitutions as well as to respect, as far as possible, the national constitutional consensus.

I. Constitutional Law, Domestic and Beyond

Traditionally, constitutional law is domestic. Its two major features are that constitutional norms take up the top rank in legal hierarchy, and that they can be amended or abandoned only under limited conditions (either by a super-majority or by a referendum). There is no law above the constitution. International law, or transnational and supranational law, cannot have a higher or an equal rank, surely, unless the constitution itself allows for it. Thus, from a domestic point of view, traditionally, the rank of international law is determined by the states and their respective constitutional order; in monistic systems, it automatically becomes part of domestic law, whereas, in dualistic systems, international law has to be transformed into

domestic law: there needs to be a legislative act of parliament that determines the domestic application of international law.⁹

Supranational law disturbs this well-ordered setting, and the EU legal order has caused nervous reactions on the part of a number of constitutional courts. The most recent example is the German FCC's Lisbon ruling in which the court expressly stated that there are constitutional limits to European integration, and that, if these limits *can* be overcome, it is only by creating a new German constitution.¹⁰

In contrast to this dramatic setting, transnational/international law appears less dangerous for local constitutionalism. WTO law is not directly applicable in the EU,¹¹ and the ECHR¹² has, for the most part, the rank of domestic law, but not the rank of constitutional law. In the member states of the Council of Europe (CoE), the Convention is not a constitutional document, independent from the domestic design with regard to the relation between domestic and international law. For example, in Germany and in Spain, although these countries follow different paths with regard to the applicability of international law (Germany has a version of the dualist system, Spain a monist system), the Convention has the rank of regular legislation. In both countries, the Convention prevails over regular legislation (in Spain,

⁹ Clearly, the solutions coming from the international legal orders are different (see the Vienna Convention). As a result, we can find another layer of conflicts between legal orders - the states can be held internationally responsible if the formulae laid out in their constitutions do not allow them to maintain their international legal commitments.

¹⁰ See *Bundesverfassungsgericht*, decision of 30 June 2009, cases no 2 BvE 2/08 and others, esp. paras. 216-219, 230-232, 332, available online in an English language version provided by the FCC at:

<http://www.bverfg.de/entscheidungen/es20090630_2bve000208en.html>. The fact that the Court also posts a French translation of the decision on its website shows that it believes its decision to be of utmost European importance. The Court even calls into question whether a new constitution would be free from the restraints of the "eternity clause" as laid down in Article 79.3 *Grundgesetz*, or whether this clause binds the (German) *pouvoir constituant* forever.

¹¹ This is standard jurisprudence of the ECJ; see the cases *FIAMM* and *Fedon*: Joined Cases C-120/06 P and C-121/06 P, *FIAMM SpA and Giorgio Fedon & Figli SpA v European Commission and Council of the EU*, judgment of 09 September 2008, paras. 111-112, available at: <<http://curia.europa.eu>>. For an in-depth analysis and critique of the jurisprudence of the ECJ, see Alicia Cebada Romero, *La Organización Mundial del Comercio y La Unión Europea*, (Madrid, Editorial La Ley, 2002).

¹² Until the Human Rights Act of 1998, the UK was a notable exception.

this is expressly regulated; in Germany, this is an effect of jurisprudence of the constitutional court), but it is not granted the same rank as constitutional law. Even though the constitutional courts of both countries have declared that constitutional rights have to be interpreted in accordance with the Convention (in Spain, this is directly ordered in Article 10 of the *Constitucion española*), this does not elevate the Convention to the same rank as constitutional law. Nonetheless, in the case of the ECHR, we can observe a trend towards a constitutionalisation of this legal order: an active court, combined with institutional reforms and remarkable extensions of Convention rights and guarantees by means of additional protocols, has transformed the Convention during the last 20 years into a fundamental document for the European public constitutional order.¹³

II. The Constitutionalisation of the ECHR: Two Types of Conflicts

This transformation process can be traced back to a number of important innovations and a successful institutional structure. In addition, the Parliamentary Assembly and the Ministerial Committee of the CoE have played an important role in the creation of new constitutional standards, for example, in the area of data protection.¹⁴ It has drafted and adopted additional conventions, such as the Social Charter, and it has created other monitoring institutions in the field of human rights: a human rights commissioner, ECRI (the European Commission against Racism and Intolerance), and other instruments.

¹³ For a detailed analysis, see Alicia Cebada Romero & Rainer Nickel, "El Tribunal Europeo De Derechos Humanos En Una Europa Asimétrica: ¿Hacia El Pluralismo Constitucional?", in: Francisco Aldecoa Luzárraga & Pablo Antonio Fernández Sánchez (eds), *El Espacio Jurídico Común Del Consejo de Europa*, (Seville, Ediciones Gandulfo, 2010), pp 791-820; and Alicia Cebada Romero & Rainer Nickel, "El Futuro Del Tribunal Europeo De Derechos Humanos: ¿Hacia El Protocolo 15?", in: Fernando Mariño Menendez (ed), *Derechos Humanos en Europa*, (Madrid, Boletín del Estado & Universidad Carlos III de Madrid, 2009), pp 237-274.

¹⁴ In the late 1970s, the Council of Europe elaborated the "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data" (Convention ETS No. 108). It was opened for signature on 28 January 1981. According to the CoE, it was "the first legally-binding international instrument with worldwide significance on data protection". It is open for signature for all countries, not only the CoE Member States: available at: <http://www.coe.int/t/dghl/standardsetting/DataProtection/default_en.asp>.

Taken together, these features of the Council of Europe and ECHR system characterise it as a condensed and extended treaty system, if compared to “normal” international treaties. Its supervisory structures are especially important: the Convention has installed a permanent court as a supervisory body that can be addressed directly by individuals, and this court can award pecuniary compensation (beyond traditional damages), and the execution of its judgments is supervised by the Committee of Ministers of the Council of Europe. The ECtHR delivers pilot judgments¹⁵ and decides hundreds of cases according to the findings in the pilot procedure; it issues preliminary injunctions, and it sometimes pays visits to countries if further clarification of facts and circumstances is necessary.

The court safeguards the “European Public Order” as embodied in the Convention and its Protocols. However, two distinct areas of conflict arise in this regard: when interpreting the Convention, the Court sometimes has to judge on constitutional issues in the member states, for example, on whether a given constitutional order does not protect or even violates Convention rights (Sub-section II.1). At the same time, the court has to take into account that there are different constitutional traditions and cultures, and that a number of legal problems are solved in completely different ways in the constitutional orders of the member states. These concepts are virtually in conflict when the court is confronted with one of them and has to define a European standard. This is the dimension of horizontal conflicts (Sub-section II.2). Even though these kinds of conflicts remain to some degree theoretical because the legal orders of the member states do not clash directly, it is still apt to call them “horizontal” because the court has to define a common level of protection.

II.1. Vertical Constitutional Conflicts

Conflicts of a vertical kind arise in two respects in particular: firstly, when domestic constitutional provisions violate the Convention, and

¹⁵ See the decision in the case *Broniowski v Poland*, (2005) 40 EHRR 495; *Sejdovic v Italy* (Grand Chamber), Judgment of 2 March 2006, Application No. 56581/00; Valerio Colandrea. “On the power of the European Court of Human Rights to order Specific non monetary measures: some remarks in light of the *Assanidze*, *Broniowski* and *Sejdovic* cases”, (2007) 7 *Human Rights Law Review*, p 396.

secondly, when the application or the interpretation of a domestic constitution violates the Convention.

It is somewhat rare for the Court to find that domestic constitutional law directly violates the Convention and to rule it to be “unconventional” illegal constitutional law. One of the most important cases which illustrates this is the case of *Sejdic and Finci v Bosnia and Herzegovina*,¹⁶ in which the Grand Chamber had to decide whether Articles 4 and 5 of the Constitution of Bosnia-Herzegovina, which itself is based upon the 1995 Dayton Agreement, violated the European Convention on Human Rights. The cases of *Sejdic and Finci* raise two fundamental questions: the first question is connected to the legal limits that have to be observed during peace negotiations, and the second question concerns the relations between different legal orders.

In the Bosnia cases, the appellants are a Roma and a Jewish citizen of Bosnia and Herzegovina, who were denied both the right to run for office as president, and to run for a parliament seat precisely because of their ethnic or religious origin as a Roma and as a Jew. Articles 4 and 5 of the Constitution of Bosnia and Herzegovina provide that only those persons who belong to one of the “constituent peoples” of the state: Bosniaks,¹⁷ Croats, or Serbs can enjoy the right to run for office in presidential or parliamentary elections. The “others”, who are members of other national, ethnic or religious minorities, including Jews and members of the Roma and Sinti minority, are “constitutionally” excluded from these posts.

Both the UN Human Rights Committee as well as the Committee of the Convention for the Elimination of all forms of Racial Discrimination (CERD) have delivered statements (“concluding observations”) in which they recommend the state of Bosnia-Herzegovina to modify its constitution. The European Commission

¹⁶ Cases no. 27996/06 and 34836/06, *Dervo Sejdic and Jakob Finci v Bosnia and Herzegovina*.

¹⁷ The “Bosniaks” are an artificial creation of the civil war. Originally, those who are nowadays referred to as “Bosniaks” were simply members of the muslim population in the former Socialist Republic of Yugoslavia, traditionally rooted in Bosnia-Herzegovina. During the war (1992-95), they started to call themselves “Bosniaks”. “Bosniaks” are not identical with Bosnians; this term comprises all citizens of Bosnia-Herzegovina, independently of their ethnic origin or religious affiliation.

for Democracy through Law (better known as the Venice Commission) also issued a statement on the constitutional situation in Bosnia-Herzegovina. It includes the following considerations:

In the present case, the distribution of posts in the State organs between the constituent peoples was a central element of the Dayton Agreement making peace in Bosnia and Herzegovina possible. In such a context, it is difficult to deny legitimacy to norms that may be problematic from the point of view of non-discrimination but necessary to achieve peace and stability and to avoid further loss of human lives.

As already stated above, the constitution is based upon compromises reached during negotiations for the Dayton Agreement, and the distribution of posts between the “constituent peoples” fighting each other in Bosnia-Herzegovina was a crucial element of the peace accord.

It appears evident that the constitution of Bosnia-Herzegovina violates the international parameters of human rights protection, but, according to the opinion expressed by the Venice Commission, this was precisely the price that had to be paid in order to safeguard peace. On the other hand, the Commission also declared that Bosnia should change its constitution as the present circumstances allow for the beginning of a reform process that guarantees the representation of all ethnic groups, and that the present constitutional setting is incompatible with Article 14 in connection with Article 3 of Protocol 1 and Article 1 of Protocol 12 to the Convention.

This case not only shows, in crystal-clear form, the dilemma between peace and human rights, but is also relevant from a different perspective, namely, with regard to the relation between legal orders. The Bosnian Constitutional Court has decided upon this issue, in its Decisions U 5/04 of 31 March 2006 and U 13/05 of 26 May 2006. In these decisions, the Court held that it lacks jurisdiction for a judgment about the question of whether the Constitution is compatible with the ECHR, because, while the Convention has priority over regular statutes, it neither has priority over the Constitution of Bosnia and Herzegovina nor over the Election Act of

2001. The Bosnian Constitutional Court declared the requests inadmissible.¹⁸

The 2009 decision of the ECtHR flatly declares that there have been numerous violations of the Convention. This fairly obvious result, however, is complemented by an initial remark on the lack of democratic legitimacy of the Bosnian constitution. In the preliminaries of its Grand Chamber decision, the ECtHR already prepared the ground for its clearly worded decision: in its description of the case it states that:

the Constitution was drafted and adopted without the application of procedures which could have provided democratic legitimacy.¹⁹

This passage, albeit not part of the core opinion of the court, can be read as a justification for the fact that this is not a “normal” case in which the Court only interprets human rights somewhat differently from a national court. In these regular cases, the Court never mentions or analyses the democratic quality of a constitution, or

¹⁸ Decisions no. U 5/04 and U 13/05, available at: <<http://www.ccbh.ba/eng/odluke>>. Both proceedings were initiated by Mr Sulejman Tihić, the Chair of the Presidency of Bosnia and Herzegovina at the time of filing the request. In the case U 5/04, the Court holds:

“14. ...the Constitutional Court notes that the rights under the European Convention cannot have a superior status to the Constitution of Bosnia and Herzegovina. The European Convention, as an international document, entered into force by virtue of the Constitution, and therefore the constitutional authority derives from the Constitution and not from the European Convention itself....

16. In light of the aforesaid, the Constitutional Court concludes that it falls out of the scope of its competence to decide in the present case on the conformity of certain provisions of the Constitution of Bosnia and Herzegovina with the European Convention and its Protocols.”

¹⁹ ECtHR, Case of *Sejdic and Finci v Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, judgment of 22 December 2009:

“6. The Constitution of Bosnia and Herzegovina [...] is an annex to the General Framework Agreement for Peace in Bosnia and Herzegovina (“the Dayton Peace Agreement”), initialled at Dayton on 21 November 1995 and signed in Paris on 14 December 1995. Since it was part of a peace treaty, the Constitution was drafted and adopted without the application of procedures which could have provided democratic legitimacy. It constitutes the unique case of a constitution which was never officially published in the official languages of the country concerned but was agreed and published in a foreign language, English. [...]”

judges its degree of legitimacy. In contrast to these normal cases, here the Court expressly overrides a central domestic constitutional provision that defines the democratic process of a constitutional entity. It was clearly aware of the constitutional conflict with which it was confronted: a conflict between the Convention and a national constitutional order. Its reasoning seems to suggest that the lack of democratic legitimacy of the Bosnian Constitution justifies this fundamental interference in the domestic legal order. This “birth defect” of the Bosnian Constitution may have made it easier for the Court to uphold the European public order embedded in the Convention and its Protocols against a constitutional construct that guaranteed peace, but which also broke fundamental principles of human rights.²⁰

Another example of a vertical conflict - and of a creeping constitutionalisation of the ECHR legal order - can be found in the *von Hannover v Germany* decision of the European Court of Human Rights.²¹ This decision re-defined - and strained - the relationship between the German Federal Constitutional Court (FCC) and the ECtHR.

The European Convention on Human Rights had, for a long time, only been an additional instrument of human rights protection in Germany (as in most European Member States). Due to the comprehensive guarantees of basic rights in the *Grundgesetz* of 1949 and the active role of the FCC in the implementation of these rights in the German legal order, the 1950 Convention had very limited significance in Germany for a long period of time. Only since the intensifying of the European integration in the 1990s and the introduction of a “new” ECtHR through Protocol 11 to the Convention has it gained increasing importance in the national context. Three particular reasons can be identified for this development: access to the ECtHR is much easier now than it was before 1998, when admissibility applications were first considered by

²⁰ It has to be mentioned, however, that the Bosnian parliament voted upon a constitutional amendment, but the proposal did not obtain the necessary super-majority. This can also be read as a democratically-legitimated confirmation of the constitution.

²¹ Case of *von Hannover v Germany*, application no. 59320/00, judgment of 24 June 2004.

the European Commission on Human Rights; a public relations offensive after 1998 increased awareness about the ECtHR within the populations of the Member States; and finally, the number of contracting states of the Council of Europe has risen dramatically, so that nowadays 47 countries have signed the Convention, and the ECtHR's 47 judges have to deal with tens of thousands of applications. According to statistical data, the backlog of cases is impressive: on 1 January 2009, approximately 97,300 applications were pending before a decision body.²² Due to the large number of judgments delivered, the Court even had to establish an internal clearing-house in order to keep track of its own jurisprudence.

The *von Hannover* judgment is remarkable because it reviews²³ a "hard case" in the jurisprudence of the German FCC - and it rejects the FCC's wider concept of freedom of the press in favour of the right to privacy of VIPs. The case dealt with the publication of secretly shot photos, all of them showing Caroline von Hannover, Princess of Monaco, in a variety of situations. Both courts had to balance the rights involved. The German FCC declined to differentiate between "useful" and "useless" information delivered by the press, and also rejected the idea that pure entertainment in the tabloid press is not part of the debates of general interest, and is not, therefore, protected by the freedom of the press.²⁴ In contrast to this, the ECHR demands that photos and/or articles in the press need to contribute to a debate of general interest in order to survive the breach-of-privacy test:

63. The Court considers that a fundamental distinction needs to be made between reporting facts - even controversial ones -

²² For more detailed information, see the ECtHR Report *50 Years of Activity - The European Court of Human Rights. Some Facts and Figures*, available at: <<http://www.echr.coe.int/NR/rdonlyres/65172EB7-DE1C-4BB8-93B1-B28676C2C844/0/FactsAndFiguresEN.pdf>>.

²³ Technically, however, the ECtHR cannot "review" national law or national decision - it can only state a violation of convention rights and grant a just compensation, see Articles 41 and 46 of the Convention.

²⁴ See paragraphs 97-98 of the first decision in this matter which laid the constitutional ground for later decisions: FCC, judgment of 15 December 1999, Case no. 1 BvR 653/96, available in German at: <http://www.bverfg.de/entscheidungen/rs19991215_1bvr065396.html>. The second decision was subject of the ECtHR decision: FCC, judgment of 26 April 2001, case no. 1 BvR 758/97 *et al.* An English translation can be found at: <http://www.bverfg.de/entscheidungen/rk20010426_1bvr075897en.html>.

capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of 'watchdog' in a democracy by contributing to 'impart[ing] information and ideas on matters of public interest' [...], it does not do so in the latter case.

Following a stricter concept of the freedom of the press, as is followed, for example, in France, the ECHR held that no watchdog function had been exercised in the case before it,²⁵ and it declared that there had been a violation of Article 8 of the Convention. With this decision, it materially re-defined the content of the right to freedom of the press for all 47 member states of the convention.

The decision is an example of conflicting conceptual overlap, of a *dedoublement*: both the German Constitution and the Convention contain a right to privacy and a guarantee of the freedom of the press. The obvious question in such a context - who is the final arbiter? - can be answered easily: formally, the ECtHR can only state a violation of Convention rights and grant just compensation, see Articles 41 and 46 of the Convention, but it cannot overturn the decision of a domestic court. The legal situation, however, is far more complex than this. According to the jurisprudence of the FCC, courts are generally obliged to take the jurisprudence of the ECtHR into account (whereby the term "generally" needed closer definition), and if a court disregards the reasonings of the ECHR, the claimant can successfully lodge a constitutional complaint: the neglect of ECtHR decisions potentially constitutes, in itself, a violation of the *Rechtsstaat*/rule of law principle.²⁶ In the *von Hannover* case, later decisions both of the

²⁵ "The Court considers that the publication of the photos and articles in question, the sole purpose of which was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society despite the applicant being known to the public [...]", paragraph 65 of the judgment.

²⁶ This jurisprudence was expressly confirmed in the infamous *Görgülü* case, available in English at: http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html (judgment of 14 October 2004, case no. 2 BvR 1481/04). Mr Görgülü had successfully lodged a complaint according to Article 34 of the European Convention. The lower court ignored the decision of the ECtHR in favour of Mr Görgülü, and the FCC

Bundesgerichtshof (Federal Court of Justice) and of the FCC integrated the ECtHR position into their judgments, although not without adding certain nuances to their interpretation of the right to freedom of the press.

The *von Hannover* decisions, whose twists and turns cannot be fully explored here, confirm the thesis of an on-going, conflict-laden constitutional discourse about the contents and limits of fundamental rights. Domestic courts, and constitutional courts, increasingly apply the art of distinction, well-known to common law countries, in order to avoid head-on collisions with the ECtHR. This tactic of avoidance represents a soft answer to the potential ambitions of the ECtHR to become the constitutional court of Europe.

II.2. Horizontal Constitutional Conflicts

The ECHR has been heavily criticised in recent times for its “intrusive” and “too detailed” judgments.²⁷ For example, the decision of the ECtHR in the *von Hannover* case has been greeted, almost unanimously, with severe criticism, and it has caused even alarmist and angry comments in Germany. The *Taxquet* decision of the ECtHR on jury trials not only stirred emotions in Belgium, from where the

delivered its judgment of 14 October 2004. In the following time, the lower court again ignored the ECtHR jurisprudence, which led to another - successful - constitutional complaint: http://www.bverfg.de/entscheidungen/rk20050405_1bvr166404.html. The lower court still ignored the judgments of the ECtHR and the FCC. In its decision on the third - successful - constitutional complaint of Mr Görgülü the FCC plainly accused the lower court of arbitrariness. Criminal proceedings against the judges of the lower court are pending.

²⁷ Lord Hoffmann, one of the most prominent UK law lords, has publicly criticised the ECHR and its jurisprudence as “inconsistent”, that the court has “assumed power to legislate”, and that its decisions are too intrusive: “It has been unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe”. Lord Hoffmann, “The Universality of Human Rights”, Judicial Studies Board Annual Lecture, London, 19 March 2009, available at:

http://www.jsboard.co.uk/downloads/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.doc, p. 14 & 21. See, also, the (critical) comment by Afua Hirsch: “Judges: can’t live with ‘em...”, *The Guardian*, 06 April 2009, available at:

<http://www.guardian.co.uk/commentisfree/libertycentral/2009/apr/06/law-eu>.

case originated, but also in Norway, where the criminal court system shows similar features and where the fear is rising that the country will have to adopt a completely new system of criminal procedure prescribed by the ECtHR.²⁸ This criticism is based upon the idea that the court should respect legal and constitutional diversity in Europe as far as possible: many authors in this debate demand that the court should refrain from solving what we have defined here as horizontal conflicts, *i.e.*, from levelling conceptual differences between the member states about the scope and the range of protection that Convention rights should enjoy. By simply imposing one solution that is supposed to fit all member states, as the Court did in the *von Hannover* case, it moves closer to a role of *the* constitutional court of Europe.

However, the court's jurisprudence is not as consistent as some of the criticism suggests. The core rights of the Convention (Articles 8 to 11: right to respect for private life, freedom of religion, freedom of expression, freedom of assembly and association) contain a provision that allows for restrictions of a Convention right only if they are "prescribed by law and are necessary in a democratic society". It is clear that this leaves a lot of room for interpretation, and that the ECtHR has the power to restrict itself to the protection of a constitutional minimum.

In addition, according to the ECtHR's jurisprudence, member states have a margin of appreciation; within its limits, they can impose restrictions on rights without violating the Convention. For example, in the *Hirst* case about prisoner's rights to vote in the UK parliamentary elections, the court held:

There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.²⁹

²⁸ IL Backer, "Definition and Development of Human Rights in the International Context and Popular Sovereignty - A Comment", presented at the UNIDEM Seminar Frankfurt am Main, 15-16 May 2009, p 8, on file with the authors.

²⁹ ECtHR, Grand Chamber. Case of *Hirst v The United Kingdom* (no. 2), Application no. 74025/01, judgment of 06 October 2005, para. 61.

Clearly, it is the ECtHR that defines the limits of this margin:

It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.³⁰

This can lead to a definition of new legal benchmarks:

Therefore, while the Court re-iterates that the margin of appreciation is wide, it is not all-embracing. Further, although the situation was somewhat improved by the 2000 Act which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.³¹

The margin of appreciation doctrine was particularly important in cases of a regime change:

The Court has held that less than full compensation may also be necessary *a fortiori* where property is taken for the purposes of 'such fundamental changes of a country's constitutional system as the transition from monarchy to republic' (see *The former King of Greece*, cited above, § 87). The

³⁰ *Ibid.*, para. 62.

³¹ *Ibid.*, para. 82.

State has a wide margin of appreciation when enacting laws in the context of a change of political and economic regime (see, in particular, *Kopecký v Slovakia* [GC], no. 44912/98, § 35, ECHR 2004-IX). The Court has reaffirmed this principle in *Broniowski* (cited above, § 182), in the context of the country's transition towards a democratic regime, and has specified that rules regulating ownership relations within the country 'involving a wide-reaching but controversial legislative scheme with significant economic impact for the country as a whole' could involve decisions restricting compensation for the taking or restitution of property to a level below its market value. The Court has also reiterated these principles regarding the enactment of laws in 'the exceptional context of German reunification' (see *Von Maltzan and Others v Germany* (dec.) [GC], nos. 71916/01, 71917/01 and 10260/02, §§ 77 and 111-12, ECHR 2005-V, and *Jahn and Others*, cited above).³²

The ECtHR applies the criterion of margin of appreciation, which is in line with the subsidiary character of the protection that the Convention offers, with a surprising diversity. Sometimes, the court refers to the margin of appreciation, but later, in its analysis of the case, the criterion is watered down, up to a point where the resulting decision is barely reconcilable with the notion of a margin of appreciation: there is no margin left to speak of.³³ In other cases the court not only applies the criterion, but also clearly defines the result of the approach to complex legal questions from a pluralistic perspective. A paradigmatic case, in which the court fully applied this kind of approach, is the case *Odièvre v France*.³⁴

In this case, the court acknowledges that there is a conflict between the interests of the adopted child and the interests of the biological mother. The former wants to know who is his/her mother whereas the mother wants to hide her motherhood. The mother cannot be

³² Grand Chamber, case of *Scordino v Italy* (no. 1), application no. 36813/97, judgment of 29 March 2006, para. 98

³³ See, for example, the *Axl* case (Finland), on the right of parents to call their child after Axl Rose, the lead singer of the band "Guns and Roses": Case of *Johansson v Finland*, application no. 10163/02, judgment of 06 September 2007, especially paragraph 38.

³⁴ Application no. 42326/98, decision of 13 July 2003.

forced to unveil her identity. The information about her identity can only be transmitted to the child in the event that she gives her consent. The court states:

The child's vital interest in its personal development is also widely recognized in the general scheme of the Convention (...) On the other hand, a woman's interest in remaining anonymous in order to protect her health by giving birth in appropriate medical conditions cannot be denied.³⁵

The court holds that:

[t]here is also a general interest at stake, as the French legislature has consistently sought to protect the mother's and child's health during pregnancy and birth and to avoid abortions, in particular illegal abortions, and children being abandoned other than under the proper procedure. The right to respect for life, a higher-ranking value guaranteed by the Convention, is thus one of the aims pursued by the French system.

And it proceeds:

In these circumstances, the full scope of the question which the Court must answer – does the right to know imply an obligation to divulge? – is to be found in an examination of the law of 22 January 2002, in particular as regards the State's margin of appreciation (...). [T]here are different ways of ensuring 'respect for private life', and the nature of the State's obligation will depend on the particular aspect of private life that is at issue.

The paragraph in which the Court further develops the scope of the application of the criterion of "margin of appreciation" is no. 47:

The Court observes that most of the Contracting States do not have legislation that is comparable to that applicable in France, at least as regards the child's permanent inability to establish parental ties with the natural mother if she continues

³⁵ *Ibid.*, paragraph 44.

to keep her identity secret from the child she has brought into the world. However, it notes that some countries do not impose a duty on natural parents to declare their identities on the birth of their children and that there have been cases of child abandonment in various other countries that have given rise to renewed debate about the right to give birth anonymously. In the light not only of the diversity of practice to be found among the legal systems and traditions but also of the fact that various means are being resorted to for abandoning children, the Court concludes that States must be afforded a margin of appreciation to decide which measures are apt to ensure that the rights guaranteed by the Convention are secured to everyone within their jurisdiction.

And finally, the court signals that:

[t]he French legislation thus seeks to strike a balance and to ensure sufficient proportion between the competing interests. The Court observes in that connection that the States must be allowed to determine the means which they consider to be best suited to achieve the aim of reconciling those interests.

It finally comes to the conclusion that there has not been a violation of Article 8 of the Convention.

We have literally quoted a number of paragraphs of the decision because we think that, in these passages, the court perfectly unfolds the approach which we support.³⁶ The result is a margin of

³⁶ In the same line we could also cite the decision in the case *Mikulic v Croatia* (decision of 7 February 2002), even if in this case the court finally sentenced Croatia for a violation of Article 8. The following paragraphs are worth to be cited: "However, the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual; and in both contexts the State enjoys a certain margin of appreciation (see, for instance, Keegan, cited above, p 19, § 49, and *M.B. v United Kingdom*, no. 22920/93, Commission decision of 6 April 1994, Decisions and Reports 77-A, p 116).

The States parties to the Convention have different solutions to the problem that arises when a putative father refuses to comply with court orders to submit to the tests which are necessary to establish the facts. In some States the courts may fine or

appreciation granted to the states, which guarantees the preservation of a certain degree of constitutional pluralism. This approach accepts that various combinations of the different variables in the game can be combined, and that they produce the same result: an acceptable degree of protection of the rights that are guaranteed by the ECHR.³⁷ As is pointed out in the joint dissenting opinion by the justices Bratza, Bonello, Loucaides, Cabral Barretto, Tulkens and Pellonpää, it seems that one can deduct from this decision that the margin of appreciation granted to the states “was greater in the instant case *in view of the diversity of practice to be found among the legal systems and traditions...*”.³⁸

A third way of giving room for constitutional pluralism is the idea that some legal systems are generally “trustworthy”, *i.e.*, that the institutions and the mechanisms of legal protection generally guarantee the protection of Convention rights, so that the court can loosen its control regime. This – quite novel – technique was first applied in the case of the EU/EC.

The ECtHR is constantly in a situation in which it needs to define the “European Public Order” embodied in the European Convention on Human Rights, while, at the same time, it has to pay its tribute to the

imprison the person in question. In others, non-compliance with a court order may create a presumption of paternity or constitute contempt of court, which may entail criminal prosecution.

A system like the Croatian one, which has no means of compelling the alleged father to comply with a court order for DNA tests to be carried out, can in principle be considered to be compatible with the obligations deriving from Article 8, taking into account the State's margin of appreciation.”

³⁷ In his concurring opinion, Judge Rozakis criticises the relevance given to the margin of appreciation by the Court. He tries to prove that, in reality, the criterion has played a rather minor role in the decision-taking process.

³⁸ Paragraph 10 (emphasis added). They criticise the approach based upon diversity by directly pointing at the absence of a real diversity among the practice of the Member States: “by relying on the alleged diversity of practice among the legal systems of traditions (...) as a justification for the margin of appreciation and for declaring the mother’s absolute right to keep her identity secret compatible with the Convention, the majority have stood the argument concerning the European consensus on its head and rendered it meaningless. Instead of permitting the rights guaranteed by the Convention to evolve, taking accepted practice in the vast majority of countries as the starting point, a consensual interpretation by reference to the virtually isolated practice of one country (...) is used to justify a restriction on those rights”.

national constitutional orders of the Member States. This constellation is tempting for a court with a tendency for judicial activism, and the Court has, more than once in recent times, been accused of overstepping its territory. In its *Bosphorus*³⁹ decision, however, the ECHR went down a different path: it had to define its role *vis-à-vis* the EC/EU legal order, and it came up with a distinctive and creative solution. It stated that the EC/EU legal order provides for a sufficient degree of legal protection, and that a complainant has to show, in his or her case, that this general level of protection has not been met. This hurdle, although not as steep as the *Solange II* admissibility hurdle set up by the German FCC in relation to constitutional oversight over EC/EU law,⁴⁰ represents another possible path for the settlement of conflicting constitutional orders: mutual recognition as the rule, stricter scrutiny as the exception.

In its decision on the *Bosphorus* case⁴¹ the court held that “as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides”, it will not undertake a thorough examination of the act in question:

If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation.⁴²

³⁹ ECtHR, *Bosphorus Hava Yollari v Ireland*, Application no. 45036/98, judgment of 30 June 2005, available at: <<http://www.echr.coe.int/echr/en/hudoc>>.

⁴⁰ See BVerfGE 73, 339 (1986), *Solange II*: Constitutional complaints that are based upon a claim for the unconstitutionality of EC/EU law are inadmissible unless the complainant shows in a detailed analysis that the *general* level of human rights protection within the EU has sunk below the *general* level of protection guaranteed by the German constitution. This Herculean task that has not been met in the last 25 years since the judgment was handed down in 1986. The latest judgment in EU matters, the *Treaty of Lisbon* decision (note 10 above) expressly allows for complaints directed at EU legal acts which are *ultra vires*, but it has again confirmed the *Solange II* rationale with regard to constitutional rights protection.

⁴¹ Case *Bosphorus Hava Yollari Turizm v Ireland*, application no. 45036/98, decision of 30 June 2005.

⁴² *Ibid.*

Even if we take into account that this is a special case because the EC was not a member of the Convention, this idea of “general trust” can be introduced into the general debate about the role of the ECtHR. At least with regard to those states in which a certain minimum degree of protection of human rights exists, the Court could show a greater willingness to apply the criterion of “margin of appreciation” in a more generous way.

In addition, it is important to underline that constitutionalism beyond the state has to be more flexible than domestic constitutionalism. It has to leave a margin for different solutions to conflicts between constitutional rights, and, therefore, for different interpretations of these rights. This is a fundamental difference between the two layers of constitutionalism. While, at national level, the conflicts between rights are solved by giving priority to one right over the other, and there is only one solution accepted as constitutional, on the regional (transnational, international) level, the pre-eminent idea should, in contrast, be that different solutions are possible, and that *any or all* of them could be deemed to be “constitutional”.

The constitutional standards at regional level, in the case of conflicts between constitutional rights, should be more general than the standards applied in the same cases at national level. This is especially true when the Court is confronted with conflicts between rights (as in the *von Hannover* and *Odievre* cases). These cases are different from the cases of violation of rights in which there is no such conflict. In the latter, what is at play is an interpretation of a certain right. Can the European Court of Human Rights raise the level of protection by differing from the interpretation given by the national constitutional courts? What should be the limit here? We think it is legitimate to expect a certain degree of self-restraint on the part of the Court in these cases, but the reasons for this are different from the reasons that justify the respect for the margin of appreciation in the case of conflicts between rights.

For example, in cases like the *Axl* case,⁴³ one can question the fundamental or constitutional relevance of a case-by-case definition of the parental rights to give a certain name to their child. In stark contrast to this constellation, the constitutional relevance in the *von*

⁴³ See note 33 above.

Hanover or *Odièvre* cases is clear. In these cases, the Court has to take the local roots, the “localism” of a given constitutional order, into account. A recent decision of the Court on a “hard” case,⁴⁴ constitutional regulations on abortion in Ireland, confirms this view and suggests that the ECtHR has finally embraced a more cautious approach towards overarching standards. In this decision, the Court discusses at length the constitutional situation in Ireland and the referendum of 1983 which basically confirmed the existing - very restrictive - approach towards abortion.⁴⁵ Although the applicants delivered solid arguments for the fact that public opinion towards abortion has changed since then, the Court rejects the idea that it should “displace the State’s opinion to the Court on the exact content of the requirements of morals in Ireland”. Upon this basis, the Court holds that “by reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international judge to give an opinion, not only on the ‘exact content of the requirements of morals’ in their country, but also on the necessity of a restriction intended to meet them”.⁴⁶ It reaches the following conclusion:

A broad margin of appreciation is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention.⁴⁷

Even though a wide-ranging consensus among the Council of Europe member states exists towards allowing abortion on broader grounds than those accorded by Irish law, this consensus does not justify stricter limits on the margin of appreciation. The Court mentions its responsibility according to Article 19 of the Convention (“to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto”),

⁴⁴ ECtHR, judgment of 16 December 2010, case of *A, B and C v Ireland*, application no. 25579/05.

⁴⁵ *Ibid.*, paras. 222-225.

⁴⁶ *Ibid.*, para. 226.

⁴⁷ *Ibid.*, para. 233.

which establishes its duty to protect the Convention rights, but finally concedes that Ireland has taken a democratic decision which it cannot ignore:

From the lengthy, complex and sensitive debate in Ireland (summarised at 28-76 above) as regards the content of its abortion laws, a choice has emerged.⁴⁸

According to the Court, it is sufficient for the protection of the Convention rights of women that they can travel to neighbouring countries with less strict abortion rules, and that the Irish authorities cannot prohibit the dissemination of information about this possibility.⁴⁹

The abortion rights decision is remarkable in two respects: firstly, it confirms that a European constitutional standard, underlined by a wide-ranging constitutional consensus among the member states of the Council of Europe, can establish a firm benchmark for the interpretation of Convention rights. And, secondly, this consensus can be counter-balanced if the deviating local constitutional consensus is based upon a lengthy, complex and sensitive public debate on the issue in question. The Court's approach sets new limits to European-wide constitutional standards: if the democratic quality of a local decision is indisputable, general European standards cannot prevail *ipso facto*. Only if Convention rights are in danger of being hollowed out altogether, for example, if there was no legal and/or practical way for women to travel abroad for an abortion, would the general standard prevail.

With this approach, the Court does not strengthen constitutional localism as such; a mere constitutional configuration or tradition without an actual, substantive and measurable public and democratic support does not meet the criteria which the Court established in its decision. It was only this type of qualified democratic legitimacy which the Court saw at work in the Irish abortion case, and neither constitutional law legitimacy nor constitutional court legitimacy alone, can justify a stronger status of localism *vis-à-vis* the European constitutional order.

⁴⁸ *Ibid.*, paras. 235-236, quotation in 239.

⁴⁹ *Ibid.*, paras. 239 & 241.

III. Conflict of Constitutional Laws in Europe: A General Case for General Pluralism?

What are appropriate guidelines for solutions to constitutional conflicts in transnational settings? Pluralism seems to be the most fitting answer. There are a number of approaches under the headline of “constitutional pluralism”, which demand greater leeway for national legal orders.⁵⁰ These approaches, despite differing in detail, have a common core: they observe the trend towards overarching standards of a (mainly) human rights constitutionalism that endanger local constitutional concepts. However, they are often merely descriptive, and they evade core questions of constitutional conflicts instead of addressing them directly. International Courts constantly have to define and refine their approach towards uniformity and diversity in concrete cases; they cannot evade decisions or remain at an abstract level of debate. Our perspective is that, even if we think that the constitutionalisation of an international legal order such as the European Convention of Human Rights is positive in itself, it should not be done at the expenses of constitutional pluralism. As long as and as far as a regional legal order (such as the European one) does not replace the national legal orders, there is room for recognising a certain degree of constitutional pluralism. The crucial question is: How?

Constitutional pluralism is a noble goal, but its content is far from clear. Many academic proponents of constitutional pluralism focus their attention on the EU legal order. Some of them demand greater leeway for local preferences *vis-à-vis* the EU legal order, while others ask national courts to pay more respect to EU law within national legal orders.⁵¹ Debates concentrate on “constitutional supremacy”

⁵⁰ For a general concept of Constitutional Pluralism, see Neil Walker, “The Idea of Constitutional Pluralism”, (2002) 65 *Modern Law Review*, pp 317-359; and Neil MacCormick, *Questioning Sovereignty*, (Oxford, Oxford University Press, 1999). At an even more general level, Nico Krisch, in *Beyond Constitutionalism. The Pluralist Structure of Postnational Law*, (Oxford, Oxford University Press, 2010), suggests a pluralism beyond constitutionalism, a “pluralist vision of postnational law”.

⁵¹ See Matthias Kumm, “The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty”, (2005) 11 *European Law Journal*, pp 262-307; Miguel Poiares Maduro, “Contrapunctual Law: Europe’s Constitutional Pluralism in Action”, in: Neil Walker (ed), *Sovereignty in Transition* (Oxford, Hart Publishing, 2003), pp 501-537; *idem*, “Interpreting European Law:

and the delicate relation between the EU Member States' highest courts and the ECJ,⁵² whereas the European Court of Human Rights is either treated only in passing, or as if it was basically at the same level of hierarchy and in the same situation as the ECJ. For example, Charles Sabel and Oliver Gerstenberg recently claimed that European constitutionalism is based upon an "overlapping consensus" that generates a "coordinate constitutional order", an order which is administered by the courts in Europe.⁵³ While it is certainly true that European constitutionalism is based upon a joint commitment to some basic rules of societal organisation in the Rawlsian sense, it is also certain that it is *not* a co-ordinate order, otherwise there would not be a need for this heated debate about pluralism, legal unity, and difference in Europe. In addition, by using John Rawls'⁵⁴ concept of a *procedural idea of political consensus* in the context of European constitutionalism, Sabel and Gerstenberg seem to level a major difference between political theory, on the one hand, and legal theory and methodology, on the other: Rawls' political philosophy is based upon a procedural idea of justice, and not on the idea that courts authoritatively define the actual contents of a just or fair legal order. The idyllic picture of a self-generating constitutional consensus, or, as Sabel and Gerstenberg put it, this "quiet and apparently modest innovation" of a co-ordinated consensus,⁵⁵ obscures the fact that constitutional settlements are the result of intensive constitutional fights over the definition of justice and the public good, or over distributive policies and economic governance. In short, the consensus concept represses the existence of constitutional conflicts,

Judicial Adjudication in a Context of Constitutional Pluralism", (2007) 1 *European Journal of Legal Studies*, p. 21, available at: <www.ejls.eu>.

⁵² A good example is Janneke Gerards, "Pluralism, Deference and the Margin of Appreciation Doctrine", (2011) 17 *European Law Journal*, pp 80-120. Gerards focuses on what she calls "the EU courts" and claims the following: "It has now become widely accepted that the EU cannot be regarded as a single, hierarchical legal system in which there is complete supremacy of the legal rules created by the EU institutions over national legislation and even over national constitutions." *Ibid.*, p 80. Gerards does not take Declaration No. 17 to the Treaty of Lisbon (which confirms the primacy rule) into account; see text and note 57 below.

⁵³ Charles Sabel & Oliver Gerstenberg, "Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order", (2010) 16 *European Law Journal*, pp 511-550.

⁵⁴ John Rawls, *Political Liberalism*, (New York, Columbia University Press, 1993).

⁵⁵ Note 52 above, p 550.

it is forgetful about democratic rule, and hands over the solution of constitutional fights solely to the (domestic, supranational or transnational) judiciary.⁵⁶

We believe that debates about constitutional pluralism in Europe need to be more precise. In particular, it is essential to distinguish clearly between EU constitutional pluralism, on the one hand, and Council of Europe constitutional pluralism, on the other hand, for different reasons. Firstly, the relation between EU law and Member State law is basically settled: Declaration No. 17 to the Treaty of Lisbon contains *expressis verbis* a commitment to the primacy of EU law⁵⁷. In addition, after its 2008 *Lisbon* ruling that caused much concern in the ranks of European lawyers, and contrary to the hopes of some ECJ critics, the German Federal Constitutional Court did not fundamentally question the authority of the ECJ to interpret EU law. In its 2010 decision in the *Mangold* case, the FCC showed considerable judicial self-restraint, stressed the concept of the primacy of EU law, and extended a particular version of the *Solange* doctrine to the *ultra vires problématique*. In essence, constitutional complaints against the jurisprudence of the ECJ face almost unsurmountable hurdles of admissibility.⁵⁸

⁵⁶ For a critique of this “juristocratic” concept of supra- and transnational constitutionalism, see Rainer Nickel, note 4 above.

⁵⁷ “The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law. [...]”. Declaration No. 17 concerning primacy, in: “Declarations annexed to the final act of the intergovernmental conference which adopted the Treaty of Lisbon, signed on 13 December 2007”, OJ C/115, 335, 09 May 2008, at 344.

⁵⁸ “As long as the Court of Justice did not have an opportunity to rule on the questions of Union law which have arisen, the Federal Constitutional Court may not find any inapplicability of Union law for Germany”, FCC, judgment of 06 July 2010, case no 2 BvR 2661/06, available in an official English language version at <http://www.bverfg.de/entscheidungen/rs20100706_2bvr266106en.html>, para. 60. The FCC also holds that judicial activism by the ECJ is not inadmissible or *per se* an *ultra vires* act, paras. 62 and 63, and as long as no dramatic *ultra vires* violation has occurred there is no constitutional ground for constitutional complaints, see para. 61 *ultra vires* review only if the ECJ is “manifestly in violation of competences”, and if the subject of the decision “is highly significant in the structure of competences between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law”).

Secondly, the functions of the ECHR and the ECtHR differ significantly from the function of the EU legal order: admittedly, as we were recently able to observe in the *Schmidberger*⁵⁹ and *Omega*⁶⁰ cases, there is room for indirect conflicts, especially when national constitutional law functions as a justification for restrictions on the fundamental freedoms. However, these indirect conflicts arise in rather exceptional cases of diagonal conflicts,⁶¹ whereas potentially diverging interpretations of domestic and ECHR human rights obligations are a structural (and inevitable) element of the human rights protection system of the Council of Europe. It can be said that conflicts between the ECHR legal order and the domestic legal orders are always of a constitutional nature, whereas this is the exception, rather than the rule, in cases of conflicts between the EU legal order and national legal orders. In addition, the ECHR catalogue of rights covers most of the rights catalogues in national constitutions, and cases reach the ECtHR only after they have wandered through domestic jurisdictions. Therefore, the Court *always* faces domestic human rights jurisprudence when it decides upon an alleged infringement of the Convention. Every single case that reaches the ECtHR inevitably forces the Court to scrutinise domestic human rights protection measures.

Thirdly, the EU system is much more uniform than the Convention system. It is based upon a clear hierarchy and an either/or structure, whereas the ECtHR only considers whether a domestic legal act or decision is compatible with the rights enshrined in the Convention. As we showed in detail above, there are numerous elements of flexibility built into the Council of Europe system of human rights protection. In addition, there is no doubt that EU law always has primacy over the law of the Member States (with the notable exception of domestic constitutional essentials⁶²), whereas the

⁵⁹ Case C-112/00 *Schmidberger* [2003] ECR I-05659.

⁶⁰ Case C-36/02 *Omega* [2004] ECR I-09609.

⁶¹ About the concept of diagonal conflicts, see Christian Joerges, "Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form", in: R Nickel & A Greppi (eds), *The Changing Role of Law in the Age of Supra- and Transnational Governance*, (Baden-Baden, Nomos Verlag, forthcoming 2011), Chapter 5, sub-Section IV.4.

⁶² A number of constitutional courts in EU Member States have expressed reservations and claim that they have the last say if it comes to essential elements of domestic constitutions, such as the democratic principle. See, for example, the Lisbon

domestic status of the ECHR and the mechanisms in which the Member State incorporate the jurisprudence of the ECtHR vary to a great extent (see Part I *supra*).

To sum up, any conceptual approach towards pluralism in European constitutionalism needs to distinguish between the two distinct constitutional spheres, the EU sphere and the Council of Europe sphere, if it wants to escape the risks of constructive vagueness and of court practice complacency. In our concluding section, we take up our discussion about constitutional conflicts and suggest a new concept for pluralism in the framework of the Council of Europe.

IV. Constitutional Pluralism in an Asymmetric Europe: The Need for an Asymmetric Approach

The ECtHR is situated in an *asymmetric Europe*. The caseload of the Court, which presently has about 120,000 complaints pending, is desperate; this situation is clearly a threat to the primary function of the Court as the guarantor of a minimum standard of human rights protection. If the Court does not want to risk its reputation and legitimacy, it should refrain from making decisions which are too detailed on the legal orders of the member states. More importantly, however, it should acknowledge that there is an asymmetric Europe in which some of the member states are responsible for the bulk of the violent and dramatic human rights violations (killings, torture, *etc.*), while others sufficiently guarantee a generally high standard of human rights protection.

In this situation, which has remained fairly stable since the introduction of Protocol 11 and the establishment of the permanent court system in 1998, a call for judicial self-restraint is not sufficient: the Court is facing a legal landscape in which most of the member states of the Council of Europe (CoE) guarantee the Convention rights most of the time, whereas some member states do not prevent cases of massive and severe violations of core provisions of the convention, such as the right to life and the prohibition of torture. The Court's jurisprudence should reflect this reality of an asymmetric

judgment of the German FCC, note 10 above, in which the Court held that a substantial hollowing-out of the competences of the German parliament would be unconstitutional.

Europe, and deal with constitutional conflicts in an adequate and pluralism-enhancing way. We suggest a two-tier approach:

Constitutional relevance test: this test, if correctly interpreted and applied, can be very effective, as it can lead to an easier dismissal of minor cases coming from states with a high level of protection. Several aspects can be taken into account; for example, whether a Council of Europe member state has a constitutional court which is effectively accessible to citizens via constitutional complaints or by means of an appeal; whether this constitutional court exercises an effective oversight over lower courts or “regular” courts; whether this constitutional court imposes constraints on the lower courts so that they have to respect the Convention rights (and the jurisprudence of the ECtHR); and whether a violation of a Convention right, or disregard for the jurisprudence of the ECtHR, enables citizens to challenge a court decision on these grounds. If all these conditions are met, one can establish a *prima facie* presumption that the guarantees of the Convention are generally respected in this CoE member state, and a complainant would additionally have to show that, in his or her individual case, these procedural and material safeguards were not sufficient to protect his or her rights.

Democratic legitimacy test: it is not self-explanatory why the ECtHR should take the democratic quality of a constitutional design into account, given the fact that even a member state constitutional rule that is the fruit of an impeccable and inclusive democratic process of reflection, participation, and deliberation can nonetheless constitute a violation of a Convention right. Indeed, clear-cut cases such as the *Sejdic* and *Finci* case underline the function of the Court as a guardian of the rights of structural minorities against majoritarian exclusion, even though the constitutional rules leading to this exclusion enjoy profound democratic legitimacy. The fact that the Court has accepted the democratic environment of a constitutional rule as one element for its justification, however, as occurred in the *Irish abortion law* cases and in the *Odièvre* case, is, nonetheless, justified. Constitutional provisions are often a result of intense public debates involving complex legal and political problems. Due respect for domestic solutions based upon such intense debates allows for a certain degree of democratically-substantiated

diversity within the European public legal order, or, in other words, it enables constitutional pluralism. To be sure, there is also an important limit to this approach. Democratic legitimacy of constitutional norms comes with an expiry date. Mere references to history or any forms of US-style originalism collide with the interpretation of the ECHR as a “living instrument” that needs to be adjusted to contemporary societies in Europe. The longer domestic public debates date back in time, the less legitimacy can be claimed for a domestic constitutional concept.⁶³

An application of this two-fold test has to go hand in hand with a clarification of the complex relations between the different layers of constitutionalism. On the one hand, the developments in the framework of the ECHR lead to the strengthening of the constitutional dimension of the so-called European public order; on the other, it seems increasingly clear that the constitutional consensus at the different levels enjoys a different degree of precision. The constitutional constellation at supranational and international levels cannot reckon without the member states and without their national constitutions. While it is true that, at international level, even the validity of domestic constitutional norms can be monitored, it is no less true that the Courts (the ECJ and the ECtHR), tasked with the duty of preserving constitutions beyond the state, are expected to acknowledge the existence of the domestic Constitutions as well as to respect, as far as possible, the national constitutional consensus. The practice of the ECtHR, with its application of the margin of appreciation doctrine, proves that there is room for constitutional

⁶³ In its recent Grand Chamber decision in the crucifix case *Lautsi and Others v Italy*, application no. 30814/06, judgment of 18 March 2011, the ECtHR unfortunately ennobled the argument that a constitutional practice can be justified because it represents a certain tradition. The Court confirmed the Italian habit of hanging crucifixes in school classrooms on the basis of the following reasoning: “The Court takes the view that the decision whether or not to perpetuate a tradition falls in principle within the margin of appreciation of the respondent State” (*ibid.*, para. 68). In addition, the Court notes that there is no constitutional consensus on this question in Europe (“great diversity, see *ibid.*, paras. 68 and 70, and para. 28, with a more detailed description of the legal situation in a number of member states). We think that only the latter reason can justify the Court’s decision, and not the former argument of a certain constitutional tradition. This monolithic tradition was founded sixty or more years ago under completely different societal and political circumstances that bear no resemblance to today’s societal reality in Italy and Europe.

pluralism within the European constitutionalism. We think that this path should be further explored and that more consistency should be required as a condition for the re-inforcement of the constitutional dimension of Europe.

Chapter 16

Global Governance in the *Rechtsfreier Raum*

The Case of the Legal Discipline for
Airspace Security – A Comparison between
Germany, Italy and Spain

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“Are there good governments and bad governments? No, there are only bad governments and worse governments.”

(Charles Bukowski)

I. The Thesis in a Nutshell

- 1) The issue of “the war on international terrorism” continues to erode the rule of law in terms of the sources of the production of the law. Law “against international terrorism” is becoming ever more de-formalised, or informal.
- 2) This erosion does *not* occur at national level. Instead, it happens in the spaces, the folds between national and international levels, at transnational level. This level is called herein, with a critical

intent, *global governance*. Governments make increasingly informal international agreements and then enact them strategically at national level through top-down decisions. Thus, governments achieve as little scrutiny as possible from both parliaments and the judiciary, not to mention the avoidance of public opinion.

- 3) The power of the constitutional rule of law is being degraded, and this decline in power allows it to be supplanted by technocratic decisions made by both political and military élites. These decisions fall from on high and make for grave tensions with the deliberations of parliaments, the decisions of courts, and, generally, the sovereignty of a democratic republic, namely, the people.
- 4) In this manner, the law itself is deprived of its democratic legitimacy.

II. The Question of Global Governance

This chapter examines the way in which European governments pursue international or global policies which are increasingly top-down in the interstices between domestic law and international law. Methods of governing, which, in the words of Martti Koskenniemi, may, with critical intent, be called *global governance*,¹ are becoming

* This text is the updated and slightly altered translation of a text published in Italian entitled "Governance nello spazio giuridicamente vuoto. Il caso della disciplina giuridica per la sicurezza dello spazio aereo - un confronto tra Germania, Italia e Spagna", in: P Giunti (ed), *Iuris Quidditas, Liber amicorum per Bernardo Santalucia*, (Naples, Editoriale Scientifica, 2010), p 337 *et seq*; an early version with a Comparison only between German and Italian legal discipline has been published with the title "Governance im luftleeren Raum. Erosion des Rechtsstaates durch transnationale Netzwerke - Ein Vergleich zwischen Deutschland und Italien", (2009) 42 *Kritische Justiz*, p 39 *et seq*

+ Translated by Gregory Gashgarian.

¹ M Koskenniemi, "Global Governance and Public International Law", (2004) 37 *Kritische Justiz*, p 241 *et seq*. The literature on the concept of governance and "good governance" has grown in recent times to such an extent as to be almost impossible to master. For the history and general concept of governance, see A Benz, "Governance - Modebegriff oder nützliches sozialwissenschaftliches Konzept?", in: *idem* (ed), *Governance - Regieren in komplexen Regelsystemen*, (Wiesbaden, Verlag für Sozialwissenschaften, 2004), p 11 *et seq*. On the dominant "Machtlogik" or the "Ausblendung" related to the new type of political guidance through governance, see R Mayntz, "Governance im modernen Staat", in: A Benz (ed), *Governance - Regieren in komplexen Regelsystemen*, this note above, p 65 *et seq.*, at 75. For criticism of the concept of governance and its technocratic characteristic as informed by an analysis of power inspired by Michel Foucault's concept of governmentality, see T

increasingly bold and extensive. In Koskenniemi's way of thinking, the global governance of international law may be described as an amalgam consisting of three elements: de-formalisation *i.e.*, informal agreements, fragmentation or the strategic differentiation of knowledge, and empire - the imposition of top-down decisions.²

Lemke, "Eine unverdauliche Mahlzeit? Staatlichkeit, Wissen und die Analytik der Regierung", in: S Krasmann & M Volkmer (eds), *Michel Foucaults "Geschichte der Gouvernementalität" in den Sozialwissenschaften*, (Bielefeld, Transcript 2007), p 47 *et seq.*, at 59 *et seq.* For the discussion of governance in the law of the EU, see Ch Joerges, "Integrazione attraverso la degiuridicizzazione? Un intervento interlocutorio", (2008) 27 *Rivista Critica del Diritto Privato*, p 163 *et seq.* For an attempt to emphasise the value of social movements in the area of governance or to include them through (implicitly good) governance, see M Blecher, "Mind the gap", (2008) 27 *Rivista Critica del Diritto Privato*, p 205 *et seq.* For a fundamental criticism that underlines the fragmentation and corruption of governance, and nevertheless tries to use its "eccedenze", see A Negri, "La filosofia del diritto contro la Sovranità. Nuove eccedenze, vecchie frammentazioni", (2008) 27 *Rivista Critica del Diritto Privato*, p 197 *et seq.*, in particular, p 202; see, also, M Hardt & A Negri, *Comune. Oltre il privato e il pubblico*, (Milan, Rizzoli, 2010), p 226 *et seq.* For an attempt to recover the stateliness, *Staatlichkeit*, and, especially, the culture of fundamental rights of the constitutional state within the bounds of global governance, see M Seckelmann, "Keine Alternative zur Staatlichkeit - Zum Konzept der 'Global Governance'", (2007) 98 *Verwaltungsarchiv. Zeitschrift für Verwaltungslehre, Verwaltungsrecht und Verwaltungspolitik*, p 30 *et seq.* Lastly, the emergence of a global "security agency" inside a "network of militant security states" is dealt with by R Nickel, with reference to Klaus Günther, in: R Nickel, "Private and Public Autonomy Revisited: Habermas' Concept of Co-Originality in Times of Globalisation and the Militant Security State", in: M Loughlin & N Walker (eds), *The Paradox of Constitutionalism*, (Oxford, Oxford University Press, 2007), p 147 *et seq.*; see Nickel's recent article on Data Mining and "Renegade" Aircraft: The States as Agents of a Global Militant Security Governance Network - The German Example (2010) 24 *Emory International Law Review*, p 619 *et seq.*

² "Today, however, the idea, that the world can - or should - be governed through a single international law just like the domestic is undermined by three developments. One I call, following Max Weber, *de-formalisation*, the increasing management of the world's affairs by flexible and informal, non-territorial networks within which decisions can be made rapidly and effectively. Think about the G8, the World Economic Forum in Davos, the collaboration between huge transnational corporations, financial and trade institutions and regulatory branches of governments ... globalisation invokes not government, but *governance*, a spontaneous process, pushed by private interests and actors in a thoroughly pragmatic process, accountable to no functional equivalent of a public realm but to an amorphous aggregate of stakeholders. The second threat to the traditional image arises from what international lawyers call "*fragmentation*", the division of international regulation into specialised branches, deferring to special interests and managed by technical experts. Instead of a single international law, we have today human rights law, environmental law, international trade law, international criminal law, and so on with little unifying ethos. More often than not, special regimes are created with

The concept of *de-formalisation* describes the fact that decisions are made at intergovernmental level by agencies, committees, and networks, which are becoming less formal over time. Such decision-making *fora* have one common characteristic: they are not part of public opinion-making processes. On the contrary, decisions adopted in such a manner are often kept from public attention for long periods for various reasons, not the least being “security”, until they suddenly appear in domestic law. In this context, the concept of *fragmentation* indicates the strategic exploitation of a situation in which legal decisions are adopted in partial systems which are barely transparent or are, indeed, quite opaque. Through transnational networks, decisions are implemented “managerially” by the respective internal justice systems. In this way, parliaments are partially informed and in a systematically-untimely fashion; likewise, public opinion, and with it the people, are excluded from any decision-making process. *Empire* allows the empowered to impose policies which lead to the creation of a *Präventionsstaat*, weakening and hence de-legitimising the rule of law.³ This style of governing, this (global) governance, removes primarily the single states and the EU from juridical review.

This tendency towards the de-juridification of decision-making at the core of the republican and democratic life of European states is examined below with regard to the regulation of airspace security.

III. German Airspace Security Regulation

The starting-point of the following reflections is the juridical regulation for airspace security enacted by the Federal Republic of Germany. This case is built very selectively as a dialogue between the federal government and the parliament or rather the *Bundestag*, on the one hand, and the *Bundesverfassungsgericht* (constitutional court), on the other.

the distinct purpose to undermine or deviate from general law. Such fragmentation is not - as it is often treated - a technical problem but best understood as a set of *hegemonic* manoeuvres whereby new institutions seek to articulate special preferences as universal ones ... De-formalisation, fragmentation, and a third - empire. The fact of American disengagement from law are staggering ...” M Koskeniemi, “Global Governance and Public International Law”, (2004) 37, *Kritische Justiz*, p 241 *et seq.*, p 243.

³ For the situation concerning the policies of the German Minister of the Interior, see H Prantl, “Der große Rüssel”, *Süddeutsche Zeitung*, 21/22 April 2007, p 15.

III.1. The *Luftsicherheitsgesetz* (Airspace Security Law)

Two noteworthy incidents stoked the German debate on airspace security. The first occurred at global level. It was the terrorist attacks in the USA on 11 September 2001, in which hijacked civilian aircraft full of passengers were used to crash into targets causing a total of over 3,000 deaths. The second was more local or national. On 5 January 2003, an incident occurred in German skies over Frankfurt am Main. An armed man commandeered a light civilian airplane and threatened to crash it into the tower of the European Central Bank unless he was allowed to speak to a person in the USA. German jet fighters were sent to intercept the airplane. The emergency ended when the authorities were able to convince the pilot to land by acceding to his demand and then promptly arresting him.⁴ As of 1 October 2003, a national situation and control centre, *Nationales Lage- und Führungszentrum*, called Airspace Security, *Sicherheit im Luftraum*, was instituted in Kalkar am Niederrhein. From that time onwards, the German army, national police and air-traffic control personnel at Kalkar were tasked, first and foremost with “prevent[ing] harm from so-called renegade aircraft”,⁵ meaning civilian aircraft “which have fallen into the hands of people who intend to use them as a weapon by aiming them at a target”.⁶ Once an aircraft is declared to be a renegade by the Kalkar centre, or by NATO, the responsibility for any measures taken to prevent the threat which it represents resided with “competent authorities of the Federal Republic”.⁷ From 11 January 2005 on, this *de facto* structure received its juridical regulation or, in

⁴ BVerfGE 115, p 118 *et seq.*, at 120.

⁵ “Aufgabe des Zentrums ist es vor allem, Gefahren abzuwehren, die von so genannten Renegade-Flugzeugen drohen”. BVerfGE 115, p 118 *et seq.*, at 121.

⁶ “Renegade-Flugzeugen ... sind zivile Luftfahrzeuge, die in die Gewalt von Menschen gelangt sind, die sie als Waffe für einen gezielten Absturz mißbrauchen wollen”. BVerfGE 115, p 118 *et seq.*, at 121. See, on this point, B Hirsch, “Das Urteil des Bundesverfassungsgerichts vom 15.2.2006”, in: EM Giemulla & BR Rothe (eds), *Recht der Luftsicherheit*, (Berlin-Heidelberg, Transcript, 2008), p 82 *et seq.*, at 84 *et seq.*

⁷ BVerfGE 115, p 118 *et seq.*, at 121. The entire passage of the BVerfGE reads: “Nach der Klassifizierung eines Luftfahrzeugs als Renegade - sei es von Seiten der NATO, sei es durch das Nationale Lage- und Führungszentrum selbst - liegt die Verantwortung für die erforderlichen Abwehrmaßnahmen im deutschen Luftraum bei den zuständigen Stellen der Bundesrepublik Deutschland”. BVerfGE 115, 118, 121.

the words of the *Bundesverfassungsgericht*, its “juridical foundations”.⁸ The heart of the airspace security law, *Luftsicherheitsgesetz*, is in § 14. It authorised the armed forces and military pilots, in particular, to take a series of measures of escalating gravity to prevent “particularly serious incidents”. Paragraph 1 of § 14 authorises military pilots to cause other aircraft to change course, *abdrängen*, to constrain them to land, and to threaten the use of weapons or to fire warning shots.⁹ Paragraph 2 of § 14 introduces the principle of proportionality “in a broad sense”. On the one hand, it necessitated a choice from among possible measures “which predictably harms the individual and the collectivity least”. On the other hand, this rigorous proportionality was immediately attenuated in the second part of the same paragraph. In fact, it stated that the measures taken could not lead to “a disadvantage in recognisable disproportion to the desired result”. Finally, and in particular, paragraph 3 of § 14 of the *Luftsicherheitsgesetz* authorised the German Minister of Defence or a competent authority of the federal government on his behalf, to order the Air Force to shoot civilian aircraft down, implicitly authorising their destruction, whenever, based upon the circumstances, the aircraft might be employed “against human life”, and the use of weapons is considered “the only means to thwart a present danger”.¹⁰

⁸ BVerfGE 115, p 118 *et seq.*, at 121: “Die rechtlichen Grundlagen für diese Maßnahmen sind in dem Gesetz zur Neuregelung von Luftsicherheitsaufgaben vom 11. Januar 2005 enthalten”.

⁹ The entire text of § 14 of the *Luftsicherheitsgesetz* of 11 January 2005 reads: § 14 Einsatzmaßnahmen, Anordnungsbefugnis. (1) Zur Verhinderung des Eintritts eines besonders schweren Unglücksfalles dürfen die Streitkräfte im Luftraum Luftfahrzeuge abdrängen, zur Landung zwingen, den Einsatz von Waffengewalt androhen oder Warnschüsse abgeben. 2) Von mehreren möglichen Maßnahmen ist diejenige auszuwählen, die den Einzelnen und die Allgemeinheit voraussichtlich am wenigsten beeinträchtigt. Die Maßnahme darf nur so lange und so weit durchgeführt werden, wie ihr Zweck es erfordert. Sie darf nicht zu einem Nachteil führen, der zu dem erstrebten Erfolg erkennbar außer Verhältnis steht. 3) Die unmittelbare Einwirkung mit Waffengewalt ist nur zulässig, wenn nach den Umständen davon auszugehen ist, dass das Luftfahrzeug gegen das Leben von Menschen eingesetzt werden soll, und sie das einzige Mittel zur Abwehr dieser gegenwärtigen Gefahr ist. (4) Die Maßnahme nach Absatz 3 kann nur der Bundesminister der Verteidigung oder im Vertretungsfall das zu seiner Vertretung berechnigte Mitglied der Bundesregierung anordnen. Im Übrigen kann der Bundesminister der Verteidigung den Inspekteur der Luftwaffe generell ermächtigen, Maßnahmen nach Absatz 1 anzuordnen.

¹⁰ See M Pawlik, “§ 14 Abs. 3 des Luftsicherheitsgesetzes - ein Tabubruch?”, (2004) 59 *JuristenZeitung*, p 1045 *et seq.*; A Sinn, “Tötung Unschuldiger auf Grund § 14 III

III.2. The Decision of the Constitutional Court

Paragraph 3 of § 14 of the *Luftsicherheitsgesetz* was declared unconstitutional by the *Bundesverfassungsgericht* in February 2006, where it authorises the use of deadly force by military aircraft against so-called “renegade” civilian airplanes in cases in which there are “uninvolved” people on board.¹¹ The court’s decision was based upon two arguments.

Luftsicherheitsgesetz - rechtmäßig?”, (2004) 24 *Neue Zeitschrift für Strafrecht*, p 585 *et seq*; W Hoefling & S Augsberg, “Luftsicherheit, Grundrechtsregime und Ausnahmezustand”, (2005) 60 *JuristenZeitung*, p 1080 *et seq*; M Baldus, “Streitkräfteeinsatz zur Gefahrenabwehr im Luftraum. Sind die neuen luftsicherheitsgesetzlichen Befugnisse der Bundeswehr kompetenz- und grundrechtswidrig?”, (2004) 22 *Neue Zeitschrift für Verwaltungsrecht*, p 1278 *et seq*.

¹¹ BVerfG - 1 BvR 357/05, in: Entscheidungen des Bundesverfassungsgericht, Herausgegeben von den Mitgliedern des Bundesverfassungsgerichts, 115. Band, 2006, hereafter: BVerfGE 115, p 118 *et seq.*, at 118 *et seq.* An official English translation can be found at the Bundesverfassungsgericht website (www.bverfg.de), last accessed on 3 May 2010. See D Winkler, “Verfassungsmäßigkeit des Luftsicherheitsgesetzes”, (2006) 26 *Neue Zeitschrift für Verwaltungsrecht*, p 536 *et seq*; W Hecker, “Die Entscheidung des Bundesverfassungsgerichts zum Luftsicherheitsgesetz”, (2006) 39 *Kritische Justiz*, p 179 *et seq*; M Baldus, “Gefahrenabwehr in Ausnahmefällen. Das Luftsicherheitsgesetz auf dem Prüfstand”, (2006) 26 *Neue Zeitschrift für Verwaltungsrecht*, p 532 *et seq*; V Baldini, “Stato di prevenzione vs Stato costituzionale di diritto: un nuovo capitolo di una storia infinita. A proposito di una decisione della Corte costituzionale federale tedesca sulla legge federale in materia di sicurezza dei voli”, (2006) 53 *JuS*, p 463 *et seq*; A Nisco, “Necessità, emergenza e dignità umana: note sul caso della legge tedesca sulla sicurezza aerea (*Luftsicherheitsgesetz*)”, (2007) 47 *Cassazione penale*, p 780 *et seq*; B Hirsch, “Das Urteil des Bundesverfassungsgerichts vom 15.2.2006”, in: Giemulla & Rothe (eds), *Recht der Luftsicherheit*, note 6 above, p 82 *et seq.* The issue re-surfaced upon the announcement in 2007 by then Defence Minister Jung that he was prepared to give an order to fire on so-called renegade aircraft despite the decision of the BVerfG, and the backing he received from then Interior Minister Schäuble, who stated “I would give the order” in: Focus 38/2007, p 38 *et seq*; see, also, “Schäuble verteidigt Minister Jung”, *Spiegel Online*, 17 September 2007. See, also, J Isensee, “Leben gegen Leben. Das grundrechtliche Dilemma des Terrorangriffs mit gekapertem Passagierflugzeug”, in: M Pawlik & R Zaczyk (eds), *Festschrift für Günther Jakobs*, (Cologne, Heymanns, 2007), p 205 *et seq*; M Ladiges, *Die Bekämpfung nicht-staatlicher Angreifer im Luftraum. Unter besonderer Berücksichtigung des § 14 Abs. 3 LuftSiG und der strafrechtlichen Beurteilung der Tötung von Unbeteiligten*, (Berlin, Duncker & Humblot, 2007); J Isensee, “Not kennt kein Gebot. Selbstbehauptung des Rechtsstaats gegenüber dem Terrorismus”, in: *idem*, *Recht als Grenze – Grenze des Rechts. Texte 1979-2009*, (Bonn, Bouvier, 2009) p 216 *et seq.* Penal doctrine excludes recourse to the state of necessity to justify § 34 StGB and seems to lean towards a supralegal justification or exclusion from guilt based in part on the state of necessity justification of § 35 StGB. See T Lenckner & W Perron, § 34 StGB, in: A Schönke & H Schröder, *StGB-Kommentar*, 27. Auflage, (Munich, Beck, 2006), Rdn. 23 *et seq*; A Sinn,

The first, related to the German federal system, lies in the structural difference between the activities of the federal armed forces, which are oriented primarily towards defence and those of the regional police, oriented towards the prevention of dangers. The use of the armed forces is regulated most of all in Paragraphs 1 and 2 of Article 87a of the *Grundgesetz* (constitution, GG). Article 87a Paragraph 1 establishes federal competence for cases of defence, *Verteidigung*, through the use of the armed forces¹². Article 87a Paragraph 2 GG explicitly *reserves* to the authorisation given by the constitution further cases of the use of the armed forces.¹³ These further cases, which are explicitly regulated by the constitution, are those of a state of defence and of tension in Article 87a Paragraph 3 GG,¹⁴ and of defence against a threat to the existence or the free democratic constitutional order of the *Bund* or of a *Land* as in Article 87a Paragraph 4 GG,¹⁵ and especially the state of regional and

“Tötung Unschuldiger auf Grund § 14 III Luftsicherheitsgesetz – rechtmäßig?“, note 10 above, p 591; J Wessels & W Beulke, *Strafrecht AT* [Allgemeiner Teil], (Heidelberg, CF Müller 2006), § 8, Rdn. 316b; div. NK [Nomos Kommentar]-Neumann, (Baden-Baden, Nomos 2005) § 34 StGB, Rdn. 76 *et seq.*, Rdn. 77; V Erb, *Münchener Kommentar zum Strafgesetzbuch*, Vol. 1, (Munich, Beck, 2003), § 34 StGB, Rdn. 118 *et seq.* See, finally, Pawlik, “§ 14 Abs. 3 des Luftsicherheitsgesetzes – ein Tabubruch?“, note 10 above, p 1049, and, especially, C Roxin, *Strafrecht AT* [Allgemeiner Teil], (Munich, Beck, 2006) § 22, Rdn. 149. On the conflicting ideas expounded by the government security school and that of constitution-based freedom, see for example W Schäuble, “Aktuelle Sicherheitspolitik im Lichte des Verfassungsrechts“, (2007) 39 *Zeitschrift für Rechtspolitik*, p 210 *et seq.*, and B Hirsch, “Aktuelle Sicherheitspolitik im Lichte des Verfassungsrechts – Eine notwendige Entgegnung“, (2008) 40 *Zeitschrift für Rechtspolitik*, p 24 *et seq.*

¹² Article 87 para. 1 first sentence, GG: “The Federation shall establish Armed Forces for purposes of defence...” Here and hereafter, the translation used is from <<http://www.iuscomp.org/gla/statutes/GG.htm>>.

¹³ Article 87 para. 2 GG: “Apart from defence, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law.”

¹⁴ Article 87 para. 3 GG: “During a state of defence or a state of tension the Armed Forces shall have the power to protect civilian property and to perform traffic control functions to the extent necessary to accomplish their defence mission. Moreover, during a state of defence or a state of tension, the Armed Forces may also be authorised to support police measures for the protection of civilian property; in this event the Armed Forces shall co-operate with the competent authorities.”

¹⁵ Article 87 para. 4 GG: “In order to avert an imminent danger to the existence or free democratic basic order of the Federation or of a Land, the Federal Government, if the conditions referred to in paragraph (2) of Article 91 obtain and the police forces and the Federal Border Police prove inadequate, may employ the Armed Forces to support the police and the Federal Border Police in protecting civilian property and

transregional necessity in Article 35 Paragraph 2 Sentence 2 and Paragraph 3 sentence 1 GG.¹⁶ It was specifically these last articles that the *BVerfG* deemed irrelevant. The court interpreted Article 87 Paragraph 2 GG in the first place literally, the operative principle being “strict textual faithfulness”, so as “to limit the use of the army inside the country”.¹⁷ This approach avoids interpretations which would derive “unwritten competences from the *Natur der Sache*” (“the nature of the thing”)¹⁸ and hence implicitly abuses the constitutional text. In the second place, the *BVerfG* literally interprets Article 35 Paragraph 2 Sentence 2 GG, which regulates the case of a state of regional necessity. This authorises the *Länder* “to call for the assistance” of the federal armed forces solely for the purposes of “support” to the *Länder* police. It is thus not permitted to use the armed forces “*with specifically military weapons* in response to natural disasters and particularly serious accidents”.¹⁹ By analogy, the same is true for the state of necessity across regions as in Article 35 Paragraph 3 Sentence 1 GG.²⁰ In summary, the *BVerfG* emphasised the structurally auxiliary and supportive function of the *Bund*’s armed forces in aid to the *Länder*’s police in activities under Article 35

in combating organized armed insurgents. Any such employment of the Armed Forces shall be discontinued if the Bundestag or the Bundesrat so demands.”

¹⁶ Article 35 GG: “(1) All federal and Land authorities shall render legal and administrative assistance to one another. (2) In order to maintain or restore public security or order, a Land in particularly serious cases may call upon personnel and facilities of the Federal Border Police to assist its police when without such assistance the police could not fulfill their responsibilities, or could do so only with great difficulty. In order to respond to a grave accident or a natural disaster, a Land may call for the assistance of police forces of other *Länder* or of personnel and facilities of other administrative authorities, of the Armed Forces, or of the Federal Border Police. (3) If the natural disaster or accident endangers the territory of more than one Land, the Federal Government, insofar as is necessary to combat the danger, may instruct the Land governments to place police forces at the disposal of other *Länder*, and may deploy units of the Federal Border Police or the Armed Forces to support the police. Measures taken by the Federal Government pursuant to the first sentence of this paragraph shall be rescinded at any time at the demand of the Bundesrat, and in any event as soon as the danger is removed.”

¹⁷ *BVerfGE* 115, p 118 *et seq.*, at 142.

¹⁸ *Ibid.*, p 118 *et seq.*, at 142.

¹⁹ *Ibid.*, p 118 *et seq.*, at 146. My italics.

²⁰ *Ibid.*, p 118 *et seq.*, at 150 *et seq.* In addition to the central argument that prohibits the use of the Armed Forces with specifically military weapons, the *BVerfG* bases its argument on the collegial nature of the federal government. See *BVerfGE* 115, p 118 *et seq.*, at 149 *et seq.*

Paragraph 2 Sentence 2 and Paragraph 3 Sentence 1 GG. The assistance provided by the armed forces to the police must not be qualitatively different in nature from the police role. The indicator of the right kind of action is, in fact, the weapons used.

This definitively means that, according to the German constitutional judges, the *Bund's* military may act within the national territory under the states of regional and trans-regional necessity provided for by the German Constitution in order to combat "grave accidents or a natural disaster" only in a subsidiary way and in support of the regional police, and therefore not "with specifically military weapons". Undoubtedly, a jet fighter armed with missiles is a specifically military weapon.

The second argument raised by the *Bundesverfassungsgericht* was the decisive importance of the Kantian principle of human dignity, a cornerstone of the German Constitution. The innocent passengers on board, and the equally innocent crew cannot be made to answer for the aggression perpetrated by the hijackers or terrorists. There is no calculus or equilibration that can justify the sacrifice of their lives in favour of the equally innocent lives of the potential future victims of a terrorist attack.²¹

²¹ *Ibid.*, p 118 *et seq.*, at 151 *et seq.* On the question of whether the *Luftsicherheitsgesetz* also need be approved in the Bundesrat, the upper house, the *Bundesverfassungsgericht* decided against in the context of a *Normenkontrollverfahren*, requested by the *Verwaltungsgericht*, Administrative Court, of Darmstadt regarding a question of private pilot licences (§ 7 para. 1 no. 4 of the *Luftsicherheitsgesetz* in connection with § 4 para. 1 sentence 2 no. 3 of the *Luftsicherheitsgesetz*). See 2 BvI 8/07, 2 BvL 9/07 of 4 May 2010, at: <www.bverfg.de>. At the time this article was written, an appeal by Bayern and Hessen regions against the *Luftsicherheitsgesetz* is pending before the *Zweiter Senat*, the second circuit, of the *Bundesverfassungsgericht*. According to journalistic sources, there are divergent opinions between the judges of the *Zweiter Senat* and their colleagues in the *Erster Senat*, the first circuit, which found § 14 para. 3 of the *Luftsicherheitsgesetz* to be unconstitutional in February 2006 with regard to the use of the Armed Forces on the nation's territory. This situation could lead to a decision of the Plenum, that is, a meeting of the entire court. See W Janisch & H Prantl, "Senat gegen Senat: Was darf die Bundeswehr?", *Süddeutsche Zeitung*, 4 August 2010; H Kerscher, "Warum die zwei Senate des Bundesverfassungsgerichts ein und dasselbe Gesetz völlig unterschiedlich bewerten", *Süddeutsche Zeitung*, 4 August 2010, p 5; R Leicht, Sechzehn Richter, zwei Meinungen, *Die Zeit*, 5 August 2010, p 8; W Janisch, "Karlsruhe will über Militäreinsatz im Innern urteilen", *Süddeutsche Zeitung*, 18 October 2010, p 1.

IV. The Italian Case

That is, very selectively, the situation as far as the Federal Republic of Germany is concerned. *Quid iuris* for the Republic of Italy? The Italian legal framework is less well-delineated than the German one. No act of parliament has been passed, nor even a *decreto legge*, a decree with force of law, which is made by the government in extraordinary cases of necessity and urgency (Article 77 of the Italian Constitution). A sub-legislative juridical source, a government decree (*D.P.C.M. - Decreto del Presidente del Consiglio dei Ministri*) was adopted by the Berlusconi government on 2 April 2004, and classified secret for reasons of national security. The existence of the secret regulation only came to light some three years later, in November 2007, following an answer by the Prodi government to a question posed in the defence committee of the House of Representatives by the MP Tana De Zulueta.²² The government's response²³ was that this regime was the result of the implementation and integration at national level of the so-called "Renegade Concept", a NATO document in Directive MCM-062-02.²⁴ According to the Italian Government, this document contains 1) "the description of the characteristics of a civilian aircraft used as a weapon to conduct terrorist attacks", 2) the relative "military-political implications", and finally, 3) the "guidelines" to adopt on a case by case basis in related "crisis situations".²⁵ The criteria and the procedures that would, if followed, legitimate the destruction of civilian aircraft, also classified as secret, would fall under the authority of the executive. The final decision to shoot down an aircraft would fall to a "National Government Authority"²⁶ as

²² Minutes of the House of Representatives, Parliamentary Acts, Appendix B, 13 November 2007, p 9325 *et seq.* I take the liberty of citing on this point, D Siciliano, "Non si possono fare con una scavatrice tenere carezze. Sulla giustificazione dell'uso della forza militare contro aerei civili", (2008) 39 *Politica del diritto*, p 353 *et seq.* In the application of the dogmatic category of the "scriminanti incentrate su un atto autorizzatorio" ("justifications, which are based upon an authorising act"), see F Palazzo, "Costituzione e scriminanti", (2009) 41 *Rivista italiana di diritto e procedura penale*, p 1033 *et seq.*, at 1054 *et seq.*; see, also, R Bartoli, "Incriminatione e giustificazione: una diversa legalità?", (2010) 42 *Rivista italiana di diritto e procedura penale*, p 597 *et seq.*, at 607 *et seq.*

²³ Camera dei Deputati, IV Commissione permanente (Difesa), 14 novembre 2007, p 106 *et seq.*, at 111 *et seq.*, & at 117. (Appendix 3-Text of the response)

²⁴ *Ibid.*, p 106 *et seq.*, at 111 *et seq.* & at 117.

²⁵ *Ibid.*, p 106 *et seq.*, at 117.

²⁶ *Ibid.*, p 106 *et seq.*, at 117.

defined by the previous Prime Minister, Berlusconi, in the secret decree of 2004. The structure of such an authority is unclear. The Italian reaction to the hijacking of a Turkish Airliner in October 2006 makes it plausible to suppose that the above-mentioned authority included the Minister of Defence or an Under Secretary of Defence in his or her stead.²⁷ On 31 January 2006, the Republic of Italy concluded an international defence agreement with Switzerland “concerning co-operation in air security against non-military air threats”.²⁸ Therein, “non-military air threats” are defined in Article 1 as civilian aircraft that have been “taken over by hostile means” or which are “employed for hostile purposes”. The agreement expressly excludes a regulation for “firing to intimidate” with weapons, and “firing to destroy” ascribing these matters to the “exclusive competence” of the signatories. These would be handled by a “national intervention mechanism in the national airspace within the national chain of command and control” (Article 5). This issue, which has been reserved to the authority of each signatory, was handled by Switzerland through the “*Ordinance for the protection of airspace sovereignty*” (OSS) of 23 March 2005,²⁹ and, in Italy, by the above-mentioned secret decree. The Under-Secretary for Defence in the Prodi administration, the MP Forcieri, in the conclusion of his response to the MP De Zulueta’s question expressed doubts as to the constitutionality of the rules. Nevertheless, no action worth mentioning has been taken to address the situation by either the former Prodi government or, after parliament was dissolved, by the present government and its parliamentary opposition, with the important exception of a question in parliament posed by MPs Mogherini Rebesani, Zaccaria, Corsini and La Forgia, on 16 June 2010, a question which is still awaiting a response from the government.³⁰

²⁷ See T Attino, “Questo biglietto al Papa o l’aereo salta”, in: *La Stampa*, 4 October 2006, p 7.

²⁸ Supplemento ordinario n. 177 alla Gazzetta ufficiale n. 181 del 5 agosto 2006.

²⁹ Articles 9 and 14 call for the use of weapons in a case where there is a state of necessity or in legitimate defence. See: <www.admin.ch/ch/i/as/2005/1757.pdf>, last accessed 5 November 2007.

³⁰ Camera dei Deputati, Resoconti dell’Assemblea, Allegato B alla seduta n. 338 del 16 giugno 2010, Mogherini Rebesani, Zaccaria, Corsini and La Forgia, Oral question 3/01131, announced in session no. 338 on 16 June 2010. The text may be found on the website of the House of Representatives, Camera dei Deputati, <www.camera.it/417?idSeduta=338&resoconto=bt01¶m=n3-01131#n3-01131>, visited on 22 June 2010. In their question, the MPs asked the Prime Minister and the

It must be remembered that, as far as the writer could determine, no public action of the parliament, or of the government, or of the administration in general, worthy of note has been produced which modifies the regulation established in April 2004 in its decisive form, that is, in the use of weapons in cases of necessity against airplanes hijacked by terrorists (and thereby shooting them down). If there have been modifications to the implementation of NATO's Renegade Concept in the Italian judicial system, these have occurred at an informal level behind closed doors. It is plausible, then, to assert that the present system is that of the *D.P.C.M.* of 2004.³¹ Briefly stated, in Italy, there has been, from April 2004 to November 2007, and there is considerable evidence that there still is, a procedure which 1) regulates at a sub-legislative level by a secret government decree, the shooting down of so-called "renegade" civilian aircraft which constitute a "non-military air threat"; 2) is harmonised with a similar regulation of the Helvetic Confederation by international agreement, which aims to regulate the policing of airspace at the shared border of the two states; and 3) is the result of the implementation of a NATO directive at national level.

The Italian procedure resembles the German *Luftsicherheitsgesetz*, with two important differences. Firstly, whereas the Italian rules were established by a secret sub-legislative decree, the German rules were produced in the form of a law, an act of Parliament. Thus, on the one hand, the decision to have recourse to such a procedure for security reasons in the higher interest of the state (*ragione di stato*) made it possible to keep the rules from the democratic scrutiny of both parliament and the public. On the other hand - and this is the second important difference - the greater concern of the German government for its citizens made it possible to have an extensive public debate and eventually a successful appeal in the German Constitutional Court or *Bundesverfassungsgericht*.

Minister of Defence 1) whether the political-military regulations for the shooting down of "renegade" civilian aircraft were "still in effect", and if so, 2) "whether the regulation had been modified since the Prime Ministerial decree of April 2004".

³¹ While this chapter was waiting to be published, the Italian government replied to the question asked by Mogherini Rebesani and others (which had been "transformed" on 21 July 2011, in question number 5-05153), confirming that the 2004 regulation is still in force. See Camera dei Deputati, IV Commissione Permanente (Difesa), 26 luglio 2011, p 81 *et seq.*, at 89 *et seq.*, (Appendix 3 - Text of the response).

V. The Spanish Case

Let us now see what transpires in another member of both the European Union and NATO: Spain. On 11 March 2004, terrorist attacks were carried out at the Madrid-Atocha railway station, which cost the lives of 191 people and injured 1,800 others. On 14 March, the Socialist Party under José Luis Zapatero won national elections defeating the coalition under José María Aznar. Only three days later, on 17 March 2004, the crisis cabinet, *Gabinete de Crisis*, of the government still under Aznar, following the security plan, *Plan de seguridad*, prepared after the recent grave terrorist attacks at Atocha, took measures to thwart further terror. On 19 March 2004, as called for in the plan, the Secretary of State for Security, Ignacio Astarloa, was named the “*autoridad nacional*” (national authority) whose mission was “*de hacer frente a un avión “renegade” (renegado según la terminología de la OTAN).*”³² According to Spanish daily *El País*, the system put in place by the Spanish government would respond to a “*demanda de la OTAN*” (request by NATO).³³ Again, according to *El País*, some two years before, in May 2002, the NATO *Comité Militar* had adopted the so-called “*Concepto Renegade*” (Renegade Concept). NATO, it seems, requested that member states appoint the relative “*autoridades nacionales*” (national authorities).³⁴ The new government led by Zapatero produced an explicit legal form for the military-political system prepared by the outgoing Aznar government. On 31 March 2005, Zapatero proposed a “*Ley Organica de la Defensa Nacional*”.³⁵ Among other things, this proposed law explicitly regulated “Armed Forces missions and their control by Parliament” (Article 14 *et seq.*). In Article 15 of this proposed bill, the types of uses of the armed forces, *tipos de operaciones*, were described. In particular, Article 15 Paragraph 1 letter a), in expressly regulating operations both within the national territory and abroad, states:

³² “ ... to deal with threats posed by ‘renegade’ aircraft (renegado as defined by NATO)”. Ministerio del Interior, España, at <www.mir.es/DGRIS/Cronologia/2004/2003>, 8, last accessed 4 February 2009.

³³ M González, “El Congreso regula por ley la respuesta ante ataques suicidas como los del 11-S” in: *El País*, 28 June 2005.

³⁴ *Ibid.*

³⁵ Congreso de los Diputados, Boletín oficial de las cortes generales, VIII Legislatura, Serie A: Proyectos de Ley, Proyecto de Ley Organica de la Defensa Nacional, 121/000031, 31 de marzo de 2005, Núm. 31-1, p 1 *et seq.*

El cumplimiento de las misiones de las Fuerzas Armadas requiere realizar diferentes tipos de operaciones, tanto en territorio nacional como en el exterior, que pueden conducir a acciones de prevención de conflictos o disuasión, actuaciones en situaciones de crisis y, en su caso, de respuesta a la agresión. En particular, las operaciones pueden consistir en [...] la vigilancia de los espacios marítimos, como contribución a la acción del Estado en el mar, la vigilancia del espacio aéreo y el control del espacio aéreo de soberanía nacional y aquellas otras actividades destinadas a garantizar la soberanía e independencia de España, así como a proteger la vida de su población y sus intereses.³⁶

In this way, the proposed law expressly provided the armed forces with the responsibility to guard national airspace, and, in general, to perform any and all tasks to protect “the lives of its population and its interests”. In June 2005, *La Ponencia*, the commission tasked to rewrite the proposed *Ley Organica* for the parliamentary defence committee, inserted a new paragraph 1 letter d) into the discipline for the specific uses of the Spanish Armed Forces at Article 15 Paragraph 1 letter a) and successive paragraphs in the same article.³⁷ This article specifically regulated the case of airspace security: defence from threats posed by civilian aircraft used to perform acts of terrorism. The new text, now at Article 16, Paragraph 1, letter d) reads:

En particular, las operaciones pueden consistir en [...] la respuesta militar contra agresiones que se realicen utilizando aeronaves con fines terroristas que pongan en peligro la vida de la población y sus intereses. A estos efectos, el Gobierno designará la Autoridad nacional responsable y las Fuerzas

³⁶ “The accomplishment of missions by the Armed Forces requires them to perform many different types of operations both within national borders and abroad, which may lead to actions to dissuade or prevent conflicts, perform tasks in crisis situations, and, in this case, to repel aggression. In particular, the operations may consist of [...] surveillance of maritime space, as a contribution to the actions of the state at sea, surveillance of airspace, and control of national airspace sovereignty, and any other activity that serves to guarantee the sovereignty and independance of Spain, so as to protect the lives of its population and its interests”.

³⁷ Congreso de los Diputados, Boletín oficial de las cortes generales, Serie A: Proyectos de Ley, Informe de la Ponencia, 28 de junio de 2005, Núm. 31-7, p 107 *et seq.*, at 114.

Armadas establecerán los procedimientos operativos pertinente.³⁸

In this manner, along with the *general* responsibility in Article 15 Paragraph 1 letter a), which, in the meantime had become Article 16 Paragraph 1 letter a), authorising the armed forces to undertake activities of airspace surveillance to protect the lives and interests of the Spanish population, the armed forces were given *specific* responsibility in Article 15 Paragraph 1 letter d) in the event of terrorist attacks by hijacked planes which, once again, threaten *the lives* and, in an important shift with regard to the corresponding German regulation, *the interests* of the Spanish population. Moreover, the government would be granted the power to designate a competent national authority and the armed forces would be able to adopt measures upon an *ad hoc* basis.

VI. A Transnational Network

All of the preceding allows one to establish that 1) the secret Italian government decree of 2 April 2004, 2) the Spanish political-military regulations of March 2004 and the rules under Article 16 Paragraph 1 letter d) of the *Ley Organica de la Defensa Nacional* of November 2005, and 3) the German *Luftsicherheitsgesetz* of January 2005, or rather the related projects of the *Bundesrat* of 7 November 2003 and of the *Bundestag* of 14 January 2004, are the product of the implementation of the same NATO directive, *i.e.*, the “Renegade Concept” at national levels.³⁹

³⁸ “In particular, operations may consist in [...] military reaction to repel aggression by aircraft employed for terrorism which endanger the lives of the population and their interests. To this end, the government shall designate a responsible National Authority and the Armed Forces shall produce the pertinent operational procedures.”

³⁹ Regulations and procedures for air policing, authorising the shooting down of suspect civilian aircraft or no, seem to have come into being in many other countries both members and non-members of the EU. Regarding the Swiss Confederation, see, above, in Section IV). With reference to Froelich and van Schyndel, Giemulla and Rothe recall a Polish law of 13 January 2005 which gives the Minister of Defence or the Supreme Commander of the Polish Armed Forces the power to order the shooting down of hijacked civilian or military aircraft used to perform acts of terrorism, as well as a Slovakian law of 14 December 2005 and finally a Russian law of 6 March 2006. EM Giemulla & BR Rothe, in: *idem*, (eds), *Recht der Luftsicherheit*, note 6 above, p 103. Also according to Giemulla & Rothe, the National Security Council of Austria, Sicherheitsrat, seems to have decided in July 2007 that military

The issue at the core of the *Luftsicherheitsgesetz* is not, therefore, only one of “tragic choices”,⁴⁰ but also and, in particular, one of *democratic* control of the transnational political-military networks in Europe, especially of the NATO network with regard to such crucial tragic choices.

The German law and the Italian regulation on airspace security can be traced back to the NATO network. The strong similarities are not only in the organisation of the political-military chain of command, they also have a semantic nature. *On the one hand*, the Italian government of Romano Prodi, in its response of November 2007 in parliament, names the conception and the NATO directive which is

pilots were authorised to shoot down hijacked civilian aircraft in cases of military or terrorist attacks; in France, there seems to have been an Air Defence decree in force since 1975 which also permits the destruction of civilian aircraft hijacked and used to commit acts of terrorism. *Idem*, *Recht der Luftsicherheit*, note 6 above, p 98 *et seq.* See, also, German weekly *Der Spiegel*, according to which the destruction of planes in particular is prohibited in Sweden. E Lodde, “Tödliche Gefahr über Europas Himmel”, *Spiegel Online* - 17 February 2006, at <www.spiegel.de/politik/deutschland>, last accessed 19 October 2007. In Great Britain according to Michael Bohlander, it seems that some unpublished orders have been given to the RAF. M Bohlander, “Of Shipwrecked Sailors, Unborn Children, Conjoined Twins and Hijacked Airplanes - Taking Human Life and the Defence of Necessity”, (2006) 69 *The Journal of Criminal Law*, p 147 *et seq.*, at 157. Also see the answer of the European Commission on 27 October 2005 to a question put in the European Parliament by MEP Esko Seppänen, in the light of modifications on the part of the Finnish Parliament to policing laws which permit “in the name of defence from the threat of terrorism, the shooting down of civilian aircraft with the executive assistance of the army” (question no. 105 by MEP Esko Seppänen (H-0834/05)): “There is no EU law or common position or joint action of the EU on the question of the interception of civilian aircraft in cases of terrorist threats. The way member states use the military forces at their disposal lies exclusively within the sphere of their jurisdiction. Neither Finland nor any other member state has undertaken to adopt at the EU level national legislation that allows the use of military forces to intercept civilian aircraft in case of terrorist attacks. This, however, is not a new matter; many member states already have legislation in force which permit recourse to military means in case of terrorist attacks, such as, for example, Denmark, the UK, Lithuania, the Czech Republic and so forth. This issue has also been widely discussed at NATO and at the European Organisation for Air Navigation Security (Eurocontrol)” at <www.europarl.europa.eu/sides>, visited 6 November 2009. Finally, see the so-called “solidarity clause”, Article 222 of the Treaty of Lisbon, which has now been ratified.

⁴⁰ See Guido Calabresi & Philip Bobbitt, *Tragic choices*, (New York, Norton, 1978).

used to identify “dangerous” civilian aircraft, “Renegade Concept”, and goes on to speak of the destruction of a “renegade”.

On the other hand, also in the German debate, there are clear signs of the “Renegade Concept”. Firstly, in the discussion of the *Luftsicherheitsgesetz*, one notes the reference to the classification on the part of NATO (also) of “dangerous” civilian aircraft as “*Renegade Fälle*”, or “renegade case”, or as “Renegade”.⁴¹ Secondly, and more generally, it is possible to re-constitute the profile of the Renegade Concept. The German Foreign Minister, with reference to the fight against terrorism by NATO, thus speaks of the “Renegade Concept”: it is a concept which the alliance has developed “*zur Abwehr von Gefahren, die von Luftfahrzeugen mit terroristischem Hintergrund ausgehen*” (“to defend us from threats coming from aircraft which have terrorist characteristics”).⁴² Moreover, according to a German report to the OECD for 2006, of 5 April 2007, NATO was engaged “in verification and amending the ‘Renegade Concept’”. The activity served “to support nations in the defence from the possible use of airplanes for terrorism”.⁴³ In particular, the connection between the *Luftsicherheitsgesetz* and the NATO Renegade Concept surfaced in the parliamentary debate on the *Luftsicherheitsgesetz*. Even in the initial debate in the *Bundestag* on 30 January 2004, the MP Silke Stokar von Neuforn was able to declare that the proposed law was “nothing

⁴¹ See BVerfGE 115, 118 *et seq.*, at 121: Klassifizierung durch die NATO oder das Nationale Lage- und Führungszentrum in Kalkar von “Renegade” Flugzeugen; P Dreist, “Einsatz der Bundeswehr im Innern - Das Luftsicherheitsgesetz als Anlass zum verfassungsrechtlichen Nachdenken”, in: U Blaschke, A Förster, S Lumpp & J Schmidt (eds), *Sicherheit statt Freiheit? Staatliche Handlungsspielräume in extremen Gefährdungslagen*, (Berlin, Duncker & Humblot, 2005), p 77 *et seq.*, p 86: “Diese Fälle werden in der NATO als sog. ‘Renegade Fälle’ bezeichnet, für deren Bewältigung ... die NATO als militärisches Verteidigungsbündnis nicht zuständig ist”; thoroughly on this point, see R Niklaus, *Zum Abschuss freigegeben? Eine interpretative Mikro-Policy-Analyse des Sicherheitskonzeptes zur Abwehr terroristischer Gefahren aus dem Luftraum*, (Marburg, Tectum 2006), p 53 *et seq.*

⁴² <www.auswaertigesamt.de/diplo/de/Aussenpolitik/FriedenSicherheit/TerrorismusOK/Terrorismusbekaempfung-NATO.html>, Stand: 12 June 2007, last accessed 27 February 2008, p 2.

⁴³ AUSWÄRTIGES AMT, Informationsaustausch zum Verhaltenskodex zu politisch-militärischen Aspekten der Sicherheit (FSC.DEC/4/03), at: <<http://www.auswaertiges-t.de/diplo/de/Aussenpolitik/Themen/Abrue-stung/Downloads/OSZE-VerhKodex-dtStellungnahme07.pdf>>, last accessed 27 February 2008, p 12.

fundamentally new", "*nichts gänzlich Neues*".⁴⁴ The MP explained this assertion, among other things, by stating that there was already a corresponding NATO directive. Most European states had already adopted a corresponding regulation according to Stokar von Neuform. So there was "a legal gap only for German domestic flights". In Stokar von Neuform's words:

Außerdem gibt es eine entsprechende NATO-Verordnung. Die meisten europäischen Länder haben diese Militärverordnung übernommen. Es gibt eine Regelungslücke lediglich bei deutschen Inlandsflügen.⁴⁵

Further evidence can be found in the response by the Parliamentary Secretary of State for the Minister of Defence, Hans Georg Wagner, to a question, *kleine Anfrage*, from the MP Petra Pau on the *procedures* governing the national situation and control centre created on 1 October 2003 at Kalkar am Niederrhein.⁴⁶ According to Wagner, NATO began to review the existing rules immediately after the terrorist attacks in the USA in September 2001. This was aimed at

⁴⁴ *Deutscher Bundestag Stenographischer Bericht*, 89. Sitzung, Plenarprotokoll 15/89, p 7886.

⁴⁵ "Moreover there is a corresponding NATO directive. Most European countries have already conformed to this directive. A gap exists in the regulation only for German domestic flights." *Deutscher Bundestag Stenographischer Bericht*, 89. Sitzung, p 7886. See similar declarations by Stokar von Neuform during a later discussion of the law on 18 June 2004: "Im internationalen Luftverkehr werden der Einsatz der NATO und damit der Einsatz der Bundeswehr bei einer schwerwiegenden Bedrohung des Luftraums geregelt. Es handelt sich hier lediglich um eine Regelungslücke im Bereich des innerdeutschen Luftverkehrs". *Deutscher Bundestag Stenographischer Bericht*, 115. Sitzung, 18. June 2004, p 10540. My italics. In Stokar von Neuform's speech the decisive juridical regime is the "international" one. In contrast, the "German internal legal regime" has no chance to affirm itself. Germany, a member state of NATO, submits in the international context to the other states. In the end, Germany has but to implement or "fill a gap" in the national law. On the idea of juridical regime, see M Koskenniemi, "The Fate of Public International Law: Constitutional Utopia or Fragmentation?", LSE Chorley Lecture 2006, p 37 *et seq.*, available at: <<http://www.helsinki.fi/eci/Publications/MKChorley%20Text-06a.pdf>>, last accessed 26 October 2009; see G Teubner & A Fischer Lescano, *Regime-Kollisionen. Zur Fragmentierung des globalen Rechts*, (Frankfurt aM, Surhkamp Verlag, 2006), p 7 *et seq.*, in particular, at 57.

⁴⁶ *Deutscher Bundestag Stenographischer Bericht*, 96. Sitzung, Plenarprotokoll 15/96, 10 March 2004, p 8584 *et seq.*

being able to respond to the new threat.⁴⁷ In the context of relocations of the NATO military organisation, most member states, including Germany, successfully requested that “the fight against so-called renegade airplanes be conducted at national level because of the related political and legal conditions”.⁴⁸ Correspondingly, the NATO member states were obliged “to develop procedures and organisations to ensure that this national responsibility was met”.⁴⁹

In response to a successive question from the MP Gesine Loetsch on whether there was NATO co-ordination for defence against renegade aircraft, and what form it might have, Wagner refers to a NATO regulation on this topic:

Frau Kollegin, auch das ist geregelt. Das wird von der NATO vorgegeben: Die nationalen Behörden müssen eingreifen.”⁵⁰

This means: 1) the juridical regulation of the organisation in Kalkar was adopted at the NATO level, too; 2) responsibility for the prevention of and the fighting of renegade aircraft was placed at the level of national sovereignty; and 3) the member states thus had to turn obligations assumed at “international” or “transnational” level into national regulations. The member states were thus obliged to implement the Renegade Concept at their respective national levels. “*Nationale Behörden*”, national authorities, were obliged to intervene.

That leaves Spain. The Spanish political-military regulation of March 2004 and its successive legislative juridical discipline can also be

⁴⁷ *Ibid.*, p 8585.

⁴⁸ *Ibid.*, p 8585.

⁴⁹ *Ibid.*, p. 8585.

⁵⁰ “Honourable colleague, this, too, is regulated. This has been established by NATO. National authorities have to intervene.” *Ibid.*, p 8585. On the connection between NATO defence organisation and the German Federal Republic, see the public audience as a consultant of Lieutenant General Heinz Marzi, *Deutscher Bundestag, Innenausschuss Protokoll*, p 35. Sitzung, Öffentliche Anhörung del 26 aprile 2004, Protokoll Nr. 15/35, p 27 *et seq.* See, here, Niklaus, *Zum Abschuss freigegeben? Eine interpretative Mikro-Policy-Analyse des Sicherheitskonzeptes zur Abwehr terroristischer Gefahren aus dem Luftraum*, note 41 above, p 54 *et seq.* In this context, Niklaus describes in detail national “air policing” and the classification of air threats as non military or civilian and therefore as “Renegade Fall”. Niklaus, *Zum Abschuss*, note 41 above, p 55; see, also, Ladiges, *Die Bekämpfung*, note 11 above, p 101.

traced back to the NATO Renegade Concept. The structure of the regulation is, in fact, similar to the German and the Italian regulations. On the one hand, civilian airplanes hijacked by terrorists are defined as “*renegado*”, renegade.⁵¹ On the other, the “*Gabinete de Crisis*” of the Aznar government in March 2004 constitutes an “*autoridad nacional*”, national authority. This, presumably, is the equivalent function of the “*Autorità nazionale governativa*” (“national government authority”) of the Italian D.P.C.M. of a few days later, on 2 April 2004, and of the “*Nationale Behörde*” to which Secretary of State Georg Wagner referred a few days before in his speech of 10 March 2004 in the *Bundestag*.⁵² With regard to the chain of command, this differs slightly from the Italian and German regulations, because it seems that, in the Spanish regulation, the Vice-minister or the “*Segretario de Estado de Seguridad*”, and not the Minister, is directly the first point of reference for the military.⁵³

VII. Conclusions

The common semantics in the German, Italian and Spanish debates refer to a concept stemming from the NATO context, the “Renegade Concept”. It is all about a form of global governance consisting of informal transnational agreements among military and political networks which are implemented through their respective national juridical systems in a strategic way through top-down decisions.

Making the same NATO concept judicially operational took the form of a parliamentary law in Germany. In this way, the result of a NATO

⁵¹ See M González, “El secretario de Estado de Seguridad podrá derribar aviones suicidas como los del 11-S”, *El País*, 20 March 2004.

⁵² The same re-construction of the development of the Spanish military regulation in March 2004 in the NATO context, which was reported in detail in the Spanish daily *El País*, was never contradicted by the Spanish government as far as this writer has been able to ascertain. See M González, “El secretario”, note 51 above, JA Rodriguez, “10.000 policías vigilarán el enlace real, para el que se cerrará el espacio aéreo de Madrid”, in *El País*, 30 April 2004, as well as M González, “El Falso secuestro de un avión marroquí activó la alerta diseñada tra el 11-S”, in: *El País* 2 April 2007: “El Procedimiento Renegade se instauró en España a demanda de la OTAN, cuyo Comité Militar instó en mayo de 2002 a todos sus países miembros a que lo aplicaran”; with regard to just the Spanish national situation, see *idem*, “El Congreso regula por ley la respuesta ante ataques suicidas como los del 11-S”, in: *El País*, 28 June 2005: “La ley Orgánica de Defensa nacional, que hoy debate el Congreso, dará cobertura legal a un sistema regulado desde abril de 2004 por un acuerdo secreto del Gabinete de Crisis.”

⁵³ See note 52 above.

decision made informally was transformed into a *national* issue and only then became a subject of debate.⁵⁴ As a consequence, it was not possible to question NATO on the compatibility of the war on terror with juridical language based upon the principle of the constitutional rule of law. The Italian justice system is more unstable from the perspective of the principle of constitutional rule of law. Thus, making the decisions juridically operational took a form that was typical of measures regarding the higher interest of the state, the secret decree. This is how even the *possibility* of a *national* debate was avoided from the outset. In Spain, however, a tentative solution, or *Zwischenlösung*, was found. First, a model similar to that adopted almost contemporaneously in Italy was adopted by the Aznar government using the higher interests of the state to shroud a political-military regulation in secrecy. Then, under Zapatero, a model was created similar to that which had been adopted in Germany in the meantime, an act of parliament. Such transnational policies, such forms of governance, are fundamentally aloof from political and juridical control by single states, by local public opinion and by the European Union. The very political and juridical limitations of global governance, especially where decisions of life and death are concerned, should, in every case, be a central duty of states which claim to observe the constitutional rule of law such as Germany, Italy and Spain. This should also apply for an institution such as the EU. It, too, is bound to respect the principle of rule of law.

⁵⁴ For all sources, see the works cited above at notes 10 and 11. With the exception at least of the article by Giemulla & Rothe, appropriately entitled "Der Abschuss von Zivilluftfahrzeugen - (k)ein deutsches Problem", in: *idem*, *Recht der Luf Sicherheit*, note 6 above, p 97 *et seq.*

Chapter 17

Global Governance Conflicts on Social Rights

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I. A Change in Addressee

International law finds it difficult to establish reasons for a subjective legal position. It is argued that the addressees of social rights in particular, defined as the social, technical and ecological protection of living conditions, are not sufficiently determined to derive and justify individual legal rights.¹ Against such a legal obligation, it is also argued that the enforcement of the rights to a “good” life always come under the *caveat* of the available means, resources and possible access, and remain, therefore, open to mechanisms of justification. At the same time, globalisation shifts the balance between the state and politics. Previously regarded as the guarantors of social living-conditions, states are unable to cope with their control and steering tasks on their own, in view of the new actors emerging on the world market. As a result, the nation state is weakened in its ability to

¹ See B Simma, “The Implementation of the International Covenant of Economic, Social and Cultural Rights”, in: F Matscher (ed), *Die Durchsetzung wirtschaftlicher und sozialer Grundrechte*, (Kehl am Rhein-Arlington VA, NP Engel, 1991), pp 75 et seq., at 77; see, also, P Alston in: *idem*, (ed), *The United Nations and Human Rights: A Critical Appraisal*, (Oxford, Clarendon Press, 1992), p 473 et seq., at 490.

develop social structures and to stabilise solidary communities. At global level, this deficiency finds no political compensation. Beyond the nation state, a societal complexity and cultural diversity exists that can no longer be integrated into a political system. The difficulty - on the part of nation states - to come to international agreements comes to mind as an example of these complexities.² Against this backdrop, the process of globalisation (mainly read as economic liberalisation) is perceived as a threat to social order. At the same time, expanding world trade creates independent transnational norm-complexes which are meant both to solve steering-problems within the system *and* to protect its freedoms. The WTO, NAFTA, the Single European Market, Mercosur, the IMF, and, last, but not least, the corporate governance of multinational corporations provide novel mechanisms in order both to solve the emerging conflicts between the economy and its functional, human and natural environments in a system-compatible manner *and* to realise the freedom of world trade.

In the “postnational constellation”, how these new forms of self-steering develop, and whether they can contribute to the stabilisation of society as a whole, are decisive issues. In this context, Helmut Willke talks about the “improbability of the social arrangement”.³ It is obvious to assume inherent dynamics, power structures and merit-principles; nevertheless, hope rests on these processes of self-organisation in the paradoxical situation of the steering-failure of politics and given the increasing societal demand for regulation. A more optimistic view of these new governance structures would seem, therefore, to be appropriate. Hence, the question moves centre stage to *how* the external demands and needs of the social and human environments are perceived and taken into consideration by these new processes of governance. Then, the social element of governance structures needs to be defined. The problem of defining the social and social rights, respectively, already indicates the complexity of the issue: there is no neutral standard of the social. Recourse to “the good” or to “the values” remains impossible in a pluralist society. The social instead becomes a perspectival, value-laden and context-

² For the failure of the UN to regulate a number of issues, see, for example, JG Ruggie, “Business and Human Rights: The Evolving International Agenda”, (2007) 101 *American Journal of International Law*, pp 819-40.

³ H Willke, *Systemtheorie III: Steuerungstheorie*, 3rd ed., (Stuttgart, UTB, 2001), p 188.

bound matter. As a result, the social already entails a procedural element. After a look at the structures of global governance, the concepts of discourse theory, systems theory and social human rights are accessed as approaches to the social question. Starting from different premises, they all try to determine the social aspect of these novel structures.

II. The Trajectories of Transnational Governance

Emerging in the 1990s under the term *multinational corporation* and nowadays vividly continuing under the catchword *private governance*, a prominent place is reserved in discourse⁴ to the voluntary commitments and social responsibility of economic actors.⁵ Although international conventions as inter-state treaties under international law, such as the *Universal Declaration of Human Rights*, the *Cartagena Protocol on Biosafety*, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR) of 1966, the *Convention on the Rights of the Child*, and the *Kyoto Protocol*, all define social norms and all affect the areas of human rights, labour standards, sustainable development and global environmental law, they can - at best - provide a framework for economic activity only indirectly. For any direct effect, they lack authority.

Faced with gaps in regulation, as well as burgeoning protests and scandals, global actors reacted with novel "co-operative procedures

⁴ The terms "transnational governance", "co-regulation" and "co-governance" are used synonymously; see P Utting, "Regulation Business via Multistakeholders Initiatives: A Preliminary Assessment", in: R Jenkins, P Utting & R Alva (eds), *Voluntary Approaches to Corporate Responsibilities: Readings and a Resource Guide*, (Geneva, NGLS-Unrisd, 2002), pp 61-130; K Dingwerth, *The New Transnationalism*, (Basingstoke, Palgrave, 2007).

⁵ UNCTAD - United Nations Conference on Trade and Development, *Disclosure of the Impact of Corporations on Society: Current Trends and Issues*, (New York-Geneva, United Nations Publications, 2004); R Dombois, "Auf dem Weg zur Globalisierung sozialer Rechte? - Governanceprozesse trans- und internationaler Arbeitsregulierung", in: S Moebius & G Schäfer (eds), *Soziologie als Gesellschaftskritik*, (Hamburg, VSA, 2006), pp 206-225, at 213 *et seq.* For this shift, see, also, R Köpke & W Röhr, *Codes of Conduct: Verhaltensnormen für Unternehmen und ihre Überwachung*, (Cologne, PapyRossa, 2003); L Fransen & A Kolk, "Global rule-setting for business: A critical analysis of multi-stakeholder standards", (2007) 14 *Organization*, pp 667-84.

of order formation”⁶ in order to solve issues of globalisation and their regulatory needs. Without a direct connection to politically-established legal norms and formal validity claims, such a functionally-differentiated process of norm-generation draws on societal expectations.⁷ Hence, they can neither be categorised as national state law, nor as international law; instead, they transcend traditional legal categories and constitute the category of transnational law.⁸ As a hybrid legal form, transnational law manifests itself differently, appears, and “shines through” traditional law. Cautiously, one can distinguish between merely private economic organisations, multi-stakeholder models with private participation, and those with (inter-) state participation.⁹

As purely private initiatives, the codes of conduct of multinational corporations need to be mentioned in particular.¹⁰ The efforts of the *European Alliance for Corporate Social Responsibility*, the *Business Social Compliance Initiative*, the *Charter of the Social Partners in the European Textile and Clothing Sector*, the *Common Code for the Coffee Community*, *Responsible Care (RC)*, the *Wolfsberg Principles*, the *CO₂ commitment of the European Automobile Manufacturers*, and the *Code of Business Practices of the International Council of Toy Industries*, for instance, are also all purely private initiatives.¹¹

An example for a multi-stakeholder model as a governance network comes, for instance, in the form of stewardships, such as the *Forest*

⁶ For this term, see T Vesting, “Kein Anfang und kein Ende - Die Systemtheorie des Recht als Herausforderung für Rechtswissenschaft und Rechtsdogmatik”, (2001) 5 *JURA*, pp 299-305, at 305.

⁷ See, generally, G Teubner (ed), *Global Law without a State*, (Aldershot, Ashgate-Dartmouth Publishing, 1997).

⁸ For this categorisation, see A Fischer-Lescano & G Teubner, “Fragmentierung des Weltrechts: Vernetzung globaler Regimes statt etatistischer Rechtseinheit”, in: M Albert & R Stichweh (eds) *Weltstaat - Weltstaatlichkeit: Politische Strukturbildung nach der Globalisierung*, (Wiesbaden, Verlag für Sozialwissenschaften, 2007), pp 37-61, at 47.

⁹ Details for the different initiatives can be found at the homepage of “CSR weltweit”, available format: <http://www.csr-weltweit.de/initiativen-prinzipien/index.nc.html>, (last accessed 3 March 2011).

¹⁰ See, for example, M Herberg, *Globalisierung und private Selbstregulierung: Umweltschutz in multinationalen Unternehmen*, (Frankfurt aM, Campus Verlag, 2007).

¹¹ Köpke & Röhr, note 5 above, mention a number of separate, independent codices. See, also, Utting, note 4 above.

Stewardship Council (FSC) and the *Marine Stewardship Council* (MSC). Here, NGOs and corporations with an interest in the long-term sustainable use of certain resources engage with each other and develop alternative regulatory systems, such as systems of certification. Further initiatives in which different stakeholders co-operate include, for instance, the *Ethical Trading Initiative* (ETI), the *Clean Clothes Campaign*, the *Global Reporting Initiative*, and the *Voluntary Principles on Security and Human Rights*.

Labelled as public-private partnership, a multi-stakeholder initiative with state participation can, for instance, be found in the *International Standardisation Organisation* (ISO), which, with the help of expert input, is concerned with the public marketability of products. Another part of this category can be found in the *Extractive Industries Transparency Initiative* (EITI), the *Kimberley Process*, and the *Global Compact*, in particular. Forms of co-operation which entail administrative regulations, such as the *OECD High Production Volume Initiative* (HPVI), which collects information about harmful substances, and the *Codex Alimentarius Commission* (CAC), which establishes food standards in order to protect both consumers and fair trade in foodstuffs, allow for the participation of stakeholders, but establish their norms within networks of expert agencies, and are, therefore, rooted in nation states.¹²

III. Social Governance Structures?

Different civil societal actors contribute to the de-centralised processes of norm-generation. International organisations, multinational corporations, global law firms, global funds, global associations, NGOs and protest movements all advance global processes of law-making under the very pressures caused by problems of globalisation. They show numerous differences in the direction which their regulations take with regard to their object of protection, their level of regulation, and their mechanisms of ascription. They establish links to their social environment in totally different ways. And thus the central question is, therefore, whether these developments can rupture the economic logic, or, to phrase it

¹² See MJ Warning, *Transnational Public Governance: Networks, Law and Legitimacy*, (Basingstoke, Palgrave Macmillan, 2009).

differently, whether they can be seen as a counter-move in the sense of Karl Polanyi.

In multi-stakeholder arrangements, private actors commit themselves to comply with certain standards and to involve stakeholders, such as employees, shareholders, and, increasingly, suppliers, business partners, NGOs and local communities as well. They are characterised by co-operation and dialogue amongst the parties involved. The expertise of the different participants can contribute to an adequate solution of conflict. In these networks, in particular, it is possible to establish responsibilities. However, these arrangements also remain bound to their sectorial logic and are blind to external needs. The *International Standardisation Organisation* (ISO) is, for instance, geared towards the marketability of products, and can hardly reflect a public interest into product quality. The needs of externally-affected parties, unrelated to product marketability, can only be introduced in the discourse to a limited extent.¹³ Furthermore, the power imbalance between economic and civil societal participants cannot be resolved.

From this perspective, the stewardships of public goods also need to be assessed critically, since they allow corporations to participate in certification programmes which are only interested in the protection of a public good due to an economic interest in its long-term use. The problem-solving capacity of such initiatives remains limited to cases in which the economic actors involved hope for long-term economic benefits. Furthermore, the process of certification shifts social responsibility on to the consumer.

This logic of standardisation becomes even more apparent, once one examines the numerous economic initiatives. They consist of partnerships, exchange and networks, and can serve as a foundation for company-specific programmes of corporate social responsibility (CSR). To some extent, they all also include internal commitments concerning certain areas and goods, and also aspects of self-monitoring, although the instruments used differ widely in substance, scope, origin and enforcement. Furthermore, the acceptance of such commitments is voluntary and can be fed by

¹³ See, generally, H Schepel, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, (Oxford, Hart Publishing, 2005).

completely different purposes. "Societal engagement" linked to the economic logic cannot solely be based upon various motives: these include external profiling with the help of branding (for example, clean products, social certificates), effective consumer campaigns and public reputations, as well as company-internal fostering of loyalty, productive co-operation, co-operation with interest representations,¹⁴ and the prevention of political regulation.¹⁵ In this way, social orientation becomes a factor in competition. But, this also means that social orientation is only present within the framework of the competitiveness and the legal capacity of a corporation. Only economically healthy and successful companies are able to act in such a social manner. Here, at the latest, external factors collide with the aim of protecting jobs.

Introduced by Kofi Annan at the 1999 *World Economic Forum* in Davos, only the Global Compact as a multi-stakeholder arrangement between the United Nations and companies (with the additional participation of research institutes, economic and employers' associations, cities and civil society) seems to be able to break with this functional logic by taking precisely this aspect as its starting-point. Initially not designed as a code of conduct or monitoring system, but as a voluntary forum for learning and discussion, it attempts to utilise the economic orientation of companies and the reputation of the UN.¹⁶ This platform is meant to be an incentive for compliance with ten guiding principles (which include, among others, human rights, rights at the workplace, environmental protection, and the fight against corruption). In this co-regulation, the comparative advantage of the United Nations, its legitimacy, global reach, summoning power and the development of governance structures as an alternative to state regulation and economically

¹⁴ For an overview of agreements between multinational corporations and global union federations with the participation of company and national unions, see L Riisgaard, "International Framework Agreements: A New Model for Securing Workers Rights?", (2005) 44 *Industrial Relations*, pp 707-37.

¹⁵ See M Koenig-Archibugi, "Transnational Corporations and Public Accountability", (2004) 39 *Government and Opposition*, pp 234-59.

¹⁶ JG Ruggie, "The Theory and Practice of Learning Networks: Corporate Social Responsibility and the Global Compact", (2002) 5 *Journal of Corporate Citizenship*, pp 27-36. See, also, K Buhmann, "Regulating Corporate Social and Human Rights Responsibilities at the UN Plane: Institutionalising New Forms of Law and Law-making Approaches?", (2009) 78 *Nordic Journal of International Law*, pp 1-52.

profitable networks, all become noticeable. With the help of the voluntary involvement of global players, the UN tries to regain and to restore its steering capacity; it provides the platform, establishes a legal framework, and labels the procedure an open (learning) process, and, in this way, it involves the private economy in the generation of common values.¹⁷ In this context, corporations have the opportunity to become accustomed to the notion of corporate social responsibility (CSR), and to enter the “global CSR world”. It is in this context that John Ruggie refers to the signalling effect of rules.¹⁸

In this regulatory alliance, companies turn into globally responsible partners outside of politics, although they do, nonetheless, remain under observation. Nevertheless, mere membership is no guarantee of responsible action on the part of corporations. Instead, the *Global Compact* should, apart from allowing membership, be able both to exert internal pressure concerning certain forms of social behaviour, and to establish the respective monitoring bodies; and it is here that the weak spot of the *Global Compact* lies.

Although there are constant efforts to reform the reporting and complaint system, critics still find fault with the effectiveness of this arrangement. The duty of corporations to report their progress is only reviewed formally, and leads, in the case of an infringement, to the suspension of membership, while a second infringement leads to its termination. Additional sanctioning or monitoring measures or independent verification mechanisms regarding corporate commitments are, however, not foreseen. Compliance with the guiding principles remains, therefore, opaque, and the danger exists that the *Global Compact* will be abused as a marketing campaign without any obligation. Currently, however, momentum increases among those involved who comply with their commitments and who fear that this form of abuse harms the reputation of the association as a “seal of quality”. They insist that the *Global Compact* become more binding and transparent, since only this will allow them to benefit from it.

¹⁷ JG Ruggie, “Reconstituting the Global Public Domain: Issues, Actors and Practices”, (2004) 10 *European Journal of International Relations*, pp 499-531.

¹⁸ JG Ruggie in ZEIT-Interview “Vergessen Sie Johannesburg!”, 2002, available form at: <http://www.zeit.de/2002/35/200235_interv_ruggie.xml>, (last accessed 03 March 2011).

In summary, it can be said that a plethora of initiatives exists, which try to react appropriately to the conditions of globalisation as well as to the resulting “postnational constellation”,¹⁹ and that they attempt to follow the shift in the form of political power. With the redistribution of former state tasks and with the multitude of new actors, such as employers’ associations, NGOs, citizen groups, local and international unions, and interest representations, as well as new non-state enforcement *fora*, new hybrid structures emerge in which the state is only one kind of actor among others. In this way, the social task has become vacant and is perceived and addressed very differently by these new forms of steering. All approaches are characterised by an orientation toward problem-solving and mechanisms of co-operation meant both to tame an unrestricted economic logic and to ground it in its social environment. The pressures of problems, problem-solution and efficiency are the engines of this trend. The multitude of novel governance patterns generates new opportunities for co-operation and communication, which are, theoretically, able to integrate new actors, but are, in fact, shaped by completely new power- and resource-differences that dominate problem solutions. Standards change in these new forms of steering. The societal logics that prevail at the time determine the agenda. Societal structures are taken into account when they disturb these logics, especially economic logics. Only the problems that affect system rationality are addressed – hence, governance structures are also, but only to this extent, capable of solving the problems. In this economic logic, however, solutions can always only be about human labour and employment, and about a minimum standard determined by the degree that the economy has to concede in order to maintain its system communication. Known forms of political steering in the context of the nation state and classical public interests cannot be taken into account by this form of governance since a neutral view of society is not possible. All approaches share the fact that they are functionally-orientated, *i.e.*, they perceive humans only in their social role in the economic system. They aim at a capable, prepared employee. System functionality determines who is worthy of protection. Direct external steering seems to be an illusion. The economy, in particular, reacts only to those environmental interests that disturb their own economic viability.

¹⁹ J Habermas, *The Postnational Constellation: Political Essays*, (Cambridge MA, The MIT Press, 2001).

The trajectory of governance cannot, therefore, hide the fact that the diverse regulatory approaches have no common core; communalities appear instead as mere arbitrary overlaps in the network (the intersection often being the fundamental principles and labour rights of the ILO), which even show very different scopes and binding force, especially if monitoring procedures are arranged within the company. Hence, one can hardly talk of a consistent legally-protected development, but, instead, of a new obscurity, which is, in particular, shaped by economic dynamics.

IV. Social Governance Networks through Democratisation

There are numerous approaches that try to grasp these new regulatory forms beyond the nation state with the help of political and legal structures, in order to comprehend the pre-conditions for these processes and the effect that they have on their environments. However, these approaches differ with regard to their normative pre-requisites and foundations in democratic theory. Three theoretical models are introduced in the following; they are meant, in particular, to highlight the social process in global governance structures, and are not satisfied with the standards of efficiency and problem-solving capability of governance structures: these are the model of deliberative democracy (Section IV.1), the observation of a reflexive, plural and fragmented “global law without a state” (Section IV.2), and the approach of (social) human rights (Section IV.3).

The starting-point of this analysis is the assumption that the concept of democracy needs to be modified in view of globalisation. In contrast to an increasingly common objection,²⁰ this cannot lead to the argument that governance processes need less democratisation due to their limited horizontal and partial or substantive scope. Democracy

²⁰ See, for example, A Moravcsik, “Is there a Democratic Deficit in World Politics?”, (2004) 39 *Government and Opposition*, pp 336-63, at 362. Neyer justifies this with the low intervention intensity of these non-hierarchical co-ordinated processes: J Neyer, “Demokratisches Regieren in einem post-pathetischen Europa”, in: A Geis & D Strecker (eds), *Blockaden staatlicher Politik*, (Frankfurt aM-New York, Campus Verlag, 2005), pp 169-84.

cannot end with the enforcement of rational/reasonable policy results and merely hope for responsible decisions.²¹

IV.1. Deliberative Democracy

From the perspective of deliberative democracy, the above-discussed deficiencies in the developments of governance clearly come to light.²² According to this approach, private governance structures and their self-legislation, as an exercise of collective political autonomy, are legitimate and can be equivalent to a political process of democratisation if they take the interests, contributions and arguments of the actors and individuals involved into consideration. Participation by dint of equal involvement and rationality by a consent based upon this equal involvement prevents the self-programming of governance networks. The decisive criterion is that the procedure itself generates acceptance of the results of decision-making.

Due to the particular need for flexibility, governance networks benefit, in particular, from the deliberation aspect of their horizontal co-ordination. It can be observed that concepts of deliberative democracy shift their focus from democracy to deliberation, when it comes to the transnational level, because it allows non-hierarchical forms of steering.²³ Also, according to Habermas, the decisive aspect of the postnational constellation is not primarily participation and the expression of will, but the “general accessibility of a deliberative process whose structure grounds an expectation of rationally

²¹ For this criticism, see H Buchstein & D Jörke, “Unbehagen an der Demokratietheorie”, (2003) 31 *Leviathan*, pp 470-95, at 471.

²² See, for this term already, Ch Joerges & J Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology”, (1997) 3 *European Law Journal*, pp 273-99; J. Habermas, *Faktizität und Geltung*, (Frankfurt aM, Suhrkamp Verlag, 1992), p 349 *et seq*; J Cohen, “Deliberation and democratic Legitimacy”, in: A Hamlin & P Pettit (eds), *The Good Polity*, (Oxford, Blackwell Publishing, 1989), pp 17-34.

²³ For the advantages, see KD Wolf, “Contextualizing Normative Standards for Legitimate Governance Beyond the State”, in: JR Grote & B Gbikpi (eds), *Participatory Governance*, (Opladen, Leske & Budrich, 2002), pp 35-50; T Risse, “Global Governance and Communicative Action”, (2004) 39 *Governance and Opposition*, pp 288-313. For a critical position, see P Niesen, “Deliberation ohne Demokratie? Zur Konstruktion von Legitimität jenseits des Nationalstaats”, in: R Kreide & A Niederberger (eds), *Transnationale Verrechtlichung: Nationale Demokratien im Kontext globaler Politik*, (Frankfurt aM-New York, Campus Verlag, 2008), pp 240-59.

acceptable results".²⁴ Hence, the concern is, first of all, with an appropriate and effective protection of rational co-ordination within governance networks.

This corresponds to the attempts of governance networks to generate legitimacy through forms of participation and transparency.²⁵ Here, participation is broadly defined as the involvement and consideration of all affected stakeholders. The collective patterns of legitimation, which are absent at the level of world politics, are meant to be replaced by individual possibilities of self-determination. At this transnational level, representation is meant to be replaced by opportunities for participation. This does not, therefore, imply political inclusion as a pre-condition for democracy, but implies overall societal (economic) inclusion, instead. Participation is meant to ensure that the broad interests of the affected stakeholders are taken into account in the generation of norms. This, at least, guarantees that norm-generation is not only entirely dependent upon the economy, but that it also has to reflect its societal environment.

Even more problematical is the way in which the broad integration of stakeholders is meant to be achieved. Round tables seem to be an insufficient measure. There seems to be the inherent danger that the involvement of different actors remains piecemeal and is conducted very selectively by the corporations involved, especially if one considers, for instance, the length of value-creation chains and the confusing circle of the affected and responsible actors. Those at the beginning of these chains disappear from view for those companies at their end, since the inter-relations become opaque. Studies have established that participation is highly pre-structured by lobbyism for some areas.²⁶ Labelled as a process of social mediation, this process is shaped by stakeholders of various strengths and is, hence, characterised by a varying degree of interest implementation. This gives rise to the danger that social interests are only perceived in a

²⁴ Habermas, note 19 above, p 110.

²⁵ See Ch Engel, "A Constitutional Framework for Private Governance", in: (2004) 5 *German Law Journal*, pp 197-236, at 197; B. Lang, *Experience with Voluntary Initiatives and Related Multi-Stakeholder Dialogues*, (Eschborn, Gesellschaft für Technische Zusammenarbeit, 2006).

²⁶ See JL Campbell, "Why Would Corporations Behave in Socially Responsible Ways? An Institutional Theory of Corporate Social Responsibility", (2007) 32 *Academy of Management Review*, pp 946-67.

fragmented and distorted way. The establishing of the pre-conditions for the participatory process still depends, however, on economic and state actors. There are no legal foundations regulating this process; instead, it also depends on the voluntary mode of private governance. Participation depends upon the criteria for the selection of the stakeholders, the form in which they are involved and the extent to which they are actually representative. Thus, qualified participation would be necessary in order to safeguard against a one-sided implementation of interests.

Similar objections have to be raised against the demand for transparency. The monitoring, evaluating and control procedures essential for the principle of transparency are substantively shaped by the companies themselves and under the *caveat* of transaction costs. The principles of the private sector, such as, the reservation of proprietary rights, often stand in conflict with the opening up of processes. It is, hence, relevant, both how and what information, especially with regard to the decision-making processes of governance structures, is made publicly available to stakeholders so that they can participate in a meaningful manner.

From a theoretical perspective, it has, therefore, to be concluded that the opportunities to participate are too vague not only from a social viewpoint, but also from the perspective of democratic theory. Due to the limited participatory mode, social interests can merely be perceived from an observatory position. It also remains unclear, or, at least, incoherent, how forms of participation are, or should be, shaped. For the most part, the weak consultation rights of weak actors face strong participatory rights and representative participation, which render a balanced mediation of interests unlikely. It cannot be guaranteed that social interests actually enter the decision-making process in an appropriate form. Governance structures do not aim at the inclusion of social actors, such as the concept of consumer - generated by societal pressure - in national and European contexts, but rather at their merely being taken into account. As a result, the very diverse forms of participation are still far removed from public processes of opinion-formation.²⁷

²⁷ See the parallel discussion of the comitology procedure in P Nanz & J Steffek, "Global Governance, Participation, and the Public Sphere", (2004) 39 *Government and Opposition*, pp 314-35, at 314 & 319.

Such participatory processes only lead to formal democratisation and can only result in legitimation within networks themselves. The latter, therefore, set their own procedural and legitimacy norms. Seen from outside, however, a distorted picture emerges, since opinions are asserted which have hardly any impact on self-legislation, especially on norm-generation, because they are not able to shake off the economic logic or continue to be dominated by it. This becomes particularly apparent when norm-generation is offset against transaction costs. In fact, this mechanism contributes to reinforce network logics if the interests of the affected actors are formally taken into account while the force of their criticism and scandalisation is undermined.²⁸

A logically consistent theory of deliberative democracy would, therefore, need to re-visit the original democratic notions and demand a strengthening of the participatory forms of civil societal actors in order to establish higher quasi-representative requirements.²⁹

According to this approach, this is only imaginable by dint of a consensus with regard to the procedure of decision-making and self-legislation under a return to the principles of popular sovereignty and the premise of value pluralism in complex societies.³⁰ Only then does it seem possible that, on the one hand, systemic self-preferences and logics can find entrance as equivalent interests into decision-making processes alongside potential social and other interests, and that, on the other, decisions can have a binding effect that are to the detriment of the dominating system. The participatory status would need to be designed in a way that allows it to overcome a lack in political institutionalisation, such as a citizenship.

Only under these circumstances is it conceivable to take social interest effectively into account through deliberation, and to achieve a binding effect. Social integration would then remain part of a

²⁸ N Luhmann, *Legitimation durch Verfahren*, (Frankfurt aM, Suhrkamp Verlag, 1983), p 195.

²⁹ See Niesen, note 23 above, p 258 *et seq.*, who speaks of rectifying democratisation.

³⁰ Habermas talks in a number of contexts about the requirement of a common practice of opinion- and will-formation; see note 19 above, p 151.

“political”, because it is societal, process of will-formation.³¹ However, this raises the further question of how realistic the instituting of an open process of communication actually is, given the absence of a global constitution and the complexity of different regulatory subjects. Although stakeholders, such as NGOs, can stage social interests in a media-effective way, such action remains punctual at best and is again limited by the observer status of the NGOs.

IV.2. The Reflexivity of a Plural and Fragmented “Global Law without a State”

More recent strands of systems theory have also studied and described heterarchical network structures at the level of world society. Here, explanatory patterns for the social formation of governance structures could potentially be found.

The considerations of systems theory start by diagnosing a paradox of societally-differentiated action logics, on the one hand, and systemic relationships of dependence, on the other. Intensified by globalisation, this opening/closing-problem challenges non-state, decentral, cognitive mechanisms, such as those emerging in governance processes, which develop independent mechanisms in order to cope with collisions.³² Beyond international law, societal sub-systems satisfy their massive need for norms with regard to reliable expectations and conflict resolution through direct access to law, and, in this way, become sources of a novel global law themselves.³³ Figuratively, at the periphery of law, law fulfils its new tasks through the structural coupling with other societal sub-systems.³⁴ This is then

³¹ J Habermas, “Braucht Europa eine Verfassung? Eine Bemerkung zu Dieter Grimm”, in: *idem* (ed), *Die Einbeziehung des Anderen*, (Frankfurt aM, Suhrkamp Verlag, 1996), pp 185-91.

³² A Fischer-Lescano & G Teubner, *Regime-Kollisionen - Zur Fragmentierung des globalen Rechts*, (Frankfurt aM, Suhrkamp Verlag, 2006), p 127; G Teubner, “‘Global Bukowina’: Legal Pluralism in the World Society”, in: *idem* (ed), note 7 above, pp 3-28; V Ronge (ed), *Am Staat vorbei: Politik der Selbstregulierung von Kapital und Arbeit*, (Frankfurt aM-New York, Campus Verlag, 1980).

³³ See G Teubner, “Des Königs viele Leiber: Die Selbstdekonstruktion der Hierarchie des Rechts”, (1996) 2 *Soziale Systeme*, pp 229-55.

³⁴ For the structural coupling of law in other social systems, see G Teubner, “Eigensinnige Produktionsregimes: Zur Ko-evolution von Wirtschaft und Recht in den Varieties of Capitalism”, (1999) 5 *Soziale Systeme*, pp 7-26.

primarily no longer about societal steering, which is, in any case, only possible to a limited extent due to the momentum of globalisation; but, instead, by taking up societal trends, these regimes follow their own globalisation paths and fill the legal gaps that emerge through the lack of state/political regulation.³⁵ The rapid growth of these non-state autonomous “private” legal regimes produces a “global law without a state”.³⁶ The main focus of spontaneous global law-generation shifts from the institutionalised legislative and judicature to the private provision of order at the periphery of law.³⁷ Thus, the global juridification of societal sub-areas always exhibits a melange of heteronomous and autonomous law-generation, which face one another as equals in a new legal heterarchy.³⁸ It is in this co-evolutionary multi-dimensional internal differentiation of law that the multi-dimensionality of global legal pluralism becomes visible.³⁹ The fragmented, poly-contextually embedded global law emerges as an epiphenomenon of the plural world society.⁴⁰ It is more oriented towards society, and, hence, is an expression of the underlying societal contradictions caused by the colliding rationalities of world society.

Resulting from socio-structural contradictions, legal fragmentation is increased and re-inforced by the positivisation of constitutional norms. The susceptibility of the “novel” hybrid legal forms to unfiltered societal (private) influence renders the constitutional question virulent. The process of constitutionalisation begins with the process of juridification and shifts to the global level, similar to the

³⁵ The term regime needs here to be distinguished from its common politically-laden use in the Theory of International Relations and to be embedded societally.

³⁶ Teubner, note 7 above; Ronge, note 32 above.

³⁷ See G Teubner, “State Policies in Private Law? Comment on Hanoch Dogan”, (2008) 56 *The American Journal of Comparative Law*, pp 835-44.

³⁸ G Teubner, “Globale Zivilverfassungen: Alternativen zur staatszentrierten Verfassungstheorie”, (2003) 63 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, pp 1-28, at 15.

³⁹ O Perez, *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict*, (Oxford, Hart Publishing, 2004).

⁴⁰ G Teubner, “Die zwei Gesichter des Janus: Rechtspluralismus in der Spätmoderne”, in: E Schmidt & H-L Weyers (eds), *Liber Amicorum Josef Esser*, (Heidelberg, CF Müller, 1995), pp 191-214. For this normative diversity, see, for example, in classic legal sociology E Ehrlich, *Grundlegung der Soziologie des Rechts*, 4th ed., (Berlin, Duncker & Humblot, 1913), p 81 *et seq.*

latter, from the political system to different societal sectors. Since the model of juridico-political constitutionality beyond the nation state reaches its conceptual limits and can furthermore no longer meet the demands of broad globalisation processes due to their one-sided commitment to political and legal rationalities, civil societal structures constitute themselves in parallel to political constitutional norms in order to guarantee autonomous spaces within society.⁴¹ The concept of constitution becomes decoupled from the primacy of politics and the state, and, by careful generalisation and re-specification of the traditional concept of constitution, is transferred to the coupling of law with other societal systems. In this context, Teubner refers to an actually observable real trend of emergence, or a gradual development, of auto-constitutions respectively (global civil constitutions, private transnational legal orders, auto-constitutional regimes)⁴² for “global villages” which are in competition and offer themselves as an alternative to nation-state constitutions following the model of a “social institutionalisation of a constitution”.

Thus, the coupling of the generation of legal norms (legal process) and the plethora of social orders (social process) reaches a degree of constitutionalisation which is comparable to that of politics, when it intertwines its reflexive processes with each other beyond the generation of secondary/procedural norms – hence, when the fundamental principles of rationality of the autonomous social orders are inscribed into secondary legal standardisations.⁴³ The “self-generated” law has to cope with its formative paradox through the hierarchisation of primary norms (rules of conduct) and secondary norms (rules for the generation of law: legal quality, actors and procedures) and has to incorporate self-control mechanisms

⁴¹ For the concept of *societal constitutionalism*, see D Sciulli, *Theory of Societal Constitutionalism*, (Cambridge, Cambridge University Press, 1992). For constitutional pluralism, see, also, N. Walker, “The Idea of Constitutional Pluralism”, (2002) 65 *Modern Law Review*, pp 317-59.

⁴² For this terminology, see G Teubner, “Die anonyme Matrix: Menschenrechtsverletzungen durch ‘private’ transnationale Akteure”, (2006) 45 *Der Staat*, pp 161-87.

⁴³ See Fischer-Lescano & Teubner, note 32 above, p 53. However, for a critical position towards the replication of political structures in non-political social systems, see T Vesting, “Constitutionalism or Legal Theory: Comments on Gunther Teubner”, in: Ch Joerges, I-J Sand & G Teubner (eds), *Transnational Governance and Constitutionalism*, (Oxford, Hart Publishing, 2004), pp 29-39.

following the model of the “political” review of norms in order to distinguish itself from mere social norms. The standard for such a civil constitutional review would be an *ordre public* determined according to the respective auto-constitution or a regime-specific standard of fundamental rights respectively, which “private” standardisations would need to take as point of orientation.⁴⁴ Such checks arranged according to system-specific rationality can already be found in forms of general terms and conditions, private standardisations, norms of private associations and the rulings of arbitration courts.⁴⁵

The duality of the fundamental societal autonomies (the inherent logic of law and of the respective social area) would need to be ensured by a control dynamic that standardises the balance between the area of the spontaneous and the area of organisation. These mutual restrictions within the structural coupling “block” one-sided overpowering and avoid structural corruption. In this context, Teubner refers to a “constitutional moment” which is able to trigger mechanisms of self-restriction through external pressure. At this point, the typical elements of a constitution can be identified: “regulations about the establishment and functioning of decision-making processes (organisational and procedural rules), and the codification of the boundaries of the organisation in relation to individual freedoms and civil liberties (basic rights)”.⁴⁶ To this extent, one could talk about private law as a constitutional law of global private regulatory systems, which needs to take up and cope with different conflictive situations throughout society.

⁴⁴ The concept of the universal effect of fundamental rights is replaced by a pluralism of fundamental rights: P Korth & G Teubner, “Zwei Arten des Rechtspluralismus, Normkollisionen in der doppelten Fragmentierung der Weltgesellschaft”, in: M Kötter & GF Schuppert (eds), *Normative Pluralität ordnen*, (Baden-Baden, Nomos Verlag, 2009), pp 137-68.

⁴⁵ See, generally, G Teubner, “Selbst-Konstitutionalisierung transnationaler Unternehmen? Zur Verknüpfung ‘privater’ und ‘staatlicher’ Corporate Codes of Conduct”, in: S Grundmann *et al.* (eds) *Unternehmen, Markt und Verantwortung, FS für Klaus Hopt*, (Berlin, Walter de Gruyter, 2010), pp 1449-470.

⁴⁶ G Teubner, “The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination”, in: Rainer Nickel (ed), *Conflict of Laws and Law of Conflicts in Europe and Beyond: Patterns of Supranational and Transnational Juridification*, ARENA Report no 1, 2009, pp 261-276, at 267.

With the rejection of the notion of unity, the normative consistency of law has to be rejected as well, and has to be replaced by a normative compatibility of regimes established through operative connectivity and networking.⁴⁷ The task of law is, therefore, to establish a global legal discourse, which is able to exert external pressure to trigger self-regulation (be it through civil society, scandalisation, political control, NGOs, media, or law) and, in this way, provides a corrective mechanism. Accordingly, collision law is then assessed by how it reformulates the systemic autonomous spaces in law, how it protects their boundaries, and, especially, how it compensates for the loss of the public-good orientation of national legal orders. According to Teubner, the colliding units have to be inter-linked loosely and punctually with the help of a de-centralised handling of collisions, so that mutual observation and control is made possible within the network. This process is described as evolutive. It is the expression of a self-reflexive learning in the handling of collisions.⁴⁸ These observations coincide with the above-described governance processes and give rise to the hope that societal processes of self-regulation can stabilise societal conditions through inter-linking. However, individuals experience the processes of self-regulation only as social constructs, in their respective social role as employee, consumer, citizen, *etc.*

This leads to the central question of how the social process can ideally be influenced from the outside, *i.e.*, what the external pre-conditions of a social transnational law are for it to develop “social structures” further. How, for instance, can it be *guaranteed*, and not merely hoped, that legal regimes formulate independent, regime-specific standards of human rights? Teubner wants to ensure this via the external pressure for self-regulation. The structural conditions of the ability to learn are closely-coupled to system rationalities and regime logics. Incentives and motives, such as reputation, profit, market

⁴⁷ See, for example, R Mayntz, “Interessenverbände und Gemeinwohl”, in: *idem* (ed), *Verbände zwischen Mitgliederinteresse und Gemeinwohl*, (Gütersloh, Bertelsmann Stiftung, 1992), pp 11-35; K-H Ladeur, “Die Regulierung von Selbstregulierung und die Herausbildung einer ‘Logik der Netzwerke’”, (2001) suppl. 4 *Die Verwaltung*, pp 59-77, at 62 *et seq*; T Vesting, “The Network Economy as a Challenge to Create New Public Law (beyond the State)”, in: K-H Ladeur (ed), *Public Governance in the Age of Globalization*, (Aldershot, Ashgate Publishing, 2004), pp 247-88.

⁴⁸ See also K-H Ladeur, *Postmoderne Rechtslehre - Selbstreferenz - Selbstorganisation - Prozeduralisierung*, 2nd ed., (Berlin, Duncker & Humblot, 1995), p 160.

share, public opinion, co-operation and the avoidance of public regulation, discipline the regime to remain open to societal impact and impulses. This can be achieved as long as societal needs are claimed. However, the question arises of how the human being can be reflected in these processes as a psychical and physical being. In the logic of systems theory, it remains excluded from society and cannot take part in communication. Hence, how can it attract attention if it cannot participate in societal communication? Here, systems theory refers to the irritating effect of protests and scandals by “humans of flesh and blood”, who attract attention indirectly via the communicative construct of the person, and can find entry into communication via this “place holder”.⁴⁹

Against this backdrop, the corporate codes of the OECD, the UNO, the ILO and the EU, as well as the agreements about human rights, such as the *Universal Declaration of Human Rights* or the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Social Covenant* of 1966, again become the focus of public attention. Neither their legal quality nor their binding force is, therefore, decisive, but the history of their origins is. They have to be read as processes of norm-creation in reaction to the societal needs for regulation. They are the result of societal and political articulations of the expectations and needs of autonomy.

In this role, they can permanently irritate economic norm initiatives, such as codes of conduct, through their standardisations, principles, suggestions, and guidelines without being implemented by them; in this way, they can initiate a “learning process”. Teubner refers, in this context, to “constitutional impulses” as eternal pressure for self-restriction and control.⁵⁰

While this makes the inscription of societal interests into the economic discourse a realistic option, it must, however, be seriously doubted as to whether this also applies to “humans of flesh and blood”. We would then be confronted with a twofold reflexive mechanism. On the one hand, the human being has to be re-

⁴⁹ N Luhmann, “Das Paradox der Menschenrechte und drei Formen seiner Entfaltung”, in: *idem* (ed), *Soziologische Aufklärung 6: Die Soziologie und der Mensch*, 3rd ed., (Wiesbaden, Verlag für Sozialwissenschaften, 2008), pp 218-25.

⁵⁰ See Teubner, note 45 above, pp 1469 *et seq.*

formulated in these societal processes of norm-generation by constructing persons, which already leads to some alienation and generalisation, while, on the other, a reflection within the economic initiatives has to take place. This perhaps signifies the limits of a cognitive model of law and indicates that an environmentally-adequate comprehension of the human being is unrealistic via these two levels of reflection. The human being can only be grasped in a contorted manner in the logic of problem-solving mechanisms, since this implies a twofold detour in order to define it as a societal problem at all. It seems worthwhile to examine the special position of the human being further, and, at first, not to accept the indirect inclusion of the human being in social processes of norm-generation. An additional normative framework for the justification of human rights might emerge alongside the numerous normative dependencies of governance structures in their legal and political environment.

Political human rights lead - possibly - to concrete obligations, and moral human rights can be read as external value decisions. Thus, the societality of governance processes would depend upon the justification and efficiency of the human right. If politically laid down and "moral" human rights are read as rules of reflection in the trends to constitutionalisation, they can foster the development of system-specific, evolutive human rights standards and enforcement mechanisms as counter institutions *vis-à-vis* societal conflict situations.⁵¹ The relevance of political human rights, in particular, should increase, especially when political institutions and actors become involved in governance networks. The societal involvement of human beings could generate further expectations, which formulate obligations at a moral level, which find support in social human rights. Governance-external claims for the realisation of human rights could emerge.

IV.3. (Social) Human Rights

Within governance structures, possibilities can be observed that expectations for conduct become generalised and standardised.

⁵¹ See, also, the approach of RG Steinhardt, which develops human rights as control standard, *idem*, "Corporate Responsibilities and the International Law of Human Rights: The New Lex Mercatoria", in: P Alston (ed), *Non-State Actors and Human Rights*, (Oxford, Oxford University Press, 2005), pp 177 *et seq.*, at 223 *et seq.*

However, both approaches - rooting in the theory of democracy and systems theory respectively - show a need for the concretisation and stabilisation of social arrangements. The latter can potentially find support in both fundamental and human rights. Thus, these rights could be defined as a cross-sectorial, cross-level and cross-system social framework for order, which could bind politics in its constructions of the classical obligations to defend and protect (ensuring function), and can furthermore tame "private power" in a horizontal (also institutional) sense and enforce private rights.⁵²

However, it is especially where no politically-positivised democratic constitutional law exists that the question of the substance of human rights arises. There is consensus about the political idea of human rights.⁵³ In particular, it finds expression in the formulations of aims and programmatic approaches under human rights. Furthermore, large parts of these freedoms are established as being individually and judicially enforceable. Despite their gradual codification, this cannot be said of the so-called "social" human rights.⁵⁴ Following Kant,⁵⁵ it is argued that the Economic, Social and Cultural Rights as well as the rights to development and fair access to resources define their scope too vaguely and are, therefore, dependent upon considerations of political sovereignty and feasibility. Furthermore, social demands do not correspond to complete duties, since a definite ascription of responsibility remains impossible. A lack of

⁵² See, also, the Ruggie-triad "protect, respect, remedy". See the recent first draft of JG Ruggie's Final Report and Guiding Principles, available from < [http://globalcompact.de/index.php?id=44&tx_ttnews\[tt_news\]=169&tx_ttnews\[year\]=2010&tx_ttnews\[month\]=11&tx_ttnews\[day\]=24&cHash=7037563a8d](http://globalcompact.de/index.php?id=44&tx_ttnews[tt_news]=169&tx_ttnews[year]=2010&tx_ttnews[month]=11&tx_ttnews[day]=24&cHash=7037563a8d)> (last accessed 3 March 2011).

⁵³ Ch Menke & A Pollmann, *Philosophie der Menschenrechte*, (Hamburg, Junius, 2007), pp 9 *et seq.*, & 25 *et seq.*

⁵⁴ See J Schneider, *Die Justiziabilität wirtschaftlicher, sozialer und kultureller Menschenrechte*, (Berlin, German Institute for Human Rights, 2004), p 5; P Kirchhof, "Verfassungsrechtlicher Schutz und internationaler Schutz der Menschenrechte: Konkurrenz oder Ergänzung?", (1994) 1-2 *EuGRZ*, pp 16 *et seq.*, at 21; J Isensee, "Verfassung ohne soziale Grundrechte: Ein Wesenszug des Grundgesetzes", (1980) 19 *Der Staat*, pp 367 *et seq.*, at 373, & 378 *et seq.* The two relevant treaties are the European Social Charter (ESC), in effect since 1965, BGBl. 1965 II, 1122 and the International Covenant on Economic, Social and Cultural Rights (ICESCR), in effect since 1976, BGBl. 1976 II, 428.

⁵⁵ I Kant, *Die Metaphysik der Sitten*, (first published 1797) (Wiesbaden, Insel-Verlag, 1956), vol. IV, pp 600 *et seq.*

universalisability stands in the way of actionability.⁵⁶ This argument might seem plausible if one has nation-state models in mind. In the tradition of negative rights (fundamental and human rights), the state or politics respectively⁵⁷ is here prevented from infringing autonomous spaces; it is also called to take account and to care through claims and obligations to protect. The principles of the social and constitutional state thus oblige the state as a political collective, but not the individual.⁵⁸

IV.3.a. Functional Justifications for Human Rights

State/political responsibility is especially justified with reference to its functions. In this view, political care and the responsibility of the welfare state enable education and opportunities for development, and are, therefore, the pre-conditions for the active participation of the individual both in democracy and in the formation of the community. Thus, welfare measures become “measures for the qualification of citizens”⁵⁹ and serve to protect democracy.⁶⁰ The freedom granted by the state is inferior to the political order.

Although Habermas is sceptical of this concept of the welfare state,⁶¹ he nevertheless provides a similar freedom-functional argument⁶² by

⁵⁶ For issues of enforcement, see JP Wimalasena, “Die Durchsetzung sozialer Menschenrechte”, (2008) 41 *Kritische Justiz*, pp 2 *et seq*; O O'Neill, “Transnationale Gerechtigkeit”, in: S Gosepath & G Lohmann (eds), *Philosophie der Menschenrechte*, (Frankfurt aM, Suhrkamp Verlag, 1998), pp 188-232, at 220.

⁵⁷ It is also argued that the European Community has such obligations to protect: see *Schmidberger v Austria*, [2003] ECR I-5659 (Case C-112/00), para 68 *et seq*.

⁵⁸ See, generally, HM Heinig, *Der Sozialstaat im Dienst der Freiheit*, (Tübingen, Mohr Siebeck, 2008).

⁵⁹ UK Preuß, “Verfassungstheoretische Überlegungen zur normativen Begründung des Wohlfahrtsstaates”, in: Ch Sachße & HT Engelhardt (eds), *Sicherheit und Freiheit: Zur Ethik des Wohlfahrtsstaates*, (Frankfurt aM, Suhrkamp Verlag, 1990), pp 106-32, at 124 *et seq*; *idem*, *Legalität und Pluralismus*, (Frankfurt aM, Suhrkamp Verlag, 1973), pp 95 *et seq*.

⁶⁰ See, also, W Abendroth, who, however, reduces the argument to state measures aimed at equal distribution. *Idem*, “Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland”, in: E Forsthoff (ed), *Rechtsstaatlichkeit und Sozialstaatlichkeit*, (Darmstadt, Wissenschaftliche Buchgesellschaft, 1968), pp 114 *et seq*.

⁶¹ For the paternalism problem of an “overly caring” state, see J Habermas, “Die Krise des Wohlfahrtsstaates und die Erschöpfung utopischer Energien”, in: *idem* (ed), *Die neue Unübersichtlichkeit*, (Frankfurt aM, Suhrkamp Verlag, 1985), pp 141 *et seq.*, at 150 *et seq*; *idem*, *Faktizität und Geltung*, note 22 above, p 470.

introducing an internal connection or an inter-dependence and co-originality respectively of human rights (private autonomy) and popular sovereignty (public autonomy).⁶³ According to Habermas, if one applies the discursive principle to the legal form, four legal principles result, which rational citizens can agree to: (1) equal and subjective freedoms of action; (2) the status of membership; (3) the right to legal protection; and (4) equal opportunity to participate in processes of political opinion- and will-formation. As universalist constitutional principles, they aim at procedurally-empowering public and private autonomy, and have to be expressed through concrete terms through specific human rights adjusted to ways of life by the political legislator in a democratic process governed by constitutional principles.⁶⁴ As a result, these principles already imply “basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, in so far as the current circumstances make this necessary if citizens are to have equal opportunities to utilise the civil rights listed in (1) through (4)”.⁶⁵ Social rights are therefore subjugated to freedoms and civil rights, and conceptualised as a supplement for their use. Thus, they range - due to this connection or dependence - closer to the legal form than to morality.⁶⁶

This concept of human rights allows a globalised conception of politics to be adjusted. If social rights are conceptualised functionally in order to ensure the material democratic processes, they are not depended on the state as an institution. On the one hand, they have, therefore, also to be transferable to other political democratic collectives/orders and, on the other, they can, and, indeed, must, also

⁶² For a critical position, see F Nullmeier, *Politische Theorie des Sozialstaats*, (Frankfurt aM, Campus Verlag, 2000), pp 382 *et seq.* For criticism of the Habermasian concept of equality, see, also, Heinig, note 58 above, pp 286 *et seq.*

⁶³ Habermas, “Über den internen Zusammenhang von Rechtsstaat und Demokratie (1994)”, in: *idem*, note 31 above, pp 293 *et seq.*, at 301 *et seq.*; *idem*, note 22 above, pp 112 *et seq.*, pp 156 *et seq.*; R Forst, “Das grundlegende Recht auf Rechtfertigung: Zu einer konstruktivistischen Konzeption von Menschenrechten”, in: H Brunkhorst *et al.* (eds), *Das Recht auf Menschenrechte*, (Frankfurt aM, Suhrkamp Verlag, 1999), pp 66 *et seq.*

⁶⁴ Habermas, note 22 above, p 159.

⁶⁵ J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, (Cambridge, Polity Press, 1997), p 123; similarly, *idem*, note 31 above, pp 185 *et seq.*, at 189.

⁶⁶ Habermas, note 22 above, pp 112 *et seq.*, pp. 123 *et seq.*

follow a change of democracy under this functional aspect (see above).⁶⁷ Habermas himself stresses that the concrete formation of constitutional principles and their adjustment to ways of life remain in the hands of the democratic legislator. At another point, he concedes that the global spread of human rights requires a separate justification, which needs to focus on the inter-connectedness of world society.⁶⁸ In complex societies, only a procedural consensus is decisive and possible. As a result, the order of society itself is permanently at the disposition of the democratic will-formation of the people.⁶⁹ This not only allows the notion of the democratisation of governance structures, but also confirms their social potential at the same time. Social rights as legal principles exist to the extent that they are necessary to ensure the democratisation of governance-rights. Apart from participatory rights as direct legal principles which ensure that social interests enter the will-formation of governance processes, governance processes have additionally also to safeguard the social conditions for these participatory rights and other freedoms through the concretisation of the very legal principle of social rights.⁷⁰

The only factor that is decisive is that these social rights are developed in a democratic process, and even through self-legislation, which is, in turn, democratised by participation and procedural consensus. Hence, there is a social and democratic obligation to formulate concrete social rights and to aid their enforcement to the extent that they are necessary for the democratic process. In this interpretation, the argument of the vagueness of social obligations can apply no longer. It is not the individual, but the collective, which becomes obliged. This obligation can entail defining responsibilities or to the furthering of other structures of responsibility, and this ascription option also seems practicable. However, the

⁶⁷ See, also, Abendroth, note 60 above, p 127.

⁶⁸ J Habermas, "Das utopische Gefälle. Das Konzept der Menschenwürde und die realistische Utopie der Menschenrechte", (2010) 8 *Blätter für deutsche und internationale Politik*, pp 43-53, at 52 *et seq.*

⁶⁹ I Maus, "Menschenrechte als Ermächtigungsnormen internationaler Politik, oder: der zerstörte Zusammenhang von Menschenrechten und Demokratie", in: Brunkhorst *et al.* (eds), note 63 above, pp 276 *et seq.*, at 287.

⁷⁰ This explains, for instance, also the form of the status of citizen (which is, however, not without alternatives).

universalisability of these obligations under human rights has also to be confined to the respective governance discourse.

IV.3.b. The Moral Justification of Human Rights

If one wants to manage without this functional argumentation and to justify rights even outside of political orders, the notion of a close link remains between morality and law. At this point, no recourse is possible to the numerous justificatory approaches to human rights. Nevertheless, I would briefly like to investigate the moral substratum underlying human rights in the following, since this line of argument suggests itself, especially given that it was stated at the beginning that governance structures increasingly rest on societal patterns of expectation. They replace or fill gaps in political regulation in the classical sense, and thereby follow societal needs and expectations, whose origin lies outside of law. This opens up opportunities for the societal demand for human rights. It is here that the potential of social movements, political struggles, protest and scandalisation lies.⁷¹

In this way, strands of argument resting in natural law, rational law and morality attempt to counter societal tendencies of alienation already at the justificatory level of human rights by deriving universal reasons of validity from a “pre-state” (“pre-societal, pre-political”) moment. In order to do so, one refers to the “absolute” or “god given” values of human beings, or to discursive principles of rationality. Membership in society grants a moral, rational or solidary status and protection. Following Hegel, it can be argued that one can derive a concrete obligation for a turn to the individual from the moral principle of mutual recognition of all humans.⁷² This turn implies the granting of human dignity. Habermas also refers to the Janus face of human rights, which face law and morality at the same time. According to him, a connection exists between morality and human dignity. Abstract dignity in positive law is fed by a moral source and the experience of contempt in the past.⁷³ Although the difference between morality and law is meant to be upheld, the

⁷¹ To this extent, discourse and systems theory agree. Luhmann, note 49 above, p 220 *et seq*; Habermas, note 22 above, pp 435 *et seq*.

⁷² For different strands of reasoning in moral theory, see Menke & Pollmann, note 53 above, pp 27 *et seq*.

⁷³ Habermas, note 68 above, pp 44 *et seq*.

emergence of the idea of recognising human beings through the constitution of human dignity and also through the declarations of human rights “gave rise to a *legal duty* to realize exacting moral requirements”.⁷⁴

Admittedly, these universal reference-points in postulates of morality and equality are societally practicable, since they allow us to manage the difference between society and the individual within society; on their own, however, they destroy any form of individuality and are prone to become an instrument of power politics.⁷⁵ As a result, the problem of the human being is not solved, but is, instead, taken to extremes. In a plural society, which exhibits no unified canon of values, and whose different logics face each other in an unmediated manner, aim at differentiation, and are blind to the other due to their high and increasing degree of fragmentation, morality can only be conceived as being divided.⁷⁶ Pluralism, the co-existence of different worldviews, indicates that universally valid, value-laden assertions about the human being as an individual are problematical, while moral codes are paradoxical.⁷⁷ However, what happens to the notion of human rights? Based upon an ethic of human rights, current tendencies become apparent which cannot strengthen the validity claim of human rights, but which, instead, lead to a softening of the difference between society and the individual, and to a diminished

⁷⁴ J Habermas, “The Concept of Human Dignity and the Realistic Utopia of Human Rights”, (2010) 41 *Metaphilosophy*, pp 464-80, at 476.

⁷⁵ See the criticism of moral politics, in H Arendt, “The Rights of Man”, (1949) 3 *Modern Review*, pp 24-37. Udo di Fabio argues differently: *idem*, “Menschenrechte in unterschiedlichen Kulturräumen”, in: G Nooke *et al.* (eds), *Gelten Menschenrechte universal?*, (Freiburg, Herder Verlag, 2008), pp 63-97. He conceives human rights as the result of a “universal mechanics of civilisation”, and as part of the genetic code.

⁷⁶ N Luhmann, “Soziologie der Moral”, in: N Luhmann & S Pfürtnner (eds), *Theorietechnik und Moral*, (Frankfurt aM, Suhrkamp Verlag, 1978), pp 8-116. Consequently, the modern world can, according to Luhmann, no longer be integrated by morality; *idem*, *Paradigm Lost: Über die ethische Reflexion der Moral*, (Frankfurt aM, Suhrkamp Verlag, 1990), p 40. For a multi-cultural paradigm, see, also, UK Preuß, “Solidarität unter den Bedingungen von Vielfalt”, in: J Bizer & H-J Koch (eds), *Sicherheit-Vielfalt-Solidarität*, (Baden-Baden, Nomos Verlag, 1998), pp 125 *et seq.*, at 126 *et seq.*

⁷⁷ See N Luhmann’s criticism of a morally-grounded environmental ethics; *idem*, *Ökologische Kommunikation - kann die moderne Gesellschaft sich auf ökologische Gefährdungen einstellen?*, 4th ed., (Wiesbaden, Verlag für Sozialwissenschaften, 2004), pp 262 *et seq.*

opportunity for their enforcement. Shaped mainly by “Western” values, moral discourse obscures the actual problem. Since it can no longer constitute truth, human rights are reduced to an idea which is prone to the most different interpretations and whose abolition or re-interpretation respectively seems justified in the face of any “emergency situation”.⁷⁸

IV.3.c. The Right to Subjective Rights or Objective Obligations

A third approximation to human rights takes the concept of subjective rights as its starting-point. The introduction of this concept signifies, according to Luhmann, the “change of legal consciousness in modern society”.⁷⁹ Following Weber, the emergence of subjective rights coincides with the emergence of the modern state, on the one hand, and the liberalisation of the market, on the other.⁸⁰ This gives rise to the twofold nature of the subjective form of rights. On the one hand, they empower us to participate in social practices (social member/person) and, on the other, they provide opportunities for their use (private individual).⁸¹ In this way, the subject is determined concomitantly as a member of society and as a private individual. This is already an immanent aspect of the justification of subjective rights. They mark the contradiction between claims for inclusion and autonomy, and, hence, express the paradox of human rights. In this way, they already carry the normative substance of human rights (participation, freedom, provision) in their form. Reduced to a rather simple formula, the individual must be able to participate in society, if he or she intends to do so.

In the form of subjective rights, the law can reflect the individual as a part of social processes, and the effects of this aspect of a person on

⁷⁸ See Menke & Pollmann, note 53 above, pp 71 *et seq*; N Luhmann, *Grundrechte als Institution - Ein Beitrag zur politischen Soziologie*, 4th ed., (Berlin, Duncker & Humblot, 1999), p 197 *et seq*.

⁷⁹ N Luhmann, “Subjektive Rechte: Zum Umbau des Rechtsbewußtseins für die moderne Gesellschaft”, in: *idem*, *Gesellschaftsstruktur und Semantik*, vol 2, (Frankfurt aM, Suhrkamp Verlag, 1981), pp 45-104.

⁸⁰ M Weber, *Wirtschaft und Gesellschaft: Grundriß der verstehenden Soziologie*, edited by J Winkelmann, (Tübingen, Mohr, 1980), p 398.

⁸¹ Ch Menke, “Subjektive Rechte: Zur Paradoxie der Form”, (2008) 29 *ZfR*, pp 81-108.

individuality.⁸² However, it cannot be sufficiently outlined here whether, following systems theory, this self-reflection towards “the other of law” is geared as an operation of self-observation in law itself, and, hence, whether it produces the differentiation of the social person and the individual as the difference between the system and the environment, and pre-suppose it at the same time, or whether, in a de-constructivist vein, this process requires a “political” process/effect of the normative force of justice.⁸³ The latter insight can, perhaps, be countered with a legally-immanent concept of justice, which would require a re-definition of the concept of normativity. Nevertheless, the power of justice could be discovered as a “political” engine for processes of subjectivisation. Christoph Menke refers to the “right to subjective rights” as the idea of human rights.⁸⁴ As a result, this outlines a right to societal re-construction by providing legal positions which are kept reflexive.

Applied to a transnational concept of law, the concomitant dangers of instrumentalisation seem, however, to become only bigger. As a result, it is questionable whether the ambitious concept of subjective rights is realistic for the structures of governance processes. Niklas Luhmann already describes this for the welfare state, which uses the subjective legal form in order to meet its integration objectives. In the welfare state, the subjective right is:

not a right to subjective arbitrariness, which justifies itself and only presupposes the complementary experience of others. It keeps its form but is limited by a plethora of regulations [...]. Control is transferred to the addressee of the rights; to the one who has to fulfil them; since this addressee is the welfare state which formulates at the same time the conditions for the granting of rights and varies them within its functional agendas.⁸⁵

⁸² For such a concept of human rights, see G Teubner, “Die anonyme Matrix: Zu Menschenrechtsverletzungen durch ‘private’ transnationale Akteure”, (2006) 45 *Der Staat*, pp 161-87, at 177 *et seq.*

⁸³ See Menke, note 81 above, p 102 *et seq.*

⁸⁴ Menke, note 81 above, p 106 *et seq.*

⁸⁵ Luhmann, note 79 above, pp 88 *et seq.*

Not only are the pre-conditions for inclusion regulated, but also a general will to integration is assumed. If one now follows the globalisation of law, subjective legal positions are not only subject to social intention but also to other systemic functional agendas, since the economic interests that dominate governance networks seem unable to guarantee that subjective legal positions are provided unconditionally and free. The societal hold of the human being, which occurs with every inclusion by subjective legal positions, can, therefore, no longer be conceived as neutral. As a result, the two-sided form of subjective rights cannot be maintained. It has to be assumed that transnational law is not comprehensively able to determine what individuals normatively expect.⁸⁶ The all-inclusion of individuals *via* subjective rights as concepts of modern societies becomes unrealistic for the level of world society.

The particularities of transnational law potentially require a less integrative, but more promising, concept. Following the notion of endangerment in recent systems theory,⁸⁷ it would be necessary to focus more on autonomous spaces and less on societal all-inclusion. The concept of human autonomy is mainly conceived in connection with society, and not, as suggested here, as difference to society. In Kant, one can, for instance, find recourse to the concept of personal identity. The morally-particular position of the human being is justified via its characteristics as a rational, sensible being. Via the reciprocal relations of recognition between autonomous persons, it is referred to a common moral conscience. Elsewhere, one can find related patterns of argument, which refer to relations of closeness and attachment as an element of a genus and interactive relationships.⁸⁸ What all of the latter have in common is that they reflect the human being as a social being, as a member of society, and, as a result, focus only on his or her interests as such, as a person. This highlights the limits of a concept of personal freedom: it can only encompass the bodily and psychical integrity of the human being as a function of society, and, hence, only ensure it indirectly via societal functional

⁸⁶ For this function of law, see N Luhmann, *Das Recht der Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 1993), Chapter 1.

⁸⁷ Teubner, note 82 above, p 177 *et seq.*

⁸⁸ See, generally, M Gruber, *Rechtsschutz für nichtmenschliches Leben: Der moralische Status des Lebendigen und seine Implementierung in Tierschutz-, Naturschutz- und Umweltrecht*, (Baden-Baden, Nomos Verlag, 2006), p 75 *et seq.*

logics.⁸⁹ The reflection of the human being is, therefore, as already discussed above, only conceivable through societal functional logics, and has necessarily to be accompanied by a generalisation in ascribing the status of a person. Furthermore, an emotional inclusion has to be favoured, for instance, via pity, empathy, reason, sensitivity, *etc.* These deficiencies become clearly apparent when one deals with the themes of governance. The hold of the human being has to be read as a process of alienation, concentration of power and objectification.

In the observation form of systems theory, societal sub-systems decouple themselves from all “human” influences. However, according to Luhmann, this also preserves the freedom of the psychical and physical systems.⁹⁰ Although Luhmann rejects a “humanism” which “relates everything, also society, to the entity [...] of the human being”,⁹¹ systems theory, in contrast, respects the autonomy of the human being by distinguishing it from society. Accordingly, it is impossible for social systems to have an impact on the operative manner of psychical systems. Socialisation can only be conceived as self-socialisation.⁹² The “de-naturalisation of the social dimension” renders the difference individual/society bearable by allowing it to be re-formulated as the *problématique* of inclusion/exclusion within society. At the level of society, the issue of the disintegration of human beings does not arise, as long as a change in the human environment does not become a problem for society. In this way, however, the problem of human rights is reduced both significantly and unnecessarily, since human systems are still able to irritate society, even in an unspecific way, and not via communication. Via

⁸⁹ See Luhmann, note 49 above, pp 219 *et seq.*; Teubner, note 82 above, pp 178 *et seq.* J Habermas also addresses this problem, but pins increased hopes on this direct form of justification: see, “Die Herausforderung der ökologischen Ethik für eine anthropozentrisch ansetzende Konzeption”, in: *idem, Erläuterungen zur Diskursethik*, (Frankfurt aM, Suhrkamp Verlag, 1991), p 223.

⁹⁰ N Luhmann, *Die Gesellschaft der Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 1997), p 1036; *idem, Soziologische Aufklärung 6: Die Soziologie und der Mensch*, 3rd ed., (Wiesbaden, Verlag für Sozialwissenschaften, 2008), p 252 *et seq.*

⁹¹ See N Luhmann, “Operationale Geschlossenheit psychischer und sozialer Systeme”, in: H Fischer *et al.* (eds), *Das Ende der großen Entwürfe*, (Frankfurt aM, Suhrkamp Verlag, 1992), pp 117-32, at 131.

⁹² N Luhmann, *Soziale Systeme: Grundriss einer allgemeinen Theorie*, 4th ed., (Frankfurt aM, Suhrkamp Verlag, 1991), p 327.

the observation mode of the third order, which is achievable in the governance society, the difference individual/society can be seen as being insurmountable, and loose connections can be established for such irritations, which happens not by ascription but through the provision of autonomous spaces.

But what is won if one focuses on the autonomy of the human being as a bodily and societal being who is suitable as a basis for establishing objective obligations? Freedom of autonomy is, therefore, necessarily something else as the individual freedom to exercise of the holder of subjective rights. This freedom is not dependent on the fact that the individual, as a legal person, exercises his or her own legal power. The protection of the individual would, therefore, not be the expression of a private need. In world society, this seems to be too ambitious and would again require the ascription of legal positions and participatory rights. As outlined above, this would be prone to a permanent danger of being instrumentalised and would be subject to power dynamics which could not be controlled within global structures.

If the subject cannot be sufficiently determined in law without confining its freedom, the law has, perhaps, to be content with establishing taboo-areas. Such a law would protect the autonomy of the individual and therefore precede subjective rights. To this extent, it is more substantive, although it can result in subjective rights. Elsewhere, it would be necessary to inquire into the effect of such a concept for the justification of subjective rights. In any case, it seems sufficient to address also those “environments of society” which find no communicative equivalent in society. Thus, apart from individuals, this approach seems to be especially relevant for ecological issues. Conceived for the safeguarding of non-discursive autonomies against societal “private” dynamics, as analysed in the governance debate, human rights must be understood as a guarantee or negative boundary of human autonomy. Then, one is no longer dealing with the “self-rights” of human beings, which have to be judicialised societally via “governors”;⁹³ instead, from this perspective, one could justify a universal and legally-constitutive obligation to concretise human autonomy. Autonomy requires the award of a particular status, which would then, albeit not necessarily,

⁹³ Teubner, note 82, p 178.

already be a status of citizen or a legal status. Turned in such a way, one can talk of a universal principle of respect for human autonomy, which, however, leads, in its concretisation, not to universal human rights, but to specific constructions of obligations, which, and this is the significant difference, do not deal with human autonomies in their logics of action, but mark the border area of autonomy, and remain, in their reflection, specific to the respective systems and governance network. Procedures need to be established which allow us to perceive these autonomies, to reflect them and to stabilise them via the learning experiences typical to governance structures.⁹⁴ As a result, “perception” turns into a normative, procedural and especially reflexive principle, because a unitary view of the human being cannot be assumed.⁹⁵ In this legal re-construction of autonomous spaces, the danger of alienation is smaller than in the ascription of social roles and rights, since the autonomous spaces would need to be drawn wider in doubtful cases.⁹⁶ Especially for human life and integrity, it seems to be realistic to formulate such autonomous spaces.

The significant aspect of this new perspective is that an ambitious inclusion (via the status of the citizen, via other social roles such as that of the employee) is not the only possibility of concretising the legal principle of the respect for human autonomy. Since the notion of human autonomy, or, in the parlance of systems theory, the difference society/human being is absolute and not dependent upon a particular worldview or a legal right respectively. As a result, the issue of human rights is primarily not one of subjective rights and rights to all-inclusion, which correspond with respective obligations. Here, a distinction could be drawn to the (also horizontally turned) fundamental rights. With the principle of the autonomy of the human being, the focus moves to the obligatory aspect of human rights. From the autonomy of the human being, an intra-societal obligation

⁹⁴ For the concept of human rights as processes of experience and learning, see R Rorty, “Gerechtigkeit als erweiterte Loyalität”, in: *idem* (ed), *Philosophie und die Zukunft*, (Frankfurt aM, S Fischer, 2000), pp 79-101; *idem*, “Menschenrechte, Rationalität und Gefühl”, in: S Shute & S Hurley (eds), *Die Idee der Menschenrechte*, (Frankfurt aM, S Fischer, 1996), pp 144-70.

⁹⁵ For such a danger, see N Luhmann, “Die Tücke des Subjekts und die Frage nach dem Menschen”, in: P Fuchs & A Göbel (eds), *Der Mensch - das Medium der Gesellschaft*, (Frankfurt aM, Suhrkamp Verlag, 1994), p 55.

⁹⁶ For the problems of translation in the justification of subjective rights, Menke, note 81, p 99 *et seq*; Teubner, note 82, p 174 *et seq*.

is derived to establish just domestic and supranational institutions, and also the obligation to turn them into a juridical and actionable form.⁹⁷ This finds its particular expression in the obligations to constitutionalise. The state constructions of obligations to protect can, with regard to their catalogue of obligations and implementation mechanisms, play a role as a model for these horizontal obligations due to the universal principle of respect for autonomy. Accordingly, human rights provisions already establish obligations to respect protect and fulfil.⁹⁸ Institutionalisation tendencies, such as the establishing of international courts, especially the European Court of Human Rights, the International Criminal Court, different war crime tribunals, the institution of human rights commissions and the individual complaint procedure, as well as the obligation to report on human rights standards, can be read as meeting this obligation.

Beyond legal rights and their positivisation, human rights can then be re-formulated as obligations, bans, requirements of the design of membership roles,⁹⁹ incompatibility rules, which are, in effect, in the whole of society and against private actors without the need to refer to moral, solidary, altruist motives.¹⁰⁰ The legal principle or the human right to respect the autonomy of the human being respectively can, hence, turn into a legal basis or a normative standard for the “humanly adequate” formation of governance networks, and thereby complement the above-mentioned concepts of deliberation and transnational law. Their formation would then not be dependent upon noisy processes of scandalisation and participatory procedures. Governance structures would need to adjust to this protection of autonomy both as expression of human (basic) needs and as a reflection of the difference between individual/society; it would also need to keep it free from their sectorial logics.

⁹⁷ See, also, A Wildt, “Menschenrecht und moralische Rechte”, in: Gosepath & Lohmann (eds), note 56, p 124 *et seq.*, at 130 *et seq.*; E. Tugendhat, *Vorlesungen zur Ethik*, (Frankfurt aM, Suhrkamp Verlag, 1993), p 336 *et seq.*, at 350.

⁹⁸ W Kaleck & M Saage-Maaß, *Transnationale Unternehmen vor Gericht, Schriften zur Demokratie*, vol. 4, (Berlin, Heinrich Böll Stiftung, 2008), p 37 *et seq.*

⁹⁹ See, generally, G Preyer, “Luhmanns Theorie der sozialen Differenzierung - Das Ende der Inklusionslogik”, (2005) 1 *Rechtstheorie*, pp 49-67, at 54 *et seq.*

¹⁰⁰ For the justification of duties, see, generally, A Clapham, *Human Rights Obligations of Non-State Actors*, (Oxford, Oxford University Press, 2006); Luhmann, note 86, p 580.

Chapter 18

A Covenant to Combat Poverty

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I. Ebadi's Proposal

"Do we want humanity to replicate an apartheid state on a global level?" Thus, Irene Khan asked for a comparison of South Africa under apartheid and today's world as a whole, in her introduction to a human-rights approach to global poverty, entitled *The Unheard Truth: Poverty and Human Rights*.¹ The parallel was meant to challenge the ongoing entrenchment of a two-track world between rich and poor people. It was not exact, Khan noted, for the contemporary rich world includes some Asian and Latin American countries, and there are very rich individuals in poor countries. But the richest ten per cent of a world population of 6.3 billion takes fifty per cent of world income, while 3 billion live in poverty.² In apartheid South Africa, the twenty per cent of the people who were of European descent took seventy per cent of national income; at the same time, half of the population, almost all of whom were of non-European descent, lived

¹ Irene Khan with David Petrasek, *The Unheard Truth: Poverty and Human Rights*, with Foreword by Kofi Annan, Secretary-General of the United Nations (1997-2006), (New York & London, WW Norton, 2009), pp 66-71 (the quoted sentence is on p 70).

² Or on less than two and a half dollars a day. On defining poverty, see, critically, Thomas Pogge, *Politics as Usual: What Lies Behind the Pro-Poor Rhetoric*, (Cambridge, Polity Press, 2010), pp 62-71.

in dire poverty. Life expectancy, infant mortality, and adult literacy can also be divided along parallel lines.³ It was an arresting way of presenting the statistics. The disparities reflected in South Africa were, if anything, less than those found in the world today. Among the correcting factors, Khan said, "Foreign aid is undoubtedly part of the answer".⁴ What other ways than starting from aid do we have to contemplate upon this situation?

The purpose of this chapter is to reflect on global poverty without rushing to think immediately about aid. Aid should be a secondary institution beside major institutions, as it is in other than global contexts; it suits emergencies and cases in which we can see its visible effects within months or years. This conviction about the limited place for aid was one motivation that originally drew me to a proposal by the Iranian lawyer Shirin Ebadi. In several *fora* a couple of years ago, Ebadi proposed an International Convention to Combat Poverty.⁵ I quote the following description, taken from a translation of her Anna Lindh Lecture at the Raoul Wallenberg Institute, University of Lund, Sweden, in September 2009:

[H]itherto the UN and international organisations have focused their attention on the promotion of civil and political rights. They have not paid much attention to economic rights, which is one of the reasons for the growing poverty around the world. In this connection, I suggest the drafting of a convention called the 'International Convention to Combat Poverty', to be presented to the UN General Assembly for

³ Life expectancy in OECD countries is nineteen years greater than in low-income countries and thirteen years greater than in low- and middle-income countries; in South Africa, the life expectancy of those of European descent was fourteen years higher than that of the majority. Infant mortality in OECD countries is between fifteen and ten per cent lower; in South Africa, it was five to six times lower. Adult literacy is ninety-nine per cent for OECD countries, sixty-one per cent for low-income countries, and seventy-nine per cent for low- and middle-income countries; in South Africa, it was ninety-seven per cent among those of European descent and sixty-six per cent among the non-European majority group. Khan, note 1 above.

⁴ Khan, note 1 above, p 70.

⁵ For example, Speech by Ms. Shirin Ebadi on universality of human rights on the occasion of the second edition of the Geneva Lecture series, Geneva, 10 December 2008, available at:

<<http://www.unitar.org/gls/sites/unitar.org.gls/files/Speech%20by%20Ms%20Shirin%20Ebadi%2010.12.08.pdf>>.

adoption. The most important issue that must be addressed by the said convention is to encourage governments to cut defence spending. They must consider appropriate strategies aimed at allocating national resources to improve public welfare, instead of purchasing and stockpiling weapons. For example, the convention should stipulate that any country that becomes a signatory should not spend more on defence than on education and health. And if any of the convention's member states' defence budget exceeded the budget allocated for education and health, that country would not be qualified to receive loans or financial credits. For instance, the World Bank would not be allowed to extend credit to such countries. It could also be stipulated in the convention that any country that finds itself unable to repay its debts could have the bulk or all of its debts written off, provided it dissolved its military and only used its police force to maintain order. In so doing, the smaller and poorer countries would be encouraged to purchase fewer weapons, which would be conducive to reducing civil wars.⁶

Articulating the ideas more clearly than has been done before, Ebadi proposes global state-budget control so that no country would be allowed to spend more on military forces than on education and health. The sanction for non-compliance is disqualification for loans or credits from the international community.

Concentrating, in what follows, on the idea of a proportion between maximum military-spending and minimum social-spending, I do not consider the exact proportion to be crucial, although a threshold of equal proportion helps to keep the proposal in one's mind. Nor are the precise budget items of education and health set in stone. As I read the purpose of the proposal, "allocating national resources to improve public welfare", they stand for social expenditure generally. I do not go into the question of writing-off foreign debt, even though Ebadi proposes it as part of the pact. The reason for not following, at

⁶ Shirin Ebadi, "Barriers to the Advancement of Human Rights in the World and in Iran", The Anna Lindh Lecture - 2009, Raoul Wallenberg Institute, University of Lund, Sweden, 29 September 2009, available at: <http://www.rwi.lu.se/publicseminars/annalindh/lecture09.pdf>, p 3 (translation slightly altered).

least not literally, this part of the proposal is the strong idea of dissolving the military. Reducing the military can be discussed; but if a small state were totally incapable of defending itself physically, both it and its resources would be all the more open to political and economic domination, even exploitation (Witness Tibet, now under Chinese control).

Let us explore country examples using equal proportion as the yardstick. The website "Visual Economics: How Countries Spend Their Money"⁷ compares the military, health, and education expenditures of twenty-eight countries. Among countries where military spending exceeds the other two items combined, we find India, Pakistan, and the United Arab Emirates. China and Russia come close. According to other sources, South Sudan spends more than twice on security than on health (which is mainly donor money, anyway) and education combined.⁸ Saudi Arabia, the biggest arms importer in the world, spent nearly as much on military and security as on health and education, although the former component is not disclosed in the budget.⁹ A decade ago, in six Arab countries, Kuwait, Libya, Qatar, Oman, Sudan, and Syria, military expenditure exceeded the health and education budget, the United Arab Emirates came close, and Algeria, Bahrain, Egypt, and Jordan were not far behind.¹⁰ The United States, a long-time provider of aid, amounting sometimes to over twenty per cent of the above-mentioned countries' (as well as Israel's) military budgets, and the world's largest arms exporter, spends as much on its (notoriously inefficient) health-care system as on the military, with education running close.

⁷ <<http://www.visualeconomics.com/how-countries-spend-their-money>>.

⁸ Fiona Davies & Gregory Smith, "Planning and budgeting in Southern Sudan: Starting from scratch", ODI Briefing Papers 65, October 2010, available at: <http://www.bsf-south-sudan.org/sites/default/files/ODI%20Report_0.pdf>, p 2.

⁹ According to the report "Saudi Arabia's 2011 Budget", by Paul Gamble, available at: <http://www.gulfbase.com/site/interface/SpecialReport/EconomicResearch_December2010.pdf>. "Although not disclosed in the budget, we think that defence and security accounted for the largest component of government spending (it was 31 percent of the budgeted total in 2010). Multi-billion dollar defence contracts were signed this year, but with payments to be spread over many years, the impact on spending in 2011 should not be too great. The pay rise for the military will push up defence and security expenditure." *Ibid.*, p 3.

¹⁰ Adel Masoud, "Military Spending in the Arab World", *Al-Siyassa Al-Dawliya*, October 2003, available at: <<http://www.siyassa.org.eg/esiyassa/ahram/2003/10/1/MIL12.HTM>>.

Rather than dispute the figures in the paragraph above, which can exaggerate social expenditure and hide aspects of military spending, I try to build normative surroundings to Ebadi's non-aid-related proposal. In other words, I begin, in a time-honoured fashion, from a current item, in this case, the proposal for a treaty, and I give it a broader justification, just as traditions are built back towards the past, or justificatory devices are constructed, which reflect upon existing practices, such as development assistance. I argue that precluding military spending from exceeding social spending implements the idea that a legitimate state sustains its people. I add that the duties of both individuals and states are an alternative framework to human rights for grounding this idea, drawing here on Simone Weil's account of obligations as requisites for rights to be fulfilled. Concretely, one can think of the current commitment of states to spend 0.7 per cent of national income on development assistance as a precedent for the kind of obligations foreseen in this abstract reasoning.

In a subsequent discussion, I contrast the aspirational treaty idea to the case-based or example-driven legal construction of conflicts in the theory of Christian Joerges, which is debated in this volume, *After Globalisation - New Patterns of Conflict and their Sociological and Legal Re-constructions*. The theory of conflicts law as "constitutional form", developed out of conflict-of-laws reasoning, has certainly not been devised with the problem of poverty in mind. But, in dealing with examples, such as disputes in European law between economic freedoms and social protection, Joerges has defended social justice against the automatic application of liberty rights, and my discussion, which looks beyond the fact of desired economic growth to the ideas needed to think about poverty, lends itself to testing whether the conflicts approach, concerned as it is with social justice, can contribute a perspective on the major pattern of conflict in our time, namely, the divide between the rich and the poor. It will be particularly useful to consider conflicts law after first documenting the substantive agreement between the ideas of this chapter and those of a leading academic theorist of global justice, Thomas Pogge, who lays emphasis, similarly as Joerges does, on the correction of the negative external effects which affluent western democracies impose upon people across borders. For Joerges, these effects are a question, indeed, a failure, of democracy; for Pogge, they constitute a question of justice with regard to our institutions. I conclude the discussion by

addressing practical objections to the proposal theorised in this chapter.

II. Theorising the Proposal

Thinking on such a scale as the whole world, the point of departure is naturally one's individual thoughts here and now; in addition, there is a problem, that of poverty, and one relies on assumptions or common elements, such as the elements of living and dying, or the assumption that all people are somewhat similar across the entire globe. Nevertheless, what is to be discussed is not survival or minimal subsistence, but subsistence as secure livelihood, a standard of living that is better than survival. Some would say that, theoretically speaking, we cannot discuss a standard of living first. I assume, accordingly and instead, such starting-points as living, and, following Simone Weil's argument, hunger as a basic human need and an analogue from which to arrive at more demanding standards.

There are others who would, still, routinely start thinking globally from the approximately two hundred states. It is important not to assume this starting-point now, as the focus is not on state budgets, because international treaties are drafted at state level or for other reasons like that. Instead, the right level is found where a small number of leaders, based upon family or wealth, cannot perpetuate the situation and where poor people have, at least to some extent, been represented when welfare states and programmes have been initiated and developed. This level *above* the local level, on the other hand, takes into account the experience of the time before the welfare state in the north, when local élites mistreated or discriminated among the poor.

The proportion between social and military spending at state level guides thought, on a higher level of abstraction, to the legitimacy of the state. One guiding idea from which to proceed is the life of individuals as the reason for the very existence of the state. In this light, protection from unnecessary death and acute poverty is the legitimising condition of the state. Looking at global poverty in this abstract way, Ebadi's proposal contains an insight: it shows us how to deal with the actual, calculating, utilitarian state while taking the abstract point of view, namely, by means of budget control.

Besides its spotlight on the domestic allocation of resources instead of aid, another motivation that originally drew me to Ebadi's proposal was its capacity to deal with the utilitarian state. For years, I had found the reasoning that, just as people and territory define a state, a legitimate state sustains the subjects that make up the whole, to be a sensible argument. This reasoning led me to enquire into ways of confronting the calculation, which can avoid severe poverty and ultimately death. Coming across Ebadi's proposal, I found one solution to the problem of dealing with the utilitarian state, although it did not seem necessary to me that the funding of health and education should be tied to the protection of human rights.

Alternatively, the obligation to allocate funds to the social sector can be a duty of both states and - in the last, not purely legal, instance - individuals, such as officials of the state.¹¹ A comprehensive set of pre-institutional duties was outlined during the Second World War by Simone Weil, whose argument in favour of duties before rights I shall rely upon below. In contrast to today, when refined procedures of reason-giving are invoked to define the theoretically-subsequent standard of living, in her *Need for Roots: Prelude to a Declaration of Duties towards Mankind* - which predates, by five years, the Universal Declaration of Human Rights (1948) - Weil started from human needs, as the real medium through which a universal obligation of respect towards the human being must actually be expressed. Her point of departure was hunger, and the sense that, in general terms, no one "is innocent if, possessing food himself in abundance and finding some one on his doorstep three parts dead from hunger, he brushes past without giving him anything".¹² Weil derived, by way of analogy, an open-ended list of other universal obligations, which correspond to both physical needs and needs of the soul that, analogous to hunger, are vital: housing, clothing; warmth, sleep; medical care in the case of illness... and, on the moral side of life, order, equality, freedom of opinion... Like a party's agreement to

¹¹ Prior to their enforcement, such obligations need not be divided into either duties with corresponding rights - call these "perfect" - or duties with no right corresponding to them - "imperfect" - as this distinction has a rights-basis. See Onora O'Neill, *Faces of Hunger: An Essay on Poverty, Justice and Development*, (London, Allen & Unwin, 1986), p 103.

¹² Simone Weil, *The Need for Roots: Prelude to a Declaration of Duties towards Mankind* [1943], Translated by Arthur Wills, with a preface by TS Eliot, (New York, Routledge, 2002), p 6.

reasons in more recent theories, Weil's procedure is based upon insight. But the insight is not about agreeable reasons, nor is it about consensus in the sense of agreement. Weil is more mystical than this, pondering on an impersonal world order.

The argument which I find in Weil, and which makes sense, is that duties come before rights, even though both may have to be enforced, because a right is not effectual just by being recognised. The effective exercise of rights springs from other individuals, who consider themselves under an obligation towards the right-holder.¹³ For example, Weil asks (elsewhere) what prevents one from putting out the eyes of a passer-by in the street. Not the other's rights, she answers,¹⁴ but the obligation towards every human being as a whole, simply because he or she *is* a human being. The example demonstrates, brilliantly, the priority of something akin to duties in the very case in which the language of rights sounds most natural, in the case of the right to one's own body.

As a multi-factor problem, poverty involves, among others, corruption, and certainly calls for rights against discrimination in public services, against discrimination on and off school grounds, and so on. Nothing in the above should be read as minimising human rights. They form the framework on a certain plane of discourse, though not on the intuitive or phenomenal plane, where our concerns are about justice: we need assistance, or a specific education, to articulate situations in terms of rights. They are here to stay, because, even if states adopted effective welfare-level treaties, one third of human rights, the procedural rights that are close to courts, would presumably remain. Even so, when the global pattern of conflict divides the rich and the poor, it is to be hoped that the cold-war distinction separating civil and political rights from economic and social rights - captured in the two international human-rights covenants from the 1960s¹⁵ - will cease to be perpetuated. Significantly, regardless of how the empirical arguments about the

¹³ *Ibid.*, p 3.

¹⁴ For the preceding example in the text, see Simone Weil, "Human Personality", in: Weil, *An Anthology*, edited and introduced by Siân Miles, (London, Penguin, 2005), pp 69-98.

¹⁵ International Covenant on Civil and Political Rights (1966), International Covenant on Economic, Social and Cultural Rights (1966).

allegedly smaller relative amount of resources required for courts, education, and other institutions to secure civil and political rights - as opposed to economic and social rights - will turn out, the proposal in question directly addresses the need for resources in order to protect social and economic rights. At the same time, the experience of societies under Soviet rule should not, needless to say, be forgotten: people who were constantly indebted to the state, which offered them free services, did not claim civil and political rights. These rights require equal legal attention.

After theorising the proposal in the perspectives of the legitimacy of the state and a duty-based approach, I can draw the thread of my argument together as follows: the state provides for security, but, as half of the world population is now poor, it makes sense to have the state to avoid the latter. A prohibition to spend more on armed forces than on education and health brings these reasons into equilibrium. I turn, next, to the areas which have been raised in discussions.

III. Discussion

When debating the above-theorised proposal with people, I notice that arguments invariably tend to follow the trend in academic and policy discourse and shift to economic growth. As the following subsections concentrate on other strands of the debates, such as showing the congruence between the foregoing approach and Thomas Pogge's moral-human-rights-based theory and finding links between these global proposals and conflicts law, I should first stress the compatibility between the theorised proposition and an economic focus. Neither the aspiration to discover alternatives to aid, nor educational spending, is at all at cross-purposes with improving long-term economic performance - quite the opposite. Nevertheless, I have reservations about the perspective of prioritising economic production as a framework for distribution, even in such innocent observations as, crudely put, "we produce enough goods - they are just not in the right place". It is not clear why the two-stage picture of economic ethics, in which, first, production is to be efficient, and then distribution should be just, has been so prevalent, as the first and second instances are not really separate - what is produced is always already owned by someone - and their analytical separation concentrates, and, indeed, limits, the justice debates unnecessarily to arguments about the proper tax rate. Besides this doubt, there are well-known arguments, in the literature, against the idea of waiting

for economic growth to end poverty: if growth is the only way, improvements in the lives of poor people are hostage to economic booms and slumps; the poorest can be the last to benefit and the first to suffer from changes; and the causal evidence is unclear, as, in some countries, poverty has increased in times of, though not necessarily because of, improved economic performance. But let us not rehash these.

III.1 Moral Human Rights and Causation

Similar to the proposal with which I began, Thomas Pogge aims at institutional reform, for which he argues in his three publications in the first decade of the Twenty-first century: *World Poverty and Human Rights*, the edited volume *Freedom from Poverty as a Human Right*, and the provocatively titled *Politics as Usual: What Lies Behind the Pro-Poor Rhetoric*.¹⁶ Introducing the edited volume, he relates three points which I have selected from the beginning of his outline, working his way towards the crux of the principal ethical, legal, and political problem of our time:

- 1) The “great scandal of this globalised civilisation”, he writes, is the massive persistence of severe poverty.
- 2) There is poverty in the more affluent countries, but this mainly “relative” poverty falls outside the discussion.
- 3) Institutional reform is needed to abolish poverty in law, which does not, of course, mean passing a law against poverty, but changing the institutional order that encourages, facilitates, and enforces severe human poverty.¹⁷

In other words, one need not immerse oneself in history. Our present global order causes violations of moral human rights on a terrific scale.

By this, Pogge means aspects of the institutional order which are, in his words, more significant, though less obvious, than, for example,

¹⁶ Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* [2002], 2nd ed., (Cambridge, Polity Press, 2008); *idem* (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?*, (Oxford, UNESCO & Oxford University Press, 2007); *idem*, *Politics as Usual*, note 2 above.

¹⁷ Thomas Pogge, “Introduction”, in: *idem*, *Freedom from Poverty*, note 16 above, pp 1-9, at 1-4 (quoted expression at 1).

the illicit funds from foreign public officials in Western banks, among which - to quote his non-equatorial metaphor - "the fabulous amounts that rulers such as Marcos, Suharto, Sani Abacha, and Mobutu Sese Seko have managed to steal with help of Western banks are only the tiny tip of an iceberg".¹⁸ Again, in February 2011, when Hosni Mubarak was non-violently overthrown by the people of Egypt, the amount of his expatriated wealth was kept secret; when the Swiss government said it was freezing all money belonging to Mubarak or his family, the people still did not know how much they had lost. Now, the less obvious ways in which international law is complicit in perpetuating an unjust global order (the same order that, for instance, tolerated, or even actively supported, Mubarak for thirty years) are manifested in the four "international privileges" identified by Pogge. Because any group controlling the means of coercion within a country is internationally recognised as the legitimate government of the country's territory and people, the group can, acting on behalf of the people which it rules, dispose of the ownership rights of the resources of the country (international resource privilege), borrow in the name of the country (international borrowing privilege), undertake binding treaty obligations (international treaty privilege), and use state funds to import the arms needed to stay in power (international arms privilege).¹⁹

These privileges are freedoms allowed by law, as analysed, in the setting of domestic litigation, by Wesley Hohfeld, whom Pogge cites when explaining that the international resource privilege includes the power to alter first-order liberty rights, claim rights, and duties, thus effecting legally-valid transfers of ownership.²⁰ As also analysed by Hohfeld, the legal opposite of a privilege (or freedom or liberty) is a duty, meaning that, in a contentious legal case, a party may end up either having a freedom to do something, or being under a duty not to do it.²¹ The duty needed to negate the resource privilege might be declared internally, Pogge suggests, by a constitutional amendment, providing that only a constitutionally democratic government may

¹⁸ Pogge, *World Poverty and Human Rights*, note 16 above, n 170, at 286.

¹⁹ Pogge, "Severe Poverty as a Human Rights Violation", in: *idem*, *Freedom from Poverty*, note 16 above, pp 11-53, at 48-51.

²⁰ *Ibid.*, p 48.

²¹ Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning", (1913) 23 *The Yale Law Journal*, pp 16-59.

effect legally-valid transfers. This declaration would, if authoritarian rulers took over, at least make the recipients of property aware that their ownership rights will be contested once democracy returns.²² When banks operate in the global sphere, they could also be prohibited from granting loans by duties which negate the borrowing privilege. And by the same analysis, Ebadi's proposal of limiting military expenditure, or dismantling, or, less drastically, reducing the size of, armed forces, would negate the arms privilege, the fourth privilege identified by Pogge. This shows how intimate the analyses of Ebadi and Pogge are, and, indirectly, how close my effort and Pogge's approach would be if only he started from obligations, rather than from moral human rights.

Doubt should, of course, be directed at the factual claim about the causal impact of globalisation on the poor.²³ The difficulties of convincing readers by causal arguments can, in fact, be illustrated by another example from Pogge's *World Poverty and Human Rights*. According to Pogge, there may be greater discrepancy between opinions which allow, and opinions which condemn, the denials of health care on account of an inability to pay, when groups of people live in mutual isolation, lacking "vivid awareness" of one another's circumstances.²⁴ The claim appears at the start of the book, as a lead-in to other, more contentious, causal arguments. But does awareness of poverty increase concern for the poor? I believe this depends on the individual, as is shown by the fact that people who live abroad or travel widely do not necessarily become more understanding, less racist, and so on, but can remain the same or develop in the opposite direction.

Because Pogge's claim is that western institutions cause world poverty, it is relevant to think through the assumption that we would realise what we are doing better if we were aware of poverty. There is some similar criticism of this assumption in Kwame Anthony Appiah's *Cosmopolitanism: Ethics in a World of Strangers* (2006). Appiah recounts the example of the Victorian multilingual world-traveller Sir Richard Francis Burton, "fascinated by the range of human invention,

²² Pogge, *World Poverty and Human Rights*, note 16 above, pp 168-169.

²³ See, generally, for example, Peter Singer, *One World: The Ethics of Globalization* [2002], 2nd ed., (New Haven CT & London, Yale University Press, 2004), pp 87-91.

²⁴ Pogge, *World Poverty and Human Rights*, note 16 above, pp 4-5.

the variety of our ways of life",²⁵ who still ranks Africans below Arabs and most Indians, both of whom are below Europeans, and vilifies most people. Appiah concludes,

Over and over again in his writings, he passes by opportunities to intervene to reduce human suffering: he records it, sometimes with humor, rarely with outrage. [...] Burton is a standing refutation, then, to those who imagine that prejudice derives only from ignorance, that intimacy must breed amity.²⁶

I do not deny that regular direct contact could corroborate moral attention to poverty, just as the greater the number of foreigners with whom a voter is acquainted, the more positive may be his or her attitude towards immigration. But the causal argument can turn out to be false.

Among the concrete ways in which affluent democracies could stop aggravating severe poverty abroad, Pogge proposes that:

Poverty avoidance would be better served [...] if the affluent countries were required to pay for the negative externalities we impose on the poor: for the pollution we have produced over many decades and the resulting effects on their environment and climate, for the rapid depletion and resulting higher prices of natural resources, for our exports of landmines and small arms, for our suppression of trade in generic medicines and seeds, and for the violence caused by our demand for drugs and our war on drugs.²⁷

Pogge's examples of harmful effects - or of negative externalities, in the parlance of late-Twentieth-century economics - manifest the same inter-dependence that animates the legal theory discussed in this volume, *After Globalisation*, for which the present essay was written. While Pogge's approach zooms in on the major European and American democracies, the theory of conflicts law expounded in this

²⁵ Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers* [2006], (London, Penguin, 2007), p 7.

²⁶ *Ibid.*, p 8.

²⁷ Pogge, note 19 above, p 37.

volume unfolds gradually outwards from democratic European nation states. Both are critical of the effects of economic institutions, but whereas Pogge puts emphasis on our responsibility, the conflicts approach emphasises inclusion within democratic decision-making.

III.2 Conflicts Law and Poor

In the present volume, in which more than half of the chapters are contributed by lawyers, there is particular interest in the relation between poverty and the law. A broad dilemma in this relation is that many marginalised communities, including the poor, avoid, and need to avoid, the law and the state altogether. There are reasons for this avoidance, spanning the whole gamut of law - "private" (as when land rights involve only individual ownership), "public" and "private" (as when workers remain poor because the law permits low compensation and gruelling working conditions), "public" (as when poor people are denied citizenship or identity cards, which may, in turn, deny them access to government services, or when squatters and street vendors are penalised), and the *de facto* application of law (as when people need to deal with bureaucratic barriers in order to work, go to school, or be treated in hospital legally).²⁸ From a different perspective, of course, the rule of law, independent judiciary, and statutory social and economic reforms are an advance on previous forms of governance - although, again, these reforms can be top-down, which is a cause for criticism; in fact, the socially-wasteful pursuit of welfare transfers, "rent seeking", may be more common after top-down reform (welfare system initiated from above) than after bottom-up processes (including the legal empowerment of the poor). Reading about these perspectives in the literature on global justice is like studying the field of law anew. Law school does not typically teach its subject from the pertinent perspectives.

The impact of Western democracies on outsiders was judged, by Pogge, in terms of justice and injustice. This theorising carries on the tradition of Rawls, who used the predicates just and unjust of domestic institutions and taught that justice is the first virtue of institutions. Pogge expands beyond the domestic case:

The political and economic institutions of the US, for example
- through their impact on foreign investment, trade flows,

²⁸ The examples are from Khan, note 1 above, pp 204-205.

world market prices, interest rates, and the distribution of military power - greatly affect the lives of many persons who are neither citizens nor residents of this country. We should allow, then, that the justice of an institutional order may in part depend on its treatment of outsiders.²⁹

This is not the place to question whether justice should be above, or even equal to,³⁰ rationality, when we contemplate institutions. But it is the case that, in the legal theory around which this volume is built, the above-quoted influence of various institutional regimes on each other and on individuals is judged by starting from quite different organising basis than that of justice.

In Christian Joerges' theory of European conflicts law, the external effects, which constitute part of the causal basis of Pogge's ethics, are meant to be brought within systems of democratic decision-making. According to this approach, a supranational review of national legislative or executive decisions can, then, be legitimate, to the degree that it is necessary to solve conflicts in which the harmful effects from one state reach actors in another. These external effects expose "democracy failures", according to Joerges, so called because the affected individuals have not been represented among the authors of the authorising decisions. In the European Union, such a degree of review is justified because of the commitment on the part of the Member States to co-exist peacefully as neighbours within positive legal institutions.³¹ This commitment renders a democratic principle of legitimacy, originally coined by Jürgen Habermas to apply to nation-state legislation, applicable to European law: only those laws that can meet with the assent of all citizens in a discursive process of legislation which, in turn, has been legally constituted, may claim legitimacy.³²

²⁹ Pogge, *World Poverty and Human Rights*, note 16 above, p 38.

³⁰ Neil MacCormick opposed Rawls' rhetoric by insisting that rationality was the first virtue. See D Neil MacCormick, "Die Grenzen der Rationalität im Rechtsdenken", in: *idem* & Ota Weinberger, *Grundlagen des Institutionalistischen Rechtspositivismus*, (Berlin, Duncker & Humblot, 1985), pp 222-242.

³¹ Christian Joerges, "Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form", Chapter 3 in this volume, Section VII.2.

³² Adapted from Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* [1992], Translated by William Rehg, (Cambridge, Polity Press, 1996), p 110.

Three degrees of political integration divide the world, in this view, into decreasingly legitimate layers of judicial review. First, there is the political culture which supports legislation, and includes courts, within the nation state. Second, a weaker political culture supports judicial review in the European Union, along the lines of the conflicts law. Third, a still weaker political culture unites individuals in Africa, Asia, Europe, and so on, which lies outside the purview of the Eurocentric formulations of the theory. Originally, the same three layers, in the same decreasing order of intensity, which expanded from the same starting-point in nation-state legislation, already formed the concentric circles in Habermas' essay "Citizenship and National Identity" in 1990.³³ The structure of his essay extended step by step, in three sections, from "The Past and Future of Nation-State" to united Europe and, finally, to transnational migration into Western Europe. If these steps of state-Europe-migration (as the last affects Europe) capture at least *some* of the thinking behind the conflicts law, global poverty will be an utterly new thing to be considered within this theory.

Inter-dependence is a fact, while the facticity of political culture and positive law limits the theory of conflicts law to Europe. Consequently, when African states or the Middle East have a union comparable to that of Europe, they will be able, within their institutions, to have a conflicts law that deals with external effects from the union member states. By means of conflicts law as the "constitutional form", as Joerges suggests for Europe, a union among democratic countries in Africa may extend democratic justification in cases in which there are external effects that originate from its members. The same could occur in a Middle East Community, proposed, midway through the first decade of the Twenty-first century, by Johan Galtung on the model of the original European Community, with the six states of Egypt, Israel, Jordan, Lebanon, Palestine, and Syria transforming the Israel-Palestine conflict and recognising equal rights.³⁴

³³ Jürgen Habermas, "Citizenship and National Identity" [1990], Appendix II in Habermas, note 32 above, pp 491-515.

³⁴ For instance, see the more recent interview in 2010, at Democracy Now!, available at:

<http://www.democracynow.org/2010/9/16/johan_galtung_on_the_wars_in>.

The imagery of several conflict-of-laws regimes operating side by side preserves the facticity, which constrains the theory culturally. How would the present problem of poverty be addressed by the European, and possibly transplanted, conflicts law? In principle, as poverty persists when the poor lack the resources to defend their interests and the affluent do not do so, there is a democracy failure, in so far as the causes of poverty include the very policies approved by the democracies that the conflicts law addresses. In order to resolve cases such as the impact of European Common Agricultural Policy in Africa, a clarification of the theory could be sought by asking how the European conflicts law can be used as a model outside Europe, which would, conceivably, require reflection on the kind of entity the European Union actually is. Further, as the theory appears to pursue arguments that should, within some constraints, be legally sustainable, its implications on poverty might also be clarified by insisting on the question of upon what grounds cases of European Common Agricultural Policy, European arms export policies, Swiss bank secrecy, or unequal bargaining powers in international treaty negotiations are distinguishable from each other, within the conflicts approach, if, indeed, they are. All these cases are causes of external effects from Europe on poverty abroad. What kind of causal arguments, or normative legal arguments, bring some, or all, of the cases within conflicts thinking?

While ethical deliberations about poverty cannot pre-suppose the restricted outlook of a profession,³⁵ legal theories tend to build on professional traditions. The European conflicts law pre-supposes a certain political culture and certain institutions, the analysis of which I have tried to tease out by enquiring into how others outside Europe might benefit from the theory. As its name already implies, the conflicts-law approach also seems to be concentrated on the legal premise of a judgment, in contrast to all legal and factual premises as a whole or to questions of fact. This analytical focus requires a rational and accessible explanation, one which is consistent with the stressed facticity (of inter-dependence, of political culture, of positive law) underlying the approach.

³⁵ Though they should not be too abstract to grasp questions of need. O'Neill, note 11 above, Preface, p xiii.

The aim of solving these scruples of theory should be to know what kind of a critical tool for changing the imbalance that keeps people poor the conflicts approach, as critical theory, is. Indubitably, the approach will then also fall into place as a plea for democracy in medium contexts, complementing such potential constraints on democracies in the wide, global context, as Ebadi's proposal does. Next to such positive, aspirational ideas as the proposal in hand, conflicts law may be a more modest, legal acknowledgment of economic inter-dependence, political unity in diversity, and democratic inclusion. But, as yet, there is no well-founded answer to the question of whether it can recognise the substantive problems of poverty.

III.3 Practical Objections

This chapter has not attempted a systematic review of the many empirical questions that arise, including the manipulation of budgets, the hiding of military spending (both present and past, such as interest on military-related debt), unanticipated security conditions, and the association between social expenditure and outcomes. The monitoring of Ebadi's proposed convention would also require a new global accounting institution. Its task would seem to be technical, necessitating neither time-consuming dialogue nor specific virtuousness on the part of bureaucracies, thus avoiding unrealistic demands. The last remark is directed at the charge put to the bureaucrats of global poverty that they "do not care".³⁶ Be that as it may, the intricacies of monitoring institutions are beyond the scope of this chapter, as is the extent to which monitoring from below, such as the constraints from states located downwards towards the local level in federal systems, can complement this control.

When this essay was written in 2010–2011, I was frequently asked to consider the consequences of the widely-discussed privatisation of military services, a trend begun in the 1990s when services previously supplied by governments, such as education and health care, were increasingly contracted to private providers. The George W Bush administration, in 2000–2008, encouraged the use of private firms in national security and in military operations abroad. The consequent reduced military accountability is not in question here. What started under pressure to reduce costs, turned into the opposite: Western

³⁶ Pogge, *Politics as Usual*, note 2 above, p 4.

soldiers were offered higher pay; contracts were awarded in the absence of competition; cost-plus contracts invited spending; but this is normal economics, not specific to the military. As the firms price risks, their costs should show up as higher military spending, and so the rationale of Ebadi's proposal is unaffected. There may be a link if transparency is reduced: for example, in the United States, the intelligence sector is said to be so large now that "no one knows how much money it costs" and "it's impossible to tell whether the country is safer because of all this spending and all these activities".³⁷ Alas, questions of transparency and effectiveness arise not only on the side of the social sector, but also on the side of the military.

A more accurate objection concerns the incentives of the arms industry in Western democracies, and the choices by states to support the arms industry and to export weapons, especially as the proposal calls for developing countries to commit themselves as to how to spend their money. Our obligation in the West, at the same time, could be to scale down the arms industry. Currently, for example, the number of export licences granted by the United Kingdom for arms sales to Saudi Arabia is on the rise. Yet, Saudi Arabia is a country in which protests are suppressed, in which, according to the journalist George Monbiot, "while explaining why protests in the kingdom are unnecessary, the foreign minister, Prince Saud Al-Faisal, charmingly promised to 'cut off the fingers of those who try to interfere in our internal matters'".³⁸ In other words, the economy is all-important, and alternatives must be found to the prevailing industrial policies, in conformity with which military contractors carry out research and development. But where should high-technology jobs be re-directed? Space programmes and exploration has been mentioned, as have investments in alternatives to oil, which would reduce the dependency of Europe on, for example, Saudi Arabia, and a reduction of working time. Ideas to re-prioritise policies abound, and they do not (all) sound as if the course of history were changing.

Above, the relation between reducing both military spending and poverty has been presented as a choice between directing resources

³⁷ Dana Priest & William M Arkin, "Top Secret America", Part I: A hidden world, growing beyond control, *The Washington Post*, 19 July 2010.

³⁸ George Monbiot, "Why western governments won't support democracy in Saudi Arabia", *The Guardian*, 14 March 2011.

among budget items. With regard to empirical studies on the relationship between conflict and poverty, there is some, albeit not much, research.³⁹ The discussion in this chapter has assumed some reciprocal causation between chronic poverty and conflict, but more research could corroborate this intuition and convince people who are unmoved by the budget-item argumentation. While waiting for these results, the wager of this chapter has been that the positions discussed are not detached from comprehensive thinking about poverty. Even a person resolute to consider only real forces must somewhere think in ideas; and, for us others, besides force or terror, from which nothing is to be learned, there are other, real principles.

IV. Conclusion

The proportion of military and social spending has been offered here as the primary means to combat poverty, de-throning development assistance and including all human rights, in contrast with the dichotomies of previous generations. In the ways suggested, the idea makes sense within a broader perspective on the legitimacy of the state, and fits a duty-based approach, if one chooses to think of obligations prior to rights. Among practical questions, the need to direct incentives away from the arms industry in Western democracies was highlighted, and the links with conflicts thinking were explored in a section on the law and the poor. A thought with which I would like to end is to ask whether this proposal could be such a rational idea that it becomes convincing over time, in one form or another, as a treaty or, more likely, perhaps, as a legal principle. As Shirin Ebadi writes, in the title of one of her columns, while acting realistically, we should “Think in Dreams”.⁴⁰

³⁹ See, for example, Patricia Justino, “On the Links between Violent Conflict and Chronic Poverty: How Much Do We Really Know?”, Chronic Poverty Research Centre Working Paper No. 61, 2006, available at: <<http://ssrn.com/abstract=1753644>>.

⁴⁰ Shirin Ebadi, “Think in Dreams, Act Realistically”, 20 December 2008, available at: <<http://www.roozonline.com/english/news3/newsitem/article/think-in-dreams-act-realistically.html>>.

Epilogue

Chapter 19

The Limits to the "Conflicts Approach" Law in Times of Political Turmoil

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I. A Law of Democratic Inclusion

Amongst the many efforts to sketch out a form of normative legitimacy for the emerging polity of the European Union, the conflict of laws approach can be clearly distinguished by virtue of its unstated, yet primary, concern, which is one of the maintenance of the legitimacy of European law within that polity.¹ In other words, although the conflicts approach is not developed without vital cross-reference to political theory - and, above all, to the theory of democratic inclusion developed by Jürgen Habermas² - the normative prescriptions that it entails are informed by a consuming mission to secure the "integrity" of the various legal systems that interact within

¹ See, above all, Ch Joerges, "Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration", (1996) 2 *European Law Journal*, pp 105-135. Joerges' injunction to political scientists to recognise the "normative" dimensions of law within their analytical modelling may equally be read as a reminder to lawyers never to forget legal theory, and the efforts of generations of lawyers before them to identify an independent legitimacy for the law.

² The vital point of reference being, *Between Fact and Norms*, (Cambridge MA, The MIT Press, 1996), and the Habermasian recognition that law is unique in bridging the gap between empirical reality and the construction of human legitimacy.

the European legal forum, including, importantly, international law.³ In these terms, it might then be suggested that, to the conflicts approach and its partner mechanism of deliberative supranationalism,⁴ democratic inclusion is not the *sine qua non* of law. Instead, existing as a pre-legal normative commitment - or constitutional principle - the imperative of democratic inclusion by means of deliberation acts as an extra-legal, or first order, organising principle, upon which the legal systems of Europe might systematically build their politically non-partisan decision-making and adjudicative structures, in order to mediate between and overcome the conflicting social values that each national, supranational and international body of law embodies.

This is a seemingly subtle distinction, but it is one which has important consequences, as will be shown below. Nonetheless, it is not the aim of this short comment to critique the conflicts approach as an inappropriate structure for the EU. On the contrary, the approach is surely still distinguished as the *only* normative prescription for the European polity, which pays adequate attention to the vital need to ensure that a largely legally-driven process of integration will not be undermined by critically-justified assertions, from left or from right, of the illegitimacy - partisan and arbitrary nature - of the legal governance that has characterised and continues to characterise the EU. However, to recognise that the conflicts approach is primarily concerned with the integrity of law is simultaneously to locate it within the critical legal tradition from which it springs, and further to concede that it, too, must be marked by the tensions, inconsistencies and uncertainties which continue to be the focus of that tradition.⁵ As a consequence, this comment notes that we must be aware of the limits to the conflicts approach, in particular, with regard to the ability of law to integrate and mediate the social justice demands of an infinitely-complex social reality (see below). First, however, it is

³ See, also, for details, M Everson, "From *Effet Utile* to *Effet Néolibérale*", in: Ch Joerges & T Ralli (eds), *European Constitutionalism without Private Law - Private Law without Democracy?*, Recon Report No. 14, Ch. 2.

⁴ See Ch Joerges, "'Deliberative Supranationalism' - Two Defences", (2002) 8 *European Law Journal*, pp 133-151.

⁵ See, for an examination of the contradictions within the critical legal method with particular regard to the European Union, M Everson, "Politics, Power, and a European Law of Suspicion", in: J Neyer & A Wiener (eds), *Political Theory of the European Union*, (Oxford, Oxford University Press, 2010), Chapter 7.

worth stressing the superior ability of the conflicts approach to furnish us with a normatively-coherent view of current European governance.

The conflicts approach draws heavily on the works of Brainerd Currie.⁶ An antecedent which at once confirms that the theory is located within the critical tradition, Currie's critical legacy similarly demands that modern conflicts theory updates and adapts his central critical insight to our material world of globalisation and Europeanisation. Accordingly, Currie's core prescription that, in the field of conflict of laws, due democratic process and legitimacy - the law's first order point of reference - can only be properly and systematically protected by law by means of a conflicts principle that remains committed to the law of the forum in which that law's policies and the forum's "governmental interests" would be adversely affected. Such defence of the order most intimately concerned with the normative (public) consequences of the (private) material at issue, which Currie had advocated quite rigidly,⁷ is significantly moderated in Joerges' conflicts approach and translates there into a threefold schema of legal challenge and response:

1.1. Problem-solving

Paraphrasing Harald Laski, critical law is all about the adaptation of the "philosophical" constructs of the law to the "real-world about it".⁸ Accordingly, the critical mission to "socialise" law demands that law not be blinded to reality by its own internal constructs, but, instead, that it take cognisance of reality, in order to test and adapt and its own "autonomous" rationality. In our context then, there can be no starting "reality" for the legal system of a sovereign supranational legal order which might simply assert itself over the integration process. Instead, law must be led by the real-world

⁶ See, for a comprehensive overview of Currie's works, Brainerd Currie, *Selected Essays on the Conflict of Laws*, (Durham NC, Duke University Press, 1963) [William S Hein & Co: Buffalo NY, 1990]; for an explanation of the debt owed to Currie, see Ch Joerges, "European Challenges to Private Law: on false dichotomies, true conflicts and the need for a constitutional perspective", (1998) 18 *Legal Studies*, pp 146-166.

⁷ See B Currie, "The Disinterested Third State", (1963) 28 *Law & Contemporary Problems*, pp 754-793.

⁸ See H Laski, *A Grammar of Politics*, 4th ed., (London, Allen & Unwin, 1958), pp 26-27.

recognition that contexts of Europeanisation and globalisation have inevitably given rise to conflicts between national and supranational interests, between Member State interests, between supranational and international interests and between individual and collective interests. These are, thus, conflicts, to which law *must* respond.

1.2. Legal Rationality

At the same time, however - or at least within the constructivist tradition - critical law must remain law, rather than exist as an arbitrary exercise of politics or power;⁹ and accordingly, to the degree that law and legal autonomy must also be preserved within a distinct legal rationality, the conflicts approach joins in the eternal - and eternally flawed - critical legal mission to identify an overarching organising principle upon which the legal system can build, in order to ensure its internal *coherence*, or methodological integrity.

1.3. An Empirically-responsive Principle of Democratic Inclusion

It is at this exact point of the impossible marriage between reality (the social environment of law) and the abstract, coherence-ensuring, legal construct that critical law lives its greatest moment of tension. Legal rationality, in contrast to scientific rationality, cannot rest secure in its self-referential nature, can never deny reality; yet, at the same time, it must contain its window on the world within a distinct legal methodology, and must simultaneously face inwards and outwards in order to secure legal legitimacy. And it is exactly at this point of innate tension that the conflicts approach returns to Currie's prescription that law must give primacy to democratic process, at the same time adapting it to correct the empirical and normative failings in national democratic process, which have, in their turn, precipitated our troubled empirical reality and normative vision of supranational and international order. The nation state has failed to fulfil its constitutional promise of democratic inclusion, both in theory and in practice. Instead, in a global world of increasing inter-dependency between collective polities, it has both denied and given voice to the

⁹ Duncan Kennedy's critical approach to law was always founded in the understanding that to be recognised as an autonomous (non-political) institution of governance, law must identify its own independent and independently rigorous governing philosophy; see "The Paradox of American Critical Legalism", (1997) 3 *European Law Journal*, pp 359-377.

“foreigner” – just as it has dis-enfranchised and empowered the national citizen – as the causes and effects of supranational/international interdependence and supranational/international order have witnessed:

- a) the disempowering of the national citizenry, as globalisation and Europeanisation processes have limited the scope for effective national governmental action;
- b) the concomitant denial of voice to all foreigners organised in national polities in a globally-interdependent world that denies national political power;
- c) ordered efforts to ameliorate the negative externalities of national democratic organisation (limit the negative external effects of national democracy by means of inclusion of the foreigner in decision-making);
- d) similarly ordered efforts to re-empower the national citizenry by means of supranational/international co-operation that aims to re-inforce national political power; and
- e) an abiding suspicion that supranational/international co-operation intensifies, rather than ameliorates, democratic exclusion.

And it is here, in dealing with these multiple tensions both within law and within its social environment, that the conflicts approach proves its empirical and normative worth, arguing that, just as the empirical spur for supranational/international organisation is one of an attempt to ensure the democratic inclusion of the foreigner and citizen, then its sole justificatory organising principle can *only* be one of securing democratic inclusion.¹⁰

Translating back into an internal language of legal coherence: within the mission to overcome the negative democratic externalities of the nation state in a principled supranational order, the conflicts approach is all about identifying a “contractual basis”,¹¹ which can

¹⁰ The vision of a supranational legal order that is justified by its ability to overcome the democratic (democratically-exclusionist) failings of the nation state marks the beginning of the conflicts approach; see Ch Joerges & J Neyer, “From Intergovernmental Bargaining to Deliberative Political Processes: The Constitutionalisation of Comitology”, (1997) 3 *European Law Journal*, pp 273-299.

¹¹ See Joerges, “Deliberative supranationalism – two defences”, note 4 above.

govern supranational co-operation in a manner that secures, as far as is possible, the “rational” inclusion of both the foreigner and the citizen in democratic decision-making.

Vitally, however, the rationality of contractually-based democratic inclusion is not the pure or abstract “legal rationality” of a given or natural contractual autonomy; an autonomy which would simply allow diversely empowered national governments to bargain away the democratic rights of their citizens within a nominally-sovereign supranational order. Instead, maintaining the critical tradition, and following the insights of theorists as seemingly diverse as Habermas and Luhmann, the legal rationality of democratic inclusion is to be found in a procedural paradigm that limits (or recognises the inevitable/necessary limits to) material legal intervention; a procedural, rather than an interventionist, legal paradigm that takes care to found itself firmly in reality, at the same time maintaining the coherence of legal application, solving the problem of the varied conflicts thrown up by supranational order by means of situated application of the associated principle of “democratic deliberation”. In brief, and at its operational core, the conflicts approach thus founds legal integrity in the law’s differentiated mission to structure inclusively-deliberative democratic debate, whatever the empirical imperatives of supranational or globalised order may be. At the time of writing, the approach accordingly identifies three dimensions of deliberation within the EU order:

1.4. Horizontal, Vertical and Diagonal Conflicts

Within a realm of horizontal conflicts between Member States, vertical conflicts between supranational and national orders, and diagonal conflict between the various aims of the supranational order and their undifferentiated/unforeseen impacts on the Member States, the conflicts approach returns to its conflict of laws and private international law roots. Where conflicting interests can be “balanced” - presumably to the degree that the supranational principle of “proportionality” is prepared to disregard (minimal) efficiency (economic) gains in favour of democratic deliberation - the law of integration must favour the primary sites of democratic deliberation within the EU, that is, most commonly, national polities; just as it is also empowered, where possible, to require Member States polities to alter or to adapt the conduct of their democratically-legitimated

material intervention, in order to minimise any detrimental impact upon the supranational order.¹²

1.5. Co-operative Empowerment and the Duty to Co-operate

By the same token, however, the principle of democratic inclusion translates an empirical fact that national governments have lost their scope for sovereign action into a national duty to co-operate, where supranational problem-solving offers a better perspective for successful intervention. Here then, the conflicts approach is more concerned with the “constitutionalisation” of the growing technocratic arm of EU governance, or with the establishment of legal structures that reflect the reality of and legitimise such governance through procedural intervention. Once again, proportionality is key: under principles of democratic inclusion, the measure of the deliberative quality of EU governance is thus to be found in its ability to balance the efficiency gains of efficient and scientific governance against the continuing relevance of social and ethical concerns. Science and efficiency, as well as social and ethical concerns must be tested for their relevance. The core aim is thus “rationally” to re-integrate deliberative democratic influence (if not due process) within executive governance.

1.6. Democratic Inclusion beyond the Rule of Law

Finally, however, the conflicts approach has also identified one area of informal European governance with which its relations are strained. Personified most cogently by the Open Method of Co-ordination (OMC), within which the EU (Commission-led) has sought to compensate for a continuing lack of contractual agreement on the integration process - most notably in relation to the disputed social competence - with informal co-operation, founded in new governance techniques such as benchmarking between national administrations. This sphere *per se* lies beyond the rule of law, and, here, the response of the conflicts approach is currently muted. Is co-operative governance beyond the rule of law an anathema, a provocation to the dominance of Foucault’s political technology, or even an invitation to simple exercise of cunning power? Alternatively, is it a necessary part of the (economic) sociology of

¹² Ch Joerges, “Democracy and European Integration: A Legacy of Tensions, a Re-conceptualisation and Recent True Conflicts”, EUI Working Paper LAW 27/2007.

governance, a reproduction of dense webs of informal co-operation maintained at national level? Should it be restricted, colonised or ignored by the legal system? Briefly, and non-conclusively, it is probably all three phenomena at once and, as such, a continuing challenge to law.¹³

II. Conflictual Limits: A Passionate Dynamism

As noted, it is not a part of this short comment to suggest that the conflicts approach is not appropriate within the EU setting. In contrast, it is apparent here that the approach is not only highly advantaged above other theories of integration, but also that it is the most constructive approach available to us with regard to the need to tackle the current tensions of European integration and, above all, the growing popular disenchantment with regard to the EU and its law:

- a) Reality: with its in-built “mirror on the world”, the conflicts approach is founded in reality, rather than a comprehensive theoretical wish list and is thus far better placed to recognise the “discrepancies”, which so often confound theories of intergovernmentalism, economic efficiency, *etc.*
- b) Differentiation: by the same token, the core of reality at the heart of the model allows for differentiation in its application
- c) Normative sensibility: equally, with its emphasis on the primacy of the need for problem-solving, the conflicts approach is not beholden to its own normative substance - for example, a desire to promote efficiency in global economic affairs - but instead draws its normative power from an external reality that existing national collectivities have engaged in co-operative behaviour beyond the state in order to overcome their own democratic deficiencies; it simply holds nations and supranational orders to account for this empirical impulse
- d) Legal integrity: most importantly, however, in a reality marked by the dominance of legal governance and an absence of explicit political disputation, the approach pursues a vital core mission of ensuring the continuing integrity of the legal system

¹³ The problem, if not the solution, is detailed in: Ch Joerges, “Integration through de-legislation? An irritated heckler”, European Governance Papers (EUROGOV) No. N-07-03. Available at: <http://www.connex-network.org/eurogov/pdf/egpnewgov-N-07-03.pdf>.

However, the conflicts approach has been the subject of criticism. For some, especially with regard to the dimension of legal control of governance structures in areas of joint 'co-operative' competence, the approach is a simple mask and veil for technocracy: how can the absolutism of efficiency values ever be tempered by or balanced against, equally universalist ethical concerns?¹⁴ For others, mirroring this theme of "incommensurate values", the approach can never - its first constitutional dimension - hope properly to balance a national interest in, say, social welfare, against a supranational interest in globalisation-defying economic efficiency.¹⁵ For yet others, the approach promotes social stagnation, denying and retarding the inevitable progress to a European Federation which might at last "justly" - and democratically - overcome the mismatch between the economic competences of the EU and the social competences of the nation state.¹⁶

There are faint echoes of truth in these critiques, perhaps most importantly in relation to the charge of social stagnation: for all that critical legal thinking is revolutionary in its desire to reflect social reality, its demand for the translation of reality into internal legal coherence is inherently conservative in nature, and can retard, as well as reflect, social dynamism (see below). Nonetheless, such criticism also seems at core to be founded in a fundamental misunderstanding: the conflicts approach seeks to ensure the integrity of law, rather than the primacy of any one political, social, economic or ethical concern. To this end, it concerns itself with giving politics or processes of democratic deliberation *the best possible chance* of overcoming incommensurability or potential stagnation. The theory does not encompass its own independent and absolute theory of democratic process. The law of the conflicts approach is instead - and by virtue of its critical heritage - modest. Certainly, supranational, as well as international, orders are currently dominated by legal and judicial governance. Nonetheless, the rationale of the conflicts approach is

¹⁴ I have, however, taken the liberty of overstating their argument; see O Gerstenberg & CF Sabel, "Directly-Deliberative Polyarchy: An Institutional Ideal for Europe?", in: Ch Joerges & R Dehousse (eds), *Good Governance in Europe's Integrated Market*, (Oxford, Oxford University Press, 2002), pp 289-341.

¹⁵ M Everson, "Administering Europe", (1998) 36 *Journal of Common Market Studies*, pp 195-216.

¹⁶ A Menéndez, "The European Democratic Challenge", (2009) 15 *European Law Journal*, pp 277-308.

one that politics (democratic process) and not interventionist law must be and, indeed still is, the final arbiter in cases of conflict. Law can give voice to social and ethical concerns - or, by contrast, technocratic impulses - by indicating the form of deliberative democratic forum that is competent in decision-making; it cannot, however, (legitimately) decide which logic will triumph and when.

At the same time, however, and within this analysis, it is precisely this critical heritage, or this overwhelming mission to ensure the integrity of law, that similarly determines that the conflicts approach is also indelibly marked by the tensions, inconsistencies and paradoxes that are inherent to critical legal thinking, in particular:

- the tensions inherent to legal rationality;
- the paradox of social stagnation.

II.1. Legal Rationality and Denial of Political Passion

As noted, democracy and democratic inclusion is not the *sine qua non* of the conflicts approach. Instead, where its main mission is one of securing legal integrity, democracy or the politics of democratic process can similarly be argued to be an adjunct to, rather than the purpose of, a critical effort that, in addition to mirroring social reality, also seeks to secure the internal coherence, stability or rationality of legal method. The distinction is subtle, but vital: within critical legal thinking, forms of democracy and political expression are just as surely bounded by legal method and the imperatives of legal integrity.

In other words, the conflicts approach - also known as “deliberative” supranationalism - is founded in a particular democratic construct: one suited to the application of rationalising legal principles such as proportionality, transparency and accountability in its narrowest, non-mandated, form. The confrontation between science and ethics is civilised, made amenable to solution by virtue of an assumption that incommensurability may be overcome by rationalism and its partner mechanism of deliberation. An assumption is made that rationalism - the preparedness to subject political and methodological truth claims to the forensic tests of law (state of the art science, proportionality of intervention, *etc.*) - will be accepted by all parties to the debate. By the same token, law assumes that conflict may then be mediated by deliberation, or by the preparedness of participants in debate to cede to the rationally-validated truth claims of others.

The liberal Occidentalism of the deliberative position is manifest, as is the debt to Habermas. And certainly, the bounding of democracy is highly appealing and perhaps an imperative in *all* forms of critical legal thinking: after all, the few examples of a truly critical Soviet legal theory also worked with a “democratic” pre-conception founded in the permanence and primacy of revolution, and thus the revolutionary action of the Soviets.¹⁷ Nonetheless, the very act of legal translation, the operation of the legal rationalisation of politics, can likewise be viewed as a denial of social reality; or, of a legal blending out of and/or refusal to recognise the competing democracies or democratic rationales within the social environment of law. Above all, a legally-bounded deliberative democracy is inimical to the rationale of democratic hegemony, the legitimating appeal of political passion, or the rhetorical democratic superiority of the “best-made” above the “correct” arguments.

II.2. Dynamism and the Limited Social Cognisance of Law

To this degree then, the charge that the conflicts approach is technocratic in nature contains a germ of truth, at least to the degree that incommensurability between values is arguably overcome by the legally-rationally act of the bounding of politics, or, of the construction of “deliberative” democratic process so that once impossible agreement or balancing is made possible by legal limitation of the validity of forms of political voice and action used in debate. Nonetheless, this is not a problem specific to the conflicts approach, and may, instead, be argued to be a feature within *all* critical legal thinking, at least within its constructivist variants. In a final analysis, then, this is just as surely an enduring tension within critical legal thought, being, perhaps, a simple result of the fact that were we to dispense with the notion of legal rationality, we would also necessarily be forced to cease to believe in the rule of law.

In other words, the vital point is not one that the conflicts approach must be criticised by virtue of its inherent tension, its bounding of democratic voice by virtue of its quest for legal rationality. Instead, as a critical legal position, it must be reminded to remain forever

¹⁷ See, for a fascinating insight into the problem of law in revolutionary transition, Evgeny Pashukanis, “The Marxist Theory of Law and the Construction of Socialism”, (1927), in: *idem, Selected Writings on Marxism and Law*, edited by P Beirne & R Sharlet, (London & New York, Brill/Academic Press Inc, 1980), pp 186-99.

vigilant with regard to the potential illegitimacies, or challenges to legal integrity that may arise where the tensions inherent to the act of looking inwards and outwards - of reflecting and translating social reality into law - become too great, or begin to de-stabilise law or law's relationship with its external environment. Returning to prosaic reality, however, or the operation of EU governance within a rule of law, tensions would currently not appear to be too disruptive: after all, the continuing GMO saga, the obfuscations of, and obstructions to, the Commission's liberalising regulatory programme indicate that "impassioned" political voice can still find its way into a deliberative realm of EU governance.¹⁸ Nonetheless, in other areas of first order "constitutional" conflict, and, above all, with regard to the paradox of social stagnation within ostensibly critical thinking, strains and tension within the approach are becoming more readily apparent, and can, perhaps, also be discerned within a growing crisis within global legal methodology.

At the core of the normative thinking within the conflicts approach lies a Kantian recognition that the great age of enfranchisement - 1848 "and all that" - contained its own unlimited and limitless social dynamism. The age of nationalism, with all of its inherent contradictions, may have facilitated a form of democratic inclusion. At the same time, however, the object of inclusion, the "imagined" collectivism of states - or, as pluralist theory has it, the false notion that the minds of men, were like the minds of bees and could be collected into one organic whole or hive¹⁹ - both created its own internal and external exclusionism and contained the seeds of its own destruction, as the promise of universalism inevitably collided with the new reality of national particularism. The universalist movement may have needed 100 years and two cataclysmic world wars before it could begin meaningfully to assert itself in supranational and international order. Nonetheless, it has also accompanied the inspirationally-inclusive nation state from its inception - think only of the "internationalist" movement - and must surely continue to inspire anti-collectivist social revolution in all of its wide variety of forms (individualism, secessionism, identity politics, *etc.*).

¹⁸ See M Everson & E Vos (eds), *Uncertain Risks Regulated*, (London, Routledge, 2009).

¹⁹ See H Laski, *Studies in the Problem of Sovereignty*, (1917), (Cambridge, Yale University Press, 1968).

To this degree then, for all that it fully recognises and responds to the trend to question and to undermine all forms of “imagined collectivism”, the conflicts approach - with its cross-referencing to the structures of democratic inclusion of the nation state, as well as the occidental notion of deliberation - may likewise be identified as a “holding mechanism”, as a transitional theory and a potential instrument of social stagnation. Vitally, however, this is not because it denies ideologically-motivated arguments, which maintain that the contradictions of European integration can only be overcome by means of the establishment of an “imagined” federalised Europe. Instead, the dangers of potential stagnation become apparent as the mission to mirror reality within the structures of legal integrity, can still - and paradoxically so - blind law to revolutionary social dynamism, or can lead law to under-estimate the powers of a social dynamism which is limitless in its form. More importantly for our practical purposes, however, it can also lessen the powers of the conflicts approach to respond effectively to an on-going crisis in legal adjudication, which defies all of the rationally-legal arguments that seek to contain it (see below).

This is now particularly important within the global context generally, and within the EU in particular. A period of unprecedented social dynamism is upon us, and questions must necessarily arise as to whether law can pre-empt its results or even capture its contours. International indications are clearly contradictory; think only of the renewed nationalism apparent within emerging markets such as China, which contrasts starkly with a rapidly de-nationalising EU. Nonetheless, even if we cannot fully understand them, we must admit that the signs of social crisis and social revolution are ubiquitous: financial crisis, environmental crisis, failures of Western military intervention, “democratic” Arabic uprising, the rise of militant theocracy and the rise of even more militant secularism, global networking and the international potency of single issue politics, as well as the power of identity-politics, a (Western) lack of faith in the effectiveness of established structures of democratic representation, together with on-going battles for the soul and meaning of markets and consumerism. The advent of the Twenty-first century has not seen the end of history; instead, it has seen an explosion of history and a period of crisis and revolution unparalleled since the end of World War Two and the passing of colonial empires. EU studies, perhaps distracted and deadened by

virtue of their long engagement with the technical minutiae of integration, have been strangely slow to react to, or even to recognise, such social dynamism. Nonetheless, attention to the issue of how this dynamism is now being experienced within Europe is surely long overdue, and must now, at last, be addressed with regard to the simple question of exactly which parallels may now be drawn with 1848. Will explosive history lead to a retrenchment of Europe, an attempt to salvage a European position within the global context and the final securing of an imagined hive of European consciousness? Alternatively, will universalist aspirations prevail, straining not only national organisation, but also the very concept of European/supranational order itself? Is society overcoming all constructed forums of “order”?

Again, at social and political level, signs are contradictory. Financial crisis, above all, would seem to be promoting unprecedented acts of supranational co-operation amongst the governments of the Member States, as well as acts of political domination, which have similarly precipitated renewed nationalistic feeling at national level (in particular, in Greece, Ireland and Germany). By the same token, however, and at least to the degree that social reality in Europe is also adequately reflected in the medium of legal adjudication (response to asserted social claims), social dynamism would appear - importantly, within a sustained development - to be questioning of all forms of “imagined”, or constructed, collective order; that is, both the national and the supranational order, as well as the relationship between the two, which the conflicts approach seeks to constitutionalise:

- 1) The global in Europe and the fragmentation of European identity: it is a truism that international migration flows have altered the character of European society. The ending of Europe’s colonial empires - as well a humanitarian impulse - has determined that refugee and preferential immigration law have opened Europe up to “the other”. What is, perhaps, less apparent, however, is the continuance of the universalist moment of 1848, which has seen the extension of a European right to free “economic” movement extended to encompass non-Europeans, even as regards their rights to access Member State welfare provision.²⁰ Here, the vital

²⁰ See, for details regarding the universalism of third-state national movement directives and ECJ citizenship jurisprudence detaching rights of citizenship from

point is that recognition of “the other” is not historically-contingent, based upon social responsibility for the negative consequences of colonialism or war, but is rather immediate and inevitable, a response to the condition of mankind: rights that were once designed to secure a “European club” cannot but be opened up beyond Europe, as the universalist impulse that underlay their creation in the European sphere is extended beyond that sphere and also results in the negation of an “imagined” European community.

- 2) Emerging social identities: equally telling, however, is EU and national law’s responsiveness to new forms of social identity and demands for identity-based inclusion with reference to the medium of non-discrimination law. To the degree that non-discrimination claims are satisfied legally by means of individualistic rights-based claims, a conflict has now surely arisen between the politically-contingent social rights of the welfare state that were founded in social re-distribution within the “imagined” collective, and an absolutist conception of equality which governs resource allocation with reference to personal characteristics alone.²¹

Just as the conflicts approach seeks to respond to a universalistic social reality that has resulted in the construction of the supranational EU, universalistic social dynamism may be questioning the overall validity of imagined constructs *per se*. Can the conflicts approach respond?

III. Law in a Time of Revolution?

Within legal literature, there have been some hints about the extraordinary - albeit, as yet, only darkly perceived - ramifications of globalised social dynamism for law and legal method. At core, “universalist aspirations” and the search for global identity remain indistinct, subject to violent disputation (for example, theocratic universalism *versus* scientific secularism) and are, as a consequence,

nationality law, M Everson, “European Citizenship and the Disillusion of the Common Man”, in: R Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond*, (Antwerp, Intersentia, 2010), pp 135-154.

²¹ See A Somek, “Equality and Constitutional Indeterminacy: An Interpretative Perspective on the European Economic Constitution”, (2008) 7 *European Law Journal*, pp 177-195.

currently experienced most keenly by a global legal community in the re-emergence of the age-old dispute between personal autonomy and collective action. In the absence of an authoritative globalised political community, questions about the nature of autonomy and community within and beyond the nation state have led to a host of - for example - rights-based, secessionistically-flavoured and/or (economically) rationalist challenges to established national, supranational and international polities before national constitutional, supranational and international (human rights and trade) courts. Law and coherent legal method is uniquely exposed and, if our measure of legal integrity is legal coherence, appears simply to have broken down, as such courts - both individually and collectively - have delivered a host of contradictory (rights-based *versus* formalist *versus* politically contingent) judgments.²² Presented with a first order, pre-legal question of "what is the polity?" - can personal autonomy prevail over the collective, which collective has primacy, *etc?* - legal systems generally are naturally confounded: often tempted to respond lazily with a legal projection of the polity that appears to respond to immediate social demands that are presented to it (individuals have rights which the law must defend); but equally often drawn to avoid the issue altogether (unsatisfying application of legal formalism).

To this degree then, the ECJ cases - such as *Laval*, *Viking*²³ and, more recently, *Land Oberösterreich v ČEZ a.s.*²⁴ - which form the current focus for the complaints of the conflicts approach,²⁵ can likewise be identified as further examples of methodological incoherence within global law: the dynamism of the rights-based impulses of the ECJ in *Laval* and *Viking* contrast oddly with its statically formalistic assertion of the geographical limits to national jurisdictions in *Commission v*

²² For a highly illuminating review of the global reach of the crisis in adjudication, see Samuel Issacharoff, "Democracy and Collective Decision Making", (2008) 6 *International Journal of Comparative Law*, pp 231-288.

²³ Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, [2007] ECR I-10779; Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet*, [2007] ECR I-11767.

²⁴ Case C-115/08, *Land Oberösterreich v ČEZ as*, judgment of 27 October 2009 (Grand Chamber).

²⁵ See, Ch Joerges, "Unity in Diversity as Europe's Vocation and Conflicts Law as Europe's Constitutional Form", Chapter 3 in this volume.

Austria. Why can Latvian and Lithuanian workers export their legal regimes to Finland and Sweden, when, at the same time, Austrians are denied the opportunity to extend their legal regime to Czechoslovakia, even where their own (property) rights have been severely curtailed?

By the same token then, the conflicts approach would seem to offer us a vital and superior means of preserving legal integrity, offering society the chance to decide for itself on the nature of the polity through political process, no matter how legally-bounded that process is. First, it vitally cautions the ECJ that a rights-based approach within law is tantamount to politically-partisan action by law, an undermining of political voice and political action to secure social justice at national level, and, further, an unintended fillip to socially-destructive economic behaviour at supranational level (the use of posted workers to lower wages). And second, it indicates that legal formalism can also strain the authority of law, denying the validity of political protest. On the one hand, law is not an efficient instrument of material intervention; on the other, it cannot simply deny all governance responsibility through formalism, and must, instead, seek to support inclusive democratic process.

In a final analysis, however, the rights-based vehemence of the ECJ in *Laval/Viking* also sounds a legitimate note of warning to the conflicts approach. Taken in tandem with its citizenship jurisprudence, the Court's very real impulse to provide immediate justice to "individual" Latvian and Lithuanian workers who had lost their jobs by virtue of "collective" industrial action that was sanctioned by national law, also speaks to, and is a reflection of, the universalist spirit of 1848. The pursuit of rights-based jurisprudence by law might be an act of legal arrogance; to have achieved such dominance within global law, it must nonetheless also reflect the reality of a social dynamism (lawyers are also a part of society), which questions all imagined communities. The ECJ was also responding to valid social justice demands. In its concern for legal integrity, the conflicts approach is - and in the opinion of this comment, correctly so - *conservative*, procedurally apportioning the right of normative decision amongst *established* political communities, rather than the emerging forces of social dynamism. If, however, it is to retain its ability to convince the legal community generally, and continue equally to fulfil its *radical* critical mission of recognising the reality of

its social environment in particular, it must now, at the very least, begin to open up a fourth dimension of application; it must address the conflict between autonomy and the collective. It must open up a dimension which explicitly recognises *emergent political communities* - some as yet unformed - which are also prepared to challenge the established national/supranational order. Where the promotion of rights-based jurisprudence - or material legal intervention - has also, and so often, undermined the integrity of the global legal order, the conflicts approach must now struggle to find a procedural mechanism which can substitute for the unbounded universalist impulses behind it, giving political voice rather than legal weaponry to the wider forces of social dynamism.

This action, though, will inevitably occur within the paradox of critical legal thinking. The law cannot respond to all social movements and still retain the sobriquet of law. Once again - as Jacques Derrida notes - law exists always in a sphere of impossibility.

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‘Conflicts law as Constitutional Form’ has become the trademark of the effort within Work Package 9 of the RECON project to define a non-statal legal framework with democratic credentials for the postnational constellation. The present report discusses the potential of the approach for globalisation and the European Union. It explores its sociological adequacy and contrasts it with sociological and political theories of global governance. Further exemplary studies examine constitutional conflicts, the generation of transnational human-rights frameworks, transnational air-space security, and strategies to combat global poverty. An epilogue summarises the accomplishments and shortcomings of the conflicts-law approach and seeks to define a future agenda.

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